



**Mukuvi & another v Munandi (Environment & Land Case
33 of 2018) [2023] KEELC 15946 (KLR) (7 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 15946 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 33 OF 2018**

DO OHUNGO, J

MARCH 7, 2023

BETWEEN

MATECHE MUKUVI 1ST PLAINTIFF

BARASA MUYEKHO 2ND PLAINTIFF

AND

MUSEVE MUNANDI DEFENDANT

JUDGMENT

1. By Originating Summons (OS) dated 22nd March 2018, the plaintiffs claimed to have become entitled to 1 (one) acre of the parcel of land known as Kakamega/Chemuche/249 by purchase and by adverse possession. They sought the determination of the following issues:
 1. Whether Museve Munandi holds title to one acre piece of land being part of land parcel number Kakamega/Chemuche/249 in trust for the first and second applicants.
 2. Whether the purchase of one acre piece of land being part of land parcel number Kakamega/Chemuche/249 by the first plaintiff/applicant from the defendant/respondent is valid.
 3. Whether the subsequent purchase of the one (1) acre piece of land being part of land parcel number Kakamega/Chemuche/249 by the second plaintiff/applicant from the first plaintiff/applicant is valid.
 4. Whether the said Mateche Mukuvi and Barasa Muyekho have acquired title to the one (1) acre piece of land being part of land parcel number Kakamega/Chemuche/249 by way of adverse possession.



5. Whether the title deed held by the said Museve Munandi for one (1) acre piece of land being part of land parcel number Kakamega/Chemuche/249 should be subdivided and a new title be issued to the second plaintiff/applicant Barasa Muyekho.
 6. Who shall bear the costs of this suit.
2. The OS was supported by affidavits sworn by the plaintiffs and was opposed through a replying affidavit and further affidavit both sworn by the defendant. The defendant later passed away on 6th August 2021 and was substituted by his son Isaac Isiye Museve, pursuant to an order made on 24th November 2021.
 3. In his said replying affidavit and further affidavit, the defendant deposed that he was the registered owner of the suit property and that the first plaintiff purchased it from him sometime in 1995. That thereafter, his sons objected to the sale prompting him to immediately call the first plaintiff for refund of the purchase price of KShs 52,000 but the first plaintiff refused to accept the refund despite the defendant explaining to him that the suit property was ancestral land. That he reported the matter to the area Chief and to his advocates who summoned the first plaintiff to collect the refund, but the first plaintiff failed to heed the summons. That forcefully occupied the suit property for about ten years and thereafter sold it to the second plaintiff. The defendant went on to state that one of his family members filed Kakamega CMCC No. 526 of 1998 against the first plaintiff and that the said suit was pending as of 15th March 2019. That he filed Kakamega CMCC No. 353 of 2007 against both the plaintiffs herein and obtained an injunction against them but the suit was dismissed for want of prosecution as a result of which he filed Kakamega HCC Appeal No. 113 of 2009.
 4. The OS was heard by way of oral evidence. The first plaintiff testified as PW1 and adopted his statement filed on 26th March 2019. He stated that he purchased the suit property from the defendant on 29th May 1997 and that he paid the purchase price of KShs 52,500 in two instalments. That he used the suit property for ten years then transferred it to the second plaintiff together with a house which he had constructed on it and that the second plaintiff occupied the suit property from 2007 to the date of his testimony. He further stated that he had disputes with the defendant and that which led to the defendant's son lodging a caution against the title and various court cases being filed against him (the first plaintiff) including being charged between 2007 and 2018. He added that the defendant and him never attended the Land Control Board in respect of the agreement dated 29th May 1997, that he sold the suit property to the second plaintiff and that the defendant never refunded the purchase price.
 5. The second plaintiff testified as PW2 and adopted his statement dated 27th March 2018 as his evidence in chief. He stated that he purchased the suit property from the first plaintiff on 25th June 2007, paid the purchase price and took immediate possession. That as at the date of his statement, he had been in occupation for 11 years and that he was still in occupation as at the date of his testimony. That he was charged in court in connection with the suit property within the first year that he took possession, that an injunction was issued against him and that his son was charged with assaulting the defendant's child and was jailed.
 6. The plaintiffs' case was then closed.
 7. During defence hearing, Isaac Isiye Museve testified as DW1. He adopted his witness statement dated 8th March 2022 and the above affidavits sworn by his father as his evidence in chief. He stated that the first plaintiff purchased the suit property from his father (the defendant) sometime in 1995 and that his father never informed his family of the sale until they learnt of it sometime in 1996. That DW1 and his



