



**Mutsotso v Mikoye (Environmental and Land Originating Summons
107 of 2019) [2025] KEELC 3976 (KLR) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3976 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 107 OF 2019**

DO OHUNGO, J

MAY 22, 2025

BETWEEN

CHARLES LYULA MUTSOTSO PLAINTIFF

AND

MICHEL AVONDI MIKOYE DEFENDANT

JUDGMENT

1. Proceedings in this matter commenced on 10th September 2019, when the Plaintiff filed Originating Summons (OS) dated 9th September 2019. The initial OS underwent several amendments, resting with Amended Amended OS amended on 4th February 2022 (hereinafter “Amended OS”). The Plaintiff averred in the Amended OS that he was entitled to a portion the parcel of land known as Kakamega/Shinyalu/557 measuring 0.9 hectares (the suit property) by adverse possession. He sought determination of the following questions:
 1. Whether the plaintiff has been in open, continuous peaceful and exclusive possession of part of land parcel No. Kakamega/Shinyalu/557 measuring 0.9 HA which is a free hold interest for a period exceeding 12 years.
 2. Whether the defendant, by selling part of L.R No. Kakamega/Shinyalu/557 measuring 0.9 HA to the plaintiff and allowing him to take possession of it for a period of over 12 years now, created a constructive trust in his favour.
 3. Whether the sale of part of L.R No. Kakamega/Shinyalu/557 measuring 0.9 HA to the plaintiff, the Defendant’s proprietorship has been extinguished by operations of the law.
 4. Whether the defendant is holding part of Kakamega/Shinyalu/557 measuring 0.9 HA in trust or the plaintiff.



5. Whether the plaintiff is entitled to be registered as the proprietor of part of land parcel No. Kakamega/Shinyalu/557 measuring 0.9 HA under the *Limitation of Actions Act*.
2. The Plaintiff therefore sought the following orders:
 - a. A declaration that the defendant's right over part of land parcel No: Kakamega/Shinyalu/557 measuring 0.9 HA in area has been extinguished by adverse possession upon expiration of 12 years when the plaintiff was in possession.
 - b. A declaration that the defendant created a constructive trust in favour of the plaintiff by selling part of land parcel No: Kakamega/Shinyalu/557 measuring 0.9 HA to the plaintiff and allowing him to take possession of it to his exclusion for a period of over 12 years now.
 - c. A declaration that upon expiration of 12 years when the plaintiff was in open, peaceful and continuous occupation and use of part of land parcel No: Kakamega/Shinyalu/557 measuring 0.9 HA it was held and is currently held in trust for the plaintiff.
 - d. An order that part of land parcel No: Kakamega/Shinyalu/557 measuring 0.9 HA vests in the plaintiff and that he be registered as the owner thereof under S. 38 of the *Limitation of Actions Act* Cap. 22 Laws of Kenya.
 - e. An order that defendant be ordered to sign all relevant documents to facilitate transfer of part of land parcel No: Kakamega/Shinyalu/557 measuring 0.9 HA to the plaintiff and that in default, the Deputy Registrar of this Honourable Court be at liberty to sign the same.
 - f. An order that defendant be condemned to pay costs of this suit.
 - g. Such further orders or reliefs as this Honourable Court may deem just and reasonable to grant.
3. The Amended OS is supported by an affidavit sworn by the Plaintiff. The Defendant opposed the suit through a replying affidavit which he swore and filed. Hearing proceeded by way of oral evidence.
4. The Plaintiff adopted his witness statement dated 1st February 2022 as his evidence in chief and produced copies of the documents listed as item numbers 1 to 7 in his list of documents dated 1st February 2022 as his exhibits. He further produced copies of annexures "CLM 1b" and "CLM 2" to his supporting affidavit which he had filed on 14th February 2020. He stated in the statement that he entered into an agreement dated 24th July 2004 pursuant to which he purchased the suit property at a purchase price of KShs 414,000. That he had paid KShs 135,000 prior to the date of the agreement and that he paid KShs 200,000 on the date of the agreement. That by 17th May 2005, he had paid a total of KShs 410,000 and that he placed a caution on the suit property to protect his interest. He also stated that he took possession in the month of July 2004 and remained in peaceful and continuous possession as of the date his witness statement.
5. The Plaintiff went on to testify that he purchased 0.9 hectares and that he continued in possession and use even at the date of his testimony. He also testified that he paid a total of KShs 410,000 and that the Defendant refused to collect the balance of KShs 4,000. He further testified that the Defendant refused to transfer the suit property to him.
6. The Plaintiff's case was then closed.
7. On his part, the Defendant adopted his witness statement dated 4th February 2022 as well as his replying affidavit sworn on 1st November 2019 as his evidence in chief. He also produced annexures MAM1a, MAM1b, MAM 2a, 2b and 2c in the said affidavit as his exhibits.



