



Ochieng v Ouma (Sued on Behalf of the Estate of Jacob Wanzala Ogolla - Deceased) (Environment & Land Case E034 of 2021) [2023] KEELC 17701 (KLR) (31 January 2023) (Judgment)

Neutral citation: [2023] KEELC 17701 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E034 OF 2021**

BN OLAO, J

JANUARY 31, 2023

BETWEEN

PETER ONYANGO OCHIENG PLAINTIFF

AND

HANNINGTON OCHIENG OUMA (SUED ON BEHALF OF THE ESTATE OF JACOB WANZALA OGOLLA - DECEASED) DEFENDANT

JUDGMENT

1. The land parcel No Marachi/Kingandole/344 measuring 6.5 acres (the suit land), has since 8th November 1966 been registered in the name of Wanzala Ogolla also referred to in these proceedings as Jacob Wanzala Ogolla now deceased. He was the father to Peter Odhiambo Wanzala (Wanzala) and the grandfather to Hannington Ochieng Ouma (the defendant).
2. By a sale agreement dated 20th June 1986, Wanzala sold to Peter Onyango Ochieng (the plaintiff) a portion measuring 3 acres out of the suit land at a consideration of Kshs.7,000 per acre this making a total of Kshs.21,000. The sale agreement shows that the purchase price was fully paid.
3. By Originating summons dated 23rd June 2021 and filed herein on 24th June 2021, the plaintiff citing the provisions of Order 37 Rule 7 of the Civil Procedure Rules, Sections 37 and 38 of the Limitation of Actions Act and Section 28(1) of the Land Registration Act impleaded the defendant seeking a determination of the following issues with regard to the suit land:
 1. That the plaintiff be declared the absolute registered owner of 3 acres out of the land parcel No Marachi/Kingandole/344 measuring 3.5 Hectares 16.25 acres) as established on the ground and which he has been in actual possession with his family adversely, notoriously, openly and un-interrupted for a period of 35 years.
 2. That the defendant be ordered to execute all the documents of transfer in respect of the aforementioned 3 acres or thereabouts of land parcel No Marachi/Kingandole/344 as



established on the ground in favour of the plaintiff failing which the Deputy Registrar or an authorized officer of this Honourable Court be empowered to execute the same in place of the defendant and the Land Registrar Busia dispense with the production of the original title deed if the defendant fails to comply and/or produce the same.

3. That an injunction and inhibition do issue restraining the defendant, his agents and/or servants from interfering with or in any manner sub-dividing or transferring land parcel No Marachi/Kingandole/344 pending the hearing and final determination of this case.
4. That costs of this application be provided for.
4. Prayer NO 3 is of course clearly misplaced as this Court is not considering any interlocutory application at this stage. The basis of the plaintiff's case is that vide an agreement dated 20th June 1986, he purchased from Wanzala a portion of land measuring 3 acres out of the suit land at a consideration of Kshs.21,000 which was paid in full. At that time, the land was registered as it still is, in the name of Jacob Wanzala Ogolla. He took immediate possession of the 3 acres which had a boundary and which he reinforced by planting pine, Cyprus and eucalyptus trees among others as well as sugarcane, maize, cassava and other crops. He also established fishponds thereon. He and his family has therefore been in occupation of the entire 3 acres for over 35 years without interruption by anybody. However, nobody was willing to succeed the registered proprietor of the suit land Jacob Wanzala Ogolla which forced the plaintiff to file for citation. It was only then that the defendant came forward and filed another succession cause which led to the cancellation of the Grant previously issued to the plaintiff. It is the plaintiff's case that he has acquired the 3 acres out of the suit land by way of adverse possession hence this suit.
5. The plaintiff filed statements of his witnesses Boniventure Oduor and Fredrick Onyango although only the former was called to testify.
6. In his statement dated 15th July 2021, Boniventure Oduor (PW2) confirmed that the plaintiff is his village mate and that he (plaintiff) had informed him in 1987 that he had purchased 3 acres out of the suit land in 1986. That he is aware that the plaintiff and his family have been in occupation of the said land which has mature trees and whose boundary is clearly marked. That the plaintiff and his family have also been doing fish farming and planting seasonal crops like maize, cassava and nappier grass thereon and that the defendant and his family have never utilized the land. That Wanzala was the only child of Jacob Wanzala Ogolla and the defendant is a distant grandson.
7. The plaintiff filed the following documents in support of his case:
 1. Sale agreement dated 20th June 1986.
 2. Copy of the Register to the land parcel No Marachi Kingandole/344.
 3. Citation to accept or refuse letters of Administration intestate vide Busia Chief Magistrate's Court Misc Application No 57 of 2012.
 4. Affidavit in support of citation.
 5. Citation order.
 6. Petition for Letters of Administration in Busia CM P & A No 640 of 2018.
 7. Affidavit in support of application for Letters of Administration in Busia CM P&A NO 640 of 2018.
 8. Grant of Letters of Administration in Busia CM P&A No 640 of 2018.



