



**Otsieno v Ndubi & another (Enviromental and Land Originating Summons E012 of 2020) [2024] KEELC 13399 (KLR) (22 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13399 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E012 OF 2020  
BN OLAO, J  
NOVEMBER 22, 2024**

**BETWEEN**

**STEVEN OLANDO OTSIENO ..... PLAINTIFF**

**AND**

**STANSLAUS OKOTH NDUBI ..... 1<sup>ST</sup> DEFENDANT**

**LAWRENCE ODUYA OTSIENO ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Steven Olando Otsieno (the Plaintiff) impleaded Stanslaus Okoth Ndubi And Lawrence Oduya Otsieno, the (1<sup>st</sup> and 2<sup>nd</sup> Defendants) and sued as the personal representative of the Estate of one Otsieno Musundi Musundi Alias Otsieno Musundi claiming to have acquired by way of adverse possession a parcel of land measuring 0.6 Hectares out of the land parcel NO Marachi/Elikhari/1092 (the suit land). He therefore sought a determination of the following questions:
  - a. Whether the Plaintiff has been in open and notorious possession of a portion of land measuring 0.6 Hectares out of the land parcel NO Marachi/Elikhari/1092 for a continuous uninterrupted period exceeding 12 years.
  - b. Whether the Defendant's title to the portion measuring approximately 0.6 Hectares out of the land parcel NO Marachi/Elikhari/1092 became extinguished upon expiry of 12 years from the time the Plaintiff went into possession of the said land.
  - c. Whether the Plaintiff has now acquired title to the said portion measuring approximately 0.6 out of land parcel NO Marachi/Elikhari/1092 by virtue of adverse possession.
  - d. Whether the registration of the Defendant's father as owner of a portion 0.6 Hectares out of the land parcel NO Marachi/Elikhari/1092 should be cancelled and the Plaintiff be registered as the owner of the said parcel of land.



- e. Costs of the suit
2. Arising out of the above determinations, the Plaintiff sought for orders against the Defendants in the following terms:
    1. That the Defendants' rights over a portion of land measuring 0.6 Hectares out of the land parcel NO Marachi/Elikhari/1092 got extinguished by adverse possession upon expiry of the 12 years from the date the Plaintiff came into possession.
    2. That the Defendants be perpetually barred from taking or using a portion of land measuring approximately 0.6 Hectares out of the land parcel NO Marachi/Elikhari/1092.
    3. That the Plaintiff be registered as the proprietor of a portion measuring approximately 0.6 Hectares out of the land parcel NO Marachi/Elikhari/1092.
    4. That the Defendants do execute all the relevant documents to facilitate the transfer of the suit land into the names of the Plaintiff and that in default. The Deputy Registrar do execute the same in the place of Defendants.
    5. That the Defendants do pay the costs of this case.

In support of this claim, the Plaintiff filed a supporting affidavit dated 9<sup>th</sup> November 2020 and a statement dated 15<sup>th</sup> March 2023, both of which he adopted as his evidence during the trial.

3. The gist of the said supporting affidavit and statement is that the suit land is registered in the name of Otsieno Musundi now deceased and the Defendants are his personal representatives. That he is the son and personal representative of the Estate of TOMasi Otsieno Ndeka who occupied a portion of the suit land measuring about 0.6 Hectares or thereabout. That his late father offered a part of the said portion to the Busia County Council for use as a market place and Elara Market was established thereon. However, the said Busia County Council did not compensate his late father for the portion and allowed him to re-take possession thereof and started ploughing it for planting foodstuff. The Plaintiff is currently using the said portion of land to grow cassava and other foodstuff and the same is clearly demarcated and his use and occupation thereof is open, peaceful, continuous and without occupation from the time he was born to date.
4. The Plaintiff also recorded the statements of his witnesses Calistus Olando Otsieno (PW2) and Charles Omondi Onyango (PW3) both dated 15<sup>th</sup> March 2023.
5. In his statement, Calistus Olando Otsieno (PW2) states that he is the son of Thomas Otsieno Ndeka And Philista Apondi and that his father occupied a portion of the suit land measuring approximately 0.6 Hectares registered in the name of Otsieno Musundi. That when his brothers Chodo Otsieno And Kolombo Otsieno passed on, they were buried on the said portion. That his late father had offered the said portion to the Busia County Council to be used as a market place and Elara Market was opened thereon. However, his late father was not compensated by the said Busia County Council and the said portion is now being utilized by his brother.
6. In his statement Charles Omondi Onyango (PW3) states that his land parcel NO Marachi/Elikhari/1093 on which he lives shares a boundary with the suit land a portion of which is across the main road from Bukhuyi to Lugulu Market which portion is utilized by the Plaintiff although it is owned by Otsieno Musundi. That the occupation of the said portion by the Plaintiff has been peaceful, continuous, open and without force.



