



**Shavanji v Makomere & 2 others (Environment & Land Case  
103 of 2017) [2023] KEELC 17319 (KLR) (10 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17319 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 103 OF 2017**

**DO OHUNGO, J**

**MAY 10, 2023**

**BETWEEN**

**EDWARD SHAVANJI ..... PLAINTIFF**

**AND**

**MALAKI AKHAMWA MAKOMERE ..... 1<sup>ST</sup> DEFENDANT**

**GLADYS VERONICA CHITAI ..... 2<sup>ND</sup> DEFENDANT**

**EVERLINE BWOYA MALALA ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. By amended Originating Summons (OS) dated 1<sup>st</sup> October 2019, the plaintiff claimed to have acquired the parcels of land known as Marama/Shirotsa/2219 and Marama/Shirotsa/2220, being subdivisions of Marama/Shirotsa/268, by adverse possession. The OS is supported by an affidavit sworn by the plaintiff wherein he deposed that the first defendant was the registered owner of all that parcel of land known as Marama/Shirotsa/268 (suit property) and that the plaintiff has been peacefully living on the suit property with his family since August 1971 and has made developments therein. He further deposed that the first defendant who was aware of his peaceful possession never raised any concerns until 2014 when the first defendant transferred the suit property to himself with the intent of selling it. That subsequently, the plaintiff placed a restriction on the suit property which the first defendant sought to lift through Butere Miscellaneous Application No. 5 of 2015. He therefore prayed that he be granted the prayers sought.
2. The plaintiff filed a further affidavit which he swore on 29<sup>th</sup> November 2019 wherein he deposed that from 1976 to about 2015, the suit property was registered in the name of one Akhamwa Makomere and that later the suit property was registered in the first defendant's name. That as of 26<sup>th</sup> March 2019, land parcel numbers Marama/Shirotsa/2219 and Marama/Shirotsa/2220 were registered in the second and the third defendant's names respectively. He further deposed that he has been peacefully



residing on the suit property for over 40 years and has extensively developed it and cultivates therein for personal sustenance. That for the entire period, the first defendant was aware that the plaintiff was in the suit property.

3. At the hearing, the plaintiff testified as PW1 and adopted his aforesaid affidavits as his testimony. He further stated that he lodged a caution over the plots but withdrew it so that the parties could discuss the matter at home. That the second and the third defendants took possession of the plots and have been cultivating the whole of the area save the ground where the plaintiff's house is standing.
4. Fredrick Okwomi Angwe testified as PW2 and adopted his witness statement dated 22<sup>nd</sup> June 2020 as his evidence in chief. He stated that the plaintiff is his stepbrother and that he is the first defendant's nephew. That the initial registered owner of the suit property was the late Makomere Akhamwa who was the first defendant's father, that the plaintiff purchased the suit property from the late Makomere Akhamwa and had been in peaceful occupation from 1971 to 2015 when the first defendant started interfering with the plaintiff's peaceful occupation. He also stated that the defendants forcefully took over the suit property from the plaintiff.
5. The plaintiff's case was then closed.
6. During defence hearing, Malaki Akhamwe Makomere testified as DW1 and adopted his witness statement dated 18<sup>th</sup> March 2022 as his evidence. He stated that he inherited the suit property from his late father Joseph Makomere Akhamwa, and that the plaintiff trespassed into the suit property and built a house therein. That when he wanted to subdivide the suit property, he sued the plaintiff in Butere SRMC Misc. Civil Application No. 5 of 2015 and that the plaintiff agreed to remove a caution which the plaintiff had registered against the suit property. That upon the removal, he subdivided the suit property into land parcel numbers Marama/Shirotsa/2219 and Marama/Shirotsa/2220 and sold Marama/Shirotsa/2219 to the second defendant and Marama/Shirotsa/2220 to the third defendant. He further stated that the plaintiff was aware of the sale to the second defendant and even assisted the second defendant's surveyor to demarcate the land and further allowed the second defendant to cultivate. He went on to state that the plaintiff only resides in the house on Marama/Shirotsa/2219 but does not cultivate or occupy any portion of the land.
7. DW1 further testified that his grandfather and the plaintiff's father were brothers, and that the plaintiff has a house on the suit property which house was built a long time ago "when the late President Moi was still in power." He added that the plaintiff used to farm on the suit property and that the second and third defendants were the ones farming on it as at the date of his testimony. Further, that as at the date of his testimony, the plaintiff was in use of a small portion of the suit property while the second and third defendants were farming the larger portion.
8. Gladys Veronica Chitai testified as DW2. She adopted her witness statement dated 18<sup>th</sup> March 2022 and stated that she purchased land parcel number Marama/Shirotsa/2219 from the first defendant in the year 2015 and that at the time of the purchase, she asked the plaintiff why he was staying in the said parcel and the plaintiff told her that he was allowed to temporarily stay therein by the first defendant. She further stated that the plaintiff allowed her to fence the parcel and to cultivate around his house up to his doorstep with a promise that he would demolish the house and move to his adjacent parcel.
9. Defence case was then closed, and parties thereafter filed and exchanged written submissions. I have considered the pleadings, evidence, and submissions. The issues that emerge for determination are whether adverse possession has been established and whether the reliefs sought should issue.



