



**Mwita & another v Joshua & another (Environment & Land Case
E1 of 2020) [2023] KEELC 17456 (KLR) (16 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17456 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE E1 OF 2020**

MN KULLOW, J

MAY 16, 2023

BETWEEN

SUSANA ROBI MWITA 1ST APPLICANT

STEPHEN MWITA MOHABE 2ND APPLICANT

AND

EMMANUEL BOKE JOSHUA 1ST RESPONDENT

NYAIMWA MARWA NCHAMA 2ND RESPONDENT

JUDGMENT

1. The Plaintiff herein commenced this suit by way of an Originating Summons dated September 21, 2020 against the Defendant seeking the following Orders: -
 - i. That this Honourable Court do declare the Applicants to have acquired by Adverse Possession the whole of LR No Bukira/ Bwisaboka/ 2306 measuring 0.24Ha.
 - ii. That this Honourable Court be pleased to further order for registration of the portion measuring approx. 0.24Ha of LR No Bukira/ Bwisaboka/ 2306 in the name of the Applicants and the Respondents' names be cancelled from the Land Register.
 - iii. That this Honourable Court be pleased to issue an Injunction restraining the Respondents from interfering with the Applicants' enjoyment of the suit land herein.
 - iv. That this Court do order the Respondents to pay costs of this Application.
2. The Originating Summons is premised on 26 grounds on its face and on the 1st Applicant's Supporting Affidavit sworn on even date, on her own behalf and on behalf of the 2nd Applicant. She avers that in the year 1999, her husband, the 2nd Applicant purchased a portion of the suit land measuring 0.16Ha from



one Joshua Motongori Boke and bought another portion of the suit land measuring 0.08Ha from the 1st Respondent, thus making the entire suit land measuring approx. 0.24Ha.

3. She contends that pursuant to the said transactions, they immediately took vacant possession of the suit land and have been using and cultivating the same to date. Their possession and use of the land has been open, continuous and uninterrupted for a period of over 20 years.
4. It is her claim that the said Joshua Motongori Boke initiated the process of transfer of the suit land; made an Application for Consent but he unfortunately died before completing the process. However, upon his death, the suit land was transferred to the name of his son, the 1st Respondent who subsequently transferred the same to the 2nd Respondent, who is the current registered owner of the suit land despite the Applicants' occupation and use thereof.
5. She further deponed that despite the transfer, subdivision and subsequent registration of the suit land in the name of the 1st Respondent and thereafter the 2nd Respondent; they have remained in occupation and continued to use the entire suit land without interference or interruption by the Respondents.
6. She now contends that owing to their occupation and use of the suit land for over 12 years, they have acquired prescriptive and adverse rights over the suit land and the Respondents' rights over the same land have since extinguished. She thus urged the court to allow their claim on adverse possession and rectification of the register thereof.
7. The Respondents entered Appearance through the firm of Kerario Marwa & Co Advocates and filed a Replying Affidavit sworn on February 17, 2021 by the 1st Respondent on his own behalf and on behalf of the 2nd Respondent. He avers that he is the Administrator of the Estate of the late Joshua Motongori Boke and the Confirmed Grant thereto was issued on the December 11, 2019 vide Migori Chief Magistrates Court Succession Cause No 174 of 2015. The said Grant allowed him to distribute the estate of the deceased to all the beneficiaries listed thereon.
8. It is his contention that before the said Confirmed Grant was issued, an advertisement was done in the Kenya Gazette on October 5, 2018, notifying the public that he had applied to administer the estate of his late father. Despite the Applicants being aware of the said intention and the succession cause in respect to the estate of the late Joshua Motongori Boke, they neither filed any objection in the said Succession Cause No 174 of 2018 at the Migori Chief Magistrate's Court nor did they prove any claim against the said estate. He thus maintained that the transfer and registration of the suit land in the name of the 2nd Respondent was legal.
9. He dismissed the Applicants' claim as not being based on any evidence and stated that the Applicants have never resided on any portion of the suit land since 1999 as alleged or at all. Further, it is his assertion that the Agreements exhibited as evidence of purchase of the suit land by the 1st Applicant are not dated, the parcel number is not indicated and the same cannot be used as proof to confirm the alleged purchase in the year 1999 or at all. He urged the court to dismiss the suit with costs.

Trial

10. The Applicants' case proceeded for hearing on November 23, 2021, the 1st Applicant testified as PW1. It was her testimony that she has occupied and used the suit land for over 24 years; she has planted trees and fenced the land.
11. She produced the following documents as Plaintiff Exhibits, Authority to Plead as Pexh 1, Sale Agreement dated July 22, 1999 as Pexh 2, sale agreement dated July 22, 1999 as Pexh 3, certified copy of the Register as Pexh 4, a copy of the register in respect of parcel No 2306 as Pexh. 5, certificate of



