



**Nyamweya v Onyuere (Environment & Land Case 782 of 2016)  
[2023] KEELC 21761 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21761 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 782 OF 2016**

**M SILA, J**

**NOVEMBER 23, 2023**

**BETWEEN**

**PATRICIA KERUBO NYAMWEYA ..... PLAINTIFF**

**AND**

**YUVINALIS MECHA ONYUERE ..... DEFENDANT**

**JUDGMENT**

(Suit by plaintiff claiming title to the disputed land by way of adverse possession; plaintiff asserting that she came into possession after her late husband purchased the suit land with three cows as consideration which the defendant used to pay dowry; plaintiff alleging that the said agreement was put down in writing together with the notebook in which dowry proceedings were recorded; plaintiff procuring a translation of that alleged agreement; turning out that the purported translation is a falsehood and there was never any recording that the plaintiff's husband bought the suit land with 3 cows; plaintiff providing evidence that was full of lies and prevarication; same for her witnesses; court declaring the plaintiff and her witnesses as uncredible witnesses and court unable to believe the plaintiff's version of events; suit of the plaintiff dismissed with costs)

1. This suit was commenced through an Originating Summons filed on 23 March 2012. The applicant (whom I will henceforth refer to as the plaintiff) lodged the suit for a declaration that she has obtained title, by way of adverse possession, a portion of land measuring 0.5 ha out of the land parcel West Kitutu/Bogusero/1195 (the suit land), which land is registered in name of the respondent (henceforth referred to as the defendant). In the supporting affidavit to the Originating Summons, the plaintiff contended that this portion was purchased from the defendant, by her late husband, Nicolas Nyamweya Nyagega (deceased), in May 1976 but they did not proceed to the Land Control Board and thus the process of transfer was never effected. Nevertheless, the plaintiff contends that she has been in occupation of the land since, and that her occupation has been open, peaceful and continuous, for more than 30 years. That is why she seeks title by way of adverse possession.



2. The defendant filed a replying affidavit to oppose the suit. He refuted entering into any sale agreement as claimed by the plaintiff. He stated that they had been living side by side with the late Nicholas Nyamweya Nyagega, who, before his death in 2007, demolished some houses which were on his (defendant's) land and relocated to the land parcel No. 2053. He avers that the plaintiff's claim is unfounded since her husband moved from the disputed area in 2007 and never laid claim to it. He accused the plaintiff of having lodged a false criminal complaint which led him to being charged in Kisii Criminal Case No. 175 of 2008 but was acquitted. He avers that while he was in custody, the plaintiff mischievously planted bananas, napier grass, grevillea and blue gum trees, on the disputed land. He added that the plaintiff filed a suit before the Land Disputes Tribuna, which was dismissed, and she did not appeal before the Provincial Land Disputes Committee. He asked that the suit be dismissed.
3. Directions were taken for the suit to be heard through viva voce evidence and the parties testified and called witnesses.
4. PW- 1 was the plaintiff. She reiterated that the disputed land was purchased from the defendant by her late husband who died in 2008. She testified that when she got married, her husband was resident on the suit land, and she has since been living here. She stated that her husband was buried on the suit land and she has also buried four of her children in it without the defendant making any protest. She stated that the defendant even assisted her late husband to put up a house on the land and was friendly to them. She averred that the defendant never interfered with her husband's occupation of the land when he was alive and only started interference after he died and ordered them out of the land. She stated that the defendant is a neighbor and carries out his activities at his home and that there is a boundary between her home and that of the defendant. She testified that she reported the defendant's interference to the Assistant Chief, which was escalated to the District Officer, and ultimately to court. She claimed that the defendant was ordered to give her the title deed to the land but the defendant appealed to the District Officer in Kisumu. She added that when they went to Kisumu, the defendant requested the matter to be resolved at home. When they came back home, he refused to resolve the matter. She proceeded to register a caution. On the claimed sale to her husband, she testified that they had an agreement in writing, which she produced, together with what she alleged to be the correct English translation of it. She also produced some photographs of the land to demonstrate her activities therein and minutes of what she claimed was a family meeting held on 4 August 2011.
5. Cross-examined, she acknowledged that they own the neighboring parcel No. West Kitutu/Bogusero/2053 which is the name of her late husband. She explained that this land was the first to be sold to them by the defendant and that the disputed portion was added later. She was not aware that the two parcels of land were registered on the same day. She testified that she was present when the defendant married. She testified that the suit land was also being occupied by a deceased brother of the defendant, and after his demise, the land was shared between him and his brother's family. She stated that this process was carried out by force. She added that the defendant's brother's children have also put up their homes on the suit land. She was aware that the defendant was brought up by his uncles, Ambrose and Mariera.
6. PW-2 was Catherine Nyanchama Omuga. Her evidence was that she knows the parties and that the plaintiff resides in land registered in name of the defendant. She stated that on the suit land, the plaintiff has planted trees, bananas and tea plants. She stated that the plaintiff's husband was buried on the suit land and that the plaintiff's four children were also buried here. She stated that the plaintiff has four houses on the suit land. She testified that she was present when the land was bought from the defendant and that 3 cows and 3 goats were paid. These 3 cows and 3 goats, she stated, were the second payment. She was questioned whether she knew Romano, an uncle of the defendant, which she affirmed. She



