



REPUBLIC OF KENYA



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**Amukowa v Adome (Environment & Land Case 47 of 2018)
[2022] KEELC 4863 (KLR) (21 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4863 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 47 OF 2018
AA OMOLLO, J
SEPTEMBER 21, 2022**

BETWEEN

ERNEST AMUKOWA APPLICANT

AND

ERIC ADOME RESPONDENT

JUDGMENT

1. Ernest Amukowa took out originating summons dated May 28, 2018 under the provisions of section 7 and 38 of the [Limitation of Actions Act](#) and order 37 of the [Civil Procedure Rules](#). He posed the following questions for determination;
 - a. Whether the applicant has been in open and notorious possession of a portion of land measuring approximately 0.08 ha out of LR No South Teso/Angoromo/11756 for a period of 12 years.
 - b. Whether the respondents' title to a portion measuring approximately 0.08 ha out of South Teso/Angoromo/11756 became extinguished upon expiry of 12 years from the time the applicant went into possession of the said land.
 - c. Whether the applicant has now acquired title to the said land by virtue of adverse possession.
 - d. Whether the registration of respondents as owner of LR No South Teso/Angoromo/11756 should be cancelled and the applicant be registered as the owner of a portion measuring approximately 0.08 ha out of the said parcel
 - e. Who should pay the costs of this suit?
2. The applicant seeks for judgment in the following terms;



1. That the respondents' rights over a portion measuring approximately 0.08 ha out of LR No South Teso/Angoromo/11756 got extinguished by adverse possession upon expiry of 12 years from the dates the applicants came into possession.
 2. That the respondents have been perpetually barred from taking or using a portion measuring 0.08 ha out of South Teso/Angoromo/11756 currently in occupation of the applicant.
 3. That the applicant be registered as a proprietor of portion measuring 0.08 ha out of LR No South Teso/Angoromo/11756 which portion the applicant is occupying and has fully developed.
 4. That the respondent do execute the relevant documents to facilitate the transfer of a portion measuring approximately 0.08 ha out of LR No South Teso/Angoromo/11756 into the name of the applicant and that in default the deputy registrar do execute the same in the place of the respondent.
 5. The respondents do pay the costs of this case.
3. The originating summons was supported by the applicant's affidavit deposed on May 28, 2018 that LR South Teso/Angoromo/11756 is registered in the name of the respondent. That he (applicant) in 1991 bought a portion of land out LR South Teso/Angoromo/2730 then registered in the name of Raphael Adome Omuse and attached a copy of the sale agreement to support. The applicant deposed that the sold portion was clearly demarcated on the ground and boundaries thereto were planted by the seller and he immediately took vacant possession. The applicant avers that a title deed was prepared for him while he was away which excluded a portion measuring 0.08 ha which he occupies but is registered in the name of the respondent. He added that he has extensively developed the 0.08 ha portion with a built homestead and has used it quietly, peacefully for over 27 years thus prayed for orders in the plaint.
 4. The respondent contested the suit through his replying affidavit filed on July 9, 2018. He stated that the claim before court is founded on a dishonourable cause of action as it arises out of an illegal act of the applicant. The respondent deposed that the applicant got the 1½ acres of land he purchased from his deceased father and what is now claimed constitutes an act of trespass and the developments done by the applicant are in furtherance of the trespass. He urged the court to dismiss the claim as it has been brought with dirty hands.
 5. Once the pleadings closed, the applicant presented his evidence as PW1 produced the sale agreement and sketch map drawn for the portion sold as Pex 2 & 3. Pex 1 is the certified copy of the register for LR South Teso/Angoromo/11756. He stated that the respondent was present during the sale and signed the agreement as a witness. That the size of land sold was 1½ acres. The applicant continued that in the year 2006, he built his house on the land sold and they have lived in peace.
 6. The applicant stated further that he started these proceedings after he got information that someone had bought a nearby plot and now there was a different sketch which indicated that the 0.08 ha was not part of his land. He referred the court to the sketch annexed to his statement (Pex 3) which showed the boundaries placed when he bought the land and which boundaries still exists on the ground todate, fenced with chain link. He brought this suit to be awarded the 0.08 ha and costs of the suit.
 7. In cross-examination, PW1 said he borders Obiero's family on the disputed portion and according to Pex 4, the road touches Obiero's plot. PW1 continued that he obtained the land control board consent produced in court as well a transfer for the sold portion. That LR 11756 was created on January 10, 2017 and when he bought the land, he did not know the size was 1½. In re-examination, PW1 said that