- official search as Pexh 6, Application for Land Control Board Consent and Letter of Consent as Pexh 7 (a & b), bundle of photographs as Pexh 8. He urged the court to grant them the orders sought.
12. On cross-examination, she reiterated that her claim is on adverse possession since she has lived on the suit land for over 12 years. She stated that she has not constructed on the suit land but she fenced the same and has been using the land for cultivation. It was her testimony that she bought a portion of the suit land measuring 0.16Ha from Joshua Motongori Boke, she however conceded that she could not remember when the agreement was executed.
 13. She further stated that the 2nd Agreement was between her and the 1st Respondent though she could not remember the parcel number. She also denied knowledge of the succession proceedings. On re-examination she reiterated that she has cultivated the suit land for about 24 years.
 14. The Defence case proceeded for hearing on November 2, 2022, the 1st Respondent testified as DW1. He stated that the Applicants have never lived on the suit land and maintained that he sold a portion of the land to the 2nd Defendant and has since transferred the same to his name.
 15. It was also his testimony that the Applicants have never purchased any portion of land either from his deceased father or himself, he denied any existence of a sale agreement and dismissed pexh. 2 & 3.
 16. He also produced the following documents as defence exhibits, a copy of the Confirmed Grant as Dexh. 1, Kenya Gazette as Dexh. 2 and a certificate of official search in respect to the suit land as Dexh. 3. He urged the court to dismiss the Applicants' claim with costs.
 17. On cross-examination; he reiterated that the suit land was registered in his name by way of transmission upon completion of the succession proceedings in respect of his late father's estate and that he thereafter transferred the same to the 2nd Respondent by way of sale. He denied any sale transaction between him and the Applicants.
 18. He however conceded that he was not using the suit land and that he had never seen the 2nd Respondent living on the land nor does he know what the 2nd Respondent was doing with the same. He confirmed that Pexh. 7 was done by his late father and the same was in favor the 2nd Applicant. He also confirmed that the reason for the said transfer was the sale in respect of parcel No. Bukira/ Bwisaboka/ 206.
 19. On re-examination it was his claim that even though the Applicants averred that his late father sold them a portion measuring 0.16Ha, the Consent produced sought for the transfer of a portion measuring 0.24Ha.
 20. The Defence case was deferred to March 8, 2023, the 2nd Respondent testified as DW2 and urged the court to dismiss the Applicants' suit. On cross-examination, he stated that the land was originally registered in the name of the Joshua Motongori Boke and the same was subsequently registered in his name in the year 2020 after succession.
 21. He maintained that he was in occupation of the suit land before the Grant was confirmed but conceded that he had not produced any photographs to show that he is in occupation thereof.
 22. Upon close of the defence case, I issued directions on the filing of submissions. Both parties filed their rival submissions and authorities which I have read and taken into account.

Analysis and Determination

23. I have reviewed the pleadings herein, the respective exhibits and parties' rival submissions in totality and it is my considered opinion that the following issues arise for determination: -



- a. Whether the Applicants have sufficiently proved their claim on Adverse Possession.
- b. Whether the Applicants are entitled to the reliefs sought.

A. Whether the Applicants have sufficiently proved their claim on Adverse Possession Claim of Adverse Possession

24. Sections 7,13, 17 and 38 (1) and (2) of the [Limitation of Actions Act](#) and Section 28 (h) of the [Land Registration Act](#) provides the statutory framework for the doctrine of adverse possession.
25. Makhandia, JA in [Mtana Lewa v Kabindi Ngala Mwangandi \[2015\] eKLR](#) in describing the doctrine of adverse possession held as follows: -
 - ' Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, it is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the [Limitation of Actions Act](#)'
26. The requirements for a claim of adverse possession are now well settled; The land in question must be registered in the name of a person other than the Applicant, the Applicant must demonstrate that he took possession of the parcel of land, asserted his rights over it in an adverse manner to the title of the land owner and the said title holder did not take any precipitate action against the said Applicant for a period of 12 years. Lastly, he must then demonstrate that his possession and occupation of the said land was not by force or under the licence of the land owner and that the said possession was open, in continuity for an uninterrupted period of over 12 years.
27. With regards to the possession; the claimant must also establish the date he took possession, the nature of his possession, the duration of his possession and whether the same was open and uninterrupted for the 12 years' statutory period. See Court of Appeal decision in [Richard Wefwafwa Songoi v Ben Munyifwa Songoi \[2020\] eKLR](#)
28. I will now proceed to analyse the various exhibits produced by the parties' vis a vis the necessary requirements to be proved in a claim of adverse possession. The first ground to be proved is that the suit land must be registered in the name of a person other than the Applicants. It is common ground that the original parcel was registered in the name of the late Joshua Motongori Boke, the 1st Respondent's father. The land was thereafter registered in the name of the 1st Respondent by way of transmission and subsequently transferred and registered in the name of the 2nd Respondent by way of sale. The Applicants produced copies of the registers as Pexh. 4 and 5 and copy of the search certificate as Pexh. 6. This fact was further confirmed by the Respondents in their Dexh.3.
29. Upon establishing the registration of the suit land the next issue and which is at the core of the claim herein is the issue of possession of the suit land. As earlier pointed out, the onus is on the Applicants who are alleging the occurrence of an event to demonstrate the duration and nature of their possession and whether the same accrued any prescriptive and overriding rights over the suit land, capable of registration.



