



Pamba & 2 others v Barasa & 3 others (Environmental and Land Originating Summons E005 of 2020 & Environment & Land Case 111 of 2019 (Consolidated)) [2024] KEELC 3909 (KLR) (24 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3909 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E005 OF 2020
& ENVIRONMENT & LAND CASE 111 OF 2019 (CONSOLIDATED)**

BN OLAO, J

APRIL 24, 2024

BETWEEN

VALENTINE EKAPOLON PAMBA PLAINTIFF

AND

ELIZABETH BARASA 1ST DEFENDANT

DORINE ASIEPET 2ND DEFENDANT

**AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 111 OF 2019**

BETWEEN

ELIZABETH BARASA 1ST PLAINTIFF

DOREEN ASIEPET 2ND PLAINTIFF

AND

OPAMA EMAASE JUVENALIS 1ST DEFENDANT

VALENTINE EKAPOLON 2ND DEFENDANT

JUDGMENT

1. This Judgment was due on 20th February 2024. However, I was away from the Court having taken my ailing step-mother to hospital. She later passed away on 14th March 2024 and was subsequently



buried on 30th March 2024. The delay in delivering it is highly regretted but was un-avoidable in the circumstances.

2. The Judgement is in respect of two consolidated suits being Busia ELC Case No E005 of 2020 (OS) and Busia ELC Case No 111 of 2019. The order of consolidation was made by Omollo J on 7th July 2022 by which the Originating Summons in BUSIA E005 of 2020 (OS) became the plaint while the Replying affidavit therein and the plaint in Busia ELC Case No 111 of 2019 became the defence and counter-claim.
3. By his Originating Summons dated 13th October 2020, Valentine Ekapolon Pamba (the Plaintiff) impleaded Elizabeth Barasa and Dorine Asiepet (the 1st and 2nd Defendants respectively) claiming to have acquired by way of adverse possession a portion of land measuring half (½) an acre comprised in the land title No South Teso/Angoromo/2544. He sought a determination of the following issues:
 1. Whether the Plaintiff was in open and continuous possession of a portion of land measuring half (½) acre now comprised in the title No South Teso/Angoromo/7322 (the suit land) from 1999 a period of nearly 20 years.
 2. Whether the Defendants claim to the land parcel No South Teso/Angoromo/7322 was extinguished upon expiry of 12 years from the time the Plaintiff went into possession of the land.
 3. Whether the Plaintiff has acquired the title to the suit land by virtue of adverse possession.
 4. Whether the Plaintiff is entitled to be registered as the owner of the title No South Teso/Angoromo/7322.
 5. Who pays the costs of the Summons.

Arising out of the above issues, the Plaintiff sought Judgment against the Defendants in the following terms:

- a. That the Defendants rights over the land parcel No South Teso/Angoromo/7322 got extinguished by adverse possession upon expiry of nearly 20 years from the date the Plaintiff came into possession thereof.
 - b. That the Defendants be perpetually barred by an order of permanent injunction from putting to use, constructing, transferring, alienating, sub-dividing, fencing off or in any other way howsoever putting to use the said land.
 - c. That the Plaintiff be registered as the owner of the land parcel No South Teso/Angoromo/7322 and the Defendants be directed forthwith to execute all relevant transfer forms to enable the Plaintiff obtain a title for the land and in default, the Court's Executive Officer be mandated to execute the same on behalf of the Defendants.
 - d. That the Defendants give vacant possession of the said land parcel No South Teso/Angoromo/7322 and/or in default eviction orders to be issued against the Defendants, their servants, workers, agents or any other persons claiming through them.
 - e. That the Defendants be condemned to pay the costs of this case.
4. In support of his Originating Summons, the Plaintiff filed a supporting affidavit dated 8th September 2020, a supplementary affidavit dated 18th April 2023 and his statement dated 13th October 2020.



