



**Amisi (Suing on behalf of the Estate of Jotham Ngunza Amisi) v Ouko & 2 others (Being administrators of the Estate of the Late Jason Atinda Ouko) (Environment and Land Case Civil Suit 418 of 2018) [2023] KEELC 172 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 172 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 418 OF 2018  
OA ANGOTE, J  
JANUARY 19, 2023**

**BETWEEN**

**FREDRICK AYIGO AMISI (SUING ON BEHALF OF THE ESTATE OF JOTHAM NGUNZA AMISI) ..... APPLICANT**

**AND**

**AARON TAFARI OUKO ..... 1<sup>ST</sup> RESPONDENT**

**ROSELYN DOLA OUKO ..... 2<sup>ND</sup> RESPONDENT**

**DAVID SCOTT ONGOSI ..... 3<sup>RD</sup> RESPONDENT**

**BEING ADMINISTRATORS OF THE ESTATE OF THE LATE JASON ATINDA OUKO**

**JUDGMENT**

1. In the Amended Originating Summons dated May 20, 2019, the Applicant sought for determination of the following questions:
  - a. Whether the said Jotham Ngunza Amisi took possession from Jason Atinda Ouko (deceased) two and a half acres carved from land known as Title Number 3569/6 IR No 23229 in the year 1983 and if so, whether the said possession entitles him to adverse possession hence the said two and a half acres should be transferred to his name;
  - b. Whether Jotham Ngunza Amisi took possession of the said two and a half acres in 1983 and had factual uninterrupted possession for a period of over 29 years;
  - c. Whether by virtue of Jotham Ngunza Amisi's occupation and possession of the said portion of the said parcel has entitled him by adverse possession to two and a half acres carved out of



the piece of land known as Title Number 3569/6 IR No 23229 from the estate of Jason Ouko Atinda;

- d. Whether the late Jason Atinda Ouko did transfer the said two and a half acres to the Applicant;
  - e. Whether a vesting order should be issued in favor of the Applicant that the two and a half acres the Applicant has all along occupied be transferred to the Applicant;
  - f. Whether the declaration should be issued that the Principal Registrar signs the transfer papers in respect of the two and a half acres be transferred to the Applicant;
  - g. Whether the Respondents, their agents/ servants and/or workmen or whoever claiming under or through them of the estate of Jason Atinda Ouko should be restrained by way of permanent injunction from evicting, dispossessing the Applicant of the building and/or erecting any structures whatsoever on a portion measuring two and a half acres or thereabouts which the Applicant occupies being part of land known as Title Number 3569/6 IR No 23229 or otherwise interfering with the said piece of land or any portion thereof in any manner whatsoever and not to prevent the Applicant from its use and quiet enjoyment.
  - h. Whether the Applicant is entitled to be compensated by the Respondents jointly and severally for interfering with the Applicant's quiet possession and causing the Applicant and his family anguish and emotional distress.
  - i. Whether the Applicant is entitled to costs of this suit.
2. The Originating Summons is supported by an affidavit sworn by the Applicant who deponed that the deceased, Jotham Ngunza Amisi, entered into a sale agreement with the deceased, Jason Atinda Ouko, in 1983 through which he purchased two and a half acres out of Title Number 3569/6 IR No 23229.
  3. The Applicant deponed that the deceased paid the full purchase price to the vendor in accordance with the Sale Agreement and thereafter put up a residential home which him and his family have occupied uninterrupted for over 29 years. However, it was deponed, the late Jason Atinda Ouko passed away before he could sign the transfer forms and settle the issue of the caveats that had been registered against the title.
  4. It was deponed by the Applicant that on September 8, 2011, the deceased received notices from the Respondents' advocates asking him to regularize his position failing which him and the family would face distress and eviction and that in compliance, the deceased forwarded various documents to the Respondents in support of ownership of the land.
  5. It is the Applicant's case that to date, they have not heard from the Respondents and that they are apprehensive that the Respondents may make good on their threats. In support of his depositions, the Applicant annexed on the affidavit the sale agreement between the late Mr Jotham Amisi and the late Mr Jason Atinda dated December 10, 1983 and receipts as evidence of payment of the purchase price.
  6. The Respondents opposed the suit vide a Replying Affidavit sworn by Aaron Tafari Ouko, the 2<sup>nd</sup> Respondent, on June 25, 2019, who deponed that the late Jason Atinda was and still the registered owner of LR No 3589/6, measuring approximately 87.5 acres, which he acquired in 1969.
  7. The 2<sup>nd</sup> Respondent deponed that there was a sale agreement to sale two and a half acres to the late Jotham Amisi for a consideration of Kshs 230,000; that the purchase price was to be paid as follows: a down payment of Kshs 10,000 at the signing of the agreement; payment of Kshs 5,000 every three months beginning March 1984; and the last balance of Kshs 40,000 to be paid in lump sum when subdivision is finalized and title made available.