- denied that it was Romano who sold land to the plaintiff's husband and was not aware whether it was Romano who brought up the defendant.
7. PW-3 was Silvester Okari Maiko. He also stated that he has known the parties for a long time. He testified that the plaintiff has resided on the suit land since she was married and has constructed houses thereon, planted trees, bananas and napier grass. He stated that the land was purchased by the plaintiff's husband from the defendant for 3 cows and 3 goats. He added that the plaintiff's husband was buried on the suit land and the plaintiff's four children are also buried here. He also reiterated the evidence of PW-2, that the plaintiff has planted napier grass, trees and bananas on the land.
  8. PW- 4 was Onyancha Joseph Ford, the Chief of Bogusero North Location. He has been Chief since 1992. He testified that he was born in the location and knows the parties well. He stated that he has always known the plaintiff to reside where she currently is since he was born. He testified that her husband is buried here and that on the land she has planted tea and bananas. He stated that she has also built on the land and her children also reside here. He stated that the defendant has never complained about the plaintiff occupying his land and the plaintiff has been harvesting trees on the land without any issue from the defendant. He stated that the plaintiff and defendant occupy distinct parcels of land and he has not heard of any disagreements or disputes. He offered that the plaintiff has peacefully been in occupation.
  9. At this juncture, the court (Mutungi J) directed the Land Registrar and Surveyor, to visit the land and file a report on the occupation. This was done and a report filed. The County Surveyor, Philip Wafula, testified as PW-5 and produced the report. He testified that his colleague, Charles Bosire, visited the site on 5 June 2018. The visit culminated in the report dated 11 June 2018 which was signed by Mr. Bosire and the Land Registrar. His evidence was that a portion of the parcel No. 1195 is occupied by the plaintiff and that she is in occupation of land measuring 0.43 Ha. This portion has no permanent developments, but has blue gum trees, napier grass, grevillea and maize planted by the plaintiff. He testified that there is no boundary between the portion of the suit land occupied by the plaintiff and the land parcel No. 2053, owned by the plaintiff's family. He observed that the report mentions discrepancy between the ground acreage and the acreages in the title. The ground acreage of the suit land is 2.5 Ha whereas the title reads 3.2 Ha and the ground acreage of the parcel No. 2053 is 1.2 Ha yet the register shows 1.8 Ha.
  10. With the above evidence, the plaintiff closed her case.
  11. The defendant testified as the sole defence witness. He acknowledged that the plaintiff is wife to Nicholas Nyamweya (deceased). He however denied selling the suit land to the plaintiff or her late husband. He stated that the plaintiff owns the parcel No. 2053. He testified that the plaintiff's husband bought this land from his uncle Romano who was brother to his father. He stated that the two land parcels, No. 2053 and 1195, were initially one parcel in name of his father, Agostine Onywere, who died in 1967 while he was still young. He testified that Romano sold the land before demarcation so that the plaintiffs obtained title to the parcel No. 2053. He was not raised up on this land. He stated that he was raised up by his grandmother who lived in Nyamage, near Kisii University, whereas the land is in Mosocho. After he became an adult he came to live in this land in Mosocho. This was in 1973. He testified that he found his uncle had died in the year 1972 and that Nicholas was cultivating both parcels No. 1195 and 2053. He was not there when the titles were prepared and he found the same bearing the names Yuvinalis Ontune. After he obtained an ID, he effected change of name to Yuvinalis Mecha Onywere. He denied selling land to the plaintiff's husband for some cows used to pay dowry. His explanation was that when he came to the land he had a small structure and could not host his in-laws there for the dowry ceremony. The ceremony was thus held at the plaintiff's home. He stated that dowry in form of cows was paid while they were there but these were his cows. Regarding the crops



on the land, he stated that the banana plants are his and that the plaintiff caused him to be arrested for interfering with them. He claimed that in the year 2009, while he was in remand, the plaintiff took advantage of his absence to plant trees on the land. He also mentioned that there was a case before the tribunal. His view was that the plaintiff should be satisfied with the land that she owns. He stated that what the plaintiff has occupied for over 30 years is the parcel No. 2053.

