



**Maliachi v Nangoli (Environment & Land Case 63 of 2019)
[2023] KEELC 19869 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19869 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 63 OF 2019
DO OHUNGO, J
SEPTEMBER 20, 2023**

BETWEEN

JAMES ATSENGA MALIACHI PLAINTIFF

AND

ZABLON ANZIMBO NANGOLI DEFENDANT

JUDGMENT

1. The plaintiff moved the court through originating summons dated May 31, 2019, wherein he averred that he had become entitled to the parcel of land known as Isukha/Shirere/5359 (suit property) through adverse possession. The originating summons is supported by an affidavit sworn by the plaintiff. The defendant opposed it through his replying affidavit sworn on November 16, 2020.
2. Hearing of the matter proceeded by way of oral evidence. The plaintiff testified as PW1 and stated that on August 18, 2003, one Angeline Ileko Nakweya purchased a portion of land measuring approximately 24m by 54m by 23m by 54m from the defendant at an agreed consideration of Kshs 90,000 out of which Angeline paid the defendant Kshs 60,000 leaving a balance of Kshs 30,000. That on April 5, 2006, Angeline sold the portion of land to him at a consideration of Kshs 60,000 which he paid in full. PW1 further stated that since Angeline had not paid the defendant the balance of Kshs 30,000, the three parties agreed that PW1 would directly pay the defendant the balance of Kshs 30,000 which was owed by Angeline and an additional sum of Kshs 30,000, thus making the total paid by PW1 to the defendant Kshs 60,000. He added that he has paid total of Kshs 120,000 for the portion of land in question with the defendant and Angeline receiving Kshs 60,000 each.
3. PW1 also stated that he has occupied the portion of land in question since April 5, 2006 in an open, peaceful, and uninterrupted manner and that the portion is registered in the name of the defendant as land reference number Isukha/Shirere/5359 (suit property). Under cross examination, he stated that he did not witness payment of the Kshs 60,000 by Angeline to the defendant and that he does not have any evidence that the balance of Kshs 30,000 was paid. He added that as of the date of his testimony,



- he was residing on a different parcel as opposed to the suit property and that he took possession of the suit property immediately after buying it and started farming on it.
4. Next on the stand was Antony Liyayi Akwabubi (PW2) who stated that the plaintiff purchased land from the defendant. The plaintiff's case was then closed.
 5. The defendant testified as DW1 and stated that he is the registered proprietor of the suit property and that he never entered into any land sale agreement with the plaintiff. That the suit property is a subdivision of Isukha/Shirere/3873 which shared a common boundary with the plaintiff's Isukha/Shirere/3874 and that the plaintiff has been interfering with the common boundary of the two plots. He further stated that the plaintiff approached him in the year 2009, told him that they should invite a surveyor to confirm the boundary and gave him some forms for him to sign only for him to be summoned later to appear before the Land Control Board to give consent for transfer of the suit property to the plaintiff, which he declined to do. The defendant also stated that he sold a portion of parcel Isukha/Shirere/1270 to Angeline on August 18, 2003 and that upon its subdivision, Angeline found herself inside parcel 3873. That the purchase price was Kshs 90,000 out of which Angeline paid Kshs 30,000 leaving a balance of Kshs 60,000. That as of the date of his testimony, the balance had not been paid and the plaintiff was in use of the portion that he sold to Angeline but resides on Isukha/Shirere/3874.
 6. Wynzi Bandi Lunalo testified last as DW2 and stated that he was present during the sale to Anjeline and that she paid part of the purchase price. He denied knowledge of any sale of land by the defendant to the plaintiff and further stated that as of the date of his testimony, the plaintiff was using the land that was bought by Anjeline.
 7. Defence case was then closed, and parties thereafter filed and exchanged written submissions. I have considered the parties' respective pleadings, evidence, and submissions. The issues that arise for determination are whether adverse possession has been established and whether the reliefs sought should issue.
 8. The law on adverse possession is settled. As the Court of Appeal stated in *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR, the party claiming adverse possession must assert hostile title in denial of the title of the registered proprietor. The process must start with a wrongful dispossession of the rightful owner and the proper way of assessing proof of adverse possession is whether the title holder has been dispossessed or has discontinued his possession for the statutory period of 12 years, as opposed to whether the claimant has proved that he or she has been in possession for 12 years. The plaintiff who claims adverse possession must demonstrate the date he came into possession, the nature of his possession, whether the fact of his possession was known to the registered proprietor and that the possession was open and undisturbed for the requisite 12 years.
 9. There is no dispute that the defendant is the registered proprietor of the suit property. Indeed, both parties produced certificates of search which confirm that the defendant was registered as proprietor on March 14, 2012. The plaintiff's contention is that he has occupied the suit property since April 5, 2006 after he purchased it from Angeline. Angeline had in turn purchased the land from the defendant. Thus, by his own account, the plaintiff's entry into the suit property was through a sale transaction.
 10. As we have already seen, a party claiming adverse possession must assert hostile title in denial of the title of the registered proprietor and the reckoning of time for purposes of establishing the requisite 12 years of quiet possession must start with a wrongful dispossession of the registered proprietor.
 11. A party who enters and occupies another's land pursuant to a sale agreement does so by permission of the proprietor. Such occupation does not amount to adverse possession. Nevertheless, once a



purchaser completes paying the purchase price, his possession and occupation of the property ceases to be by permission of the seller and time for purposes of adverse possession starts to run in his favour from the moment of final payment of the purchase price. See *Public Trustee v Wanduru Ndegwa* [1984] eKLR. Thus, such a claimant must demonstrate full payment of the purchase price as well as the date of that payment.

12. By the plaintiff's own account, Angeline purchased the suit property from the defendant at a consideration of Kshs 90,000 out of which Angeline paid the defendant Kshs 60,000 leaving a balance of Kshs 30,000. I note that under cross examination, the plaintiff conceded that he did not witness payment of the Kshs 60,000 by Angeline to the defendant and that he does not have any evidence that the balance of Kshs 30,000 was paid to the defendant.
13. On his part, the defendant testified that Angeline paid only Kshs 30,000 leaving a balance of Kshs 60,000 which remains unpaid. I note that the sale agreement dated August 18, 2003 which the plaintiff produced expressly states that Angeline paid only Kshs 30,000 leaving a balance of Kshs 60,000. Even another acknowledgment dated April 5, 2006 which the plaintiff relied on states that there was a balance of Kshs 45,000 as of that date. The plaintiff did not offer any proof of full payment of the purchase price that he referred to. In such circumstances, time for purposes of adverse possession cannot start to run in his favour.
14. The plaintiff has failed to establish adverse possession. Consequently, the reliefs sought cannot issue. If the plaintiff's intention was to enforce a sale transaction, adverse possession was not the way to go.
15. In view of the foregoing, I find no merit in the plaintiff's case, and I therefore dismiss it with costs to the defendant.

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

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Ikhumba for the plaintiff

Ms Kadenyi for the defendant

Court Assistant: E. Juma