9. Grant of Letters of Administration issued to the plaintiff in Busia CM P&A NO 640 of 2018.
 10. Grant of Letters of Administration issued to the defendant in Busia CM P&A NO 640 of 2018.
 11. Photographs of the suit land.
8. The defendant opposed the Originating Summons by filing a replying affidavit dated 4th July 2022 as well as a statement of even date. He also filed statements of his witnesses Silvester Ouma Akello and Stephen Odhiambo Odewo both dated 4th July 2022 and the list of documents of even date.
 9. In his replying affidavit and statement, he confirmed that he is the Administrator to the Estate of his late grandfather Jacob Wanzala Ogollabut added that the plaintiff did not buy the 3 acres of land since the vendor was not the registered proprietor of the suit land. That the plaintiff has no case since he has not described the suit land properly by referring to it as measuring 16.25 acres yet it is 6.5 acres. That in any event, the plaintiff's claim is statute barred and there are Succession proceedings in Cause No308 of 2018. That the plaintiff has never stepped onto the suit land which has the defendant's homestead with over 8 homes and is his ancestral land.
 10. In his statement dated 4th July Silvester Ouma Akello (DW3) confirms that the defendant is his neighbour and that the plaintiff has never stepped onto the suit land nor cultivated or done any fish farming activities thereon. That the plaintiff's claim to have purchased the 3 acres is unfounded as that issue was never raised during the burial of Wanzala and the plaintiff has his own land at Bumwaya A. where he resides with his family.
 11. In his statement also dated 4th July 2022 Stephen Odhiambo Odewo (DW2) also confirms that the defendant is his neighbour and that the plaintiff has never cultivated the suit land for 35 years as claimed. That the entire suit land is ancestral land occupied by the defendant and the plaintiff's claim thereto was handled by the local Administration and dismissed.
 12. The defendant annexed the following documents to his replying affidavit.
 1. Copy of Register to the land parcel No Marachi/Kingandole/344.
 2. Sale agreement dated 20th June 1986.
 3. Grant of Letters of Administration issued to the defendant in respect to the Estate of Jacob Wanzala Ogollain BUSIA CMCC Succession Cause No308 of 2018 consolidated with No640 of 2018.
 13. The plenary hearing commenced before Omollo J on 14th July 2022 when the plaintiff testified and adopted as his evidence the supporting affidavit filed herein. He also produced the list of documents as part of his evidence.
 14. The defendant testified before me on 11th October 2022. He too adopted as his testimony the contents of his replying affidavit and statement filed herein. His witnesses Stephen Odhiambo Odewo (DW2) and Silvester Ouma Akello (DW3) also adopted their statements as their evidence. The defendant produced the list of documents dated 4th July 2022 as his documentary evidence.
 15. Submissions were thereafter filed by Mr Bagonko instructed by the firm of Obwoye Onsongo & Company Advocates for the plaintiff while the defendant filed his in person.
 16. I have considered the evidence by both parties and the submissions filed. It is common ground that the defendant is the Administrator to the Estate of Jacob Wanzala Ogollaaka Wanzala Ogolla the registered



proprietor of the suit land. It is also not in dispute that there was a sale agreement executed on 20th June 1980 between the plaintiff and Wanzala the son of the registered proprietor of the suit land by which the plaintiff purchased 3 acres at a consideration of Kshs.21,000. The defendant's case however is that in fact Wanzala had no capacity to enter into that transaction which is null and void. He adds further that this suit is statute barred and the plaintiff has wrongly described the suit land as measuring 16.25 acres when it is only 6.5 acres.