what he bought was marked on the ground. That he was given a title deed thereafter. That his land ends at Abiero's land for 27 years.

8. Ben Okuoma testified as PW2. He confirmed that the applicant purchased 1½ acres of land from the respondent's father in 1991 and ground position for the sold portion was clearly demarcated. PW2 added that the plaintiff took possession and has been using the same exclusively ever since and peacefully so. PW2 stated that the applicant has extensively developed the disputed portion of 0.08 ha out of LR South Teso/Angoromo/11756.
9. During cross-examination, PW2 said that his home is in Burumba estate but knew where the homes of the plaintiff and defendant are. That in the verbal agreement, the applicant purchased two acres. He witnessed the applicant pay the vendor Kshs 26,000 and there was no balance. That it is the vendor who placed a boundary for the sold portion and Euphobia trees planted to separate their boundaries.
10. The County Surveyor, Geoffrey Kamadi Odindo gave his evidence on February 16, 2022 as PW3. The witness stated that acting on a court order, directing them to determine the land occupied by the applicant over South Teso/Angoromo/3291. Upon their visit, they found the applicant is occupying an excess of 0.07 ha. The parties were in agreement over the existing boundaries. That the order did not direct him to ascertain the road of access and that the two parcels are served by a common road of access. In re-examination, PW3 stated that the 0.07 ha did not form part of the title No 3291. They followed the existing boundaries on the ground during the exercise. This evidence marked the close of the applicant's case.
11. The respondent relied on his sole evidence which was also presented on February 16, 2022. DW admitted the plaintiff purchased 1½ acres of land from his father. That the plaintiff occupies more than 1½ acres of land. According to him, the plaintiff blocked a surveyed road of access. DW further stated that the applicant started constructing on the disputed portion after this suit was filed. He argues that this suit is untenable and ought to be dismissed and the caution lodged on his title be vacated.
12. The plaintiff filed his submissions on March 4, 2022 and reiterated the evidence adduced. The applicant submitted that his possession has been open for a period in excess of 27 years and prayed to be granted the orders in the originating summons. In supporting their claim, the applicant cited *Njuguna Madato vs Masai Itumo & 2 others* (2002) eKLR where the Court of Appeal held thus; "For the defence of adverse possession to succeed, the possessor(s) must show that the possession was adequate, continuous and exclusive. In other words, such possession, to be adverse, must be adequate in continuity, in publicity and in extent to show that the possession was adverse to the proprietor." And the case of *Harrison Ngige Kaare vs Gichobi Kaara & Ano* (1997) eKLR that; "Possession is hostile if it is open, without right, without force or fraud or exclusive. On other words, the adverse possessor must be shown to be using the land as though it is solely his own, before a right of action to recover it can be said to have accrued for limitation period to start running."
13. The respondent filed his submissions on April 7th, 2022. He raised one issue:-

Whether a boundary dispute is affected with lapse of time in order to turn to a claim of adverse possession. They answered the question in the negative relying on the equitable doctrine of he who comes to equity must come with clean hands. The respondent submits that there is no legal relief out of a dishonourable cause of action. It is his submission that the applicant obliterated the original boundary features, erased roads of access and embarked on a legal process to give legal sanctity to his unlawful acts. That to allow the suit is to set in motion social discord.



