



Okello & 3 others v Egesa & 3 others (Environment & Land Case 31 & 109 (CM) of 2020 (Consolidated)) [2024] KEELC 383 (KLR) (30 January 2024) (Judgment)

Neutral citation: [2024] KEELC 383 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 31 & 109 (CM) OF 2020 (CONSOLIDATED)
BN OLAO, J
JANUARY 30, 2024**

BETWEEN

**RADCLIFFE OKELLO 1ST PLAINTIFF
BONFACE ONJWAYA 2ND PLAINTIFF**

AND

**GEORGE FREDRICK EGESA 1ST DEFENDANT
KENNETH OUMA 2ND DEFENDANT**

**AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 109 (CM) OF 2020**

BETWEEN

**GEORGE FREDRICK EGESA 1ST PLAINTIFF
KENNETH MASIGA OUMA 2ND PLAINTIFF**

AND

**BONFACE OKELLO 1ST DEFENDANT
CHRISTOPHER OWINO EGESA 2ND DEFENDANT
LAND REGISTRAR BUSIA 3RD DEFENDANT**

JUDGMENT

1. On 10th February 2022, directions were taken in the above two cases which were consolidated by Omollo J for hearing.



2. Busia CMCCNo109 of 2020 became the lead file while the Originating Summons (OS) in Busia ELC Case No31 of 2020 became the counter-claim.
3. In Busia CMCCNo109 of 2020, George Fredrick Egesa and Kenneth Masiga Ouma (the 1st and 2nd Plaintiffs respectively) sought judgment against Bonface Okello, Christopher Owino Egesa and the Land Registrar Busia in the following terms with respect to the land parcel No Bukhayo/ebusibwao/88 (the suit land):
 - a. An order for the eviction of the 1st Defendant, himself, his agents, relatives and/or any person acting on his instructions from the land parcel No Bukhayo/ebusibwao/88.
 - b. An order directing the Land Registrar to remove the caution registered on the land parcel No Bukhayo/ebusibwao/88.
 - c. Costs, general damages and interest.
4. It is the Plaintiffs' case that the 1st Plaintiff has since 9th September 1996 been the registered proprietor of the suit land and holds the title deed thereto the same being family land and which he holds in trust for the family. That the suit land was subsequently transferred to the 2nd Plaintiff but the process could not be completed because the 2nd Defendant has registered a caution thereon on 20th May 2007 without the knowledge and consent of the 1st Plaintiff. That the 2nd Plaintiff took possession of the suit land and started farming on it until March 2020 when the 1st Defendant trespassed thereon and started building a temporary house. That the 1st and 2nd Defendants are strangers to the suit land. That the 1st Defendant has his own ancestral land being Bukhayo/ebusibwao/109 where he resides and the 3rd Defendant should be ordered to remove the caution on the suit land and allow the transfer process to continue.
5. The Plaintiffs also filed their statements dated 3rd August 2020 and that of their witness Fanis Ndanyi Egesa (PW3) also dated 3rd August 2020.
6. In his statement, the 1st Plaintiff who testified as PW1 said he is the registered proprietor of the suit land since 9th September 1996 and obtained the title thereto on 22nd March 2007. That on 27th September 2013, he, his mother Fanis Ndanyi Egesa (PW3) and brother Gilbert Egesa sold the suit land to the 2nd Plaintiff. He executed all the necessary documents but the transfer could not be completed because the 2nd Defendant had placed a caution thereon. That the Defendants are strangers to his family and the 1st Defendant has his family land being Bukhayo/ebusibwao/109 where they reside. That the 1st Defendant and his family have had a land dispute with Ebusibwabo Catholic Church which stands on the land parcel No Bukhayo/ebusibwao/84. That the 1st Defendant trespassed onto the suit land in March 2020, cleared the sugar cane plantation and started putting up a temporary house on it despite attempts by the 1st Plaintiff to stop him. The 1st Defendant should therefore be evicted from the suit land and the Land Registrar Busia be directed to remove the caution thereon so that the transfer process can continue.
7. In his statement, the 2nd Plaintiff who testified as PW2 stated that he purchased the suit land from the 1st Plaintiff and family on 27th September 2013. However, when he started the process of transfer, he discovered that the 2nd Defendant had registered a caution thereon. When the 1st Plaintiff approached the 2nd Defendant to remove the caution, he refused. In March 2020, the 1st Defendant cut down the 2nd Plaintiff's sugar cane and put up a temporary house on the suit land. The matter was reported to the Assistant Chief and Agricultural Officer and the 1st Defendant was arrested and charged for malicious damage.



