



REPUBLIC OF KENYA



KENYA LAW
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**Wamukoya v Opetu & 2 others (Environment & Land Case
10 of 2019) [2022] KEELC 138 (KLR) (14 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 138 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 10 OF 2019**

DO OHUNGO, J

JUNE 14, 2022

BETWEEN

ALI MALALA WAMUKOYA APPLICANT

AND

OMAR MAKOKHA OPETU 1ST RESPONDENT

HUSEINI MUNYENDO OPETU 2ND RESPONDENT

ASMAN BABU OPETU 3RD RESPONDENT

JUDGMENT

1. By Originating Summons (OS) dated 1st March 2019, the plaintiff/applicant claimed that he had acquired title to 0.5 acres of the parcel of land known as North Wanga/Matungu/390 (the suit property) by adverse possession. He therefore sought determination of the following issues:
 1. Whether the applicant has acquired title deed for 0.5 acres of land parcel number North Wanga/matungu/390 by way of adverse possession against the Respondents.
 2. Whether the Respondents are holding title deed for 0.5 acres of land parcel number North Wanga/matungu/390 in trust for the applicant who has acquired title for the same by way of adverse possession.
 3. Wheter (sic) the title deed in respect of 0.5 acres of land parcel number North Wanga/matungu/390 held by the Respondents should be cancelled and title deed for the same be issued in favour of the applicant.
 4. Wheter(sic) the Deputy Registrar Kakamega High court should be authorized to execute transfer documents on behalf of the Respondents in favour of the applicant in respect of 0.5 acres of land parcel number NorthWanga/matungu/390.



5. Whether the applicant bought 0.5 acres of land parcel number North Wanga/matungu/390 from the late Salim Opetu Munyendo legally.
6. Who should pay the costs of this case.
2. Directions were taken that hearing proceeds by way of oral evidence. At the hearing, the plaintiff/applicant testified as the sole witness in respect of his case. He stated that on 18th October 1988, he purchased 0.5 acres of the suit property from the late Salim Opetu Munyendo and that he took immediate possession of the said portion, established a school thereon and remained in possession up to the time of filing the OS. That when the respondents instituted succession proceedings in respect of the estate of the late Salim Opetu Munyendo, they failed to include him to enable him get title to his 0.5 acres. That the respondents obtained title to the entire suit property and that they are holding it in trust for him since he has acquired title to the 0.5 acres by adverse possession.
3. Under cross-examination and re-examination, he stated that he does not reside on or farm on the suit property. That the buildings on the suit property are madrasa classrooms which are under the management of Jamia Namulungu Mosque. That there is a committee which is in charge of running the mosque and that the committee had not authorized him to file this suit. That he is claiming the plot so as to give it to the mosque.
4. The plaintiff's case was closed at that point.
5. The defence case also had only one witness, Asman Babu Opetu, the third defendant/respondent who stated that his father the late Salim Opetu Munyendo passed away in 2000. That since his father and his entire family profess the Muslim faith, his father donated a portion of his land to the Islamic Community for the purpose of building a mosque, as a result of which Namulungu Jamia Mosque was established. That although the Islamic Community established a school on the land, the government later took over the school and acquired land which the school relocated to thereby leaving the original land and classrooms which are now being used as madrasa. That the plaintiff/applicant has never occupied the land.
6. Under cross-examination, he stated that the madrasa is located on the suit property and that he and the other defendants would not have any problem if the portion where the madrasa is located is transferred to Namulungu Mosque provided that they have a mutual agreement to allow that.
7. The defence case was then closed and parties were ordered to file and exchange written submissions.
8. The plaintiff submitted that the defendants had admitted that the portion of the suit property which is claimed is being used by Namulungu Jamia Mosque which has built madrasa classrooms on it. He added that he had proven his claim for adverse possession and urged the court to order the defendant to subdivide the suit property and to transfer the 0.5 acres to Namulungu Jamia Mosque.
9. In response, the defendants submitted that the plaintiff had admitted that he did not have any authority to file the suit on behalf of Namulungu Jamia Mosque and that he is not in occupation of the suit property. Citing *inter alia* the case of *Mtana Lewa vs Kabindi Ngala Mwagandi* [2015] eKLR, they argued that the plaintiff is not in possession and had failed to establish adverse possession.
10. I have considered the pleadings, the evidence and submissions in this matter. The issues that arise for determination are whether adverse possession has been established and whether the reliefs sought should issue.



11. 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*

12. The plaintiff has admitted that he is not in possession of the portion of the suit property that he is claiming. Possession is a core ingredient of adverse possession. Although he claimed to have entered the suit property on 18th October 1988, it emerged from his evidence that he has never resided on or undertaken any activities on the suit property that would qualify as possession. On the contrary, there are madrasa classrooms on the suit property which are under the management of Jamia Namulungu Mosque. The plaintiff conceded that there is a committee which is in charge of running the madrasa as well as the mosque and that he has no role in the committee. In the absence of proof of possession for an uninterrupted period of 12 years, the plaintiff's claim for adverse possession crumbles.
13. In his own words, the plaintiff's claim to the portion of the suit property is grounded on an alleged sale transaction between him and the late Salim Opetu Munyendo. A person who is in possession with permission of the registered owner cannot be in adverse possession. See *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others* [2009] eKLR. Even if he had established possession, his claim for adverse possession would fail on the basis that his possession would be with the permission of the registered proprietor.
14. In view of the foregoing discourse, the plaintiff has failed to establish adverse possession. That being the case, the reliefs sought cannot issue. Consequently, I dismiss the plaintiff's case with no order as to costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 14TH DAY OF JUNE 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the plaintiff/applicant

No appearance for the defendants/respondents

Court Assistant: E. Juma

