



Isiye & another v Kharinda & 2 others (Environment & Land Case 17 of 2022 & 23 of 2020 (Consolidated)) [2025] KEELC 1040 (KLR) (6 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1040 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 17 OF 2022 & 23 OF 2020 (CONSOLIDATED)
DO OHUNGO, J
MARCH 6, 2025

BETWEEN

APOLLO KATAMU ISIYE PLAINTIFF

AND

NATHAN MUSEVE KHARINDA 1ST DEFENDANT

ROSA A. ELIATI 2ND DEFENDANT

AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 23 OF 2020

BETWEEN

ROSA ELIATI ATEMA (SUING ON HER OWN BEHALF AS WELL AS THE ADMINISTRATRIX OF THE ESTATE OF THE LATE JACKSON MUHEHE KITIAKALA) PLAINTIFF

AND

APOLLO KATAMU ISIYE DEFENDANT

JUDGMENT

1. This judgment is in respect of two consolidated cases: ELCC No. 17 of 2022 and ELCC No. 23 of 2020. Litigation in ELCC No. 17 of 2022 commenced in the High Court at Kakamega on 25th May 2011, when Apollo Katamu Isiye (Apollo) filed Plaintiff dated 24th May 2011, against Nathan Museve Kharinda (Nathan) as First Defendant and Rosa A. Eliati (Rosa) as Second Defendant. The matter was transferred to this Court, then to the Subordinate Court and back to this Court, hence its current case number.



2. Apollo averred in the Plaint that he was the registered proprietor of land parcel number S/Kabras/Bushu/1238 (the suit property) having acquired it by purchase from Nathan. That Rosa had barred him from entering, occupying and utilizing the suit property. He therefore prayed for judgment against the Defendants jointly and severally for their eviction together with their family members, servants, agents and anyone else occupying the suit property. He also prayed for costs of the case.
3. Nathan filed Statement of Defence dated 4th July 2019 in which he admitted selling the suit property to Apollo and added that Apollo was entitled to possession. He denied being in occupation of the suit property and urged the Court to enter judgment in favour of Apollo and against Rosa.
4. On her part, Rosa filed Statement of Defence and Counterclaim dated 1st August 2011 wherein she averred that Apollo obtained title fraudulently and that she had been in quiet possession, occupation and use of the suit property from 1983. That her late father purchased four acres of land parcel number S/Kabras/Bushu/1047 from Nathan through agreement dated 24th February 1981 following which the said parcel was subdivided into two new parcels including the suit property and that her father was entitled to the suit property. She further averred that Nathan's title was extinguished by operation of law hence he could not pass any title to Apollo. She therefore prayed that Apollo's case be dismissed with costs and that judgment be entered in her favour against Apollo for a declaration that she is the bona fide owner of the suit property and for cancellation of Apollo's registration as proprietor. She also sought costs of the Counterclaim.
5. On the other hand, proceedings in ELCC No. 23 of 2020 commenced in this Court on 19th March 2013, when Rosa filed Originating Summons dated 21st January 2013, against Apollo. The matter was also transferred to the Subordinate Court and back to this Court, hence its current case number. Rosa averred that she had acquired title to land parcel number S/Kabras/Bushu/1238 (the suit property) through adverse possession and sought determination of whether Apollo holds title to the suit property in trust for her, whether Apollo's title was extinguished upon expiry of 12 years of her possession, whether Apollo's title should be cancelled and she be registered as proprietor, whether Apollo should be ordered to execute all documents of transfer to facilitate transfer in her name and whether Apollo should be condemned to pay costs.
6. The Originating Summons was supported by an affidavit sworn by Rosa and was opposed by a replying affidavit sworn by Apollo.
7. ELCC No. 17 of 2022 and ELCC No. 23 of 2020 were consolidated pursuant to an order made on 4th October 2022. ELCC No. 17 of 2022 was selected as the lead file.
8. At the hearing, Apollo (PW1) adopted his witness statement dated 3rd May 2011 and also produced copies of the documents listed as item numbers 1 to 5 in his further list of documents dated 20th August 2019 as his exhibits. He stated in the statement that on 29th January 2009, he entered into an agreement with Nathan pursuant to which he purchased the suit property at an agreed consideration of KShs 630,000 which he paid and that he was issued with a title deed on 21st June 2010. That when he wanted to take possession, Nathan requested him to hold on briefly as he wanted to sort out with Rosa so that Rosa moves from the suit property. That when the matter took long with Rosa not vacating, he went to fence the suit property, but Rosa barred him from doing so. He added that he had severally requested Nathan to sort out with Rosa so that he could start using the suit property and that Nathan and Rosa could be colluding to keep him from benefiting from the suit property.
9. During cross examination and re-examination, Apollo stated that he purchased the suit property in the year 2008 and that it was vacant at the time of purchase. That he completed paying the purchase



price in 2009 and that he did not reside on the suit property as of the date of his testimony neither did he have any house on it. That marked the close of the Plaintiff's case.

