

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ELC NO. E006 OF 2021 (O.S)

MARGARET NYAKANYI LUTTA

APPLICANT

= VERSUS =

JOSEPHAT NZAI ODAYA 1ST RESPONDENT

BONIFACE ODHIAMBO 2ND

RESPONDENT

J U D G M E N T

1. This judgment was due on 8th December 2025. However, following my transfer from Busia to Iten Court w.e.f 15th January 2026, I had to prioritize handling my part heard cases. This contributed towards the delay in the delivery of this judgement. The same is regretted but was unavoidable given the circumstances.
2. **MARGARET NYAKANYI LUTA** (the Plaintiff) has approached this Court vide her Originating Summons dated 12th February 2021 and filed on 16th February 2021.

The same is premised under the provisions of **Sections 7** and **38** of the **Limitation of Actions Act** and **Order 37 Rule 7** of the **Civil Procedure Rules**. She has impleaded **JOSEPHAT NZAI ODANYA** (the 1st Defendant) and **BONIFACE ODHIAMBO MEYO** (the 2nd Defendant and sued as personal representative of the Estate of **JAMES MEYO OGESO**) claiming to have acquired the land parcel **NO BUNYALA/MUDEMBI/1034** (herein the suit land) by adverse possession. She therefore asks that this Court determines the following questions:

- 1) Whether the Plaintiff has been in quiet and notorious possession of the land parcel **NO BUNYALA/MUDEMBI/1034** for a period exceeding 12 years.
- 2) Whether the 2nd Defendants title to the land parcel **NO BUNYALA/MUDEMBI/1034** became extinguished upon expiry of 12 years from the time the Plaintiff went into possession of the said parcel of land from 1983.

3) Whether the Plaintiff should be registered as the owner of the land parcel **NO BUNYALA/MUDEMBI/1034.**

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

1) That the right of the Defendants over the land parcel NO BUNYALA/MUDEMBI/1034 got extinguished by adverse possession upon the expiry of 12 years from the time the Plaintiff came into possession in 1983 which was 1985.

2) That the whole of the land parcel NO BUNYALA/MUDEMBI/1034 be registered in the name of the Plaintiff.

3) That the 1st Defendant be ordered to execute all the relevant statutory documents required of them to facilitate the transfer of the land parcel NO BUNYALA/MUDEMBI/1034 to the Plaintiff and in default, the Deputy Registrar of this

Court do execute the same in place of the 1st Defendant.

4) That the 1st and 2nd Defendants, their family members, servants, agents and those claiming under or through them be permanently barred or inhibited from disposing of, using or in any way interfering with the Plaintiff's possession and enjoyment of the said parcel of land.

5) That costs of this summons be borne by the Defendants.

In support of the Originating Summons, the Plaintiff filed a supporting affidavit of even date. She has deponed therein that her late husband and herself purchased the suit land from **MUSUMBA OUMA** at a consideration of Kshs.4,500, took possession thereof and has continued to plant bananas, trees and mangoes thereon now for 37 years. And although the land was demarcated, they never obtained title but fenced it. Every member of their community knows that the suit land belongs to her and that although it was in the name of **JAMES MEYO OGEJO**,

his title got extinguished in 1995. That the 2nd Defendant sold the suit land to the 1st Defendant without recognizing her occupation of the same.

4. Annexed to the supporting affidavit are the following documents:

- 1) Copy of the Green Card for the land parcel **NO BUNYALA/MUDEMBI/1034 (MNL1)**.
- 2) Copy of the certificate of Official Search for the land parcel **NO BUNYALA/MUDEMBI/1034 (MNL-2)**.
- 3) Copy of a letter dated 23rd August 1989 addressed to **MUSUMBA OUMA** by the firm of **ADEMBESA & COMPANY ADVOCATES** in respect of plot **NO 1034/NAMALO (MNL-3)**.

