



Namadoa v Gina (Suing on Behalf of his Father (DCD)Godfrey Adam Ogwa) (Civil Appeal E108 of 2022) [2025] KECA 479 (KLR) (13 March 2025) (Judgment)

Neutral citation: [2025] KECA 479 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL E108 OF 2022
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
MARCH 13, 2025**

BETWEEN

GEOFFREY OGABA NAMADOA APPELLANT

AND

ABRAHAM ADAMS GINA RESPONDENT

SUING ON BEHALF OF HIS FATHER (DCD)GODFREY ADAM OGWA

(Being an appeal from the Judgment and Decree of the Environment and Land Court at Busia (A. Omollo, J.) dated 31st March 2022 in Case No. 33 of 2019 (O.S.))

JUDGMENT

1. The appellant Geoffrey Ogaba Namadoa who was the respondent at the trial, is aggrieved by the decision in Busia ELC 33 of 2019 where the court (Anne Omollo, J.) made a finding in favour of the respondent herein, Abrahams Adams Gina who as the applicant at the trial had filed suit by way of an originating summons on behalf of his late father Geoffrey Adams Ogwa, to the effect that:
 - a. an order of permanent injunction be issued against the appellant restraining him from using and or interfering with the suit land Bunyala/Bulemia/2678.
 - b. An order of eviction issued against the respondent, his servants and/or to remove any of their structures from the suit land.
 - c. The registration of the appellant as absolute proprietor of the suit land shall be cancelled in favour of the respondent.
 - d. The Land Registrar Busia County is directed to register the respondent in place of the appellant.



- e. The respondent shall execute transfer documents in favour of the respondent within 45 days hereof, in default the Deputy Registrar of this Court shall sign.
2. The genesis of this appeal is borne out of a suit filed by the respondent, Abraham Adams Gina (Abraham), on behalf of his late father, Godfrey Adam Ogwa, against Geoffrey Ogaba Namadoa, the appellant, vide Originating Summons dated 18th April 2019 claiming that he had acquired by way of adverse possession rights over LR No. Bunyala/Bulema/2678, which was registered in the name of Geoffrey Ogaba Namadoa.
 3. The appellant's claim was that his father had lived openly on the suit land since 1991 to 2004; and that as the administrator of the estate of his late father Geoffrey Adams Ogwa (the deceased), he was entitled to be registered as proprietor of the suit property, which his deceased father had acquired title by adverse possession; that by the time Geoffrey Ogaba Namadoa (Namadoa) was obtaining registration, the deceased's rights as an adverse possessor had accrued and superseded the rights of James Ouma Natalio who had sold the land to the Namadoa. He thus sought orders of injunction to issue against Namadoa; cancellation of the land registration in favour of the Namadoa and the same be replaced by registration in favour of Adams as well as his eviction from the suit land.
 4. Abraham who testified as PW1, on cross examination, told the trial court that his father bought the suit land from James Natolio in the year 1991; and although there had been some wrangles between vendor and purchaser, the dispute did not interfere with the possession, as James Natolio had allowed his father to peacefully live on the land between the year 1991 – 2006; and that the appellant only got himself registered as the owner in the year 2015.
 5. James Omondi Likuku (PW2), the deceased's son in law informed the trial court that even when he met his wife, the deceased was practicing horticulture on the said piece of land between the year 1992-2006; and as far as he knew, the deceased who lived in Kisumu, would visit the property over the weekends, and would carry out farming activities on the land, but in the year 2000, he moved to live on the land; and even buried his wife and son on the said land. However later on the deceased got ill, and fully vacated the land to go and live with his mother elsewhere. He confirmed that the deceased had filed Busia ELC No. 70 of 2013 against James Natolio; and the suit was dismissed.
 6. The appellant in response claimed that that he was the registered owner of the suit property having initially purchased the land from the late Geoffrey Adams Ogwa at Kshs.500,000/- in the year 2003, and he even moved in to take possession, only to later discover that the deceased did not have title, and that Mzee Natolio Ouma was the registered owner. Natolio demanded for fresh payment, as the deceased had not paid him as agreed. He explained that when he purchased the land from the deceased, the latter had moved out due to the protracted dispute he had with the Natolio. The appellant maintained that he bought the land for value from James Natolio in 2015, free from any encumbrance after the respondent's claim in Busia ELC 70 of 2013 was dismissed; and the deceased had vacated the land.
 7. It was his further contention that the suit was time barred under section 7 of the Statute of Limitation of actions as the claim against him was being filed after 16 years; offended the principle of res judicata as the same matter had been determined in ELC No. 70 of 2013; that there was no reasonable cause of action as there was no possession of the land; and that in any event, the respondent had no locus standi.
 8. The appellant further asserted that he took vacant possession of the property; and fenced it with cedar poles and barbed wire in 2015, and that the claim for adverse possession did not meet the threshold as the respondent's late father did not have peaceful occupation since, the said Natolio had tried several



times to eject him from the suit property causing the respondent's father to move out in 2004; and burial of several relatives thereon did not constitute entitlement to the land.