17. I shall start with the jurisdictional issues raised by the defendant because jurisdiction is everything and without it, this Court must down its tools – *The Owners of Motor Vessel “Lillian S” V Caltex Oil Kenya Ltd 1989 KLR 1.*

18. On the issue of the plaintiff's suit being statute barred, the plaintiff has averred in paragraph 5 of his replying affidavit that:

5. “That it is not true that the Applicant has since occupied the said portion as claimed and that the suit is time barred in respect to *Limitation of Actions Act.*”

No doubt the defendant had in mind Section 7 of the said Act which reads:

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.”

The plaintiff's claim is based on adverse possession. He says he went into occupation and possession of 3 acres out of the suit and in 1986 and therefore, the defendant's right to that portion of land has been extinguished. The plaintiff is not seeking to enforce the sale agreement dated 20th June 1986. Therefore, Section 7 of the *Limitation of Actions Act* actually works in favour of the plaintiff and against the defendant. If the plaintiff is able to prove that he has occupied and been in possession of the said 3 acres for over 12 years peacefully, openly and without interruption, then the Court must grant him the orders sought. And as to the issue that Wanzala had no capacity to execute the sale agreement, the plaintiff's claim as I have already stated above is not aimed at enforcing the said agreement. Finally, on the issue that the plaintiff has wrongly described the land as measuring 16.25 acres when it is 6.5 acres, that is mere typing error which does not go to the jurisdiction of this court. The copy of Register of the suit land as produced by both parties shows clearly that it measures 6.5 acres. No prejudice has been caused by that error.

19. The plaintiff's claim is based on adverse possession. Section 38(1) of the *Limitation of Actions Act* provides that:

“38(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 settled that the combined effect of the relevant provisions of Sections 7, 13 and 17 of the *Limitation of Actions Act* is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of the adverse possession. – *Benjamin Kamau & Others v Gladys Njeri C.A. Civil Appeal No 2136 of 1996.*

20. The suit land is registered in the name of a deceased person and not the defendant. However, it is clear from the case of *Karuntimi Raiji V M'makinya M'itunga 2013 eKLR* that a claim for adverse possession can be made against the Estate of a deceased person. In this case, the defendant is the Administrator



to the Estate of Jacob Wanjala Ogolla the registered proprietor of the suit land and therefore this claim has been properly filed against him.

21. In *Kasuve v Mwaani Investments Ltd & Others* 2004 1 KLR 184, the Court of Appeal set out what a party claiming land by way of adverse possession must prove. It said:

“And in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of 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 on his own volition.”

Adverse possession is a fact to be observed upon the land itself – *Maweu v Liu Ranching & Farming Co-operative Society Ltd* 1985 KLR 430. The possession must not be by force nor secretly and it must be without the permission of the owner i.e nec vi, nec clam, nec precario – *Kimani Ruchine v Swift Rutherford Co. Ltd* 1980 KLR 10. It must also be open, continuous, peaceful and notorious and with the know but without the permission of the owner – *Robert Shume & Others v Samson Kazungu Kalama* 2015 eKLR. See also *Grace Wairimu Sorora v Chaka Ltd & Others* 2017 eKLR.

22. In a recent exposition on the doctrine of adverse possession, the Court of Appeal stated as follows in the case of *Mtana Lewa v Kahindi Ngala Mwangandi C.A. Civil Appeal No 56 of 2014* [2015 eKLR]:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period. In Kenya, it is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisite being that the possession of the adverse possessor is neither by force or stealthy or under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that the possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the *Limitation of actions act* which is in these terms”

In resisting the plaintiff’s claim, the defendant has stated that the plaintiff has never occupied the suit land. That it is the defendant’s family which occupies the suit land where they have 8 homes. The defendant’s witness even added that the plaintiff lives on another parcel of land at BUMWAYA A. However, the plaintiff’s claim is not premised on the fact that he lives on the land. His claim, as is clear from paragraphs 5, 6, 7 and 8 of his supporting affidavit is that he has planted trees and crops on the 3 acres. This is what he has deposed in those paragraphs:

5. “That I took possession of the three acres immediately as the seller had planted for me a boundary which I reinforced by planting trees like pine, cyprus and eucalyptus among others.”

