



**Nechesa v Mika (Environment & Land Case 1 of 2020)
[2023] KEELC 22308 (KLR) (19 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22308 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 1 OF 2020
DO OHUNGO, J
DECEMBER 19, 2023**

BETWEEN

JOHN MAINA NECHESA PLAINTIFF

AND

JUMA WEKONDI MIKA DEFENDANT

JUDGMENT

1. John Maina Nechesa (the plaintiff) moved the court through plaint dated 28th September 2009, which he filed in the High Court on 1st October 2009 as Kakamega HCCC No. 143 of 2009. The matter was later transferred to this court and became Kakamega ELC No. 1 of 2020. The plaintiff averred in the plaint that pursuant to an agreement made on 21st October 1992, he sold to Juma Wekondi Mika (the defendant) 1 acre of the parcel of land known as Marama/Lunza/854 (the suit property) at an agreed purchase price of KShs 45,000. That the defendant did not pay the purchase price in full and that in breach of the agreement, the defendant forcefully entered into a portion of the suit property measuring 1.5 acres and started farming thereon.
2. The plaintiff further averred that the sale agreement was void for want of both consideration and consent of the land control board. He therefore prayed for judgment against the defendant for a declaration that the agreement was null and void and for a permanent injunction to restrain the defendant, his agents, and servants from entering, farming or in any other manner dealing with the suit property. He also prayed for costs.
3. The defendant filed a defence dated 9th December 2009 in which he averred that he paid the whole purchase price through offsetting a bank loan which the plaintiff owed and that he took possession in 1972. He added that the plaintiff's suit was barred by the *Limitation of Actions Act* and that he had acquired the suit property through adverse possession.



4. The defendant also filed a separate suit in the High Court against the plaintiff on 24th November 2009 through Originating Summons dated 1st October 2009. The suit was serialised as Kakamega HCCC No. 175 of 2009 (O.S). It was later transferred to this court and became Kakamega ELC No. 433 of 2018. The two suits were consolidated and Kakamega ELC No. 1 of 2020 selected as the lead file. The defendant averred in the Originating Summons that he had acquired the 1 acre of the suit property through adverse possession.
5. Hearing of the consolidated cases proceeded by way of oral evidence. The plaintiff adopted his witness statement and testified that he was the registered proprietor of the suit property and that he obtained a loan from Kenya Commercial Bank which he repaid leaving a balance of KShs 4,000. That to enable him to settle the balance, he entered into the sale agreement with the defendant. That the defendant only paid KShs 19,000 leaving the balance of the agreed purchase price unpaid and instead forcefully subdivided the suit property with the assistance of the area assistant chief. That the defendant did not reside on the suit property but farmed on it for 15 years as a refund of the KShs 19,000 which he had paid. He added that he evicted the defendant from the suit property in the year 2009 and that he used the land from that year.
6. The plaintiff went on to state that the defendant fully repaid the bank loan and saved the suit property from being sold by the bank. Although he denied that the defendant paid KShs 45,000 to the bank, he could not tell how much loan or interest the defendant repaid on his behalf. He also stated that the defendant started farming sugarcane, maize, and groundnuts on 1 ½ acres of the suit property in 1992 and continued to do so without any interruption until 2009. That the portion that the defendant was farming had a clearly demarcated boundary which remained intact as of the date of his testimony.
7. The plaintiff's case was then closed.
8. The defendant adopted his witness statement and his affidavit in support of the originating summons. He testified that they entered into the agreement and that he repaid the bank loan in full which according to him was KShs 45,000. Although he stated that the bank issued to him a receipt when he made the payment, he did not produce the receipt. He further stated that he took possession in 1992 and that as of the date of his testimony he was residing on a different parcel which neighbours the suit property.
9. The defence case was then closed. Parties then filed and exchanged written submissions. The plaintiff argued that in view of the sale agreement, the defendant did not establish adverse possession and that it therefore follows that the plaintiff's claim for a permanent injunction should be allowed. On the other hand, the defendant argued that there existed a valid sale agreement between the parties pursuant to which the defendant paid the outstanding loan and purchase price and that lack of consent of the land control board is cured by the resulting implied or constructive trust. That the plaintiff is not entitled to a mandatory injunction since he testified that he re-entered the suit property in the year 2009. Regarding the question of adverse possession, the defendant argued that he established adverse possession since he entered the suit property in 1992 and remained thereon until 2009. That by the time the plaintiff re-entered the suit property, the defendant's prescriptive rights had crystallized.
10. I have considered the parties' pleadings, evidence, and submissions. The issues that arise for determination are whether the defendant established adverse possession and whether the reliefs sought by the parties should issue.
11. There is no dispute that the plaintiff is the registered proprietor of the suit property. The defendant produced a copy of the register which confirms that the plaintiff became registered proprietor on 16th February 1967. It is further not contested that the parties entered into a sale agreement dated 21st