8. Fanis Ndanyi Egesa(PW3) is the mother to the 1st Plaintiff. In her statement, she states that the 1st Defendant is the son to one Benard Odhiambo whose land is Bukhayo/ebusibwabo/109 while the suit land is registered in the name of the 1st Plaintiff. That on 27th September 2013, the suit land was sold to the 2nd Plaintiff who took possession and started growing sugar cane thereon. Then in March 2020, the 1st Defendant entered the suit land, cleared the sugar cane and started building a temporary house thereon. The matter was reported to the police and the 2nd Defendant has placed a caution on the suit land which the Court should order the Land Registrar Busia to remove.
9. The Plaintiffs did not file any documents.
10. The 1st and 2nd Defendants filed a joint statement of defence dated 1st September 2020 in which they denied that the 1st Plaintiff is registered proprietor of the suit land. They added instead that their grandfather one Naftali Egesa Onjwaya (deceased) purchased the suit land in the year 1966 and bequeathed it to the 1st Defendant's father one Benard Ojiambo Egesa (deceased) in the year 1987 who established his matrimonial home thereon in 1992 where he lived until his demise in 1998 after which the 2nd Defendant and his family have continued residing thereon to-date. That the 1st and 2nd Defendants have been in open and notorious possession of the suit land since 1987 and have therefore acquired it by operation of law. They have filed Busia ELC Case No 31 of 2020 to claim their rights over the suit land after the Plaintiff tried selling it to 3rd parties in total disregard of the fact that the same was sold to the 1st and 2nd Defendants family. The Plaintiffs are not therefore entitled to the prayers sought in their plaint since their rights over the suit land have been extinguished by operation of the law. Further, that this matter is sub-judice in view of the pending Busia ELC Case No 31 of 2020.
11. The 1st and 2nd Defendants did not file any statements but annexed to their defence their pleadings filed in Busia ELC Case No 31 of 2020 which I shall be referring to shortly. They also filed a Notice of Preliminary Objection that the Plaintiff's suit is sub-judice. That objection was not canvassed as the two suits were consolidated. I shall be summarizing the 1st and 2nd Defendants pleadings and documents filed in Busia ELC Case No 31 of 2020 (OS) shortly.
12. On their part Radcliffe Okello and Bonface Onjwaya (the 1st and 2nd defendants respectively) filed an Originating Summons dated 10th July 2020 in Busia ELC Case No 31 of 2020 (OS) against the 1st and 2nd Plaintiffs in which they claim to have acquired the suit land by way of adverse possession. They therefore sought a determination of the following questions:
 1. Whether the Defendants have been in open and notorious possession of the land parcel No Bukhayo/ebusibwabo/88 since 2002 to-date which is a period exceeding 12 years.
 2. Whether the Plaintiffs' title to land parcel No Bukhayo/ebusibwabo/88 became extinguished upon the expiry of 12 years from the time the Defendants went into possession of the said portion of land.
 3. Whether the Defendants have now acquired the land parcel No Bukhayo/ebusibwabo/88 by virtue of adverse possession.
 4. Whether the registration of the Plaintiffs as owners of the land parcel No Bukhayo/ebusibwabo/88 should be cancelled and the Defendants be registered as owners thereof.
 5. Who should pay the costs.
13. The Originating Summons is supported by the supporting affidavit of Radcliffe Okello dated 10th July 2020 in which he has deposed, inter alia, that the suit land is registered in the name of the 1st Plaintiff George Fredrick Egesa but the same is in actual possession of the 2nd Defendant who has