The Plaintiff avers that the said letter **(MNL-3)** was written by the said advocate to **MUSUMBA OUMA** who was the first proprietor of the suit land on the instructions of her late husband **MICHAEL LUTA** demanding him to surrender the title but he did not respond. That since 1983, she has never received any demand to vacate the suit land hence this Originating Summons.

5. In support of her case, the Plaintiff filed statements of his witnesses **FRANCIS OKUMU MULONDO** and **SHADRACK OLUOCH WANYAMA** both dated 14th May 2024.
6. In his statement **FRANCIS OKUMU MULONDO (PW2)** states that he knows very well that **MICHAEL LUTTA** purchased the suit land in 1983 from **MUSUMBA OUMA**. During that time, the witness's father **MULONDO LWAGULA** was the village elder (**LIGURU**) of the area while **BENARD SWART** was the assistant Chief. That he was a neighbour of **MICHAEL LUTTA** and was among the young men who were tasked with planting sisal plants at the site and a pit latrine was constructed and bananas, mangoes and other conventional crops like maize were planted. That **MICHAEL LUTTA** paid Kshs.4,500 for the suit land and he was married to the Plaintiff at the time of the purchase.
7. Although the Plaintiff filed a witness statement of one **SHADRACK OLUOCH ONYANGO** dated 6th March 2023 she did not call him to testify.
8. The 1st Defendant filed a replying affidavit dated 14th April 2021 in response to the Plaintiff's claim. He states therein

that he purchased the suit land from the 2nd Defendant vide a land sale agreement dated 11th January 2018 for a consideration of Kshs.200,000 which was fully paid. That prior to the purchase, he had confirmed from the Busia Lands Office that the suit land was free from any encumbrance and also that the 1st Defendant was the registered proprietor thereof. He denied that the Plaintiff was in occupation of the suit land when he purchased it. After taking possession of the suit land, he started cultivating it by planting crops including cassava which is still on the suit land.

9. That the 2nd Defendant had informed him that his (2nd Defendants) late father one **JAMES MEYO OGEJO** had filed a case against one **MICHAEL LUTTA** the Plaintiff's late father seeking an eviction order in **BUSIA SENIOR RESIDENT MAGISTRATE'S COURT CIVIL CASE NO 16** of **1996**. That those orders of eviction were obtained and executed against **MICHAEL LUTTA** and his family including the Plaintiff and therefore the issue of the Plaintiff staying on the suit land continuously does not arise at all.

10. The 1st Defendant annexed to his replying affidavit a copy of the sale agreement executed on 11th January 2018 between him and the 2nd Defendant.
11. The 1st Defendant also filed a statement of his witness **JAMES OKELLO MUGA (DW2)** dated 15th March 2023. He states therein that he served as the Assistant chief of **MUDEMBI SUB LOCATION BUNYALA EAST LOCATION** from 1996 upto 2021 when he retired. That he knew as a fact that **JAMES MEYO OGEJO**, now deceased, was the father to the 2nd Defendant who was the registered proprietor of the suit land.
12. That sometime in the mid 1990's there was a land dispute between **JAMES MEYO OGEJO** and one **MICHAEL LUTTA** also deceased. The latter being the husband to the Plaintiff. That the said case was determined in favour of **JAMES MEYO OGEJO** at the **BUSIA COURT** following which the Plaintiff and her family were evicted therefrom.
13. That on 28th July 2007 when he was now the Acting **ASSISTANT CHIEF OF RWAMBA SUB-LOCATION**, he was a witness when the 1st Defendant purchased the suit land from the 2nd Defendant. By that time, the 2nd

Defendant's father who was the registered proprietor of the suit land was already deceased. By that time, the 2nd Defendant had not done succession. That at the time of the said sale, the suit land was vacant. Therefore, the allegation by the Plaintiff that she has been in un-interrupted occupation of the suit land after the eviction of 1996 are false and dishonest.

