



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Bogonko v Nyangute (Environment & Land Case 14 of 2020)
[2022] KEELC 3152 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3152 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 14 OF 2020**

JM ONYANGO, J

MAY 31, 2022

BETWEEN

ALOYS BOGONKO APPLICANT

AND

SAMUEL NYABWANGA NYANGUTE RESPONDENT

JUDGMENT

Introduction

1. The applicant instituted this suit against the respondent by way of originating summons dated May 11, 2020, seeking a declaration that he is the lawful owner of land parcel number Wanajare/bomariba/1299 (hereinafter referred to as the suit property), having purchased the same from one Francis Mochama alias Mochama Oyomo - Deceased. He also prayed for an injunction restraining the Respondent by himself, his servants, members of his family and/or agents from entering, residing, trespassing, digging, building, constructing, carrying on development thereon and/or in any way interfering with the applicant's possession and occupation of the suit property.
2. The origination summons was supported by the applicant's affidavit sworn on the May 11, 2020. In the said affidavit the applicant deposes that the suit property initially belonged to one Francis Mochama alias Mochama Oyomo (Deceased) who died intestate in 1995. Before his demise, the deceased had sold the suit property to the applicant on November 17, 1976. He subsequently obtained the consent of the Land Control Board but he died before he transferred the suit property to the applicant.
3. After the applicant bought the suit property he took possession thereof and he has been cultivating the same. He further deposed that the respondent who is the deceased's nephew has been threatening to evict him as he claims that he is the nephew of the deceased and he therefore has a beneficial interest in the suit property. The applicant filed Tribunal Case No. 37 of 2007 at South Kisii Land Disputes Tribunal and the Tribunal gave an award in his favour. He added that despite the said award by the



Tribunal, the respondent has continued to interfere with him. He therefore prayed that he be granted the reliefs sought in the originating summons.

4. Despite being served with the originating summons, the respondent did not file any response. The court therefore directed that the matter be heard by way of Formal Proof. The case was heard on May 5, 2022 when the applicant testified as the only witness and produced a number of exhibits.

Applicant's Case

5. In his testimony, the applicant who is a retired teacher relied on his replying affidavit in support of the Originating summons as his evidence. He produced a copy of the certificate of official Search in respect of land parcel number Wanajare/bomariba/1299 dated 18.2.2019 as plaintiff's exhibit 1, a copy of the sale agreement dated 17.11.1976 between him and one Francis Mochama as Plaintiff's exhibit 2, a copy of the consent of the Land Control Board as plaintiff's exhibit 3 and a copy of the proceedings and verdict in South East Kisii District Land Disputes Tribunal Case No. 37 of 2007 as Plaintiff's exhibit 4.
6. He told the court that he has been cultivating the suit property openly and continuously since he bought it in 1976, but sometime in 2007 before he filed the case at the Land Disputes Tribunal, the Respondent had been threatening to evict him. He therefore prayed that he be declared as the owner of the suit property and that the Respondent be restrained from interfering with his quiet possession of the suit property.

Analysis and Determination

7. Having considered the originating summons and the applicant's supporting affidavit as well as the applicant's evidence, the issues for determination are twofold:
 - a). Whether the applicant is entitled to the suit property by way of adverse possession.
 - b). Whether a permanent injunction should be issued restraining the respondent from interfering with the Applicant's quiet possession of the suit property.
8. It was the applicant's uncontroverted evidence that he purchased the suit property from Francis Mochama (Deceased) vide a sale agreement dated 17.11.1976. Thereafter the deceased obtained the consent of the Land Control Board but unfortunately he died before he transferred the suit property to the applicant.
9. However, the deceased gave vacant possession of the suit property to the applicant and he has been in open, continuous and uninterrupted use and occupation thereof since 1976. Owing to the Respondent's threats to evict him, the Applicant instituted a case at South East Kisii Land Disputes Tribunal vide Tribunal Case No. 37 of 2007 which was decided in the applicant's favour. The applicant would now wish the court to declare him as the proprietor of the suit property in order to ward off any claim by the Respondent over the suit property.
10. The law pertaining to adverse possession is now settled. section 7 and 38(1) of the [Limitation of Actions Act](#) provide as follows:
 - "7. An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.



- (1) 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.”

11. The courts have put the above provisions of the law and the doctrine of adverse possession into context. In the case of *Celina Muthoni Kithinji* (supra) the court held as follows:

“The requirements of adverse possession in Kenya have also been set out in the case of *Mbira v Gachuhi* (2002)1EALR 137 in which the court held that

“.....a person who seeks to acquire title to land by the method of Adverse Possession for the applicable statutory period must prove non-permissive, or non-consensual actual, open notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption.

Likewise, in *Jandu v Kirpial & another* (1975) EA 225 it was held:

“.....to prove title by Adverse Possession it is not sufficient that some acts of Adverse Possession must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner, it must be actual, visible exclusive, open and notorious.

The ingredients were recently discussed by the Court of Appeal in the Case of *Mtana Lewa v Kahindi Ngala Mwangandi* (2005) eKLR where it was held that Adverse Possession is essentially a situation where a person takes possession of the land, asserts rights over it and the person having title to it omits or neglects to take action against such a person in assertion of his title for a certain period, in Kenya, 12 years.

It is also a well-established principle that a party claiming Adverse Possession ought to prove that the possession was “nec vi, nec clam, nec precario” that is peaceful, open and continuous. The possession should not have been through force, nor secrecy and without the authority or permission of the owner”

12. The question that arises is whether adverse possession can arise from a purchase. This issue was extensively considered in the case of *Gabriel Mbui v Mukindia Maranya* (1993) eKLR where Kuloba J held as follows:

“One issue which the parties required the court to decide was whether adverse possession may arise out of a sale agreement. The answer is this. “Yes”, if nothing subsequent to the sale agreement is in contravention of any law or equity. But if the entry or continued possession is in violation of a statute or is not consonant with equity, then such possession cannot be a basis for claiming title by adverse possession. No Court shall aid the breaking of the law, or promote unconscionable conduct. Moreover, if the basis of the claim under adverse possession is a sale agreement, the doctrine will not apply because the sale agreement postulates consent, and consent and adverse possession are not bed-fellows.”

13. In the instant case, the applicant proved that after he purchased the suit property, consent of the Land Control Board was obtained but the necessary transfer was not effected before the death of the vendor.



The title is still registered in the name of the deceased and it is not clear whether the respondent or any other beneficiary of the deceased has taken out letters of administration.

14. In the circumstances, even though the applicant has proved that he is entitled to the suit property by adverse possession, the respondent cannot be directed to transfer that suit property to him as he is not the registered owner thereof. The applicant is however at liberty to stake his claim against the administrator of the estate of Francis Mochama - deceased.
15. The upshot is that the plaintiff has proved his case on a balance of probabilities and I enter judgment for him and make the following orders:
 - a) A declaration is hereby issued that the Plaintiff is the lawful owner of land parcel number Wanajare/bomariba/1299 by way of adverse possession.
 - b) An injunction is hereby issued restraining the respondent by himself, his servants, members of his family and/or agents from entering, residing, trespassing, digging, building, constructing structures, carrying on development thereon and/or in any way interfering with the applicant's possession and occupation of the suit property.
 - c) The costs of the suit shall be borne by the respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 31ST DAY OF MAY, 2022.

J.M ONYANGO

JUDGE

