



Agengo (Suing as an administrator of the Estate of Agnes Andenyi Imbuchi (Deceased) & another v Ambula & another (Sued as administrators of the Estate of Richard M Imbuchi) (Environment & Land Case 94 of 2019) [2024] KEELC 4129 (KLR) (8 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4129 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 94 OF 2019**

DO OHUNGO, J

MAY 8, 2024

BETWEEN

ALEXANDER AGENGO (SUING AS AN ADMINISTRATOR OF THE ESTATE OF AGNES ANDENYI IMBUCHI (DECEASED)) 1ST PLAINTIFF

KENNEDY NANG'AME 2ND PLAINTIFF

AND

ROSE IKAMBI AMBULA 1ST DEFENDANT

NANCY WITAMBULA AMBULA 2ND DEFENDANT

SUED AS ADMINISTRATORS OF THE ESTATE OF RICHARD M IMBUCHI

JUDGMENT

1. Proceedings in this matter started on 6th August 2019 when Agnes Andenyi Imbuchi and Kennedy Nang'ame filed Originating Summons dated 5th August 2019 wherein they averred that they had acquired title to a 1.56 hectares portion of the parcel of land known as Kakamega/Lumakanda/3274 (hereinafter the suit property) by adverse possession. They therefore prayed for orders that they have obtained title to the 1.56 hectares portion of the suit property by adverse possession, that the defendants' title to the 1.56 hectares portion of the suit property has been extinguished by lapse of time, and that the Land Registrar Kakamega land registry do subdivide the suit property to two parcels measuring 1.56 hectares and 1.78 hectares and to issue fresh title deeds to the plaintiffs and the defendants. They also prayed for costs of the suit.
2. The Originating Summons was supported by affidavits sworn by Agnes Andenyi Imbuchi and Kennedy Nang'ame. It was opposed through affidavits sworn by Nancy Witambula Ambula. She counterclaimed for recovery of the suit property and eviction of the plaintiffs from the suit property.



3. Agnes Andenyi Imbuchi passed away on 31st October 2020 and was substituted with Alexander Agengo, pursuant to an order made on 8th March 2022. Alexander Agengo had obtained limited grant of letters of administration ad litem in respect of her estate. Following the substitution, the plaintiffs filed an Amended Originating Summons on 23rd November 2022. Nothing changed in the plaintiffs' claim, save for the introduction of the substituted first plaintiff.
4. Hearing of the matter proceeded by way of oral evidence. Alexander Ageng'o testified as PW1 and adopted his supporting affidavit which he swore on 22nd November 2022 and filed on 23rd November 2022. He also produced the annexures thereto marked AA -1 (b) to AA-8 (b) as his exhibits. He deposed in the affidavit that Agnes Andenyi Imbuchi was his mother and the mother of Richard Mise Imbuchi (deceased) who was the registered proprietor of the suit property which was matrimonial property. That Agnes Andenyi Imbuchi was buried on the suit property and that she was in occupation of the 1.56 hectares portion of the suit property with two semi-permanent houses, a semi-permanent pit latrine and a borehole on it. He added that the defendants were in occupation of the remaining portion of the suit property which the defendants were cultivating through one Mr Kindia. PW1 further deposed that Agnes Andenyi Imbuchi filed Kakamega ELC No. 400 of 2017 claiming the whole of the suit property on behalf of her grandchildren and that the said suit was struck out on 26th February 2019 following an application by the defendants. That the defendants were the administrators of the estate of his brother Richard Mise Imbuchi and that a survey was conducted on the suit property and a report prepared.
5. PW1 further testified that his brother Richard Mise Imbuchi passed away in the year 2012 and that a succession cause in respect of his estate was filed in Eldoret. That Agnes Andenyi Imbuchi raised an objection in the succession cause and that the objection was dismissed. He further stated that they had lived on the suit property since 1968 and that Agnes Andenyi Imbuchi was in occupation of one part while Richard Mise Imbuchi was in occupation of the other.
6. Kennedy Nang'ame (PW2) adopted his supporting affidavit which he swore on 5th August 2019 and filed on 6th August 2019. He deposed that he is a grandson of Agnes Andenyi Imbuchi and a nephew to Richard Mise Imbuchi. He repeated the same statements as those in the affidavit of PW1 and further testified that he was born on the suit property in 1973.
7. Evalyne Suba Kangucha Mugita (PW3) testified that she knew Agnes Andenyi Imbuchi as her neighbour since 1981 and that Agnes Andenyi Imbuchi and Kennedy Nang'ame had always lived on the suit property as their home.
8. Lastly, Laban Kedogo Kisangi (PW4) testified that he had known Agnes Andenyi Imbuchi and Kennedy Nang'ame since 1980 and that they had always utilized more than an acre of the suit property and grew maize and vegetables on it and even built permanent structures.
9. The plaintiffs' case was then closed.
10. Nancy Witambula Ambula (DW1) was the sole defence witness. She stated that she is the widow and administrator of the estate of Richard Mise Imbuchi. She adopted her replying affidavit which she swore on 11th September 2019 as well as her supplementary affidavit which she swore on 30th November 2019. She produced annexures marked NWA 1 to NWA 4 in her replying affidavit as well as documents listed as numbers 1 to 9 in her Additional list of Documents dated 20th June 2022 as her exhibits.
11. DW1 deposed in her said affidavits that Agnes Andenyi Imbuchi was the mother to Richard Mise Imbuchi who was her husband while Kennedy Nang'ame is the son of her sister-in-law Beatrice Kavesta. That the suit property borders Kakamega/Lumakanda/3275 where her late husband's