7. The Plaintiff filed a list of documents dated 15<sup>th</sup> March 2023 to which are annexed the following documents:
  1. Certified copy of register for the land parcel NO Marachi/Elikhari/1092.
  2. Grant of Letters of Administration in respect to the estate of Otsieno Musundi Musundi.
  3. Grant of Letters of Administration in respect to the estate of Tomasi Otsieno Ndeka.
  4. Measurements of a portion of the land parcel NO Marachi/Elikhari/1092 occupied by the Plaintiff.
  5. Map for land parcel NO Marachi/Elikhari Sheet No 4.
  6. Letter from the office of the Chief Marachi East Location dated 9<sup>th</sup> April 1992 addressed to Otsieno Ndeka.
  7. Letter from County Council Of Busia dated 28<sup>th</sup> May 2001 and addressed to Otsieno Ndeka.
  8. Letter dated 5<sup>th</sup> January 1969 addressed to the District Market Officer By Otsieno Ndeka.
8. In response to the Plaintiff's Originating Summons, the 2<sup>nd</sup> Defendant Lawrence Oduya Otsieno (DW1) filed two replying affidavits the first dated 22<sup>nd</sup> March 2021 and the second dated 3<sup>rd</sup> April 2023.
9. In the replying affidavit dated 22<sup>nd</sup> March 2021, the 2<sup>nd</sup> Defendant who is a brother to the 1<sup>st</sup> Defendant Stanslaus Okoth Ndubi has averred inter alia, that the suit land belongs to their late father Otsieno Musundi as per the annexed copy of the register. That the Plaintiff's late father Thomas Otsieno Ndeka had made an attempt to put up a house on the suit land when the Defendants' father was alive but he was stopped from doing so and never took occupation of the same. That the Plaintiff does not qualify as an adverse possessor given that there have been several complaints and cases at the chief's office over his trespass on the suit land and therefore his occupation has not been peaceful and continuous. The Originating Summons is therefore without any legal basis and ought to be dismissed with costs.
10. In his second replying affidavit dated 3<sup>rd</sup> April 2023, the 2<sup>nd</sup> Defendant has averred, inter alia, that the suit land is registered in the name of his late father who died in 1996. That during his life time, his late father Otsieno Musundi never sold nor partitioned the suit land. Further that the Plaintiff has never been in peaceful, quiet, continuous or un-interrupted occupation of the same. Instead, the Plaintiff has always lived on his father's land which is separate and does not share any common boundary. That the Plaintiff has only periodically used the suit land by force and it has never been continuous. There have also been several disputes over the Plaintiff's use of the land and the Chief has had to stop him from using it This suit should therefore be dismissed.
11. The 2<sup>nd</sup> Defendant also filed statements of his two witnesses John Nyongesa Daudi (DW2) and Lawrence Ogieko Musundi (DW3) both dated 3<sup>rd</sup> April 2023.
12. In his statement John Nyongesa Daudi states that the suit land has always belonged to Otsieno Musundi but the Plaintiff has been using it forcefully. That several meetings have been held at the chief's office and decisions have been made against the Plaintiff and his father. That the Plaintiff lives on land belonging to his father and no member of the Plaintiff's family has been buried on the suit land. The use of the suit land by the Plaintiff has not been peaceful and his claim should be dismissed with costs.
13. Lawrence Ayieko Musundi states in his statement that the suit land belonged to Otsieno Musundi the deceased father of the Defendants. That the Plaintiff's father Otsieno Ndeka was a cleaner at the



Elara Market which was on the suit land. That the Plaintiff used to till part of the suit land but would stop doing so whenever a dispute arose. That his use of the suit land was not peaceful or continuous and at no time did he use it consecutively for 5 years. His claim should be dismissed.