14. **BONIFACE ODHIAMBO MEYO (DW3)** the 2nd Defendant filed a replying affidavit dated 16th March 2023. He has deponed therein, inter alia, that his late father **JAMES MEYO OGEJO** filed **BUSIA SENIOR RESIDENT MAGISTRATE'S COURT CIVIL CASE NO 16** of **1996** against **MICHAEL LUTTA** the Plaintiff's husband seeking an order of eviction from the suit land. That the order of eviction was issued and executed in 1996. Soon after the eviction of **MICHAEL LUTTA** and his family from the suit land, the 2nd Defendant decided to put it up for sale and in July 2007, he sold it to the 1st Defendant vide a sale agreement dated 28th July 2007. The sale agreement was witnessed by **JAMES OKELLO MUGA (DW2)** who was the Assistant Chief.

15. Since the 2nd Defendant could not transfer the suit land, he applied for Letters of Administration vide **BUSIA HIGH COURT SUCCESSION CAUSE NO 107** of **2013** after which he transferred the suit land to the 1st Defendant. That although the Plaintiff and her family were evicted from the suit land, attempts by his lawyer to obtain the judgment have been unsuccessful as the file is missing. The only document they were able to obtain was the Court Register showing that the case was filed on 22nd January 1996 and judgment was delivered on 30th May 1996 and other than the order of eviction, **MICHAEL LUTTA** was ordered to pay damages of Kshs.20,000. Therefore, the Plaintiff's allegation of having lived on the suit land uninterrupted after the orders of eviction are a demonstration of extreme dishonesty and unfaithfulness. The only trees on the suit land and other vegetation were planted by his father before the 1st Defendant purchased it.
16. The Defendants filed a list of documents dated 15th March 2023 containing the following:

- 1) Copy of a sale agreement dated 28th July 2007 between the 1st and 2nd Defendants over the suit land.
- 2) Copy of a sale agreement dated 11th January 2018 between the 1st and 2nd Defendant over the suit land.
- 3) Copy of Grant of Letters of Administration issued on 4th November 2013 to the 2nd Defendant in respect of the Estate of **JAMES MEYO OGEJO** in **BUSIA HIGH COURT SUCCESSION CAUSE NO 107 of 2013.**
- 4) Copy of a letter dated 26th May 2022 addressed to the Deputy Registrar Busia Court by **MANWARI & COMPANY ADVOCATES** in respect to this case and requesting the facilitation of tracing the file **NO BUSIA SRMCC 16 of 1996.**
- 5) Copy of the Register of Busia Magistrae's Court.
- 6) Copy of a letter dated 10th June 2022 addressed to the Deputy Registrar Busia Court by **MANWARI & COMPANY ADVOCATES** seeking

the facilitation of tracing file **NO BUSIA SRMCC NO 16 of 1996.**

17. The Defendants also filed a supplementary list of documents dated 18th September 2024. It contained the following:

- 1) Copy of the Land sale agreement dated 7th June 1989 between **BENABA MUSUMBA OUMA** and **JAMES MEYO OGEJO** for the suit land.
- 2) Proceedings of **BUSIA MAGISTRATE'S COURT CIVIL CASE NO 16 of 1996.**
- 3) Page 1(one) of the judgment in **BUSIA MAGISTRATES COURT CIVIL CASE NO 16 of 1996.**

18. The hearing commenced and was completed on 7th May 2025 when all the parties testified and called their witnesses. They all adopted as their testimonies the contents of their respective affidavits and statements which I have already summarized above. They also produced as their documentary evidence the documents filed herein.

19. Submissions were thereafter filed both by **MR J. V. JUMA** instructed by the firm of **J. V. JUMA & COMPANY ADVOCATES** for the Plaintiff and by **MR MOGI** instructed by the firm of **MANWARI & COMPANY ADVOCATES** for the Defendants.
20. I have considered the evidence by the parties and their witnesses the documents filed and the submissions by consent.
21. The Plaintiff's case is that she has acquired the suit land by way of adverse possession having gone into occupation and possession thereof in 1983 after she and her late husband **MICHAEL LUTTA** had purchased it from the first proprietor at a consideration of Kshs.4,500 and she and her family have continued to plant bananas, trees and mango tree continuously and openly without interruption. The Defendants have denied all that with the 1st Defendant stating in his replying affidavit dated 14th April 2021 that he had purchased the suit land from the 2nd Defendant on 11th January 2018 at a price of Kshs.200,000 and took vacant possession of the same. The 2nd Defendant's case is that in fact the Plaintiff and her family

were evicted from the suit land in 1996 following orders issued against her late husband **MICHAEL LUTTA** in **BUSIA MAGISTRATE'S COURT CIVIL CASE NO 16** of **1996**.