5. He also filed statements of his witnesses Vincent Barasa Ekapolon (PW2) and Harrison Ondong'a (PW3) dated 13th October 2020.
6. The summary of the Plaintiff's affidavits and statement referred to above is that vide a sale agreement dated 10th August 1999, he purchased one (1) acre of land from Silvester Opiyo (the deceased father to the Defendants) for a consideration of Kshs.120,000 which he fully paid. The deceased showed him the boundary which was marked with sisal plants and he took immediate possession thereof and continued cultivating it by growing crops thereon. In 2008, the deceased initiated steps to sub-divide the land parcel No South Teso/Angoromo/2544 in order to facilitate the transfer of the portion which he had sold to the Plaintiff. However, the deceased died the same year before the process was completed. The Plaintiff nonetheless continued cultivating the portion which the deceased had sold him and has continued to do so for over 20 years continuously and without interruption to the exclusion of any other person.
7. In 2019, the Defendants who are daughters of the deceased started being hostile and eventually forcibly removed him from the suit land with the assistance of the Busia County Commissioner. It was then that he checked with the Busia Land Registry And Discovered That The Defendants Had Filed Busia Chief Magistrate's Court Succession Cause No 344 of 2017 in respect to the Estate of the deceased and were registered as the proprietors of the suit land. It is his case that for over 20 years since 1999, he has been in peaceful, continuous, open and un-interrupted occupation of the suit land. That when he took measurements of the suit land, he discovered that it measures only half (½) acre yet he had purchased a portion measuring one (1) acre.
8. The Plaintiff filed the following documents annexed both to his affidavit dated 8th September 2020 and his supplementary affidavit dated 18th April 2023;
 1. Copy of sale agreement dated 10th August 1999 for the purchase of one (1) acre by the Plaintiff from the deceased out of the parcel No South Teso/Angoromo/2544 at a consideration of Kshs.120,000.
 2. Mutation Form for the sub-division of the land parcel No South Teso/Angoromo/2544 to create land parcels No South Teso/Angoromo/7320, 7321, and 7322.
 3. Certified copy of the Register for the land parcel No South Teso/Angoromo/2544.
 4. Certified copy of the Register for the land parcel No South Teso/Angoromo/7322.
9. The Originating Summons was also supported by the statements of Vincent Barasa Ekapolon (PW2) and Harrison Ondong'a (PW2) both dated and filed on 13th October 2020.
10. In his statement Vincent Barasa Ekapolon (PW2) confirmed that he was present when the Plaintiff purchased the suit land from the deceased in 1999 and that he was among the witnesses. That the deceased identified the boundary which was marked with sisal plants and the Plaintiff took immediate possession and started cultivating it. In 2008, the deceased commenced the sub-division of the land parcel No South Teso/Angoromo/2544 in order to transfer to the Plaintiff his portion but he died before he could finish the exercise. The Plaintiff however continued cultivating the said portion and had done so for 20 years when the Defendants who are daughters of the deceased became hostile and attempted to evict the Plaintiff from the suit land. The Plaintiff reported the incident to the District Officer at Alupe who however stopped the Plaintiff from utilizing the suit land. He urged the court to up-hold justice and allow the Plaintiff to have his land which he lawfully purchased from the deceased 20 years ago.



