



**Oundo (Suing on behalf of the Estate of Robert Oundo Adakai) v Magio & another (Environment & Land Case 152 of 2014) [2024] KEELC 1299 (KLR) (11 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1299 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE 152 OF 2014**

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

**BETWEEN**

**GILBERT ADAKAI OUNDO (SUING ON BEHALF OF THE ESTATE OF ROBERT OUNDO ADAKAI) ..... APPLICANT**

**AND**

**ALFRED ONIALA MAGIO ..... 1<sup>ST</sup> RESPONDENT**

**JOHN OUMA KIMOSO ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Judgment was due on 8<sup>th</sup> February 2024. However, I took some leave to attend to a patient. The delay is regretted.
2. Gibling Adakai Oundo (the Plaintiff herein) suing on behalf of the Estate of Robert Oundo Adakai (the deceased) approached this Court vide his Originating Summons dated 24<sup>th</sup> July 2014 and filed on 4<sup>th</sup> August 2014 seeking the following orders against Alfred Oniala Magio and John Ouma Kimoso (the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively) with respect to the land parcel No Bukhayo/Matayos/1171 (the suit land):
  - a. A declaration that the Plaintiff has acquired the rights and interest including ownership of the land parcel No Bukhayo/Matayos/1171 by operation of the law of adverse possession.
  - b. A declaration that the 2<sup>nd</sup> Defendant holds the land parcel No Bukhayo/Matayos/1171 in trust and on behalf of the Estate of Robert Oundo Adakai and/or the Plaintiff to who it should be transferred.
  - c. A declaration that the 1<sup>st</sup> Defendant's rights and interest have been extinguished by operation of the law at the end of 12 years of the Plaintiff's occupation and the 1<sup>st</sup> Defendant had no right or interest to transfer to the 2<sup>nd</sup> Defendant.



- d. A declaration that the Defendants' rights and interest in the land parcel No Bukhayo/Matayos/1171 have been extinguished by operation of the law.
  - e. An order that the whole land parcel No Bukhayo/Matayos/1171 be transferred to the Plaintiff.
  - f. An order that the 2<sup>nd</sup> Defendant do execute all the relevant documents to transfer the land parcel No Bukhayo/Matayos/1171 to the Plaintiff or in default, the Deputy Registrar to execute such documents on his behalf.
  - g. An order that the Defendants do pay costs of this suit.
3. The Originating Summon was supported by the Plaintiff's affidavit of even date in which he deposed, inter alia, that he is the Legal Representative of the Estate to the deceased who was his father. That in 1978, the deceased had purchased from the 1<sup>st</sup> Defendant a portion of the suit land measuring 1.52 hectares. That on 30<sup>th</sup> January 1979 or thereabout, the 1<sup>st</sup> Defendant applied for and obtained the consent of the Land Control Board to sub-divide the suit land. However, and in an attempt to defeat the Plaintiff's claim, the 1<sup>st</sup> Defendant transferred the suit land to the 2<sup>nd</sup> Defendant which made the Plaintiff to lodge a caution thereon. That the said caution was removed without his consent and the suit land was fraudulently transferred to the 2<sup>nd</sup> Defendant yet in 1978, the 1<sup>st</sup> Defendant had given vacant possession of the purchased portion to the Plaintiff who commenced development thereon. That both the deceased and his wife were buried on the suit land where the Plaintiff and his family reside having extensively developed the suit land on which they also carry out farming. That the Defendants and family members have never occupied nor used the suit land since 1979 a fact which the Defendants acknowledged vide their letter dated 18<sup>th</sup> October 2013 and the Chief's letter dated 23<sup>rd</sup> October 2013. That it is the deceased, the Plaintiff and his brothers who have been in open, exclusive and uninterrupted occupation of the suit land since 1978 to-date. That he has been advised that upon expiry of the 24 years since 1979 of the deceased's adverse possession, the Defendants right in the suit land was extinguished by operation of the law and the 2<sup>nd</sup> Defendant is holding it in trust for the Plaintiff or the deceased's estate.
4. The following documents are annexed to the Originating Summons:
1. Limited Grant of Letters of Administration Ad Litem issued to the Plaintiff on 30<sup>th</sup> June 2014 in respect to the estate of Robert Oundo Adakai.
  2. Letter of consent to sub-divide land parcel No Bukhayo/Matayos/176.
  3. Register for the land parcel No Bukhayo/Matayos/1171.
  4. Register for the land parcel No Bukhayo/Matayos/176.
  5. Notice dated 18<sup>th</sup> October 2013 from Korongo Advocates addressed to Gilbert Odhiambo Oduor and Milton Oduori to vacate land parcel No Bukhayo/Matayos/1171.
  6. Letter dated 23<sup>rd</sup> October 2013 from Assistant Chief Busende Sub-location addressed to the Land Registrar Busia in respect to the land parcel No Bukhayo/Matayos/1171.
- In addition to the supporting affidavit, the Plaintiff also filed a statement reiterating the contents of the said affidavit.
5. The Plaintiff also filed statements of the following witnesses Aggrey Adakai Oundo (PW2) and Patrick Mugeni Ouma (PW3).