12. Cross-examined, he testified that he got married in 1977. He recalled that there was an agreement written in respect to dowry. He denied that the agreement recorded that the plaintiff's husband was to give him livestock in exchange for the suit land. He was referred to the plaintiff's translation of the agreement which averred that cows were given in exchange for land but he refuted this. At this juncture, since the translation was contested, I referred parties to the Chairman, LSK, South West Brach to make an independent translation. This was done, and the translation that emerged was different from that of the plaintiff. The translation of the Chairman was however disputed by the plaintiff. I called for a Senior Court Assistant, to give his opinion on the translation that the plaintiff had and that of the Chairman. He returned an opinion that the correct translation was that of the Chairman.
13. The translation of the plaintiff where relevant read as follows :-

“ This 20-5-1976, I Nyamweya I am giving Yuvinalis cows for selling me a piece of land. This cows are for dowry payment. Three cows was given to Yuvinalis, their colours are as follows  
1. Brown 2. Brown with black spots 3. Gray. In this three the other three will be taken to the bride-grooms home thereafter. Out of those three that have been paid four have remained.”
14. The translation of the Chairman was as follows :-

“ 20.5.76 Negotiation of dowry for Yovinalis Mecha was done on 19.576 they left. 20. 5.  
76 now they are taking 3 cows physically. Their Description : 1. Cream white  
2. Ash Grey with black eyes. 3. Bull with brown and white in colour. Out of  
the cows they took, we shall take 3 cows later. Agreement – cows. Remained 4  
cows as a debt where we sat at the homestead of Nicholar Nyamweya...”
15. I made the order that it is the translation of the Chairman which was to be held to be the correct translation.
16. On further cross-examination, the defendant insisted that the dowry negotiations related to marriage and not sale of land. He testified that he has no family relationship with the late Nyamweya but that he found him on the land when he came to settle there. He asserted that he only asked to use his home for the dowry negotiation ceremony and it would be wrong to relate the dowry ceremony to the land. He testified that when he came to the land, he found Romano had already registered his name on the title of the land and he subsequently effected a change of name.
17. He denied having a dispute with the plaintiff before the District Commissioner's office. He stated that the dispute they had went to the Land Disputes Tribunal and he denied that he agreed to give the plaintiff 1 ½ acres of land when they were before the tribunal. He claimed that what happened is that the plaintiff made an offer to purchase. He was not aware that the tribunal findings were forwarded to court for adoption. He stated that he filed an appeal to the Appeals Committee at Kisumu. He insisted that the plaintiff came to the land when he was in remand over the criminal case and that it is then that she planted crops and trees on it. He reported to the Assistant Chief when he found her on the land.
18. Re-examined, he stated that the late Nyamweya moved his houses from the suit land to the parcel No. 2053. He had left some trees on the land. It is when he went to cut them that he was arrested.



