



**Lukwa (Suing as the Legal Representative of the Estate of the Late Julius Muhambi Amayi - Deceased) v Imbuusi (Environment & Land Case 10 of 2020) [2023] KEELC 21600 (KLR) (15 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21600 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 10 OF 2020  
DO OHUNGO, J  
NOVEMBER 15, 2023**

**BETWEEN**

**AGNES NYALOYA LUKWA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE JULIUS MUHAMBI AMAYI - DECEASED) ..... APPLICANT**

**AND**

**ANTONY PANGA IMBUUSI ..... RESPONDENT**

**JUDGMENT**

1. The applicant commenced proceedings herein through Originating Summons (OS) dated 14<sup>th</sup> February 2020 wherein she averred that she had acquired title to the parcel of land known as Idakho/Shikulu/2339 (the suit property) by way of adverse possession. She therefore sought determination of the following questions:
  1. Whether the applicant herein Agnes Nyaloya Lukwa legal representative of the estate of the late Julius Muhambi Amayi has acquired title to the parcel of land known as Idakho/Shikulu/2339 measuring 0.5 Ha or thereabouts by way of adverse possession.
  2. Whether the respondent Antony Panga Imbuusi holds title to the said parcel of land in trust for the applicant.
  3. Whether the title of the respondent to the said parcel of land got extinguished upon the expiry of 12 years from the date the applicant took possession in or about 1995.
  4. Whether the respondent should be ordered to execute all documents of transfer to facilitate the transfer into the applicant's name of the said parcel of land.
  5. Whether the respondent should be condemned to pay costs of this suit.



2. The Originating Summons was supported by an affidavit sworn by the applicant. She deposed that she was the legal representative of the estate of Julius Muhambi Amayi (deceased) who was her husband, and that the deceased purchased the suit property on 21<sup>st</sup> June 1995 from Mukanzi Ilakula who was the brother to the then registered proprietor the late Michael Ilakula for valuable consideration through a sale agreement dated 21<sup>st</sup> July 1995. That Michael Ilakula died intestate without leaving a wife or children and was only survived by Mukanzi Ilakula who was entitled to inherit the suit property.
3. She further deposed that her husband and her took immediate possession of the suit property and established their home on it. That they had been in open and uninterrupted occupation and exclusive utilization of it without any interference from anyone including the respondent since 1995 and that the respondent had never set foot on the suit property or interfered with her occupation save that upon the death of her husband, the respondent filed Kakamega CMC ELC Number 946 of 2018 to stop her from burying her husband but the burial took place on the suit property on 20<sup>th</sup> July 2018. That the respondent filed an application for exhumation, but the application was dismissed.
4. The respondent opposed the OS through a replying affidavit which he swore on 21<sup>st</sup> November 2020 wherein he deposed that he was a stranger to the allegations made by the applicant that her husband purchased the suit property from Mukanzi Ilakula. That he perused Kakamega High Court Succession Cause Number 320 of 1993 and established that when the applicant's husband purported to have purchased the land, the registered owner Michael Ilakula was deceased and that although Mukanzi Ilakula had petitioned for letters of administration in respect of his estate, no letters of administration had been issued. That a grant was issued to Mukanzi Ilakula on 3<sup>rd</sup> July 1995 and confirmed on 19<sup>th</sup> July 1996 without the applicant's husband's claim being noted in the proceedings and that Mukanzi Ilakula died on 3<sup>rd</sup> August 1997 when the suit property was still registered in the name of Michael Ilakula.
5. The respondent further stated that Clement Sikachi Lubira applied to the succession court and an Amended Grant of Letters of Administration as well as confirmed grant in respect of the estate of Michael Ilakula were issued to Clement Sikachi Lubira on 28<sup>th</sup> September 1999. He added that the suit property was procedurally transferred to him by Clement Sikachi Lubira in his capacity as the administrator on 15<sup>th</sup> July 2003. He also stated that prior to him acquiring title to the suit property, there had been disputes concerning occupation of the suit property by the applicant's family. He referred the court to a letter dated 20<sup>th</sup> December 1997 from Assistant Chief Sikulu Sub Location to DO Ikolomani, minutes of 17<sup>th</sup> February 1998 of Ikolomani Land Control Board where the board held that the suit property was illegally sold to the applicant's husband, a letter dated 1<sup>st</sup> February 1999 from J J Mukavale Advocate to Imbenzi & Co Advocate in response to a protest against the sale, and lastly, to a letter dated 12<sup>th</sup> April 2004 which he wrote to the applicant's husband demanding that he vacates.
6. Pursuant to paragraphs 12 and 13 of his replying affidavit, the respondent included a counterclaimed for eviction of the applicant from the suit property.
7. At the hearing, the applicant testified as PW1 and adopted her above supporting affidavit. She also called Eshimael Kwatsima Omar (PW2) who stated that he was aware that Clement Sikachi Lubira filed a tribunal case against the applicant's husband concerning the suit property and that he attended the tribunal proceedings. That save for the burial case, the applicant and her husband had had quiet possession.
8. The applicant's case was then closed.