22. **Section 38(1)** of the **Limitation of Actions Act** allows a claimant to approach the Court for orders that he/she has acquired a parcel of land by way of adverse possession. 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 of this Act, 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 of **KASUVE -V- MWAANI INVESTMENTS LTD & 4 OTHERS 2004 L KLR 184** at page **186**, the Court of Appeal stated 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 (No 2)* [1984] KLR 284. A title by adverse possession can be acquired under Limitation of Actions Act for a part of the land and the mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such person’s adverse possession - (see *Githu v Ndeete* [1984] KLR 776).”

It is common ground that the suit land was registered in the name of one **MUSUMBA OUMA** on 2nd October 1985 and thereafter on 18th August 1988 in the name of **BERNARD MUSUMBA OUMA** following a change of name. On 21st June 1989, it was transferred to **JAMES MEYO OGEJO** who was the father to the 2nd Defendant

and who acquired ownership thereof on 2nd March 2013 before selling it to the 1st Defendant on 2nd March 2018. The 1st Defendant has averred that when he purchased the suit land in 2018, it was vacant and he took possession of it and started cultivating on it. He has pleaded in paragraphs 6 and 7 of his replying affidavit as follows:

6: “That it is not true as alleged by the Applicant in her supporting affidavit that when I purchased the subject title she was in occupation of the land.”

7: “That after taking possession of the land I started cultivating the same planting various crops including cassava the most recent of which still on the land.”

On her part, the Plaintiff has averred in paragraphs 2, 3, 4 and 5 of her supporting affidavit dated 12th February 2021 as follows:

2: “That my late husband and I bought BUNYALA/MUDEMBA/1034 from MUSUMBA

OUMA the first proprietor of the said parcel of land in 1983 at Kshs.4,500.”

3: “That the land demarcation was done and numbers were issued however the certificate of title had not been issued.”

4: “That I took possession of the land immediately in 1983 and started developing it and I am still in possession of it until now which is 37 years.”

5: “That I fenced, planted bananas, trees and mango trees which are still on the said land.”

The Court is therefore faced with a situation where both the Plaintiffs and 1st Defendant claim to be in occupation of the suit land as at the time of the trial. The 2nd Defendant told the Court during the plenary hearing that when he sold the suit land to the 1st Defendant, it was vacant. I have looked at the evidence to determine whether infact the Plaintiff has always been in occupation and possession of the suit land.

23. I note from the copy of letter dated 23rd August 1989 and addressed to **MSUMBA OUMA** from whom the late **MICHAEL LUTTA** the Plaintiff's husband purchased the suit land that the firm of **ADEMBESA & COMPANY ADVOCATES** acting for the late **MICHAEL MUSUMBA** wrote as follows in paragraphs 1 and 2:

“That you sold to our client the above piece of land plot NO 1034 for a consideration of Kshs.4,500. You have been paid the amount by our client in full and final settlement.

We have further been informed that you have refused to hand over the title deed of the said plot to our client, all particulars are well supplied and within your knowledge.”

That letter was being written some 6 years after the entry of the Plaintiff and her late husband onto the suit land following a purchase agreement. That cannot be disputed as there is no other documentary evidence to rebut the contents of the letter. This Court must therefore accept the Plaintiff's evidence that she and her late husband went into occupation of the suit land in 1983 but did not

formalize the transfer of the suit land into the name of **MICHAEL LUTTA** or the Plaintiff thus necessitating the letter by counsel.

