



**Simali v Munyokho (Environment & Land Case 115 of 2019)
[2024] KEELC 666 (KLR) (13 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 666 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 115 OF 2019
DO OHUNGO, J
FEBRUARY 13, 2024**

BETWEEN

ADRIANO SIMALI PLAINTIFF

AND

NASHON NANGABO MUNYOKHO DEFENDANT

JUDGMENT

1. The Plaintiff moved the court through Originating Summons (OS) dated 15th October 2019 wherein he averred that he had acquired title to a 0.6 hectare portion of the parcels of land known as Butsotso/Ingotse/2887 and Butsotso/Ingotse/2889 (the suit properties) by adverse possession. The OS is supported by an affidavit sworn by the plaintiff on 15th October 2019.
2. The Plaintiff deposed that on 2nd June 1999 he purchased from the defendant a parcel of land measuring 0.6 hectares which was to be hived off land parcel number Butsotso/Ingotse/1700 at a consideration of KShs 90,000 which sum he fully paid to the defendant. He annexed copies of sale agreements dated 2nd June 1999 and 2nd October 1999 and added that the defendant instructed a surveyor by the name Cornelius Lusichi of A-Plus [2005] Properties and Land Surveyors to carry out subdivision and that he (the plaintiff) paid the surveyor KShs 9,000. He annexed copies of receipts issued by the surveyors and mutation form and further stated that upon payment of the purchase price, he commenced utilizing the purchased portion by planting maize, other food crops and trees. That on 28th January 2007, the defendant married a third wife and since the defendant wanted to construct a house for her, he relocated the plaintiff to another portion of land which the plaintiff has since been utilizing.
3. The plaintiff went on to depose that in February 2019, he requested the defendant to transfer the portion to him, but the defendant became evasive and that when the plaintiff conducted a search at the lands registry he discovered that the defendant had subdivided the land into Butsotso/Ingotse/2887 and Butsotso/Ingotse/2889 (the suit properties) which were then registered in the defendant's names.



He also deposed that he had been using the portion that he purchased peacefully and uninterrupted for 12 years and without any challenge from the defendant.

4. The defendant opposed the OS through a replying affidavit which he swore on 22nd November 2019. He deposed that the plaintiff has never stayed on the suit properties and that the suit properties are occupied by his (the defendant's) family comprising three wives, children, and purchasers. He added that as of the date of filing of this suit, Butso/Ingotse/2887 did not exist since it had been sub-divided into Butso/Ingotse/3461 occupied by a purchaser who is not a party to this suit and Butso/Ingotse/3460 which is in the defendant's names and occupied by one of the defendant's wives and children. That if there was any agreement for sale between him and the plaintiff then the same is invalid in light of the Land Control Act. Lastly, he deposed that he would request the Deputy Registrar to visit the suit properties to ascertain the real occupants.
5. Hearing of the OS proceeded by way of oral evidence. The plaintiff testified as PW1 and adopted his aforesaid supporting affidavit and added that he was in occupation of Butso/Ingotse/2887 as of 8th March 2022 when he testified. He also stated that he is claiming 1 ½ acres from the defendant.
6. Erick Lukanji Malanya (PW2) testified next and adopted his witness statement dated 1st December 2020 wherein he stated that the plaintiff is his elder brother and that he (PW2) was involved on 2nd October 1999 in the payment of KShs 8,000 being the second instalment of the purchase price thereby leaving a balance of KShs 15,000. He also stated that the plaintiff was in occupation of the portion until February 2019 when the defendant stopped him.
7. The plaintiff's case was then closed, after which defence hearing was scheduled for 21st September 2022. Come 21st September 2022, the defendant sought and was granted adjournment. After other adjournments, defence hearing was scheduled for 20th April 2023. The defendant again sought an adjournment on 20th April 2023. Upon considering parties' submissions, the court dismissed the application for adjournment and gave an indication of time for defence hearing later that day. When the appointed time arrived, neither the defendant nor his counsel was in court. The defence case was then closed, upon an application by counsel for the plaintiff.
8. Parties were then given directions for filing and exchange of written submissions. Only the plaintiff filed submissions. I have considered the parties' pleadings, and evidence together with the submissions on record. The issues that arise for determination are whether adverse possession has been established and whether the reliefs sought should issue.
9. As the Court of Appeal stated in Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] eKLR, 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 he came into possession, the nature of his possession, whether the fact of his possession was known to the registered proprietor and that the possession was open and undisturbed for the requisite 12 years.



10. To succeed in his claim for adverse possession, the plaintiff must establish that he has had peaceful possession for the requisite period of 12 years. As the Court of Appeal stated in [Loise Nduta Itotia v Aziza Said Hamisi](#) [2020] eKLR:

“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.”

11. A claimant seeking title by adverse possession must prove that he used the land as of right. 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.
12. The plaintiff's case is that on 2nd June 1999 he purchased from the defendant a parcel of land measuring 0.6 hectares which was to be hived off land parcel number Butso/Ingotse/1700 at a consideration of KShs 90,000 which sum he fully paid to the defendant. He further contended that on 28th January 2007, the defendant relocated him to another portion of land which he has continued to use. It is not stated whether the portion he was relocated to was within parcel number Butso/Ingotse/1700.
13. In a claim of adverse possession, it is imperative that the land being claimed is clearly identified. It is for that reason that order 37 rule 7 of the [Civil Procedure Rules](#) specifically requires that the OS be supported by an affidavit to which a certified extract of the title to the land in question is annexed. The Court of Appeal stated in [Wilson Kazungu Katana & 101 others v Salim Abdalla Baksbwein & another](#) [2015] eKLR thus:

The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of *Githu v Ndele* [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them....

14. The copy of register in respect of Butso/Ingotse/1700 which the plaintiff availed on record shows that the said parcel was closed on 22nd September 2003 upon subdivision into Butso/Ingotse/2419 and Butso/Ingotse/2420. The registers in respect of parcel numbers Butso/Ingotse/2419 and Butso/Ingotse/2420 were not produced and it is therefore not clear when the said parcels were closed.
15. According to the plaintiff, the defendant further subdivided the land into Butso/Ingotse/2887 and Butso/Ingotse/2889 and that the portion that he is claiming falls within Butso/Ingotse/2887.



In his replying affidavit, the defendant denied that that the plaintiff has ever stayed on the suit properties and maintained that the suit properties are occupied by his (the defendant's) family and purchasers. Specifically, he deposed that Butsotso/Ingotse/2887 no longer exists since he subdivided it into Butsotso/Ingotse/3461 which is occupied by a purchaser who is not a party to this suit and Butsotso/Ingotse/3460 which is registered in the defendant's names and occupied by one of the defendant's wives and children. The defendant availed these details long before the matter went to trial, yet the plaintiff did not find it necessary to produce the register in respect of Butsotso/Ingotse/2887. In fact, he did not produce all the registers showing how parcel number Butsotso/Ingotse/2887 was created.

16. As matters stand, based on the material on record, it is not possible to ascertain whether Butsotso/Ingotse/2887 still exists and whether the registered proprietor is the defendant. It may very well be that there are other proprietors and occupants who have not been made parties to this case.
17. I find that the plaintiff has failed to establish adverse possession. I find no merit in this case, and I therefore dismiss it. Considering that the defendant did not fully defend the matter, I make no order as to costs.

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 Ligare holding brief for Mr Khayumbi for the Plaintiff

No appearance for the Defendant

Court Assistant: E. Juma

