



Ndakula v Nakhanga alias Nakhwanga (Environmental and Land Originating Summons 40 of 2020) [2025] KEELC 2959 (KLR) (28 March 2025) (Judgment)

Neutral citation: [2025] KEELC 2959 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 40 OF 2020**

BN OLAO, J

MARCH 28, 2025

BETWEEN

FELESTA AJIAMBO NDAKULA PLAINTIFF

AND

WILBERFOCE OUMA NAKHANGA ALIAS NAKHWANGA DEFENDANT

JUDGMENT

1. Felesta Ajiambo Ndakalu (the Plaintiff) moved to this Court vide her Originating Summons dated 28th August 2020 and filed on the same date. She impleaded Wilberforce Ouma Nakhanga Alias Nakhwanga (the Defendant) claiming to have acquired a portion measuring 1.1 Hectares out of the land parcel No Samia/Budongo/632 (the suit land) by way of adverse possession. She therefore sought a determination of the following questions:
 - a. Whether the Plaintiff has been in open, quiet and notorious possession of the land parcel measuring 1.1 Hectares out of the land parcel No Samia/Budongo/632 for a period exceeding 12 years.
 - b. Whether the Defendant's title to the land parcel No Samia/Budongo/632 became extinguished upon expiry of 12 years from the time the Plaintiff went into possession of the suit land in 1994.
 - c. Whether the Plaintiff has now acquired title to 1.1 Hectares out of the land parcel No Samia/Budongo/632 by way of adverse possession.
 - d. Whether the registration of the Defendant as owner of the land parcel No Samia/Budongo/632 should be cancelled and the Plaintiff be registered as the owner of 1.1 Hectares of the said land.
 - e. Who should pay costs.



2. Arising out of the above, the Plaintiff sought judgment against the Defendant in the following terms:
 1. That the Defendant's right over the land parcel No Samia/Budongo/632 was extinguished upon the expiry of 12 years from the time the Plaintiff came into possession from 1994.
 2. That the land parcel No Samia/Budongo/632 be sub-divided and the Plaintiff be registered as the owner of 1.1 Hectares of the said land.
 3. That the Defendants be ordered to execute all relevant statutory documents required of him to facilitate the transfer of 1.1 Hectares out of the land parcel No Samia/Budongo/632 and in default, the Deputy Registrar to do so in his place.
 4. The Defendant, his family members, servants, agents, and those claiming through him be permanently barred, restrained and/or enjoined from taking, using or in any way interfering with the Plaintiff's portion of the land parcel No Samia/Budongo/632.
 5. That costs of the case be addressed at the hearing.
3. In support of the Originating Summons, the Plaintiff filed an affidavit of even date in which she has averred, inter alia, that she is the daughter of OBWAKA NDAKULA OYIKA and NAMBUDIE TAKA both deceased. That her father OBWAKA NDAULA OYIKA who died in 1973 was buried on the suit land and she is the only remaining child among her siblings.
4. That she and her siblings have been in occupation of a portion of the suit land measuring 1.1 Hectares which is the only home they know. That she put up her house in 2007 after leaving her matrimonial home and in 2013, her son SAMUEL JONGA TABS also put up his home thereon where they have lived peacefully to date.
5. She has now learnt that the Defendant acquired the title to the suit land since 1994. That registration was done unlawfully and in disregard of her rights and she has been in possession thereof since 1994 now 26 years and so she has acquired the 1.1 Hectares by way of adverse possession. Annexed to the Originating Summons is a copy of the Register showing that the suit land has since 7th March 1994 been registered in the name of the Defendant. The first proprietor on 27th March 1980 was one CHRISTOPHER OUNDO.
6. The Plaintiff also filed a witness statement dated 6th August 2021 whose contents, mirror those of her supporting affidavit. She also filed the witness statement of her son SAMUEL JONGA TABS dated 6th August 2021. In the said statement SAMUEL JONGA (PW2) confirms that he is the Plaintiff's son. That the Plaintiff who is the only surviving sibling of her parents was born on the suit land which she later left and moved to her matrimonial home. However, in 2007 she left the matrimonial home and moved back to the suit land where she put up a house and settled. That he also later joined her in 2013 and put up his house thereon where they have lived peacefully.
7. The Defendant opposed the Originating Summons vide his replying affidavit dated 8th February 2021 in which he has averred, inter alia, that he is the registered proprietor of the suit land since 7th March 1994 and has charged the title thereto to Barclays Bank for a loan of Kshs.400,000. He is therefore entitled to all the rights and interests appurtenant thereto to the exclusion of any other person including the Defendant. That the suit land originally belonged to one CHRISTOPHER OUNDO from whom he purchased it in 1988 and in 2014, his late father HABIL NAKHWANGA asked him to assist the Plaintiff with a place to live after she became a widow and he agreed. The Plaintiff then put up a house on a small portion in 2016 which she occupied under licence from the Defendant. He denied that the Plaintiff has been in quiet, peaceful and notorious occupation of the suit land in



excess of 26 years adding that she was married in MUMIAS and PORT VICTORIA where she has a matrimonial home and in any event, she has only been in occupation of the suit land for 5 years under his license. That the Plaintiff's suit is therefore misconceived, an abuse of the Court process and should be dismissed with costs.

