



**Wawire v Rupia (Environment & Land Case 86 of 2018)
[2022] KEELC 3347 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3347 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 86 OF 2018**

DO OHUNGO, J

MAY 31, 2022

BETWEEN

ELIJAH SALIM WAWIRE PLAINTIFF

AND

LIVINGSTONE OKUMU RUPIA DEFENDANT

JUDGMENT

1. The plaintiff commenced proceedings in this matter by filing originating summons (OS) on October 14, 2009 in the High Court. The matter was later transferred to this court. He averred that he is entitled to 1 acre of the parcel of land known as Butsotso/Esumeyia/649 (the suit property) by adverse possession. He therefore prayed for the following orders:
 - a. A declaration that the applicant bought a portion of land measuring 1 acre comprised in LR No Butsotso/Esumeyia/649 and took vacant possession in 1996 and has been in continuous peaceful, uninterrupted possession since then to-date.
 - b. A declaration that the respondent's rights and interest in the 1 acre comprised in the aforesaid parcel of land got extinguished by adverse possession upon expiry of 12 years while the applicant was in actual possession.
 - c. A declaration that the respondent at the expiry of 12 years held and is holding a portion of land measuring 1 acre in trust for the applicant.
 - d. A declaration that the aforesaid portion of land of 1 acre comprised in the aforesaid parcel of land vests in the applicant, to whom it should be transferred and be accordingly registered as sole absolute owner forthwith.
 - e. In order that the respondent do sign all relevant documents to facilitate the submission and consequent transfer to the applicant of a portion of land measuring 1 acre out of LR No



Butsotso/Esumeyia/649 and/or in default the Deputy Registrar of this honourable court be authorized to sign such documents on behalf of the respondent.

- f. An order that the respondent be condemned to pay the costs of this suit.
 - g. Such further orders or relief as this honourable court deem fit to grant.
2. The OS is supported by an affidavit sworn by the plaintiff on October 12, 2009. The defendant opposed it through a replying affidavit which he swore on November 18, 2010.
 3. At the hearing, the plaintiff adopted his aforesaid supporting affidavit as his evidence in chief. He stated that he purchased 1 acre out of the suit property from the defendant on May 20, 1996 at a purchase price of KShs 50,000. That he paid KShs 43,000 on May 20, 1996 and the balance of KShs 7,000 on August 3, 1998. He added that he took vacant possession of the purchased portion immediately he paid the first instalment of the purchase price and that he remained in occupation farming sugarcane contracted to Mumias Sugar Co Ltd for an uninterrupted period of 13 years prior to filing the OS.
 4. Under cross-examination, the plaintiff stated that he planted sugarcane on the suit property under a joint contract with the defendant and that he vacated the land when the contract expired in the year 2012. That he was not in possession of the land as at the date of his testimony and even as at the date of filing this case.
 5. The plaintiff's case was closed at that point.
 6. The defendant testified next. He too adopted his aforesaid replying affidavit as his evidence in chief. He stated that the plaintiff leased the one acre for six sugarcane harvests from 1996 as opposed to buying. That the consideration for the lease was KShs 40,000 which the plaintiff paid in instalments until completion. He added that at the expiry of the six harvests contract the plaintiff voluntarily vacated and was no longer in possession as at the date of swearing the replying affidavit.
 7. The defence case was thereby closed. Parties then filed and exchanged written submissions.
 8. The plaintiff argued that he had established his claim for adverse possession and that the defendant did not produce any evidence to show that there was a lease as opposed to a sale. Citing article 159 (2) (d) of the *Constitution*, section 19 (1) of the *Environment and Land Court Act* and the case of *James Mangeli Musoo v Ezeetec Limited* [2014] eKLR, he urged the court not to focus on procedural technicalities and to allow his case.
 9. For the defendant, it was argued that the OS is misplaced since the defendant testified that he was evicted from the suit property prior to filing the OS. It was further argued that the plaintiff had not satisfied the principles of adverse possession. Relying on the case of *Samson Mbaabu Nkarichia v Sacinta Kinya Gituma* [2020] eKLR, the defendant urged the court to dismiss the OS.
 10. I have considered the parties' pleadings, evidence and submissions in this matter. The issues that arise for determination are whether the plaintiff has established adverse possession and whether the reliefs sought should issue.
 11. The essential ingredients of adverse possession were discussed by the Court of Appeal in *Mtana Lewa v Kabindi Ngala Mwagandi* [2015] eKLR as follows:

"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. This doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act ...*."

12. The Court of Appeal in the subsequent case of *Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others* [2018] eKLR elaborated further on the elements required to prove adverse possession thus:

"18. Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, nec vi nec clam nec precario. See *Jandu v Kirplal & another* (1975) EA 225. In other words, a party relying on the doctrine bears the burden of demonstrating that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period. See this court's decision in *Wambugu v Njuguna* [1983] KLR 173..."

13. Thus, the first pre-requisite is that the plaintiff demonstrates that the title holder has lost his right to the land either by being dispossessed of it by the plaintiff or having discontinued his possession of it and the plaintiff taking possession and retaining possession for an uninterrupted period of 12 years. The plaintiff in this matter testified that he vacated the suit property prior to the filing of the OS and that he was not in possession as at the date of his testimony. Having lost possession prior to filing this suit, the plaintiff's claim for adverse possession has no leg to stand on.

14. The plaintiff's case is further that he took possession of the suit property pursuant to a sale agreement between him and the defendant on May 20, 1996. In those circumstances, assuming his account is correct, his entry into the suit property would have been by permission of the defendant. Even if he was still in possession as at the date of filing this suit, it wouldn't be acceptable for him to turn around and claim that his entry and stay on the property was by way of adverse possession. I would either way not have been persuaded by that reasoning.

15. In view of the foregoing, the plaintiff has failed to establish adverse possession. It follows therefore that the reliefs sought are not available. In the result, I dismiss the plaintiff's suit with costs.

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

DO OHUNGO

JUDGE

Delivered in open court in the presence of:

The plaintiff present

No appearance for the defendant

Court Assistant: E Juma