6. “That I and my family took occupation and possession by planting sugarcane, trees, maize, cassava and other crops to-date.”

7. “That we also established fish ponds thereon.”

8. “That we have also planted trees of many types which are mature for harvesting timber.”



The plaintiff produced photograph showing trees and maize on the land. When he was cross-examined by Mr Onsongo, the defendant did not deny that the trees and maize are on the suit land. However, he said they were planted by his grandfather Jacob Wanzala Ogolla. This is what he said:

“I have seen the photographs of the land. The land belongs to my late grandfather. The trees were planted by my father in 2006. I can see maize. It was also planted by my father in 2006. The land has no boundary. I do not know about the maize at all.”

The defendant was clearly being dishonest. It is not possible that maize planted in 2006 could still be germinating 16 years later when he was being cross-examined on 11th October 2022.

23. His witness Stephen Odhiambo Odewo (DW2) was equally dishonest. When he was cross-examined, he said:

“I know the plaintiff in this case. He has never occupied or used the land in question. It is a bush. It only has bush which grows naturally. Apart from the bush there is nothing else on the land.”

On his part, Silvester Ouma Akelo (DW3) said:

“It is not true that the plaintiff cultivates the 3 acres. The land is a bush. It is ancestral land.”

In their zeal to give false testimony, the defendant’s own witnesses pretended that they could not see the maize crop in the photographs yet the defendant himself saw it. This Court is satisfied that the trees and maize on the suit land were planted by the plaintiff.

24. The defendant’s witness testified that the plaintiff does not live on the suit land. As already stated above, the plaintiff’s case is not that he lives on the suit land. His case is that he has cultivated it by growing trees, maize and other crops thereon. What is crucial in adverse possession is the dispossession of the proprietor of the land in dispute by the adverse possessor. Therefore cultivation of the 3 acres and fencing, as happened in this case, is sufficient proof of dispossession. It is not a must that the claimant be living on the land in dispute. In *Gatimu Kinguru v Muya Gathangi* 1970 – 80 1 KLR 253, MadanJ (as he then was) said:

“The defendant did acts which were inconsistent with the enjoyment of the soil by the person entitled i.e. the plaintiff for purposes for which he had a right to use it. Planting a boundary of tufts of napier grass is the best evidence of adverse possession like fencing off and cultivation of land even without fencing off has been held sufficient to prove adverse possession.” Emphasis mine.

The above was approved in *Wanje v Saikwa* 1984 KLR 284. It is therefore enough that the plaintiff in this case not only took possession of the 3 acres from Jacob Wanzala Ogolla in 1986 and fenced it but further, that he has continued to do so by planting trees and crops thereon thus dispossessing both Wanzala and the defendant.

25. Of significance is the fact that the defendant made no attempt to produce any photographs of the 8 homes on the suit land. But even if such homes were there, it must be obvious now that they can only be on another portion of the suit land. This is because the plaintiff is not claiming the whole land. His claim is restricted to the 3 acres only.



26. The defendant has further poured cold water on the sale agreement executed on 20th June 1986 between the plaintiff and Jacob Wanzala Ogolla describing it as void for want of the consent for the Land Control Board. This is how he has submitted in paragraph 4 of his submissions:

“I further my Lord submit that the said transaction became void since there was no consent of the Land Control Board after 6 months of the transaction whereby in this case they could engage and or tried to persuade the registered father to the vendor to appear to the Board if the transaction was valid and true. I submit that the Applicant did not and has not in this instance acquired purchaser interest on the land.”

As I stated earlier, the plaintiff herein is not seeking to enforce the agreement dated 20th June 1986. And as was held in *Public Trustee V Wanduru* 1984 KLR 314, the provisions of the *Land Control Act* have no application where the claim to title of agricultural land is by operation of law such as by adverse possession. As to whether or not Wanzala had the capacity to sell the 3 acres to the plaintiff, in *Mwangi & Another v Mwangi* 1986 KLR 328, it was held that the right of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights. In *PETER Mbiri Michuki v Samuel Mugo Michuki C.A. Civil Appeal No 22 of 2013* [2014 eKLR]. The court said that:

“Section 18 of the *Limitation of Actions Act* provides that subject to Section 20(1) of the *Limitation of Actions Act*, the Act applies to equitable interests in land and accordingly a right to action to recover land..... accrues to a person entitled to possession to such an equitable interest in the like manner and circumstances and on the same date as it would accrue if his interest were a legal estate in the land ...”