11. In his statement, Harrison Ondong'a (PW3) stated that he is a neighbor to the Plaintiff and saw him planting sisal plants to mark the suit land in 1999. That since then, he has been seeing the Plaintiff cultivating the suit land peacefully until 2019 when he noticed that the Plaintiff was no longer cultivating thereon. When he enquired, he was informed that the defendants had turned against him and wanted to evict him from the suit land.
12. The Originating Summons was opposed and Elizabeth Barasa (the 1st Defendant and with the authority of Dorine Asiepet the 2nd Defendant) filed a replying affidavit dated 1st April 2021 and a statement dated 5th October 2021.
13. She deposed that she and the 2nd Defendants are the personal representatives of the deceased's Estate having obtained a grant of Letters of Administration in respect to his Estate. That the deceased who was the registered proprietor of the land parcels No South Teso/Angoromo/7320, 7321 and 7322 died on 25th October 2008 when both of them were still minors. That the Plaintiff and his cousin took advantage of the demise of the deceased and started cultivating the land parcels No South Teso/Angoromo/7320, 7321 and 7322. The Defendants reported to the District Officer about the invasion to the suit land and they were stopped. The Defendants then filed a succession cause in respect of the deceased's Estate and the suit land as well as the land parcel No South Teso/Angoromo/7321 were both registered in the Defendants' names. The Plaintiff however threatened to invade the suit land again and that prompted the Defendants to file Busia Chief Magistrate's Court ELC Case No 111 of 2019 seeking orders to injunct the Plaintiff who is not in occupation of the land.
14. The 1st Defendant filed the following documents in support of their case:
 1. Copy of Grant of Letters of Administration issued to the 1st Defendant and Florence Sikutatu Barasa in respect to the Estate of the deceased in Busia High Court Succession Cause No 273 of 2012.
 2. Copy of Certificate of confirmed Grant issued in Busia Chief Magistrate's Court Succession Cause No 344 of 2017 (formerly High Court Succession Cause No 273 of 2012).
 3. Certified copy of the Registers for the land parcels No South Teso/Angoromo/7320, 7321 and 7322.
 4. Copies of Plaint and Defence filed in Busia ELC Case No 111 of 2019.
 5. Copy of a letter dated 5th September 2011 and addressed to the Assistant Chief Alupe by the 1st Defendant.

On their part, the Defendants filed Busia ELC Case No 111 of 2019 against Opama Emaase Juvenalis and Valentine Ekapolon Pamba. They sought Judgment against them as follows:

 - a. An order of permanent injunction be and is hereby issued restraining the Defendants whether by themselves, their agents, servants and/or employees or anybody claiming through them from entering, staying, occupying, using or working on the land parcels No South Teso/Angoromo/7321 and 7322 or any portion thereof and from interfering with the Plaintiff's use and/or quiet enjoyment and occupation thereof.
 - b. Costs.
15. The basis of their claim is that they are the registered proprietors of the land parcels No South Teso/Angoromo/7320, 7321 and 7322 having inherited the same from their deceased father Silvester Opiyo Obara who died on 25th October 2008 while they were minors. That the Defendants took advantage



of the absence of their father and invaded the land parcels No South Teso/Angoromo/7321 and 7322 which they have been using to make bricks and cultivate.

16. That following the demise of the deceased, they commenced succession proceedings in Busia High Court Succession Cause No 273 of 2012, were issued with the confirmed Grant and are now the proprietors of the suit land as well with the land parcels No South Teso/Angoromo/7321 yet the Plaintiff is now threatening to invade it thus giving rise to this suit.
17. The 1st Defendant recorded a statement dated 21st August 2019 and a list of documents of even date in support of their case.
18. The said statement is a rehash of the plaint. She has repeated that the suit land and the land parcel No South Teso/Angoromo/7321 were both the properties of their late father Silvester Opiyo Obara who died on 25th October 2018 while she was in Form 1 and the 2nd Defendant was a minor. Their mother was ailing. That the Plaintiff and Opama Emaase Juvenalis took advantage of that to invade the suit land and land parcel No South Teso/Angoromo/7321 which made the Defendants to file Busia High Court Succession Cause No 273 of 2012 and were issued with a confirmed Grant. They are now the proprietors of the suit land which the Plaintiff has now invaded and it took the intervention of the local administration to stop that invasion. That led to the filing of this suit.
19. The Defendants also filed the following documents some of which I have already referred to above when I summarized their response to the Originating Summons:
 1. Grant of Letters of Administration issued in Busia High Court No 273 of 2012 in respect to the Estate of the deceased.
 2. Confirmed Grant issued in Busia Chief Magistrate's Court Succession Cause No 344 of 2017.
 3. Copy of Register for the land parcels No South Teso/Angoromo/7320, 7321 and 7322.
 4. Letter dated 5th September 2021 addressed to the Assistant Chief Alupe.