6. In his statement dated 24<sup>th</sup> July 2014 Aggrey Adakai Oundo (PW2) confirms that he knows the parties herein and that in 1978, the Defendant's father sold the suit land to the Plaintiff who took possession and has continued to do so to-date. That the Defendants have never occupied or used the suit land which the Plaintiff and his brothers are now entitled to.
7. In his statement also dated 24<sup>th</sup> July 2014 Patrick Mugeni Ouma (PW3) states that he is a neighbour to the parties. He confirmed further that in 1978, the deceased purchased the suit land from the 1<sup>st</sup> Defendant. That the suit land is a sub-division of the original land parcel No Bukhayo/Matayos/176. That when the deceased passed away in 1994, he was buried on the suit land and so too was his first wife. That the Plaintiff and his family have put up houses and planted crops on the suit land and have occupied it since 1928 (this must be a typographical error and he must have meant 1978). That the Defendants have never occupied or used the portion of land sold to the deceased.
8. The Originating Summons was opposed by both Defendants.
9. The 1<sup>st</sup> Defendant filed a replying affidavit dated 3<sup>rd</sup> February 2015 in which he deposed, inter alia, that in 1976 he sold a portion of land measuring 2 acres to the deceased at a consideration of Kshs.3,000. However, since he is illiterate, he did not know that in the application for consent the land had been indicated as measuring 1.21 hectares. He denied that the deceased and his wife were buried on the suit land. He denied having transferred the suit land to the deceased or that the Plaintiff has constructed a house thereon. He however admitted having put the Plaintiff in possession of the suit land but denied that the occupation is adverse to his interest or that his right therein has been extinguished. He added further that the Originating Summons is incompetent and the Plaintiff has no capacity to file this suit.
10. The 1<sup>st</sup> Defendant did not however testify during the trial.
11. The 2<sup>nd</sup> Defendant filed a replying affidavit dated 1<sup>st</sup> September 2015 in response to the Originating Summons. He described it as vexatious, frivolous and sought its dismissal with costs. He added further that he had purchased a portion of the suit land measuring 1.52 hectares from the 1<sup>st</sup> Defendant on 13<sup>th</sup> October 2013 after conducting an official search. That the suit land was free from any encumbrances and all the legal procedures were followed including obtaining the relevant consent of the Land Control Board after which the title thereto was transferred into his names. That he has been using the suit land openly and without interference having constructed a house thereon. He added that the Plaintiff occupies another parcel of land being the land parcel NO BUKHAYO/MATAYOS/175 and has never been in occupation of the suit land at any given time. That the Plaintiff has not produced any document to prove his ownership of the suit land such as a sale agreement and mere cultivation of the suit land does not amount to adverse possession. That the Plaintiff never purchased the suit land and if he did, then he should direct his claim to the 1<sup>st</sup> Defendant who still has an extra 5.28 hectares of land. He denied having destroyed the Plaintiff's millet and trees on the suit land.
12. The 2<sup>nd</sup> Defendant annexed the following documents to his replying affidavit:
  1. Sale agreement dated 17<sup>th</sup> October 2013 between the 1<sup>st</sup> Defendant as vendor and the 2<sup>nd</sup> Defendant as purchaser for a portion of the land parcel No Bukhayo/Matayos/1171 measuring 1.42 hectares at a consideration of Kshs.980,000/=.
  2. Certificate of official search for the land parcel No Bukhayo/Matayos/1171.
  3. Transfer of land Form.
  4. Receipt for Kshs.5,000 being stamp duty.