9. The court in its judgment framed 3 issues for determination, firstly whether the respondent's claim was time barred and/or res judicata, secondly whether the respondent had established a claim for adverse possession, thirdly whether the appellant was an innocent purchaser for value without notice and lastly costs.
10. On the first issue the court noted that a suit can only be time barred if the owner takes possession either by filing suit or using process provided by the law. The learned Judge held the view that the appellant was wrong in arguing that the suit was filed 16 years after the deceased vacated the land, without establishing that the said vacation extinguished rights that had accrued. The trial court noted that evidence on record by the respondent was that the reason for the departure by the deceased from the suit property due to illness, a fact corroborated by the respondent's witness, the deceased's son in-law who stayed behind and cultivated the suit property until the year 2006 when the previous owner started raising issues. The court also established that by the year 2004, the 12 years had already lapsed; and that the appellant presented no evidence to show that the previous owner had taken steps to recover the land which would make time stop running in favor of the estate of the deceased. The learned Judge thus found that the suit was not time barred.
11. On the second limb regarding whether the suit was res judicata, the learned trial judge noted that the parties agreed that the claim in Busia ELC No.70 of 2013 sought specific performance whereas, the suit before it was based on a claim for adverse possession. The court in analyzing the record noted that although the parties were the same, and that ELC No.70 of 2013 was heard on merit the subject matter was entirely different, and as such the suit was not res judicata.
12. On the issue as to whether the respondent demonstrated his claim for adverse possession, the court noted that the respondent had tendered evidence to show that possession was taken in 1991; that the appellant did not deny the taking possession but insisted that said possession was with consent of the owner, and that the reason the deceased moved out was because of hostility from the previous owner, Natolio, but did not make it clear when this hostility started.
13. The court noted that the occupation was solely based on a sale agreement between the deceased and Natolio and that the occupation by the deceased and his family was open and notorious and the appellant knew that the suit land belonged to the deceased; that the appellant's contention that he bought the suit land from the deceased in 2004, and paid consideration of Kshs.500,000/=, if true, would mean that the respondent's interest by adverse possession was extinguished by said sale. However, the learned judge noted that the assertion of said sale was contradicted by the deceased's son in law, who stated that the deceased did not vacate the land but went to live with his mother due to his illness; that the appellant did not produce evidence of purchase between him and the deceased, nor did he demonstrate what he was doing on the suit land that dispossessed the deceased of the right of adverse possession, whereas the respondent and his witness, on the other hand gave evidence that post 2006 the trees planted by the deceased were still on the land. The court went then to hold that in the absence of a sale agreement between the deceased and the appellant, and in the absence of proof of the appellant taking possession prior to 2015, the possession of the respondent was not interrupted, and further that by the time Natolio was selling the land to the appellant his interest in the land had been extinguished by the respondent's possession and he had nothing to pass onto the appellant.
14. On the issue of the appellant being an innocent purchaser for value the court noted that the appellant did not meet the criteria as he did not provide a sale agreement between him and Natolio, showing he had paid for the suit property; further, that the appellant was well aware of the dispute between the



respondent and Natolio over the suit property, yet still went into transaction with Natolio regardless. The court thus held that the defence of innocent purchaser was therefore not available to the appellant, stating as follows:

“...the suit was not time barred nor did it fail on account of the doctrine of res judicata as one suit was based on a contractual claim for specific performance, whilst the other was purely on a claim of ownership based on the doctrine of adverse possession; that the appellant did not qualify to be considered as an innocent purchaser for value without notice as he purchased the suit land fully aware of the existing dispute between the respondent and one James Natolio; and purchaser for value is not available to him. The rights of the previous registered owner James Natolio had been extinguished by operation of law and so he had nothing to sell or transfer to the respondent. The learned judge held that although the title to the suit property was in the name of the previous owner and subsequently the respondent, they were merely holding the title in trust for the applicant and the estate of the late Godfrey Adams Ogwa.”

