



**Opata v Opata (Environment & Land Case E028 of 2022)
[2024] KEELC 1300 (KLR) (11 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1300 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E028 OF 2022**

**BN OLAO, J
MARCH 11, 2024**

BETWEEN

JACKSON BARASA OKINDA OPATA APPLICANT

AND

CHRISTOPHER ODUOR OPATA RESPONDENT

JUDGMENT

1. Jackson Barasa Okinda Opata (the Plaintiff herein) filed his Originating Summons dated 28th November 2022 and later amended on 17th March 2023 in which he sought a determination of the following issues as against Christopher Oduor Opata (the Defendant herein) with respect to the land parcels No Marachi/bujumba/1430, 1431 and 1432 (the suit land):
 1. Whether the Plaintiff be declared the absolute owner of 2 acres out of the land parcels No Marachi/Bujumba/1430, 1431 and 1432 having lived thereon peacefully and un-interrupted for the past 43 years since the year 1975.
 2. Whether the Defendant who is the Administrator of the Estate of his deceased father Alphonse Opata pursuant to orders issued in Busia CMC Succession Cause No E367 of 2022 be ordered to execute all documents of transfer in respect of 2 acres out of the land parcels No Marachi/Bujumba/1430, 1431 and 1432 in favour of the Plaintiff failure to which the Deputy Registrar of this Honourable Court be empowered to execute the same on behalf of the Defendant.
 3. Whether the Defendant, his agents, servants or workers be restrained permanently by injunction from interfering with the said 2 acres of land.
 4. Whether the Defendant should be ordered to give vacant possession of the 2 acres of land.
 5. Whether the Defendant should meet costs of this suit.



6. Whether this Honourable Court should grant such and further orders as it may deem fit and just to grant.
2. The amended Originating Summons is supported by the Plaintiff's affidavit dated 23rd March 2023 in which he has deposed, inter alia, that he has lived on 2 acres out of the suit land which was previously registered in the deceased's name as land parcel Marachi/Bujumba/543 before it's sub-division. That his occupation of the said 2 acres has been peaceful, quiet, continuous and un-interrupted after the deceased adopted him as his son when he was only 1½ years old after marrying his mother. However, the Defendant filed Succession Cause No E367 of 2022 at the Busia Chief Magistrates Court and excluded him from the beneficiaries of the deceased's Estate yet the deceased had given him 2 acres where he has put up a home and lived for over 50 years. He therefore seeks an order that the Defendant, as the Administrator of the Estate of the deceased, transfers to him the said 2 acres.
3. The following documents are annexed to the amended Originating Summons:
 1. Copies of the Green Card for the land parcels No Marachi/Bujumba/1430, 1431 and 1432 in the name of Alphonse Oyata.
 2. Photographs of houses.
 3. Letter dated 7th October 2022 from the Chief Bujumba Location addressed to whom it may concern in respect to the Estate of the deceased.
 4. Copy of Kenya Gazette dated 1st July 2022 but which has nothing to do with the deceased's Estate.
 5. Copy of Grant of Letters of Administration issued to the Defendant in respect to the Estate of the deceased in Busia Chief Magistrate's Court Succession Cause No E367 of 2022.
4. The record shows that the firm of Omeri & Associates Advocates entered appearance on behalf of the Defendant on 9th December 2022. However, no response was filed to the Originating Summons.
5. The Plaintiff also filed a statement of Naftali Odwori Nasanyi as his witness dated 25th October 2023 in which he states, inter alia, that his father and the deceased father to the Plaintiff were neighbours and friends for a long time. That one day when he had gone to visit the Plaintiff, the deceased informed him that he (deceased) wanted to apportion his land to his two sons. The witness advised the deceased to involve the village elder. A day after those discussions, they assembled at the home of the deceased whose elder brother Emmanuel Juma was also present. In their presence, the deceased apportioned the Plaintiff and Defendant their land. Then in 1987, the Plaintiff constructed his house on his portion where he lives with his family. That if the Defendant had any objection, he should have raised it before the demise of the deceased in 1989. Since then, the Plaintiff has been in peaceful and uninterrupted occupation of the suit land.
6. When the case came up for hearing on 31st October 2023, there was no appearance by the Defendant or his counsel though duly served. And as I have already stated above, the Defendant did not file any response to the Originating Summons which is therefore un-opposed.
7. The Plaintiff and his witness Naftali Odwori Nasanyi (PW2) testified and adopted as their evidence the contents of their respective affidavits which I have already summarised above. The Plaintiff also produced as his documentary evidence the documents annexed to the amended Originating Summons. Submissions were thereafter filed by Mr Ashioya instructed by the firm of Ashioya & Company Advocates for the Plaintiff.



