



**Obasie v Ipaye & another (Environment & Land Case 17 of 2020)
[2023] KEELC 21746 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21746 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 17 OF 2020**

**BN OLAO, J
NOVEMBER 23, 2023**

BETWEEN

ABEL ORONE OBASIE PLAINTIFF

AND

BENARD OKAPESI IPAYE 1ST DEFENDANT

ABRAHAM OGEMA OPAYE 2ND DEFENDANT

JUDGMENT

1. Abel Orone Obasie (the Plaintiff) has vide his amended Originating Summons dated 10th July 2020 and filed herein on 16th July 2020 sought a determination of the following questions as against Benard Okaresi Ipaye and Abraham Ogema Ipaye (the 1st and 2nd Defendants respectively) in regard to the land parcel No South Teso/Amukura/188 (the suit land):
 - 1A: Whether the Plaintiff has been in open and notorious possession of the land measuring 4 acres out of the land parcel No South Teso/Amukura/188 since 2002 to date which is a period exceeding 12 years.
 - 2: Whether the Defendant's title to land parcel No South Teso/Amukura/188 extinguished upon expiry of 12 years from the time the Plaintiff went into possession of the portion out of land parcel No South Teso/Amukura/188 measuring 4 acres.
 - 3: Whether the Plaintiff has now acquired title to the portion out of land parcel No South Teso/Amukura/188 measuring 4 acres by virtue of adverse possession.
 - 4: Whether the registration of the Defendant as owners of the land parcel No South Teso/Amukura/188 should be cancelled and the Plaintiff be registered as the owner of the portion out of the land parcel No South Teso/Amukura/188 measuring 4 acres.
 - 5: Who should pay the costs.



2. The Plaintiff filed a supporting affidavit dated 10th July 2020 in which he averred, inter alia, that the 1st Defendant is the registered proprietor of the suit land and that by an agreement dated 23rd July 2002, the 1st Defendant sold him 2 acres of land. Then by another agreement dated 6th September 2002, the 2nd Defendant sold to him an additional 2 acres. Since the Defendants are brothers, it was agreed that the 2 acres which each of them had sold him be combined to make a total of 4 acres as the portions were adjacent to each other. That he took possession of the 4 acres which he started using as a church as well as school established thereon.
3. In 2015, the Defendants started causing him problems as well as to the church and school forcing both of them to relocate elsewhere as a result of the threats from the Defendants. Then the Defendants sold a portion out of the 4 acres to the Constituency Development Fund (CDF) which in turn built a school thereon.
4. The Plaintiff complained to the area Assistant Chief who summoned the Defendants but they refused to honour the summons. The Assistant Chief then referred him to the area Chief who however declined to handle the dispute as the matter was already in Court. The Defendants have approached him with the intention of refunding the purchase price but he has declined. That he has been in open and peaceful occupation of the suit land for over 12 years without interference by the Defendants and all his friends, relatives and neighbours know that a portion of the suit land measuring 4 acres belongs to him.
5. Annexed to the Originating Summons are the following documents:
 1. Green card for the land parcel No South Teso/Amukura/188.
 2. Copy of the sale agreement dated 23rd July 2002 between the Plaintiff and 1st Defendant for purchase of 2 acres.
 3. Copy of the sale agreement dated 6th September 2002 between the Plaintiff and 2nd Defendant for purchase of 2 acres.
 4. Letters dated 2nd May 2020 from the Assistant chief Kodedema sub-location summoning the Defendants.
 5. Letters dated 9th May 2020 addressed to the chief Kamolo Location from the Assistant Chief Kodedema sub-location.
6. The 1st Defendant filed a replying affidavit also on behalf of the 2nd Defendant dated 13th October 2021. He confirmed that the 2nd Defendant has no interest in the suit land. He added that he is the registered proprietor of the suit land since 3rd December 2015 but added that the 2nd Defendant has no interest in the same.
7. He denied having sold the suit land to the Plaintiff because the same was then registered in the name of his late father Ipaye Osangire. That the Plaintiff was only a licensee on the suit land where he used to farm and is now making false allegations. Further that the Plaintiff voluntarily surrendered the suit land after which the 1st Defendant built a school thereon and has continued to be in possession thereof since 2015. That the Plaintiff's claim does not meet the threshold of adverse possession as he was only a licensee upto 2015. In an event, the Plaintiff's claim is premised on an alleged land sale agreement which is denied and the claim has also abated by effluxion of time.
8. The parties were the only witness to their respective cases. The Plaintiff testified before Omollo J on 27th January 2022 while the 1st Defendant testified before me on 4th July 2023. The parties adopted as their evidence the contents of their affidavits and documents filed.