9. The respondent testified as DW1 and adopted his above replying affidavit as his evidence. He added that the applicant remains in occupation against his will and that his efforts to get possession had been in vain.
10. Defence case was then closed. Parties then filed and exchanged written submissions. I have considered the OS, the affidavits, the testimonies, and the submissions. The issues for determination are whether adverse possession has been established and whether the reliefs sought should issue.
11. As the Court of Appeal stated in *Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020]* eKLR, a 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 party 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.
12. There is no dispute that the deceased's husband purchased the suit property pursuant to sale agreement dated 21<sup>st</sup> July 1995. The agreement states that the purchase price was fully paid. Given the facts and circumstances of this case, nothing much turns on the sale agreement, as will be manifest later in this judgment.
13. To succeed in her claim for adverse possession, the applicant must establish that she has had peaceful possession for the requisite period of 12 years. As the Court of Appeal stated in *Loise Nduta Itotia v Aziza Said Hamisi [2020]* eKLR:
 

In line with the Act, Kneller, J. (as he then was) in the case of *Kimani Ruchire vs Swift Rutherford & Co. Ltd. [1980] KLR 10*, outlined some tenets of adverse possession thus; "The plaintiffs have to prove that they have used this land which they claim as of right. *Nec vi, nec clam, nec precario* (No force, no secrecy, no persuasion). So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it or by way of recurrent consideration.."
14. It is apparent that the applicant has had anything but peaceful possession. Following purchase of the suit property on 21<sup>st</sup> June 1995 by her husband, disputes emerged almost immediately on the question of whether they were entitled to remain thereon. The applicant's own witness (PW2) testified that Clement Sikachi Lubira filed a case at the Ikolomani Division Land Disputes Tribunal against the applicant's husband in which he sought to get the applicant's husband to vacate the suit property and that he (PW2) attended the tribunal proceedings. The date on the tribunal proceedings which were produced is not quite legible but it is clear that the proceedings were held in the 1990s which at the most would be no more than five years after the purchase.
15. I further note that the respondent testified that letters were written to the applicant's husband demanding that he vacates the suit property. He produced a copy of letter dated 12<sup>th</sup> April 2004 which he wrote to the applicant's husband and a copy of letter dated 1<sup>st</sup> February 1999 written by the applicant's husband's advocates in which he denied that he had been ordered to vacate.
16. Additionally, there is no dispute that the respondent filed Kakamega CMC ELC Number 946 of 2018 against the applicant to stop her from burying her husband's remains on the suit property. A perusal



of the plaint in the said case shows that it was filed on 16<sup>th</sup> July 2018 and that at paragraph 9 thereof the respondent pleaded that the applicant had trespassed on the suit property. The OS herein was filed less than two years later, on 18<sup>th</sup> February 2020. The upshot of all this is that the applicant has failed to establish that she had peaceful possession of the suit property for the requisite period of 12 years prior to filing the OS.

17. It must be remembered that this is a claim for adverse possession as opposed to a claim for enforcing the sale transaction. The parties dwelt a bit on validity or otherwise of the sale agreement but as I noted earlier, nothing much turns on the sale agreement in this case since the ingredients of adverse possession have not been established.
18. There is no dispute that the respondent is the registered proprietor of the suit property. It is on that account that the claim for adverse possession was brought against him. I note from the evidence on record that the respondent was registered as the proprietor on 14<sup>th</sup> July 2003 and title deed issued to him on 14<sup>th</sup> July 2003. Being a registered proprietor of land, the respondent is entitled to the rights, privileges, and benefits under Section 24 of the *Land Registration Act*. Further, Section 26 of the Act obligates the court to accept his certificate of title as conclusive evidence of proprietorship, unless of course the provisos under Section 26 (1) (a) or (b) are established. There has been no challenge to the respondent's title beyond the claim for adverse possession. There is thus no valid reason why the respondent should not be allowed to fully enjoy the suit property as he has sought through his counterclaim.
19. It follows therefore that the applicant has failed to establish adverse possession and is thus not entitled to the reliefs she sought. On the other hand, the respondent has established his counterclaim and is entitled to relief.
20. In view of the foregoing discourse, I make the following orders:
  - a. The applicant's claim is dismissed.
  - b. The applicant to vacate the parcel of land known as Idakho/Shikulu/2339 within ninety (90) days of delivery of this judgment. In default, an eviction order shall issue.
  - c. The respondent shall have costs of the suit.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 15<sup>TH</sup> DAY OF NOVEMBER 2023.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Ms Luseno holding brief for Ms Kegehi for the Applicant

Ms Kadenyi for the Respondent

