



**Karani & another (Both suing as legal representatives of the Estate of the Late Abastiano Karani Mekenye) v Khasenye (Environment & Land Case E016 of 2021) [2023] KEELC 365 (KLR) (24 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 365 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE E016 OF 2021**

**BN OLAO, J  
JANUARY 24, 2023**

**BETWEEN**

**PATRICK SANYA KARANI ..... 1<sup>ST</sup> APPLICANT**

**ALEX MAINYA KARANI ..... 2<sup>ND</sup> APPLICANT**

**BOTH SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE  
ABASTIANO KARANI MEKENYE**

**AND**

**BONFACE MUGENI KHASENYE ..... RESPONDENT**

**JUDGMENT**

1. Patrick Sanya Karani and Alex Mainya Karani (the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs respectively) are sons to the late Abastiano Karani Makenge (the deceased) and also hold Limited Grant of Letters of Administration issued in Busia Chief Magistrate's Court Succession Cause No E141 of 2021 authorizing them to file this suit.
2. Bonface Mugeni Khasenye (the defendant) is the registered proprietor of the land parcel No Samia Bujwanga/1533 (the suit land). He became the registered owner thereof on September 7, 2020 and holds the title deed thereto following succession proceedings in Busia Chief Magistrate's Succession Cause No 343 of 2016. The first registered proprietor on May 26, 1992 was Christopher Onyango Musamia as per the register.
3. The plaintiffs moved to this court on October 15, 2021 through their Originating Summons of even date in which they framed the following issues for determination:
  1. Whether the plaintiffs have been in open, quiet and notorious possession of all that parcel of land No Samia/Bujwanga/1533.



2. Whether the defendant's title to the suit land became extinguished upon expiry of 12 years from the time the plaintiffs went into possession of the suit land.
3. Whether the plaintiffs have now acquired title to the suit land by way of adverse possession.
4. Whether the registration of the defendant as owner of the whole land parcel No Samia/Bujwanga/1533 should be cancelled and the said title transferred to the plaintiffs.

Arising out of the above, the plaintiffs sought judgment against the defendants in the following terms:

- a. That the defendant's right over the land parcel No Samia/Bujwanga/1533 got extinguished by adverse possession upon the expiry of 12 years from the time the plaintiffs came into possession in the year 1978.
  - b. That the land parcel No Samia/Bujwanga/1533 be transferred to the plaintiffs.
  - c. That the defendant be ordered to execute all the relevant statutory documents required to facilitate the transfer of the land parcel No Samia/Bujwanga/1533 to the plaintiffs and in default the Deputy Registrar of this Court to execute the same in place of the defendants.
4. In support of their claim to the suit land, the plaintiffs filed separate supporting affidavits in which they averred, inter alia, that the suit land was purchased by the deceased from the defendant's father one Khasenye Musamia vide land sale agreements executed on October 5, 1978 and November 2, 1978. That the deceased immediately took possession of the suit land where the plaintiffs and the other members of their family were born and have resided peacefully after the defendant's father Khasenye Musamia moved to another parcel of land where the defendant resides. However, despite their peaceful occupation and possession of the suit land, neither the deceased nor the plaintiffs have obtained title thereto and upon conducting a search, they discovered that the suit land had been registered in the name of the defendant on September 7, 2020 following succession proceedings in Busia Chief Magistrate's Court Succession Cause No 343 of 2016 where the defendant conceded the fact that the plaintiffs were beneficiaries. That the defendant has never stepped into the suit land which the plaintiffs have continued to occupy and till for over 30 years hence this suit.
5. The plaintiffs filed the following documents in support of their case:
1. Copy of official certificate of search for the land parcel No Samia/Bujwanga/1533.
  2. Copies of the plaintiffs identity cards.
  3. Copy of the register of the land parcel No Samia/Bujwanga/1533.
  4. Copy of the death certificate of Abastiano Karani Makenye.
  5. Copy of Limited Grant Ad Litem issued to the plaintiffs.
  6. Copies of sale of land agreements.

The record shows that the defendant was served with the Originating Summons, affidavits in support thereof as well as other annexures on October 27, 2021 at Rakite by one Hilary Okanga Ongwete a court process server and acknowledged receipt by signing. However, the defendant did not file any replying affidavit in response to the Originating Summons and neither did he attend Court on the various dates on which this suit was listed for mention or hearing though served as directed by Omollo J.