extensively developed it since 2002. That he too has been using the suit land for purposes of growing food crops since 2002 a period now in excess of 12 years. That his late grandfather Naftali Egesa Onjwaya purchased the suit land in 1966 from Egesa Ochokolo (deceased) and later bequeathed it in 1987 to the 1st Defendant's father Benard Ojiambo Egesa who lived thereon until his demise. That the 2nd Defendant has built a house on the suit land where he lives with his family. That following the demise of his grandfather and father, the Plaintiffs took advantage of the fact that the suit land was not yet registered in the name of the Defendants who were minors and fraudulently sold it to other persons. That the Defendants and their family have continued to openly, peacefully, continuously and without interruption used the suit land for a period exceeding 12 years. That the Plaintiffs have not interfered with the Defendants' physical occupation and use of the suit land and even their friends, relatives and neighbours know that the suit land belongs to the Defendants.

14. The Defendants therefore seek in their Originating Summons (now the counter-claim), judgment against the Plaintiffs in the following terms:
 1. That the Plaintiffs' right over the land parcel No Bukhayo/ebusibwabo/88 got extinguished by adverse possession upon the expiry of 12 years from the time the Defendants came into possession.
 2. That the Plaintiffs be perpetually barred from taking and/or using the Defendants' land parcel No Bukhayo/ebusibwabo/88.
 3. That the Defendants be registered as the proprietors of the land parcel No Bukhayo/ebusibwabo/88.
 4. That the Plaintiffs do execute all the relevant documents to facilitate the transfer of the land parcel No Bukhayo/ebusibwabo/88 into the names of the Defendants and in default, the Deputy Registrar do execute the same in place of the Plaintiffs.
 5. That the Plaintiffs do pay the costs.
15. Annexed to the Originating Summons are the following documents:
 1. Copy of certificate of official search for the land parcel No Bukhayo/ebusibwabo/88 in the name of the 1st Plaintiff George Fredrick Egesa but with a caution registered on 24th May 2007 in favour of Christopher Owino Egesa.
 2. Copy of a letter from the Chief Busibwabo Location dated 18th May 2007 and addressed to the District Land Registrar Busia in reference to the land parcel No Bukhayo/ebusibwabo/88.
16. The Defendants also filed a witness statement by Christopher Owino Egesa (DW2) in which he said he is an uncle to the Defendants and a brother to their deceased father Benard Onjwaya Egesa. That he was born in 1966 and used to see his father farming on the suit land. That when Benard Onjwaya Egesa came of age, his father gave him the suit land where he built his house and started a family. And when he died, Benard Onjwaya Egesa and his wife were both buried on the suit land. Following the demise of Benard Onjwaya Egesa, he lodged a caution on the suit land to protect the interests of the Defendants who were still minors and who have continued to use the suit land for a period now exceeding 12 years. That the Plaintiffs have not interfered with the Defendants' use of the suit land at all and the neighbours know that the suit land belongs to the Defendants.
17. There was also a statement by one Albert Omudeke Ombale who however did not testify.
18. The Plaintiffs opposed the Defendants' Originating Summons by filing a replying affidavit signed by the 2nd Plaintiff on behalf of the 1st Plaintiff and dated 26th October 2020. He described the Originating