14. At the end of the plenary hearing, submissions were filed both by Mr Otanga instructed by the firm of Bogonko, Otanga & Company Advocates for the Plaintiff and by Mr Ashioya instructed by the firm of Ashioya & Company Advocates for the Defendants.
15. I have considered the evidence by the parties and the submissions by counsel.
16. The Plaintiff's claim is that he is entitled to a portion of the suit land measuring 0.6 Hectares by way of adverse possession. The doctrine of adverse possession is embodied in Section 7 of the [Limitation of Actions Act](#) which provides that:

“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.”

Section 38 of the same Act allows a party to apply to the Court for an order that he has acquired land by way of 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 proprietor of the land.”

In the case of [Mombasa Teachers Co-operative Savings & Credit Society Limited -v- Robert Muhambi Katana & 15 Others C.a. Civil Appeal No 53 of 2017](#) [2018 eKLR], the Court of Appeal stated at paragraph 18 that:

“Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, nec vi nec clam nec precario. See Jandu Vs. Kirplal & Another 1975 EA 225. In other words, a party relying on the doctrine bears the burden of demonstrating that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period. See this Court's decision in Wambugu -v- Njuguna 1983 KLR 173.”

The same Court held in the case of [Kasuve -v- Mwaani Investments Ltd & Others](#) 2004 KLR 184 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 the discontinuation of possession by the owner on his own volition – Wanje -v- Saikwa No 2 KLR 284. A title by adverse possession can be acquired under the [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.”

It is not in dispute that the suit land was first registered in the name of Otsieno Musundi, the Defendant's late father, on 8<sup>th</sup> November 1966. It is also common ground that the Defendants are the



legal representatives of the said Otsieno Musundi by virtue of a Grant of Letters of Administration issued to them in Busia Chief Magistrate's Court Succession Cause No 268 of 2020.

17. Although the Plaintiff did not in his supporting affidavit and statement filed herein state exactly when he entered the suit land, he stated in cross-examination by Mr Ashioya that he was born on the suit land in 1950 and in 1969, his father gave a portion of it to the then Busia County Council for the establishment of a market and stalls were built thereon. However, this late father was not compensated and took back the land which the Plaintiff now ploughs and the Defendants have never utilized it. The Plaintiff's brother Calistus Olando Otsieno (PW2) also confirmed that he was born on the suit land in 1959 and that their two brothers Chodo Otsieno and Kolombo Otsieno were buried thereon. And when he was cross-examined by Mr Otanga, the 2<sup>nd</sup> Defendant said:

“It is true that there is a road traversing the suit land. There is a lower part and an upper part. The Plaintiff is utilizing the upper part but he is doing so by force. He has been in occupation and possession of the land for a long time. I cannot remember how long.”

18. There is no doubt from the totality of the evidence that the Plaintiff, and before him, his father, have been in occupation and possession of the lower part of the suit land for a period well in excess of 12 years. And although the 2<sup>nd</sup> Defendant referred to part of the Plaintiff's evidence the various letters written to the Plaintiff with regard to the suit land by the Chief Marachi East Location as well as the Clerk To Council Busia County Council, those letters were not written by the Defendants or their late father Otsieno Musundi the registered proprietor of the suit land. The letter dated 9<sup>th</sup> April 1992 addressed to the Plaintiff's late father by the Chief Marachi East Location reads:

“RE: Elara Market

It has been reported that you have ploughed the whole of the above-named market compound claiming that it is your land.

It is noted that you filed a case in Court to evict the people with buildings on that market. I hope you are aware that the same case is still in Court pending the final decisions.

Meanwhile, I have been instructed to stop you from ploughing the market compound until further notice.

Therefore, please ensure that this instruction is strictly adhered to accordingly.

Chief

Marachi East Location”

In yet another letter addressed to the Defendants' late father on 28<sup>th</sup> May 2001 by the CLERK TO Busia County Council, it was stated thus:

“REF: Elara Market

It has been reported to this office that you are threatening to evict people with building at Elara Market.

According to the records held in this office, its established that it was you and others who applied for establishment of this market and it was on this strength that the Council approved the establishment of Elara Market. Whoever (sic) the matter is still in Court therefore, you have no authority to remove or destroy structures on this market.

I enclose the photocopy of your application you made to the council.

Yours faithfully



Pascal Ayieko

For Clerk To Council

Busia County Council.”