In response to that plaint which is now the counter-claim for purposes of this judgment, the Plaintiff (2nd Defendant) filed a defence dated 13th November 2019 in which he pleaded, inter alia, that he had purchased the suit land from the deceased at a purchase price of Kshs.120,000 vide a sale agreement dated 10th August 1999. That for the last 20 years, he has been in possession of the suit land until March 2019 when he was forcibly evicted therefrom by the local administration. By that time however, he had already acquired the suit land by way of adverse possession. That by inheriting their late father's land, the Defendants also inherited all his obligations including the transfer of the suit land to him. He denied all the averments levelled against him.
20. Opama Emaase Juvenalis who had been sued as the 1st Defendant did not file any defence.
21. In reply to that defence, the Defendants denied that the Plaintiff had purchased the suit land at a consideration of Kshs.120,000 as alleged and put the Plaintiff to strict proof thereof. They denied that the District Officer had stopped the Plaintiff from using the suit land or that the deceased owed the Plaintiff any debt.
22. The hearing commenced on 4th July 2023 when the Plaintiff testified. He adopted as his evidence the contents of his supporting affidavit, supplementary affidavit and statement. He also produced as his documentary evidence the documents filed herein.



23. When the hearing continued on 23rd October 2023, he called as his witnesses Vincent Barasa (PW2) and Harrison Odongo'a (PW3). They too adopted as their evidence the contents of their statements which I have already summarized above.
24. Thereafter, the 1st Defendant testified and she too adopted as her evidence, the contents of her statement dated 5th October 2021. She also produced as her documentary evidence the documents filed herein.
25. Submissions have been filed by Mr Mogi instructed by the firm of Mr Manwari & Company Advocates for the Plaintiff and by Mr Otanga instructed by the firm of Bogonko Otanga & Company Advocates for the Defendants.
26. I have considered the evidence by the parties and the submissions by counsel.
27. The Plaintiff's case is that he has acquired a portion of the suit land measuring half (½) an acre by way of adverse possession. The Defendant's case is that the Plaintiff has no right to the suit land which he unlawfully invaded following the demise of their father and he should be permanently enjoined from entering it.
28. I consider the following to be the issues for my determination in this matter:
 1. Whether the Plaintiff has acquired the portion measuring half (½) an acre out of the suit land by way of adverse possession and the Defendants be enjoined therefrom.
 2. Whether in fact the Defendants are the rightful owners of the suit land and if they are entitled to an order permanently enjoining the Plaintiff from interfering with the same.
 3. Who shall meet the costs of the suit?

1. - Plaintiff's Claim in Adverse Possession

29. Section 38 (1) and (2) of the *Civil Procedure Rules* provides that:

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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 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.”

“(2) An order made under subsection (1) of this section shall by registration take effect subject to any entry on the register which has not been extinguished under this *Act*.”

Having approached this Court for an order that he has acquired half (½) acre of the suit land by way of adverse possession, the Plaintiff had to meet the threshold set out in various precedents. These include the case of *Kasuve v Mwaani Investments Ltd & Another* 2004 1 KLR 184. There, the Court of Appeal held that:

“And in order to be entitled to the land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption



for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner of his own volition...”

Similarly, as was held in the case of *Kimani Rubhine-v-Swift Rutherford & Co. Ltd* 1980 KLR 10, the Plaintiff was required to show that the possession is of right without force, stealth or the permission of the owner “*nec vi, nec clam nec precario*”. That possession and occupation must also, as was held in the case of *Grace Wairimu Sorora v Chaka Ltd & Others* 2017 eKLR, be “continuous, open and peaceful without permission of the owner.” It must also not be interrupted. It is also now well settled that a purchaser in possession and occupation having fully paid the purchase price is a party in whose favour the period of limitation can run and justify an order in adverse possession – *Public Trustee v Wanduru* 1984 KLR 314.

