

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ELC MISC. CASE NO. 2 OF 2023
IN THE MATTER OF THE LAND REGISTRATION ACT, 2012

AND

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT (CAP 22)

AND

IN THE MATTER OF LAND PARCEL TITLE NO.
KAKAMEGA/BUYONGA/398

BETWEEN

SOLOMON ASAVA.....APPLICANT

VERSUS

PETER AMOI ENJAIRO.....1ST RESPONDENT

PETER VIDONYI AMOI.....2ND RESPONDENT

LAWRENCE AGUFANA ENJAIRO.....3RD RESPONDENT

JUDGEMENT

Vide the amended Originating Summons dated 27th March 2024 Solomon Asava, the Applicant, who claims to be in actual occupation, user, possession and an adverse possessor entitled to and having acquired overriding interests on a portion measuring 0.26 Ha composed in land parcel title KAKAMEGA/BUYONGA/398 presented before court the following question for determination against Peter Amoi Enjairo, Peter Vidonyi Amoi and Lawrence Agufana Enjairo, the Respondents;

- a. Whether the Applicant be declared to be entitled to a portion measuring 0.26 Ha from L.R. No. KAKAMEGA/BUYONGA/398
- b. Whether the Applicant be declared the absolute owner of the foresaid portion of parcel of land after acquiring it by adverse possession.

- c. Whether the Applicant has been in actual effective use and occupation of the said portion of parcel of land KAKAMEGA/BUYONGA/398 peacefully, quietly and openly for more than twelve (12) years to the exclusion of the Respondents.
- d. Whether upon expiring of 12 years since the Applicant was in actual possession of the suit portion L.R. KAKAMEGA/BUYONGA/398, the Respondents' rights over the said portion of land has been extinguished by operation of law.
- e. Whether the Respondents hold the said portion of parcel of land in trust for the Applicant.
- f. Whether the Applicant be ordered to execute all transfer documents in respect of the foresaid portion of parcel in favour of the Applicant in default, the Deputy Registrar of the Court be empowered to execute the same to give effect to the aforesaid orders.
- g. Whether the costs of the suit be borne by the Respondents.
- h. Such, orders or further relief this honourable Court may grant in the circumstances.

The amended Originating Summons was supported by the averments in the Supporting Affidavit of Solomon Asava sworn on 27th March 2024.

The 1st, 2nd and 3rd Respondents filed their Replying Affidavit dated 7th June 2024 to the amended Originating Summons.

Vide directions taken by consent on 17th September 2024, the matter proceeded to hearing by way of *viva voce* evidence.

The Evidence

PW1 was Solomon Asava Amuyunzu. He adopted the contents of his witness statement dated 23rd October 2024 as his evidence-in-chief. He had stated in the

said witness statement that the suit land is registered in the joint names of Sheke Magoma and Peter Amoi Enjairo. That Sheke Magoma recently passed away. That he (applicant) had been living, occupying and using a portion of land parcel No. KAKAMEGA/BUYONGA/398 measuring 0.26 Ha from the time he purchased it in 1987 from Sheke Magoma at Kshs. 10,000/- which he paid in full, to date.

That since he bought the land he had enjoyed quiet and uninterrupted stay for a period of more than 31 years. That he buried the body of his mother and other family members on the land without any objection from the Respondents who are not occupying and / or working on the subject portion of land. That although the land sale agreement indicated that what he was buying was KAKAMEGA/BUYONGA/630, what he was shown was KAKAMEGA/BUYONGA/398 from where the 0.26 Ha was curved out for him and that he immediately established his matrimonial home thereon. That Sheke Magoma then planted a boundary to mark the 2 portions of land. That at that time, he trusted Sheke Magoma to have done the right thing and allocated to him KAKAMEGA/BUYONGA/630 and had promised to take out Letters of Administration and entrusted the land to him.

That at one time Sheke Magoma asked him to take out Letters of Administration to the estate of one Dorcas Khavali who was the mother of Sheke Magoma and that he did so and took out Letters of Administration to the estate of Dorcas Khavali dated 24/7/2017. That all along he was misled into thinking that he was pursuing succession to inherit the correct parcel of land.

That it was only when a survey was conducted that he realized that he was actually occupying land parcel No. KAKAMEGA/BUYONGA/398 and not 630.

That subsequently he cited Sheke Magoma Amoi who took out Letters of Administration to the estate of Amoi Kabalenya which he did together with the 1st Respondent and a Certificate of Grant was issued.

That after the grant was issued in the year 2022 the Respondents forced their way onto the portion that he had been occupying with his family and started planting crops, destroying the crops planted by the Applicant and threatening the Applicant and his family.

