



**Omutondo v Ndeda (Environmental and Land Originating Summons
E007 of 2022) [2024] KEELC 6052 (KLR) (24 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6052 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E007 OF 2022
BN OLAO, J
SEPTEMBER 24, 2024**

BETWEEN

DAVID CHRISTOPHER OTIENO Omutondo APPLICANT

AND

BENARD WANDERA NDEDA RESPONDENT

JUDGMENT

1. David Christopher Otieno Omutondo (the Plaintiff) claims to have acquired a portion measuring 0.075 Hectares out of the land parcel NO Bukhayo/Bugengi/7539 (the suit land) by way of adverse possession. He has therefore impleaded Benard Wandera Ndeda (the defendant) seeking a determination of the following questions vide his Originating Summons dated 2nd February 2022:
 - i. Whether Benard Wandera Ndeda And David Christopher Otieno Omutondo entered into a land purchase agreement in 2004 over a portion of the land parcel NO Bukhayo/Bugengi/7539 measuring 0.075 Hectares.
 - ii. Whether the plaintiff, his agents, servants and kin made entry and have been utilizing the suit land for agricultural and incidental activities for a period of over 12 years.
 - iii. Whether the use, occupation and utilization has been open, notorious and uninterrupted.
 - iv. Whether the Defendant should bear costs of this suit.
2. Arising out of that determination, the plaintiff seeks judgment against the defendant in the following terms:
 - a. A declaration that the plaintiff has acquired proprietorship rights by way of adverse possession of a portion measuring 0.075 Hectares to be hived from the land parcel NO Bukhayo/Bugengi/7539.



- b. Costs of this suit to the plaintiff.
3. In support of that Originating Summons, the plaintiff filed a supporting affidavit of even date in which he has deposed, inter alia, that sometimes in the year 2004, he entered into a land sale agreement through his deceased sister to purchase a portion of the suit land from the defendant. That he took possession of the land and has been engaged in agricultural activities thereon and sometimes leases it to his neighbours. However, due to pressure of work, he and the defendant were unable to complete the transfer process but they have enjoyed an amicable relationship with respect to the suit land. Along the way, both of them lost their copies of the sale agreement and decided to re-draft it again in the year 2014 in order to comply with the law since the purchase price had been fully paid. However, the defendant has now refused to execute the transfer forms thus necessitating this suit.
4. In support of his claim, the plaintiff filed the following documents:
1. Certificate of Official Search for the land parcel NO Bukhayo/Bugengi/7539 measuring 0.42 hectares in the name of the defendant.
 2. Land sale agreement dated 14th December 2014 between the plaintiff and the defendant for a portion of land out of the suit land.
 3. Record of Mpesa transactions.
5. The record shows that Anzelim Okello a process server of this court served the defendant with copies of the Originating Summons, supporting and verifying affidavits as well as the list of exhibits on 4th March 2022 as per the affidavit of service dated 14th July 2022. However, no reply was filed by the defendant in opposition of the Originating Summons.
6. By a further list of documents dated 14th June 2023, the plaintiff filed a further list of documents comprising the following:
1. Copies of the land sale agreements dated 23rd December 2000, 13th April 2001 and 12th May 2001.
- And although the said list indicates that the register for the suit land has been filed as item NO (2), no such register was infact filed by the plaintiff.
7. The plaintiff was the only witness who testified in support of his case. He adopted as his oral testimony the contents of his supporting affidavit and produced the above documents as his documentary evidence.
8. At the end of the plenary hearing, his counsel Mr Juma instructed by the firm of Balongo & Company Advocates filed written submissions in support of the plaintiff's case.
9. I have considered the plaintiff's case, un-defended as it is, as well as the submissions by counsel. The plaintiff seeks an order that he has acquired by way of adverse possession a portion of land measuring 0.075 Hectares out of the suit land. That he took possession of the said portion of land in 2004 following a land sale agreement between him and the defendant although both of them lost their respective copies of that agreement. In order to formalize the process, the parties executed another agreement in 2014 in order to comply with the law. However, the defendant has refused the formally execute the transfer documents hence this suit.



10. Section 38 (1) of the *Limitation of Actions Act* allows a person seeking to be registered by way of adverse possession as proprietor of land belonging to another person to approach the court for such an order. It reads:

“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.”

11. In *Kasuve -v- Mwaani Investments Ltd & Others* 2004 1 KLR 184, the Court of Appeal said the following on what a person claiming 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).”

Such occupation must be peaceful, with the knowledge of the owner but without his consent, continuous and un-interrupted – *Kimani Ruchine & Another -v- Swift Rutherford Company Ltd* 1976 – 80 KLR 500. A claim to land by way of adverse possession can also be made for only a portion of land – *Githu -v- Ndeete* (supra). In *Wambugu -v- Njuguna* 1983 KLR 172, it was held that:

“In order to acquire by the statute of Limitation a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the property that defeats the title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.”

The plaintiff’s case is that he has been in occupation and possession of a portion of the suit land measuring 0.075 Hectares following a land sale agreement in 2004. That means that by the time this suit was filed in 2022, he had been utilizing the said portion for 18 years which is well beyond the statutory 12 years required to entitle him to be registered as the proprietor thereof by way of adverse possession. It is common ground that a party in occupation and possession of land having paid the full purchase price is a person in whose favour the limitation period can begin to run – *Public Trustee -v- Wanduru* 1984 KLR 314.

12. The Originating Summons, as I have already stated above, was not opposed. I have nonetheless found it appropriate to consider and apply relevant precedents to the facts herein and I am satisfied that the plaintiff’s evidence, uncontroverted as it is, meets the threshold to warrant the grant of the order that he has acquired a portion of the suit land measuring 0.075 Hectares by way of adverse possession. He entered the suit land by way of a land sale agreement in 2004 and also remains in occupation and possession thereof. There is nothing to suggest that the defendant has taken any action to evict him from the said portion or that the said occupation and possession has not been peaceful, uninterrupted and with the knowledge of the defendant for the requisite period to warrant the orders sought. And by failing to file any response to the Originating Summons, this court is entitled to conclude, which



are hereby do, that the defendant has no reason to challenge the plaintiff's averments as contained in his supporting affidavit and that he in fact admits them as factual. That being the position, I find that the plaintiff has proved his claim as required in law.

13. The up-shot of all the above is that having considered the plaintiff's evidence, unchallenged as it is, I make the following disposal orders:
1. The plaintiff has acquired by way of adverse possession a portion of the land parcel NO Bukhayo/Bugengi/7539 measuring 0.075 Hectares by way of adverse possession.
 2. The defendant shall within 45 days of service upon him of a copy of this judgment surrender to the Land Registrar Busia the original title deed to the land parcel NO Bukhayo/Bugengi/7539 for cancellation and to execute all the necessary documents to facilitate the sub-division and thereafter registration of the portion measuring 0.075 Hectares in the name of the plaintiff and the remainder in the name of the defendant.
 3. In default of (2) above, the Deputy Registrar shall upon request execute all such necessary documents on behalf of the defendant and the Land Registrar and County Surveyor Busia shall proceed as in (2) above notwithstanding the absence of the original title deed.
 4. The plaintiff shall meet the costs of the survey and other attendant costs.
 5. As the suit was not defended, the plaintiff shall meet his own 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