30. The Plaintiff has pleaded and testified that he entered the suit land as a purchaser. He has produced a sale agreement dated 10th August 1999 between him as the purchaser and the deceased as the vendor for the purchase of one (1) acre out of the land parcel No South Teso/Angoromo/2544 at a consideration of Kshs.120,000 which was fully paid. He added further that the deceased had, prior on his demise on 25th October 2008, commenced the sub-division of the said land in order to transfer to him the one (1) acre. The Plaintiff took possession of the suit land in 1999 and it was only after the deceased had subdivided the land parcel No South Teso/Angoromo/2544 that the Plaintiff discovered that the portion he occupied was the suit land which is half (½) an acre and which he now claims in adverse possession.
31. This Court is satisfied the Plaintiff first took possession of the half (½) acre comprised in the suit land in 1999 soon after the execution of the sale agreement dated 10th August 1999. And he continued to be in occupation and possession of the said land until 2019 when the District Officer, at the request of the Defendants, stopped him from cultivating it. Indeed the 1st Defendant confirmed as much when she was cross-examined by Mr. Mogi on 23rd October 2023. She said:

“It is true that by the time our father died in 2008, the Plaintiff was still using the land suit. And he continued using it until 2019 when the Assistant County Commissioner stopped him from using it.”

There is no evidence to suggest that the Plaintiff’s occupation and possession of the suit land from 1999 upto 2019 (a period of 20 years) was not open, peaceful, continuous, un-interrupted and with the knowledge both of the deceased, and after his demise, of the Defendants. I did not hear the Defendants dispute the contents of the sale agreement executed between the Plaintiff and their deceased father for the purchase of the suit land. The Plaintiff called two witnesses Vincent Barasa (PW2) and Harrison Odong’a (PW3) who attested to it and who both confirmed the Plaintiff’s occupation and possession thereof. Given that un-controverted evidence, it is difficult for this Court to conclude otherwise than that the Plaintiff is entitled to an order that he has acquired the portion measuring half (½) acre out of the suit land by way of adverse possession.

32. In disputing the Plaintiff’s claim to the suit land by way of adverse possession, Mr. Otanga counsel for the Defendants has submitted at page 4 of his submissions that:

“It is on record that the Applicant filed the suit herein while he was not in possession of L.R No South Teso/Angoromo/7322 and that he only returned to the parcel after attending court on 16th November 2022 and seeking adjournment to consider the issue of interruption. The Respondents have produced a letter of protest dated 1st December 2022 addressed to counsel for the Applicant and a response dated 13th February 2023 from counsel of the Applicant as exhibits. It is our humble submission that even if the Applicant has



occupied L.R. No South Teso/Angoromo/7322 for over 20 years his legal ownership could only ripen after registration after a Court order.

That is the reason why Section 38 of the *Limitation of Actions Act* requires that where a person claims to have become entitled by adverse possession to land, he must apply to the High Court for an order that he be registered as the new proprietor of the land.

The occupation of the Applicant was interrupted before he took action to assert his claim to ownership and that from time of return to the land, the statutory period has not elapsed.

We urge your honour to find and hold that the Applicant has not proved his case to the required standard and humbly pray that the same be dismissed with costs.”

It is of course correct that the Plaintiff filed this suit when he was not in occupation of the suit land. It is also the position that the Plaintiff can only be declared as the owner of the suit land following a court order. The fact however is that by the time the Plaintiff was stopped from using the suit land by the local administration in 2019, he had already been in possession and occupation of the suit land for 20 years which is well beyond the statutory period of 12 years. It is also the law that only this court can declare the Plaintiff to have acquired the suit land by way of adverse possession. And that is exactly why the Plaintiff has moved to this Court seeking that declaration. I am satisfied from the evidence that the Plaintiff has proved that he is entitled to an order that he has acquired a portion of the suit land measuring half (½) acre by way of adverse possession. The Defendants’ suit filed in Busia ELC Case No 111 of 2019 came too late to interrupt his possession and occupation of the suit land.

