



**Nyongesa v Mawang' & another (Environment & Land Case
126 of 2019) [2022] KEELC 159 (KLR) (30 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 159 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 126 OF 2019**

DO OHUNGO, J

MAY 30, 2022

BETWEEN

MARGRET ADHIAMBO NYONGESA PLAINTIFF

AND

ROSEMARY APE MAWANG' 1ST DEFENDANT

STEPHEN WEKOTO ONG'ONG'O 2ND DEFENDANT

JUDGMENT

1. By Originating Summons (OS) dated December 5, 2019, the plaintiff claimed to have acquired the parcel of land known as Marama/Shiatsala/614 by adverse possession and sought the following orders:
 - A. The Applicant having been in actual, exclusive, peaceful, open, continuous and uninterrupted occupation, possession and use of the said parcel be declared to have become the legal owner entitled by adverse possession of over twelve (12) years since September, 1990 of a portion of Land parcel of land measuring 2 ACRES and comprised in Title Number LP No Marama/Shiatsala/614 situated in Shiatsala, Butere.
 - B. The said Applicant be registered as the sole proprietor of the said parcel of land measuring 2 Acres and comprised in LP No Marama/Shiatsala/614 in place of the above named Respondents in whose favour the land is currently registered.
 - C. The applicant herein is entitled under Sections 7, 17, & 18 of Limitations of Actions Act Cap 22 of the Laws of Kenya to be registered as the Proprietor of a portion of the suit land LP No Marama/Shiatsala/614 measuring 2 Acres.
 - D. The last original indentures in respect of LP No Marama/Shiatsala/614 which are with the Respondents be dispensed with their title to this land having been extinguished by operation of law and that they hold the parcel of land in trust for the Applicant.



- E. The Respondents herein be ordered to execute all the necessary documents to effect the transfer of title to LP No Marama/Shiatsala/614 and vest a portion of the suit land measuring 2 Acres in favour of the Applicant herein in default whereof the Deputy Registrar of this Honourable court be empowered to execute all such documents on behalf of the Respondents.
- F. Costs of this application be provided for.
- G. Any further or other relief this honourable court deems fit to grant.
2. The OS was supported by an affidavit sworn by the plaintiff. She deposed that she has been living on the suit property with her husband Oketi Odongo and their 5 children since September 1990 until her husband passed away and that the defendants are mother and son and the registered proprietors of the parcel of land known as Marama/Shiatsala/614. That her husband purchased a portion of the parcel of land known as Marama/Shiatsala/614 measuring 2 acres from the deceased husband of the first defendant and father of the second defendant on September 12, 1990.
3. The plaintiff further deposed that her husband passed away on November 24, 2011 before the process of transfer of the portion he had purchased could be conducted and that after his demise, the defendants started threatening her with eviction. That she conducted a search and discovered that the suit property passed to the defendants through succession and that she has lived peaceably on the suit land for 29 years with her family, making developments and cultivating it for personal sustenance with the defendants' knowledge.
4. The defendants opposed the OS through a replying affidavit sworn by the 1st defendant. She deposed that the purported agreement dated September 12, 1990 has not been annexed to authenticate it and that if such an agreement exists, then none of the defendants witnessed it and or gave consent.
5. Despite evidence of service being availed, the defendants did not attend the hearing and did not therefore offer any evidence. The plaintiff testified as PW1 and adopted her aforesaid affidavit as her testimony.
6. Patrick Joab Okutoyi Omuremechi testified next as PW2 and stated that he served as Chief of Manyala Location from 1987 to 2003 then retired. That the plaintiff was married to one Wycliffe Oketi Odongo until 2011 when he passed way and that Wycliffe Oketi Odongo moved to Ebukuti Village after purchasing a portion of the suit land from Patrick Wekoto in 1990. That while residing on the suit land, the plaintiff and Wycliffe Oketi Odongo were blessed with five children being two sons who have homes on the suit land and three daughters. He further averred that the deceased and the plaintiff resided in his area peacefully without any complaint and uninterruptedly until the demise of the plaintiff's husband. He added that the plaintiff remained on the suit property even as at the date of his testimony. Further, that he met the defendants in 1999 in his office when they complained that they did not recognize the plaintiff's husband who was in occupation and use of their land at the time. He added that he forwarded the issue to the Divisional Officer Butere who resolved it by recommending that the plaintiff's husband continue with the use and occupation of the land.
7. Both the plaintiff's and defence cases were then closed. Parties were ordered to file and exchange written submissions. Only the plaintiff filed submissions.
8. The plaintiff argued that having stayed peacefully in the suit property for over 29 years, developing it and cultivating it, and the respondents being aware of her existence therein without raising any concerns, she has established her claim on adverse possession. She further submitted that the defendants do not contest the fact that she has lived peaceably on the suit land with her family,