5. Application for consent of the Land Control Board for the transfer of the whole land parcel No Bukhayo/Matayos/1171 from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant.
  6. Letter of consent.
  7. Copy of a title deed for the land parcel No Bukhayo/Matayos/1171 issued to the 2<sup>nd</sup> Defendant on 10<sup>th</sup> March 2014.
13. The hearing commenced before Omollo J on 20<sup>th</sup> January 2022 when the Plaintiff testified. Thereafter, his witnesses Aggrey Daniel Adakai (PW2) and Patrick Mugeni Ouma (PW3) testified before me on 21<sup>st</sup> February 2023. The Plaintiff adopted as his evidence the contents of his supporting affidavit filed herein and produced the annexures thereto as his documentary evidence. His witness also adopted as their testimonies their respective statements.
  14. The 1<sup>st</sup> Defendant did not testify.
  15. The 2<sup>nd</sup> Defendant testified on 24<sup>th</sup> October 2023. He too adopted as his testimony the contents of his replying affidavit dated 1<sup>st</sup> September 2015 and also produced as his documentary evidence the documents annexed thereto.
  16. Submissions were thereafter filed by Mr Fwaya instructed by the firm of Gabriel Fwaya Advocates for the Plaintiff, Mr Ashioya instructed by the firm of Ashioya & Company Advocates for the 1<sup>st</sup> Defendant and by Ms Achala instructed by the firm of Abalo & Company Advocates for the 2<sup>nd</sup> Defendant.
  17. I have considered the evidence by all the parties and the submissions by counsel.
  18. The Plaintiff's case is that he has approached this Court as a legal representative to the estate of his deceased father who he says purchased the suit land from the 1<sup>st</sup> Defendant in 1978 being a sub-division of the land parcel No Bukhayo/Matayos/176. That his deceased father took possession of the suit land which measures 1.52 hectares. That the deceased and his wife were buried on the suit land where the Plaintiff and his family have put up houses and continued to live to-date. It is his case therefore that he has acquired ownership of the suit land by way of adverse possession.
  19. The 1<sup>st</sup> Defendant filed a replying affidavit dated 18<sup>th</sup> June 2015 in which he admitted having sold to the deceased two (2) acres but which agreement he repudiated because the deceased later claimed to have purchased four (4) acres. However, since the 1<sup>st</sup> Defendant did not testify as he died and was not substituted, the contents of his said affidavit do not assist his case.
  20. The 2<sup>nd</sup> Defendant on his part claims to have purchased from the 1<sup>st</sup> Defendant the suit land measuring 1.52 hectares vide a sale agreement dated 17<sup>th</sup> October 2013. That the Plaintiff has never utilized the suit land and instead occupies the neighbouring land parcel No Bukhayo/Matayos/175.
  21. The Plaintiff's claim to the suit land is based on adverse possession and alternatively trust. Section 38(1) of the *Limitation of Actions Act* allows a party to approach the Court for orders in adverse possession. It reads:

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

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.

22. In *Kasuve v Mwaani Investments Ltd & Others* 2004 I 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 land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner of his own volition.”

23. Adverse possession is a fact to be observed upon the land itself – *Maweu v Liu Ranching & Farming Co-operative Society Ltd* 1985 KLR 450. The possession must not be by force nor secretly and it must not be with the permission of the owner – *nec vi, nec clam, nec precario* (*Kimani Ruchine v Swift Rutherford Company Ltd* 1980 KLR 10). It must be open, continuous, peaceful, notorious and with the knowledge but without the permission of the owner – *Robert Shume & Others v Samson Kazungu Kalama* 2015 eKLR. See also *Grance Wairimu Sorora v Chaka Ltd & Others* 2017 eKLR. And in the case of *Mtana Lewa v Kahindi Ngala Mwagandi C.A. Civil Appeal No 56 of 2014 [2015 eKLR]*, the Court described the doctrine of adverse possession in the following terms:

“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 prerequisite 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 the 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 ...”

It is also now well settled that a purchaser in occupation and possession of land after having paid the full purchase price is a person in whose favour the period of limitation can run – *Public Trustee v Wanduru* 1984 KLR 314.

24. This Court will be guided by the above precedents, among others, in determining this suit.
25. As I have already stated above, the Plaintiffs claim to the suit land is premised on adverse possession and, in the alternative, trust.
26. With regard to the 1<sup>st</sup> Defendant, no claim to the suit land can be successfully mounted against him either in trust or adverse possession. It is common ground that the suit land is currently registered in the name of the 2<sup>nd</sup> Defendant since 6<sup>th</sup> March 2014 although it was first registered in the name of the 1<sup>st</sup> Defendant as the first proprietor on 3<sup>rd</sup> July 1979. The 2<sup>nd</sup> Defendant has confirmed in his replying affidavit that he purchased it from the 1<sup>st</sup> Defendant on 17<sup>th</sup> October 2013. He has produced, among his documentary evidence, a sale agreement to that effect. A claim to land by way of adverse possession, as is clear from the provisions of Section 38 (1) of the [Limitation of Actions Act](#), can only be made as against the person “registered as proprietor of the land” in dispute. Similarly, in *Mtana Lewa v Kahindi Ngala Mwagandi* (*supra*), the Court went on to add that:

“In terms of Sections 7, 9, 13, 17, 37 and 38 the title of a registered owner of land will be extinguished and vested in a third party who proves that he has been in possession of the land continuously and uninterrupted for a period of 12 years; that such possession has been



open and notorious to the knowledge of the owner; that the possession has been without the permission of the owner; and that the third party has asserted a hostile title and dispossessed the true owner.” Emphasis mine.

As is clear from the register herein, the 1<sup>st</sup> Defendant ceased being the registered proprietor of the suit land on 6<sup>th</sup> March 2014 some four (4) months before his suit was filed. In the circumstances, the Plaintiff’s claim in adverse possession as against the 1<sup>st</sup> Defendant is clearly ill founded. It is for dismissal.