15. The trial court then went on to find that the respondent had not proved his claim and was entitled to be declared as the owner of the suit property and entered judgment in favor of the respondent as prayed for.
16. Aggrieved by this outcome the appellant has filed this appeal on grounds that:
 - a. the learned judge erred in fact and in law by failing to appreciate the preliminary objection of the appellant, the submissions and authorities filed in support of the preliminary objection on Jurisdiction as it provided that the suit was time barred under section 7 of the *Limitation of Actions Act* having been brought to court after 29 years.
 - b. The learned judge erred in fact and in law failing to appreciate the preliminary objection on points of law by the appellant, the submissions and authorities filed in support of the point that the suit was res judicata the claim by the respondent having been heard and determined by the same court in Busia ELC No. 70 of 2013 by Hon Justice Kibunja who dismissed the suit for being time barred hence the suit amounted to the court sitting on its own appeal.
 - c. The learned judge erred in fact and in law and misdirected herself and made a finding that the respondent's deceased father had acquired the suit property by adverse possession, when it was not in dispute that he occupied the land with consent of the owner James Ouma Natolio (now deceased) on a sale agreement, further the land since 1991 has so many cases, deliberations and cautions thus interrupting the continuous peaceful occupation and hence the respondent's father did not meet the legal threshold of the prerequisites of the doctrine of adverse possession.
 - d. The learned judge erred in fact and in law by failing to appreciate that a court of concurrent jurisdiction in ELC No. 70 of 2013 had made a finding that the appellant's claim against the late James Ouma Natolio was one of specific performance under a contract, changing that decision and to arrive at a finding that the respondent's claim is now for adverse possession amounts to sitting on its own appeal.
 - e. The learned judge erred in fact and in law by holding that the appellant was a beneficiary of the estate of the late James Ouma Natolio when in fact the appellant was a bona fide innocent purchaser for value having bought the suit property Bunyala/Bulimia/2678 after the same court had dismissed the respondent's claim against the said Natolio, and caution was validly removed and there were no encumbrances on the title as no appeal had been lodged against the decision of Hon. Justice Kibunja.



- f. That the learned judge erred in law by holding that the suit property be transferred to the Respondent yet the appellant was an innocent purchaser for value and hence, even if he had any right to the land, he would have recovered his loss by suing the estate of the Late Natalio a remedy that Hon. Justice Kibunja had suggested in his judgement, without in anyway interfering with the rights of the appellant who was not privy to any dealings between the respondent's late father and the land James Ouma Natolio and who had been in occupation of the suit property for 18 years and the registered proprietor of the property.
- g. The learned judge erred in fact and in law by holding that time continued to ran adversely against James Ouma Natolio even after the respondent's father left the suit property in 2004 and never reclaimed it, and ignored the undisputed fact that time could not adversely run against the late James Ouma Natolio, the respondent's father having been in occupation with the consent of the said Natolio and on a sale agreement and the fact that the suit land was later reclaimed by the then registered owner (James Ouma Natolio) who later sold it to the appellant and acquired a title deed and has since then been in occupation.
- h. The learned judge erred in fact and law by failing to appreciate the principles that qualify one as an innocent purchaser for value and particularly whether the appellant acquired good title for the land having bought it after the same court dismissed the respondent's claim against the owner and no appeal had been lodged against that decision.
17. In his written submissions, the appellant through his counsel Mr. Ashioya, contends that the court erred in ignoring the issue concerning James Ouma Natalio being made a party, and only made passing remarks about him when it stated that: "...the first claim of specific performance was strictly between the parties to the contract while the claim for adverse possession includes the rights of parties to the contract as well as the rights of applicant in his individual capacity.", yet the final orders clearly demonstrated that they were directed at the said Natalio James; that the respondent could not bring a claim of adverse possession against the appellant since he bought the land when the respondent's father had already vacated the land.
18. The appellant argues that the learned Judge, being fully aware that James Ouma Natalio or his representatives was a necessary party who ought to have been enjoined in the proceedings, failed to direct that service be effected on the latter; and the failure was contrary to Article 50(1) of *the Constitution* of Kenya, and Order 37 rule 7 (3) of the Civil Procedure Rules, 2010. In support of this proposition the appellant refers us to the case of Grace Wairimu Sorora vs. Chaka Limited & 6 others [2017] eKLR and Chevron (K) Ltd vs. Harrison Charo Wa Shutu [2016] eKLR that the registered owner at the time of accrual of adverse right is a necessary party; as well as the decision in Mtana Lewa vs. Kahindi Ngala Mwangandi [2015] eKLR, where this Court sitting in Malindi held that:
- “ ... The registered owner of any person who may have an interest in the property the subject of the summons must be served with it.”
- We are thus urged to find that judgment was entered against a party who had not been served, hence not heard, and order that the same be set aside ex debito justitiae.
19. The appellant also submits that neither the Respondent nor his father proved that they had uninterrupted occupation for 12 years; and that the Court equally failed to assess the evidence adduced for purposes of ascertaining the requisite threshold. Drawing from the decision in Chandrakant Devraj Shah vs. Alibhai Haji & Another [2018] eKLR the appellant argues that threshold in claims for adverse possession requires proof of activities carried out on the suit land and not to merely allege them; and