8. The plenary hearing commenced on 23rd March 2023 when the Plaintiff testified. She adopted as her testimony the contents of her affidavit and produced the Green Card to the suit land as her documentary evidence.
9. There was then a lull in the proceedings when the parties agreed to have their dispute sent to the ASSISTANT COUNTY COMMISSIONER for mediation. However, when the report was filed, it became obvious that the parties could not agree with the recommendation therein.
10. The hearing therefore continued on 24th April 2024 when the Plaintiff's son SAMUEL JONGA TABS (PW2) and the Defendant (DW1) testified. They both adopted as their testimony the contents of their statement dated 6th August and replying affidavit dated 8th February 2021 respectively.
11. Submissions were thereafter filed both by Mr J. V. Juma instructed by the firm of J. V. Juma & Company Advocates for the Plaintiff and by Ms Maloba instructed by the firm of Maloba & Company Advocates for the Defendant.
12. I have considered the evidence by the parties and the submissions by counsel.
13. The only issue for my determination is whether the Plaintiff has proved that she is entitled to an order that she has acquired the suit land by way of adverse possession.
14. Section 38(1) of the *Limitation of actions Act* allows a person to approach this Court seeking an order that he has acquired land registered in the name of another by way of adverse possession. It reads:

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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."

Section 7 of the same Act provides that:

- 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."

Section 13 of the same Act provides that the right to recover such land can only arise when the claimant is in possession of the land being claimed through adverse possession. Section 17 of the same Act provides that at the end of the limitation period of twelve (12) years, the title of the registered proprietor is extinguished. 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 land in favour of the adverse possessor at the expiry of (12) twelve years of the adverse possession – Benjamin Kamau & Others -v- Glaydys Njeri C.a. Civil Appeal No 213 of 1996.

15. In *Kasuve -v- Mwaani Investments Ltd & Others* 2004 1 KLR 184, the Court stated 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.”

16. Adverse possession is a fact to be observed upon the land itself – Maweu -v- Liu Ranching & Farming Co-operative Ltd 1985 KLR 430. It must not be by force, secrecy nor stealth. It should also be open, continuous, notorious and without the permission but with the knowledge of the owner. It must also be peaceful – see Kimani Ruchine -v- Swift Rutherford Co Ltd 1980 Klr 10, Robert Shume & Others -v- Samson Kazungu Kalama 2015 Eklr, Grace Wairimu Sorora -v- Chaka Ltd & Others 2017 Eklr And Also Mtana Lewa -v- Kahindi Ngala Mwangandi 2015 eKLR among others.
17. It is not in doubt that the Plaintiff is in occupation and utilization of a portion of the suit land. And although in paragraph (1) of the remedies which she sought she urged the Court to find that the Defendant’s “right over L.R No Samia/Budongo/632 got extinguished by adverse possession upon expiry of 12 years from the time the Applicant came into (Plaintiff) possession in 1994,” in paragraph (2) she pleaded that “L.R No Samia/Budongo/632 be sub-divided and the (Plaintiff) Applicant be registered as the owner of 1.1 Hectares of the said parcel of land.” Clearly, the Plaintiff is not claiming the whole of the suit land which, as per the Register filed herein, measure 1.1 Hectares. The Plaintiff did not specifically plead in her Originating Summons what portion of the suit land she occupies but since she has asked this Court to order that it be sub-divided, she must be claiming only a portion thereof. During cross-examination by Mr Shihemi on 23rd March 2023 she said:

“I have a home on ¼ acre which I utilize. I plough it and live there”.

Therefore, notwithstanding the deficiency in her pleadings, I am satisfied that the Plaintiff’s claim is not for the whole land but for ¼ acre only. The Plaintiff’s occupation of a portion of the suit land is indeed conceded by the Defendant who has pleaded in paragraph 8 of his replying affidavit thus:

“That the Plaintiff therefore started occupying my land under licence.”

Further, in paragraph 7 of his replying affidavit, the Defendant had averred thus:

“... That I agreed to my father’s plea and allowed the Plaintiff a small space in my land where she put up a house in the year 2016.”