27. As regards the claim against the 1<sup>st</sup> Defendant as premised on the alternative ground of trust, it must also collapse. This is because a trustee, as defined in Black’s Law Dictionary 10<sup>TH</sup> Edition is:

“Someone who stands in a fiduciary or confidential relation to another; esp, one who, having legal title to property, holds it in trust for the benefit of another and owes a fiduciary duty to that beneficiary.” Emphasis mine.

A trust is defined in the same Dictionary as,

“The right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; as property interest held by one person (the trustee) at the request of another (the settlor) for the benefit of a third party (the beneficiary). Emphasis mine.

Again as already stated above, the 1<sup>st</sup> Defendant no longer holds the legal title to the suit land. That title passed to the 2<sup>nd</sup> Defendant on 6<sup>th</sup> March 2014. He cannot therefore, by any stretch of imagination, be a trustee holding any interest therein in trust for the Plaintiff or indeed for any other person.

28. The claim as against the 1<sup>st</sup> Defendant whether founded on adverse possession or trust can only be for dismissal. Whatever interest he had in the suit land was extinguished in 2013 when he transferred it to the 2<sup>nd</sup> Defendant.
29. But that is not all. On 9<sup>th</sup> July 2020, Mr Ashioya counsel for the 1<sup>st</sup> Defendant addressed Omollo J in the following terms:

“Ashioya: My client passed away early this year. We request time to file for substitution.”

That substitution appears not to have been done. It follows therefore, pursuant to the provisions of Order 24 Rule 4 of the Civil Procedure Rules, that the suit against the 1<sup>st</sup> Defendant abated in early 2021.

30. As regards to the claim against the 2<sup>nd</sup> Defendant, he is the Registered Proprietor of the suit land since 6<sup>th</sup> March 2014 and currently holds the title deed. What the Court now needs to establish is whether the deceased, and after him, the Plaintiff and his family are in occupation and possession of the suit land and if that occupation and possession meets the threshold to prove a claim in adverse possession.
31. As regards occupation and possession, the Plaintiff’s claim is that his deceased father purchased the suit land measuring 1.52 hectares being a sub-division of the original land parcel No Bukhayo/Matayos/176 in 1978 from the 1<sup>st</sup> Defendant and took immediate possession. The deceased and his wife were subsequently buried on the suit land which they had extensively developed. The Plaintiff and his brothers have continued to live on the suit land to-date. It is his case therefore that the title of the 1<sup>st</sup> Defendant therein was extinguished 12 years after 1978. This is what he has deposed in paragraph 18 of his supporting affidavit:



18: “That the deceased, myself and brothers have been in open, exclusive, uninterrupted vacant possession of the whole subject matter since 1978 to date.”

The 1<sup>st</sup> Defendant filed a replying affidavit in which he admitted in paragraph 2 thereof that he had sold only two (2) acres of land to the deceased who however went to the Land Control Board and claimed that he bought four (4) acres. However, since the 1<sup>st</sup> Defendant did not testify, his replying affidavit cannot be considered as evidence to rebut the contents of the Plaintiff’s supporting affidavit.

32. On his part, the 2<sup>nd</sup> Defendant confirmed in his replying affidavit dated 1<sup>st</sup> September 2015 that he had purchased the suit land from the 1<sup>st</sup> Defendant on 17<sup>th</sup> October 2013 and has been using it openly since then. He therefore seeks the dismissal of the Plaintiff’s claim as being, inter alia, baseless. This is what he has deposed in paragraphs 4, 8 and 9 of his replying affidavit;

4: “That the 2<sup>nd</sup> Respondent states that he purchased the suit parcel herein No Bukhaya/Matayos/1171 a portion measuring 1.52 Ha from the 1<sup>st</sup> Respondent on 13/10/2013 (annexed and marked J.O.K-1 is the sale agreement).”

8: “That the 2<sup>nd</sup> Respondent has all along been using the suit parcel herein Bukhaya/Matayos/1171 openly and without any interference since the date he obtained a title deed of the same and the 2<sup>nd</sup> Respondent has constructed a building on the same.”

9: “That the Applicant above has never stepped inside parcel No Bukhaya/Matayos/1171 and has never been in the occupation of the same at any one given time as alleged but rather they occupy parcel No Bukhaya/Matayos/175 which is neighbouring the one of the 2<sup>nd</sup> Respondent which they purchased from the brother of the 1<sup>st</sup> Respondent.”

