



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC NO. 32 OF 2012

EDWARD OKELLO SYATA.....PLAINTIFF

= VERSUS =

WABWIRE OLAGO WANDERA.....DEFENDANT

JUDGEMENT

INTRODUCTION

1. By a Complaint dated 2nd November, 2012, the Plaintiff brought this suit against the Defendant, praying for: Eviction from land parcels SOUTH TESO/ANGOROMO/7541 to 7546;[\[R1\]](#)

- a. The District surveyor-Busia be directed to reinstate the boundaries and access roads to all the land parcels created from S. Teso/Angoromo/852;
- b. The Defendant to pay mesne profits;
- c. Costs.

2. Together with the Complaint and Verifying Affidavit, the Plaintiff filed an undated document titled “**Statements**” (*sic*), a **List of Witnesses** which was dated 2nd November, 2012 and a **List of Documents** dated the same day, with a set of copies of documents attached thereto.

3. The Defendant entered **Appearance** in person on the 30th September, 2013 and later instructed counsel, M/S Ashioya & Co. Advocates, to take over the conduct of the matter. Later, after the court granted the Defendant leave to amend his Defence, he filed the **Defendant’s Amended Statement of Defence and Counter-Claim** dated 11th December, 2018. The Plaintiff filed a **Reply to the Defendants Statement of Defence and Counter-Claim**, dated the 14th December, 2018. Together with it, the Plaintiff filed another document dated the same day and titled the **Plaintiff’s Further List of Documents**. To it was attached copies of four documents.

4. The Defendant filed an Affidavit sworn on 28th January, 2019 which he titled **Defendant’s Statement**. It did not contain any attachment thereto. This is the statement the Defendant would later adopt as his evidence. However, on the same day he filed a list titled **Defendant’s List of Documents**. It contained only one attachment, the copy of the Green card for LR. No. South Teso/Angoromo/1998. The card was issued to the father (now deceased) on the 5th of January, 1988. In addition to the Statement and List of Documents, he filed the “**Defendant’s List of Witnesses**” the same day.

5. In the Amended Defence and Counter-Claim, the Defendant, at Paragraph 3, admits to knowing the Plaintiff but avers that he lawfully resides on land parcel No. South Teso/Angoromo/1998 which is part of the estate of his deceased father, Bonface Wandera Obara, and to which, according to him, the Plaintiff has no lien, lawful interest and or validity. He further pleaded that he has no knowledge of the existence of land parcels South Teso/Angoromo/7541 and 7456. He the pleaded in paragraph 7 that the suit parcel of land he is lawfully residing on forms part of the estate of his deceased father, Bonface Wandera Obara.

6. In the counter-claim the Defendant pleaded, at Paragraph 1, that if at all he is residing on the land parcels with titles LR. South Teso/Angoromo/7451-7456, he has been doing so continuously for over thirty years, peacefully, openly and **uninterrupted**. He then denied in the same paragraph that the Plaintiff is the owner of all the parcels of land in question, and that if the Plaintiff is the owner thereof, his rights to them have been extinguished by virtue of the Limitation of Actions Act hence the parcels are not recoverable in law.

7. The Defendant then prayed for:

- i. A declaration that the plaintiff's rights to LR Nos. South Teso/Angoromo/7541 - LR. No. South Teso/Angoromo/7546 have been extinguished by the Defendant's right of adverse possession;
- ii. That the Deputy Registrar of this Court do sign all relevant forms to facilitate transfer of LR Nos South Teso/Angoromo/7541 - LR. No. South Teso/Angoromo/7546 into the names of the Defendant;
- iii. That the Plaintiff be and is hereby restrained from using, claiming, working on LR Nos South Teso/Angoromo/7541 - LR. No. South Teso/Angoromo/7546;
- iv. Costs of this suit to be borne by the Plaintiff.

8. The Plaintiff contends that he is the absolute owner of parcels of land known as **LR Nos South Teso/Angoromo/7541, 7542, 7543, 7544, 7545 and 7546**. He further argues that the Defendant who occupies land parcel S. Teso/Angoromo/1998 has trespassed into a portion of his parcels, destroyed the boundaries and constructed houses thereon.

