



REPUBLIC OF KENYA



KENYA LAW
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**Ogutu v Osore & another (Environment & Land Case 605 of 2014)
[2022] KEELC 3795 (KLR) (28 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3795 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 605 OF 2014**

DO OHUNGO, J

JUNE 28, 2022

BETWEEN

ABDUL KWEYU OGUTU PLAINTIFF

AND

OMARI OSORE 1ST DEFENDANT

ALI SHIKUKU WERE 2ND DEFENDANT

JUDGMENT

1. This suit was originally filed in the High Court as HCCC No. 190 of 2000 (OS). The matter was later transferred to this court, hence its new case number. By Originating Summons (OS) dated December 11, 2000, the plaintiff averred that he had been in possession of 5.5 acres of the parcel of land known as E. Wanga/Isongo/977 since the year 1972 and that the defendants' title to the said portion had been extinguished by adverse possession. The OS is supported by an affidavit sworn by the plaintiff. The defendants opposed the OS through a replying affidavit and a further affidavit, both sworn by the first defendant.
2. The OS was heard by way of oral evidence. The plaintiff stated that his father, Ramadhan Emitati Kasamani, purchased 5.5 acres of the parcel of land known as E. Wanga/Isongo/977 from Juma Were Sakane, the defendants' father, in 1972. That his father occupied the land upon purchase and later died in 1982, leaving his family on the land. He added that his father was buried on the land and that as at 26th November 2014 which was the date of his witness statement, he was the only son of his father who was staying on the suit land. That the defendants, whose father passed away in 1984, had forcefully taken about 2 acres of the land. That his father purchased the land through a written sale agreement and completed paying the purchase price on August 20, 1972. That following their father's death, the defendants agreed before the area sub-chief on August 8, 1990 that they would transfer the portion to the plaintiff but they later went ahead and shared the land among themselves through confirmation of grant.



3. The plaintiff further stated that he has about 4 houses on the suit property and has planted crops and trees on it. That his father, mother and brothers have been buried on it. That he has been on the suit land since 1972 when he was 6 years old, that his father lived on it for 10 years and his mother for 34 years until she passed away in 2006. He produced a handwritten note dated August 20, 1972, certified copy of the register in respect of E. Wanga/Isongo/977 as at April 6, 1999, another handwritten note dated 8th August 1990 grant of letters of administration intestate in respect of the estate of Ramadhan Emitati Kasamani, issued to him on November 10, 2000. He added that when the defendants refused to give him the land, he filed a claim in the Land Disputes Tribunal in 1998 and that there was an appeal against the decision of the tribunal in 1999. He conceded that he has had disputes with the defendants over the land and that trouble started in 1984 when the defendants' father passed away. That although the land was not surveyed, his father told him that he bought 5.5 acres.
4. Next to testify was Oliver Iddi Oduor Samba, PW2, the plaintiff's neighbour who stated that the plaintiff's father purchased 5.5 acres of the suit property from the defendants' father on August 20, 1972 through an agreement which was signed in his presence although he did not sign the agreement. He added that the plaintiff's father settled his family on the suit property in 1972 and that the plaintiff has been on the land since his childhood. He added that the defendants took back 2 acres of the land leaving the plaintiff with about 2 acres and that the plaintiff and the defendants have had disputes over the land for a long time.
5. Jackson Nyanje Mzee, PW3, reiterated what the plaintiff and PW2 stated about the plaintiff's father purchasing the 5.5 acres and taking possession with his family, about the defendants taking back 2 acres and about existence of disputes between the plaintiff and the defendants over the suit property. Specifically, he stated that the plaintiff went to the area chief, the District Officer and later to the tribunal in the course of the disputes.
6. The plaintiff's case was then closed. The plaintiff later passed away in February 2018 and pursuant to order made on February 17, 2021, was substituted by Abdul Kweyu Ogutu.
7. The first defendant, Omari Osore Were (DW1), testified as the sole defence witness. He stated that the second defendant is his brother. That they had a dispute with the plaintiff which went to the Mumias Land Dispute Tribunal as Case No. 21 of 1997 against whose decision he appealed to the Provincial Appeals Committee in Case No. 88 of 1998. That the provincial tribunal upheld the Mumias tribunal decision and he again appealed to the High Court in Kakamega HCCA No. 38 of 1999 and the court set aside the provincial tribunal's decision. He produced proceedings of both tribunals and added that they have not had a peaceful stay with Hussein Kasamani (the deceased plaintiff) and that the deceased vacated the plot after the High Court decision. That he (DW1) was in possession as at the date of his testimony. He conceded that he signed the handwritten note dated August 8, 1990 but added that he did so under duress since the chief had ordered the police to put him behind bars. That the deceased plaintiff vacated the suit property and was not buried on it. That they had many cases with the deceased plaintiff over the suit property, including even a criminal case. He however conceded that the deceased plaintiff's father bought the plot in 1972 and moved into it the plot the same year.
8. The defence case was then closed.
9. Parties filed and exchanged written submissions. I have carefully considered the pleadings, the evidence and the submissions. The issues that arise for determination are whether the plaintiff has established adverse possession and whether the reliefs sought should issue.
10. The law is that a person who seeks to acquire title to land through adverse possession must prove non-permissive or non-consensual actual, open, notorious, exclusive, peaceful and adverse use by him or