27. It must also be remembered that when Wanzala entered into the sale agreement with the plaintiff, received the whole of the purchase price and allowed the plaintiff to take possession of the 3 acres, he became a trustee of the plaintiff with respect to that portion of the suit land. It would therefore be inequitable and unjust enrichment for the defendant to claim that the plaintiff has no right in the said 3 acres. And even though a trust was not pleaded in this case, taking into account all the above circumstances, I would not hesitate in imposing a constructive trust in favour of the plaintiff. Such a trust, as was held in *Twalib Hatayan Twalib Hatayan & Anor V Said Saggah Ahmed Al-heidy & Others* [2015] eKLR, will be “imposed by the Court” where one party wants to take advantage of his position for his own benefit.
28. It is clear from the evidence that the defendant has always been aware about the occupation and possession of the 3 acres by the plaintiff. He has seen the trees and maize grown by the plaintiff but has never taken any action to evict him from the land even after he obtained the Grant of Letters of Administration in respect of the Estate of Jacob Wanzala Ogolla on 16th September 2019. It is also instructive that from 20th June 1986 when the sale agreement was executed up to the time when this suit was filed on 24th June 2021, Wanzala did not take any action to assert any right over the suit property. There is no evidence of any force or stealth in the manner in which the plaintiff has continued to occupy the 3 acres of land. His occupation and possession has been open, peaceful un-interrupted and with the knowledge of both Wanzala and the defendant. The law also allows the plaintiff to claim only a portion of the suit land as he has done in this case – *Githu V Ndeete* 1984 KLR 776. And as the plaintiff has already informed the Court, the 3 acres which he purchased on 20th June 1986 had its boundary demarcated by Jacob Wanzala Ogolla and he also reinforced it after taking possession and occupation of the said land. A purchaser in possession of land after having paid the purchase price is a person in whose favour the period of limitation can run - *Public Trustee v Wanduru* (supra). In this



case, the time for purposes of adverse possession started running on 20th June 1986. That means that by the time this suit was filed on 24th June 2021, the plaintiff had been in occupation and possession of the 3 acres for 35 years well beyond the statutory period of 12 years required in law for him to obtain the orders sought.

29. Having considered the evidence by both parties, I am satisfied that the plaintiff has proved his case. He is entitled to orders that he has acquired 3 acres out of the suit land by way of adverse possession.
30. The up-shot of all the above is that there shall be judgment for the plaintiff in the following terms:
 1. The plaintiff has acquired 3 acres out of the land parcel No Marachi/Kingandole/344 by way of adverse possession.
 2. The defendant shall within 30 days of this judgment surrender to the Land Registrar Busia the original title deed to the land parcel No Marachi/Kingandole/344 for cancellation and execute all transfer documents.
 3. The Land Registrar and County Surveyor shall thereafter survey and register a portion of the land parcel No Marachi/Kingandole/344 measuring 3 acres in the name of the plaintiff and the remainder in the name of the defendant to hold in trust for himself and his family.
 4. The 3 acres shall as much as possible include the portion which the plaintiff occupies and on which he has planted trees and other crops.
 5. In default of (2) above, the Land Registrar Busia shall dispense with the production of the original title deed for the land parcel Marachi/Kingandole/344 and the Deputy Registrar shall be at liberty to execute the necessary transfer documents to vest the portion measuring 3 acres into the name of the plaintiff.
 6. The parties shall each bear the costs of the survey and registration of their respective parcels in their names.
 7. The defendant shall meet the plaintiff's costs of this suit.

BOAZ N. OLAO

JUDGE

31ST JANUARY 2023

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT ON THIS 31ST DAY OF JANUARY 2023.

Mr. Onsongo for plaintiff present

Defendant present in person.

Court Assistant: Anyasi/Ajwang'

Right of Appeal

BOAZ N. OLAO

JUDGE

31ST JANUARY 2023

