



**Khachenda v Ingosi (Environment & Land Case 71 of 2015)
[2023] KEELC 19909 (KLR) (25 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19909 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 71 OF 2015
DO OHUNGO, J
SEPTEMBER 25, 2023**

BETWEEN

TESINA INZIANI KHACHENDA PLAINTIFF

AND

PAULINE KHAYALI INGOSI DEFENDANT

JUDGMENT

1. The plaintiff (Tesina Inziani Khachenda) moved the court through Originating Summons dated March 11, 2015 in which she averred that she had become entitled to the parcel of land known as Kakamega/Shitoli/1308 (suit property) through adverse possession. She later passed away on October 22, 2018 and was substituted on September 18, 2019 by her daughter Adelaide Khalayi Khachenda, who had obtained Limited Grant Ad Litem in respect of her estate. The Originating Summons was however not amended to reflect the substitution.
2. Hearing proceeded by way of oral evidence. Adelaide Khalayi Khachenda testified in support of the plaintiff's case and stated that the plaintiff was her mother and that Khachenda Kulenywa Peter who was her father passed away in the year 2004. That the defendant is the registered proprietor of the suit property and that her late father purchased the suit property from one Shivaso Muteshi through a sale agreement in 1986. That prior to the purchase, her family occupied the suit property from 1963 and that they continue to occupy and cultivate it. She added that while in the process of pursuing succession proceedings in respect of her late father's estate, she discovered that the suit property, which according to her forms part of her father's estate, had been fraudulently transferred and registered in the name of the defendant. She further stated that although she got married, she returned home to the suit property and lived there with her parents until their demise and even to the date of her testimony. She also stated that her father acquired the suit property following succession proceedings in respect of the estate of one Daria who was the wife of Shivaso Muteshi.
3. The plaintiff's case was closed at that point.



4. For the defence, Pauline Khayali Ingosi testified that she is the registered proprietor of the suit property and denied that the plaintiff and her family had been in occupation of the suit property. She stated that Khachenda Kulenya Peter (deceased) who was the plaintiff's husband, was a nephew to Daria Atamba Shivaso (deceased), who was previously the owner of the suit property. That when Daria passed away in the year 1992, the plaintiff's late husband surreptitiously filed Kakamega HC Succession Cause No. 479 of 1995 in respect of Daria's estate claiming to be Daria's son when in fact Daria was survived by two daughters namely Hannah Busolo and Deresina Lihavi. That after the two daughters successfully sought revocation of the grant, the plaintiff's husband filed Kakamega HCC No. 22 of 1998 (O.S) claiming that he had acquired the suit property through adverse possession, but the suit was dismissed. That it is not true that the plaintiff's husband was in occupation of the suit property since 1963 because the property had different occupants until till the plaintiff's husband claimed to have acquired it through adverse possession. Further, that the occupation was never peaceful in view of the various cases and that the plaintiff's family have not allowed her to occupy and use the suit property.
5. The defence case was then closed. Parties thereafter filed and exchanged written submissions. I have considered the parties' respective pleadings, evidence, and submissions. The two issues for determination are whether adverse possession has been established and whether the reliefs sought should issue.
6. As has severally been stated, a claimant seeking to acquire title by adverse possession must establish that he has used the land as of right, without force, secrecy, or persuasion and uninterruptedly for the requisite period of 12 years. See *Peter Mbiri Michuki v Samuel Mugo Michuki* [2014] eKLR.
7. The plaintiff's case is that her family occupied the suit property in 1963 and remained therein until they purchased it in 1986. One central ingredient in establishing adverse possession is that the claimant must assert hostile title in denial of the title of the registered proprietor. In other words, the claimant must demonstrate that the occupation was without the proprietor's permission. Ipso facto, occupation pursuant to a sale agreement is by permission of the proprietor and does not therefore amount to adverse possession. In such a situation, time can only start running in favour of purchaser once he completes paying the purchase price. It follows therefore that the purchaser must prove both the purchase price and the date of its full payment. See *Public Trustee v Wanduru Ndegwa* [1984] eKLR and *Peter Mbiri Michuki v Samuel Mugo Michuki* (*supra*).
8. Assuming that it is true that the plaintiff entered the suit property in 1963 and stayed therein until 1986 when her family entered into a sale agreement with the registered proprietor, the implication is that their occupation from 1986 was by permission of the proprietor and therefore not hostile to her title. The plaintiff has not availed any evidence of the purchase price and the date of its full payment, so that time can be calculated from the date of payment. I find that adverse possession has not been established. Consequently, the reliefs sought cannot issue.
9. In the result, I dismiss the plaintiff's case with costs to the defendant.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 25TH DAY OF SEPTEMBER 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Eroba for the plaintiff

Mr Aburili for the defendant



Court Assistant: E. Juma