brother Reuben Munandi registered a caution against the suit property, but the first plaintiff forcefully built a house on it despite their complaints to the area Chief and District Officer. That subsequently, the defendant instituted filed Kakamega CMCC No. 353 of 2007 against the plaintiffs but the suit was dismissed for want of prosecution and that thereafter the defendant filed Kakamega HC Civil Appeal No. 113 of 2009. That the first plaintiff secretly sold the suit property to the second plaintiff which the defendants came to know of when they saw the second plaintiff on the suit property in 2009 after stealthily occupying it at night. That his father asked the second defendant to leave the suit property by reporting to the area chief but he forcefully continued to stay on it. He added that the second plaintiff has been in possession of the suit property since buying it and that when the first plaintiff entered the suit property, he was summoned by the Chief to accept refund but he refused.

8. Selpher Muyoka Imbili, a Court Administrator at Kakamega Law Courts, testified as DW2 and confirmed the existence of the cases and that Kakamega HC Civil Appeal No. 113 of 2009 is still pending.
9. Defence case was then closed. Parties thereafter filed and exchanged written submissions. I have duly noted the submissions.
10. I have considered the parties' pleadings, evidence, and submissions. The issues that arise for determination are whether adverse possession has been established and whether the reliefs sought should issue.
11. The essentials of adverse possession were restated by the Court of Appeal in [*Loise Nduta Itotia v Aziza Said Hamisi*](#) [2020] eKLR as follows:

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."
12. Thus, the burden of proof lies with the plaintiffs who must prove that they have had peaceful and uninterrupted possession for 12 years.
13. There is no dispute that Museve Munandi, the defendant, was the registered proprietor of the parcel of land known as Kakamega/Chemuche/249 (the suit property). That much is confirmed by the copy of register which the plaintiffs produced. It is further not in dispute that in or about 1995, the first plaintiff and Museve Munandi entered into an agreement pursuant to which Museve Munandi sold to the first plaintiff 1 acre of the suit property at a consideration of KShs 52,500 which the first plaintiff paid. The agreement seems to have immediately run into headwinds as Museve Munandi's family opposed it and one of his sons by the name Munandi Museve protested to the area chief and registered a caution against the suit property on 11th October 1996.
14. The disputes did not end there. The first plaintiff conceded in his testimony that there were court cases filed. Those cases included Kakamega SPMCC No. 526 of 1998 which was filed by Museve Munandi's son Munandi Museve against Museve Munandi and the first plaintiff seeking a permanent injunction to restrain Museve Munandi from transferring the 1 acre to the first plaintiff. Another case was Kakamega CMCC No. 353 of 2007 which was filed by Museve Munandi against the plaintiffs herein seeking a permanent injunction to restrain them from dealing with the suit property. Further,



Kakamega High Court Civil Appeal No. 113 of 2009 was filed against an order made on 26th October 2009 in Kakamega CMCC No. 353 of 2007 and is still pending.

15. For a claim of adverse possession to succeed, the claimant must demonstrate that the occupation was without the proprietor's permission. Ordinarily, entry and occupation pursuant to a sale agreement is by permission of the proprietor and does not therefore amount to adverse possession. However, once a purchaser completes paying the purchase price, his possession and occupation of the property is 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. In this case, it is not disputed that purchase price was fully paid as of 1997.
16. In his testimony, Isaac Isiye Museve (DW1) admitted that the plaintiffs have been in possession of the 1 acre and that as at 10th March 2022 when he testified, the second plaintiff was in possession. The requirement however is that a party seeking title by adverse possession must prove peaceful uninterrupted possession for at least 12 years. The plaintiffs filed this suit on 23rd March 2018. Prior to that date they had been involved in active litigation with the defendant as recently as 2009 in Kakamega High Court Civil Appeal No. 113 of 2009.
17. The parties have been involved in litigation from 1998 to 2009 and time did not run during that period. The existence of the suits, including Kakamega High Court Civil Appeal No. 113 of 2009 which is still pending, stopped time from running for purposes of adverse possession. I find that the requisite 12 years had not been met by the time this suit was filed on 23rd March 2018 and that adverse possession has not been established. It follows therefore that the reliefs sought by the plaintiff cannot issue.
18. I find no merit in the plaintiffs' case and I therefore dismiss it. Considering the circumstances of the case, I make no order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 7TH DAY OF MARCH 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Atulo holding brief for Mr Manyoni for the plaintiffs

Ms Muthami for the defendant

Court Assistant: E. Juma

