



**Otipa v Wakungwi alias Mwanaisha Kunani Wakungwi & another;
Eshirere & 2 others (Interested Parties) (Environment & Land Case
177 of 2017) [2022] KEELC 13690 (KLR) (25 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13690 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 177 OF 2017**

**DO OHUNGO, J
OCTOBER 25, 2022**

BETWEEN

JOSEPH OSUNDWA OTIPA PLAINTIFF

AND

**KUNANI WAKUNGWI ALIAS MWANAISHA KUNANI WAKUNGWI 1ST
DEFENDANT**

ASMAN OSUNDWA AKUNGWI 2ND DEFENDANT

AND

ISMAEL WESONGA ESHIRERE INTERESTED PARTY

MOHAMMED OMAR INTERESTED PARTY

PATRICK WASWA OTIPA INTERESTED PARTY

JUDGMENT

1. The plaintiff/applicant commenced proceedings in this matter through originating summons (OS) dated April 6, 2010 which was filed in the High Court as HCCC No 46 of 2010. The matter was transferred to this court on May 29, 2017, hence its current case number. The plaintiff averred in the OS that he became entitled to the parcel of land known as E. Wanga/Eluche/808 (the suit property) by adverse possession. He therefore sought the following orders:

1. That Joseph Osundwa Otipa be registered as proprietor of portion of land measuring 3.6 Ha from land parcel No E. Wanga/Eluche/808 having peacefully acquired right to it by adverse possession having used it peacefully, continuously, openly and without interruption since 1976.
2. That costs of this summons be provided for.



2. The OS was supported by an affidavit sworn by the plaintiff/applicant. He deposed that he purchased the suit property on February 28, 1976 from the first defendant/respondent Kunani Wakungwi alias Mwanaisha Kunani who was the then registered owner and that on February 20, 2007 the suit property was secretly transferred to Asman Osundwa Akungwi who is the son of the first defendant/respondent. That he has been residing on the suit property since 1976 to the date of the affidavit, using the parcel openly, continuously and without any interruption from anybody and that he had therefore acquired it by way of adverse possession.
3. Asman Osundwa Akungwi opposed the OS through a replying affidavit in which he deposed that the plaintiff/applicant is his uncle and a brother to his father Said Akungwi and that when his father died, the plaintiff/applicant inherited his mother, and it is on that basis that the plaintiff/applicant found himself on the suit property. He further deposed that his mother never sold the suit property to the plaintiff/applicant and that the plaintiff/applicant never stayed on the suit property as alleged save for his relationship with the first defendant/respondent.
4. At the hearing, the plaintiff/applicant testified as PW1. He adopted his witness statement and stated that he bought the suit property from Kunani Wakungwi on December 28, 1976, took immediate possession of it, developed it, and lived on it uninterruptedly from 1976. That Asman Osundwa who is the son of the first defendant/respondent transferred the suit property to himself without his consent and went ahead to subdivide and transfer it to the interested parties herein. He therefore prayed for the same to be revoked and the suit land be registered in his name as the sole proprietor having stayed there since 1976 and without any interruption.
5. Under cross examination, he stated that he bought the suit property in October 1976 through a written agreement which he did not in his list and bundle of documents. He further stated that Mwanaisha was the wife of Saidi Wakungwi Osundwa who was the plaintiff/applicant's brother, and that the plaintiff/applicant did not marry or inherit Mwanaisha after his brother passed away. He testified further that upon selling to him the suit property, Mwanaisha moved to plot 807 and that as at time he filed this case, the interested parties had all already obtained titles. That from 1976 to 2010, he did not demand a transfer or title from Mwanaisha and that as at the date of the sale agreement, Justine Otipa was 4 years old.
6. Justine Otipa Ofisi testified as PW2. He adopted his witness statement filed on August 10, 2020 as his evidence in chief. He stated that he is plaintiff/applicant's son and close neighbour to the defendants/respondents. That the first defendant/respondent and the plaintiff/applicant entered into a sale agreement for the sale of the suit property in 1976 and that the plaintiff/applicant took immediate possession. That Asman Osundwa being registered owner of the suit property secretly subdivided it into East Wanga/Eluche/2296 to 2299 and transferred them to the interested parties.
7. Under cross examination, PW2 testified that he was born in 1976 but his identity card reads 1979 and that he was not a witness when the plaintiff/applicant bought the suit property from the first defendant/respondent. He added that the plaintiff/applicant did not inherit the first defendant/respondent and that the plaintiff/applicant and the first defendant/respondent's husband each inherited land from PW2's grandfather. That the land which the plaintiff/applicant inherited was plot number 2286 which the plaintiff/applicant sold and then bought the suit property.
8. Benedict Matumbai Munyendo testified as PW3. He adopted his witness statement filed on August 10, 2020 and stated that he is a close neighbour of the plaintiff/applicant and defendants/respondents. That sometime in 1976 Kunani Wakungwi and Joseph Osundwa entered into the sale agreement of the suit property. That Joseph Osundwa took possession and has remained in the suit property for 43