With regard to occupation and possession of the suit land therefore, in the absence of the testimony of the 1<sup>st</sup> Defendant who is the one that put the deceased in occupation following the purchase in 1978, this Court must believe the un-controverted evidence of the Plaintiff. The 2<sup>nd</sup> Defendant only came into the picture on 17<sup>th</sup> October 2013 when he purchased the suit land from the 1<sup>st</sup> Defendant a fact which cannot be disputed. In his submissions, counsel for the 1<sup>st</sup> Defendant has stated thus:

“The 1<sup>st</sup> Defendant in his replying affidavit filed on 27<sup>th</sup> June 2015 avers that his deceased father was selling land to the Plaintiff’s father, arrangements were even made to have it transferred to him. But later, the Plaintiff’s father claimed he had bought 4 acres which created a problem between the Plaintiff’s father and the 1<sup>st</sup> Defendant’s father. The 1<sup>st</sup> Defendant says he had sold only 2 acres. Hence hampering the transfer process.

That the 1<sup>st</sup> Defendant’s father allowed the Plaintiff’s late father possession of the land while awaiting him to admit 2 acres sold to him and not 4 acres but this never happened.”

The only person who could authoritatively rebut the Plaintiff’s testimony that the deceased took possession of the suit land in 1978 and was buried thereon would be the 1<sup>st</sup> Defendant. He did not testify and the record of the proceedings of 9<sup>th</sup> July 2020 and which I have already referred to earlier, show that Mr Ashioya addressed the Court and stated that the 1<sup>st</sup> Defendant died early that year. The proceedings of 21<sup>st</sup> February 2023 show that although there were attempts to substitute him, that was never done. The Plaintiff’s testimony must therefore be taken by this Court as the only true account of who took possession of the suit land in 1978.

33. This Court has however gone further to see if there is any evidence to support the Plaintiff’s claim with regard to the occupation and possession of the suit land. That evidence is found in the letter dated



23<sup>rd</sup> October 2013 written by the Assistant Chief Busende Sub-location and addressed to the Land Registrar Busia. It is a short letter and due to its relevance, I shall cite it in extenso. It reads:

“Dear Sir,

Re: Land No Bukhayo/Matayos/1171

This is to inform your office the back ground on the land above. The original No was B/M/176 then it divided into two 1170 & 1171 now original registered to Alfred Oniala Makio then also 1172 remained in the same and B/M/1171 was sold to the late Robert Oundo in the year 1979 upto date is over 33 years ago. It is now alleged that parcel B/M/1171 was sold cash 200,000 (two hundred thousand) and now 3 sons of the late to quit from the parcel:

1. Gilbert Adakai – Adult
2. Milton Oundo – Adult
3. Lawrence Adakai Oundo – Student

Please these family require your assistance from your office.”

That letter was produced as part of the Plaintiff's documentary evidence. It shows clearly that the deceased purchased the suit land in 1979 and that the Plaintiff and his siblings were under pressure “to quit from the parcel”. That confirms that the deceased and his family which include the Plaintiff and his siblings have always been in occupation and possession of the suit land. Whether that occupation started in 1978 or 1979, it is obvious that by the time the 2<sup>nd</sup> Defendant purchased it in 2013, the Plaintiff and his family had occupied it for well over 30 years. That is well beyond the 12 years required to entitle the Plaintiff for an order in adverse possession.

34. In paragraph 10 of his replying affidavit, the 2<sup>nd</sup> Defendant has deposed thus:

10: “That the Applicant has not provided to this Honourable Court any important document to prove ownership towards parcel No Bukhayo/Matayos/1171 such as the sale agreement to support his claim.”

It is true that although the Plaintiff has deposed in paragraph 4 of his supporting affidavit that the deceased purchased the suit land from the 1<sup>st</sup> Defendant in 1978 or thereabout, no sale agreement has been availed to prove that allegation. However, there is other evidence that corroborates the testimony of the Plaintiff with regard to the sale of the suit land to the deceased. Firstly, there is a copy of an application for consent of the Land Control Board dated 21<sup>st</sup> November 1978 and signed by both the deceased and the 1<sup>st</sup> Defendant showing that the 1<sup>st</sup> Defendant was selling a portion of the original land parcel No Bukhayo/Matayos/176 to the deceased at a consideration of Kshs.2,000.

35. Secondly, there is a letter of consent dated 30<sup>th</sup> January 1979 approving that application. There is also a letter dated 22<sup>nd</sup> January 1979 inviting the deceased to the Nambale Division Land Control Board Meeting on 30<sup>th</sup> January 1979.
36. Thirdly, the register to the suit land shows that on 18<sup>th</sup> October 2013, the Plaintiff and his brother Lawrence A. Oundo placed a restriction on the suit land claiming a purchaser's interest in favour of the deceased.



37. Fourthly, there is a copy of a letter dated 18<sup>th</sup> October 2013 and addressed to the Plaintiff and his sibling Lawrence by the firm of Korongo & Company Advocates writing on behalf of the 1<sup>st</sup> Defendant. It is a brief letter and again due to its relevance, I shall reproduce it in extenso. It reads:

“Dear Sir,

Re: Refund And Notice To Vacate (sic) L.R. No Bukhayo/Matayos/1171 Our Client Alfred Onialo Magio.

