



**Omuyoyi v Mukabane (Suing in his capacity as the personal representative of the estate of Wilson Mukabane Otieno Alias Mukabane Otieno Deceased) & 2 others (Environment and Land Appeal 2 of 2023) [2023] KEELC 22380 (KLR) (14 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22380 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA  
ENVIRONMENT AND LAND APPEAL 2 OF 2023**

**E ASATI, J**

**DECEMBER 14, 2023**

**BETWEEN**

**SHABAN KUYA OMUYOYI ..... APPELLANT**

**AND**

**PETER ABSOLOM MUKABANE (SUING IN HIS CAPACITY AS THE  
PERSONAL REPRESENTATIVE OF THE ESTATE OF WILSON MUKABANE  
OTIENO ALIAS MUKABANE OTIENO DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH OKATA OTIENO ..... 2<sup>ND</sup> RESPONDENT**

**JACKSON AMBOLE ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the judgement delivered by Hon. R.  
Ndombi in VIHIGA PMCC E&L CASE NO E050 OF 2021 (OS))*

**JUDGMENT**

**Introduction**

1. The appellant Shaban Kuya Omuyoyi was the plaintiff in Vihiga SPMC ELC NO. E50 of 2021(OS) wherein he sued the Respondents herein vide the Originating Summons dated 28<sup>th</sup> July 2021 seeking to be declared owner of land parcels known as West Bunyore / Ebusakami/1399 and West Bunyore / Ebusakami/1400 by reason of adverse possession.
2. The Respondents vide the Replying Affidavit sworn by Peter Absolom Mukabane on 15<sup>th</sup> February 2022 denied the Plaintiff's claim.
3. The suit was heard before the trial court who vide the Judgment dated 29<sup>th</sup> June 2023 found that since there was an agreement of sale of the suit land a claim of adverse possession could succeed. The trial



- court further found that the Originating Summons lacked merit and dismissed the appellant's claim with costs.
4. Dissatisfied with the Judgment of the trial court, the appellant filed this appeal vide the Memorandum of Appeal dated 14<sup>th</sup> July 2023 seeking for orders that: -
    - a. The appeal be allowed and the judgment and decree of the trial court dated 29<sup>th</sup> June 2023 be set aside and/or vacated in its entirety and be substituted with judgment allowing the appellant's claim for adverse possession together with costs.
    - b. Costs of the appeal be borne by the Respondents.
    - c. Such further and/or other reliefs as the court may deem necessary.
  5. The appeal was canvassed by way of written submissions. Written submissions dated 18<sup>th</sup> September 2023 were filed on behalf of the appellant by G. Imbaya Law Advocates for the appellant. Similarly, written submissions dated 2<sup>nd</sup> October 2023 were filed on behalf of Koech Law LLP Advocates.
  6. The issues that arise for determination in accordance with the six grounds of appeal are: -
    - a. Whether or not the trial Magistrate erred in law and in fact in holding that the appellant had not proved his case on a balance of probabilities to declare that he had acquired title to the suit property by virtue of being in adverse possession.
    - b. Whether or not the trial Magistrate erred in law and in fact in failing to appreciate that the appellant had been in open and notorious possession of an identified portion of land parcel No. West Bunyore / Ebusakami/1399 and West Bunyore / Ebusakami 1400 for over 12 years.
    - c. Whether or not the learned trial magistrate erred in law and in fact by failing to consider and analyze the entire evidence of the witness thereby arrived at the wrong finding on the issue of adverse possession.
    - d. Whether or not the learned trial magistrate erred and exercised her discretion wrongly in the circumstances.
    - e. Whether or not the learned trial magistrate erred in law and in fact in disregarding the appellant submission thus leading to resultant miscarriage of justice to the appellant.
    - f. The judgment, against the weight of the evidence and the law.

### **Analysis and determination**

7. This is a first appeal and as such, the court has a duty to re-examine and re-analyze the evidence
8. The first issue for determination is whether or not the trial court erred in holding that the appellant had not proved his case on a balance of probabilities to enable the court to declare that he had acquired title to the suit property by virtue of being in adverse possession. The substantive contention in the Originating Summons by the appellant was that he claimed to be an adverse possessor of the suit property. That the appellant's family had been in occupation of the suit property since 1988. That in the process of such occupation the appellant had constructed dwelling structures where he has lived and rented out as of right to the total exclusion of the Respondents. That the appellant and his family have continued to benefit from the suit property without interruption for over 22 years.
9. The appellant testified as PW1 and adopted the contents of his Supporting Affidavit. He had deposed that he bought a portion of the suit land from one Miriam Semo Mukabane who was the widow of the



registered owner who was already deceased as at the time of the said purchase. That the agreed purchase price was Kshs 50,000/- and that as at the time of purchase of the land Miriam Semo Mukabane had not taken out Letters of Administration to the estate of the deceased. That an agreement dated 1<sup>st</sup> October 1988 was entered into. That on 3<sup>rd</sup> May 2001, they agreed that one Okata Otieno through Miriam Semo Mukabane will give the appellant an additional parcel of land at a consideration of Kshs 20,000/= and an agreement was entered into. He testified that he immediately took possession of a portion of land parcel No. West Bunyore / Ebusakami/1399 and West Bunyore / Ebusakami/1400 at the exclusion of the Respondents and began constructing therein.

