



Shibisi v Chivuli (Legal Representative of the Estate of Philip Malanga Chivuli alias Malanga Chibuli - Deceased) (Environment & Land Case 78 of 2019) [2024] KEELC 673 (KLR) (13 February 2024) (Judgment)

Neutral citation: [2024] KEELC 673 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 78 OF 2019
DO OHUNGO, J
FEBRUARY 13, 2024**

BETWEEN

ADRIAN MUSONYE SHIBISI PLAINTIFF

AND

CHARLES MALANGA CHIVULI DEFENDANT

**LEGAL REPRESENTATIVE OF THE ESTATE OF PHILIP MALANGA CHIVULI
ALIAS MALANGA CHIBULI - DECEASED**

JUDGMENT

1. The Plaintiff moved the court through Originating Summons (OS) dated 2nd July 2019 wherein he averred that he had become entitled to a 4 acre portion of the parcel of land known as N. Kabras/ Malava/1261 (the suit property) by adverse possession. The OS is supported by an affidavit sworn by the plaintiff on 2nd July 2019. The defendant opposed it through a replying affidavit which he swore on 18th December 2019.
2. Hearing of the OS proceeded by way of oral evidence. The plaintiff testified as PW1 and adopted his aforesaid supporting affidavit and also produced documents annexed to it as well as documents in his list of documents dated 9th March 2022. He stated in the affidavit that he purchased a 4 acre portion of the suit property in the year 2003 from Philip Malanga Chivuli and took immediate possession before the seller later passed away on 1st January 2004 without transferring the portion to his name. That the defendant filed Kakamega HC Succession Cause No. 888 of 2010 in respect of the estate of the seller and that he (plaintiff) filed an objection in the said cause whereafter a judgment was delivered on 10th April 2019 in which his interest was recognised. The plaintiff further testified he was still in possession and cultivating sugarcane as of the date of his testimony.



3. Gabriel Mukhola Daclas testified as PW2 and adopted his witness statement dated 29th January 2021 as his evidence. He stated that he was present as a witness on 6th August 2003 when Philip Malanga Chivuli sold the portion to the plaintiff in the presence of Rachel Malanga who was Philip's wife and Philip's sons by the names Lihanda, Jeremiah, Peter and Shitanda. That Philip was paid KShs 280,000 in cash and that the plaintiff was in possession as of the date of his testimony. The plaintiff's case was thereby closed
4. The defendant, Charles Malanga Chivuli, testified as the sole defence witness. He adopted his witness statement dated 2nd July 2021 wherein he stated that he was appointed the administrator of the estate of Philip Malanga Chivuli Alias Malanga Chibuli (deceased) in Kakamega HC Succession Cause No. 888 of 2010 and that denied that the plaintiff purchased the portion adding that the deceased was incapable of entering into any agreement due to mental illness. He further stated that he did not participate in the agreement that the plaintiff is referring to and that the plaintiff has never been in occupation of any part of the suit property. He conceded that the Peter that PW2 referred to is his brother but hastened to add that he did not know if Peter witnessed any sale agreement. He also stated that he and his brothers were in occupation of the suit property as of the date of his testimony.
5. Defence case was then closed. Parties thereafter filed and exchanged written submissions. I have considered the parties' pleadings, evidence, and submissions. The issues that arise for determination are whether adverse possession has been established and whether the reliefs sought should issue.
6. 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.

7. The plaintiff's case is that he purchased the 4 acre portion of the suit property from Philip Malanga Chivuli Alias Malanga Chibuli (deceased) through sale agreements dated 7th May 2003 and 6th August 2003, that he paid the purchase price in full and that he took immediate possession.



8. 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. Nevertheless, 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.
9. From the material on record, I note that the deceased passed away on 2nd January 2004 after the alleged sale agreements and that the deceased remains the registered proprietor of the suit property. I have perused the said agreements and I note that it is stated therein that the plaintiff purchased the said 4 acre portion of the suit property at a consideration of KShs 280,000. In the agreement dated 6th August 2003, it is stated that the purchase price was fully paid, and that the plaintiff herein was to take immediate possession.
10. Although the defendant claimed that the plaintiff was not in possession, I note that the parties herein litigated in HC Succession Cause No 888 of 2010 (Kakamega) In the Matter of the Estate of Philip Malanga Chivuli Alias Malanga Chibuli (deceased). In the judgment delivered in the said matter on 10th April 2019, the court (W Musyoka, J) stated thus:
 8. Adriane Musonye Shibisi filed another application on 10th May 2013, dated 8th May 2013, seeking conservatory orders, ostensibly pending disposal of the revocation application. The application elicited a response to it by the administrator [Charles Malanga Chivuli], through an affidavit sworn on 23rd May 2013, where he said that Adriane Musonye Shibisi had forcefully entered the land erected illegal structures after the deceased died.
 9. On 27th February 2014 a ruling was delivered by Chitembwe J on the application dated 8th May 2013, wherein the court ordered maintenance of status quo, pending hearing and determination of the cause, with a direction that Adriane Musonye Shibisi not to put up new structures on the subject land until his claim was determined by the court. [Emphasis supplied]
11. Thus, the defendant cannot be heard to now deny that the plaintiff was in occupation. Further, the sale agreements were witnessed by several persons one of whom the defendant acknowledged to be his brother. The defendant did not find it necessary to call his said brother or the other witnesses to testify to discount the plaintiff's claim that the portion was sold to him. The plaintiff having taken immediate possession pursuant to the agreement dated 6th August 2003 wherein full payment of the purchase price was confirmed, the requisite 12 years of peaceful possession was attained by 7th August 2015, long before the filing of the OS herein. I am satisfied that the possession was open and undisturbed for the requisite 12 years.
12. I find that the plaintiff has established adverse possession and is thus entitled to relief. I therefore enter judgment in favour of the plaintiff as follows:
 - a. The plaintiff is hereby declared the owner of the portion of land measuring 4 (four) acres out of land parcel No. N. Kabras/Malava/1261, which he is in occupation of, by virtue of adverse possession.



- b. It is hereby declared that the defendant and the estate of Philip Malanga Chivuli Alias Malanga Chibuli (deceased) are holding title to the portion of land measuring 4 (four) acres out of land parcel No. N. Kabras/Malava/1261 in trust for the plaintiff.
- c. The defendant and the estate of Philip Malanga Chivuli Alias Malanga Chibuli (deceased) are hereby ordered to execute all documents to transfer title to the plaintiff, in respect of the portion of land measuring 4 (four) acres out of land parcel No. N. Kabras/Malava/1261, which the plaintiff is in occupation of, within ninety (90) days from the date of this judgment.
- d. The plaintiff shall bear all costs related to survey, subdivision, and transfer of the portion to him.
- e. In default of the defendant and the estate of Philip Malanga Chivuli Alias Malanga Chibuli (deceased) transferring the portion as ordered above, the Deputy Registrar of this court shall be at liberty to execute, on behalf of the defendant and the estate of Philip Malanga Chivuli Alias Malanga Chibuli (deceased), all documents necessary to effect the above orders.
- f. No order as to costs of this suit.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 13TH DAY OF FEBRUARY 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Shiloya holding brief for Ms Kegehi for the Plaintiff

The Defendant present in person

Court Assistant: E. Juma