8. The Defendant confirmed that there was indeed a sale transaction between him and the Plaintiff and that the purchase price was KShs 414,000. He added that the Plaintiff paid him KShs 410,000 leaving a balance of KShs 4,000 which still remains unpaid. That the Plaintiff was both a neighbour and a family friend at the time of the agreement. That the Plaintiff had planted maize on the suit property as of the date of his testimony and that the size of land sold was not stated in the agreement. That according to him, the Defendant is entitled to only 0.75 acres. The Defendant further testified that although they had a sale agreement, the intention was to create security for refund of money which the plaintiff had lent his family when his mother was very sick. He added that he was willing to refund but they had not agreed on the amount due as refund since the Plaintiff's wife wanted KShs 1.2 million while the Plaintiff wanted KShs 1.5 million.
9. The Defence case was then closed. Thereafter, directions for filing and exchange of written submissions were issued. The Plaintiff filed submissions dated 10th November 2023 while the Defendant filed submissions dated 12th February 2024.
10. I have carefully considered the pleadings, evidence and the submissions. There is no dispute that the Defendant is the registered proprietor of the suit property. A perusal of the certificate of search produced by the Plaintiff and the copy of title deed produced by the Defendant shows that the suit property measures 1.2 hectares and that the Defendant was registered as proprietor thereof on 4th August 1990. It is also not contested that the Plaintiff and the Defendant entered into an agreement dated 24th July 2004 pursuant to which the Defendant sold to the Plaintiff "part of" the suit property at an agreed purchase price of KShs 414,000 and that the Defendant received a total of KShs 410,000.
11. The issues that arise for determination are whether adverse possession has been established, whether constructive trust has been established and whether the reliefs sought should issue.
12. The Court of Appeal discussed the law on adverse possession in the case of *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.

13. The Plaintiff's case is that he took possession of the suit property in July 2004 in furtherance of the sale agreement dated 24th July 2004. Ordinarily, entry and possession pursuant to a sale agreement is deemed to be by permission of the proprietor and does not therefore amount to adverse possession. Time for purposes of adverse possession does not run in favour of such a claimant as long as his presence on the land is by permission of the proprietor. Nevertheless, once a purchaser completes paying the purchase price, his possession and occupation of the purchased property is no longer by permission of the seller. In that case, 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.
14. As stated above, the purchase price was KShs 414,000 out of which the Plaintiff paid KShs 410,000. A balance of KShs 4,000 remains unpaid. The Plaintiff testified that the Defendant refused to collect the said balance. In the context of a claim for title based on adverse possession, it matters not the reason for non-payment of the balance. As long as the purchase price remains unpaid, the parties are deemed to be in the contractual phase and a claim by way of adverse possession cannot aid the purchaser to enforce the contract. If the intention is to enforce the contract, an ordinary suit should be filed since an adverse possession claim is an ineffective instrument for that purpose.
15. Another aspect of the present case that makes adverse possession untenable is that there is no clarity on the size of the portion occupied by the Plaintiff. The sale agreement which forms the foundation of the Plaintiff's case does not specify the acreage sold. It simply states that the Defendant sold to the Plaintiff "part of" the suit property. Identification of the land claimed is a central pillar of an adverse possession claim. See *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another* [2015] eKLR. Beyond producing an extract of the title to the subject land, a claimant who is seeking title to only a portion of a particular parcel must identify the portion clearly through size and its location on the ground through a survey sketch. In this case, the Plaintiff has claimed 0.9 hectares of the suit property. Besides the said size not having been stated in the agreement, the Plaintiff did not adduce any survey evidence to justify the size of 0.9 hectares.
16. Owing to failure to demonstrate possession that is adverse to the Defendant's title for the requisite 12 years and further considering that the Plaintiff has not clearly identified the portion claimed, I find that adverse possession has not been established.
17. The Plaintiff also claimed that the Defendant created a constructive trust in his favour in respect of the portion purchased. As the Supreme Court stated in *Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others* [2023] KESC 106 (KLR), a constructive trust is an equitable instrument which serves the purpose of preventing unjust enrichment and is applicable to land sale transactions. In the present case, the Defendant does not dispute the existence of a sale transaction and that he received KShs 410,000 from the Plaintiff. Only a sum of KShs 4,000 remains outstanding. The Defendant gave the Plaintiff possession of the property and even testified that he had not refused to transfer the property to the Plaintiff. His hope that the Plaintiff will accept a refund is contrary to the sale agreement and can only bear fruit if the parties enter into a fresh agreement in that regard.
18. I have discussed the Plaintiff's failure to justify the size of 0.9 hectares that he is claiming. I note however that in his testimony, the Defendant conceded that the Plaintiff is entitled to 0.75 acres of the suit property. In the circumstances, the Plaintiff has established that the Defendant is holding 0.75 acres



of the suit property in constructive trust for him. The Plaintiff must however pay the balance of KShs 4,000 prior to acquiring title.

19. In the result, the Plaintiff's case succeeds partially. I make the following orders:
- a. A declaration is hereby made that the Defendant created a constructive trust in favour of the Plaintiff in respect of 0.75 acres of the parcel of land known as Kakamega/Shinyalu/557.
 - b. The Plaintiff to pay to the Defendant the sum of KShs 4,000 (Four Thousand), being the balance of the purchase price, within 21 (Twenty One) days of delivery of this judgment. In the event that the Defendant declines to receive the amount, the Plaintiff shall be at liberty to deposit the said amount in this Court. The said amount shall be released to the Defendant when he is ready to receive it.
 - c. Upon the Plaintiff paying to the Defendant or depositing in Court the said sum of KShs 4,000 (Four Thousand), the Defendant to forthwith sign all relevant documents to facilitate transfer of 0.75 acres of the parcel of land known as Kakamega/Shinyalu/557 to the Plaintiff. In default of the Defendant signing, the Deputy Registrar of this Court shall be at liberty to sign on behalf of the Defendant.
 - d. The Plaintiff shall bear all statutory charges in respect of (c) above.
 - e. Each party shall bear own costs of the suit.

DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 22ND DAY OF MAY 2025.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

Mr Abok for the Plaintiff

No appearance for the Defendant

Court Assistant: B Kerubo