8. It was deponed by the 2<sup>nd</sup> Respondent that the other terms of the sale agreement were that the purchaser would pay any amount that was available at any time, and that the schedule of payment were to be made within a period of ten years.
9. The 2<sup>nd</sup> Respondent deponed that Jotham Amisi neglected to comply with the terms of the agreement and only remitted Kshs 51,000, with the last payment being made in 1990; that all the same, the Applicant's family continued to enjoy the property unabated and that before the death of Jason Atinda, he constantly prodded the Applicant to remit payments but there was no compliance.
10. It is the Respondents' case that the Applicant has sought to obtain orders of specific performance disguised as adverse possession against the Respondent. The Certificate of Title IR 23229 in the name of Jason Atinda Ouko was annexed on the Replying Affidavit as proof of title.
11. The Applicant swore a Supplementary Affidavit in response dated November 11, 2019, in which he deponed that pursuant to the agreement dated December 10, 1983, the estate of the late Mr Jotham Amisi fulfilled its obligations but that of the late Mr Jason Atinda has failed to fulfill its obligations.
12. He averred that the late Mr Jason Atinda had outstanding arrears at the City County of Nairobi which frustrated the performance of the sale agreement as the City County refused to approve the subdivision of LR No 3589/6 until payment of arrears and that the late Mr Jotham Amisi and the late Mr Jason Atinda entered into an agreement that Mr Amisi would pay Kshs 150,000 to City Council of Nairobi to offset the rent for LR No 3589/6 which was to be auctioned.
13. It was deponed by the Applicant that despite the late Jotham Amisi paying the full purchase price, subdivision is yet to be conducted and the title deed has not been made available; that the allegation that the late Jason Atinda kept prodding them for the balance was false as he was aware the purchase price was paid in full, which he informed his lawyer at the time, Mr Fackson Kagwe and that the late Mr Atinda did not at any time after 1992 seek additional payment from Mr Amisi.
14. The Respondents responded vide a Further Affidavit dated August 27, 2020 in which they contended that save for the sale agreement, there was no other agreement executed by the parties in relation to the suit property, and that the sale agreement has never been varied to provide for a different mode of payment of the purchase price as alleged.
15. The Respondents deponed that after execution of the sale agreement in 1983, the Applicant immediately took possession of the suit property although the full purchase price had not been paid, and that the Applicant was obligated to pay his portion of land rates and rents that accrued in respect of the suit property.

### **Hearing and Evidence**

16. The Applicant, PW1, testified that the suit property was purchased by his parents; that the receipts he filed show that they paid a total of Kshs 119,000 for the land that the last payment was made in 1992. PW1 informed the court that there is no supplementary agreement to the sale agreement dated September 10, 1983, and that he did not have a receipt of Kshs 150,000 from the late Mr Atinda Ouko.
17. DW1, Aaron Tafari Ouko, testified that he is a co-administrator of the estate of the late Jason Atinda Ouko; that he was aware that the late Jotham Ngunza lived on the portion of LR 3859/6 and that while the late Mr Amisi was to pay Kshs 230,000, according to the Applicant's own admission, they only paid Kshs 51,000 to the bank.



18. DW1 stated that LR 3589/6 has never been subdivided to date; that some people were holding the land without paying rates for the land and that the payment of Kshs 150,000 by the Applicant was not part of the purchase price but a fulfillment of the Applicant's duty to pay his rates.

