



Mapesa (Substituted by Anastasia Atieno Odhiambo) v Ondusie (Enviromental and Land Originating Summons 80 of 2015) [2024] KEELC 6342 (KLR) (1 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6342 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 80 OF 2015**

BN OLAO, J

OCTOBER 1, 2024

BETWEEN

JAMES ODHIAMBO MAPESA (SUBSTITUTED BY ANASTASIA ATIENO ODHIAMBO) PLAINTIFF

AND

OMIGO ONDUSIE ALIAS WAKWABI OMIGO DEFENDANT

JUDGMENT

1. By an un-dated Originating Summons filed herein on 5th August 2015 James Odhiambo Mapesa (now deceased and represented by his wife Anastasia Atieno Odhiambo as Plaintiff) impleaded Omigo Ondusie alias Wakwabi Omigo (the Defendant) claiming to be entitled by way of adverse possession to a portion of the land parcel No MARACHI ELUKONGO/1000 measuring 1½ acres (the suit land) which the Defendant now holds in trust for him. The Plaintiff sought a determination of the following issues:
 1. The ownership of a portion measuring 1½ acres of the land parcel NO MARACHI/ELUKONGO/1000.
 2. Whether the Plaintiff purchased approximately 1½ acres out of the land parcel NO MARACHI/ELUKONGO/1000 in 1978.
 3. Whether the Plaintiff took possession thereof in 1978 and has been in open, peaceful and un-interrupted possession/use of the aforesaid portion since 1978 to-date.
 4. Whether the Plaintiff has acquired the aforesaid portion by operation of the law.
 5. Whether the Defendant’s rights and interest in the aforesaid portion was extinguished by operation of the law.
 6. Whether the Defendant holds the aforesaid portion in trust for the Plaintiff.



7. Whether the Plaintiff is entitled to a portion of the aforesaid parcel of land.
Arising out of the above determinations, the Plaintiff sought judgment against the Defendant in the following terms:
1. An order that the Plaintiff is entitled to be registered as absolute owner of a portion measuring 1½ acres out of the land parcel NO MARACHI/ELUKONGO/1000.
 2. An order that the Defendant executes the relevant transfer documents in favour of the Plaintiff in default, the Deputy Registrar of this Court be authorised to sign the same for the Plaintiff to get a portion of the land measuring 1½ acres.
 3. An order that the Defendant be condemned to pay costs.
 4. Further orders or reliefs that this Honourable Court may deem fit to grant.
2. In support of his Originating Summons, the Plaintiff also filed an un-dated affidavit (for to-day I shall reserve my barbs to counsel for not dating pleadings). In the said supporting affidavit, the Plaintiff has deposed that on or about 23rd April 1978, the Defendant offered him and he agreed to purchase a portion of land measuring 1½ acres out of the suit land. They duly executed a land sale agreement and the Plaintiff settled the purchase price in two installments and thereafter took possession of the said portion in 1978. He has remained in open, peaceful and un-interrupted occupation of the said land from 1978 to-date and in order to protect his interest therein, he lodged a caution on the suit land. He has therefore been advised by his counsel that at the expiry of twelve (12) years since he purchased the said portion, the Defendant's interest therein was extinguished by operation of the law and that he has acquired it by way of adverse possession and the Defendant is now holding it in trust for him.
3. In support of his claim, the Plaintiff filed the following documents:
1. Copy of register for the land parcel No MARACHI/ELUKONGO/1000.
 2. Copy of sale agreement dated 23rd April 1978.
4. The Plaintiff also filed a witness statement by John Okello Okema this time dated 20th April 2017 in which the witness states that the parties are his neighbours. That he was a witness and signed the sale agreement in 1978 when the Plaintiff purchased the portion of land in dispute and took possession of it. That the boundaries were clearly marked and the Plaintiff has since 1978 occupied and used the said portion of the suit land openly, peacefully and interrupted to-date.
5. Following the demise of the deceased on 11th July 2018, he was substituted by Anastasia Atieno Odhiambo the Administratrix to his Estate. She filed a statement dated 7th September 2022 in which she reiterated and adopted the averments in the affidavit of the deceased. She added that together with the deceased, they have been in quiet peaceful and un-interrupted occupation and use of a portion of land measuring 1½ acres out of the suit land since 1978 to-date. She asked the Court to have the said portion transferred to her on behalf of the Estate of the deceased.
6. The Defendant filed a replying affidavit dated 13th August 2015 in opposing the Originating Summons.
7. He confirmed that whereas he and the Plaintiff had executed a sale agreement on 23rd April 1978, the purchase price was Kshs.1,500 of which only Kshs.1,000 was paid leaving a balance of Kshs.500 which remains un-paid to-date. He denied that there was another agreement dated 10th September 1980 by which an additional ½ acre was purchased by the Plaintiff and added that any such further agreement could only be a forgery. He deposed further that upon being informed about the further sale agreement, he reported the fraud to the Chief where both parties were summoned and the Plaintiff



admitted that indeed there had been no further agreement by which he had purchased an additional ½ acre. The Plaintiff is therefore fraudulently trying to acquire a further ½ acre of land through dubious means and his claim is misplaced, made in bad faith and should be dismissed.

