



Moseti v Chacha (Sued as the legal rep of the Estate of Sigismundis Sarara Mwita (Deceased) & another (Environmental and Land Originating Summons E018 of 2021) [2023] KEELC 17391 (KLR) (10 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17391 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E018 OF 2021**

MN KULLOW, J

MAY 10, 2023

BETWEEN

FAUSTUS BOKE MOSETI PLAINTIFF

AND

JULIUS MWITA CHACHA (SUED AS THE LEGAL REP OF THE ESTATE OF SIGISMUNDIS SARARA MWITA (DECEASED) 1ST DEFENDANT

JULIUS NYAMOHANGA KOROSO 2ND DEFENDANT

JUDGMENT

1. The plaintiff herein commenced this suit by way of an Originating Summons dated April 29, 2021 against the defendants seeking a determination of the following Issues: -
 - i. Whether the defendants and the Estate of Sigismundis Sarara Mwita (Deceased) right to recover a portion of Land Title No. Bugembe/ Isebania/ 1537 measuring 0.023Ha registered in the name of Julius Nyamohanga Koroso and formerly portion of Title No. Bugembe/ Isebania/ 737 owned by Sigismundis Sarara Mwita – Deceased extinguished on account of Adverse Possession by the plaintiff which Adverse Possession has been for the past 22 years peacefully, open, continuous and uninterrupted.
 - ii. Whether upon finding in favor of the plaintiff in paragraph 1 above, the plaintiff is entitled to be registered as the owner of all that piece of land now known as Bugembe/ Isebania/ 1537 measuring 0.023Ha which was formerly a portion of Bugembe/ Isebania/ 737.
 - iii. Whether the 2nd defendant should be ordered to transfer the said L.R. No. Bugembe/ Isebania/ 1537 to the plaintiff.
 - iv. Whether the defendants have held the suit land in trust for the plaintiff.



- v. Whether the defendants by themselves, servants, agents or otherwise howsoever, should be restrained from interfering with the plaintiff's quiet Possession, occupation and use of the suit land now registered as Bugembe/ Isebania/ 1537 in the name of the 2nd defendant.
- vi. Whether the defendants should be ordered to pay costs of the suit.

plaintiff's Case

2. The Originating Summons is premised on the 13 grounds thereon and on the plaintiff's Supporting Affidavit sworn on even date. The plaintiff avers that sometimes in the year 1999, he applied for allocation of the suit land from the then Kehancha Municipal Council within Nyabohanse Market. The request was granted and he was granted the suit land – Plot No. 22A measuring 0.023Ha vide its Town Planning Min. 14/99 APP A (151) of 30/3/99 FCM 5/99. He thereafter took immediate possession of the said Plot in the year 1999, built commercial premises and has continued to occupy the same peacefully, openly and uninterruptedly for 22 years.
3. It is his claim that sometimes in the year 2020, he learnt that the estate of the late Sigismundis Sarara Mwita were laying claim over the suit land on the basis that the same formed part of their L.R. No. Bugembe/ Isebania/ 737. The suit land was included in the succession proceedings whereafter the 1st defendant distributed the original land and the same has since been subdivided and registered in the name of the 2nd defendant as L.R. No. Bugembe/ Isebania/1537.
4. He maintained that his occupation and use of the suit land has been adverse and thus extinguished the title of the late Sigismundis Sarara Mwita over the said portion of the suit land measuring 0.023Ha and consequently, the 1st defendant could not transmit the title thereof to the 2nd defendant. It is therefore his position that the 2nd defendant hold the title deed to the said portion in trust for him.
5. He thus urged the court to allow his claim as he stands to suffer irreparable loss if the defendants proceed to dispossess him of the suit plot where he has invested immensely.
6. The plaintiff's case was scheduled for hearing on 19/1/2023, however, on the said date, neither the plaintiff nor his advocate was present in court. The court on being satisfied that that the plaintiff was properly served with the hearing date, proceeded to dismiss the plaintiff's case for nonattendance pursuant to Order 12 of the [Civil Procedure Rules](#) and consequently closed the plaintiff's case.