Summons as baseless adding that the Defendants have never occupied the suit land as alleged and neither have they ever been registered as proprietors of the same. The 2nd Plaintiff deposed that the 1st Plaintiff herein is the 1st registered proprietor of the suit land since 9th September 1996 and holds the title thereto issued on 23rd March 2007 and has been in actual possession and occupation thereof since the death of his father. That the Defendants are sons of the late Benard Ojiambo Egesa whose land was Bukhayo/ebusibwabo/109 which neighbours the suit land. That the Defendants and their family have never occupied the suit land at all. That on 27th September 2013, the 2nd Plaintiff purchased the suit land from the 1st Plaintiff and has owned it since March 2013 and in March 2020, Radcliffe Okello trespassed thereon, cleared his sugar cane and put up a temporary house thereon. The matter was reported to Busia Police Station and Busibwabo Police Post and Radcliffe Okello was arrested and charged. The matter was also reported to the Department of Agriculture and an officer visited the suit land and prepared a report of the damaged crop as well as the sketch plan showing where Benard Ojiambo's land was. That he and the 1st Plaintiff then filed Busia CMCC No 109 of 2020 seeking to evict the Defendants from the suit land. That the Originating Summons by the Defendants is grounded on lies and false allegations and it should be dismissed. That the Defendants have never used the suit land openly, peacefully, continuously and without interruption for 12 years and it was only in March 2020 that they built the house thereon.

19. The Plaintiffs filed the following documents:

1. Authority to swear and sign issued by the 1st Plaintiff in favour of the 2nd Plaintiff.
2. Copy of the title deed for the land parcel No Bukhayo/ebusibwabo/88 in the name of the 1st Plaintiff issued on 22nd March 2007.
3. Copy of land sale agreement dated 27th September 2013 between Fanis Egesa, George Egesa and Gilbert Egesa as vendors and Mzee Alois Ouma Onjwaya as purchaser of the land parcel No Bukhayo/ebusibwabo/88 at Kshs.170,000.
4. Copy of petty cash vouchers dated 6th June 2014 for receipt Kshs.5,000 by George Okuku Egesa.
5. Copy of petty cash voucher dated 5th March 2013 for receipt of Kshs.20,000 by George Fredrick Egesa.
6. Copy of undertaking dated 5th March 2014 signed by George Egesa acknowledging receipt of Kshs.20,000 from Linus Juma.
7. Copy of report from the Agricultural Officer Busibwabo Ward dated 2nd April 2020 assessing damage to crop on the land parcel No Busibwabo/88.
8. Copy of map.
9. Copy of certificate of search for the land parcel No Bukhayo/ebusibwabo/88.
10. Copy of transfer of land form which is blank but to which photographs are attached.
11. Letter dated 8th February 2022 addressed to "To whom it may concern." By Assistant Chief Nakhina Sub-county.

The hearing commenced before Omollo J on 10th February 2022 when the Plaintiffs testified. They adopted as their evidence the contents of their respective statements and produced as their documentary evidence the documents filed herein.



20. I heard the evidence of the Plaintiff's witness Fanis Ndanyi Egesa (PW3) who also adopted as her evidence the contents of her statement dated 3rd August 2020 whose contents I have already summarised above.
21. The 1st Defendant testified on 9th May 2023 and clarified that both he and the 2nd Defendant occupy the suit land. He adopted as his evidence the supporting affidavit dated 17th July 2020 and also produced as his documentary evidence the documents filed herein.
22. Christopher Owino Eesa (DW2) also adopted as his evidence the contents of his statement dated 10th March 2021. The Defendants also called as their witness Paul Ouma Opiyo (DW3) a retired Assistant Chief of Nakhakina sub-location. He produced as the Defendants' documentary evidence a copy of a letter dated 18th May 2007 which he said he wrote at the request of Christopher Owino Egesa (DW2) following this dispute.
23. Submission were thereafter filed both by Mr Luchivya instructed by the firm of Marisio Luchivya & Company Advocates for the Plaintiffs and by Mr Okeyo instructed by the firm of Okeyo Ochiel & Company Advocates for the Defendants.
24. I have considered the evidence by the parties and the submissions by counsel.
25. The Plaintiffs' case is that the 1st Plaintiff is the registered proprietor of the suit land which he sold to the 2nd Plaintiff. They seek the eviction of the 2nd defendant Bonface Okello therefrom. The case of Radcliffe Okello and Bonface Onjwaya the 1st and 2nd Defendant vide their counter-claim have pleaded that they have acquired the suit land by way of adverse possession.
26. As the registered proprietor of the suit land, the 1st Plaintiff is, by virtue of the provisions of Section 26(1) of the *Land Registration Act*, the "absolute and indefeasible owner" of the same. He is therefore entitled to seek the eviction of the Defendants and indeed, any other persons from the suit land. At the same time, Section 28 of the *Land Registration Act* recognises that registered land is always subject to any overriding interests. Such interests include under paragraph 28(h) of the said Act;