### **The Submissions**

19. Through submissions filed on December 16, 2021, the Applicant submitted that the Respondents never issued them with a rates clearance certificate indicating that they had settled all the rates payable. They urged that the property was not subdivided owing to the failure of the Defendant to pay full rates owed to the Nairobi County Government.
20. It was the Applicant's submission that the rent payable for Title No 3589/6 from the title produced by the Respondent was Kshs 123/- in 1919 and that it makes no sense how the Applicant's rates would stand at 150,000/- in 1995 in respect of two and a half acres only. Therefore, it was submitted, the Kshs 150,000 must have been part of off-setting debts over the whole parcel being Title No 3589/6.
21. It was submitted by the Applicant that the Applicant fully paid the purchase price although the agreement stipulated that Kshs 40,000/- would be paid after sub-division which the Respondents have not done to date.
22. They urged that since February 12, 1992 when the late Jotham Amisi paid the final balance under the agreement, the late Jason Atinda never wrote a letter demanding any balance from him and that no one has ever attempted to evict the Applicant from the two and a half acres which they had occupied for 21 years as at the time the suit was filed.
23. The Respondents submitted that the Applicant has failed to produce evidence demonstrating that LR No 3589/6 has been excised in any way; that it is undisputed that the late Jason Atinda was the proprietor of LR No 3589/6 and that the Applicant is not entitled to legal ownership of the suit land through adverse possession.
24. They urged that the late Jason Atinda Ouko never abandoned his property and was in touch with every purchaser, licensee, tenant and every other person allowed in the land with his consent and that the Applicant's possession was not open, quiet, uninterrupted and without the consent of the registered owner.
25. They relied on the case of *Michael Muturi Karanja v Roselyne Dola Ouko & 2 others* [2021] eKLR where the court held that where a purchaser takes possession of land and stays thereon under contract, they cannot be allowed to repudiate the contract with hindsight and claim adverse possession.
26. The Respondents urged that specific performance is an equitable remedy and as the Applicant has neglected to make full payment of the purchase price, they had not come to equity with unclean hands. The prayer is thus untenable. The Defendant relied on the case of *Reliable Electrical Engineers Ltd v Mantrac Kenya Limited* (2006) eKLR and *M'Mbaoni M'Itbara v James Mbaka* [2019] eKLR which cited the unreported case of *Samuel Miki Waweru v Jane Njeri Richu* CA No 122 of 2001, where it was held that where a purchaser is in possession of the land, adverse possession starts from the date of termination of the contract.

### **Analysis and Determination**

27. The issue for determination in this suit is whether the Applicant has obtained ownership of two and a half acres of LR 3589/6 by way of adverse possession.



28. It is undisputed that LR No 3589/6 IR No 23229 measuring approximately 87.5 acres is registered in the name of the late Jason Atinda, who is represented by the Respondents. It is also not disputed that the late Jotham Ngunza Amisi entered into a sale agreement with Jason Atinda Ouko in 1983 in which he agreed to purchase two and a half acres out of Title Number 3569/6 I.R. No 23229.
29. The Applicant has averred that the late Mr Amisi fully paid the purchase price through direct payments to the deceased and by offsetting outstanding rates arrears at the City County of Nairobi of Kshs 150,000. According to the Applicant, the Respondents have declined to sub divide the land and issue him with a title deed for the two and half acres.
30. It is the Applicant's case that his family have openly and peacefully lived on the purchased land for more than twenty years before they instituted this suit, by which time they had gained legal title by the doctrine of adverse possession.
31. The Defendant's case is that Jotham Amisi neglected to comply with the terms of the agreement and only remitted Kshs 51,000 as purchase price for the two and a half acres of the suit property; that the last payment towards the purchase price was made in 1990 and that it is true that the Applicant's family have continued to enjoy the property unabated.
32. The doctrine of adverse possession is set out in Section 7, 13 and 38 of the *Limitation of Actions Act*. Section 7 of the Act provides as follows:
- “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.”
33. The *Limitation of Actions Act* makes further provision for adverse possession at Section 38 as follows:
- “(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.
- (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.
- (3) A proprietor of land who has acquired a right to an easement under section 32 of this Act may apply to the High Court for an order vesting the easement in him, and may register any order so obtained in the register of the land or lease affected by the easement and in the register of the land or lease for whose benefit it has been acquired, and the easement comes into being upon such registration being made, but not before.
- (4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.”



34. The term ‘adverse possession’ was defined in *Gabriel Mbui v Mukindia Maranya* [1993] eKLR as follows:

“It is possible to define “adverse possession” more fully, as the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owners enjoyment of the land for the purposes for which the owner intended to use it.”

35. In the Gabriel Mbui case (*supra*), the elements that must be established on a balance of probability for one to succeed in a claim of adverse possession were set out as follows:

1. The person claiming land by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period.
2. The entry and occupation must be with, or maintained under, some claim or colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.
3. The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied.
4. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with the evinced unmistakable animus possidendi, that is to say occupation with clear intention of excluding the owner as well as other people.
5. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter, unless the acts be done which are inconsistent with the owner’s enjoyment of the soil for the purpose for which he intended to use it.
6. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community of the exercise of dominion over the land.
7. The possession must be continuous uninterrupted, unbroken for the necessary statutory period.
8. The rightful owner or paper title holder against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period.
9. The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.
10. The land, or portion of the land adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. The absence of a plot or title number need not present any difficulty, nor should it be a bar to establishing a claim of adverse possession.”