EVIDENCE

9. The case was heard on the 29th of January, 2019 when the Plaintiff gave evidence and called two witnesses, one of whom was stood down to another date. The Plaintiff, **EDWARD OKELLO SYATA**, testified as **PW1**. He stated that he lives in Samia, Namunyenda Village and worked with the ACK-Nambale Diocese. He further testified that he is the registered owner of land parcels LR Nos South Teso/Angoromo/7541, 7542, 7543, 7544, 7545 and 7546. He produced the title deeds to the parcels as PEX 1(a) to 1(f) respectively. He stated that all the parcels of land originated from land parcel South Teso/Angoromo/852. He gave evidence that the Defendant is his neighbour and owner of land parcel South Teso/Angoromo/1998. He stated that the Defendant has encroached on his parcels of land.

10. He testified further that when in 2007 he discovered that the Defendant had encroached his parcels of land he reported the matter to the Area Chief. The Area Chief summoned the Defendant who stated to him that he was on his late father's land. It was the Plaintiff's evidence on cross-examination that the Defendant put up the buildings on the disputed parcels of land after his (Defendant's) father's demise. To him, this took place some time in 2012.

11. After the case was filed, the parties agreed to carry out a survey of the parcels of land in issue. The survey was carried out on 7th May, 2014. It was done in presence of both parties. The surveyor then prepared a report dated 4th June, 2014. PW1 further stated that the total area encroached by the Defendant is 0.3079Ha where he has constructed buildings thereon. That the buildings are constructed on land parcels 7541, 7542, 7548, 7549, 7546, 7544 and 7540. PW1 stated that he discovered the encroachment in 2007. He denied that the Defendant has been on the land parcels for 30 years as he claimed. He therefore testified that **the Defendant is not entitled to his claim of adverse possession of the parcels of land in dispute. He concluded by stating that he wishes that the Surveyor fixes the boundaries that were removed and that the Defendant compensates him for the loss incurred.**

12. On cross-examination, **PW1** stated that he bought the land in the year 1969 and went to Nairobi in 1975. He reiterated that he discovered the encroachment in 2007. He also confirmed in evidence that the Defendant has constructed several rental buildings on the encroached portion. This development was done after the Defendant's father's death. He stated further that the Defendant's parcel LR No. South Teso/Angoromo/1998 borders his land parcels. He stated that although there is a boundary between the Defendant's parcel and his, one side of that has no boundary. He acknowledged in evidence that the land's office found a consistency between the map and the ground.

13. **PW1** continued to state that he obtained the titles to his parcels sometime in June, 2010 because prior to that they were in the name of one Vivian Syata who had forged the titles to the said land. He then testified that he has lost use of the land from the year 1969 and therefore lost KShs. 20 Million as loss of use considering that he would have constructed on the encroached portion.

14. On re-examination, **PW1** stated that sometime in 2007, his brother's son, Vivian Syata forged documents relating to the land. He transferred his land parcel known as South Teso/Angoromo/852 which land had been registered in PW1's name in in the year 1973. He stated that it was when Vivian had registered the land in his name that he subdivided it. That was in the year 2009. He stated that he filed a suit against Vivian. The Court declared him the registered owner of the land. He reiterated that he discovered the buildings on his land in 2007.

15. The Land Registrar, one **TOM CHEPKWESI** testified as **PW2**. He stated that (as at the time of giving evidence) he is the Busia County Land Registrar. He gave evidence that he was ordered to visit the suit land and confirm the owners of the parcels. He stated that the owner of the suit parcels is the Plaintiff. He also stated that land parcel no. 1998 which is neighbouring the suit lands is registered Bonface Wandera. He also indicated that the Plaintiff's parcels of land originated from parcel no. 852. He stated further that he visited the site on the 7th of May, 2014. During the visit, he found out that there was encroachment onto the parcels of land. He measured the total size of the encroached parcels that had been developed. It measured 0.03079Ha which is approximately $\frac{3}{4}$ (three quarters) of an acre. He stated that there was an inconsistency between the map and what was on the ground. He noted, however, that the mutation agreed with the map. He produced his report as PEX3 (a).