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

It is common ground that the 1st Plaintiff is the registered proprietor of the suit land. Therefore he, and any person acting on his behalf and authority is entitled to evict any trespassers who are on the said land. He is also entitled to seek the removal of the caution placed thereon. That is the remedy which the plaintiffs seek.
27. The Defendants however claim an overriding interest in the suit land by way of adverse possession. Since the title deed issued to the 1st Plaintiff in respect to the suit land is, by virtue of Section 26(1) of the *Land Registration Act*, to be taken as "prima facie evidence" of ownership, the onus shifts to the Defendant to prove their claim in adverse possession.
28. Section 38(1) of the Limitation of Action Act allows the Defendants to approach this Court for orders in adverse possession. It reads:

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(1) "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."



Section 7 of the same Act states 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.”

It is now well established that the combined effect of the relevant provisions of Sections 7, 13 and 17 of the *Limitation of Actions Act* is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of the adverse possession – Benjamin Kamau & Others -v- Gladys Njeri C.A. Civil Appeal No 2136 of 1996.

29. In *Kasuve -v- Mwaani Investments Ltd & Others* 2004 1 KLR 184, the Court of Appeal set out what a party claiming land by way of adverse possession must prove. It said:

“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.”

Such possession must be without force, stealth and the permission of the owner (*nec vi, nec clam, nec precario*) – *Kimani Ruchine -v- Swift Rutherford Co. Ltd* 1980 KLR 10. It must also be open, continuous, peaceful, notorious and with the knowledge of the owner – *Robert Shume & Others -v- Samson Kazungu Kalama* 2015 eKLR. In a recent exposition on the doctrine of adverse possession, the Court of Appeal described it as follows in the case of *Mtaana LewA -v- Kahindi Ngala Mwangandi* C.A. Civil Appeal No 56 of 2014 [2015 eKLR]:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period. In Kenya it 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 or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act* ...”

30. That the 1st Plaintiff is the registered proprietor of the suit land is not in doubt. He says he has been the proprietor thereof since 9th September 1996 and was issued with the title deed on 22nd March 2007 and that is confirmed by the certificate of official search.
31. That the 1st Defendant is in occupation and possession of the suit land is also not in doubt. In their plaint, the Plaintiff's seek the main remedy that the 1st Defendant be evicted from the suit land. The 1st Defendant Bonface Okello also known as Bonface Onjwaya did not testify but Radcliffe Okello (DW1) who was the 1st Applicant in the Originating Summons and which became the counter-claim and testified confirmed in his evidence in chief that both he and Bonface Okello aka Bonface Onjwaya are both in possession of the suit land. This is what Radcliffe Okello said in his evidence in chief when he testified on 9th May 2023:

“I filed my supporting affidavit dated 17th July 2020 in this case. In paragraph 4 of the said affidavit, I have said that Bonface Onjwaya Ojiambo is the one in occupation of the suit land. The truth is that both me and Bonface Onjwaya are in occupation of the suit land.”