these would include detailing the type(s) of farming activities; proof of any benefits derived from the sale of produce resulting from the said cultivation.

20. The respondent on the other hand did not file any written submissions nor attend the hearing.
21. From the evidence that was presented as well as the evaluation, analysis of the evidence, and application of the law and legal principles, we are in agreement with the learned judge that the appellant misapprehended the applicability of the Statute of Limitation of Actions in this matter; and that the doctrine of *res judicata* did not apply due to the fact that although the subject matter was the same suit land, one claim was based on breach of contract for failure to honour specific performance, while the other related to possession and ownership based on the doctrine of adverse possession.
22. Our considered view is that the main issue in this appeal is whether the respondent acquired title to the suit property under adverse possession. One of the essential elements of the doctrine of adverse possession is that there must be sufficient degree of physical contact on the land and that possession of the land must be actual, notorious, exclusive and continuous, and apparent and manifest to the actual landowner.
23. The burden of proof is placed on the person alleging the occurrence of an event. Owing to the nature and extent of orders for adverse possession to wit extinction of right to property, the burden is higher and lays squarely on the person claiming adverse possession to demonstrate that he has met the requirements for grant of an order of adverse possession. In the instant case, the respondent is the one who has alleged and must prove. (See COA App No. 95 of 2014 Ruth Wangari Kanyagia vs. Josephine Muthoni Kinyanjui [2017] eKLR)
24. This Court in Kisumu Civ. App. No. 110 of 2016 Richard Wefwafwa Songoi vs. Ben Muniyifwa Songoi [2020] eKLR opined that a person claiming adverse possession must establish the following
 - i. On what date he came into possession.
 - ii. What was the nature of his possession
 - iii. Whether the fact of his possession was known to the other party
 - iv. How long his possession continued; and
 - v. That the possession was open and undisturbed for the requisite 12 years.
25. To determine the nature of possession this Court in Kisumu Civil Appeal No. 27 of 2013 Samuel Kihamba vs. Mary Mbaisi [2015] eKLR held:

“strictly for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the landowner, with intention to have the land. There must be an apparent dispossession of the land from the landowner.”
26. From the evidence on record, the respondent in the High Court testified that the Godfrey Adams Ogwa, the deceased was his father and that the deceased had bought the suit property in 1991 from James Ouma, also deceased, and took possession immediately. The respondent avers that they made developments on the suit land including cultivation of crops, and built two houses thereupon and further that several family members were buried on the suit land. The respondent’s position was that the deceased had been on the suit property from 1991-2006 with no interruptions; and that at some point the deceased allowed his brother in law to cultivate the land while he was away at work but the deceased frequently visited on weekends. There is also evidence on record that a suit was filed by the



respondent against Natalio on the issue of specific performance, but it was dismissed. This Court also notes from the respondent's testimony that the deceased did wholly vacate the land; and went to stay with his mother as he was ailing and had allowed his relative to continue cultivating and living on the suit property.