8. At the end of the plenary hearing, the parties were given upto 16th April 2024 to file their submissions. However, by 10th June 2024 when the submissions were supposed to have been filed and notwithstanding the extension of time by the Deputy Registrar, only Mr Were instructed by the firm of Gabriel Fwaya Advocates had filed his submissions. The Defendant who was acting in person elected not to file any submissions.
9. I have considered the evidence by the parties and the submissions by Mr Were counsel for the Plaintiff.
10. The Plaintiff seeks an order that he has acquired by way of adverse possession a portion of the suit land measuring 1½ acres following a sale agreement executed between him and the Defendant on 23rd April 1978. Section 38(1) of the *Limitation of Actions Act* which he has cited in support of his claim provides that:

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

In the case of *Kasuve v Mwaani Investments Ltd & Others* C.A. Civil Appeal No 35 of 2002 [2004 eKLR], the Court stated the following with regard to what a party claiming land by way of adverse possession must prove:

“And in order to be entitled to land by adverse possession the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition – *Wanje –v- Saikwa* (No 2) 1984 KLR 284. A title by adverse possession can be acquired under *Limitation of Actions Act* for a part of the land and the mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such person’s adverse possession (see *Githu v Ndeete* 1984 KLR 776)”.

That the Plaintiff is currently in occupation of 1½ acres out of the suit land is not really in dispute. The parties are in agreement that a land sale agreement was executed between them on 23rd April 1978 by which the Plaintiff purchased a portion of the suit land. Where the parties differ is that whereas the Plaintiff claims that he purchased 1½ acres and paid the full purchase price, the Defendant’s case is that in fact the purchase price was Kshs.1,500 for a portion measuring 1 acre of which only Kshs.1,000 was paid and the balance of Kshs.500 remains un-paid. He denies that there was an additional agreement on 10th September 1980 by which the Plaintiff purchased a further ½ acre. He describes the additional agreement as a forgery. Nonetheless, the Plaintiff’s occupation and use of the 1½ acres since 1978 is not really in dispute. In paragraph 8 of his replying affidavit, he has averred as follows:

- 8: “That the Applicant has been using the said portion of land ever since we executed the agreement and whatever is stated in his issues are mere lies”.

This Court can only presume that since the occupation of the 1½ acres is not specifically denied, the reference to “mere lies” in the above averment can only be in reference to the acreage of the land



purchased and the purchase price which the Defendant claims is not fully settled. Indeed when he was cross-examined by Mr Were during the plenary hearing on 5th March 2024, he said:

“It is true that I have not filed for a counter-claim for eviction of the Plaintiff from the land. The Plaintiff defrauded me ½ acre in collusion with the surveyor. I cannot tell how much land the Plaintiff is using but it is a lot. It is true that on 8th October 1967, the Plaintiff placed a caution on the land. I have not made any attempt to remove the caution. I confirm that the deceased Plaintiff was buried on the land and his wife who has testified and her children also live on the land in dispute”.

The caution was actually lodged on the suit land on 24th October 1988 as per the register and not in 1967 as alleged by the Defendant. The reference to 1967 must be an error on the part of the Defendant because the sale agreement was executed in 1978 and so in 1967, the Plaintiff had no interest on the suit land to warrant lodging any caution thereon.

11. As to what portion of the suit land the Plaintiff purchased and occupied together with his wife Anastasia Atieno Odhiambo (PW2) and the family, the sale agreement dated 23rd April 1978 reads:

“Wakwabi Omingo Wakwabi sells land to Odhiambo Mapesa. It is 1 acre. We have agreed well. Kshs.1,000 has been paid. Balance Kshs.500”.

Then there is an addendum dated 10th September 1980 on the agreement. It reads:

“He has added 1,600. We have completed the purchase of the land measuring 1 acre and half. What remains is the number alone money Kshs.200”.