We have been expressly instructed by our client to write to you as follows:

That pursuant to your conversation and verbal agreement with our client, our instructions and (sic) that you appear on (sic) our office on the 19<sup>th</sup> October 2013 at 9.30am and collect Kshs.200,000 (Two Hundred Thousand Shillings only) being amount in respect to the former purchased portion to the deceased Robert Onialo.

Note that if you fail to avail at time stated, we shall have no option but to convert the same as security for awaiting further action from our client against your goods selves.

Be guided accordingly.

Yours faithfully,

M. Korongo & Co. Advocates”

It is instructive to note that the above letter was written only one day after the sale agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants dated 17<sup>th</sup> October 2013 by which the former sold the letter the suit land at Kshs.980,000. It is also interesting to note from the register that the transfer of the suit land to the 2<sup>nd</sup> Defendant on 6<sup>th</sup> March 2014 was done notwithstanding a restriction thereon placed by the Plaintiff and his brother Lawrence Oundo on 18<sup>th</sup> October 2013 which restriction was removed on the instructions of the Assistant Chief Busende through his letter, which was not availed, dated 3<sup>rd</sup> March 2014. A chief has no power to remove any restriction placed on land. Section 78(1) and (2) of the *Land Registration Act* vests such powers in the Land Registrar and the Court. This shows the extent to which the Defendants were determined to deprive the Plaintiff and his siblings of the suit land. The letter itself is headed “Refund And Notice To Vacate” which I am sure meant “Refund And Notice To Vacate”. It cannot therefore be true when the 2<sup>nd</sup> Defendant depones in paragraph 8 of his replying affidavit thus:

8: “That the Applicant above has never stepped inside parcel No Bukhayo/Matayos/1171 and has never been in the occupation of the same at any one given time as alleged but rather they occupy number Bukhayo/Matayos/175 which is neighbouring the one of the 2<sup>nd</sup> Respondent which they purchased from the brother of the 1<sup>st</sup> Respondent.”

If the Plaintiff was occupying the land parcel No Bukhayo/Matayos/175 as alleged above, the 1<sup>st</sup> Defendant counsel would not have been addressing him on 18<sup>th</sup> October 2013 to vacate the suit land.

38. From the evidence herein, it is obvious that following the sale agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants with respect to the suit land on 17<sup>th</sup> October 2013, the 2<sup>nd</sup> Defendant made it impossible



for the Plaintiff to continue living on the suit land. When he was cross-examined by Mr Ashioya on 20<sup>th</sup> January 2022, this is what the Defendant said:

“Currently I live on a rented house for my security after my house was demolished in the year 2014.

I left the land because there was no peace, there were conflicts.”

On his party the 2<sup>nd</sup> Defendant stated in paragraph 7 of his replying affidavit as follows:

7: “That the 2<sup>nd</sup> Respondent has all along been using the suit parcel herein Bukhayo/Matayos/1171 openly and without any interference since the date he obtained a title deed of the same.”

That averment is of course correct. The 2<sup>nd</sup> Defendant, by his own admission only took possession of the suit land from the “date he obtained a title deed of the same.” That date, as is clear from the copy of the title deed, was on 10<sup>th</sup> March 2014. By that time, the Plaintiff and his family had been in occupation and use of the suit land, as I have already stated above, for a period in excess of 30 years.

39. It is clear from all the above that the Plaintiff and his family have always been in occupation and possession of the suit land from 1978/1979 until 2014 when the 2<sup>nd</sup> Defendant made it impossible for them to continue living there by making it insecure for their habitation.
40. Has the Plaintiff's occupation and possession of the suit land been open, peaceful, un-interrupted exclusive, with the knowledge but without the permission of the Defendants? The answer is in the affirmative for the following reasons.
41. To begin with, the entry by the deceased father to the Plaintiff on the suit land was pursuant to a sale agreement for which the deceased fully paid the purchase price. A person in occupation and possession of land after paying the full purchase price is one in whose favour a claim to land by way of adverse possession can be made – *Public Trustee v Wanduru* (supra). The existence of a sale agreement between the deceased and the 1<sup>st</sup> Defendant is confirmed by the letter dated 18<sup>th</sup> October 2013 and addressed to the Plaintiff by the 1<sup>st</sup> Defendants counsel which clearly refers to the suit land having been “purchased” by the deceased.
42. As to whether the occupation was open, peaceful, un-interrupted, exclusive and with the knowledge of the Defendants, there is evidence that the deceased and his wife were in fact buried on the suit land. Although the death certificate of the deceased was not availed, the copy of the Limited Grant issued to the Plaintiff in Busia High Court Succession Cause No 46 of 2014 indicates that the deceased died on the suit land, he and his family had been in occupation and possession of the suit land for between 15 and 16 years depending on whether the entry thereto was in 1978 or 1979. Either way that was well beyond the 12 years required to be registered as proprietor of the suit land by way of adverse possession. There is nothing to suggest that even upto 1994, the deceased's occupation of the suit land was not peaceful or that it was interrupted. There is no evidence suggesting that the 1<sup>st</sup> Defendant, upto the time when he transferred the suit land to the 2<sup>nd</sup> Defendant in 2013, had made any effective entry or filed any case against the deceased or the Plaintiff and his siblings. That is what would have interrupted the Plaintiff's occupation and possession of the suit land – *Githu -v- Ndeete* 1984 KLR 776. There is no evidence that the burial of the deceased and his wife on the suit land was objected to by the Defendants. In any event, as I have already stated above, by 1994 the 1<sup>st</sup> Defendant's interest in the suit land had long been extinguished by operation of the law.