16. Upon cross-examination, **Mr. Chepwesi** reiterated that there was an inconsistency between the map and the ground situation and that the mutation form agreed with the map. He stated that the Defendant had developed the land by way of constructions thereon. In re-examination, he stated that the inconsistency related to the position of the land.

17. The Plaintiff then called his second witness, **PW3**, one **JULIUS MULISA**. **PW3** stated that he was the Busia County, District Land Surveyor. He further testified that he visited land parcels no. South Teso/Angoromo/7540 to 7550 and 1998. At the time of the visit, he was accompanied by the Land Registrar. The visit was done in the presence of both parties. He stated that he found that the map situation and the ground situation were different. In his evidence, he stated that he was not able to establish who made the developments on the developed parcels of land. He listed the developed parcels of land as South Teso/Angoromo/ 7541, 7542, 7548, 7549, 7544 and 7540. He prepared a report dated 4th June 2014 which he produced as PEX No. 3(e) together with the map as PEX No. 4. His Report, PEXh 3(b) at page two (2) indicated in the findings that of the parcels of land in issue, only parcels Nos. South Teso/Angoromo/7540, 7541, 7542, 7544 and 7546 which belong to the Plaintiff and are disputed herein had been fully developed. Land parcels LR. Nos. South Teso/Angoromo/7543 and 7545 belonging to the Plaintiff had not been developed. He showed these findings by way of the sketch map at page 3 of the Report.

18. On cross-examination, **PW3** stated that his report is preceded by an introductory letter from the Land Registrar. He stated that the said letter does not identify the registration section or the land parcel numbers neither does his report. He confirmed that the ground situation has to be clear. He could not tell who caused the sub-division of the map but it was the one he used. He testified that the external boundaries are intact and only the internal ones had a problem. He further stated that despite this there was no need of repeating the survey exercise. He stated that there was a problem on the ground which looked as if there is a road where parcel 7546 is indicated while it is not shown on the sketch that indicates the developed portion. At the end of Cross-Examination, the witness was stood down in order to produce, on a later date, clearer attachments to his report. The witness was never recalled for this. This was because he died before being recalled. Hence on 16th June, 2020, the Plaintiff opted close his case without calling any additional witnesses.

19. The Defence hearing took place on the 15th of December, 2020, with the Defendant, **WABWIRE OLAGO WANDERA** testifying as **DW 1** and his only witness, one **Wycliffe Makanda** as **DW 2**. **DW 1** did not adopt as his evidence the witness statement that he filed in on the 28th January, 2019. Even so, the court had occasion to read the statement. It did not add much value to his testimony since it only reiterated the averment that he has been living on LR. No. South Teso/Angoromo/1998, which forms part of the estate of his deceased father Bonface Wandera, with his family for over 30 years. The statement further indicated that his stay on that land has been peaceful, quiet, uninterrupted over that period. The statement denied knowledge of the existence of parcels LR. Nos. 7541-7546.

20. In his oral testimony, he stated that he lives in Omeri Estate within Busia Town. He testified that his parcel neighbours the Plaintiff's parcels. It was his evidence that he does not use the plaintiff's parcels of land nor has he constructed on them. He testified further that he was born on the portion the Plaintiff claims as his and has used the same for the last 52 years. It was his evidence that the portion he claims is derived from South Teso/Angoromo/7541 and 7546. He confirmed that he was aware of the Land Registrar's report that stated that he has encroached on a portion of $\frac{3}{4}$ acres. He stated that the portion referred to is the one he had used for the past 52 years.