8. I have considered the evidence of the Plaintiff and his witness, uncontroverted as it is, as well as the submissions by counsel. There is no dispute that the Defendant is the Administrator of the Estate of the deceased ALphonce Opata. He was granted letters of Administrator in BUSia Chief Magistrate's Court Civil Case No. E367 of 2022. It is not however clear if the same has been confirmed. According to the Plaintiff, and this has not been controverted, the deceased adopted him as his son after marrying his mother. He was then 1½ years old and has lived on the suit land for over 50 years. Prior to his demise, the deceased allocated him 2 acres out of the suit land where he has put up his home and continues to live to-date. Among the documentary evidence which he has produced are photographs of the said home. His testimony has been supported by that of his witness Naftali Odwori Nasanyi (PW2). It is on that basis that he claims the main order that he has acquired the said 2 acres out of the suit land by way of adverse possession.

9. According to the Green Cards, the land parcels No Marachi/bujumba/1430, 1431 and 1432 were all first registered in the name of the deceased on 14th June 1996 and are all sub-divisions of the original land parcel No Marachi/bujumba/543. Titles to those sub-divisions were however cancelled on 10th August 2021 to revert to the original land parcel No Marachi/Bujumba/543 following orders issued in ELC Case No. 22 of 2020 on 21st July 2021. Those orders were not availed but since the Green Cards have been certified by the Land Registrar Busia as true copies of the register, this Court has no reason to doubt their veracity. Further, this Court is satisfied that the original land parcel No Marachi/bujumba/543 was, prior to it, sub-division, also registered in the name of the deceased. Indeed in paragraph 3 of his supporting affidavit dated 22nd March 2023 and annexed to the amended Originating Summons, the Plaintiff has deposed thus:

3: "That I have lived with the Respondents' deceased father and family including the Respondent on L.R No Marachi/bujumba/543 now sub-divided to create L.R Nos Marachi/bujumba/1430, L.R Nos Marachi/Bujumba/1431, L.R Nos Marachi/Bujumba/1432, and have put up my home thereat and have been peacefully using a portion measuring 2 acres for over 50 years. I annex copies of photos of my home marked (a) and (c)."

There is no doubt in my mind that the Plaintiff and his family have lived peacefully, openly and without interruption either from the deceased or the Defendant on a portion of the suit land measuring 2 acres for a period of over 50 years.

10. However, what I have grappled with is whether infact the Plaintiff has met the threshold for orders that he is entitled to the said 2 acres by way of adverse possession. I say so because, an important element in the doctrine of adverse possession is that the occupation and possession of the land being claimed must be without the consent of the owner of the land. If the entry on the land is with the consent of the owner, then a claim to the land by way of adverse possession cannot be sustained. In *Wambugu - v- Njuguna* 1983 KLR 172 it was held that:

"Where the claimant is in exclusive possession of land with leave and license of the in pursuance to a valid agreement, the possession becomes adverse and time begins to run the time the license is determined."

In *Mwinyi Hamisi Ali -v- Attorney General & Philemon Mwaisaka Wanaka C.A. Civil Appeal No 125 of 1997*, it was held that:

"... adverse possession does not apply where possession is by consent ..."



In *Mtana Lewa -v- Kahindi Ngala Mwangandi C.a. Civil Appeal No 56 of 2014 [2015 eKLR]*, the Court (per Makhandia J.A) stated thus:

“The essential pre-requisite being that the possession of the adverse possessor is neither by force or stealth or under the license of the owner ...”

See also *Mbira -v- Gachuhi 2002 I EAL R 137* where it was held that:

“... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption ...”

And in *Grace Wairimu Soroma -v- Chaka Ltd & Others 2017 eKLR*, it was stated that:

“What the Applicant needed to prove was that her occupation was continuous, open and peaceful without the permission of the owner.”

Finally, in *Kimani Ruchine & Another -v- Swift Rutherford & Company LTD 1980 KLR 10*, the Court emphasised that a party claiming land by way of adverse possession must show that his occupation and possession was “*nec vi, nec clam, nec precario*” i.e. without force, without secrecy and without permission (license) of the owner. In this case, it is clear from the Plaintiff’s own testimony that the 2 acres was given to him by the deceased during his lifetime. In paragraph 6 of his supporting affidavit, the Plaintiff has deposed thus:

6: “That prior to the death of Alphonse Oyata he had allocated me as his adopted son a portion of land comprised on L.R No. Marachi/bujumba/543 now sub-divided to create L.R No Marachi/bujumba/1430, L.R No Marachi/bujumba/1431, L.R No Marachi/Bujumba/1432 where I have put up my home and lived peacefully with the full knowledge of the Respondent.”

The Defendant having been sued as a legal representative of the Estate of the deceased who, as is now clear, allowed the Plaintiff to use the suit land, it is doubtful if, in the circumstances, a claim to the suit land by way of adverse possession can be sustained.

