



**Wayungu (Administrator of the Estate of Zablou W Katembu v Amakalu & 4 others
(Environment & Land Case 173 of 2012) [2023] KEELC 18349 (KLR) (21 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18349 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 173 OF 2012**

**DO OHUNGO, J
JUNE 21, 2023**

BETWEEN

**JACKSON A WAYUNGU (ADMINISTRATOR OF THE ESTATE OF ZABLON W
KATEMBU PLAINTIFF**

AND

**PETER WAMUKOYA AMAKALU 1ST DEFENDANT
SAMWEL KWEYU 2ND DEFENDANT
GRACE O. AMAKALU 3RD DEFENDANT
JOSEPH OUNA 4TH DEFENDANT
DONALD SHABANJI 5TH DEFENDANT**

RULING

1. The plaintiff moved the court through Originating Summons (OS) dated May 2, 2012, wherein he averred that he was in occupation of the parcel of land known as Marama/Shinamwenyuli/619 (suit property) and sought determination of whether he had acquired the suit property through adverse possession. The OS was supported through an sworn by the plaintiff.
2. Counsel for the plaintiff informed the court that the fourth and fifth defendants passed away and that the plaintiff is no longer pursuing claims against them.
3. Hearing proceeded by way of oral evidence. The plaintiff testified as PW1 and stated that he is the administrator of the estate of Zablou W. Katembu (deceased) who was his father who in passed away in 1997. That his father took possession of the suit property in 1973 and occupied the whole of it with the plaintiff after purchasing it from Yonah Amakalu who was the defendants' father. That Yonah used the proceeds of the sale to buy land in Busia where he settled his family including the defendants. That sometimes in 1973, immediately after the purchase, Yonah's brother Moses Nzeya Lisanda who was



then living on the suit property lodged a caution against the suit property but later moved out to his own land. He added that the defendants removed the caution on 9th April 2010 and purported to share the suit property among themselves.

4. The plaintiff further testified that Yonah sued him in Bungoma CMCC No. 469 of 2000 and obtained ex parte judgment which the plaintiff later set aside. That Yonah died in the year 2000 after which the first defendant then took out letters of administration in respect of his father's estate but instead of transferring the suit property to the plaintiff, purported to share it with his brothers. He added that the defendants have never stepped on the suit property and that the agreement through which his father purchased the suit property was misplaced. He however produced what he said were minutes of the Land Control Board as well as Land Control Board consent in respect of the transaction between his father and Yonah.
5. The plaintiff went on to state that the first defendant filed a case at Butere Law Courts in 2010 seeking his eviction from the suit property but the court held that it had no jurisdiction. When it was put to him that his father had leased the suit property as opposed to buying it, he denied knowledge of any lease agreement. He further testified that he was 51 years old as of the date of his testimony in 2019 and that he was less than 10 years old in 1973. That he has had disputes with the defendants over the suit property since 2000 and that he obtained an injunction against the first defendant in the year 2000 when the first defendant had let out the land.
6. The next witness was Fanuel Watitwa Namayi (PW2) who stated that there was sugar cane grown on the whole of the suit property as at the date of his testimony and that when the defendants' father passed away the plaintiff started having disputes with the defendants over the suit property. Rose Muhoya (PW3) testified that the plaintiff and his siblings started using the suit property when his father died in 1987 and that they have planted sugar cane, trees and maize on it. That the first defendant cut trees on the land thus causing a dispute and that there has been a long-standing dispute on the suit property. Another witness was James Ashioya Musiko (PW4) who reiterated that the plaintiff was growing sugar cane and maize on the suit property, that trees had been cut and that there was a burial dispute on the suit property. Lastly, John Karanja Njenga (PW5), an officer in charge of the Kakamega Branch of the Kenya National Archives testified and produced, inter alia, copies of application for consent of the Land Control Board dated August 3, 1973 and letter of consent dated October 12, 1973 in respect of the suit property.
7. The plaintiff's case was then closed.
8. The first defendant Peter Wamukoya Amakalu testified as DW1 and stated that Yonah who was his father leased the suit property to the plaintiff's father for a term of ten years running from 1973 to 1983 for purpose of planting crops and at a consideration of KShs 1,000. That at the end of the lease period, Yonah took vacant possession of the suit property in 1984 and used it without interruption from the plaintiff until 1987 when after the death of the plaintiff's father, the plaintiff started interfering with the suit property on claims that his father had purchased it. That the plaintiff forcefully planted sugar cane on the suit property in 1987 and the first defendant's father reported the matter to the Assistant Chief who wrote a letter to the District Officer to act.
9. The first defendant further testified that his father then sued the plaintiff in Bungoma CMCC No. 469 of 2000 and obtained a judgment in October 2000 following which the defendants took possession after which their father passed away in December 2000. That the defendants used the suit property until 2003 when the plaintiff deposited building materials on the suit property upon which the defendants made a report to the area chief who stopped the plaintiff. That the defendants then used



