

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC NO 29 OF 2020

FREDRICK WESONGA ASOMBA

PLAINTIFF

= VERSUS =

JOYCE MMBONE OMBURA 1ST DEFENDANT

BONVENTURE OUMA OPONDO 2ND

DEFENDANT

J U D G M E N T

1. This judgment was due on 2nd October 2025. However, due to my impending transfer effective 15th January 2026, I have had to prioritize the hearing of part heard cases. This has precipitated a delay. The same is regretted.
2. By his Originating Summons dated 23rd July 2020 and amended first on 28th October 2020 and further amended finally on 3rd March 2023, **FREDRICK WESONGA ASOMBA** (the Plaintiff) impleaded **JOYCE MMBONE OMBURA** and **BONVENTURE OUMA OPONDO** (the 1st and 2nd Defendants

respectively) claiming to have acquired by way of adverse possession a portion measuring $\frac{3}{4}$ acre out of the land parcel **NO MARACH/ELUKONGO/2166** (the suit land). He therefore sought for this Court to determine the following questions:

- a) Whether the Plaintiff has been in open and notorious possession of a portion measuring approximately $\frac{3}{4}$ of an acre out of L.R **NO MARACH/ELUKONGO/2166** for a period exceeding 12 years.
- b) Whether the Defendants title to a portion of **L.R NO MARACH/ELUKONGO/2166 MEASURING** $\frac{3}{4}$ of an acre became extinguished upon expiry of 12 years from the time the Plaintiff went into possession of the said portion.
- c) Whether the Plaintiff has now acquired title to a portion of L.R **NO MARACH/ELUKONGO/2166** measuring $\frac{3}{4}$ of an acre by virtue of adverse possession.
- d) Whether a portion of **L.R NO MARACH/ELUKONGO/2166** measuring approximately $\frac{3}{4}$ of an acre should be transferred to the Plaintiff.
- e) Who should pay the costs of this cause.

3. Arising out of the above, the Plaintiff seeks the following orders:

- 1) The Defendants' rights over a portion measuring $\frac{3}{4}$ of an acre out of **L.R NO MARACH/ELUKONGO/2166** got extinguished by adverse possession upon expiry of 12 years from the date the Plaintiff came into possession.
- 2) That the Defendants be perpetually barred from taking or using a portion measuring $\frac{3}{4}$ of an acre out of **L.R NO MARACH/ELUKONGO/2166** presently under the occupation and use of the Plaintiff.
- 3) That a portion measuring $\frac{3}{4}$ of an acre out of **L.R NO MARACH/ELUKONGO/2166** be and is hereby registered in the names of the Plaintiff as absolute proprietor thereof.
- 4) That the Defendants do execute all the relevant documents to facilitate the sub-division and transfer of a portion measuring $\frac{3}{4}$ of an acre out of **L.R NO MARACH/ELUKONGO/2166** into the name of the Plaintiff and that in default, the Deputy Registrar do execute the same in place of the Defendants.

The further amended Originating Summons is supported by the Plaintiff's affidavit of even date in which he deposed, inter alia, that his late further **THOMAS ASUMBA ODWORI** was at all time the registered proprietor of the land parcel **NO MARACH/ELUKONGO/1794** which was later sub-divided to create other portions of land including the suit land which measures 2.0 acres and was sold to the 1st Defendant. The 1st Defendant occupied it for over 30 years before selling it to the 2nd Defendant. However, the 2nd Defendant only occupies 1½ acres of the suit land and not 2.0 acres as per the title and upon discovering this anomaly, he (2nd Defendant) started claiming the ¾ acre where the Plaintiff has established his homestead and occupied the same peacefully and uninterrupted since 1990 to-date a period of over 12 years. Since he has occupied the said ¾ acre out of the suit land for over 30 years, the Defendants' claim thereto has been extinguished by the principle of adverse possession. All his friends and neighbours know that the ¾ acre portion belongs to him.