43. The 1<sup>st</sup> Defendant, according to the register, was the first registered proprietor of the suit land on 3<sup>rd</sup> July 1979. And although the 2<sup>nd</sup> Defendant purchased it vide an agreement dated 17<sup>th</sup> October 2013, that change of ownership did not interrupt the Plaintiff's occupation and possession of the suit land which had long crystallized. That sale agreement only made the 2<sup>nd</sup> Defendant a trustee holding the title thereto in favour of the Plaintiff and his family. In her submissions on the issue of peaceful occupation of the suit land by the Plaintiff, Ms Achala counsel for the 2<sup>nd</sup> Defendant has stated that:

“It follows that it seems the Plaintiff and the 1<sup>st</sup> Defendant have been in disagreements over the disputed portion of land and that the Plaintiff has never enjoyed a peaceful, quiet and uninterrupted occupation as he claims. And because he has never been in such possession, the 1<sup>st</sup> Defendant had to dispose off the property to the 2<sup>nd</sup> Defendant.

The 2<sup>nd</sup> Defendant has proved that he is a bona fide purchaser for value without notice having done all due diligence both at the land registry and on the ground before he purchased the said disputed portion.”

As stated above, the 1<sup>st</sup> Defendant was already deceased at the time of the trial and was not substituted. Whatever he said in his replying affidavit cannot be evidence. Therefore, whether or not there was any disagreement between him and the Plaintiff or the deceased can only be considered as evidence from the bar. It cannot rebut the Plaintiff's evidence. And as to whether the 2<sup>nd</sup> Defendant was a bona fide purchaser who did due diligence at the Land Registry and on the ground, the register to the suit land shows that a restriction had been placed thereon on 18<sup>th</sup> October 2013 long before it was transferred to him on 6<sup>th</sup> March 2014. The transfer shows that the consideration was Kshs.250,000 yet the sale agreement states that it was Kshs.980,000. And when he was cross-examined by Mr Fwaya, the 2<sup>nd</sup> Defendant said:

“I spoke to the Plaintiff. He said he was having problems with the 1<sup>st</sup> Defendant. The Plaintiff was annoyed because the 1<sup>st</sup> Defendant had sold land to me. That quarrel was going on even as this case was in Court. I however decided to purchase the land in dispute. I moved away because the Plaintiff was threatening me.”

Given those circumstances, one can hardly describe the 2<sup>nd</sup> Defendant as a bona fide purchaser. Such a purchase is defined in Black's Law Dictionary 10<sup>th</sup> Edition as:

“Someone who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

If the 2<sup>nd</sup> Defendant had conducted a search at the Land Registry as he claims to have done, he would have found that the suit land had a restriction in which the Plaintiff and his brother were claiming a purchaser's interest. And since the Plaintiff had already complained to him about the conduct of the 1<sup>st</sup> Defendant, that was already a red alert that the suit land was not free of encumbrances. I am not persuaded that the 2<sup>nd</sup> Defendant meets the threshold of a bona fide purchaser as set out in the case of *Katende -v- Haridar & Company Ltd* 2008 2 E.A. 173 a Ugandan case which has been followed by Courts in this country.

44. Adverse possession is all about dispossessing the owner of his land. In the case of *Wambugu v Njuguna* 1983 KLR 172, the Court of Appeal citing the English case of *Leigh v Jack* 1879 5 EX D 264, stated that



the right approach is for the claimant to prove that he has dispossessed the title holder of his possession of the land in dispute or that the title holder has discontinued his possession of the same for the requisite statutory period. In this case, the Plaintiff and his family have been in occupation and possession of the suit land for well over the statutory 12 years required in law and have used it as their own including burying thereon the deceased and his wife.

