



**Lidzanga v Liseche (Environment & Land Case 91 of 2018)
[2023] KEELC 17659 (KLR) (23 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17659 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 91 OF 2018**

DO OHUNGO, J

MAY 23, 2023

BETWEEN

WILSON LUDIALI LIDZANGA PLAINTIFF

AND

CYPRIAN MUSHILI LISECHE ALIAS CYPRIAN LISECHE DEFENDANT

JUDGMENT

1. The plaintiff moved the court through Originating Summons dated December 20, 2018, in which he averred that he had become entitled to the parcel of land known as Isukha/Murhanda/1327 (the suit property) by adverse possession.
2. The Originating Summons was supported by an affidavit sworn by the plaintiff on December 20, 2018. He deposed that he was registered owner of land parcel number Isukha/Murhanda/115 which neighbours land parcel number Isukha/Murhanda/114 and that sometime in 1969, he bought a portion of land hived off land parcel number Isukha/Murhanda/114 from one Ligami Manyonyi (Ligami) at KShs 16,500. That it was a term of the contract that he would take possession after payment of the full purchase price, but he only managed to pay to Ligami KShs 16,350 as part of the purchase price before Ligami disappeared to an unknown place. That following the vanishing, he was unable to pay the balance of the purchase price since Ligami had no wife, child or close relatives who could receive it on his behalf. He further stated that following the events, he disregarded the conditions of the sale agreement and took possession of his portion sometime in 1970 and started exclusively utilizing it for farming and that he continued to do so as of the date of swearing his said affidavit.
3. The plaintiff further deposed that Ligami suddenly reappeared sometime in 1994 and sought payment of KShs 20,000 as the value of the balance owed as of that date. That on August 31, 1994, they entered into a written agreement to the effect that he pays the said sum of KShs 20,000 and that pursuant to the said agreement, he had paid to Ligami a total of KShs 13,000 by November 30, 1994, leaving a balance of KShs 7,000 which he cleared later. The plaintiff went on to state that Ligami



subdivided land parcel number Isukha/Murhanda/114 into parcel numbers Isukha/Murhanda/1185 and Isukha/Murhanda/1186 sometime in 2000 and that the portion that he had purchased became known as parcel number Isukha/Murhanda/1185. That sometime thereafter in 2001 while in the process of effecting transfer to him, Ligami informed the plaintiff that the title deed had gotten lost thereby making it impossible to complete transfer process. That sometime in 2004, he built for Ligami a temporary house in parcel number Isukha/Murhanda/1185 which house Ligami resided in until his demise on January 42009. The plaintiff further deposed that he learnt in 2017 that parcel number Isukha/Murhanda/1185 had been subdivided into parcel numbers Isukha/Murhanda/1327 and Isukha/Murhanda/1328. That parcel numbers Isukha/Murhanda/115, Isukha/Murhanda/1327 and Isukha/Murhanda/1328 were adjacent to one another without any visible boundary and he used the three parcels as though they were one and even allowed construction of a church on them. That when he learnt in May 2018 that the defendant, who became the registered proprietor of Isukha/Murhanda/1327 (the suit property) on June 8, 2010, was looking for potential purchasers for the suit property, he lodged a caution. He also stated that he received a letter from the Land Registrar in November 2018 stating that the defendant had applied for ascertainment of the boundary between Isukha/Murhanda/1327 (the suit property) and Isukha/Murhanda/115.

