



**Mukolwe v Khasuru (Environment & Land Case 26 of 2018)
[2024] KEELC 1186 (KLR) (6 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1186 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 26 OF 2018**

DO OHUNGO, J

MARCH 6, 2024

BETWEEN

CHRISTINE ESHIWANI MUKOLWE PLAINTIFF

AND

READON OMUTERE KHASURU DEFENDANT

JUDGMENT

1. The Plaintiff moved the court through Originating Summons (OS) dated 13th March 2018 wherein she averred that she had acquired title to the parcel of land known as Kisa/Khushiku/876 (the suit property) by adverse possession. The OS is supported by an affidavit sworn by the Plaintiff on 13th March 2018.
2. The Plaintiff deposed in the affidavit that she is the widow of John Mukolwe (deceased) and the Administratrix of his estate having obtained Grant of Letters of Administration Intestate in Kakamega HC Succession Cause No. 218 of 2008 while the Defendant is the son of Dickson Omutere Khasuru alias Omutere Khasulu (deceased) and the Administrator of his estate having obtained Grant of Letters of Administration Intestate in Kakamega CMC Succession Cause No. 49 of 2016. That her late husband was born on the suit property and that she settled on the suit property since 1971 when she got married to John Mukolwe. She added that the suit property has distinct boundaries and that she extensively developed it to the exclusion of the Defendant. That Dickson Omutere Khasuru executed a will dated 16th October 2001 wherein he indicated that he was holding the suit property on behalf of John Mukolwe. She further deposed that the Defendant had never occupied the suit property.
3. The defendant opposed the OS through a replying affidavit which he filed on 6th June 2018. He deposed therein that his father was the registered proprietor of the suit property which shares a common boundary with land parcel number Kisa/Kushiku/877 whose registered proprietor was John Mukolwe. He denied that the Plaintiff or her husband John Mukolwe ever occupied the suit property or that his father ever signed the will referred to by the Plaintiff. He stated that in the year 2008, the



Plaintiff's late husband filed a case against him in the Khwisero Land Dispute Tribunal alleging that he had trespassed on John Mukolwe's parcel number Kisa/Kushiku/877. He added that during the tribunal proceedings, the Plaintiff's late husband did not produce the will and his evidence was that the suit property never existed. That the decision of the Khwisero Land Dispute Tribunal was adopted in Kakamega Misc. Award No. 92 of 2008 and that the Plaintiff's late husband did not appeal against the award. That surveyors went to the ground and placed common boundary between the suit property and Kisa/Kushiku/877, which beacons have remained intact since then.

4. Hearing of the OS proceeded by way of oral evidence. The plaintiff testified as PW1 and adopted her aforesaid supporting affidavit as well as her witness statement dated 13th March 2018. She confirmed that her husband filed a tribunal case against the Defendant raising allegations that the Defendant had invaded the suit property. She also confirmed that surveyors went to the parcels and that her husband and the defendant showed the surveyors the plots and their boundaries. That the surveyors told them that the plot she was occupying was Kisa/Kushiku/877 while the Defendant was on Kisa/Kushiku/876.
5. The plaintiff's case was then closed.
6. The Defendant also adopted his aforesaid replying affidavit and his witness statement filed on 6th June 2018. He further stated that the Plaintiff was his neighbour who was occupying Kisa/Kushiku/877 and not Kisa/Kushiku/876. That the tribunal case was filed because John Mukolwe interfered with Kisa/Kushiku/876 by taking 1.4 acres thereof. He added that he is in occupation and use of Kisa/Kushiku/876 and that neither the Plaintiff nor her husband had ever used Kisa/Kushiku/876.
7. The defence case was the closed.
8. Parties thereafter filed and exchanged written submissions. I have considered the parties' pleadings, and evidence and submissions. 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 her claim for adverse possession, the Plaintiff must establish that she 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 vs 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. There is no dispute that the suit property herein is adjacent to land parcel number Kisa/Kushiku/877 whose registered proprietor was John Mukolwe, the Plaintiff’s deceased husband. It is further common ground that John Mukolwe brought proceedings against the Defendant herein before the Khwisero Land Disputes Tribunal. A perusal of the tribunal’s proceedings shows that John Mukolwe’s contention was that the Defendant herein had trespassed into his Kisa/Kushiku/877. Further perusal of the proceedings shows that the dispute centred around the question of the location of the boundary of the two parcels and whether the portion that John Mukolwe contended was Kisa/Kushiku/877 was actually within Kisa/Kushiku/876. In its findings, the tribunal held that the boundary between the two parcels did not exist because John Mukolwe destroyed it. The tribunal therefore ordered that a government surveyor goes to the ground and establishes boundary.
12. The tribunal’s award was adopted on 1st September 2008 in Kakamega CM Misc. Award No. 92 of 2008. In her testimony in this case, the Plaintiff confirmed that the surveyors went to the parcels and pointed out the boundaries in the presence of her husband and the Defendant. She also testified that the surveyors told them that the plot she was occupying was Kisa/Kushiku/877 while the Defendant was on Kisa/Kushiku/876. The visit by the surveyors could only have been after 1st September 2008, following adoption of the award. It is manifest that the dispute between the parties is a boundary dispute.
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 Bakshwein & 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. To the extent that the parties herein have a boundary dispute, one cannot say that the land claimed by the Plaintiff has been identified with certainty. Further, where parties are neighbours as is the case herein, the Plaintiff must show unmistakable evidence of an entry with an intention to dispossess the registered proprietor who is her neighbour. I do not think such an intention can exist if the claimant honestly believes that she is on her own land and not the Defendant’s. The Court of Appeal stated in *Masambaga & 7 others v Malindi Holdings and Estate Limited* (Civil Appeal 165 of 2019) [2022] KECA 782 (KLR) (10 June 2022) (Judgment) as follows:

As explained in *Elements of Land Law*, 5th Edition by Kevin Gray and Susan Francis Gray at page 1179 “Possession is attributed to the squatter (and his possession is adverse) only if he has both factual possession (*factum possessionis*) and the requisite intention to possess (*animus possidendi*). These elements of factum and animus interact significantly and must coincide continuously throughout the entirety of the required period of possession.
15. The plaintiff has not demonstrated both factual possession and the requisite intention to possess. Additionally, I note that parties were actively litigating before the tribunal until 1st September



2008. Time could not run for purposes of adverse possession during the litigation. The Originating Summons herein was filed on 13th March 2018, less than ten years after conclusion of the litigation. The requisite 12 years had not been attained by the time the proceedings herein were commenced. Simply put, the Plaintiff has not established adverse possession and is thus not entitled to the reliefs sought.

16. I find no merit in the Plaintiff's case, and I therefore dismiss it with costs to the Defendant.

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

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Wanyonyi holding brief for Mr Osango for the Plaintiff

Mr Mutoka holding brief for Ms Rauto for the Defendant

Court Assistant: M Nguyayi