14. After reviewing the evidence adduced, the pleadings filed and the submissions rendered, the court frames the following questions for determination:-
 - a. Whether or not the dispute before the court constitutes a boundary dispute.
 - b. Whether or not a claim for adverse possession has been established.
 - c. Who bears the costs of the suit?
15. The applicant is claiming the portion measuring approximately 0.07 ha comprised in the respondent's title LR No 11756 by way of adverse possession. He argues that he has always been in possession of the disputed since 1991 after he purchased land from the respondent's father in the year 1991. The respondent does not deny occupation by the applicant but argues such occupation is illegal because the applicant obliterated their common boundary and blocked a road of access. The respondent mentioned a blocked road but did not elaborate who the road of access serve neither did he produce a RIM for the two plots to show the existence of the alleged road.
16. The applicant produced a field diagram prepared by a surveyor dated January 7, 2017 which shows an existing road of access separating the disputed portion and the respondent's land marked by a brace. The respondent does not give the measurements of the road blocked as the impugned portion is clearly demarcated and distinct from the road. In the mutation form for South Teso/Angoromo/2730 which created LR No 3290 and the applicants' number 3921, there is no provision of a road. It is therefore not clear the basis upon which the road in the sketch dated January 7, 2017 was created. Yet still there is no evidence led that the creation of that road in the subsequent sub-division of LR S Teso/Angorom/3291 diminished the existence of the impugned road otherwise the respondent would have produced an expert to corroborate his assertion.
17. The respondent also contended that what the applicant is claiming is a result of boundary dispute. The applicant testified that after buying the land, the respondent's father planted sisal to demarcate the sold portion. The applicant went further to state that he fenced off the sold portion, planted trees and developed it. PW2 and PW3 corroborated his evidence. PW3 stated that he picked up the measurement of the land occupied by the applicant using the existing boundaries. The respondent in cross-examination confirmed that he was present during the survey exercise and agreed that the surveyor measured the land within the marked boundaries. The respondent confirmed that the 0.07 ha is within the fenced land in possession of the applicant.
18. Given the admission by the respondent that the applicant has occupied the 0.07 ha from the time he bought the parcel of land and even fenced it without his interference, it defeats his defence time that this was a boundary dispute. Secondly, the occupation has been open and peaceful for a period in excess of twelve (12) years meaning the applicant dispossessed the respondent the opportunity to put to use the purpose he may have intended for the suit portion. The respondent argued that if the orders sought are granted, it will cause social discord. The entry on to the impugned 0.08 ha portion by the applicant was pursuant to a sale agreement executed between him and the respondent's father. The applicant stated that the boundaries for the sold portion were demarcated by the respondent's father. The inference drawn is that the applicant occupies as demarcated by the vendor. His occupation was thus legal except he did not get title for the entire land as sold to him. The occupation would amount to trespass if the entry was illegal and in any event, the continuous possession for over 12 years extinguished the respondent's right over the land.
19. In conclusion, I find the applicant has proved his case on the standard of probabilities. Accordingly I enter judgement in his favour that;



- a. The respondents' rights over a portion measuring approximately 0.07 ha comprised in the title LR No South Teso/Angoromo/11756 got extinguished by adverse possession upon the expiry of 12 years from the date the applicant came into possession.
- b. The respondents are hereby perpetually barred from taking or using the impugned portion measuring 0.07 ha out of South Teso/Angoromo/11756 currently in the occupation of the applicant.
- c. An order be and is hereby made that the applicant shall be registered as a proprietor of a portion measuring 0.07 hectares out of title LR No South Teso/Angoromo/11756 which the applicant is occupying and has fully developed.
- d. The respondent is directed to execute the relevant documents to facilitate the sub-division of, transfer and registration of the 0.07 hectares in the name of the applicant within 45 days hereof failing which the Deputy Registrar do execute the same in the place of the respondent.
- e. Each party to bear their respective costs of this suit.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 21ST DAY OF SEPT. 2022.

A OMOLLO

JUDGE