developing it and cultivating it for 29 years. She relied on the case of *Wilson Njoroge Kamau v Nganga Muceru Kamau* [2020] eKLR.

9. I have carefully considered the parties' pleadings, evidence and submissions. Although the defendants focused a lot on sale transaction and locus standi, what is before the court is a claim for adverse possession. The claim is by the plaintiff in her own right. Consequently, issues of whether or not she holds letters of administration in respect of the estate of her late husband are really neither here nor there. The issues that emerge for determination are whether the plaintiff has established adverse possession and whether the reliefs sought should issue.
10. The ingredients of adverse possession were discussed by the Court of Appeal in *Mtana Lewa v Kabindi Ngala Mwangandi* [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*

11. In the subsequent case of *Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others* [2018] eKLR, the court elaborated further as follows:
 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 vs. 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...
12. The plaintiff's case, which remains entirely unchallenged, is that her husband purchased a portion of the parcel of land known as Marama/Shiatsala/614 measuring 2 acres from the husband of the first defendant and father of the second defendant on 12th September 1990. That she moved into the said portion of the property in September 1990 and has remained there until now. Although the transaction started as a sale transaction, the plaintiff's presence on the suit property became adverse to the defendants the moment the defendants started demanding her exit, as is indeed confirmed by the plaintiff and PW2. In the circumstances, the reference to a sale transaction is merely by way of disclosing the mode of entry into the suit land.
13. Among the documents that the plaintiff has produced is a certified copy of the register in respect of Marama/Shiatsala/614. It shows that the defendants are the registered proprietors of the said property, having been so registered on May 7, 2009. It further states that the size of the property is 6.31 hectares which translates to approximately 15.59 acres. The properties' said details are also confirmed by the Certificate of Official Search as at March 10, 2017 which the plaintiff produced. The plaintiff's claim is limited to 2 acres out of the said 15.59 acres.
14. There is uncontested evidence on record that the plaintiff has been in peaceful and uninterrupted occupation of the suit property since 1990. Even though PW2 testified that he met the defendants



in 1999 in his office when they complained that they did not recognize the plaintiff's husband who was in occupation and use of the suit property, I note that there is no evidence of any effort to get the plaintiff out of the suit property after 1999. This suit was filed on December 5, 2019, some 20 years after the said efforts by the defendants. I am therefore satisfied that the plaintiff has demonstrated non permissive, actual, open, exclusive and adverse occupation of the 2 acres of Marama/Shiatsala/614 for an uninterrupted period of over 12 years. In short, the plaintiff has established adverse possession and is therefore entitled to judgment.

15. In view of the foregoing discourse, I enter judgment in favour of the plaintiff as follows:
- a. The plaintiff having been in actual, exclusive, peaceful, open, continuous and uninterrupted occupation, possession and use of 2 acres of Marama/Shiatsala/614 is hereby declared to have become the legal owner of the said 2 acres of Marama/Shiatsala/614.
 - b. The plaintiff be registered as the sole proprietor of the said 2 acres of Marama/Shiatsala/614.
The last original indentures in respect of Marama/Shiatsala/614 which are with the defendants be dispensed with, their title to the said 2 acres of Marama/Shiatsala/614 having been extinguished by operation of law.
 - d. The defendants are hereby ordered to execute all the necessary documents to effect the transfer of the said 2 acres of Marama/Shiatsala/614 in favour of the plaintiff within 45 (forty-five) days from the date of this judgment. In default, the Deputy Registrar of this court is empowered to execute all such documents on behalf of the defendants.
 - e. Each party to bear own costs of the suit.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 30TH DAY OF MAY 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the plaintiff

No appearance for the defendants

Court Assistant: E. Juma