defendants' Case

7. The defendants filed a replying affidavit sworn on June 11, 2021 by the 2nd defendant on his own behalf and on behalf of the 1st defendant. He averred that he is the registered owner of the suit land known as L.R. No. Bugembe/ Isebania/ 1537. It was his contention that the suit parcel is as a result of the subdivision of L.R. No. Bugembe/ Isebania/ 737, originally registered in the name of the late Sigismundis Sarara Mwita and the suit land was subsequently registered in his name by virtue of being a beneficiary of the said estate, holding purchaser's interest.
8. He maintained that the suit land is a private land hence the alleged allocation by the then Kehancha Municipal Council as alleged by the plaintiff was illegal, ultra vires and unconstitutional. He denied the plaintiff's claim on Adverse Possession and stated that the plaintiff's occupation has never been peaceful and uninterrupted as alleged. He urged the court to dismiss the claim with costs.
9. Further, the defendants sought Declaratory Orders that the 2nd defendant is the registered owner of the suit land, an order directing the plaintiff to vacate the suit land and to deliver a vacant possession thereof to the 2nd defendant.



10. The defendants' case proceeded for hearing on 19/1/2023; the 2nd defendant testified as DW1. It was his testimony that he is the registered owner of the suit land. That the said parcel was purchased by his late father from the late Mzee Sigismundis Sarara Mwita, who previously owned the land originally known as L.R. No. Bugembe/ Isebania/ 737 and which has since been subdivided pursuant to the Confirmation of Grant in the Succession proceedings.
11. He further stated that he does not have any claim in respect of Plot No. 22A as referred to by the plaintiff but maintained that his claim is in respect to L.R. No. Bugembe/ Isebania/ 1537, which he urged the court to issue an Order of eviction against the plaintiff and costs of the suit.
12. He produced a copy of the title deed in respect to L.R. No. Bugembe/ Isebania/ 1537 as Dexh. 1, a copy of the Certificate of the Confirmation of Grant dated 25/03/2019 as Dexh. 2, copies of letters dated 27/4/2020 and 19/11/2019 as Dexh. 3 (a & b), copies of correspondences and demand letter as Dexh. 4 in further support of his case.
13. Upon close of the defence case, I issued directions on the filing of final submissions. Only the defendants filed their submissions and authorities which I have read and taken into account.

Analysis and Determination

14. I have reviewed the pleadings, the evidence and the submissions filed in totality and in my considered view, the issues arising for determination are as follows: -
 - a. Whether the plaintiff has proved his claim of Adverse Possession.
 - b. Whether the plaintiff is entitled to the reliefs sought.
 - c. Whether the defendants have proved their claim to warrant the grant of the reliefs sought.
 - d. Who should bear the costs of the suit

A. Whether the plaintiff has proved his claim of Adverse Possession.

15. sections 7,13, 17 and 38 (1) and (2) of the *Limitation of Actions Act* and section 28 (h) of the *Land Registration Act* provides the statutory provisions which underpin the doctrine of adverse possession.
16. The court in *Samuel Kihamba v Mary Mbaisi* [2015] eKLR in outlining the elements of adverse possession held as follows: -

“Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, *nec vi, nec clam, nec precario*. The additional requirement is that of *animus possidendi*, or intention to have the land” (emphasis mine)
17. The plaintiff contends that he was allocated the suit land within Nyabohanse Market measuring 0.023Ha, which according to her is known as Plot No. 22A, in the year 1999 by the then Kehancha Municipal Council. That upon the said allocation, he immediately took possession of the said portion, built commercial premises and continued to occupy the same for over 22 years.
18. It is further his claim that at the time of the succession proceedings in the year 2020 and 2021, the rights of the family of the late Sigismundis Sarara Mwita over the said portion had extinguished on



account of his occupation and use of the land for over 22 years which was adverse to their rights. He thus contends that the 2nd defendants hold the title thereto in his trust.

19. The 2nd defendant on the other hand denied the plaintiff's claim on adverse possession and maintained that he is the registered owner of the suit land, the same was registered by virtue of transmission; as a beneficiary holding purchaser's interest. It was his contention that the land in dispute is No. 1537 and not Plot No. 22A as alleged by the plaintiff and further that the plaintiff has never been in peaceful and uninterrupted occupation for the statutory period as alleged.
20. It is important to note that the despite being given several opportunities to prosecute his case, neither the plaintiff nor his advocate attended court since the filing of their case. He did not participate in the hearing of the case despite being served with the hearing notice and consequently he did not adduce any evidence in support of his averments.
21. The burden of proof lies with the person alleging the occurrence of an event to demonstrate that he has met the requirements for the grant of an order of adverse possession. Section 107 (1) of the [Evidence Act](#) is very clear on the production of evidence in support of averments. It states as follows: -

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”
22. The plaintiff has not led any evidence as to the nature of his occupation and whether there was dispossession of the true owner of the suit land. Further, the plaintiff did not adduce any evidence to support of his claims of being in actual possession and use of the suit land. Therefore, in the absence of proof in support of the plaintiff's claim, this court is unable to make a finding in his favor. Consequently, it is my finding that the plaintiff has failed to prove his claim on adverse possession to the required standard.