33. This court must also direct that the Defendants be permanently enjoined from interfering with the Plaintiffs’ use of the said half (½) acre of the suit land after giving him vacant possession thereof following his removal by the Local Administration. To facilitate the Plaintiff’s registration as the proprietor of the suit land, the Deputy Registrar shall execute all the necessary documents on behalf of the Defendants who are the current registered proprietors.

2. Whether the Defendants are the Rightful Owners of the Suit Land and Entitled to an Order of Injunction.

34. From what this Court has already stated above, it is clear that the Defendants’ right in the suit land has now been extinguished.
35. The Defendants appear to place much premium on the fact that they acquired registration of the suit land following orders issued in the Succession Court by way of transmission. That is correct. The Grant issued in their favour in Busia Chief Magistrate Succession Cause No 344 of 2017 was confirmed on 15th December 2017. By that time however, the interest of the deceased, and following his demise, the Defendants, had long been extinguished by operation of the law. The legal position was therefore that even as they acquired registration of the suit land in their name on 22nd August 2018 as per the register, the Defendants were merely trustees holding the said title in trust for the Plaintiff. It must be remembered that a claim in adverse possession is among the overriding interests recognized under Section 28(h) of the *Land Registration Act* which recognizes such rights as;

“rights acquired or in the process of being acquired by virtue of any written law relating to limitation of actions or by prescription.”

This Court has already made a finding that the Plaintiff has acquired the suit land by virtue of adverse possession. The Defendants cannot therefore be entitled to the order which they seek in their counter-claim that the Plaintiff by himself, his agents, servants, employees or any other persons acting through



him be stopped from entering, occupying, utilizing or working on the suit land. I notice from the counter-claim that the Defendants had also impleaded one Opama Emaase Juvenalis as a 1st Defendant. Following the collapse of the counter-claim against the Plaintiff (who was the 2nd Defendant in the counter claim) and in whose favour this court has already made a finding, the 1st Defendant's counter-claim is equally for dismissal. The Defendants cannot injunct the Plaintiff from land which belongs to him and neither can they injunct Opama Emaase Juvenalis from land over which they have no legal right.

36. The counter-claim must therefore be dismissed.

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

1. The Defendants' counter-claim is dismissed with costs to the Plaintiff. Opama Emaase Juvenalis is not entitled to any costs.
2. There shall be judgment for the Plaintiff against the Defendants jointly and severally in the following terms:
 - i. The Defendants' rights over the land parcel No South Teso/Angoromo/7322 has been extinguished by operation of the law.
 - ii. The Plaintiff has acquired the land parcel No South Teso/Angoromo/7322 by way of adverse possession.
3. The Defendants shall within 45 days of this judgment deliver to the Land Registrar Busia for cancellation the original title deed to the land parcel No South Teso/Angoromo/7322 and also execute all the necessary documents to facilitate the registration of the said land in the name of the Plaintiff.
4. In default of (3) above, the Deputy Registrar Busia shall cancel the title to the land parcel No South Teso/Angoromo/7322 in the names of the Defendants and the Deputy Registrar of this Court shall execute all the necessary documents on behalf of the Defendants to facilitate the registration of the land parcel No South Teso/Angoromo/7322 in the name of the Plaintiff.
5. The Defendants shall forthwith give vacant possession of the land parcel No South Teso/Angoromo/7322 to the Plaintiff.
6. The Defendants, their agents, servants, family members and all other parties acting through them are hereby injuncted from interfering with the Plaintiff's use of the land parcel No South Teso/Angoromo/7322.
7. The Defendants shall meet the Plaintiff's costs of his suit.

JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 24TH DAY OF APRIL 2024 WITH NOTICE TO PARTIES.

BOAZ N. OLAO

JUDGE

Right of Appeal.