That both Bonface Onjwaya and Radcliffe Okello live on the suit land was also confirmed by the 1st Plaintiff George Fredrick Egesa (PW1) when he testified before Omollo J on 10th February 2022. In cross-examination by Mr Okello, he said:

“Benard is father to Radcliffe and Bonface. Bonface and Radcliffe’s home face the Catholic Church”

Later on during the same cross-examination, he said:

“Bonface lives in Busibwabo/88. He has a house there and cultivates the other part. Bonface uses the whole land 1.41ha.”

Similarly when she was cross-examined during her testimony on 1st March 2023, Fanis Ndayi Egesa (PW3) confirmed that Bonface Onjwaya and Radcliffe Okello live on the suit land.

32. The occupation and possession of the suit land is therefore not really in dispute. It is confirmed by the Plaintiffs.

33. As to when the Defendants entered the suit land, the 1st Plaintiff’s case is that in fact Bonface Onjwaya aka Bonface Okello only entered the suit land in March 2020. This is what he said in paragraph 11 of his statement dated 3rd August 2020 and which he adopted as his evidence during the trial.

“It was in March 2020 when the 1st Defendant trespassed into the land Bukhayo/ebusibwabo/88, cleared sugar cane plantation and started putting up a temporary structure.”

The 2nd Plaintiff stated the same also in paragraph 11 of his statement dated 3rd August 2020 and which he also adopted as his testimony during the hearing.

11: “It was in March 2020 when I received a call that the 1st Defendant had cut down and cleared my sugar cane plantation forming part of the above land and put up a temporary house.”

That would mean that by the time the Defendants filed their Originating Summons on 28th July 2020, they had only been in occupation and possession of the suit land for 4 months way below the 12 years period that would entitle them to an order of adverse possession.

34. However, there is cogent evidence that in fact the Defendants had been in occupation and possession of the suit land much earlier than March 2020. In his supporting affidavit dated 10th July 2020, the 1st Defendant has deposed in paragraph 4 and 5 as follows:

4: “That the 2nd Applicant is in actual possession of L.R No Bukhayo/ebusibwabo/88 measuring 1.41HA and he has extensively developed the same ever since 2002 more than 12 years.”

5: “That I am using the same for purposes of growing food crops since 2002 to date which is a period that exceeds 12 years.”

Their 1st Defendant and Bonface Onjwaya aka Bonface Okello also filed the statement of their witness and uncle Christopher Owino Egesa (DW2) dated 10th March 2021. He is the brother to 1st Defendant and Bonface Onjwaya aka Bonface Okello and who are the Defendants for purposes of the counter-claim. He said he is a brother to the Defendants’ deceased father Benard Onjwaya Egesa who built his



home on the suit land where he lived with his family and was even buried. However, the 2nd Plaintiff denied that Benard Onjwaya Egesa was buried on the suit land. When he was re-examined by his counsel Mr Luchivya, he said:

“Benard and his wife were buried on parcel No 84.”

35. To resolve this conflicting evidence, the Court has looked at the letter by Paul Ouma Opiyo (DW3) dated 18th May 2007 and which was produced as part of the Defendants’ documentary evidence. I shall cite the contents therefore in extenso because of its relevance. The letter is addressed to the District Land Registrar Busia. It reads:

“Re: Land Dispute Bukhayo/ebusibwabo/88.

This is to notify you that there is a dispute on the above mentioned land. The person by the name George Fredrick Egesa was issued title deed on 22/3/2007 but there is someone who bought it from his father. The person who bought it by the name Naftali Egesa Onjwaya had given it to his son who died later and was buried in it together with his wife. So we cannot decide the rightful owner of the land till it is handled in Court of law.

Before this is done, I request your office to put caution on the above mentioned title deed to allow them to go to tribunal Court to detect (sic) the right owner of the land.

Thank you.

Yours faithfully

Paul O. Opiyo

Asst – Chief Ag Chief

Nakhakina Sub-location

Busibwabo Location.”