24. The next issue is whether the Plaintiff and her family were in occupation of the suit land at the time when this suit was filed and are still in occupation thereof.
25. The answer to that question is found in the orders issued by **OMOLLO J** on 29th September 2021 pursuant to the Plaintiff's Notice of Motion dated 4th May 2021 in which she sought an order of injunction to restrain the Defendants from interfering with the suit land. Having considered the said Motion, the Judge issued the following orders:

“Upon the application dated 4th May 2021 coming up for hearing inter partes on 29th September 2021 before HON LADY JUSTICE A. OMOLLO in the presence of counsel for the Applicant and counsel for the Respondents.

IT IS HEREBY ORDERED as follows:

That the Respondents herein whether acting by themselves, their agents, servants, their employees and/or anybody acting under their

instructions be and are hereby restrained from disposing of, cultivating or in any way interfering with the Applicant's possession and enjoyment of land parcel number BUNYALA/MUDEMBI/1034 pending the hearing and determination of the main suit." Emphasis mine.

26. The import of that order is to demonstrate that as at the time of filing this suit, the Plaintiff was already in possession and occupation of the suit land. The 1st Defendant has averred in paragraph 6 of his replying affidavit thus:

6: "That it is not true as alleged by the Applicant in her supporting affidavit that when I purchased the subject title, she was in occupation of the land."

However, **OMOLLO J** having issued orders on 29th September 2021 restraining the 1st Defendant and those acting under him from **"in any way interfering with the Applicant's (Plaintiff's) possession and enjoyment of the land parcel number**

BUNYALA/MUDEMBI/1034 pending the hearing and determination of the main suit”, that is a clear finding of fact that indeed it was the Plaintiff, and not the Defendants, who was in occupation and possession of the suit land. The occupation and possession of the suit land by the Plaintiff and her family is therefore incontrovertible.

27. Does that occupation and possession of the suit land meet the threshold of proving a claim in adverse possession? In the case of **RICHARD WEFWAFWA SONGOI -V- BEN MUNYIFA SONGOI 2020 KECA 942 KLR**, the Court of Appeal said:

“For a claim founded on adverse possession to succeed, the person in possession must have a peaceful and uninterrupted uses of the land. Physical fact of exclusive possession and the *animus possidendi* to hold as owner in exclusion to the actual owner are important factors in a claim for adverse possession.”

Was the Plaintiff’s occupation of the suit land interrupted by the filing of **BUSIA MAGISTRATE’S COURT CIVIL CASE NO 16 of 1996?** In his submissions on this issue,

counsel for the Defendants believes so. He has submitted at page 9 of his submissions that:

“And so, even assuming - for a moment that merely for purposes of argument - that (the now deceased) Michael Lutta and his family (including his 1st wife and his 2nd wife the Applicant herein) were already in possession and use of the subject property (land parcel NO BUNYALA/MUDEMBI/1034) as at 2nd October 1985 when it was registered in the name of the now deceased Musumba Ouma (alias Bernaba Musumba Ouma) time stopped running in their favour in the year 1996 when (the now deceased) James Meyo Ogejo filed Civil Case no 16 of 1996 (James Ogejo -v- Michael Lutta) in the Honourable Magistrate’s Court Busia.

It is a matter of simple arithmetic that the time period between the year 1985 (when the subject property was registered in the name of (the now deceased) Musumba Ouma alias Bernaba Musumba Ouma) and the year 1996

when the now deceased) James Meyo Ogejo (the 2nd Respondent's father) filed Civil Case No 16 of 1996 in the Honourable Magistrate's Court at Busia) is 11 years only, which is a year less than the minimum period of time (12 years) stipulated and prescribed under the Limitation of Actions Act cap 22."