4. The defendant opposed the Originating Summons through a replying affidavit sworn on December 29, 2018 wherein he deposed that he was registered as the proprietor of the suit property on August 2, 2010 and that twelve years had not yet lapsed by the time this case was filed on December 21, 2018. That Ligami who was the initial title holder of the suit property utilized it until his demise and as such the applicant lacks locus standi to pursue title. He further stated that he (the defendant) was in occupation of the suit property and even constructed a church therein which had been in operation for eight years. He also stated that the plaintiff interfered with the boundary as a result of which he complained to the Land Registrar. He urged the court to dismiss the suit with costs.
5. The plaintiff filed a supplementary affidavit which he swore on June 19, 2019 and in which he deposed that Isukha/Murhanda/1327 (the suit property) was registered in Ligami's name posthumously on January 19, 2009 and transferred posthumously to the defendant on June 8, 2010. He further deposed that there was no dwelling house on the suit property and that nobody was residing in the suit property as of the date of his said supplementary affidavit. That the church structure on the suit property was a semi-permanent one measuring approximately 200 square feet, that it was open for entry by the public and that the worshippers had allowed the defendant to be an informal preacher in the church. He also stated that the defendant obtained title fraudulently and that his son Lidzanga Likhanga Geoffrey reported the fraud to the police through OB number 10/3/5/2018.
6. The defendant filed a further affidavit which he swore on August 6, 2019 in which he deposed that he attended the Land Control Board with Ligami, and that consent was issued after which Ligami signed transfer and title was issued to him. He annexed a copy of letter of consent issued on July 23, 2009 following an application dated February 9, 2009 and transfer dated June 8, 2010.
7. The plaintiff passed away on October 5, 2019 and was substituted on November 9, 2020, by his son Lidzanga Likhanga Geoffrey, who had obtained grant ad litem in respect of his estate. The Originating Summons was however not amended to reflect the substitution.
8. At the hearing of the plaintiff's case, Lidzanga Likhanga Geoffrey testified as the sole witness. He adopted the plaintiff's aforesaid affidavits and his own witness statement dated February 5, 2021 as his evidence. He stated that considering that Ligami passed away on January 4, 2009, there is no way Ligami could have applied for consent on February 9, 2009 or signed transfer on June 8, 2010 and that consequently, the defendant obtained title fraudulently. He further stated that the plaintiff and Ligami were members of the same clan.



9. The plaintiff's case was then closed.
10. During defence hearing, the defendant testified as the sole defence witness. He adopted his witness statement dated October 2, 2020 as his evidence. He stated in the statement that he purchased land parcel number Isukha/Murhanda/1327 (the suit property) from Ligami sometime in 2003, that Ligami went to work for a long period as a labourer in Nandi and that when Ligami returned in 2003 he found that the plaintiff had trespassed on his land. That Ligami reported the matter to the Land Disputes Tribunal at Shinyalu and the tribunal visited the land and indicated boundaries. That since Ligami had no means to sustain himself the clan held a meeting on 3rd November 2003 wherein the plaintiff was the secretary and whereat it was agreed that the plaintiff gives the defendant possession of the land to enable the defendant to construct for Ligami a house therein and to further take care of Ligami. That sometime thereafter Ligami approached the defendant and asked him to make payments for sale of a portion of his land and Ligami later subdivided the land into two and sold the suit property to the defendant. That they thereafter attended the Land Control Board to for purposes of the transfer. That Ligami continued to reside with him until his demise and that sometime in 2017, the plaintiff trespassed into the suit property, and he reported the matter to the Chief. That the Chief referred him to the Land Registrar to fix the boundary, but the registrar could not fix the boundary since the plaintiff became hostile. He further stated that the plaintiff's family was cultivating both land parcel numbers Isukha/Murhanda/1327 and Isukha/Murhanda/1328 as of the date of the trial and that he (the defendant) was not residing on the suit property.
11. The defence case was then closed. Parties thereafter filed and exchanged written submissions.
12. The plaintiff relied on the case of *Samuel Kihamba v Mary Mbaisi* [2015] eKLR and argued that that he had established his claim for adverse possession. He urged the court to allow his claim with costs. The defendant argued that the suit property only came to existence in 2009 and that only 9 years had lapsed by the time this suit was filed. Further, that since the plaintiff was paying the purchase price, he did not prove adverse possession. He relied on *Stephen Mwangi Gatunge v Edwin Onesmus Wanjau (Suing in her capacity as the administrator of the estates of Kimingi Wariera (Deceased) and of Mwangi Kimingi (Deceased))* [2022] eKLR.
13. I have considered the parties' pleadings, evidence, and submissions. The issues that emerge for determination are whether adverse possession has been established and whether the reliefs sought should issue.
14. There is no dispute that the defendant is the registered proprietor of the suit property. That much is manifest from the certified copy of the register which the plaintiff produced, a perusal of which shows that the defendant became the registered proprietor on June 8, 2010 and was issued with title deed on November 24, 2010.
15. The parties have dwelt a bit on whether the defendant's title to the suit property was fraudulently obtained. The law on proof of fraud in civil proceedings is settled. The party alleging it must plead it, particularise it, and strictly prove it. See *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR. The burden of proof facing a party alleging fraud is higher than the usual one in civil cases of proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. See *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* [2017] eKLR. A party alleging fraud cannot simply expect the court to infer fraud from the facts.
16. That said, it must be remembered that the plaintiff specifically chose to move the court claiming that that he had become entitled to the suit property by adverse possession. There is no room for challenging