36. I did not hear the Plaintiff question the veracity of this witness’s evidence or the contents of the letter. He is therefore an independent witness well known to the parties and who had no reason to give false testimony against any of them. When he was cross-examined by Mr Luchivya and re-examined by Mr Okeyo, he confirmed that by the time he became the Assistant Chief in December 1988, Benard Ojiambo was already deceased. He however attended the burial of Benard Ojiambo’s widow around 2005 and confirmed that she was buried next to her husband on the suit land. That testimony, which I find congenial, clearly shows that in fact Benard Ojiambo Egesa and his wife and who are parents of the Defendants were in possession and occupation of the suit land long before 1998. Indeed in paragraphs 6 and 7 of his supporting affidavit, the 1st Defendant has deposed thus:

6: “That my late grandfather Naftali Egesa Onjwaya bought L.R No Bukhayo/ebusibwabo/88 in the year 1966 from Egesa Ochokolo (deceased). Attached marked R.O 2 is a copy of Chief’s letter dated 18th April 2007.”

7: “That in the year 1987, Naftali Egesa Onjwaya (deceased), bequeathed L.R No Bukhayo/ebusibwabo/88 to my father Benard Ojiambo Egesa where he lived there until his demise. Check annexure R.O. 2”

The annexure R.O 2 being referred to above is the letter by the Assistant Chief Nakhakina Sub-location dated 18th May 2007. I have already made a finding that the said witness was impartial and



independent. I am satisfied that the Defendants developed the suit land as far back as 2002 and did not trespass thereon in March 2020 as alleged by the Plaintiffs. The Defendants' version is the correct one.

37. It is also not lost to this Court that the Defendants filed their Originating Summons on 28th July 2020 before the Plaintiffs filed their plaint some two weeks later on 14th August 2020. The conclusion that the Plaintiffs suit was a reaction to that of the Defendant's cannot be far fetched. If the 1st Defendant trespassed onto the suit land in March 2020 and cut the 2nd plaintiff's sugar cane as pleaded in paragraph 3 of the 2nd Plaintiff's replying affidavit filed in response to the Originating Summons, there is no explanation why the Plaintiffs took 5 months to file their case. The Plaintiffs' suit was clearly only a knee jerk reaction to the Defendants Originating Summons with the intention of pre-empting it. If the period of occupation and possession is calculated from 2002, then it is clear that by the time the Originating Summons was filed, the Defendants had been in occupation and possession of the suit land for 18 years way above the 12 years which entitled them to orders in adverse possession.
38. The next issue is whether that occupation and possession has been open, peaceful, continuous, uninterrupted and with the knowledge of the Plaintiffs. Again, that cannot really be disputed. Other than filing their plaint on 14th August 2020, the Plaintiff did not institute any prior litigation to evict the Defendants from the suit land or even make any effective entry thereon. In the case of *Githu -v- Ndeete* 1984 KLR 776, it was held that:
- “Time ceases to run under the *Limitation of Actions Act* either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into land.”
39. Therefore, the Plaintiffs only asserted their rights long after their title to the suit land had been extinguished by effluxion of time. This is because, by the time they filed Busia ELC Case No 109 of 2020 on 14th August 2020, the Defendants had been in occupation and possession of the suit land for 18 years.
40. It is also clear that the Defendants' occupation and possession of the suit land has been peaceful and with the knowledge of the Defendants. Indeed even when Christopher Owino Egesa (DW2) registered a caution on the suit land way back on 27th May 2007 in order to protect the Defendants' interest therein, the Plaintiffs did not complain or take any action. It took them another 13 years to file this suit in which they now seek, among the remedies, an order directing the Land Registrar to remove the caution. That notwithstanding the fact that the Plaintiffs could have invoked the provisions of Section 73(2) of the *Land Registration Act* to request the Land Registrar to remove the caution. That provision reads:
- 73(2) “The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.”
41. The Plaintiffs did not have to wait until 14th August 2020 to file this suit and seek the removal of the caution. The law allows them to do so the moment the caution was filed.
42. The Plaintiffs also claim that after the 1st Defendant trespassed onto the suit land in March 2020 and cut down his sugar cane, the matter was reported to the police. That is clear from paragraph 14 of the 2nd Plaintiff's replying affidavit to the Originating Summons and paragraph 12 of his statement in support of his claim. Unfortunately, again, that was rather late in the day to show that the occupation and possession of the suit land by the Defendants was not peaceful.