The forgery or lies which no doubt the Defendant was referring to in paragraph 8 of his replying affidavit could therefore only be with regard as to whether the Plaintiff had purchased 1 or 1 ½ acres and whether he had in fact fully paid for the same. In trying to refute that there was an additional agreement for ½ acre on 10th September 1980, the Defendant has averred in paragraphs 6 and 7 of his replying affidavit as follows:

- 6: “That on discovery of the anomaly, I reported the matter to the administration (chief’s office) whereby were summoned for deliberations”.
- 7: “That on the said occasion the Applicant indeed admitted in attendance of Kulumbani, Omingo and John Alele that the said agreement of inclusion and or an additional ½ an acre never existed and that he was the author and forged only signature and the matter was resolved amicably but he has remained adamant”.

If indeed there were deliberations at the chief’s office to controvert what is contained in the sale agreement dated 24th April 1978 and the addendum dated 10th September 1980, it would have been expected that the said deliberations would have been reduced in writing and incorporated in the original sale agreement between the parties. The law is that a written agreement cannot be varied by the introduction therein of oral undertakings – *Kinyanjui & Another V Thande & Another* 1995-98 E.A. 159. Section 97(1) of the *Evidence Act* provides that:

“Where the terms of a contract, or of a grant or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, out of such matter, except the



document itself, or secondary evidence of the contents in cases in which secondary evidence is admissible under the provisions of this Act”.

Given the above legal provision, no oral evidence can be adduced by the Defendant to add or subtract from the contents of the agreement dated 24th April 1978 and 10th September 1980.

12. It is also instructive to note that although the Defendant accuses the Plaintiff of forgery, no complaint was made to the police and neither did he apply for the lifting of the caution which has been on the suit land since 24th October 1988 a period of 36 years. Most significantly, the Plaintiff and his family have remained on the suit land to-date and the deceased was even buried there. That can only mean that the Defendant, knowing that the deceased Plaintiff and his family have always been in occupation of the suit land, he did nothing to evict them therefrom and neither has that occupation been disrupted in any way. It has been peaceful. This Court finds that the deceased Plaintiff and his family are on the land having paid the full purchase price. They are therefore entitled to the orders that the Plaintiff has obtained ownership of the suit land by way of adverse possession. In the case of Public Trustee v Wanduru 1984 KLR 314 at page 319, Madan J.A (as he then was), having cited the provisions of Section 7 of the Limitation of Actions Act, stated as follows:

“A purchaser in possession of the land purchased, after having paid the purchase price is a person in whose favour the period of limitation can run under Section 10(1) of the English Limitation Act, 1939 (closely akin to our Section 7) as against the vendor ...”.

This Court having found that the deceased Plaintiff had fully paid the purchase price on 10th September 1980 having paid the first instalment on 23rd April 1978, it is clear that time started running in favour of the Plaintiff as against the Defendant on 10th September 1980 when the last instalment was paid. By the time this suit was filed on 5th August 2015, the Plaintiff and his family had been in occupation of the 1½ acres portion of the suit land for 35 years. That occupation has remained open, peaceful, uninterrupted and with the knowledge of the Defendant. The Plaintiff has proved his case to the required standard and is entitled to the orders sought in his Originating Summons.

13. Ultimately therefore and having considered all the evidence herein, I enter judgment for the Plaintiff against the Defendant in the following terms:
1. The Plaintiff has acquired by way of adverse possession a portion measuring 1½ acres out of the land parcel NO MARACHI/ELUKONGO/1000.
 2. The Defendant’s right in the said portion has been extinguished by operation of the law.
 3. The Defendant shall within 45 days of the delivery of this judgment surrender to the Land Registrar the original title deed to the land parcel NO MARACHI/ELUKONGO/1000 and execute all the necessary documents to facilitate the transfer of a portion measuring 1½ acre to ANASTASIA ATIENO ODHIAMBO to hold in trust for the family of JAMES ODHIAMBO MAPESA.
 4. In default of (2) above, the Land Registrar shall notwithstanding the absence of the original title deed to the land parcel NO MARACHI/ELUKONGO/1000 cancel the same and the Deputy Registrar shall execute all the necessary documents on behalf of the Defendant to facilitate such registration.
 5. The Defendant shall meet the costs of this suit.

BOAZ N. OLAO



JUDGE

1ST OCTOBER 2024

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT ON THIS 1ST DAY OF OCTOBER 2024 WITH NOTICE TO THE PARTIES.

Mr. Were for the Plaintiff – present

Defendant in person absent.

Right of Appeal.

BOAZ N. OLAO

JUDGE

1ST OCTOBER 2024