10. The Court of Appeal restated the essentials of adverse possession 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.”

11. In a claim of adverse possession, the burden of proof lies with the plaintiff who must prove that he has had peaceful and uninterrupted possession for 12 years. To succeed, he must demonstrate that the occupation was without the proprietor’s permission and that he had an intention to dispossess the registered proprietor.
12. The plaintiff’s case is that he entered land parcel number Marama/Shirotsa/268 in 1971 and constructed a house on it. From the evidence on record, the registered proprietor of the said parcel from 1<sup>st</sup> March 1965 to 23<sup>rd</sup> December 1976 was Makomere Akhamwa while the first defendant herein became registered proprietor from 23<sup>rd</sup> December 1976 until the parcel was subdivided.
13. It is apparent that the plaintiff and the first defendant are closely related and are members of one extended family. PW2 testified that the plaintiff is his stepbrother, that he is the first defendant’s nephew and that the late Makomere Akhamwa was the first defendant’s father. PW2 also testified that the plaintiff purchased land parcel number Marama/Shirotsa/268 from Makomere Akhamwa. Although the plaintiff did not mention any purchase in his testimony, I note that the plaintiff testified that he lodged a caution over the suit property but withdrew it so that the parties could discuss the matter at home. I further note that the plaintiff produced a copy of a certificate of search in respect of Marama/Shirotsa/2219 as of 26<sup>th</sup> March 2019 which shows that the plaintiff registered a caution against the said parcel on 26<sup>th</sup> July 2018, claiming purchaser’s interest.
14. Going by the plaintiff’s curious silence on how he entered land parcel number Marama/Shirotsa/268 and considering PW2’s evidence, I take it that entry was through a sale transaction. 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. The plaintiff has not offered any evidence on what the purchase price was and how and when he paid it. In those circumstances, the plaintiff has not shown possession for the requisite minimum of 12 years.
15. Supposing that there was no sale transaction, in view of the close family relationship between the plaintiff and Makomere Akhamwa as well as the first defendant, the plaintiff would need to show clear evidence of an entry with an intention to dispossess the registered proprietor who was a close member of his extended family. The Court of Appeal stated in *Masambaga & 7 others v Malindi Holdings and Estate Limited* (Civil Appeal 165 of 2019) [2022] KECA 782 (KLR) (10 June 2022) (Judgment) as follows:

As explained in Elements of Land Law, 5<sup>th</sup> Edition by Kevin Gray and Susan Francis Gray at page 1179 “Possession is attributed to the squatter (and his possession is adverse) only if



he has both factual possession (factum possessionis) and the requisite intention to possess (animus possidendi). These elements of factum and animus interact significantly and must coincide continuously throughout the entirety of the required period of possession.

16. Mere construction of a house is not enough, more so in this case where besides the close family relationship with the first defendant and his predecessor in title, the plaintiff had his own plot which was adjacent to the suit property. I am not persuaded that the plaintiff has demonstrated an intention to possess.
17. This suit was filed on 27<sup>th</sup> March 2017. According to evidence on record, save for the spot where his house is standing, the plaintiff lost possession to the second and third defendants before the suit was filed. He admitted that the second and third defendants are farming around the whole land, save for the spot where his house stands. In the OS, the plaintiff is claiming the whole of Marama/Shirotsa/2219 and Marama/Shirotsa/2220 or what used to be Marama/Shirotsa/268. He has not offered a clear identification by way of demarcation and size, of the space where his house is standing.
18. In view of the foregoing, the plaintiff has not established adverse possession. That being the case, he is not entitled to the reliefs sought. Consequently, I dismiss the plaintiff's case. No order on costs.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 10TH DAY OF MAY 2023.**

**D. O. OHUNGO**

**JUDGE**

**Delivered in open court in the presence of:**

**Mr Otsyeno for the plaintiff**

**Ms Sitati holding brief for Mr Manyoni for the defendants**

**Court Assistant: E. Juma**