43. Finally, the fact that the Plaintiffs are seeking the eviction of Boniface Okello aka Bonface Onjwaya from the suit land can only mean that the Defendant's occupation thereof encompasses the whole land. It is not only a portion thereof.
44. It is clear from all the above that whereas the 1st Plaintiff is the registered proprietor of the suit, his title thereto has been extinguished by the adverse possession thereof by the Defendants. In the circumstances, neither he nor the 2nd Plaintiff have any right to evict the Defendants therefrom. And since the caution was placed thereon by Christopher Owino Egesa to protect the Defendants' interest, he will be at liberty to remove it as soon as the Court makes the final orders herein.
45. The Plaintiffs suit is for dismissal.
46. On the other hand Radcliffe Okello and Bonface Okello aka Bonface Onjwaya who are the Applicants in the Originating Summons and therefore the Defendants in the counter claim have proved that they have been in occupation and possession of the suit land peacefully, openly, continuously without interruption and with the knowledge of the Plaintiffs whom they have dispossessed of the same. They are entitled to an order that they have acquired the suit land by way of adverse possession having been in occupation and possession thereof for a period in excess of 12 years. However, a claim in adverse possession can only be made against the registered proprietor of the land in dispute. Kenneth Ouma the 2nd Plaintiff is not the registered proprietor of the suit land. The claim in adverse possession against him must therefore be dismissed. The claim against George Fredrick Egesa is allowed.
47. Ultimately therefore and having considered the evidence by the parties herein, this Court makes the following disposal orders:
 1. The Plaintiffs' suit against the Defendants is dismissed with costs.
 2. The counter-claim by the Defendants herein i.e. Radcliffe Okello and Bonface Onjwaya against Kenneth Ouma the 2nd Plaintiff is dismissed with costs.
 3. Judgement is entered for the Defendants herein i.e. Radcliffe Okello and Bonface Okello aka Bonface Onjwaya as against George Fredrick Egesa the 1st Plaintiff herein as per their counter-claim in the following terms:
 - a. The Defendants have acquired the land parcel No Bukhayo/ebusibwabo/88 by way of adverse possession. They be registered as owners thereof.
 - b. The 1st Plaintiff right over the land parcel No Bukhayo/ebusibwabo/88 has been extinguished by operation of the law.
 - c. The 1st Plaintiff shall within 30 days of this judgment surrender to the Land Registrar the original title for the land parcel No Bukhayo/ebusibwabo/88 for purposes of cancellation and execute all the relevant documents to facilitate the registration of the said land in the joint names of the Defendants.
 - d. In default of (c) above, the Land Registrar Busia shall cancel the title to the land parcel No Bukhayo/ebusibwabo/88 notwithstanding the absence of the original title and the Deputy Registrar shall execute all the relevant documents on behalf of the 1st Plaintiff.
 - e. The Plaintiffs, their family, agents, servants and all those acting through them shall thereafter be permanently barred from interfering with the Defendants' use and occupation of the land parcel No Bukhayo/ebusibwabo/88.
 - f. The 1st Plaintiff shall meet the costs of the Defendants counter-claim.



BOAZ N. OLAO

JUDGE

30TH JANUARY 2024

**JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS
30TH DAY OF JANUARY 2024 AS WAS ADVISED TO THE PARTIES ON 9TH NOVEMBER 2023.**

Right of Appeal.

BOAZ N. OLAO

JUDGE

30TH JANUARY 2024