4. The Plaintiff also filed a supporting affidavit dated 23rd July 2020 and two statements dated 24th March 2021 and 2nd June

2022. The thread which runs through all those affidavits and statements and which the Plaintiff adopted as his evidence during the plenary hearing is that the suit land is a subdivision of the land parcel **NO MARACH/ELUKONGO/1794** which belonged to his late father. That it was first sold to the 1st Defendant and her husband **ISAAC OKUMU WALUSULA** but when it was demarcated from the original land parcel **NO MARACH/ELUKONGO/1794** during the purchase, it included the portion which the Plaintiff was occupying and which had been apportioned to him by his late father and which is demarcated. That in 2019 the 1st Defendant sold the suit land to the 2nd Defendant who then started crossing the boundary and interfering with his home where he lives with his family by cultivating thereon and cutting trees. The Plaintiff reported to the District Officer who advised him to call a surveyor and seek redress in the Court.

5. The Plaintiff also had recorded and filed the statement of his witness **HENRY PAMBA ODHIAMBO (PW2)** dated 24th March 2022. He confirms that he is a neighbour to the Plaintiff. That the portion of land on which the Plaintiff lives and that on which the 1st Defendant has been cultivating are

separated by a boundary. That there has never been any dispute between the Plaintiff and the 1st Defendant until 2019 when the 1st Defendant sold her portion of the suit land to the 2nd Defendant. The 2nd Defendant after purchasing the said portion started claiming that his land extends to the piece of land where the Plaintiff has put up his home.

6. The Plaintiff also filed two lists of documents. The first is dated 29th March 2022 and a further list of documents dated 13th December 2023.
7. In the list dated 29th March 2022, the following were annexed:
 - 1) Copy of certificate of official search for the land parcel **NO MARACH/ELUKONGO/2166.**
 - 2) Copy of certificate of official search for the land parcel **NO MARACH/ELUKONGO/1794.**
 - 3) Copy of a letter dated 19th March 2020 addressed to the chief by one **PAMELA OCHIENG** a village elder.
 - 4) Copy of Occurrence Book **(OB)** from **BUMALA POLICE POST.**
 - 5) Copy of a letter dated 1st April 2020 from the **CHIEF MARACHI EAST LOCATION** addressed to the **SUB-COUNTY FOREST OFFICER.**

- 6) Copies of photographs showing graves.
- 7) Copy of a letter dated 16th April 2020 addressed to the parties herein from the **ASSISTANT COUNTY COMMISSIONER BUTULA SUB-COUNTY** summoning them to a meeting to discuss complaints from the Plaintiff regarding encroachment on his land.
- 8) Copy of a letter dated 15th May 2020 addressed to **'WHOM IT MAY CONCERN'** advising that the Plaintiff and 2nd Defendant have reported a boundary dispute and it has been agreed that the parties seek the services of a Government Surveyor

The list dated 13th December 2023 had the following documents:

- 1) Copy of register for the land parcel **NO MARACH/ELUKONGO/2166.**
- 2) Copy of register for the land parcel **NO MARACH/ELUKONGO/1794.**

The 2nd Defendant filed a replying affidavit dated 27th April 2023 in which he deposed, inter alia, that he is the registered proprietor of the suit land having purchased it from the 1st

Defendant on 11th March 2019. That as per the sale agreement dated 11th March 2019, he purchased land measuring 0.82 hectares which was clearly marked and which the 1st Defendant had been occupying and fully developed for about 30 years. That before purchasing the suit land, he had visited the Land Registry and found that it was registered in the name of the 1st Defendant with no encumbrances. The 1st Defendant informed him that she had purchased the suit land from **THOMAS ASOMBA ODUORI**. He immediately took possession and has been cultivating it from 2019 to-date. That he knows the Plaintiff as a neighbour whose father was the original proprietor of the suit land before selling it to the 1st Defendant who sold it to the 2nd Defendant. It is therefore fool hardy for the Plaintiff to mislead the Court that the 2nd Defendant only purchased a portion measuring 1¼ acre yet he bought 0.82 Hectares which is clearly marked on the ground. That the Plaintiff's claim of ¾ acre is fraudulent and without justification as he has his own land left for him by his late father. The Originating Summons should be dismissed with cost.