10. The appellant deposed further that later the said Miriam Semo died whereupon the 1<sup>st</sup> Respondent obtained Letters of Administration to the estate of the deceased and transferred the suit property to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. That prior to the succession, he had been in actual, open, continuous and uninterrupted occupation and use of the suit parcel of land to the exclusion of the Respondent had constructed thereon and rented part of the premises to several tenants.
11. He deposed further that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents now want to evict him. That they had started felling the eucalyptus trees planted to mark the common boundary and are demanding for Kshs 1,000,000/= in order to allow the appellant to continue residing on the land.
12. On cross examination, the appellant stated that he bought part of parcel No. 1399 and 1400 and put up a fence as boundary hence, he is claiming only part and not the whole of the suit property. He indicated that the size of the subject land was not stated in the agreement and that the Respondents stay on the suit land as well and that their parents were buried on the land.
13. The record shows that the appellant called 2 witnesses. PW2 adopted the contents of his witness statement filed on 11<sup>th</sup> January 2022. He had stated in the witness statement that in 1998 he was the village elder and that he was present when the sale agreement was drafted and saw the appellant paying money to Miriam as consideration. That the appellant took possession immediately and has been on the land living peacefully for 22 years. That in the year 2021 the appellant informed him that a grandson of the seller by the name Okata wanted to evict the appellant from the land. On cross-examination he stated that the two parties stay on the suit land but that there is a boundary that separates their respective portions.
14. PW3 similarly adopted the contents of his witness statement filed on 11<sup>th</sup> January 2022 as his evidence in chief. He stated that in the year 1998, he witnessed the appellant paying Miriam Kshs 40,000/= as part of the payment for the suit land. Then the appellant took possession of the land immediately and has been living peacefully thereon for 22 years.
15. The Respondent on their part pleaded through the Replying Affidavit that the suit property belonged to his deceased father. That the appellant is not a bona fide owner of the suit property and has no registrable interest therein. That the appellant gained entry onto the suit land by reason of having leased the same from the late Miriam Semo Mukabane for commercial use and upon the death of Miriam Semo Mukabane, the appellant began constructing permanent structures in the form of rental houses. That the Respondent tried to stop the construction but the appellant was adamant.
16. He deposed further that the appellant's occupation of the suit property was by consent and was not exclusive or uninterrupted. That the possession was never quiet as the father to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent were buried on the suit land during that period and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents erected their homes and have been living hereon.
17. The evidence placed before the trial court by the Respondent was the testimony of the 1<sup>st</sup> Respondent who testified as DW1 and adopted the contents of the Replying Affidavit as his evidence in chief.



18. After hearing this evidence, the trial court found that the appellant had not proved his claim on a balance of probabilities.
19. In this appeal, the appellant faults the trial court for this finding. Counsel for the appellant submitted that the principle of adverse possession is well settled under the Limitation of Actions Act and case law. That the burden to prove adverse possession lies with the appellant. Relying on the case of *Peter Mbiru Michuki –Vs- Samuel Mugo Michuki* (2014) eKLR Counsel submitted that time can start running from the year the plaintiff took possession. That as held in *Hosea –Vs- Njiru & Others* (1974) EA 526, once payment of the last installment of the purchase price had been effected the purchaser’s possession became adverse to the vendor and that hence forth by occupation for twelve years was entitled to become registered as proprietor.
20. Counsel referred the court to the case of *Stephen Mwangi Gatunge –Vs- Edwin Onesmus Wanjau (Suing in her capacity as the administrator of the estate of Kimmingi Wariera (deceased))* (2022) eKLR where it was acknowledged that entry to the land being by virtue of the sale agreement despite it being made prior to the distribution of the deceased’s estate by succession and further that adverse possession is about occupation of land belonging to another and it accrues to the land and not the title. Counsel also relied on the case of Kisumu ELC Case No. 12 of 2021 *Selpher Achieng -Vs- Fredrick Ochieng Juma (sued on his own behalf of the estate of Ojwang Ogal (deceased) and Another.* Counsel submitted that on the facts of the case, time can be deemed to have started running either in 1998 when the appellant took possession or 2001 when payment of the entire purchase price for the identified portions of the suit property was made. That the holding of the trial court was therefore misguided and led to miscarriage of justice owing to the fact that the portion of land occupied by the appellant was identified by the parties and their witnesses and that the appellant had met all the elements of adverse possession. Counsel urged the court to find that the appeal has merit and allow it.
21. On behalf of the Respondents it was submitted that the trial court correctly analyzed the evidence and found that the appellant gained possession into the suit property through the impugned sale agreement. That the appellant failed to identify the land he is claiming, that the appellant admitted that the occupation was not hostile or exclusive. Counsel relied on the cases of *Kasuve -VS- Mwaani Investment Ltd & 4 others* KLR 184 and *Kweyu –vs – Omutut* (1990) e KLR 709 to submit that in a claim based on adverse possession the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption. That the trial court was right in finding that the appellant did not meet the threshold for adverse possession. Counsel urged the court to find that the appeal is unmerited and to uphold the Judgment of the trial court.
22. It was not disputed that the basis of the appellant’s entry onto the suit property was an agreement with one Miriam Semo Mukabane. While the appellant’s case was that the agreement was for sale of the suit lands, the Respondents’ case was that the same was a lease. The Respondents neither produced copy of the lease agreement as exhibit nor provided the terms of the said lease for instance when it commenced, duration of the lease, rent and mode of payment thereof. The appellant the record shows that the appellant produced a document dated 1<sup>st</sup> October 1998. The document stated that Miriam Semo Mukabane was to sell a piece of land to the appellant at the sum of Kshs 50,000 of which Kshs 40,000 was paid leaving a balance of Kshs 10,000 to be paid in May 1999. Miriam Semo Mukabane was described in the agreement as “the honour who is registered on the property.” The document (agreement) did not disclose the description or size of the land being sold.
23. There was another agreement dated 3/5/2001 between Kata Otieno and the appellant. Similarly, it does not describe the parcel of land being sold or the size of it.



