



**Lukholola v Aluvale (Environment & Land Case 260 of 2014)
[2023] KEELC 19870 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19870 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 260 OF 2014
DO OHUNGO, J
SEPTEMBER 20, 2023**

BETWEEN

DAVID LISHAMBA LUKHOLOLA PLAINTIFF

AND

VITALIS LIKONO ALUVALE DEFENDANT

JUDGMENT

1. David Lishamba Lukholola, the plaintiff, commenced proceedings in this matter through a plaint filed on October 7, 2009, in the High Court, against Vitalis Likono Aluvale, the defendant. The matter was later transferred to this court, hence its new case number. The plaintiff averred in the plaint that he was the registered proprietor of the parcel of land known as Isukha/Mugomari/1696 (suit property) and that the defendant trespassed into the suit property and started ploughing it. He therefore prayed for judgment against the defendant for a permanent injunction to restrain the defendant, his agents and/or employees from interfering in whatever manner with the plaintiff's peaceful enjoyment of the suit property, costs of the suit and any further orders that the court may deem fit to grant.
2. The defendant filed amended defence on September 22, 2010 in which he averred that the suit property was part of land parcel number Kakamega/Mugomari/694 which belonged to Amutabi Milimu Malenya from whom his father purchased it in 1978. That Amutabi Milimu Malenya subdivided Kakamega/Mugomari/694 into Kakamega/Mugomari/1574 and Kakamega/Mugomari/1575. That the suit property remained within Kakamega/Mugomari/1574 and that when Amutabi Milimu Malenya passed away in July 1991, he had not transferred the suit property to the defendant's father. That Kakamega/Mugomari/1574 was subdivided into Kakamega/Mugomari/1693 to 1696 on March 4, 1998 and that his father passed away in 1996 having been in occupation for 18 years and left him in occupation of the suit property. He further averred that Amutabi Milimu Malenya's interest in the suit property had been extinguished by adverse possession and that the plaintiff is holding the suit property in trust for him. He therefore prayed that the plaintiff's suit be dismissed with costs and that the plaintiff be ordered to transfer the suit property to him.



3. On June 12, 2013, the defendant also filed Kakamega HC L & E Case No. 172 of 2013 against the plaintiff herein, through Originating Summons dated June 4, 2013. He averred in the Originating Summons that he had become entitled to the parcel of land known as Isukha/Mugomari/1696 (suit property) through adverse possession and urged the court to order that the suit property be transferred to him.
4. Pursuant to an order made by consent of parties on July 23, 2014, the two cases were consolidated and ELCC No. 260 of 2014 was chosen as the lead file. In essence therefore, the claim for adverse possession is deemed a defence to ELCC No. 260 of 2014.
5. Hearing proceeded partly before E.C. Mwita, J and partly before me. The plaintiff testified that he was registered as proprietor of the suit property in 1988 and that the defendant entered the property and started ploughing it without his permission. That he lodged a complaint with the area chief about the defendant's conduct in the year 2000 and made demands for him to vacate the land. He added that the defendant is leasing the suit property to other people for farming but does not reside on it. That he (the plaintiff) has never used the property since March 1988 and that when he tried to enter it in the year 2001, he was chased away by the defendant's mother. The plaintiff's case was then closed.
6. The defendant testified as DW1. He stated that he is a son of Karoli Alubala Lusinde alias Karoli Alubala (deceased) and a holder of a limited grant ad litem in respect of his deceased father's estate. That in 1978, his father purchased land measuring one acre of Isukha/Mukomari/694 from Amutaba Milimu through a written sale agreement, fully paid the agreed purchase and was put in possession the same year. The defendant further testified that one Nicholas Muhatia (since deceased) who was a son of Amutaba Milimu, subdivided Isukha/Mukomari/694, eventually leading to Isukha/Mukomari/1696 (the suit property) and that the plaintiff was registered as owner of the suit property on 4th March 1998. That upon the death of the defendant's father in 1996, the defendant embarked on developing the land by planting trees and crops on it and that he and his father have been in continuous and exclusive occupation of the whole portion since 1978. He also stated that the plaintiff has never occupied the suit property and that in the year 2002 the plaintiff agreed to transfer the suit property to the defendant's mother.
7. Other witnesses who testified were Adriano Luseka Muhanji (DW2) and Caroline Imbakala Likono (DW3) who both stated that the plaintiff has never occupied the suit property. The defence case was then closed, and parties thereafter filed and exchanged written submissions.
8. I have carefully 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 by the parties are available.
9. There is no dispute that the plaintiff is the registered proprietor of the suit property. From the material on record, the plaintiff was registered as proprietor on March 4, 1998 and title deed issued to him on November 6, 2001. The defendant does not dispute the plaintiff's proprietorship. In any case, he cannot validly claim adverse possession without acknowledging the plaintiff's title.
10. A registered proprietor of land is entitled to the rights, privileges, and benefits under section 24 of the [Land Registration Act](#). Additionally, section 26 of the Act obligates the court to accept his certificate of title as conclusive evidence of proprietorship, unless the title is successfully impeached pursuant to the provisos under section 26 (1) (a) or (b). A successful claim of adverse possession is one of the ways in which a registered proprietor can lose title to his land. It is for that reason that I will determine the issue of whether adverse possession has been established first, since if the defendant fails on that



score, there would be no valid reason to keep the plaintiff from enjoying the benefits of his registered proprietorship.

11. The essentials of proving 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 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.

12. By its very nature, adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. Thus, for a claim of adverse possession to succeed, the claimant must demonstrate that the occupation was without the proprietor's permission. Entry and occupation pursuant to a sale agreement is usually by permission of the proprietor and does not therefore amount to adverse possession. Nevertheless, once a purchaser completes paying the purchase price, his possession and occupation of the property is no longer 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.

13. The defendant has founded his case on a handwritten sale agreement dated July 17, 1978. A perusal of the agreement shows that it provides that Amutabi Milimu sold plot 694 to Karoli Alubala at a consideration of KShs 4,500. The agreement states that the purchaser paid KShs 3,400 leaving a balance of KShs 1,100. The defendant has contended that the consideration was paid in full. He has however not offered any evidence to support the claim of full payment. In those circumstances, hostile possession has not been demonstrated. I find that adverse possession is not established. It follows therefore that the plaintiff should be left to enjoy the benefits of his proprietorship.

14. In the result, I make the following orders:

- a. The defendant's (Vitalis Likono Aluvala's) case in Kakamega HC L & E Case No. 172 of 2013 is dismissed.



b. A permanent injunction is hereby issued restraining the defendant (Vitalis Likono Aluvale), his agents and/or employees from interfering in whatever manner with the plaintiff's (David Lishamba Lukholola's) peaceful enjoyment of the parcel of land known as Isukha/Mugomari/1696.

c. The plaintiff (David Lishamba Lukholola) shall have costs of the suit.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 20TH DAY OF SEPTEMBER 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the plaintiff

No appearance for the defendant

Court Assistant: E. Juma