8. The 2nd Defendant annexed to his replying affidavit the following documents:

- 1) Copy of Title Deed for the land parcel **NO MARACH/ELUKONGO/2166.**
- 2) Copy of sale agreement between the 1st Defendant and 2nd Defendant for the land parcel **NO MARACH/ELUKONGO/2166.**
- 3) Copy of the Green Card for the land parcel **NO MARACH/ELUKONGO/2166.**
- 4) Copy of transfer of Land Form.
- 5) Copy of application for consent.
- 6) Copy of letter of consent.

Although the 1st Defendant also filed a replying affidavit dated 27th April 2023, she did not testify and not surprisingly so. That is because, a claim for land by way of adverse possession is usually directed towards the registered proprietor of the land in dispute. The suit land is registered in the name of the 2nd Defendant. The 1st Defendant is no longer the registered proprietor of the suit land and at the appropriate time, I will issue an order striking out the suit against the 1st Defendant.

9. The plenary hearing commenced on 13th December 2023 and ended on 12th November 2024. The Plaintiff testified and called his witness **HENRY PAMBA ODHIAMBO (PW2)** as his witness. The 2nd Defendant was the only witness who testified in support of his case. They all adopted as their evidence the contents of their respective affidavits and statement as their evidence. The parties also produced as part of their documentary evidence the documents filed herein.
10. Submissions were thereafter filed both by **MR BOGONKO** instructed by the firm of **BOGONKO OTANGA & COMPANY ADVOCATES** for the Plaintiff and by **MR OKUTTA** instructed by the firm of **OUMA-OKUTTA & ASSOCIATES ADVOCATES** for the Defendants.
11. I have considered the evidence by the parties and the submission by counsel.
12. The Plaintiff's case is that he has acquired by way of adverse possession a portion measuring $\frac{3}{4}$ of an acre out of the suit land. It is common knowledge that the suit land has since 2nd May 2019 been registered in the name of the 2nd Defendant. Prior to that, it had been registered in the names of the 1st

Defendant and one **THOMAS ASOMBA OCHOLI** on 11th May 1999.

13. A person claiming to be entitled to land by way of adverse possession may approach the Court under **Section 38(1)** of the **Limitation of Actions Act**. It reads:

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

In the case **KASUVE -V- MWAANI INVESTMENTS LTD C.A. CIVIL APPEAL NO 35** of 2002 (NBI) [2004 KECA 161 KLR], the Court cited the above provision and went on to add that:

“And in order to be entitled to the land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a

period of 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition - **Wanje -V- Saikwa (NO2) 1984 KLR 284**. A title by adverse possession can be acquired under Limitation of Actions for a part of the land and the mere change of ownership of the land which is occupied under adverse possession does not interrupt such person's adverse possession - (see **Githu -V- Ndeete 1984 KLR 776**),”

The Supreme Court of India in the case of **KARNATAKA BOARD OF WAKF -V- GOVERNMENT OF INDIA & OTHERS 2004 16 SCC 779** discussed the essentials of adverse possession as follows:

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a

hostile possession by clearly asserting title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is 'nec vi, nec clam nec precario,' that is peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrong disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period."

The above precedents and others will guide this Court in determining this dispute.

14. A claim for land by way of adverse possession can only be maintained against the registered proprietor of the land in dispute as at the time when the suit is filed. That is clear from the provisions of **Section 38(1)** of the **Limitation of Actions Act**. The suit land is no longer registered in the name of the 1st Defendant. She relinquished ownership to the 2nd Defendant on 11th May 2015. She was therefore wrongly impleaded in this matter and since she filed a replying

affidavit dated 27th April 2023, the suit against her will be dismissed with costs.