24. Though Miriam Semo Mukabane described herself as the owner who was selling her land, the evidence available shows that the suit property was part of the estate of Wilson Mukabane Otieno who was as at the time of the agreement deceased. Miriam Otieno Mukabane had not taken out Letters of Administration to the estate of the deceased. She had no capacity to sell the land.
  25. The essence of the doctrine of adverse possession is that the adverse possessor entered and remained on the land of a registered owner in a manner that is adverse to the title of the registered owner and that the registered owner did nothing to assert his title and at the expiry of twelve years the registered owner's title became extinguished. The adverse entry onto the suit land and the inactivity of the registered owner is what sets the time running.
  26. In the present case as at the time the appellant entered the suit land, the registered owner was deceased. There was no one against whose title time could start to run. The transaction between the appellant and Miriam was an illegality in view of the provisions of sections 2, 45 and 82 of the [Law of Succession Act](#)
  27. The present case can thus be distinguished with the case of [Stephen Mwangi Gatinge](#) (supra) relied on by the appellant in which the sale was between the registered owner who also put the purchaser in occupation but failed to assert his title when the sale transaction failed. The cause of action accrued to the plaintiff and time begun to run in favour of the plaintiff and against the title of registered owner in the life time of the registered owner.
  28. The trial court was therefore justified to find that adverse possession had not been proved.
  29. Time would not run against the widow of the deceased as she was not the personal representative or the administrator of the estate of the deceased. In [Re Estate of Barasa Kanenje Manya \(Deceased\)](#) (Succession Cause 263 of 2002) [2020] KEHC 1 (KLR) it was held that the mere fact that a person was a surviving spouse or child of the deceased did not make him or her a personal representative of the deceased. One only became a personal representative or administrator upon being appointed by the court as such. The property of the intestate would not vest in any person until such person was appointed administrator by the court. Any transaction, entered into with a person who was yet to be appointed administrator, over estate assets, would be null and void, since such assets would not have vested in such a person, and such person would have no standing in law to transact over such property.” Also In [Re Estate of David Livingstone Loka Injene \(Deceased\)](#) [2019] eKLR which held that:

“I should state that the mere fact that a person is a child or a spouse of the dead owner of the property does not give them any right or power to deal with the property as if the same belonged to them. The only person who can handle the property of a dead person as if that property belonged to them is the person who holds a grant of representation, for that is a personal representative of the deceased, whether as an administrator or an executor.”
  30. The land sale transaction, appellant's entry onto and his stay on the suit land in the manner described by the appellant or at all were all acts of intermeddling with the estate of the deceased, an act prohibited by section 45 of the [Law of Succession Act](#).
  31. Having found as above, the duration which the appellant had been on the land was immaterial as time never begun to run in the first place.
  32. On the basis of the foregoing findings I find that the appeal lacks merit. The appeal is hereby dismissed. Costs to the Respondents.
- Orders accordingly.



**JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED THIS 14<sup>TH</sup> DAY OF DECEMBER, 2023 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

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**E. ASATI,**

**JUDGE.**

In the presence of:

Ajevi-Court Assistant.

for the Appellant.

for the Respondents.

