



REPUBLIC OF KENYA



**Ayugi v Ogola (Environment & Land Case 83 of 2016)
[2022] KEELC 15651 (KLR) (22 March 2022) (Judgment)**

Neutral citation: [2022] KEELC 15651 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 83 OF 2016**

**DO OHUNGO, J
MARCH 22, 2022**

BETWEEN

ERNEST MANGALA AYUGI APPLICANT

AND

JULIUS OMONDI OGOLA RESPONDENT

JUDGMENT

1. The plaintiff/applicant commenced proceedings in this matter through Originating Summons (OS) dated 20th May 2016 wherein he sought determination of the following issues:
 1. Whether the applicant has been in adverse possession of 2 acres comprised in land parcel No. Butso/ingotse/154.
 2. Whether the applicant's occupation and use of land parcel No. Butso/ingotse/154 has been continuous open and uninterrupted for a period of more than 12 years.
 3. Whether the respondent's interest in the aforesaid portion has been extinguished by operation of law.
 4. Who should be condemned in costs?
2. The OS was supported by an affidavit sworn by the applicant and another sworn by Andrew Owino. The applicant deposed that he purchased two acres of land comprised in parcel No. Butso/ingotse/154 from the respondent's grandfather and that he took possession upon the purchase and started utilizing the land. That he put his two sons in possession and that he has developed the property to the exclusion of the respondent. He added that his family has been in occupation of the land from 1972 to the date of his affidavit. That the respondent's father did not stay on the land since 1975.
3. The respondent opposed the OS through a replying affidavit in which he deposed that land parcel No. Butso/ingotse/154 was the property of his late grandfather Omukenya Shirotso who died in 1985



- and was buried on the said land. That his grandfather never informed him that he had sold the property and that his grandfather had three sons, two of whom died in 1993 and the respondent's father John Ogola Omukenya who died in 2007. He further deposed that the applicant is a stranger who has never occupied the subject land and is only using his children as cover up.
4. At the hearing, plaintiff/applicant testified as PW1 and adopted his aforesaid affidavit as his evidence in chief. He stated that his children live on the property while he lives on his father's land. That he paid the full purchase price but the seller fell sick and never effected transfer.
 5. Andrew Owino Mangala testified as PW2. He stated that he is one of the applicant's sons. That he has been in occupation of the suit property for more than 12 years and that prior to his occupation, his father the applicant occupied the suit property exclusively. He further stated that he has constructed three houses on the suit property and planted crops such as sugarcane, bananas and maize on it. That the respondent has not been in use if the suit property at all and that his family uses the property exclusively without interference from the respondent's family. He added that he resides on the suit property with his brother but his father does not reside on the suit property.
 6. Philip Wechuli Wafula testified next as PW3. He stated that the plaintiff is his cousin and that the plaintiff's sons reside on the suit property. That there are about five houses on the property and that the plaintiff's family has occupied the land for over 30 years. He added that he last visited the plot in 1984. With that, the plaintiff's case was closed.
 7. The respondent, Julius Omondi Ogola, testified next as DW1 and stated that he is a carpenter residing in Burnt Forest. He adopted his aforesaid replying affidavit.
 8. Parties filed written submissions at the conclusion of the oral testimonies.
 9. The plaintiff argued that having purchased the suit property in 1975 and having used it since then, he had established his claim on adverse possession. He relied on the Court of Appeal decision in Civil Appeal No. 51 of 2015 *Willy Kimutai Kitilit –vs – Michael Kibet (reported as Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR) and urged the court to grant him the orders sought.
 10. The defendant filed submissions reiterating the contents of his replying affidavit. He further argued that where contracts of a specific type are declared to be illegal by a particular statute, the contract is rendered void from inception and thus the plaintiff's transaction is void for all purposes' for want of consent and that his remedy lies in section 7 of the *Land Control Act*. He urged the court to dismiss the plaintiff's suit.
 11. I have considered the parties' pleadings, evidence and submissions. Although the parties have focused a lot on sale transaction and consent of the land control board, what is before the court is a claim for adverse possession. I will stay focused on that. The issues that emerge for determination are whether the plaintiff has established adverse possession and whether the reliefs sought should issue.
 12. The ingredients of adverse possession were discussed by the Court of Appeal in *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR where the court stated that adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.



13. The plaintiff's case against the defendants is that he entered into an agreement to purchase the suit property and even produced copies of agreements. Having entered the property pursuant to a sale agreement, his presence thereon would have been with the permission of the seller. Case law is clear on that. In *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others* [2009] eKLR the Court of Appeal stated:

... tenants in possession have no adverse possession. Time cannot run in their favour until the tenancy is terminated. The situation of a tenant as far as adverse possession is concerned is similar to that of a licensee and we therefore re-echo the decision of this court cited by the learned counsel for the appellant, namely, the case of *Wambo v Njuguna* 1983 KLR 172 at holding 4 where the court held:-

“Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid sale agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence the occupation is not adverse but with permission. The occupation can only be either with permission or adverse, the two concepts cannot co-exist.”

14. The plaintiff's claim is for adverse possession over the parcel of land known as Butsotso/Ingotse/154. In that regard, he has moved the court under section 38 of the *Limitation of Actions Act*. Order 37 rule 7 of the *Civil Procedure Rules* provides:

- (1) An application under section 38 of the *Limitation of Actions Act* shall be made by originating summons.
- (2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.
- (3) The court shall direct on whom and in what manner the summons shall be served. [Emphasis supplied]

15. I have perused the affidavits filed in support of the OS herein. No certified extract of the title to the land in question or even a copy of the title thereof was annexed. Whereas the defendant has not raised the issue, the requirements of order 37 rule 7 (2) are mandatory and are based on good sense. They ensure that both the identity of the land in issue and the registered proprietor thereof are verified by the court. Failure to comply with the rule is certainly fatal.

16. From the material on record, the plaintiff and his witnesses conceded that he is not in possession of the suit property. Instead, he installed his sons in possession. Yet his said sons are not the plaintiffs herein. Possession by the adverse possessor is an indispensable requirement in a claim such as the present one.

17. In view of the foregoing discourse, the plaintiff/applicant herein has failed to establish adverse possession. That being the case, the reliefs sought cannot issue.

18. In the result, I dismiss the plaintiff's case. Each party shall bear own costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 22ND DAY OF MARCH 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Munyendo for the plaintiff/applicant



Defendant/respondent present in person

Court Assistant: E. Juma