the defendant's title on grounds of fraud in a claim for adverse possession. The allegations of fraud would need to be appropriately pleaded and proven in a separate case for that purpose.

17. The ingredients of adverse possession were discussed by the Court of Appeal in *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 Sabeel – v- Mst Bibi Sakina* AIR 1964 SC 1254; and *Parsimi – v- Sukhi*, 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. The plaintiff's case is that he took possession of the suit property sometime in 1970 pursuant to a sale agreement that he entered with Ligami in 1969. By the plaintiff's own account as narrated in his affidavits, Ligami, who had vanished, suddenly reappeared sometime in 1994 and he entered into a new agreement with Ligami on August 31, 1994, pursuant to which he was to pay Ligami KShs 20,000 to finalise the 1969 agreement. The plaintiff stated that he paid to Ligami a total of KShs 13,000 by November 30, 1994, leaving a balance of KShs 7,000 which he cleared later. The date and proof of payment of the balance of KShs 7,000 have not been availed by the plaintiff.
19. Entry and occupation pursuant to a sale agreement is deemed to be 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. In other words, time for purposes of adverse possession does not start to run in favour of a purchaser until he demonstrates full payment of the purchase price. The plaintiff herein has not proven full payment of the purchase price.
20. Going by the plaintiff's statement that Ligami suddenly reappeared sometime in 1994 and that he built for Ligami a temporary house sometime in 2004 in parcel number Isukha/Murhanda/1185 and further that Ligami resided in the house until his demise on January 4, 2009, I take it that Ligami resumed possession of the suit property from 1994 to his demise on January 4, 2009. Quite apart from any sale transaction that the plaintiff may have had with Ligami, it cannot be said that Ligami had been



dispossessed or had discontinued possession from 1994 to January 4, 2009. By the time this suit was filed on DEcember 21, 2018, the plaintiff had not been in exclusive possession for the requisite period of 12 years.

21. Additionally, I note that the plaintiff's son Lidzanga Likhanga Geoffrey testified that the plaintiff and Ligami were members of the same clan. In view of the close clan relationship between the plaintiff and Ligami, the plaintiff would need to show unmistakable evidence of an entry with an intention to dispossess the registered proprietor who was a close member of his extended family or clan. The Court of Appeal stated in Masambaga & 7 others v Malindi Holdings and Estate Limited (Civil Appeal 165 of 2019) [2022] KECA 782 (KLR) (10 June 2022) (Judgment) as follows:

As explained in Elements of Land Law, 5th Edition by Kevin Gray and Susan Francis Gray at page 1179 "Possession is attributed to the squatter (and his possession is adverse) only if he has both factual possession (factum possessionis) and the requisite intention to possess (animus possidendi). These elements of factum and animus interact significantly and must coincide continuously throughout the entirety of the required period of possession.

22. In the circumstances of this case, the plaintiff has failed to persuade me that he had the requisite intention to possess (*animus possidendi*) the suit property and to *dispossess Ligami*.
23. In view of the foregoing, the plaintiff has not established adverse possession. I dismiss the suit. Considering the circumstances of the case, I make no order on costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 23RD DAY OF MAY 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Balusi for the plaintiff

The defendant present

Court Assistant: E. Juma