36. The Court of Appeal in *Mtana Lewa v Kabindi Nala Mwagandi* [2015] eKLR held that the essential prerequisites of adverse possession are that the possession of the adverse possessor should neither be by force or stealth nor under the licence of the owner. Such possession must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.
37. In this case, it is not disputed that the late Jotham Amisi and his estate have been in physical occupation of two and a half acres in LR 3859/6 (the suit land) for more than twenty years. Indeed, according to the sale agreement of December 10, 1983 between the late Jason Ouko Atinda and Jotham Nguza Amisi, the Applicant's family was to commence development of the purchased parcel of land "as soon as they are ready."
38. The sale agreement provided the completion period to be 10 years, meaning that the entire purchase price should have been paid by the Applicant by December 9, 1993.
39. In *Public Trustee v Wanduru* (1984) KLR 314 at 319 cited with approval in *Peter Mbiri Michuki v Samuel Mugo Michuki* [2014] eKLR, Madan JA stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed of possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run.
40. The facts in this matter are that Jotham Amisi entered into possession of the suit land in 1983, after entering a sale agreement for the same. While the Applicant contends that he paid the full purchase price, with the last payment being made in 1992 on behalf of Jason Atindi to the Nairobi City Council to offset his debt, the Respondent has argued that the Applicant has only paid Kshs 51,000 with the last payment having been made in 1990.
41. As held by this court in *Joseph Muoki Kakenyi & 2 others v David Hopcraft & another* [2022] eKLR, where a claimant is on the land by virtue of a sale agreement, and such claimant has never paid the full purchase price, then the claimant's possession of the suit property became adverse to the owners' title twelve (12) years from the date when the claimant made the last instalment and declined to pay the full purchase price.
42. Whether the last payment by the Applicant for the land was made in 1990 or 1992, the fact remains that by the time this suit was filed in the year 2011, the period of 12 years had lapsed from the time that the Applicant was supposed to make the last payment, that is ten (10) years from the date the agreement was made. That being the case, and the Respondents having not sued the Applicant for eviction, the Applicant's claim for the suit property had crystallized by the suit was filed.
43. The Respondents have argued in their submissions that there is no evidence that LR 3859/6 has been sub divided, which is true. Indeed. This court held in *Joseph Muoki Kakenyi & 2 others v David Hopcraft & another* [2022] eKLR that the portion of land claimed from a larger registered property need only be distinct and identifiable:

"It is therefore true that section 38 (1) of the *Limitation of Actions Act* is only applicable to land that has a title document, or land that has been registered, or both. However, where land has been registered, and an applicant files a claim for a portion of such land claiming adverse possession, such a claim will be valid notwithstanding the fact that the portion of land being claimed by the adverse possessor does not have a title or has not been registered. What is critical is the registration of the larger parcel of land, and the portion of land being claimed is being definite and identifiable."



44. In this suit, it is clear that the land which the Applicant claims out of the registered LR 3589/6 measures two and a half acres, as indicated in the Sale Agreement. Further, in his testimony to this court, the DW1 admitted that the applicant and his family are occupying the two and a half acres of LR No 3859/6 which they purchased in 1983. The suit property is therefore definite and identifiable.
45. The upshot of the forgoing is that the Applicant's claim for adverse possession is meritorious, with the only obligation of the Applicant to pay the accrued pro-rated rates for two and a half acres. For those reasons, the Applicant's suit is allowed as follows:
- a. A declaration be and is hereby issued that the Applicant, on behalf of the Estate of the late Jotham Ngunza Amisi, is entitled by adverse possession to all that portion of land measuring two and a half acres of the land known as LR 3589/6 I.R. No 23229.
  - b. A vesting order be and is hereby issued directed to the Respondents herein to immediately transfer land measuring, two and a half acres, being a portion of the land known as LR 3589/6 I.R. No 23229 upon a survey been done and a deed plan issued at the Applicant's expense, into the Applicant's name and in default, the Deputy Registrar of this Court is hereby directed to sign the transfer forms and all other necessary documents in respect to the said land, in favour of the Applicant.
  - c. A declaration be and is hereby issued that the Applicant to pay the accrued pro-rated rates in respect of two and a half acres of LR No LR 3589/6, I.R. 23229.
  - d. The Respondents, their agents, servants and/or workmen or whoever is claiming under or through them be and are hereby restrained by way of permanent injunction from evicting or dispossessing the Applicant of the building and/or erecting any structures whatsoever on a portion measuring two and a half acres or thereabouts which the Applicant occupies being part of land known as Title Number 3569/6 I.R. No 23229 or otherwise interfering with the said piece of land or any portion thereof in any manner whatsoever and not to prevent the Applicant from its use and quiet enjoyment.
  - e. The Respondents to pay the Costs to the suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 19<sup>TH</sup> DAY OF JANUARY, 2023.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Mr Nyaundi for Defendants

Mr Maina for Plaintiffs

Court Assistant - June