If the Defendant permitted the Plaintiff to put up a house on the suit land in 2016, then her occupation of the suit land from that year was with his consent in which case she cannot claim the land by way of adverse possession from 2016. The occupation of the land by the person claiming it by way of adverse possession must be non-permissive i.e. without the permission of the true owner. The Plaintiff on her part says in paragraph 3 of her supporting affidavit that her father Obwaka Ndakula Oyika died in 1973 and was buried on the suit land. I did not hear the Defendant deny that allegation. She then states in paragraphs 7 and 8 as follows:

7: “That I am since the only remaining surviving child of the late Obwaka Ndakula Oyiko And Nabudie Taka.”

8: “That I had since the death of my late parents and siblings remained in possession of land parcel LR SAMIA/BUDONGO/632 1.1 Hectares and had been cultivating it in an effort not to lose it since it is the only known home.”

Although the Defendant claims that he allowed the Plaintiff to live on the suit land in 2016 at the request of his father Habil Nakhawanga, the Plaintiffs case is that infact she and her siblings were living on the suit land even by the time their late father Obwaka Ndakula Oyika Died in 1973. She then went



to her matrimonial home but returned to the suit land in 2007 when she put up a home and later invited her son after her husband had died. While there is evidence that upon her return to the suit land, she and the Defendant have had disputes over the suit land as conceded during cross-examination by MR SHIHEMI, it is clear to me that these disputes only started in 2007 when she returned to the suit land from her matrimonial home. That would mean that from 2007 to-date, her occupation of the suit land has not been peaceful. However, there is the uncontroverted evidence that she and her siblings were on the land when their father died and was buried thereon. Since she left the suit land in 1973 for her matrimonial home and returned in 2007 when disputes started with the Defendant, time for purposes of adverse possession cannot be computed between 1973 upto 2020 when this case was filed. That is because, her occupation thereof has not been peaceful.

18. However, it is obvious that the Plaintiff was born on the suit land where she lived with her parents and siblings until 1973 when she got married and moved to her matrimonial home. She did not tell us what her age was in 1973 but it is unlikely that she had not reached the age of majority. That would mean that by the time she moved to her matrimonial home in 1973, she and her family had been in open, peaceful and un-interrupted occupation and possession of a portion of the suit land for over twelve (12) years which entitles her to the orders sought in her Originating Summons. The Defendant was only registered as the proprietor of the suit land on 7th March 1994 when he purchased it from CHRISTOPHER OUNDO who was the first registered owner on 27th March 1980. There is no evidence to suggest that the said CHRISTOPHER OUNDO at any time evicted the plaintiff's family from the suit land. And it is now settled that a man who buys land without knowing who is in possession risks his title – TITUS KIGORO MUNYI -V- PETER MBURU KIMANI 2015 eKLR. Further it cannot be possible that the Defendant's late father HABIL NAKHWANGA had requested the Defendant to allow the Plaintiff to live on the land because she had become a widow. The Plaintiff denied that assertion and in any case, the said HABIL NAKHWANGA had no interest in the suit land so he could not have prevailed upon the Defendant to permit the Plaintiff to live on the suit land. The evidence is clear that the Plaintiff and her family have always lived on the suit land as a matter of right and that explains why her father was buried thereon without any objection. And as is also clear from the testimony of the Plaintiff, she still utilized the suit land even while in her matrimonial home and that is why she was able to make a peaceful re-entry in 2007 when she became a widow. Therefore, even as the Defendant purchased the suit land on 7th March 1994, it was always subject to the overriding interests of the Plaintiff.
19. Having considered all the evidence herein, I am satisfied that the Plaintiff has proved that she is entitled to a portion of land measuring $\frac{1}{4}$ acre out of the land parcel No Samia/Budongo/632 by way of adverse possession. Accordingly, I enter judgment for her against the Defendant in the following terms:
 1. The Plaintiff has acquired ownership of a portion measuring $\frac{1}{4}$ acre out of the land parcel No Samia/Budongo/632 by way of adverse possession and the Defendant's title thereto has been extinguished by operation of the law.
 2. The Defendant shall within 45 days of the delivery of this judgment surrender to the Land Registrar Busia the original title to the land parcel No Samia/Budongo/632 for cancellation and execute all the necessary documents to facilitate the sub-division thereof and registration of $\frac{1}{4}$ acre into the names of the Plaintiff and the remainder in the names of the Defendant.
 3. Parties shall meet their own costs of the sub-division and registration.
 4. In default of (2) above, the Land Registrar Busia shall proceed to cancel the register to the land parcel No Samia/Budongo/632 notwithstanding the absence of the original title deed



and the Deputy Registrar of this Court shall execute all the relevant documents on behalf of the Defendant.

5. The Defendant shall meet the Plaintiff's costs of the suit.

BOAZ N. OLAO

JUDGE

28TH MARCH 2025

JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 28TH DAY OF MARCH 2025 BY WAY OF ELECTRONIC MAIL AND WITH NOTICE TO THE PARTIES.

Right of Appeal

BOAZ N. OLAO

JUDGE

28TH MARCH 2025

