



**Eshikumo (Suing as the Legal Representative of the Estate of the late Christopher Washington Lukoko) v Wanguba (Being Sued under specific power of Attorney on behalf of Albert Maende Wanguba) (Environment and Land Appeal E004 of 2022) [2023] KEELC 17490 (KLR) (23 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17490 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL E004 OF 2022**

**DO OHUNGO, J**

**MAY 23, 2023**

**BETWEEN**

**BONIFACE JOEL ESHIKUMO (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE CHRISTOPHER WASHINGTON LUKOKO) ..... APPELLANT**

**AND**

**BARTHOLOMEW FESTUS OLANG' WANGUBA (BEING SUED UNDER SPECIFIC POWER OF ATTORNEY ON BEHALF OF ALBERT MAENDE WANGUBA) ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the Principal Magistrate's Court at Butere (Hon. F. Makoyo, Principal Magistrate) delivered on 21st October 2021 in Butere MCELC No. 78 of 2018)*

**JUDGMENT**

1. The respondent filed plaint dated 5<sup>th</sup> June 2018 in the Subordinate Court against Riziki Edwin. He averred in the plaint that he brought the suit for and on behalf of Albert Maende Wanguba under a specific power of attorney. That Albert Maende Wanguba was the registered proprietor of land parcel number Marama/Shirotsa/1309 (the suit property) and that Riziki Edwin had trespassed upon the suit property and constructed a house thereon, fenced it and started cultivating the same while claiming ownership. He therefore prayed for an order of eviction; demolition of structures therein and permanent injunction restraining the Riziki Edwin, his agents, servants, or anybody claiming through him from trespassing upon, encroaching or interfering in whatsoever manner with the suit property.
2. Pursuant to an application dated 20<sup>th</sup> May 2019 which was filed in the Subordinate Court by Boniface Joel Eshikumo the appellant herein, the Subordinate Court ordered on 13<sup>th</sup> December 2019 that Riziki



Edwin's name be struck out from the proceedings and replaced with the appellant as the defendant, sued as the legal representative of the estate of Christopher Washington Lukoko (deceased).

3. The appellant filed statement of defence and counter claim dated 17<sup>th</sup> May 2020 and averred that the deceased and his family had occupied the suit property since the year 1974 when the deceased purchased parcel of land known as Marama/Shirotsa/538 from one Loice Shisia and that the said parcel 538 was thereafter subdivided to form the suit property among other parcels. That, consequently, the deceased's estate was entitled to the property by adverse possession. He further averred that although Albert Maende Wanguba was registered as proprietor of the suit property sometime in 1998, he was neither in occupation nor use of it and consequently, the deceased's estate had acquired prescriptive rights over the suit property by the year 1986. He therefore prayed that respondent's case be dismissed, and that the deceased's estate be registered as the proprietor of the suit property.
4. Upon hearing the matter, the subordinate court (Hon. F. Makoyo, Principal Magistrate) delivered judgment on 21<sup>st</sup> October 2021, dismissing the counterclaim, and allowing the respondent's case. The learned magistrate further ordered the appellant to vacate the suit property within six months, failure to which a demolition order would issue.
5. Aggrieved by the judgment, the appellant filed this appeal on 18<sup>th</sup> February 2022, listing the following grounds in the Memorandum of Appeal:
  1. The learned [trial magistrate] erred in law and in fact by failing to hold that by the time the respondent became the registered proprietor of L.R No. Marama/ Shirotsa/1309 in 1998, he was holding the suit property in trust for the late Christopher Washington Lukoko who had purchased it in the year 1974.
  2. The learned [trial magistrate] erred in law and in fact by holding that the agreement via which the late Christopher Washington Lukoko had purchased plot number 598 (the precursor to plot 1309) lacked particulars of the said parcel of land yet the said agreement reveals the fact that the parcel of land being purchased was plot 598.
  3. The learned [trial magistrate] erred in law and in fact by coming to the conclusion that DW2 had testified that plot number 598 was vacant in 1995 but a consideration of DW2's evidence reveals that by 'vacant' he meant that the said plot had no developments by then, which developments were embarked upon by the late Christopher Washington Lukoko in the same year 1995.
  4. The learned [trial magistrate] erred in law and in fact by failing to make a finding that the suit by the respondent was unsustainable as it sought to recover land more than 12 years after such a right first arose.
6. The appeal was canvassed through written submissions. The appellant filed his submissions on 17<sup>th</sup> January 2023 and submitted that the deceased completed paying the purchase price on 28<sup>th</sup> June 1975 and that by the time Albert Maende Wanguba became the registered proprietor in 1998, the deceased's estate had acquired the suit property by adverse possession. Reliance was placed on the case of *Mtana Lewa v Kabindi Ngala Mwagandi* [2015] eKLR. The appellant further argued that the trial court erred when it observed in the judgment that the sale agreement was of no probative value as it did not contain any details on the specific parcel of land which was the subject of the transaction since the certificate of translation clearly indicated that the deceased acknowledged on 28<sup>th</sup> March 1974 that he was purchasing parcel number 538 from one James Anekeya.