9. Submissions were thereafter filed both by Mr Okeyo instructed by the firm of Okeyo Ochiel & Company Advocates for the Plaintiff and by Mr Makokha instructed by the firm of J. P. Makokha & Company Advocates for the Defendants.
10. I have considered the evidence by both parties and the submissions by counsel.
11. The Plaintiff's claim is that he has acquired by way of adverse possession a portion of land measuring 4 acres out of the suit land which, as per the copy of the Green Card, measures 4.4 hectares i.e. 10.873 acres.
12. Section 38(1) of the [Limitation of Action Act](#) provides that:

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

Therefore, a claim to land by way of adverse possession can only be made against the registered proprietor of the land in dispute. The copy of register for the suit land shows that it was first registered in the name of one Ipaye Osangire on 7th December 1972. It is currently registered in the name of the 1st Defendant since 3rd December 2015. The 2nd Defendant is not registered as proprietor of the suit land and therefore no order of adverse possession can be made against him.

13. The claim against the 2nd Defendant must be dismissed which I hereby do.
14. Has the Plaintiff met the threshold for a claim of the suit land in adverse possession as against the 1st Defendant?
15. In [Kasuve v Mwaani Investment](#) 2004 1 KLR 184, the Court of Appeal held that:

“And in order to be entitled to the land by adverse possession the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition – *Wanje v Saikwa (No 2)* [1984] KLR 284. A title by adverse possession can be acquired under [Limitation of Actions Act](#) for a part of the land and the mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such person's adverse possession – (see *Githu v Ndeete* [1984] KLR 776).”

The Plaintiff was also required to show that his occupation of the suit land has been without force, without secrecy and without persuasion i.e. *nec vi, nec clam, nec precario* – [Kimani Ruchine & another v Swift Rutherford & Company LTD](#) 1980 KLR 10.

In [Mtana Lewa v Kabindi Ngala Mwangandi](#) CA Civil Appeal No 56 of 2014 [2015 eKLR], it was held that:

“The essential pre-requisite being that the possession of the adverse possessor is neither by force or stealth or under license of the owner.”

The Plaintiff hinges his claim on the sale agreements entered into between him and the Defendants on 23rd July 2002 and 6th September 2002. The 1st Defendant confirms the sale transaction but adds that purchase price was returned to the Plaintiff in February 2003 through the District officer and in



the presence of the area chief and village elder who were willing to testify. None of them was actually called to do so and one would have expected that just like the sale agreements which were executed, the refund of the purchase price ought to have been captured in a similar manner especially having been done through the District Officer as alleged. What is clear from the evidence is that the Plaintiff went into occupation and possession of the suit land in 2002 having fully paid the purchase price. That is a person in whose favour time for purposes of adverse possession can run *Public Trustee v Wanduru Ndegwa* CA Civil Appeal No 73 of 1982 [1984 eKLR]. The entry of the Plaintiff on the suit land on the basis of the sale agreements was confirmed by the 1st Defendant when cross-examined by Mr Okeyo counsel for the Plaintiff. He said:

“I can see the sale agreement between myself and the Plaintiff dated 23rd July 2002 by which I sold the 2 acres to the Plaintiff for Kshs 50,000. I confirm that I sold the Plaintiff 2 acres in 2002.”

If the Defendants later decided to rescind the sale agreements, this Court would have expected them to write to the Plaintiff informing him as much. This Court can only conclude that the Defendants not only received the consideration for the 4 acres but also that they have no intention of refunding the same.