- years with his family. He further testified that Asman Osundwa transferred the suit property to himself without knowledge of Joseph Osundwa and further subdivided it to third parties.
9. Under cross examination, PW3 stated he was born in 1970 and that the plaintiff/applicant has been his neighbour since he was born. He added that he did not witness the sale transaction and that the only relationship that existed between the plaintiff/applicant and Mwanaisha was that of the sale transaction.
 10. The plaintiff/applicant's case was then closed.
 11. Asman Osundwa Akungwi testified as DW1. He stated that the plaintiff/applicant is a younger brother to his father and that the plaintiff/applicant inherited his mother after his father's death. He adopted his replying affidavit whose contents I summarized earlier in this judgment. He added that the plaintiff/applicant did not buy the suit property but invaded it.
 12. Mohamed Makokha Omar, the second interested party, testified as DW2. He stated that he purchased 2.5 acres of E Wanga/Eluche/808 in 2007 from Asman Osundwa Akungwi and that he fulfilled all procedural and legal requirements leading to his registration as the sole owner.
 13. Patrick Waswa Otipa, the third interested party, testified as DW3. He stated that he is the plaintiff/applicant's son and that he is the sole registered owner of parcels of land known as E. Wanga/Eluche/2298 and 2299 having purchased them from Asman Osundwa and that the plaintiff/applicant is not entitled to the said parcels or any portion created from E. Wanga/Eluche/808. He added that he was not born on the said parcels and that he was residing on the plaintiff/applicant's plot as his son as at the date of his testimony.
 14. Ismael Wesonga Eshirere testified as DW4. He stated that he is the sole registered owner of land parcel number E Wanga/ Eluche/2296 having purchased it from Asman Osundwa Akungwi and that the plaintiff/applicant has no interest in the said parcel.
 15. The defence and interested parties' cases were then closed. Parties thereafter filed and exchanged written submissions.
 16. The plaintiff/applicant submitted that having purchased the suit property in 1976 and having used it since then, he had established adverse possession. That his entry into the suit property was not consensual as the alleged marriage was never proved by material evidence. He further stated that he has been in open notorious and exclusive use of the suit land for more than 12 years without any interference and as such has met the statutory requirements for adverse possession. He relied on sections 7, 13, 17 and 38 of the *Limitation of Actions Act* and on the case of *Mbira v Gachuhi* (2002) 1 EALR 137.
 17. The defendants/respondents and the interested parties relied on sections 7, 13, 17 and 38 of the *Limitation of Actions Act* and the case of *Wambugu v Njuguna* (1983) KLR 173 and argued that the plaintiff/applicant's entry on the suit property was consensual in that there was marriage between him and the first respondent and that as such his stay was not open, notorious, or exclusive. They further submitted that the plaintiff/applicant did not purchase any property from them and had failed to prove adverse possession. They relied on *Mate Gitabi v Jane Kabubu Muga alias Jane Kaburu Muga & 3 others* [2017] eKLR and urged the court to dismiss the case.
 18. I have considered the parties' pleadings, evidence, and submissions. The issues that emerge for determination are whether the plaintiff has established adverse possession and whether the reliefs sought should issue.



19. The Court of Appeal restated the essentials of adverse possession in *Loise Nduta Itotia v Aziza Said Hamisi* [2020] eKLR as follows:

In line with the Act, Kneller, J. (as he then was) in the case of *Kimani Ruchire v Swift Rutherford & Co Ltd* [1980] KLR 10, outlined some tenets of adverse possession thus;

“The plaintiffs have to prove that they have used this land which they claim as of right. Nec vi, nec clam, nec precario (no force, no secrecy, no persuasion). So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it or by way of recurrent consideration.”

20. The essential prerequisites of adverse possession are 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. See *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR.
21. The plaintiff's case is that he purchased the suit property in 1976 from Kunani Wakungwi alias Mwanaisha Kunani who was the then registered owner of the suit property and that he took immediate possession. He and his witnesses have given various dates as being the date of the agreement, ranging from February to December 1976. Assuming that his account as to existence of a sale transaction is correct, having entered the property pursuant to a sale agreement, his presence thereon would have been with the permission of the seller. Case law is clear on that as was seen in *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others* [2009] eKLR.
22. Although the plaintiff pegged his alleged entry into the suit property on a written sale agreement, he did not produce any sale agreement. During his testimony, he stated that he did not remember who wrote the agreement. PW2 and PW3 who supported the plaintiff as to existence of the agreement were hardly six years old as at the time the agreement is alleged to have been made. Their testimony in that regard is not helpful at all.
23. In terms of sections 107, 108 and 109 of the *Evidence Act*, the burden of proving existence of the sale agreement and completion of payment of the purchase price was upon the plaintiff. He failed to discharge the burden. His obligation in those matters was even more acute considering the vulnerability of the first defendant/respondent who he concedes was his brother's widow.
24. In view of the foregoing, the plaintiff has failed to establish adverse possession. That being the case, the reliefs which he sought cannot issue to him. I dismiss the plaintiff's case. Considering the relationship between the parties, I make no order as to costs.

Dated, signed, and delivered at Kakamega this 25th day of October 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

The plaintiff present in person

No appearance for the defendants and interested parties

Court Assistant: E. Juma