15. The Plaintiff's occupation and possession of a portion of the suit land measuring $\frac{3}{4}$ of an acre is not in dispute. When he was cross-examined by **MR BOGONKO** on 12th November 2024, this is what the 2nd Defendant said:

"I bought the land from Joyce. She is the 1st Defendant. When she sold it to me, I started using the portion which I purchased. I do not use the whole land which I purchased 2 acres but I only utilize 1 $\frac{1}{4}$ acres. The Plaintiff utilizes the other portion. The Plaintiff stopped me from utilizing the other portion. The surveyor came to the land and showed the boundary. It is true that the Plaintiff's home has graves. When I bought the land, it had graves. It is not true that I demolished any boundary. I bought 2 acres"

And when he was re-examined by his counsel **MR OKUTTA**, he said:

"The Plaintiff stopped me from using the $\frac{3}{4}$ in 2020. My land is 2 acres."

It is clear from the Plaintiff's testimony that even as the 1st Defendant was selling the suit land to the 2nd Defendant, the Plaintiff was already in occupation and possession of a portion measuring $\frac{3}{4}$ acre on which he has a homestead and has even buried some of his family members thereon. Among the documents produced by the Plaintiff as his documentary evidence are photographs showing two (2) graves. In paragraph 7 of his supporting affidavit, the Plaintiff deposed, inter alia, that even as the 2nd Defendant was purchasing the suit land in 2019, he (Plaintiff) had already been living and cultivating on the portion which he claims for more than 28 years. Adverse possession is all about dispossessing the proprietor of the land - **SISTO WAMBUGU -V- KAMAU NJUGUNA C.A. CIVIL APPEAL NO 10 of 1982 [1983 KECA 69 KLR]**. The Plaintiff has clearly dispossessed the 2nd Defendant of the $\frac{3}{4}$ acre portion of the suit land. Indeed, the Plaintiff was in occupation and possession of the said $\frac{3}{4}$ acre which had been given to him by his father and so by the time this suit was first filed on 23rd July 2020, the Plaintiff had been in occupation and possession thereof well beyond the 12

years statutory period which entitles him to claim the land by way of adverse possession.

16. There is no evidence to suggest that the Plaintiff's occupation and possession of the $\frac{3}{4}$ acre of the suit land has not been open, exclusive, peaceful, un-interrupted and with the knowledge of the 2nd Defendant. Indeed, when the 2nd Defendant purchased the suit land, the Plaintiff was already in occupation and possession of the $\frac{3}{4}$ acre. There is nothing to suggest, further, that the 2nd Defendant, or indeed even the 1st Defendant his predecessor in title, had taken any legal action towards evicting the Plaintiff from the $\frac{3}{4}$ acre portion which he continues to occupy to-date.
17. The suit land may have changed ownership from the 1st Defendant to the 2nd Defendant in May 2019. However, that change of ownership did not interrupt the Plaintiff's occupation and possession of the $\frac{3}{4}$ acre which he claims and time for purposes of adverse possession continued to run. Further, it is also now well settled that a claim in adverse possession can be made for only a portion of the land and not necessarily for the whole land that is registered in the name of the proprietor - **GITHU -V- NDEETE 1984 KLR 776**. In his

submissions, counsel for the 2nd Defendant has stated as follows in paragraph 5:

5: “It follows that the 1st and by extension, the 2nd respondent are entitled to the 2 acres sold as indicated in the Title deed issued to them. The applicant cannot without any consideration lay claim to the one quarter simply by stating that he has been occupying the same and hence that is adverse to the title of the purchase entitled to a whole 2 acres bought at consideration”.

The Plaintiff is actually claiming $\frac{3}{4}$ of an acre and not $\frac{1}{4}$ acre (one quarter) as submitted. And it is also true that the 2nd Defendant purchased the whole suit land measuring 0.82 hectares which translates to 2.026 acres. However, as at the time of the said purchase, on 11th March 2019, the Plaintiff was already in possession and occupation of $\frac{3}{4}$ of an acre out of the suit land. As was held in **MWEU -V- KIU RANCHING & FARMING CO-OPERATIVE SOCIETY LTD 1985 KLR 430:**

“Adverse possession is a fact to be observed upon the land. It is not to be seen in the title even

under Cap 300. A man who buys land without knowing who is in possession of it risks his title, just as he does, if he fails to inspect his land for twelve years after he has acquired it.”