7. Regarding ground 3 of the appeal, the appellant argued that although DW2 stated in his cross-examination that the suit property was not occupied as of the year 1995, DW2 proceeded to state in his cross-examination that the deceased started construction on the suit property in the same year 1995. That since DW2 was present in the year 1975 when the deceased completed payment of the purchase price for parcel number 538, it is safe to conclude that DW2 meant that the deceased only embarked on developing parcel number 538 in the year 1995. That nothing in DW2's cross-examination suggests that the deceased had either relinquished control of the suit property or that he bought it in the year 1995. That even if time began running from the year 1995 when construction by the deceased took off, the deceased's estate would still have acquired ownership of the suit property by adverse possession as at the year 2007.
8. The respondent filed his submissions on 18<sup>th</sup> January 2023 and argued that this court cannot presume that the purported sale agreement was valid since it lacked essential particulars as to the identity of the land being sold, who acknowledged payment and the signatures of those who were privy to the said agreement. That in as much as the appellant submits that it is James Anekaya who executed the transfer form, it is Christopher Lukoko (deceased) drew the agreement.
9. On ground 3 of the appeal, the respondent argued that a court of law cannot assume a non-existent fact, that the appellant failed to prove that he was in occupation of the suit property and that DW2's testimony confirms that the suit property was vacant. Relying on the case of *Celina Muthboni Kitbinji v Safiya Binti Swaleh & 8 others* [2018] eKLR, the respondent argued that the appellant's alleged possession was not peaceful, and that the appellant failed to prove adverse possession. He urged the court to dismiss the appeal.
10. This being a first appeal, this court's mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in their pleadings and evidence. See *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.
11. I have considered the grounds of appeal, the pleadings, the evidence, and the parties' submissions. The issues that arise for determination in this appeal are whether adverse possession was established and whether the reliefs sought by the parties ought to have issued.
12. There is no dispute that Albert Maende Wanguba is the registered proprietor of land parcel number Marama/Shirotsa/1309 (the suit property). That much is manifest from the certificate of official search, which was produced, and which shows that he became registered proprietor on 23<sup>rd</sup> April 1998.
13. As a registered proprietor of land, Albert Maende Wanguba is entitled to the rights, privileges, and benefits under Section 24 of the *Land Registration Act*. Further, Section 26 of the *Act* obligates the court to accept his certificate of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established. The said sections provide as follows:
  24. Interest conferred by registration  
Subject to this Act—
    - (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; ....



26. Certificate of title to be held as conclusive evidence of proprietorship
- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
    - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
    - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. ...
14. The appellant did not seek nullification of Albert Maende Wanguba’s title. Instead, he claimed that the title had been extinguished by adverse possession in favour of the estate of the deceased. It follows therefore that if the adverse possession claim did not succeed then Albert Maende Wanguba would have his way as the registered proprietor and would enjoy the rights and benefits that appertain to it, including vacant possession.
15. The question then arises as to whether the appellant established adverse possession. 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 v 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.”
16. A litigant claiming to have acquired title by of adverse possession bears the burden of proving that he has had peaceful and uninterrupted possession for 12 years. To succeed, he must demonstrate that the occupation was without the proprietor’s permission and that he had an intention to dispossess the registered proprietor.
17. The Court of Appeal further discussed the ingredients of adverse possession in the case of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR as follows:
- Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It must start with a wrongful dispossession of the rightful owner. (See comparative Indian cases of *S. M. Kenni alias Tamanna Sabeb – v- Mst Bibi Sakina* AIR 1964 SC 1254; and *Parsimi – v- Sukbi*, 1993 4 SCC 375).
39. In *Wambugu –v- Njuguna*, (1983) KLR 173, this Court held that adverse possession contemplates two concepts: possession and discontinuance of possession. It was further held that the proper way of assessing proof of adverse possession is whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not



the claimant has proved that he or she has been in possession for the requisite number of years.

40. A person who claims adverse possession must inter alia show:
- (a) on what date he came into possession.
  - (b) what was the nature of his possession?
  - (c) whether the fact of his possession was known to the other party.
  - (d) for how long his possession has continued and
  - (e) that the possession was open and undisturbed for the requisite 12 years.

18. I have reviewed the material on record, and I note that the appellant's witness statement as well as the witness statement of DW2 were very sketchy on the prerequisites for proving adverse possession. Whereas the appellant claimed that the deceased purchased the suit property in 1974, he did not say anything as to when, if at all, the deceased took possession. The date of possession is crucial since it forms the basis of calculating time. Mere evidence of purchase is not enough since a claim for adverse possession is different from a claim for enforcing a sale agreement.
19. Even if the appellant had demonstrated that the deceased took possession in 1974, which he failed to, he would still need to show that he had an intention to dispossess Albert Maende Wanguba as well as his predecessor in title and that the possession was open and undisturbed for the requisite 12 years. Adverse possession is to be proven by satisfying the ingredients and not by simply declaring, as the appellant did in his witness statement, that Albert Maende Wanguba "has neither resided nor utilized the [suit property] as it has always been in the use and occupation of my late father and his family in a peaceful manner in excess of 12 years."
20. Regarding the evidence of DW2, I note that the said witness adopted his brief witness statement dated 14<sup>th</sup> June 2021. He stated in the statement that the deceased purchased parcel number 538 from Loice Shisia but paid the last instalment of the purchase price to James Anekeya Wamore on 28<sup>th</sup> June 1975 and that the deceased and his family were in occupation of the suit property "since the time he bought it." I have perused the original handwritten record of the trial court and I note that during cross-examination, DW2 stated: "In 1995 there was no one on the land. It was a forest." Clearly, DW2 contradicted the appellant's case that the deceased and his family had occupied the suit property uninterrupted since the year 1974.
21. In view of the foregoing, the appellant did not prove adverse possession. The learned magistrate cannot be faulted in the manner in which the matter was handled, and the conclusions reached.
22. I find that this appeal lacks merit and I therefore dismiss it with costs to the respondent.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 23<sup>RD</sup> DAY OF MAY 2023.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Mr Okali holding brief for Ms Ikhumba for the appellant

Ms Nafuye holding brief for Mr Getanda for the respondent

Court Assistant: E. Juma