In court on cross-examination and re-examination the Applicant stated that it is him who bought the land and not his father. That he resides on land parcel number 398 and that parcel number 630 and 398 belong to the same person.

That he did not know how the Respondents were joined to the proceedings because it was Sheke Magoma who sold the land to him.

That he started occupying the land in the year 1987 having built a house thereon in the month of May 1987. That he did not know the registered owners of land parcel numbers 398 and 630.

That he filed objection during the succession proceedings. That at the time he filed the suit, land parcel number 398 was registered in the name of Sheke Magoma.

The Applicant produced documents as exhibits as contained in the list of documents dated 23rd October 2024 namely; a copy of citation, ruling in Vihiga succession 25 of 2021, a copy of certificate of grant in succession 25 of 2021, certificate of official search for KAKAMEGA/BUYONGA/398 dated 8th December 2020 and 2/8/2022, a copy of Sale Agreement, a copy of community minutes for the meeting held on 9/9/2022, a copy of Chief's letter dated 19/1/2021, copy of certificate of official search for KAKAMEGA/BUYONGA/630, copy of replying affidavit by Peter Amoi

Enjario to the Application dated 8/9/2021, copy of letters of grant dated 24th July 2017, a copy of replying affidavit dated 23/11/2021, copy of Kenya Gazette dated 23/6/2017, copy of surveyor's report dated 8th May 2016, copies of letters dated 15/2/2016 and 13/7/2016 and photographs.

PW2 was Alice Mwenderani Asava. She adopted the contents of her witness statement dated 23rd October 2024 as her evidence. She stated that she was the wife of the Applicant and was aware that the Applicant bought a piece of land from Sheke Magoma measuring 0.26 Ha. That she had built her homestead on the property and that the Chief and elders had tried to intervene but that the Respondents through their actions were set to deprive the Applicant of ownership of the land.

On cross-examination, and re-examination PW2 stated that she did not sign the land sale agreement as a witness. That it was her father-in-law by the name of Alfayo Amuyunzu who was spearheading the process of purchase. That it was her husband who was financing the process. That parcel No. 630 belongs to someone else. That the portion they were shown is the one they occupy. That parcel number 398 is registered in the names of the Respondents. That there were boundary features demarcating the Applicant's portion from that of Sheke Magoma which was destroyed.

PW3 was one Edward Ayuya Keya the Chief of Maragoli Central Location. He testified that he wrote a letter dated 19th January 2021 which was an introductory letter in respect of the estate of Amoi Kabalenya. That the children of Amoi Kabalenya were Sheke Magoma Amoi and Peter Vidonyi Amoi and that Solomon Asava, Peter Enjairo and Lawrence Enjairo are purchasers. That Solomon Asava has resided on the suit land for a long time. That when Sheke Magoma died, he was buried on his portion of the suit land. That there is a

demarcation to show where Solomon Asava occupies and where Sheke Makoma occupies, which demarcation is made of big trees.

On cross-examination and re-examination PW3 stated that the demarcation between the two portions of the parcel of land was some trees. That the Chief's letter is meant to clarify the beneficiaries and the estate of the deceased that there was no opposition when Sheke Magoma was buried on the suit land because he was buried on his portion of the land and not the portion belonging to the Applicant.

On behalf of the Respondents Peter Amoi testified as DW1. He relied on the contents of his witness statements dated 20/9/2024 as his evidence in chief. He added that Solomon Asava was his neighbour. That he had never sold land to Solomon Asava. That the suit land is registered in the names of Sheke Magoma, himself, Lawrence Agufana and Peter Vidonyi Amoi, that before the land got to their names it was registered in the name of Amoi Kabalenya who was the witness's grandfather. That the Applicant lives on the suit land by way of trespass.

DW1 had stated in his witness statement that the Applicant had filed an objection to the succession proceedings which objection was dismissed consequent to which the Applicant filed appeal No. VIHIGA HCFA 5 OF 2021 which is pending determination. That the Applicant had not been in peaceful occupation of a portion of land measuring 0.26 Ha of land parcel No. KAKAMEGA/BUYONGA/398 for a period stretching to over 12 years. That no nexus had been demonstrated between parcel number 630 and 398. That the Applicant had not sued the estate of the owner of land parcel number 630 which he bought. That the Applicant lives on his father's land parcel number KAKAMEGA/BUYONGA/523 in the names of Alfayo Amuyunzu which is adjacent to the suit land and that the Applicant's family managed to trespass

onto a portion of the suit land before they conducted succession of the estate of the initial owner Amoi Kabalenya in or about the year 2016 which trespass actions have not been condoned by the Respondents. That the applicant does not have overriding interest on the suit land. That there is no basis for transfer of the suit land to the Applicant.