10. Nathan (DW1) adopted his witness statements dated 30th March 2012 and 4th July 2019 as his evidence and produced copies of the documents listed as item numbers 2 to 4 in his list of documents dated 4th July 2019 as his exhibits. He stated in his witness statements dated 4th July 2019 that in the year 1981, he sold a 3.5 acre portion of land parcel number S/Kabras/Bushu/1047 to the late Jackson Muhehe for a consideration of KShs 7,000 out of which he paid KShs 6,000 leaving a balance of KShs 1,000 which remained unpaid until Jackson Muhehe's death in the 1980s and as of the date of the statement. That Rosa and her sister Rebeccah Mmbone attempted to start using the suit property, but he informed them that they had no claim to the land since the late Jackson Muhehe who was their father had breached the sale agreement.
11. Nathan further stated that disputes then arose and that after deliberations, Rosa agreed to pay him KShs 200,000 for the suit property within fourteen days from the date of the agreement, but she failed to honour the agreement thereby forcing him to repossess the suit property and sell and transfer it to Apollo. He added that he neither signed any transfer in favour of Jackson Muhehe nor attended the land Control Board in relation to the suit property.
12. Under cross examination and re-examination, Nathan stated that the agreement that Rosa pays him KShs 200,000 was on 18th August 2008, but she never paid the money. He added that Apollo fully paid him the purchase price and that upon buying the suit property, Jackson moved into it, constructed on it and started living in it with his family and children. He confirmed that Rosa is Jackson's child, and that Jackson was buried on parcel the suit property.
13. Rosa (DW2) adopted her witness statement dated 1st August 2011 and produced copies of item numbers 1 to 7 in her list of documents dated 1st August 2011 as well as copies of annexures REA1 and REA2 in her affidavit sworn on 21st January 2013 in support of the Originating Summons as her exhibits. She stated in the statement that Jackson Muhehe (deceased) who was her father purchased a parcel of land from Nathan on 24th February 1981 at a consideration of KShs 7,000 and that on 25th February 1983 her father made a further payment of KShs 7,300 to Nathan. That her father was shown the parcel with its boundaries demarcated and that he took possession in 1981. She added that her family resided on the land since 1981 and that her parents' remains are buried on the land.
14. Rosa further stated that upon her father purchasing the land, Nathan's parcel number S/Kabras/Bushu/1047 was subdivided into parcel number S/Kabras/Bushu/1237 and the suit property and that Nathan was left with S/Kabras/Bushu/1237. That her father gave the suit property to her and her sister Rebecca Mmbone as a gift and requested Nathan to transfer it directly to them. That Nathan agreed and even signed transfer form and application for consent of the Land Control Board but later became evasive and did not attend Land Control Board. That as a result, she lodged a caution against the suit property in 1994 and that she was never called upon to show cause why the caution should be removed. She also stated that Apollo did not bother to find out why she was in possession and instead proceeded to obtain title without making enquiries.
15. In her oral testimony, Rosa stated that her sister was the only occupant of the suit property as of the date of her testimony and that she was not present during the signing of the agreement pursuant to which her father purchased the suit property. She added that she visits her sister in the suit property frequently and that before her father passed away, he said that the suit property should be transferred to her (Rosa).