11. Having said so, the Plaintiff’s uncontroverted evidence is that the deceased not only adopted him as his son after marrying his mother but also proceeded to have other children with her. He then allocated the Plaintiff 2 acres of land where the Plaintiff has put up his home and to-date remains in occupation and possession of the same. Clearly, a trust was created in favour of the Plaintiff in respect to the said 2 acres. In *Mwangi & Another -v- Mwangi 1986 KLR 328*, the Court held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights. I am also guided by the Supreme Court decision in the case of *Isack M’inanga Kebia -v- Isaya Theuri M’lintari & Another 2018 eKLR* wherein it was stated that where the land in dispute is family land and the person claiming is part of that family, then the title thereto is held in trust. Having adopted the Plaintiff as his son and allocating him 2 acres out of the suit land where the Plaintiff lives, the expectation of the deceased could only have been that the Defendant, as the Administrator of his estate, will ensure that the Plaintiff’s beneficial interest therein is recognized. The Plaintiff has pleaded in paragraph 5 of his supporting affidavit that the Defendant filed Busia Chief Magistrate Succession Cause NO E367 of 2022 and “excluded” him “as a beneficiary thereof despite the fact that the applicant’s deceased father adopted me when I was 1½ years and married my mother ...”. Clearly, this is a case where this Court must impose a constructive trust in favour of the Plaintiff as failure to enforce his right to the 2 acres will be grossly inequitable.



12. I am of course alive to the fact that the Plaintiff did not plead any trust yet parties are bound by their pleadings. However, I take cognizance of the decision in *Odd Jobs -v- Mubia* 1970 E.A. 476 where it was held that:

“A Court may base its decision on any unpleaded issue if it appears from the course followed at the trial that the issue has been left to the Court for decision.”

That case has been followed in many cases including in the case of *Nyaga Cottolengo Francis -v- Pius Mwaniki Karani* 2017 eKLR where it was stated thus:

“More recently, the notion that the Courts are mere bystanders in adversarial litigation process has been rendered blurry by amendments to the *Civil Procedure Act* in Section 1A and 1B as well as the *Appellate Jurisdiction Act* in Sections 3A and 3B which give the Courts considerable latitude to intervene with a view to achieving the overriding objective of civil litigation, that is to say, the just expeditious, proportionate and affordable resolution of civil disputes in Kenya. Thus, the Courts have a duty and will play their part in the just determination of the proceedings, the efficient disposal of the business of the Court, the efficient use of the available judicial and administrative resources, the timely disposal of all the proceedings before the Court at a cost affordable by the respective parties and with the use of suitable technology.” Emphasis added.

Although the Plaintiff did not seek reliance on trust, the thread that runs through his evidence is that the suit land is the property of his deceased father who allocated him 2 acres on which he settled for the last 50 years. If, as he has stated, he has been short changed by his step brother the Defendant in the succession proceedings, then he stands the risk of losing his share and even be exposed to eviction. The Defendant has not made the situation easier by not giving his side of the story. This Court having been persuaded that the remedy of the Plaintiff is in trust rather than in adverse possession, it would be unjust and inequitable not to invoke the principle in *Odd Jobs -v- Mubia* (supra) and grant him the remedy which will meet the ends of justice.

13. I am therefore satisfied that the Plaintiff has proved that he is entitled to a portion of the suit land measuring 2 acres on the basis of a trust. The original land parcel No Marachi/bujumba/543 as is clear from the Green Cards of the resultant sub-divisions being Marachi/bujumba/1430, 1431 and 1432, measures 4.10 hectares which is 10.1 acres. There will still be a considerable portion remaining for the other beneficiaries.
14. On the issue of costs, the parties are siblings. The order that commends itself with regard to costs is that each party meets their own costs.
15. Ultimately therefore and having considered all the evidence herein, this Court makes the following orders in the disposal of this suit:
1. The Plaintiff is entitled to a portion of the land parcel No Marachi/bujumba/543 (if it has reverted back) or the resultant sub-divisions being Marachi/bujumba/1430, 1431 and 1432.
 2. The Defendant shall within 30 days of this judgment surrender to the Land Registrar the original title to the land parcels No Marachi/bujumba/543 (if it has reverted) or the original titles to the land parcels No Marachi/bujumba/1430, 1431 and 1432 for cancellation and execute all the necessary documents to facilitate the registration of 2 acres in the name of the Plaintiff.



3. The Land Registrar and Surveyor will ensure that as much as possible, the 2 acres to be registered in the name of the Plaintiff will include the portion of land which he is currently in occupation of.
4. In default of (2) above, the Deputy Registrar shall execute all the relevant documents on behalf of the Defendant.
5. Each party shall meet their costs of this suit.

BOAZ N. OLAO

JUDGE

11TH MARCH 2024

**JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS
11TH DAY OF MARCH 2024 WITH NOTICE TO PARTIES.**

Right of Appeal.

BOAZ N. OLAO

JUDGE

11TH MARCH 2024