On cross-examination and re-examination, DW1 stated that the Applicant trespassed onto the suit land in the year 2018 where he lives. That he had never seen the Applicant burying the body of his child on the suit land. That they have never tried to evict the Applicant from the suit land. DW1 produced exhibits namely; letter of consent, certificate of official search, copy of title deed, burial permit for Sheke Magoma Amoi, copy of certificate of confirmation of grant, green card, ruling dated 17/11/2022, copy of Memorandum of Appeal and copy of certificate of official search.

DW2 was Lawrence Agufana Enjairo. He stated that he lives on the suit land and that the Applicant lives on the land since the year 2018. That land parcel number 630 has no connection with parcel No. 398. That the Applicant has not lived on the land for 37 years. He stated on cross-examination that he was brought to live on the suit land by the wife of Amoi Kabalanya by the name of Dorcas Amoi. That they did not buy the land. That the Chief was trying to force them to accept Solomon Asava.

Submissions

Directions were given on 9/6/2025 for parties to file written submissions on the case and timelines were given for the same. On 9/7/2025 when the matter came up for mention for a date for Judgment, the Court extended the time for filing the written submissions by another 14 days.

No written submissions were filed on behalf of the Applicant.

On behalf of the Respondents, written submissions dated 7th August 2025 were filed by the firm of E. A. Wilunda & Co. Advocates. Counsel submitted that the Applicant had demonstrated that his entry onto the suit land was permissive. That the Applicant had not shown any nexus between land parcel number 630 and No. 398 except his explanation that he was shown to live on parcel 398. That the Respondents alongside Sheke Magoma, deceased, became registered owners of the suit land on 27th July 2022 and title was issued on 18th August 2022. That before this the land was registered in the name of Amoi Kabalenya deceased, and in whose succession the Applicant's liability claim was dismissed.

That the suit was filed in the year 2023 against the new owners and it is therefore not possible that the claim for the land against the Respondents has been alive for over 12 years since they only became registered owners in the year 2022.

That from the time the first registered owner died in 1972 to 12th April 2021 when the estate was given administration through the Respondents, the land had no ownership where any rights could accrue against anyone. That as at the time the Applicant alleges to have been shown the portion of land to occupy there was never an administrator nor anyone legally authorized to give capacity to the Applicant to own the land. That the Applicant has no basis for his claim of 0.26 Ha of the suit land.

Relying on the case of Richard Wafwaywa Sougoi -vs- Ben Munyifwa Songoi, Counsel submitted that a party claiming adverse possession must assert hostile title in denial of the title of the registered proprietor. That the Applicant based on the fact that he alludes to a sale agreement and secondly being shown where to possess has failed to demonstrate that his entry was adverse and non-permissive.

Relying on the case of *Mtana Lewa -vs- Kahindi Ngala Mwangandi [2015] eKLR* Counsel submitted that adverse possession can only arise out of non-permissive possession.

Counsel submitted further that the Law of Succession is clear on handling of property of a deceased person. That section 45 thereof prohibits intermeddling with property of a deceased person. That a person who contravenes the section is guilty of an offence besides being answerable to the rightful executor to the extent of the assets which have been intermeddled with.

Counsel concluded that the Applicant has not established the threshold for a claim of adverse possession and prayed that the claim be dismissed in totality with costs to the Respondents.

Issues for determination

The 7 questions raised by the Applicant for this court's determination are all centered around the issue of whether or not the Applicant has had adverse possession of the suit land. Determination of this issue will answer each of the questions either in the negative or in the affirmative.

Analysis and determination

The suit land is land parcel No. KAKAMEGA/BUYONGA/398 of which a portion measuring 0.26 Ha is what is in dispute. Certificate of official search produced by the Applicant shows that the land was registered in the names of Sheke Magoma Amoi, Peter Amoi Enjairo, Peter Vidonyi Amoi and Lawrence Agufana Injairo on 27/7/2022. The certificate of official search also shows that the size of the whole of the suit land is 1.0 Ha. This was not contested. The Respondents produced a title deed dated 18th August 2022 in respect of the suit land in the names of Sheke Magoma Amoi, Peter Amoi Enjairo, Peter Vidonyi Amoi and Lawrence Agufana Injairo to affirm this position.