16. Next on the stand was Joseph S. Isiao (DW3) who adopted his witness statement dated 1st August 2011 as his evidence in chief. He stated that he got to know Rosa when her father Jackson Muhehe (deceased) purchased land from Apollo who was his neighbour in 1981, and that the deceased and his family settled on the suit property in 1983. That the deceased passed away in 1989 and that both the deceased and his wife Bilha are buried on the suit property. Under cross examination, he stated that he was not present when the deceased entered into the sale agreement.
17. The defence case was then closed after which directions for filing and exchange of written submissions were given. Apollo filed submissions dated 26th February 2024 while Rosa filed submissions dated 2nd May 2024. Although Nathan indicated that he had filed submissions, I have not seen any submissions by him either in the Case Tracking System or in the physical file.
18. I have carefully considered the parties pleadings, evidence and submissions. The issues that arise for determination are whether adverse possession has been established, whether fraud has been established and whether the reliefs sought should issue.
19. There is no dispute that Apollo is the registered proprietor of the suit property, having been so registered on 27th May 2010 and title deed issued to him on 21st June 2010. In his capacity as a registered proprietor, Apollo is entitled to the rights, privileges, and benefits spelt out by the law, ranging from Article 40 of *the Constitution* to Section 24 of the *Land Registration Act*. Further, Section 26 of the Act obligates the Court to accept the Apollo's certificate of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established.
20. Unless Apollo loses his title either through Rosa's adverse possession claim succeeding or if his title is impeached on the ground of fraud advanced by Rosa, he should be left to enjoy the benefits of proprietorship. I will deal first with the issue of adverse possession then that of fraud.
21. The law relating to adverse possession is found in Sections 7, 13, 17 and 38 of the Limitations of Actions Act. The Court of Appeal discussed ingredients of adverse possession in the case of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR where it stated that a party claiming adverse possession must assert hostile title in denial of the title of the registered proprietor. The process must start with a wrongful dispossession of the rightful owner and the proper way of assessing proof of adverse possession is whether the title holder has been dispossessed or has discontinued his possession for the statutory period of 12 years, as opposed to whether the claimant has proved that he or she has been in possession for 12 years. The party who claims adverse possession must demonstrate the date she came into possession, the nature of her possession, whether the fact of her possession was known to the registered proprietor and that the possession was open and undisturbed for the requisite 12 years.
22. Recently, in *Munyanya v Keya* [2024] KECA 1831 (KLR), the Court of Appeal distilled the qualities of possession required to establish adverse possession. The Court stated that the possession must be:
 - a. Adverse to the interests of the owner – meaning that the claimant is in possession as owner in contradistinction to holding in recognition of or subordination to the true owner or to a recognized superior claim of another;
 - b. Actual - as opposed to constructive possession where the test is the degree of the actual use and enjoyment of the parcel of land involved by the claimant or his agent, tenant or licensee;
 - c. Open and notorious - meaning that the possession must be open and conspicuous to the common observer so that the owner or his agent on visiting the land might readily see that the owner's rights are being invaded. Differently put, the possession must be manifest to the community;



- d. Without force - meaning that the possession and occupation must have been achieved peaceably not through actual or threatened violence;
 - e. Exclusive - meaning that the possession must be of such exclusive character that it will operate as an ouster of the owner of the legal title. Differently put, the claimant must demonstrate that she wholly excluded the owner from possession for the required period;
 - f. Continuous and uninterrupted for the period of twelve years - meaning that the title owner did not re-enter the property under circumstances showing her intention to assert dominion against the adverse user for at least twelve years. (See Joseph Ndafu Njurukani & 2 Others vs. Emily Naliaka Barasa, Kisumu Civil Appeal No. 149 of 2022).
23. Rosa's case is that she has been in occupation and use of the suit property from 1983 after her late father purchased four acres of land from Nathan at a consideration of KShs 7,000 through agreement dated 24th February 1981 and that the four acres are now comprised in the suit property. She also referred to another agreement dated 25th February 1983, pursuant to which she contends her father made a further payment of KShs 7,300 to Nathan, towards purchase of the suit property. It is thus manifest that Rosa's possession, if any, is pursuant to a sale transaction.
24. By its very nature, adverse possession presupposes a hostile possession by clearly asserting hostile title in denial of the title of the true owner. See *Munyanya v Keya* above. It follows that for a claim of adverse possession to succeed, the claimant must demonstrate that her occupation was without the proprietor's permission. Entry and possession pursuant to a sale agreement is by the proprietor's permission. Time for purposes of adverse possession does not run in favour of such a person for as long as her presence on the land is by permission of the proprietor. Nevertheless, once a purchaser completes paying the purchase price, her possession and occupation of the purchased property is no longer by permission of the seller. In such a scenario, time for purposes of adverse possession starts to run in favour of the purchaser from the moment of final payment of the purchase price. See *Public Trustee v Wanduru Ndegwa* [1984] eKLR.
25. Whereas there is no dispute that a sale transaction existed between Nathan and Rosa's father, there is divergence on the agreed purchase price. Rosa has referred to an agreement dated 24th February 1981 with consideration indicated as KShs 7,000 out of which KShs 6,000 was paid leaving a balance of KShs 1,000. Nathan does not dispute the sale agreement. He has however maintained that the balance of KShs 1,000 remains unpaid to date. Instead of demonstrating payment of the balance, Rosa has stated that there was a second transaction or agreement pursuant to which a further KShs 7,300 was paid on 25th February 1983, thereby bringing the total consideration to KShs 14,300. I have perused the document dated 25th February 1983. It simply states that a further KShs 7,300 was paid but does not specify the purpose of the payment or if there was a variation of the purchase price. I bear in mind that Nathan has denied the existence of the second agreement and that Rosa testified that she was not present during execution of the agreements that she relied.
26. In the absence of proof of change of the terms of the agreement dated 24th February 1981, particularly as regards the purchase price, and in the absence of specific evidence that the balance of KShs 1,000 was paid, I find that there is no proof of full payment of the purchase price. In those circumstances, time for purposes of adverse possession did not start to run in favour of Rosa's father or Rosa herself for that matter.
27. The sale transaction that both Rosa and Nathan have referred to was between the deceased and Nathan. The deceased was in possession pursuant to the transaction. Rosa, as the deceased's child, could only be in possession as a member of her father's family. Her father having passed away in 1989, any cause of