45. From the totality of the evidence, I am satisfied that the Plaintiff has proved that he is entitled to orders that he has acquired the suit land by way of adverse possession.
46. There is however another important issue which, though not pleaded, this Court feels that it must be determined to bring this dispute to a complete end at least for purposes of this judgment.
47. As already stated above, it is not in dispute that the 2<sup>nd</sup> Defendant is the current registered proprietor of the suit land having purchased it from the 1<sup>st</sup> Defendant in 2013. But by the time of that sale transaction, the 1<sup>st</sup> Defendant's right and interest to the suit land had long been extinguished by operation of law. Having purchased the suit land, the 2<sup>nd</sup> Defendant ensured that he dispossessed the Plaintiff of his occupation and possession thereof. As I have already stated above, the Plaintiff has since 2014 been living in a rented house because of the insecurity and after his house was demolished. On his part, when he was cross-examined by Mr Fwaya on 24<sup>th</sup> October 2023, the 2<sup>nd</sup> Defendant said:

“I moved away from the land in 2016 but I still plough it. There is a crop of sugarcane.”

What is clear from those two versions by the Plaintiff and the 2<sup>nd</sup> Defendant, the 2<sup>nd</sup> Defendant has following his acquisition of the title to the suit land ejected the Plaintiff therefrom. However, that action on the part of the 2<sup>nd</sup> Defendant has come rather late and although the Plaintiff did not seek any orders injuncting the 2<sup>nd</sup> Defendant from interfering with the suit land, this Court must do so by invoking the principle in *Odd Jobs v Mubia* 1970 E.A. 476 as well as *Nkalubo v Kibirige* 1973 E.A. 103 where it was stated 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 its decision.

48. Further, in the case of *Nyaga Cottolengo Francis -v- Pius Mwaniki Karani* 2017 eKLR the Court, after citing the decision in *Odd Jobs -v- Mubia* (supra), went on to add as follows:

“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 Sections 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 proceedings, the efficient disposal of the business of the Court, the efficient use of available judicial and administration 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. Under Article 159 of the new Constitution (now 7 years old!) the people of Kenya who are the sole repository of judicial authority have spelt out in peremptory manner how that power will be exercised and the Courts have no option but to comply.”

Guided by the above jurisprudence and given the fact that while this Court has already found in favour of the Plaintiff as being entitled to the suit land by way of adverse possession, he has already been effectively ejected therefrom by the 2<sup>nd</sup> Defendant albeit long after



the Plaintiff's interest had crystallized. This Court must therefore go further and reinstate the Plaintiff to the suit land on which the 2<sup>nd</sup> Defendant is now essentially a trespasser. Failure to do so may lead to the result that the Plaintiff will have to further return to this Court seeking orders to evict the 2<sup>nd</sup> Defendant therefrom. That will be an affront to the principle of "achieving the overriding objective of civil litigation that is to say, the just expeditious, proportionate and affordable resolution of civil disputes" nor "the efficient use of available judicial and administrative resources, the timely disposal of all the proceedings before the Court at a cost affordable by the respective parties" as espoused in the case of Nyaga Cottlengo Francis -v- Pius Mwaniki Karani (supra). The view I take of this dispute is that if this Court does not make a determination to address the fact that the Plaintiff, as the adverse possessor is now living in rented premises while the 2<sup>nd</sup> Defendant admits to be ploughing it, the Plaintiff's victory may well end up being pyrrhic and may require further litigation to actualize it. To obviate that recurrence which will be both an additional expense to the parties and a drain on scarce judicial resources, and bearing in mind that this issue has been raised in the course of the trial and is important for the resolution of this dispute, this Court must make an order that the Plaintiff is restored to the suit land for reasons already stated above.

49. Ultimately therefore and having considered the evidence by all the parties herein, this Court makes the following disposal orders:
1. The suit as against the 1st Defendant is marked as having abated.
  2. Judgment is entered for the Plaintiff as against the 2<sup>nd</sup> Defendant in the following terms:
    - a. The Plaintiff has acquired by way of adverse possession the land parcel No Bukhayo/Matayos/1171.
    - b. The 2<sup>nd</sup> Defendant shall within 30 days from the date of this judgment surrender the original title deed to the land parcel No Bukhayo/Matayos/1171 to the Land Registrar Busia for cancellation and issuance of a new title deed to be registered in the name of the Plaintiff to hold in trust for the family of Robert Oundo Adakai.
    - c. In default of (b) above, the Land Registrar Busia shall issue the new title deed notwithstanding the absence of the original title deed and the Deputy Registrar shall execute any relevant documents on behalf of the 2<sup>nd</sup> Defendant to effect that transfer if need be.
    - d. The 2<sup>nd</sup> Defendant shall also vacate the land parcel No Bukhayo/Matayos/1171 within 60 days of this judgment and thereafter, he, his agents, servants, family and any other persons acting through him shall be permanently restrained from interfering with the land parcel No Bukhayo/Matayos/1171.
    - e. In default of (d) above, the 2<sup>nd</sup> Defendant shall be evicted from the land parcel No Bukhayo/Matayos/1171.
  3. With regard to costs, the 1<sup>st</sup> Defendant and now deceased, largely contributed to the situation in which the 2<sup>nd</sup> Defendant now finds himself. I find it proper to order that each party meets their own costs.

**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\_\_**