those under whom he claims for the statutory prescribed period of 12 years without interruption. See [Richard Wefwafwa Songoi v Ben Munyifwa Songoi](#) [2020] eKLR.

11. The deceased plaintiff's case was that his father purchased 5.5 acres of the parcel of land known as E. Wanga/Isongo/977 from the defendants' father, Were Sakane, in 1972 and took possession the same year. The first defendant confirmed as much in his testimony, save for the size of the portion purchased. From the certified copy of the register that was produced in evidence, it is apparent that Were Sakane was registered as proprietor of E. Wanga/Isongo/977 on February 21, 1972 and that the defendants became joint registered proprietors of the property on September 2, 1997. The size of the property is indicated as approximately 4.6 hectares which translates to approximately 11.366 acres. The register further shows that a caution was registered against the title on 8th September 1997 in favour of the deceased plaintiff who was claiming a purchaser's interest. It follows therefore that as at September 8, 1997, the deceased plaintiff acknowledged the defendant's title and did not, at that point, have any intention to dispossess the defendants. Instead, his intention was to enforce a purchase transaction. This suit was filed three years later in the year 2000, by which time the requisite period of 12 years was far from being attained.
12. The deceased plaintiff acknowledged in his testimony that there were disputes between him and the defendants concerning ownership of the suit property. Those disputes saw the parties appear before the local chief, then the District Officer, then before the Mumias Land Dispute Tribunal in Case No. 21 of 1997, followed by the Provincial Appeals Committee in Case No. 88 of 1998 and ultimately the High Court at Kakamega in HCCA No. 38 of 1999. Indeed, entry number 10 dated March 30, 1999 in the proprietorship section of the aforesaid register is a restriction barring any dealings with the property until the matter of Misc Award No. 80/98 Appeal at the Kakamega Court is heard and determined. Thus, as at 30th March 1999, there was a dispute between the deceased plaintiff and the defendants concerning ownership of the suit property. In those circumstances, the deceased plaintiff cannot claim to have had peaceful use of the suit property for the statutory period of 12 years prior to filing this suit in the year 2000.
13. In view of the foregoing discourse, the plaintiff has failed to establish adverse possession. Consequently, the reliefs sought cannot issue. If what the plaintiff sought to achieve was to enforce a sale transaction, then an OS for adverse possession was not the correct way to go about it. I therefore dismiss the plaintiff's case. Considering that the first defendant conceded in his testimony that there was a purchase transaction, I order that each party shall bear own costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 28TH DAY OF JUNE 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Munyendo for the plaintiff

No appearance for the defendants

Court Assistant: E. Juma