extended family reside and that both the suit property and Kakamega/Lumakanda/3275 are subdivisions of Kakamega/Lumakanda/532. She also deposed that following the death of her husband in the year 2012, Alexander Ageng'o (PW1) constantly threatened her with physical violence which led her to flee and find alternative land in Moi's Bridge and that when she filed Eldoret HC Succession Cause No. 316 of 2012 and obtained letters of administration in respect of her husband's estate, Alexander Ageng'o filed an application objecting to her grant being confirmed claiming that her late husband obtained title to the suit property fraudulently.

12. DW1 further testified that she sold the suit property and that she was married to Richard Mise Imbuchi in 1994. That she resided with Agnes Andenyi on the suit property and that when Richard Mise Imbuchi and Agnes Andenyi died, they were all buried on the suit property. That she last went to the suit property in the year 2013 and that she did not know if Agnes Andenyi's and Kennedy Nang'ame's houses were still there.
13. Defence case was then closed. Parties thereafter filed written submissions.
14. I have considered the pleadings, the evidence, and the submissions. The issues that arise for determination are whether adverse possession has been established and whether the reliefs sought should issue.
15. 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.
16. From the material on record, it is apparent that the parties to this suit are closely related. The original first plaintiff Agnes Andenyi Imbuchi was the mother of Richard Mise Imbuchi (deceased) who is the registered proprietor of the suit property. The second plaintiff Kennedy Nang'ame is a nephew to Richard Mise Imbuchi. The suit property is a subdivision of Kakamega/Lumakanda/532, the family land where the parties all resided prior to its subdivision. Thus, the plaintiffs' entry and occupation of both Kakamega/Lumakanda/532 and the suit property was by virtue of being members of the family.
17. While dealing with the issue of whether adverse possession could apply within families against close relatives, the Court of Appeal stated in *Samuel Kihamba v Mary Mbaisi* [2015] eKLR as follows:

The suit filed by the respondent against the appellant was founded on adverse possession where the respondent claimed to have acquired adverse rights over the suit land having occupied the same for over twelve years. Could the doctrine of adverse possession apply against the parties to the suit before the learned Judge who were related by being mother and step-son? We think not. We are persuaded by various dicta which we have quoted and relied upon in this judgement and must state that it would create havoc for families and the society of Kenya generally if the principle of adverse possession applied within families against close relatives.
18. The present case is similar to the situation in *Samuel Kihamba v Mary Mbaisi* (supra), since here, a mother is claiming adverse possession against her own son. Adverse possession cannot be granted in those circumstances.



19. The close family relationship aside, the parties had been actively litigating over ownership of the suit property and validity of Richard Mise Imbuchi's title in Kakamega ELC No. 400 of 2017 and Eldoret HC Succession Cause No. 316 of 2012. In those circumstances, coupled with the threats of physical violence which Alexander Ageng'o subjected Richard Mise Imbuchi's widow to, which made her to flee from the suit property, it cannot be said that the plaintiffs had any quiet possession at all.
20. I find that the plaintiffs have failed to establish adverse possession.
21. The defendants sought recovery of the suit property and eviction of the plaintiffs from the suit property. The second defendant conceded that she is not the registered proprietor of the suit property. Indeed, from the copy of the title deed and register in respect of the suit property which were produced, it is apparent that the suit property is still registered in the name of Richard Mise Imbuchi. As noted earlier, the parties to this case are close family members. I do not think that it is appropriate in the circumstances to issue an order of eviction.
22. In the result, I find no merit in both the plaintiffs' and the defence cases. I dismiss both. I make no order as to costs in view of the close family relationship between the parties.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 8TH DAY OF MAY 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Mondia for the plaintiffs

Ms Nyaera for the defendants

Court Assistant: E. Juma