21. On cross-examination, **DW1** stated that his children instituted a suit against the Plaintiff vide an Originating Summons no. 75 of 2017. In the said Originating Summons the two children claimed the portion that the Plaintiff is currently claiming. The court examined the copy of the Amended Originating Summons dated 14th February, 2018 and filed in court on the same date. It was attached as document No. 4 to the Plaintiff's **Further List of Documents**. It noted that indeed it is pleaded in the Amended Originating Summons that one Abdulkadir Ologe Wawire and Isaa Seboa claim to have acquired land parcels No. South Teso/ Angoromo/7542, 7542, 7543, 7544, 7545 and 7546 by way of adverse possession by virtue having lived on them for over thirty years. The Defendant is not one of the Claimants in that Amended Originating Summons. However, he admitted that the two claimants in Busia Originating Summons 70 of 2017 are his children.

22. In his evidence during cross-examination the Defendant stated that he has no parcel of land in his name and the one he constructed on is his late father's. He stated that he was not aware that he was constructing on the Plaintiff's land. His further testimony was that he only knew that it was the plaintiff's land when the Plaintiff instituted this suit. This, to him, was in 2012.

23. It was the Defendant's testimony that he was present when the surveyor visited the disputed parcels of land. He, however, did not agree with the surveyor's report the size he had encroached on was approximately 0.30 ha. But he did not know the extent of encroachment, which he was claiming. He also did not have a survey report from a different surveyor. He testified that he neither bought the land from the Plaintiff and nor did the Plaintiff give him consent to use the land. But he admitted that it was the Plaintiff who had the title to the parcels of land he was claiming.

24. He repeated during re-examination that he had used the portion he occupies for the 52 years. He further stated that the Plaintiff was not present when he built on the land. He only knew him in 2012 when the Plaintiff filed the suit herein.

25. The Defendant called his only witness, one **WYCLIFFE MAKANDA** who testified as **DW2**. Although he wrote a witness statement dated 14th June, 2019 and filed it the same day, he neither adopted nor referred to it in either examination in chief or cross examination. But since it was affidavit evidence, the court took it into account as part of the witness' testimony. In the statement, the witness stated that the Defendant lived on land parcel number LR. No. South Teso/Angoromo/1998 in all his life time. He stated further that the Defendant and his family, including his grandmother lived on the land and that his grandmother was buried there. At paragraphs 5 and 8 he states that the Plaintiff has never lived on land parcel LR. No. South Teso/Angoromo/1998. But in paragraphs 6 and 7 he states the opposite – that the

Plaintiff and his family live on the land. To that extent, this evidence does not help to bring to light the true facts in relation to the dispute herein.

26. However, in his oral testimony, **DW2** stated that he was 58 years old. He is the Defendant's neighbour. He stated that he knew the Defendant since his birth.

He also knew the Defendant's parents. It therefore follows that the Defendant is younger in age than the witness. The court infers that his age is must be equivalent to the time he say he has lived on the parcel of land LR. No. South Teso/Angoromo/1998, that is to say, 52 years.

27. DW2 stated further that the portion of land where the Defendant has built is his (the Defendant's) ancestral home. Further, he stated that the Defendant has built permanent houses thereon. His testimony was that he neither knew the Plaintiff before the suit herein nor had he ever heard of a dispute about the land. During cross-examination, **DW2** testified reiterated that he did not know the Plaintiff. He stated that knew where LR 1998 was and that it belonged to the Defendant. He stated further that it was on that land that the Defendant was built his home. He gave evidence further that he did not know where land parcels L.R 7541 to 7546 were and that he did not know whether or not it was the Plaintiff who owns the same. He stated he did not know when the Defendant built the house on LR Nos. 7541 and 7546..