28. **MR MOGI** counsel for the Defendant is therefore making a forceful submission that since the suit land was only registered in 1985, time for purposes of adverse possession will only start running then and therefore, by the time **JAMES MEYO OGEJO** the 2nd Defendant's father filed **BUSIA MAGISTRATE'S COURT CIVIL CASE NO 16 of 2016**, the Plaintiff had only been on the suit land for 11 years which is below the 12 years period required to prove a claim in adverse possession. Counsel has relied on the case of **DANIEL KIMANI RUCHINE & OTHERS -V- SWIFT RUTHERFORD COMPANY LTD & ANOTHER 1977 KEHC 30 KLR** where the High Court held, inter alia, that **"no period of possession prior to registration can be relied on for purposes of acquiring a title by**

way of prescription.” It is counsel’s submission therefore that time for purposes of adverse possession cannot be computed from 1983 when the Plaintiff and her husband took possession of the suit land following a purchase. **OJWANG J** (as he then was) struggled with a similar situation in the case of **BENSON MUKUWA WACHIRA -V- THE ASSUMPTION SISTERS OF NAIROBI REGISTERED TRUSTEES 2016 eKLR** (previously **NBI H.C.C.C NO 121 of 2006**) where the land being claimed by way of adverse possession had previously not been registered. Having grappled with that issue, the Judge delivered himself as follows:

“I have considered whether the word registered, as used in S.38 of the Limitation of Actions Act (Cap 22) is to be taken literally. Registration of title to land, as I have already noted herein, is the culmination of governmental processes which ascribe ownership of a parcel of land to a particular individual ... and those processes may entail allotment,

surveying and the registration. The term “registration” is not recurrent in the common law literature, but it is in use in Kenyan statute law, in a country in which, I would take judicial notice, there also exist unofficial, customary tenures. If the term “registration” were not used in Kenyan law relating to adverse possession, then it is conceivable, I believe, that one could claim adverse possession in relation to obsolescent traditional tenures, and this would entail complications of public policy and of law enforcement. This perception leads me to conclude that the term “owner of land”, as it would appropriately apply in Kenyan law, would refer to a person who either already bears a final paper title, or a process document secured by law and leading to the issuance of the final paper title. I would adopt this wider interpretation of the statute law, as I believe it will accommodate certain adverse possession situations of merit. Emphasis mine.

29. The matter went on appeal and **VISRAM, GBM KARIUKI & MWILU JJA** had no hesitation in affirming the findings of **OJWANG J** and stated as follows in paragraph 20 of their judgment:

20. “The focus of the trial judge was spot on.

But

more significant in this case is the fact that the suit land (which initially had no registered title but was subsequently registered before the suit for adverse possession was instituted in the High Court by the Respondent) was defined, delineated and surveyed by government as early as 1981. It was contended that in his letter dated 7th March 1981, the Commissioner of Lands required the appellant to pay survey fees for the suit land whose title reference No.LR 209/9010, Nairobi, was allocated as early as 7th March 1981, vide the Commissioner of Lands letter dated 7th March 1981

exhibited by the appellant as exhibit “BMW 3” in the High Court suit. The effect of the allocation and allotment by the Government was to divest the latter of its legal interest in the suit land and to constitute the appellant the new owner thereof. Following survey and allocation of the title number, a grant for the suit land was registered on 26th May 1995 by which time the Respondent had been on the suit land for a period exceeding 14 years (from 1981). Clearly, when the Respondent moved into possession of the suit land in 1980, the land belonged to the Kenya government and the issue of adverse possession could not arise. But after the government allocated the land to the appellant in 1981, and thus divested itself of interest in it, the appellant became the new owner and hence the doctrine of adverse possession became applicable.”

By parity of reasoning, I take the view that the same argument applies in the circumstances of this case. It is not contested that even prior to 2nd October 1985 when the suit land was registered in the name of **MUSUMBA OUMA**, he was recognized as the owner thereof by virtue of a tenure known in law. That enable him to be registered as the proprietor of the same and to subsequently transfer it to **JAMES MEYO OGEJO** on 21st June 1989 following a change of name on 18th August 1988.