The Plaintiff did not say whether he was born on the suit land which was first registered in the name of his late father on 11th May 1999 before he sold it to the 1st Defendant and her husband in the same year. It is his case that as far back as 1999, he was in occupation and possession of the $\frac{3}{4}$ acre which he now claims in adverse possession. Therefore, at the expiration of 12 years from 1990 when the 1st Defendant purchased the suit land from the Plaintiff's father, she was basically a trustee holding the $\frac{3}{4}$ acre out of the suit land in trust for the Plaintiff and so too was the 2nd Defendant when he purchased it from the 1st Defendant. This is because, the Plaintiff's interest to the $\frac{3}{4}$ acre was an overriding interest which attached to the suit land. Therefore, even as the 2nd Defendant is the proprietor of the whole 2.026 acres comprised in the suit land as per the copy of the title deed, that registration remains subject to the Plaintiff's interest in $\frac{3}{4}$ of an acre recognized under **Section 28(h)** of the **Land**

Registration Act which states that all registered land shall be subject to:

28(h) “Rights acquired or in the process of being acquired by virtue of any written law relating to the limitation actions or by prescription.”

Similarly, **Section 25(1)** of the same **Act** which protects the rights of a registered proprietor of land adds the following provision in **sub-section (2)**:

2: “Nothing in this Section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

The bottom line therefore is that for all intents and purposes, the 2nd Defendant holds the title to the suit land and, specifically $\frac{3}{4}$ acre thereof, in trust for the Plaintiff and it matters not that he purchased 2 acres. By the time he did so, his title to the $\frac{3}{4}$ acre had long been extinguished by operation of the law.

18. Having considered all the evidence herein, I am satisfied that the Plaintiff has established his case against the 2nd Defendant

that he has acquired $\frac{3}{4}$ of an acre out of the suit land by way of adverse possession. The case against the 1st Defendant is for dismissal as she no longer holds title to the suit land.

19. Ultimately therefore, and having considered all the evidence herein, this Court makes the following disposal orders:

1) The Plaintiff's suit as against the 1st Defendant is dismissed with costs agreed or taxed.

2) There shall be judgment for the Plaintiff as against the 2nd Defendant in the following terms:

a) The Plaintiff has acquired by way of adverse possession a portion measuring $\frac{3}{4}$ of an acre out of the land parcel NO MARACH/ELUKONGO/2166.

b) The 2nd Defendant shall within 30 days of the delivery of this judgment surrender to the Land Registrar Busia the original title deed for the land parcel NO MARACH/ELUKONGO/2166 for cancellation and a portion thereof measuring $\frac{3}{4}$ of an

acre be surveyed and registered in the name of the Plaintiff.

- c) The 2nd Defendant shall within the same period execute all the necessary documents to facilitate the registration of the $\frac{3}{4}$ acre portion in the name of the Plaintiff.
- d) The Land Registrar and County Surveyor Busia shall ensure that the $\frac{3}{4}$ acre is as much as possible the portion occupied by the Plaintiff.
- e) In default of (c) above, the Deputy Registrar of this Court shall execute all the necessary documents on behalf of the 2nd Defendant.
- f) The Plaintiff shall meet the costs of the survey and registration of the $\frac{3}{4}$ acre in his names.

3) The 2nd Defendant shall meet the Plaintiff's costs of the suit agreed or taxed.

BOAZ N. OLAO

JUDGE

3RD DECEMBER 2025

**Judgment dated, signed and delivered by way of electronic
mail on this 3rd day of December 2025 with notice to the
parties.**

Right of Appeal.

BOAZ N. OLAO

JUDGE

3RD DECEMBER 2025