B. Whether the plaintiff is entitled to the reliefs sought.

23. Having held that the plaintiff has failed to sufficiently prove his case, it follows that he is not entitled to the reliefs sought in his Originating Summons dated 29/4/2021.

C. Whether the defendants have proved their claim to warrant the grant of the reliefs sought.

24. The defendants at paragraph 17 of their Replying Affidavit sought for the Declaration that the 2nd defendant is the registered owner of the suit property and an Order directing the plaintiff to vacate the suit property and give vacant possession thereof.
25. It was the 2nd defendant's contention that the suit land No. 737 was originally registered in the name of the late Sigismundis Sarara Mwita, who sold a portion of the said land measuring 0.023Ha to the 2nd defendant's father. However, both the Sigismundis Sarara and the 2nd defendant's father died before transfer of the suit land was effected.
26. Succession proceedings were instituted in respect of the estate of the late Sigismundis Sarara Mwita and upon the issuance of Dexh. 2, the suit land was subdivided and registered in the name of the 2nd defendant. He thus contends that he is the rightful registered owner of the suit land and he produced Dexh. 1 to that effect.
27. The plaintiff neither filed any Supplementary Affidavit in response to the allegations raised by the 2nd defendant nor participated in the hearing to challenge the said title deed (Dexh. 1) held by the 2nd defendant in respect to the suit land. There was no challenge and/or objection by the plaintiff of the process used in the issuance of the said title deed or the succession proceedings which led to the said



registration. Further, Dexh. 1 has not been challenged in accordance to the grounds outlined in section 26 (1) (a & b) of the *Land Registration Act*.

28. It is therefore my finding that the 2nd defendant's testimony and evidence remained unchallenged and uncontroverted. The 2nd defendant has sufficiently proved that he is the registered owner of the suit land and the title deed (Dexh. 1) which he holds is a prima facie evidence of the said ownership. He is therefore entitled to all the rights as a proprietor, privileges and appurtenances thereto pursuant to the provisions of section 25 of the *Land Registration Act* to the exclusion of everyone including the plaintiff.
29. Section 24(a) of the *Land Registration Act* provides that; -
- “the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”
30. The 2nd defendant also urged the court to direct the plaintiff to vacate the suit property and issue vacant possession thereof. The plaintiff has not provided any basis and/or justification for his continued occupation and use of the suit land at the expense of the 2nd defendant. There being no basis for the continued occupation thereof, I find that there is need for the plaintiff to vacate the suit land and give vacant possession thereof.
31. Consequently, I find and hold that the defendants have satisfactorily proved their claim to the required standard and they are entitled to the reliefs sought.

Costs of the Suit

32. Costs generally follow the event and in this case, having held that the defendants have proved their case, I find that they are entitled to costs of the suit.

Conclusion

33. In the upshot, I find that the plaintiff has failed to prove his claim on adverse possession to the required threshold and I accordingly dismiss the Originating Summons dated April 29, 2021 with costs to the 1st and 2nd defendants.
34. Further, it is my finding that the defendants have proved their claim against the plaintiff and I accordingly allow the same on the following terms;
- I. A Declaration be and is hereby made that the 2nd defendant is the registered owner of the suit property L.R. No. Bugembe/ Isebania/ 1537.
 - II. The plaintiff is hereby directed to vacate the suit property L.R. No. Bugembe/ Isebania/ 1537 within 90 days from the date of this Judgment in default of which eviction order do hereby issue. However, any eviction should strictly comply with the statutory provisions of section 152E of the *Land Act*.

It is so ordered!

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 10TH DAY OF MAY, 2023.

MOHAMMED N. KULLOW

JUDGE



In presence of; -

Nonappearance for the plaintiff

Ms. Wayua for the defendants

Court Assistant - Tom Maurice/ Victor