27. The appellant on the other hand submits that he is the current owner of the suit property subsequent to a court order; that when he bought the land from Godfrey Ogwa, and upon moving to take possession found that Natalio was the registered owner, the late Godfrey Ogwa assured him that Natalio would transfer the suit property to him, although Natalio demanded new payment claiming that Ogwa did not pay him as agreed.
28. It is the appellant's contention that the respondent had not proved uninterrupted possession for 12 years. From the evidence on record, this Court notes that the judgment rendered in Busia ELC 70/13 found that the agreement between Natalio and the late Ogwa, gave the respondent's father consent to take possession of the land and carry out developments from 1991 to 2004, when the deceased was ailing and went to stay with his mother but left his brother in law to continue cultivating the suit property until 2006 when Natalio raised issues and demolished the houses and levelled the grass. The appellant also concedes that when he went to visit the property in 2003 there were no structures, but Ogwa was on the land and using the land.
29. We consider the lament that the court ignored the issue regarding James Ouma Natalio as well as the effect of the final orders, which were apparently directed at him; we revisit the appellant's argument regarding the non-joinder of Natalio or his representative in light of the provisions contained in Article 50(1) of *the Constitution* of Kenya, and Order 37 rule 7(3) of the Civil Procedure Rules, 2010 and find that indeed the judgment was entered against a party who had not been served, hence not heard. We need not belabour the issue as the orders made affected James Natalio's interest yet he was not a party to the suit.
30. When then does adverse possession get extinguished? In the Mtana Lewa case (supra) the court held that:

“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, 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*, which is in these terms: “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.”
31. The appellant submits that neither the respondent nor his father proved that they had uninterrupted occupation for 12 years and that the trial court equally failed to assess the evidence adduced for purposes of ascertaining the requisite threshold. We recognize the holding in Chandrakant Devraj Shah vs. Alibhai Haji & Another [2018] eKLR which set the obligation and threshold in claims for adverse possession to the extent that:

“...he was obligated to prove activities carried out on the suit land and not to merely allege them... Neither were the type(s) of farming activities mentioned, nor any proof of any



benefits derived from the sale of produce resulting from the said cultivation activities...the appellant was obligated to demonstrate to the Court that the evidence adduced was sufficient to enable the Judge rule in his favour.”

32. It is not disputed that by the year 2004, the deceased ceded possession when he moved out of the property completely, whether it was due to illness or due to the incessant wrangles with Natolio due to the unfulfilled commitment. We are persuaded that the latter reason is more probable, which is why they ended up in the Busia ELC No. 70 of 2013; and that is why when he entered into a sale agreement with the appellant the deceased told him, Natolio would be the one to effect the transfer. that until the license is determined, the occupation cannot be said to be adverse. Sect 13 (2) of the Statute of Limitations provides that:

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

We draw from the definition alluded to in the case of *Jandu vs. Kirpal & Another* [1975] EA 225 in which the court relied on the definition adopted in the case of *Bejoy Chundra vs. Kally Posonno* [1878] 4 Cal.327 at p. 329, that;

“By adverse possession I understand to be meant possession by a person holding the land on his own behalf, [or on behalf] of some person other than the true owner, the true owner having immediate possession. If by this adverse possession the statute is set running, and it continues to run for twelve years, then the title of the owner is extinguished and the person in possession becomes the owner.”

33. Additionally, in AIR 2008 SC 346 *Annakili vs. A. Vedanayagam & Ors*, the Supreme Court of India gave the essential elements of adverse possession which were considered in light of the Limitation Act of India that:

“Claim by adverse possession has two elements: (1) the possession of the defendant should become adverse to the plaintiff; and (2) the defendant must continue to remain in possession for a period of 12 years thereafter. *Animus possidendi* as is well known is a requisite ingredient of adverse possession. It is now settled principle of law that mere possession of land would not ripen into possessory title for the said purpose. Possessor must have *animus possidendi* and hold the land adverse to the title of the true owner. For the said purpose, not only *animus possidendi* must be shown to exist, but the same must be shown to exist at the commencement of the possession. He must continue in the said capacity for the prescribed period under the Limitation Act. Mere long possession for a period of more than 12 years without anything more do not ripen into a title.”

34. Whereas the respondent had clearly been in open and notorious occupation and possession of the suit property for over 12 years, it was with the permission of Natalio; and in any event the issue of him being in possession of the land adverse to Natalio’s interest was never determined. In our considered view, the respondent was a licensee who was allowed onto the suit land following the sale agreement he had with Natolio and a purchaser of land one who claims to be a purchaser, cannot, again claim adverse possession. Surely the argument that the deceased left trees on the land; and therefore, continued in possession does not constitute *animus possidendi*, as one cannot pass on possession to the trees; and we find that adverse possession had not matured, and to that extent the learned judge fell in error. Consequently, we hold that the appeal is merited and is allowed with costs of this appeal being awarded to the appellant.



DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF MARCH, 2025.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