6. On December 8, 2022, the suit came up for hearing and though served, the defendant did not attend court.



7. The 2<sup>nd</sup> plaintiff testified and adopted as his testimony, and that of his brother the 1<sup>st</sup> plaintiff who was away un-well, his supporting affidavit as well as the documents filed.
8. I have considered the evidence of the 2<sup>nd</sup> plaintiff as contained in his supporting affidavit and the documentary evidence filed herein.
9. It is the plaintiffs' case that they are entitled to be registered as the proprietors of the suit land by way of adverse possession.
10. Section 38(1) of the [Limitation of Actions Act](#) provides that:

"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 [Limitations of Actions Act](#) is to extinguish the title of the registered proprietor of land in favour of an adverse possessor at the expiry of 12 years of the adverse possession – *Benjamin Kamau & Others -V- Gladys Njeri* CA Civil Appeal No 213 of 1996. And in *Kasuve -v- Mwaani Investments Ltd & Others* 2004 1 KLR 184, the Court of Appeal stated thus:

“And in order to be entitled to 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.”

The possession must also be without force, secrecy or evasion (*nec vi nec clam nec precario*) – *Kimani Ruchine & Another -v- Swift Rutherford Company Ltd* 1980 KLR 10. It must also be peaceful – *Grace Wairimu Soroma -v- Chaka Ltd & Others* 2017 eKLR.

11. The plaintiffs' testimony, and which has not been rebutted, is that the deceased purchased the suit land from the defendant's father in 1978 and took immediate occupation and possession thereof. That the plaintiffs were born on the suit land where they continue to live peacefully to-date a period of over 30 years which is well in excess of the 12 years statutory period provided for in law for one to acquire land by way of adverse possession. Indeed it is now clear that a purchaser in occupation and possession of land after having paid the full purchase price is a person in whole favour the period of limitation can run – *Public Trustee -v- Wanduru* 1984 KLR 314. That means that the deceased having entered the suit land in 1978 after paying the purchase price, the title of Khasenge Musamia, also known as Christopher Onyango Musamia, the then registered proprietor of the suit land had been extinguished by operation of the law 12 years after the execution of the sale agreement i.e. 1990. The defendant was registered as the proprietor of the suit land on September 7, 2020 just a year before this suit was filed. However, as was held in *Githu -v- Ndete* 1984 KLR 776:

“The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession.”

Therefore, when the defendant acquired proprietorship of the suit land on September 7, 2020, he did so merely as a trustee holding it on behalf of the plaintiffs who were born there on March 2, 1986



and 1969 as per the copies of their identity cards which were produced as part of their documentary evidence.

12. Having considered the evidence by the plaintiffs, un-controverted as it, I am satisfied that they have proved their case as required in law.
13. Ultimately therefore, there shall be judgment for the plaintiffs as against the defendant in the following terms:
  1. The plaintiffs have acquired ownership of the land parcel No Samia/Bujwanga/1533 by way of adverse possession and the defendant's rights therein have been extinguished.
  2. The defendant shall within 30 days from today surrender the original title deed to the land parcel No Samia/Bujwanga/1533 to the Land Registrar Busia for cancellation and issuance of a title thereto in the joint names of the plaintiffs.
  3. The defendant shall also within 30 days from today execute all the necessary documents to facilitate the registration of the land parcel No Samia/Bujwanga/1533 in the joint names of the plaintiffs.
  4. In default of (3) above, the Deputy Registrar of this Court shall be at liberty to execute all the necessary documents to facilitate the registration of the land parcel No Samia/Bujwanga/1533 in the joint names of the plaintiffs.
  5. No order as to costs.

**BOAZ N. OLAO**

**JUDGE**

**24<sup>TH</sup> JANUARY 2023**

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUSIA ON THIS 24<sup>TH</sup> DAY OF JANUARY 2023.**

1<sup>st</sup> Plaintiff – Absent

2<sup>nd</sup> Plaintiff – Present

Defendant in person served – Absent

CA: Anyasi/Ajwang'

Right of Appeal

**BOAZ N. OLAO**

**JUDGE**

**24<sup>TH</sup> JANUARY 2023**