There is then the letter dated 15<sup>th</sup> January 1969 addressed to the District Market Officer by the Plaintiff's late father and others requesting to be allowed to set up a market at Elara. What is clear is that the letters addressed to the Plaintiff's deceased father Otsieno Ndeka were never written by the Defendants' deceased father Otsieno Musundi who was the registered proprietor of the suit land since 8<sup>th</sup> November 1966. They were written by the Chief and the Busia County Council on behalf of traders who were using the Elara Market and who were not the registered proprietors of the suit land. There is nothing to show that Otsieno Musundi or the Defendants took any action to assert their rights over the suit land from the time the Plaintiff and his family started using it. As was held in *Mtana Lewa -v- Kahindi Ngala Mwangandi* (2005 eKLR);

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title neglects to take action against such person in assertion of his title for a certain period. In Kenya, the period is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the license of the owner. It must be adequate in publicity and in extent to show that possession is adverse to the owner”. Emphasis mine.

The bottom line therefore is that even as the Plaintiffs late father took possession and occupation of the lower part of the suit land measuring 0.6 Hectares and utilized it as his own and the Plaintiffs also continued to do so, the person with the title thereto being Otsieno Musundi and thereafter his sons the Defendants herein only watched from a distance and took no action to assert their rights over the said land. Such assertion of rights by Otsieno Musundi the registered proprietor of the suit land or his successors the Defendants herein should have included instituting legal proceedings against the Plaintiff or his late father or making an effective entry onto the suit land – *Githu -v- Ndeete* 1984 KLR 776. None of the above was done. All that happened was that letters were being written to Mr Otieno (Othieno) Ndeka by persons who are not the registered proprietors of the suit land or his representatives. In any case, those letters “cannot be an effective assertion of right for the purpose of stopping the running of time under the *Limitation of Actions Act*” – *Githu -v- Ndeete* (supra). The fact is that save for the period in 1969 when Otsieno Ndeka voluntarily gave a portion of the suit land to the Busia County Council for the establishment of the Elara Market, he and his family have always remained in occupation and possession of the portion measuring 0.6 Hectares and have never been dispossessed of the same. On the other hand, Otsieno Musundi the registered proprietor has always been dispossessed of the portion which the Plaintiff now claims. As was held in *Wambugu -v- Njuguna* 1983 KLR 172:

“The *Limitation of Actions Act*, on adverse possession, contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”

Even as at the time of this trial, the Defendants remain dispossessed of the portion of the suit land which the Plaintiff claims in adverse possession. It is also instructive that although the 2<sup>nd</sup> Defendant



refers to a Court case which is also mentioned in the letters herein, no evidence was produced to show the existence of any Court case other than this.

19. Ultimately, therefore, and having considered all the evidence herein, I am satisfied that the Plaintiff has established his claim as required in law. I enter Judgment for him and make the following disposal orders:
1. The Plaintiff has acquired by way of adverse possession a portion of land measuring 0.60 Hectares out of the land parcel NO Marachi/Elikhari/1092.
  2. The interest of Otsieno Musundi in the said portion has been extinguished by operation of the law.
  3. Lawrence Oduya Otsieno the 2<sup>nd</sup> Defendant as Administrator to the Estate of the said Otsieno Musundi shall within thirty (30) days of the delivery of this judgment surrender to the Land Registrar Busia the original title deed to the land parcel NO Marachi/Elikhari/1092 and execute all the relevant documents on behalf of the 2<sup>nd</sup> Defendant to facilitate the registration of a portion measuring 0.60 Hectares out of the land parcel NO Marachi/Elikhari/1092 in the name of the Plaintiff to hold in trust for the family of Thomas Otsieno Ndeka.
  4. In default of (3) above, the Deputy Registrar shall execute all such documents on behalf of the 2<sup>nd</sup> Defendant and the Land Registrar shall proceed to cancel the said title and issue a title to the Plaintiff above notwithstanding the absence of the original title to the land parcel NO Marachi/Elikhari/1092.
  5. Thereafter, the Defendants, their agents, family, servants and all those claiming through them shall be perpetually barred from taking or using a portion of the land measuring 0.6 Hectares out of the land parcel NO Marachi/Elikhari/1092.
  6. Costs follow the event but in the circumstance of this case, the Court was informed on 16<sup>th</sup> July 2024 by Mr Ashioya that the 1<sup>st</sup> Defendant passed away on 8<sup>th</sup> May 2024. I direct that the parties meet their own costs rather than burdening one Administrator with costs.

**JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 22<sup>ND</sup> DAY OF NOVEMBER 2024.**

**BOAZ N. OLAO**

**JUDGE**

**22<sup>ND</sup> NOVEMBER 2024**

Right of Appeal