The Respondents also produced a copy of register (green card) as exhibit. The same shows that the register in respect of the suit land was opened on 9th July 1973 when the land was registered in the name of Amoyi Kabalenya. The green card further shows that the land remained in the name of Amoyi Kabalenya until 25/7/2022 when the land was vide succession cause No. 25 of 2021 transmitted in favour of Sheke Magoma Amoi and Peter Amoi Enjairo. It shows further that on 27/7/2022 the land was registered in the names of the current registered owners to hold in equal shares.

The Applicant claims to have entered the suit land in the year 1987 having been shown the same by Sheke Magoma Amoi. Amoyi Kabalenya was said to have died in the year 1972. It was stated in the grant of letters of administration in respect of his estate which was produce as exhibit by the Defence that Amoyi Kabalenya died August 1972. This was not contested by the Applicant. It was not demonstrated that Sheke Magoma Amoi had authority to enter into land sale agreement in respect of and/or allow occupation of the suit land in the year 1987 as he was neither the registered owner nor agent of the registered owner.

If it is the correct position that the applicant did enter the suit land in the year 1987 as claimed, the entry of the Applicant onto the suit land therefore was hostile or adverse to the interests of the registered owner. The law expected the registered owner to act and assert his title within 12 years from the date of the applicant's entry pursuant to the provisions of sections 7, 13 and 17 of the Limitation of Actions Act.

If any time was to run from the date of the Applicants entry onto the suit land, then it was to run against the title of the registered owner. The registered owner was however deceased as at the time and time could not run against the deceased. It was common ground that succession to his estate was only undertaken in the year 2021 leading to the transmission of the suit land in

favour of the current registered owners. The Law of Succession Act protects property of deceased persons and, as submitted on behalf of the Respondents, prohibits any kind of handling of such property except in accordance with the provisions of that law. See sections 2, 45, 79, 80 and 82 thereof.

Under section 45, any such handling of property of a deceased property amounts to the offence of intermeddling.

The action of Sheke Magoma of purporting to sell a portion of the suit land, the action of the Applicant of purporting to buy the said portion of land, the actions of the Applicant of entering and staying on the suit land were all acts amounting to intermeddling with the estate of the deceased.

The Applicant has no claim herein against Amoyi Kabalenya. He did not join his estate as a Respondent in the suit. Evidence was adduced that attempts by the applicant's claim to be recognized as a liability in the estate of Amoi Kabalenya were unsuccessful. The Respondents are not sued as personal representatives of Amoyi Kabalenya but in their personal capacities. Although in paragraph 3 of the Supporting Affidavit to the amended Originating Summons the Applicant stated that;

“the original proprietor for the parcel of land is Amoi Kabalenya (deceased) the late father to Sheke Magoma Amoi and grandfather to Peter Amoi Enjairo who both took out letters of Administration for his estate (attached and annexed herein is a copy of the letter of Grant of administration marked “SA-2”).

he pleaded no specific claim against the said estate. He established no nexus between his activities/transactions with Sheke Magoma and the estate of the deceased. The applicant did not sue Sheke Magoma. Regarding the current

respondents, the applicant stated that he did not know why they were included in the suit.

Adverse possession is a doctrine of law vide which a person obtains legal title to land by reason of actual, open, hostile and continuous occupation of it to the exclusion of the registered owner for a prescribed period. The possession must be without the permission but with the knowledge of the registered owner. In order for a claim of adverse possession to succeed, the claimant must prove that the land belongs to a registered owner, that the claimant's entry and occupation of the suit land is contrary to the interest of the registered owner. That the occupation was with the knowledge but without the consent of the registered owner and that the occupation has been open, hostile, continuous uninterrupted and peaceful for the period of 12 years.

These ingredients of adverse possession have been outlined in case law for instance in Kimani Ruchure vs Swift Rutherfords & Co. Ltd (1980)KLR 10 Kneller J held that "the Plaintiffs have to prove that they have used this land which they claim as of right: *nec vi, nec clam, nec precario* (no force, no secrecy, no persuasion)

And in Gabriel Mbui vs Mukindia Maranya [1993]eKLR the court held *inter alia* that:

"..the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent

with the true owner's enjoyment of land for purposes for which the owner intended to use it.”

These ingredients have not been proved herein.

For the foregoing reasons, the questions presented in the Originating Summons are determined in the negative. The applicant has not proved his case on a balance of probabilities. The suit is dismissed. Costs to the respondents.

Orders accordingly.

Judgement dated and signed at Vihiga and delivered this 16th day of October, 2025 virtually through Microsoft Teams Online Application.

**E. ASATI,
JUDGE.**

In the presence of:

Ajevi: Court Assistant.

Willie for the Applicant

Wilunda for the Respondents.