28. At the conclusion of the evidence, the parties opted to file written submissions. The Plaintiff filed his on the 16th March, 2021 while the Defendant filed his on 22nd March, 2021. The Plaintiff submitted that he is the absolute registered owner of all the suit parcels of land, namely LR. Nos. South Teso/Angoromo/7541-7546. He summed it up that the Defendant is a trespasser and that he (the Defendant) had not proved any of the elements of adverse possession in order to qualify to be declared an adverse possessor. He further submitted that the fact that the Defendant did not know that he was **encroaching on the Plaintiff's land and the area he did so defeats his claim for adverse possession**. He relied on the case of **M'Mbaoni M'thaara vs. James Mbaka (2017) eKLR.**

29. In his submissions, the Defendant argued that he has been in occupation on the suit parcels since 1972, a fact he never stated in evidence. He, however, submitted that he has even put up his home on the said parcel of land. His further submission was that he has been in continuous, uninterrupted occupation of the parcel of land and is therefore entitled to it by way of adverse possession hence the Plaintiff's right to the 0.30Ha of the land has been extinguished by operation of the law. He relied on the cases of **Celina Muthoni Kithinji vs. Safiya Binti Swaleh & 8 others (2018) eKLR** and **Rahab Wanja Mica vs. Jonah Muchoki Kariuki Murang'a Misc Appl No. 318 of 2017.**

30. This court considered the pleadings, evidence by the Plaintiff and the Defendant and the submissions of the parties in order to determine this case.

ISSUES FOR DETERMINATION

31. The parties did not frame their issues. Thus, the Court having considered the parties' pleadings, evidence, submissions and the applicable law framed the following issues. :

- i. *Whether the Defendant's possession of the suit parcels of land namely, LR. Nos. South Teso/Angoromo7540-7546 is adverse to that of the Plaintiff right of ownership and whether his rights to the parcels of land have been extinguished.*
- ii. *Whether the Defendant has encroached into the Plaintiff's parcel of land;*
- iii. *Whether an eviction order should be issued against the Defendant from land parcels LR. Nos. South Teso/Angoromo7540-7546.*
- iv. *Whether the District Surveyor – Busia should be directed to reinstate the boundaries and access roads to all parcels of land created from South Teso/Angoromo/852*
- v.
- vi. *Whether the Plaintiff should be restrained from using, claiming, working on parcels LR. Nos. South Teso/Angoromo7540-7546*
- vii. *Whether the Plaintiff is entitled to K.Shs. 20 million being damages for loss of use; and*
- viii. *Who bears the costs of the suit?*

DETERMINATION

32. In regard to the second issue, that is, *whether the Defendant has encroached into the Plaintiff's parcel of land*, the court is of the view that the Plaintiff has proved his case to the required standard, a balance of probabilities, that the Defendant encroached his parcels of land in issue except two. First, the Plaintiff proved to the satisfaction of the court that he is the registered owner of parcel numbers LR. South Teso/Angoromo/7540, 7541, 7542, 7543, 7544, 7545 and 7546. He therefore, unless he has permitted anyone else to occupy these parcels, is the only person entitled to occupy and use the parcels. In his evidence he stated that the Defendant had built on parcels numbers LR. South Teso/Angoromo/7540, 7541, 7542, 7544 and 7546. This leaves out parcel numbers South Teso/Angoromo/7543 and 7545. This was confirmed by PW3 in his findings who stated that there were developments on the parcels of land. Since this occupation of the Plaintiff's parcels of land came about by virtue of the Defendant extending his occupation and use of land parcel No. LR. South Teso/Angoromo/1998, it amounts to encroachment. Although the Defendant as his witnesses denied this fact, their evidence was not convincing.

33. Both **PW2** and **PW3** testified that there was encroachment into the Plaintiff's suit land. Both confirmed that the size of the encroached land was 0.3079Ha which is approximately $\frac{3}{4}$ of an acre. They also confirmed that the encroached land was developed.