16. As to whether the Plaintiff did in fact occupy the 4 acres out of the suit land, the 1st Defendant stated in his replying affidavit at paragraph 11 as follows:

8: “That indeed the Applicant bought two acres from each of us as indicated although the purchase price was returned through the then District Officer sometime in the month of February 2003.”

11: “That the applicant has never settled in the any portion of land title South Teso/ Amukura/188”.

Again if the purchase price was refunded in 2003, the Defendants ought to have asked the Plaintiff to vacate the suit land at that time. The allegation by the Defendants that the Plaintiff has never occupied any portion of the suit land cannot be correct because, when he testified vide cross-examination by Mr Okeyo, he said:

“So in total, the Plaintiff bought 4 acres. He left the land in 2015. He had bought the land in 2002.”

That is a confirmation of the Plaintiff’s evidence when he averred in paragraph 10 of his supporting affidavit:

10: “That in the year 2015, the Respondents started causing problems to me and to the establishments that had already been initiated on the said suit land.”

It is therefore not a matter of contest that the Plaintiff took possession of the 4 acres out of the suit land and it was not until 2015 that the Defendants started asserting their right by ejecting him. Mr Makokha has submitted that the Plaintiff has not met the threshold for orders in adverse possession. At paragraph 3 of the submissions, he has said:

“As at the time of filing the suit instant, the applicant confirms by way of averment in his affidavit dated 10th July 2020 at paragraph 10, 11 and 12 sworn in support of the Originating Summons that he had way back in the year 2015 disposed off the suit land and therefore



had lost possession and occupation of the land in issue by that year 2015. This therefore disqualifies him from entitlement to acquire the land by way of adverse possession.”

The facts in this case, however, are that by 2015, the Plaintiff had been in occupation and possession of the suit land for 13 years. There is no evidence that his occupation and possession of the 4 acres was not open, peaceful, continuous, un-interrupted exclusive and with the knowledge of the Defendants. The interruption in 2015 came too late because by the time, the 1st Defendant's right to 4 acres out of the suit land had been extinguished. He was therefore only holding the title to the suit land in trust for the Plaintiff in as far as the 4 acres is concerned. The Plaintiff's overriding interest in the said 4 acres crystallized 12 years after 2002 which was in 2014. The only way in which the Defendants could have asserted their right to the 4 acres would have been by taking legal action or asserting their right before the expiry of 12 years from 2002. In *Mwangi Githu v Livingstone Ndeete* CA Civil Appeal No 24 of 1979 1980 eKLR, it was held that:

“Time ceases to run under the Limitation of Action Act either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land.”

Whatever the Defendants did in 2015 was therefore too little too late.

17. Having considered all the evidence herein, this Court makes the following disposal orders in this suit:
1. The Plaintiff's suit as against the 2nd Defendant is dismissed with costs.
 2. Judgment is entered for the Plaintiff as against the 1st Defendant in the following terms:
 - a. The Plaintiff has acquired by way of adverse possession a portion of the land parcel No South Teso/Amukura/188 measuring 4 acres.
 - b. The Plaintiff is therefore entitled to be registered as a proprietor of a portion measuring 4 acres out of the land parcel No South Teso/Amukura/188.
 - c. The 1st Defendant shall within 30 days of this judgment surrender to the Land Registrar Busia the original title deed to the land parcel No South Teso/Amukura/188 for cancellation and to facilitate the issuance of a title to the Plaintiff for 4 acres by executing all the relevant documents.
 - d. In default of (c) above, the Land Registrar Busia shall, notwithstanding the absence of the original title deed to the land parcel No South Teso/Amukura/188, cancel the 1st Defendant's name in the register and issue the Plaintiff with a title to 4 acres and the Deputy Registrar shall be at liberty to execute any necessary documents to facilitate that Registration on behalf of the 1st Defendant.
 - e. The 1st Defendant shall meet the costs of this suit.

**JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 23RD DAY OF NOVEMBER 2023
BY WAY OF ELECTRONIC MAIL.**

BOAZ N. OLAO

JUDGE

23RD NOVEMBER 2023

Right of Appeal.