action that he may have had in adverse possession could only be agitated by a personal representative of his estate. See *Rugiri v Kinuthia & 3 others* [2024] KECA 1601 (KLR). Rosa did not demonstrate that she is a personal representative of her deceased father's estate.

28. If, on the other hand, Rosa's adverse possession claim is for her own benefit, she has to demonstrate the date from which she started asserting her own possession adverse to the interests of the registered owner. It is not enough to prove possession for 12 years; she must demonstrate her own independent intention to dispossess the registered owner. Possession of another person's land alone, however prolonged, does not amount to adverse possession. Put differently, it has to be accompanied by an intention to own the property. See *Munyanya v Keya* and *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* above. Apart from relying on her own father's possession, Rosa did not prove her own independent adverse possession. I find that adverse possession has not been established.
29. Now onto the second issue for determination, as to whether fraud has been established. Rosa has challenged Apollo's title on allegations of fraud. The learned authors of *Black's Law Dictionary* 10th Edition define fraud to mean "A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment". By way of further elaboration, the authors quote the following extract from John Willard, *A Treatise on Equity Jurisprudence* 147 (Platt Potter ed., 1879):

"Fraud has been defined to be, any kind of artifice by which another is deceived. Hence, all surprise, trick, cunning, dissembling, and other unfair way that is used to cheat any one, is to be considered as fraud."
30. Courts have consistently emphasised that fraud is a serious allegation and that a party alleging it is required to plead it, particularise it, and strictly prove it to standard higher than proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. See *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR and *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* [2017] eKLR. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. The party alleging fraud has to connect the allegations and the facts in a way that reveals actual fraud. See *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR.
31. Rosa's complaint seems to be simply that Nathan received money from her father then went ahead to transfer the suit property to Apollo. If that be the case, it does not amount to fraud. It could, perhaps, be breach of contract. To impeach Apollo's title on grounds of fraud, Rosa needed to not only prove fraud, but to further demonstrate, pursuant to under Section 26 (1) (a) of the *Land Registration Act*, that Apollo was party to the fraud. She has neither proved fraud nor that Apollo was party to any fraud.
32. In view of the foregoing, Rosa is not entitled to any of the reliefs that she sought. On the other hand, Apollo is entitled to the full benefit of his proprietorship. I find merit in his case. I therefore make the following orders:
 - a. Rosa Eliati Atema's counterclaim dated 1st August 2011 and her Originating Summons dated 21st January 2013 are dismissed.
 - b. Rosa Eliati Atema together with her family members, servants, and agents to vacate land parcel number S/Kabras/Bushu/1238 within 90 (ninety) days from the date of delivery of this judgment. In default, Apollo Katamu Isiye shall be at liberty to evict them.
 - c. Apollo Katamu Isiye shall have costs of the consolidated case. The costs shall be borne jointly by Rosa Eliati Atema and Nathan Museve Kharinda.



**DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS
6TH DAY OF MARCH 2025.**

D. O. OHUNGO

JUDGE

Delivered in the presence of:

Mr Shiloya for the Plaintiff

No appearance for the First Defendant

No appearance for the Second Defendant

Court Assistant: B Kerubo

