



**Wamore v Omar (Environment & Land Case 44 of 2019)  
[2023] KEELC 16567 (KLR) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16567 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 44 OF 2019  
DO OHUNGO, J  
MARCH 28, 2023**

**BETWEEN**

**PASILIANO MUKOYA WAMORE ..... PLAINTIFF**

**AND**

**BENVILLY SHIACHI OMAR ..... DEFENDANT**

**JUDGMENT**

1. By originating summons (OS) dated November 11, 2016, the plaintiff claimed to have acquired 3 acres out of the parcel of land known as S/Wanga/Ekero/1441 (suit property) by adverse possession.
2. The OS was supported by an affidavit sworn by the plaintiff who deposed that he purchased the suit property from one Beda Mona Omari (deceased) sometimes in 1990, immediately took possession and started planting sugarcane on a portion of it. That sometime in 1996, he entered a joint sugar cane growing contract with the defendant and Mumias Sugar Company and that he used the other portion measuring approximately 1 acre to grow subsistence crops.
3. The plaintiff further deposed that he used the suit property until 2002 when the defendant wrote to him requiring him to vacate and that in response he filed Mumias SRMCC No 328 of 2002 against the defendant. That upon the matter being determined, the defendant filed an appeal which was determined in 2015. That he continued using the suit property by planting sugarcane, maize and vegetables and that he had been in continuous use of it from 1990 to the date of his affidavit.
4. The defendant opposed the OS through a replying affidavit in which he deposed that the plaintiff never purchased the suit property as alleged and that the judgment of the subordinate court was overturned in the appeal.
5. The hearing of the matter proceeded by way of oral evidence. The plaintiff adopted his witness statement dated December 7, 2019 and reiterated that he purchased the suit property in 1990 at which time it was registered in the name of John Marembe Siachi who was his grandfather. That thereafter,



the defendant filed for succession in respect of their deceased grandfather's estate and that sometime in 1994, land parcel number S/Wanga/Ekero/1441 was registered in the name of the defendant and that in 1996 they entered a joint contract for purposes of sugar cane farming. He concluded by stating that after his subordinate court suit was heard and he was allowed to harvest his crops, the defendant filed an appeal which appeal did not touch on the issue of the ownership of the land. That neither the subordinate court suit nor the appeal decided on the issue of land ownership.

6. The plaintiff's case was then closed.
7. During defence hearing, the defendant adopted his witness statement dated October 15, 2021 as his evidence in chief. He stated that he is the son of the late John Marambe Shiachi who was the registered owner of land parcel number S/Wanga/Ekero/419 and that the deceased had four sons. That after succession, title number S/Wanga/Ekero/419 was closed and new title deeds were issued in the year 1994 with title number 1441 registered in his name. That sometime in 2002, the plaintiff trespassed into title number 1441 claiming that the defendant was on his land. He further testified that he has been in occupation of the suit property since birth and even had sugarcane contracts with Mumias Sugar Co Ltd until the company was liquidated in 2019. He concluded by stating that the late Beda Mona was using the suit property prior to his demise.
8. The defence case was then closed. Parties thereafter ordered to file and exchange written submissions. The defendant did not file any submissions.
9. I have carefully considered the parties' pleadings, evidence, and submissions. The issue that emerges for determination is whether the plaintiff has established adverse possession.
10. The Court of Appeal restated the essentials of adverse possession in [Loise Nduta Itotia v Aziza Said Hamisi](#) [2020] eKLR as follows:

In line with the Act, Kneller, J. (as he then was) in the case of *Kimani Ruchire vs Swift Rutherford & Co Ltd* [1980] KLR 10, outlined some tenets of adverse possession thus; "The plaintiffs have to prove that they have used this land which they claim as of right. *Nec vi, nec clam, nec precario* (No force, no secrecy, no persuasion). So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it or by way of recurrent consideration."
11. Thus, the burden of proof lies with the plaintiff who must prove that he has had peaceful and uninterrupted possession for 12 years.
12. For a claim of adverse possession to succeed, the claimant must demonstrate that the occupation was without the proprietor's permission. Ordinarily, entry and occupation pursuant to a sale agreement is by permission of the proprietor and does not therefore amount to adverse possession. However, once a purchaser completes paying the purchase price, his possession and occupation of the property is not by permission of the seller. In such a scenario, time for purposes of adverse possession starts to run in favour of the purchaser from the moment of final payment of the purchase price. See [Public Trustee v Wanduru Ndegwa](#) [1984] eKLR.
13. The plaintiff contends that he entered into a sugar cane framing contract with the defendant and others in the year 1996 and again in the year 2000. Disagreements arose between the parties to the sugar cane framing contracts leading to the plaintiff filing Mumias SRMCC No 328 of 2002 against the defendant herein and others. Judgment was delivered in the case on September 11, 2003, following



which Kakamega High Court Civil Appeal No 150 of 2003 was filed. According to the plaintiff, the appeal was determined in the year 2015.

14. A perusal of the plaint in Mumias SRMCC No 328 of 2002 shows that the plaintiff averred that he purchased or inherited the suit property and that he had been in possession of it for 12 years. He based his claim for a share of the proceeds of the sugar cane farming on the contention that he purchased and owned the suit property. The defendants in the case resisted the claim partly on the ground that the plaintiff did not purchase the suit property but only leased it.
15. As stated by the Court of Appeal in *Wilson Kazungu Katana & 101 others v Salim Abdalla Baksbwein & another* [2015] eKLR, a litigant seeking title by way of adverse possession must demonstrate exclusive physical possession of the land and manifest unequivocally the intention to dispossess the owner. The occupation must be open, uninterrupted, adverse to the title of the owner, adequate, continuous and exclusive. The existence of joint cane growing contracts with the defendant in the year 1996 and again in the year 2000 negates any occupation that is adverse to the title of the owner or that is exclusive. Equally, it excludes any intention to dispossess the owner. Time for purposes of adverse possession did not run between the years 1996 and 2000.
16. Further, during the period between 2002 and 2015 when the parties litigated in Mumias SRMCC No 328 of 2002 and Kakamega High Court Civil Appeal No 150 of 2003 over entitlement to proceeds of farming on the suit property by virtue of its ownership, the plaintiff cannot be said to have had uninterrupted and exclusive possession without any claim on the part of the defendant. Simply put, time for purposes of adverse possession did not run in favour of the plaintiff between the years 2002 and 2015. This suit was filed in the year 2016, and by that time, the requisite period of 12 years had not been met.
17. In view of the foregoing, the plaintiff has not established adverse possession. Consequently, the reliefs sought cannot issue.
18. In the result, I dismiss the originating summons with costs to the defendant.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 28<sup>TH</sup> DAY OF MARCH 2023.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

No appearance for the plaintiff

Ms Toloyi for the defendant

Court Assistant: E. Juma

