



**Khamisi v Mayunguva & another (Environmental and Land Originating
Summons 130 of 2019) [2024] KEELC 531 (KLR) (6 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 531 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 130 OF 2019
DO OHUNGO, J
FEBRUARY 6, 2024**

BETWEEN

ISAAC MUHANJI KHAMISI PLAINTIFF

AND

TRUDEA NEKESA MAYUNGUVA 1ST DEFENDANT

BOAZ VUTIYA CLEMENT 2ND DEFENDANT

JUDGMENT

1. The Plaintiff moved the court through Originating Summons (OS) dated 19th December 2019 wherein he averred that he had become entitled to a 3 acre portion of the parcel of land known as Kakamega/Kambiri/307 (the suit property) by adverse possession. The OS was supported by an affidavit sworn by the plaintiff. The defendants opposed it through a replying affidavit sworn by the first defendant.
2. Hearing of the OS proceeded by way of oral evidence. The plaintiff testified as PW1 and adopted the supporting affidavit which he swore and filed in support of the OS. He stated in the affidavit that he had been in uninterrupted possession of the portion of the suit property since 1980 and that he built a home therein besides regularly cultivating it. That his entry in the portion was pursuant to him having purchased it from Maikuba Mwanje and that he handed over documents evidencing the purchase together with application for consent of the Land Control Board for subdivision and transfer to his then advocate who later passed away as a result of which he was unable to retrieve the documents.
3. The plaintiff further stated that upon Maikuba Mwanje passing away, his son Clement Maikuba Chiluka became the registered proprietor of the suit property, and that Clement did not interfere with his use and occupation of the portion. That after the death of Clement, he requested the first defendant to subdivide the suit property so that he gets a title but she neither did so nor included him the succession cause in respect of Clement's estate. He added that the first defendant was the registered proprietor of the suit property as of the date of his affidavit.



4. In his oral testimony, the plaintiff added that he resides in Kitale and that his purchase of the portion took place between 1979 and 1983 when he completed paying the purchase price. He also stated that he did not lease the portion but instead purchased it and that although he resides in Kitale and not within the portion, his property is still within the portion. He further stated that he has a person staying on the portion who intends to purchase it once this case is concluded.
5. Grace Lihavi Machanja testified as PW2 and adopted her witness statement which she filed on 8th July 2021. She stated that the plaintiff has been her neighbour since 1979 when he purchased the three acre portion of the suit property from Maikuba Mwanje in 1979 and moved into it in 1980. She added that the plaintiff does not reside within the suit property but farms on it.
6. Lastly, Hezron Piti Lubwa testified as PW3 and adopted his witness statement which he filed on 20th December 2019. He stated that the plaintiff purchased the portion of the suit property from Maikuba Mwanje when he (PW3) in class 6 and that the plaintiff moved into the suit property in 1980 and constructed on it. That the plaintiff left a person by the name Veneranda on the portion as a caretaker and that the said Veneranda had been living outside Kenya for the last 7 to 8 years as of the date of his testimony.
7. The plaintiff's case was then closed.
8. Trudea Nekesa Mayunguva testified as DW1 and adopted her witness statement dated 17th August 2020. She stated that she is the widow of Clement Chiluka Maikuva and that she obtained a confirmed grant in respect of his estate. She denied that the plaintiff purchased the portion and added that the plaintiff does not have any house on the portion of the suit property. That the plaintiff farmed on the suit property for over 5 years under a lease then vacated when his lease came to an end. She also stated that she was in occupation of the suit property as of the date of her testimony.
9. Boaz Vutiya Clement testified as DW2 and adopted his witness statement dated 17th August 2020. He stated that he is a son to Clement Chiluka Maikuva and that the plaintiff did not purchase the portion but leased it from Maikuba Mwanje then vacated in 1993 when his lease ended.
10. Other defence witnesses were Ezakiel Musindi Mayukuva (DW3) and Jafred Chimaleni Marakale (DW4) who also stated that the plaintiff leased the suit property as opposed to buying it.
11. The defence case was then closed. Parties thereafter filed and exchanged written submissions. I have considered the parties' pleadings, evidence, and submissions. The issue that arises for determination is whether adverse possession has been established.
12. The law on adverse possession was discussed by the Court of Appeal in [*Richard Wefwafwa Songoi v Ben Munyifwa Songoi*](#) [2020] eKLR as follows:

Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It must start with a wrongful dispossession of the rightful owner. (See comparative Indian cases of [*S. M. Kenni alias Tamanna Sabeel – v- Mst Bibi Sakina*](#) AIR 1964 SC 1254; and *Parsimi – v- Sukhi*, 1993 4 SCC 375).

39. In [*Wambugu –v- Njuguna*](#), (1983) KLR 173, this Court held that adverse possession contemplates two concepts: possession and discontinuance of possession. It was further held that the proper way of assessing proof of adverse possession is whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not



the claimant has proved that he or she has been in possession for the requisite number of years.

40. A person who claims adverse possession must inter alia show:
- (a) on what date he came into possession.
 - (b) what was the nature of his possession?
 - (c) whether the fact of his possession was known to the other party.
 - (d) for how long his possession has continued and
 - (e) that the possession was open and undisturbed for the requisite 12 years.
13. Entry and possession of land in furtherance of a sale transaction is deemed to be by permission of the proprietor and does not therefore amount to adverse possession. That said, possession and occupation by a purchaser who has completed paying the purchase price is by right and not 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. Thus, time for purposes of adverse possession does not start to run in favour of a purchaser until he demonstrates full payment of the purchase price.
14. Beyond asserting that he purchased the 3 acre portion of the suit property, the plaintiff did not offer any evidence of what the terms of the alleged sale transaction were. He did not prove the purchase price or even full payment thereof. He simply stated that he purchased the portion and that the documentation supporting the purchase was lost when his advocate passed away. It is manifest that the plaintiff was attempting to use adverse possession to enforce the alleged sale transaction. That approach is not a good idea especially where one has no proof of existence of a sale agreement and full payment of the purchase price. As long as the plaintiff maintains that he is a purchaser, his occupation of the suit property, if any, is with the consent of the proprietor until he demonstrates the purchase price and its full payment. Possession which is not adverse to the title of the proprietor cannot be a valid basis for claiming title by way of adverse possession.
15. The plaintiff has failed to establish adverse possession. I find no merit in this case and I therefore dismiss it with costs to the defendants.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 6TH DAY OF FEBRUARY 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the Plaintiff

Mr Machafu for the Defendants

Court Assistant: E. Juma

