



**Etyang v Opasamong & another (Enviromental and Land Originating Summons E005 of 2023) [2024] KEELC 6084 (KLR) (24 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6084 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E005 OF 2023  
BN OLAO, J  
SEPTEMBER 24, 2024**

**BETWEEN**

**MOURICE OMODING ETYANG ..... PLAINTIFF**

**AND**

**BENARD OPASAMONG ..... 1<sup>ST</sup> DEFENDANT**

**ERICK EPERO ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By Originating Summons dated 29<sup>th</sup> December 2022 and filed herein on 17<sup>th</sup> February 2023, Mourice Omoding Etyang (the Plaintiff) claimed to have acquired the land parcel No South Teso/Amukura/4586 (the suit land) by way of adverse possession. He sought a determination of the following issues:
  1. Whether the Plaintiff has been in open and notorious occupation of the 0.43 Hectares comprised in the land parcel No South Teso/Amukura/4586 from 1992 to-date.
  2. Whether the Defendants' title to the land parcel No South Teso/Amukura/4586 measuring 0.43 Hectares has become extinguished upon expiry of 12 years from the time the Plaintiff went into possession of the land.
  3. Whether the Plaintiff has now acquired the land South Teso/Amukura/4586 by way of adverse possession.
  4. Whether the registration of the Defendants as the owners of the land parcel No South Teso/Amukura/4586 should be cancelled and the Plaintiff be registered as the owner.
  5. That the Defendants, their agents, servants and/or workers be restrained permanently by injunction from interfering with the land parcel No South Teso/Amukura/4586.



6. Who should pay the costs of this suit.
7. That this Honourable Court do grant such and further orders as it may deem fit.
2. Arising out of this Court's determination of the above issues, the Plaintiff sought judgment against the Defendants in the following terms:
  1. That the rights of the Defendants over the land parcel No South Teso/Amukura/4586 measuring 0.43 Hectares got distinguished by way of adverse possession upon expiry of 12 years from the date when the Plaintiff came into possession.
  2. That the Defendants be perpetually barred from using the land parcel No South Teso/Amukura/4586 measuring 0.43 Hectares which has been in the possession of the Plaintiff from 1992 to-date.
  3. That the Plaintiff be registered as the proprietor of the land parcel No South Teso/Amukura/4586 measuring 0.43 Hectares.
  4. That the Defendants do execute all the relevant documents to facilitate the transfer of the 0.43 Hectares comprised in the land parcel No South Teso/Amukura/4586 in the name of the Plaintiff and in default, the Deputy Registrar do execute the same in place of the Defendants.
  5. The Defendants do pay the costs of this suit.
3. The Originating Summons is supported by the Plaintiff's affidavit also dated 29<sup>th</sup> December 2022 to which is annexed the register to the suit land.
4. In the said affidavit, the Plaintiff has deposed, inter alia, that he has been living on the suit land since 1992. That his occupation of the suit land has been open, actual and un-interrupted thus necessitating this suit.
5. The record shows that the Defendants were served on 16<sup>th</sup> November 2023. No reply has been filed to the Originating Summons.
6. When the matter was listed for hearing today, the Defendants were also served. However, none of them has appeared in Court. The matter therefore proceeded to hearing ex-parte.
7. The Plaintiff was the only witness in support of his case. He adopted as his evidence the contents of his supporting affidavit which I have already summarized above. He also produced as his documentary evidence the copy of the register to the suit land which shows that the Defendant have since 9<sup>th</sup> October 2018 been registered as the joint proprietors of the suit land.
8. The Plaintiff has cited the provisions of Sections 7 and 38 of the *Limitation of Actions Act* in support of his Originating Summons. Those provisions read:

7 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.”

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- (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an



order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

It is now well established that the combined effect of the provisions of Sections 7, 13 and 17 of the Limitation of Actions Act is to extinguish the title of the registered proprietor of the land in favour of an adverse possessor thereof at the expiry of 12 years of the adverse possession – *Benjamin Kamau & others v Gladys Njeri* C.A. Civil Appeal No 123 of 1996.

9. In the case of *Kasuve v Mwaani Investments Ltd & others* 2004 1 KLR 184, the Court of Appeal said the following about what a party seeking land by way of adverse possession must prove:

“ And in order to be entitled to the land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition – *Wanje v Saikwa (No 2)* 1984 KLR 284. A title by adverse possession can be acquired under Limitation of Actions Act for a part of the land and the mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such person’s adverse possession – see *Githu v Ndeete* 1984 KLR 776.”

And as was reiterated by KnellerJ in the case of *Kimani* 1976 – 80 1 KLR 1500, the Plaintiffs have to prove that they have used the land which they claim as of right without force, secrecy or persuasion (*nec vi, nec clam, nec precario*).

10. The Plaintiff’s evidence which is not rebutted, is that he took possession of the suit land in 1992. He did not explain how he did so and since his claim is not opposed, the Court must believe him when he says that he has lived on the suit land openly and without interruption since then so that by 2022 when he moved to this Court, he had been in occupation and possession of the suit land for 30 years. That is well beyond the 12 years that entitles him to orders in adverse possession.
11. The register to the suit land is clear that the Defendants are the registered proprietors of the suit land. Having failed to defend this claim, this Court can only conclude that the Defendants admit the Plaintiff’s claim.
12. Accordingly, there shall be judgment against the Defendants jointly and severally in the following terms:
1. The Plaintiff has acquired by way of adverse possession the land parcel No South Teso/Amukura/4586 measuring 0.43 Hectares.
  2. The Defendants interest in the land parcel No South Teso/Amukura/4586 has been extinguished by operation of the law.
  3. The Defendants shall within 45 days of service upon them of this judgment and the decree surrender to the Land Registrar Busia the original title deed to the land parcel No South Teso/Amukura/4586 and 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 Land Registrar Busia shall, notwithstanding the absence of the original title deed to the land parcel No South Teso/Amukura/4586 proceed to cancel the register thereof and the Deputy Registrar of this Court shall execute all the relevant documents on behalf of the Defendants to facilitate the registration of the land parcel No South Teso/Amukura/4586 in the name of the Plaintiff.



5. Thereafter, the Defendants, their agents, servants, assignees or any other persons claiming through them shall be permanently enjoined from interfering with the Plaintiff's occupation and possession of the land parcel No South Teso/Amukura/4586.
6. There shall be no orders as to costs.

**BOAZ N. OLAO**

**JUDGE**

**24TH SEPTEMBER 2024**

**JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 24TH DAY OF SEPTEMBER 2024  
BY WAY OF ELECTRONIC MAIL.**

Right of Appeal

**BOAZ N. OLAO**

**JUDGE**

**24TH\* SEPTEMBER 2024**