34. PW2, the Land Registrar, made findings in his report dated 4th June, 2014, as follows:

- a. **There is an inconsistency between the ground situation and the map (see detailed Surveyor report attached);**
- b. **That Mr. Wabwire Olago Wandera (the objector) and other people acting with his knowledge have developed part of the land belonging to Edward Okello Syata (the Plaintiff); and**
- c. **That the size of the land encroached by the objector is approximately 0.3079.**

35. The Surveyor, PW3's Report dated 4th June, 2014 had the following findings:

- a. **Boundaries ab, bc, ad and cd are perimeter boundaries of the previous parcels 852 previously subdivided;**
- b. **It was discovered that the road plan A (map situation) has been shifted to the west end boundary as shown on the diagram B (Ground situation);**
- c. **The road which is reflected on the plan A is along boundary f c' as shown on the diagram B;**
- d. **The following plots have been fully developed;**

i. 7541-0.0615Ha

ii. 7542-0.0462Ha

iii. 7548-0.0430Ha

iv. 7549-0.0400Ha

v. 7546-0.0539Ha

vi. 7544-0.0414Ha

vii. 7540-0.0219Ha

= 0.3079Ha

Road access 0.0838 (5m road)

e. **Undeveloped plots:**

i 7550

ii. 7545 Area=0.268Ha

iii. 7547

iv. 7543

Total=0.6597Ha=0.70Ha

36. The findings of PW3 who is an expert in matters of survey were made upon visiting the disputed parcels of land, and in the presence of both the Plaintiff and the Defendant. The court is satisfied with the findings of both the Registrar and the Surveyor. *Section 18 (2) of the Land Registration Act provides that: **The Court shall not entertain any action of other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.** The reports of the Surveyor and that of the Land Registrar should be taken as conclusive evidence of the interference of the boundary of the Suit Parcel and the consequential encroachment.*

37. The Land Registration Act has made provisions for the rights of a proprietor of land at section 25(1) of the Act. It provides that:

'The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all the

privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.

38. Section 26(1) of the Land Registration Act provides that:

‘The certificate issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the Proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except: -

a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

39. However, this finding does not fully settle the Plaintiff’s rights over the parcels of land that have been encroached onto. His rights are intertwined, and he has to contend, with the Defendant’s claim of adverse possession of the parcels of land. Thus, I now turn to issue number one.

40. The first issue herein is whether the *Defendant’s possession of the suit parcels of land namely, LR. Nos. South Teso/Angoromo7540-7546 is adverse to that of the Plaintiff right of ownership and whether his rights to the parcels of land have been extinguished.* What is adverse possession? In *Josinter Atieno Ouma & another v Joshua O. Omiti & another [2018] eKLR* the court defined the concept as follows: “...**a method of gaining legal title to real property by the actual, open, hostile and continuous possession of it to the exclusion of its true owner for the period prescribed by law.**” It is a process party legally acquires ownership of land from another person, other than by way of sale, voluntary transfer or transmission, who initially legally owned it. It of course excludes acquisition of such ownership from the state.

41. The doctrine of adverse possession in Kenya is embodied in Section 7, 13, 17 and 38 of the Limitation of Actions Act, CAP 22 Laws of Kenya, as was stated by the Court of Appeal in *Ruth Wangari Kanyagia v Josephine Muthoni Kinyanjui [2017] eKLR*. Section 7 provides that: -

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

42. Section 13 of the Act provides that:

“(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and afresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3), the land in reversion is taken to be adverse possession of the land.”

43. A claimant for the land adverse possession must demonstrate that he has been in peaceful, continuous and uninterrupted occupation of the claimed land period of excess of twelve (12) years. Justice Makhandia J.A. in *Mtana Lewa vs. Kahindi Ngala Mwangandi (2005) eKLR* described adverse possession as below:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title neglects to take action against such person in assertion of his title for a certain period. In Kenya, the period is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the owner.”

44. The Court of Appeal has been emphatic that the person claiming another’s land by way of adverse possession must show to the court, by evidence, that the Defendant was aware either in actual sense or constructively that the Plaintiff was in possession of the land. In *Ruth Wangari Kanyagia v Josephine Muthoni Kinyanjui [2017] eKLR*, it cited with approval the case of *Wanyoike Gathure v/s Berverly (1965) EA 514, 519*, as follows: “**So the**

plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation.”