October 1992 pursuant to which the plaintiff sold to the defendant one acre of the suit property. Both parties produced a copy of the agreement whose terms speak for themselves. The agreement states that that the plaintiff obtained a bank loan using the suit property as security and that he had repaid the loan leaving over KShs 4,000 as balance and interest as of the date of the agreement. The sale of the one acre was to enable the plaintiff to offset the amount owing to the bank. Pursuant to clause 4 of the agreement, the purchase price of the one acre was agreed at KShs 45,000 which was to go towards offsetting the loan.

12. Form the evidence on record, there is no dispute that the defendant fully repaid the loan thus saving the suit property from being sold by the bank. The parties do not however agree on how much was owing to the bank and the agreement is vague on that issue. It simply states that the amount owing as of 21st October 1992 was over KShs 4,000. The defendant contended that that he paid the entire purchase price of KShs 45,000 to the bank. He did not however produce any documentary evidence to show how much he paid to the bank.
13. To succeed in a claim for adverse possession, the plaintiff must establish peaceful and uninterrupted possession for a 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 v 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. As the name suggests, 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 his occupation was without the proprietor’s permission. Entry and occupation pursuant to a sale agreement is ipso facto 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.
15. As discussed above, the purchase price of the one acre was agreed at KShs 45,000. To establish hostile possession, the defendant must prove full payment of the sum of KShs 45,000. Although it is agreed that that he fully paid what was owing to the bank, he did not produce any evidence to show how much he paid to the bank. The plaintiff acknowledged that the defendant paid KShs 19,000 as part payment of the purchase price of KShs 45,000. The defendant has not demonstrated payment of the remainder of KShs 26,000. The sale agreement does not help on the issue since it does not specify the exact sum owed to the bank as of 21st October 1992. All we know is that it was over KShs 4,000 but that is not enough since it could be KShs 4,001 or any other figure greater than KShs 4,000. In the absence of proof of full payment of the purchase price, the defendant has failed to show that his possession was adverse to the plaintiff. His claim for adverse possession therefore fails.
16. To the extent that the plaintiff is the registered proprietor of the suit property, he is entitled to the rights, privileges, and benefits under Section 24 of the [Land Registration Act](#). Section 26 of the [Act](#) obligates the court to accept his certificate of title as conclusive evidence of proprietorship. Beyond the claim for adverse possession, the defendant has not challenged to the plaintiff’s title in any way. There is



thus no valid reason to keep the plaintiff from fully enjoying the suit property as he has sought through a permanent injunction. I am however not persuaded that I should grant the plaintiff a declaration that the agreement was null and void considering that he has acknowledged that the defendant repaid the bank loan on his behalf pursuant to the agreement.

17. In view of the foregoing discourse, I make the following orders:

- a. Juma Wekondi Mika's (the defendant's) claim for adverse possession is dismissed.
- b. A permanent injunction is granted restraining Juma Wekondi Mika (the defendant), his servants, agents or any other person claiming under him from entering, farming, cultivating, laying claim to or in any other manner dealing with the parcel of land known as Marama/Lunza/854.
- c. In view of the circumstances of the case, I make no order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 19TH DAY OF DECEMBER 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Eroba for the Plaintiff

Mr Simiyu holding brief for Ms Kegehi for the Defendant

Court Assistant: E. Juma