30. Guided by the above precedents, it seems to me that I should find that the Plaintiff and her family having occupied the suit land in 1983 following the purchase from **MUSUMBA OUMA**, that is the year when time should start to run for purposes of adverse possession. That means that by the time **JAMES MEYO OGEJO** the 2nd Defendant's father filed **BUSIA MAGISTRATE'S COURT CIVIL CASE NO 16** of **1996**, the Plaintiff and her family had been in occupation and possession of the suit land for 13 years which satisfies the requirement for the 12 years to entitle her to the orders that she has acquired the suit

land by way of adverse possession. By the time **BUSIA MAGISTRATE'S COURT CIVIL CASE NO 16** of **1996** was being filed, the title then held by **JAMES MEYO OGEJO** had been extinguished by operation of the law and whatever he passed on to the 2nd Defendant who then transferred it to the 1st Defendant was always subject to the Plaintiff's overriding interest in the suit land.

31. Even if my finding above are not spot on with regard to when time started to run for purposes of adverse possession, this is a clear case where this Court can invoke the principle of constructive trust which, as is now well settled, can be imposed by the Court even if not pleaded by the parties. Such a trust was discussed in the case of **JULETABI AFRICAN ADVENTURE LIMITED & ANOTHER -V- CHRISTOPHER MICHAEL LOCKLEY C.A. CIVIL APPEAL NO 75** of **2016 [2017 eKLR]** where the Court held that:

A constructive trust is an equitable remedy imposed by the Court against one who has acquired property by wrong doing. ... It arises where the intention of the parties cannot be

ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit ... As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. Emphasis mine.

As already found earlier in this ruling, the Plaintiff and her late husband had purchased the suit land from the original owner **MUSUMBA OUMA** who received the full purchase price of Kshs.4,500. The transaction was not completed because the said **MUSUMBA OUMA** did not avail the title deed to the suit land and neither did he respond to the letter addressed to him by the counsel for **MICHAEL LUTTA** dated 23rd August 1989 informing, him to

surrender the title. Therefore, having sold the suit land to the Plaintiff's late husband and received the full purchase price, the said **MUSUMBA OUMA** became a trustee holding the title thereto for the benefit of the Plaintiff and her late husband. He could not purport to sell it to any other party as that amounted to unjust enrichment on his part. Equity abhors unjust enrichment. This is traced from the Roman Law that no one should benefit at the expense of another or be allowed to keep an advantage which he has obtained unjustly or without legal justification at the expense of another - see **KENYA NATIONAL CAPITAL CORPORATION LTD -V- ALBERT MARIO CORDEIRO & ANOTHER 2012 eKLR.**

32. Counsel also cast doubt about the validity of any sale agreement between **MUSUMBA OUMA** and the Plaintiff's husband with respect to the suit land. This is how he has submitted at page 10 of the submissions:

“Thirdly, the Applicant contends that she started cultivating and using the subject parcel of land (land parcel NO BUNYALA/MUDEMBA/1034) after they (the

Applicant and her now deceased husband) purchased it from (the now deceased) Musumba Ouma (alias Bernaba Musumba Ouma) in the year 1983.

Several provision of law - including section 3 (3) of the Law of Contract Act (cap 23) - are abundantly clear that contracts/agreements for the disposal of an interest in land must be in writing. It is imperative to not that the Applicant did not produce any contract or agreement as part of her evidence in support of her claim against the Respondent in this suit.”

33. While it is true that the Plaintiff did not avail a copy of any sale agreement between her late husband and **MUSUMBA OUMA** with respect to the suit land, she is not seeking to enforce that sale agreement whether oral or written. The Plaintiff's claim is hinged on adverse possession. The **Law of Contract Act** does not apply to a claim to land by way of adverse possession. This was settled by the Court of Appeal in the case of **PUBLIC**

**TRUSTEE -V- WANDURU NDEGWA C.A. CIVIL APPEAL
NO 73 of 1982 [1984 KECA 72 KLR] where MADAN JA**
stated that:

**“The provisions of the Land Control Act have
no application where the claim to title of
agricultural land is by operation of law such as
by adverse possession. It is not an agreement,
a transaction or a dealing in agricultural land.”**

Indeed, I may add that in many cases of adverse possession, the claimant enters the suit land as a trespasser. Such a claimant can still sustain a claim to the land by way of adverse possession as long as he meets the threshold for such a claim as set out in the law and precedents.