19. With the above evidence, the defendant closed his case.
20. I invited counsel to file written submissions which they did and I have taken these into account before arriving at my disposition.
21. The case of the plaintiff is one for adverse possession. It is trite that for one to succeed in such a case, he must demonstrate that he has been in open and peaceful occupation of the disputed land for an uninterrupted period of at least 12 years without the permission of the owner of the land. This is explained in the latin maxim *nec vi, nec clam, nec precario* (i.e without force, without secrecy and without permission). The case of the plaintiff is that she qualifies to be declared an adverse possessor as she has been in quiet, uninterrupted possession since 1976 when her late husband purchased the suit land from the defendant. She alleges that this land was purchased in return for some three cows which were used to pay dowry for the defendant. The defendant of course refutes all this. He denies that he ever entered into as sale of the land with the late husband of the plaintiff. On possession, he asserts that he had been in possession until the plaintiff engineered his arrest in the year 2008 and took advantage of his absence to plant crops and trees on the land. He however acknowledges that there before, the plaintiff and her husband were in possession, before he came to the land, and what transpired is that the plaintiff's husband demolished his houses on the land and moved to the neighbouring land parcel No. 2053 which he held title to.
22. I of course have contradictory evidence from the plaintiff and defendant and I will therefore need to sift through it to find out who, on a balance of probabilities, has the more credible version of events.
23. Let us begin with the contention of the plaintiff that she and her husband came into possession of the suit land after her husband paid for the land with some cows which the defendant used to pay dowry. To support her claim, the plaintiff produced the dowry settlement which was recorded in a small note book. This note book is in Ekegusii language. The plaintiff offered a translation of it which purported to affirm the position that the late Nyamweya gave the defendant some cows in exchange for land and that they will be used to pay dowry. Now, it has turned out that this translation is a total fabrication. The correct translation is that there was negotiation of dowry and three cows were taken, and nowhere in that document is it recorded that the late Nyamweya gave the defendant some cows in exchange for land. Indeed, that document is a dowry negotiation document and not a document for purchase of land. It is a blatant lie for the plaintiff to purport that there was ever an agreement vide which her late husband purchased the suit land from the defendant with three cows as consideration. It is a lie for the plaintiff to allege that she and her husband entered into possession of the land by virtue of this agreement. It was a blatant attempt to mislead this court by claiming that the notebook bearing dowry negotiation notes also contained an agreement for the sale of the land for 3 cows. The truth of the matter is that there is nothing of such sort.
24. It was also the evidence of the plaintiff that it is on the suit land where her residence is located. She stated that her children have houses here. Again this was a bald faced lie. The report of the surveyor demonstrates that there are no residences on the disputed land and all it has is some trees and cultivated crops. I am afraid, that given the unsavoury lies, the plaintiff's evidence has absolutely no credibility.
25. Even the evidence of the plaintiff's witnesses has no credibility. We have already determined that there was never any sale agreement between the defendant and the late Nyamweya where the late Nyamweya offered the defendant three cows as consideration that were to be used as dowry. This fabricated story was repeated by PW-2 who testified that she was present when the plaintiff (or her husband) bought land from the defendant and that she witnessed 3 cows and 3 goats being paid. It will be recalled that she also testified that the plaintiff has four houses on the land. Another untruth. The same was also the evidence of PW-3 and PW-4. These are not credible witnesses and their evidence cannot be believed. If



they opted to lie on very basic things, can this court really believe the rest of their evidence. Absolutely not ! I am in fact disturbed that the plaintiff proceeded to manufacture and procure a translation that was false. She cannot be heard to blame the translator because she vouched for this translation, and even tried to allege that the translation of the Chairman was false. I am persuaded that she engineered this translation so that it can be couched in a manner that favoured her. The long and short of it is that the plaintiff went out of her way to deceive this court. That deception must be construed against her. The effect is that this court cannot believe what the plaintiffs alleges.

26. Having so held that I am unable to believe the plaintiff, this court cannot hold in her favour. This court does not believe that she entered into the suit land in 1976 or thereabouts on the basis that her late husband purchased the suit land with three cows that the defendant used as dowry; this court does not believe the plaintiff when she claims to have been in the suit land since 1976; this court does not believe the plaintiff when she contends to have four houses and her residence on the disputed land; this court does not believe the plaintiff that she had continuously and without interruption occupied the suit land since 1976 to the time of filing suit.
27. In fact, the more consistent version of events is that given by the defendant. He testified that he was never in the picture until about 1973 when he came to settle on the suit land. At this time, he found that part of the land had been sold to Nyamweya by his late uncle which is the land parcel No. 2053, of which the plaintiff's husband had title. He found the late Nyamweya occupying the whole of the land. However when he came to settle, the late Nyamweya moved into the land that had been sold to him and left the suit land to the defendant. The defendant did not raise issue regarding the sale of the portion of the land to the late Nyamweya and settled on whatever was left and had been demarcated into his name. They lived together as good neighbours. The dowry ceremony was even held at the home of the late Nyamweya. They had no issue. I am persuaded that the plaintiff started claiming ownership of the suit land after her husband died. This is what led to them having a dispute before the Land Disputes Tribunal and the matter proceeded on appeal to the Appeals Committee. The parties were told to go and hold a meeting at home. I have seen minutes of a meeting allegedly held on 4 August 2011. The defendant insisted on being compensated for illegal occupation of the land. It cannot thus be alleged that the plaintiff had quiet possession of the land as she claims.
28. The above aside, as I have earlier discussed, I am unable to bring myself to conclude that the plaintiff has provided credible evidence of her quiet long possession given the blatant untruths and prevarications that she and her witnesses presented before this court. When witnesses are not credible, their evidence must be treated with suspicion and that is exactly how I will treat the plaintiff's case. I regret that I am unable to hold that the plaintiff has proved her case on a balance of probabilities given her very uncredible evidence and the uncredible evidence of her witnesses. The result is that the plaintiff's suit is dismissed with costs.
29. Judgment accordingly.

**DATED AND DELIVERED AT KISII THIS 23 DAY OF NOVEMBER 2023**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT AT KISII**

In the presence of: -

Mr. Wafula for the plaintiff

Mr. Anyona for the defendant