45. From the restated law above authorities this court considers the Defendant’s Counterclaim of adverse possession not to be successful. First, the Plaintiff testified that from the time he bought his land in 1969 to 2007 he never knew of the Defendant being on his land. Moreover, he also testified that until 2010 he had been dispossessed of his land by his nephew Vivian Syata. This was not controverted by the Defendant. The Defendant testified that he has been on the father’s land, parcel No. South Teso/Angoromo/1998 for 52 years. The father’s land does not constitute the Plaintiff’s parcels of land in dispute.

46. Assuming that the Defendant's occupation of the father's land caused him to occupy the Plaintiff's, no evidence was led to show that it was with the knowledge of the Plaintiff. Moreover, **DW1** testified that he is the Plaintiff's neighbor and that he has neither built on the Plaintiff's land nor is he using his plot. **DW1**'s statement suggests that he did not have an idea that he was living on the Plaintiff's land if at all. In cross-examination, he reiterated while building his house he thought that he was building on his father's plot. For possession to be adverse one must be aware that they are actually possessing someone else's land. Again, it appears, and it was confirmed in evidence by the Plaintiff, that the Defendant built on the Plaintiff's land after the Defendant's father died. However, no evidence was led by the Defendant to show when his father died so as to confirm whether the period of 12 years before the suit herein was brought, had expired. This court cannot fill in the gaps for the Defendant. In any event,

since the Defendant, together with his witness, DW1, testified that the Defendant lived on his father's land for 52 years (since he was a child), there was no evidence led to show when he moved over to the Plaintiff's parcels of land.

47. Again, the Defendant admitted that the two claimants in Busia Originating Summons 70 of 2017 are his children. He is not one of the Claimants. The two children claim on oath that they are the ones who have acquired adverse possession of the parcels of land South Teso/Angoromo/7541-7546. The Defendant has not refuted this claim, both in the Originating Claim and in this suit. If the claim by the children in Busia OS 70 of 2017 is true, then that being contradictory to the Defendant's evidence herein dislodges his claim of adverse possession. In any case, without deciding on the merits of the said amended Originating Summons No. 75 of 2017, the Defendant is not telling the truth, and his testimony cannot be found as supporting the claim on adverse possession as claimed in his counter-claim.

48. Further, what is not clear from the Defendant's evidence is, on the one hand, when he specifically entered the parcels of land in question, that is to say, parcel numbers LR. South Teso/Angoromo/ 7540-7546. But on the other hand, the Plaintiff proved that he is the registered proprietor of all the parcels since 2010. The Defendant did not also prove the exact portion of the parcels of land in question he has built on. He insisted in evidence that he had not occupied the parcels of land LR. Nos. South Teso/Angoromo/7540-7546. Instead, he stated that he has been on LR. No. South

Teso/Angoromo/1998 which is his late father's land. Thus, he did not prove which specific portion of the disputed parcels of land he encroached on. He sought to discount even the Surveyor's (PW2's) Report which clearly indicated that he occupied 0.307ha, contrary to his assertion, if his testimony were to be taken to be true but which this court has indicated elsewhere in in this judgment that it is not. He did not give a basis for such a reason of discounting the expert witness' evidence verbally. Therefore, this court cannot rely on unsubstantiated denial of an expert's evidence.

49. Furthermore, the Defendant gave confusing evidence regarding his claim by way of counterclaim to the Plaintiff's parcels of land. On the one hand, he stated in evidence almost at all points that he had not occupied them. On the other, he stated that he occupied a portion whose size he did not know. Moreover, the Defendant, and later, his witness DW2, pleaded that he lives on parcel No. South Teso/Angoromo/1998 for 52 years. He stated, and which was evidenced by the copy of the Green Card which shows that his late father was issued with title to the parcel of land on 9th June, 1987. Going by his evidence, it appears that he was born on his father's land, which he alluded to. He has lived on it since birth, as supported by the evidence of DW2 below.