34. Counsel for the Defendants has also suggested that this suit might in fact be res judicata. I say so because in his submissions at page 7, he says:

**“First and foremost, it is rather unfortunate
that the Applicant has resorted to mischief -
and a deliberate failure to disclose material
facts to this Honourable Court -in an attempt to**

unjustly deprive the 1st Respondent of his ownership and proprietorship of the subject property (land parcel NO BUNYALA/MUDEMBI/1034).

This suit is the 2nd round of litigation involving the same families and concerning rights to and interest in land parcel NO BUNYALA/MUDEMBI/1034. In her pleadings, the Applicant has conveniently avoided acknowledging the fact of previous litigation.”

It is true that in her Originating Summons, the Plaintiff made no reference to the existence of **BUSIA MAGISTRATES COURT CIVIL CASE NO 16 of 1996** which involved her late husband and the 2nd Defendant's deceased father over the suit land. However, the claim to the suit land by way of adverse possession was not, and could not have been, canvassed in that suit. So, the plea of res judicata which I think is what counsel was making reference to, cannot be sustained.

35. I must add at this stage that a claim to land based on adverse possession can only be sustained against the

registered proprietor or the legal Administrators of his Estate. It is clear from the record herein that the 2nd Defendant is no longer the registered proprietor of the suit land. The suit against him is not well founded and I must dismiss it.

36. With regard to the 1st Defendant, he is the registered proprietor of the suit land since 2nd March 2018 having purchased it from the 2nd Defendant who had acquired it by way of transmission from his father's estate in 2013. All this time however, the title of the 2nd Defendant had long been extinguished by operations of the law in view of the Plaintiff's occupation and possession thereof since 1983 peacefully, openly, with the knowledge of the Defendants and all those under whom they claim and without any interruption. It is settled that change of ownership does not interrupt adverse possession - **GITHU -V- NDEETE 1984 KLR 776**. The filing of **BUSIA MAGISTRATE'S COURT CIVIL CASE NO 16** of **1996** came too late as the title of **JAMES MEYO OGEJO** had long expired and been extinguished by operation of the law a year earlier. The 1st Defendant therefore holds the title to the suit land in trust

for the Plaintiff both under adverse possession and by virtue of a constructive trust which this Court has found it must impose in the interest of justice and stop any unjust enrichment on the part of the Estate of **MUSUMBA OUMA** and those claiming through him and who include the 1st Defendant.

37. The up-shot of all the above is that having considered the evidence by the parties herein and the submissions by counsel, this Court makes the following disposal orders.

- 1) The Plaintiff's suit against the 2nd Defendant is dismissed with costs.**
- 2) The Plaintiff has acquired the title to the land parcel NO BUNYALA/MUDEMBI/1034 by way of adverse possession and constructive trust and the 1st Defendant's title thereto has been extinguished.**
- 3) The 1st Defendant shall within 30 days of the delivery of this judgment surrender to the Land Registrar Busia the title deed to the land parcel NO BUNYALA/MUDEMBI/1034 and execute all**

the relevant documents to facilitate the transfer of the title into the name of the Plaintiff.

- 4) In default of (3) above, the Deputy Registrar of this Court shall execute all such documents on behalf of the 1st Defendant and the Land Registrar shall cancel the 1st Defendant's name in the register to the land parcel NO BUNYALA/MUDEMBI/1034 and issue a title to the Plaintiff.
- 5) The 1st Defendant shall meet the Plaintiff's costs of the suit.

BOAZ N. OLAO

JUDGE

9TH APRIL 2026

Judgment dated, signed and delivered by way of electronic mail on this 9th day of April 2026 and with notice to the parties.

Right of Appeal.

BOAZ N. OLAO

JUDGE

9TH APRIL 2026

ORIGINAL