the suit property until 2010 when the plaintiff ploughed it, because of which the first defendant sued him in Butere SPMCC No. 175 of 2010.

10. Next, Andrew Kweyu Were (DW2), took the stand. He stated that the parties herein are his neighbours and that the first defendant's father leased out the suit property to the plaintiff's father in 1974 for ten (10) years, at rent of KShs 1,000 in his presence but without a written agreement. That the plaintiff's father used the land until 1983 when he vacated and did not return to the land. That after the plaintiff's father had died, the plaintiff went to the land, uprooted the first defendant's father's trees claiming that his father had bought the land. That the first defendant's father reported the matter to the village elder and the dispute was progressed to the assistant chief, chief and even to the District Officer (DO). He added that there was no good relationship between the plaintiff and the first defendant's family owing to the disputes and that as of the date of his testimony, the plaintiff's family did not have any house on the suit property and did not use it.
11. Richard Sakwa Keya testified as DW3. He stated that the plaintiff's father passed away in 1987, after which the plaintiff started claiming that his father had bought the suit property. That the plaintiff and the defendants had a case before the village elder, the sub chief, the chief and even the DO between 1987 and 2000.
12. Defence case was closed at that point. Parties were then ordered to file and exchange submissions. The plaintiff filed his submissions but the defendants did not file any.
13. I have considered the parties' pleadings, evidence and submissions. The issues that arise for determination are whether adverse possession has been established and whether the reliefs sought should issue.
14. 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.



15. The plaintiff's case is that his father took possession of the suit property in 1973 and occupied the whole of it with the plaintiff after purchasing it from Yonah Amakalu who was the defendants' father. 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. Put differently, 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. See *Public Trustee v Wanduru Ndegwa* [1984] eKLR.
16. The plaintiff has not offered evidence of what the purchase price was and when its payment was completed. If anything, he claims that there was a sale agreement but was misplaced. I note that the plaintiff was about 5 years old in 1973 when he claims a sale agreement was entered into. He has not shown any basis of his alleged knowledge of details of the alleged transaction between his father and Yonah. Even if there was a transaction, it must be remembered that this is a claim for adverse possession as opposed to one for enforcing a sale agreement.
17. There is evidence on record that there have been disputes between the plaintiff and the defendants over ownership of the suit property. The disputes have resulted into several court cases between the parties including Bungoma CMCC No. 469 of 2000 and Butere SPMCC No. 175 of 2010 in which the first defendant sought the plaintiff's eviction from the suit property. By the time this suit was filed in May 2012, a period of 12 years had not lapsed from the time the said cases were concluded. In view of the foregoing, the plaintiff has failed to demonstrate open and undisturbed possession of the suit property for the requisite 12 years. He has not established adverse possession.
18. I find no merit in the plaintiff's case and I therefore dismiss it with costs to the first to third defendants.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 21ST DAY OF JUNE 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Andya holding brief for Ms Muleshe for the plaintiff

First and second defendants present

Counsel for the defendants absent