30. The Applicants contend that they took possession of the suit land in the year 1999 pursuant to a sale transaction between the 2nd Applicant and Joshua Motongori Boke for a portion measuring 0.16Ha and the 1st Respondent for a portion measuring 0.08 Ha, they produced Pexh. 2 and 3 in support of the said averments. The 1st Respondent denied the said averments and maintained that the Applicants have neither been in occupation of the suit land since 1999 or at all nor was there any sale transaction between the Applicants and his late father or him.
31. It is trite that in a claim for adverse possession, possession must not be consensual or permissive or by the licence of the land owner. Pexh. 2 and 3 therefore signifies that the Applicants' entry into the suit land was by the consent and permission of the land owners hence the sale agreements thereof. However, the validity of the said sale agreements is not an issue for determination in the instant claim for adverse possession and this court will only refer to the same as proof of the Applicants entry into the suit land.
32. Permissive possession is inconsistent with adverse possession, therefore, an Applicant must demonstrate how and when his possession ceased to be permissive and became adverse. The court in the case of *Jandu v Kirpal [1975] EA 225* held that possession does not become adverse before the end of the period for which permission to occupy has been granted.
33. Guided by the decision above; I am of the considered view that even though the Applicants' entry into the suit land was by consent and with the permission of the land owners, time for adverse possession started to run upon the expiry of the license/ contract period.
34. In the instant case, the sale agreements were entered into in the year 1999, parties initiated the transfer process, made the Application for Consent of the Land Control Board as evidenced by Pexh.7a and a Letter of Consent (Pexh. 7 b) was thereafter issued in favor of the 2nd Applicant. Unfortunately, Joshua Motongori died before finalizing the transfer process.
35. The Respondents did not adduce any evidence of the precipitate action taken against the Applicants and their continued use of the suit land upon the death of the 1st Respondent's father, Joshua Motongori. Therefore, in my considered opinion, time for adverse possession started running in the year 2005, upon lapse of the 6 years' contract period without its final completion. At the time of filing the suit herein, the Applicants had used the suit land for a period of 15 years which period is in excess of the 12 years' statutory period.
36. Lastly, the Applicants need to demonstrate whether the said possession and use of the suit land was adverse to the rights of the Respondents over the same land. What amounts to dispossession in a claim for adverse possession has been held to be acts done by the adverse possessor which are inconsistent with the true owner's enjoyment of the soil for the purpose for which he intended to use the same. See Court of Appeal decision in *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another [2015] eKLR*
37. The Applicants produced Pexh. 8 as proof of their use of the suit land by cultivating the same. Even though the Respondents averred that the Applicants have never resided on the suit parcel, they did not challenge and/or controvert Pexh. 8 as produced by the Applicants in support of the occupations claims. Further, the 2nd Respondent on cross-examination stated that he had been in actual occupation of the suit land, however, no proof was provided in support of the said averments. He conceded that he was not in possession of the said land. In the absence of any contrary proof, I find that Pexh.8 is the actual reflection of the status of the suit land and the same confirms that the Applicants are in actual possession of the suit land.



38. Adverse possession is a fact to be observed upon the land and not on the title. Thus, even though the original land No 206 has since been transferred and registered in the name of the 1st Respondent by virtue of transmission and subsequently transferred and registered to the 2nd Respondent; the said registrations did not affect and/or interrupt the Applicants use and rights over the said land. At the time of the said registration, the Applicants had already acquired prescriptive and overriding rights over the property, which rights were adverse to the Respondents rights and are capable of registration.
39. The totality of the foregoing is that the Applicants have sufficiently demonstrated that they have acquired prescriptive rights over the portion of the suit parcel measuring 0.24Ha by virtue of their possession and use of the suit land. Therefore, it is my finding that the Applicants have proved their claim on a balance of probabilities to warrant the reliefs sought.

B. Whether the Applicants are entitled to the reliefs sought ___

40. In view of the foregoing, having held that the Applicants have proved their claim on adverse possession against the Respondents' title to the required standard, I find that they are entitled to the reliefs sought.

Conclusion

41. The upshot of the above is that the Applicants have proved their claim against the Respondents and I accordingly allow the Originating Summons dated September 21, 2020 on the following terms;
- i. A Declaration be and is hereby made that the Applicants have acquired by Adverse Possession the whole of LR No Bukira/ Bwisaboka/ 2306 measuring 0.24Ha.
 - ii. Consequently, it is hereby Ordered that a portion of the suit land LR No BUKIRA/ Bwisaboka/ 2306 measuring approx. 0.24Ha be registered in the names of the Applicants within 60 days from the date of this Judgment and the 2nd Respondent's names be cancelled from the Land Register. In default, the Deputy Registrar is hereby directed to execute the necessary documents for purposes of the Transfer and registration in favor of the Applicants.
 - iii. An Order of Permanent Injunction is hereby issued restraining the Respondents from interfering with the Applicants' enjoyment of the suit land herein.
 - iv. Costs of the suit be borne by the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 16TH DAY OF MAY, 2023.

MOHAMED N. KULLOW

JUDGE

In presence of; -

Mr. Abisai for the Applicants

Mr. Mwita for the Respondents

Court Assistant - Tom Maurice/Victor