50. In case the physical boundary of this parcel of land LR. No. South Teso/Angoromo/1998 encroached onto the parcels of land owned by the plaintiff, the Defendant did not prove how far that did. In any event, it cannot by any stretch of imagination be implied that it is him who was resided on the parcels LR. No. 7540-7546 all along. Instead, it was his father who did so until

his death. The Defendant was only living on his father's land as he grew up. This view is bolstered by the evidence of the Plaintiff who stated in cross-examination that the Defendant put up the buildings on the parcels of land after his father's death. The Defendant failed to bring the evidence to controvert that of the Plaintiff that indeed he built the houses after his father's demise. Even so, no evidence was led to show when the Defendant's father died. The evidence would have aided the court in computing the time from when he encroached the parcels of land.

51. Of complexity, which dampens the Defendant's case for orders of adverse possession, is the fact that his two sons, Abdulkadir Ologe Wawire and Isaa Seboa, also claim to have been the ones who made the developments on the land parcels in issue. That cannot be. It is either the father or his sons. On that account alone, Defendant's claim of adverse possession lacks evidence in support thereof.

52. It is worth repeating that **PW1** testified that he only got back his titles to the suit land in 2010 after he had been dispossessed by his nephew. The Defendant cannot therefore claim adverse possession from the Plaintiff as he was not in possession of the land from 1975 until sometime in the year 2010. It was the Plaintiff's nephew who was in possession at the time. Thus, the twelve-year period of uninterrupted quiet possession is not proved. This was discussed in the case of **Ravindranath Dahybai Bhagat v Hamisi Herod & 5 others [2014] eKLR** where the court held that: -

“For one to succeed in a claim of adverse possession, the land must have been in possession of the Plaintiff in the first place.....The defendant stated that the plaintiff or the original allottees never took possession of the suit property and could therefore not have been disposed or discontinued their possession.”

53. The Defendant's claim for adverse possession against the Plaintiff therefore fails since his possession began running from the year 2010 and not 1975 as he has pleaded. This is only 11 years from the date the Plaintiff repossessed the land. And since the Defendant's claim for adverse possession has failed, it follows that his encroachment on the plaintiff's parcels of land as discussed earlier is unjustified.

54. With regard to issues number three and four, that is, whether an eviction order should be issued against the Defendant from land parcels LR. Nos. South Teso/Angoromo/7540-7546, and whether an order for reinstatement of the boundaries and access roads should issue, the

court is of the view that findings on these issues would flow from the findings on adverse possession and encroachment as discussed above. Since I have found out that the Defendant's claim of adverse possession of the parcels of land in dispute fails and that his encroachment on the Plaintiff's parcels of land is unjustified, I make a further finding that the prayer for an order of eviction of the Defendant from the parcels of land succeeds and the prayer for the Surveyor to rectify the boundaries is merited. The Defendant shall within 90 days of this judgment vacate the parcels of land he has encroached. He shall remove the materials placed on the parcels of land within that period, failure of which the Plaintiff shall remove them at the Defendant's cost. Further, the Defendant's prayer for an order that the Plaintiff should be restrained from using, claiming, working on parcels LR. Nos. South Teso/Angoromo7540-7546 fails. The Plaintiff shall have the costs of both the suit and the counterclaim.

55. In conclusion I enter judgement for the Plaintiff and hold that:

a. The Defendant is ordered to surrender vacant possession of the suit parcels No. SOUTH TESO/ANGOROM/7541 to 7546 within ninety (90) days of the delivery of this judgement.

b. In default of (b) above, eviction shall issue as stated in paragraph 54 above.

c. An order of permanent injunction be and is hereby issued against the Defendant, his family, servants, workers, agents, 3rd parties or any other person claiming through her from cultivating, planting crops, fencing off or any manner whatsoever interfering with the Plaintiff's use and occupation of Land Parcels No. SOUTH TESO/ANGOROM/7541 to 7546 respectively;

d. The Costs of the suit are awarded to the Plaintiff.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 21ST DAY OF JULY, 2021.

A. OMOLLO

JUDGE

[\[R1\]](#)Judge, please check whether or not parcel no. 7540 os included in the prayers. I may have erred in capturing or omitting it.