



**Keya & another v Musa (Environment & Land Case 136 of 2014)
[2023] KEELC 19820 (KLR) (19 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19820 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 136 OF 2014
DO OHUNGO, J
SEPTEMBER 19, 2023**

BETWEEN

FRANCIS EYINDA KEYA 1ST PLAINTIFF

JOHN ORIENYO KEYA 2ND PLAINTIFF

AND

JUMA MANGALA MUSA DEFENDANT

JUDGMENT

1. The plaintiffs (applicants) moved the court through Originating Summons (OS) dated 2nd May 2014 wherein they averred that they had acquired title to 8 acres of the parcel of land known as Marama/Shinamwenyuli/899 (the suit property) by adverse possession. They therefore sought the following reliefs:
 - a. A declaration that the applicants right over a portion of land title No. Marama/Shinamwenyuli/899 measuring 8 acres in area got extinguished by operation of law/adverse possession upon expiry of 12 years when the applicants were in possession thereof.
 - b. A declaration that upon expiry of 12 years from the date of the said registration, a portion measuring 8 acres out of Land Parcel No. Marama/Shinamwenyuli/899 was held and is currently held in trust for the applicants.
 - c. An order that 8 acres out of Land Parcel No. Marama/Shinamwenyuli/899 vests in the applicants and they are entitled thereof under section 38 of the [Limitation of Actions Act](#) Cap 22 Laws.
 - d. A declaration that the registration of Respondent as the owner of Land Parcel No. Marama/Shinamwenyuli/899 is unlawful.



- e. An order directing the District Survey Kakamega County to amend registration maps for Shinamwenyuli Registration Section Diagrams 6 and 9 12 and 13th Editions for the 8 acres of land to be included under Land Parcel No Marama/Shinamwenyuli/817 and NOT 899.
 - f. An order directing the Land Registrar Kakamega County to amend the registers in respect of Land Parcel Nos. Marama/Shinamwenyuli/899 and 817 for the 8 acres of land to be included on Land Parcel No. Marama/Shinamwenyuli/817.
 - g. An order that the Respondent do sign all relevant documents to facilitate subdivision and transfer of 8 acres out of Land Parcel No. Marama/Shinamwenyuli/899 to the applicants and that in default the Deputy Registrar of this Honourable Court to sign the same.
 - h. An order that the Respondent be condemned to pay costs of this suit.
 - i. Such other orders or reliefs as this Honourable Court may deem just and reasonable to grant.
2. The OS is supported by an affidavit sworn by Francis Eyinda Keya. He deposed that the defendant is the registered proprietor of the suit property and that during land adjudication, 8 acres of land parcel number Marama/Shinamwenyuli/817 were erroneously included in the suit property. That the plaintiffs have been in peaceful and exclusive possession of the 8 acres from 1963 to the date of filing the OS. That they grow maize, sugarcane, cassava, arrow roots, bananas, and potatoes on the 8 acres.
 3. The defendant opposed the OS through a replying affidavit in which he deposed that he is the registered proprietor of the suit property which measures 28 acres. That he was registered as proprietor on 21st September 1964 and that the first plaintiff was born in 1960 hence it is impossible that he would have been in occupation of the 8 acres from 1963 as he claims. That he left the plaintiffs' father was the initial registered proprietor of parcel number Marama/Shinamwenyuli/817 to tend cane crop on the suit property for 6 years while he (the defendant) was away in Mombasa for almost 6 years and that upon the demise of the plaintiffs' father, the plaintiffs encroached on the suit property. That the plaintiffs apologised at a meeting held on 7th July 2013. He further deposed that the second plaintiff built a house on the suit property in 1994 and that he (the defendant) immediately reported the encroachment to the area chief whereupon the plaintiffs were summoned, and they conceded that they did not know where their boundary reached. That despite promising to vacate, the plaintiffs did not vacate as a result of which the defendant filed Kakamega ELC No. 378 of 2013 seeking their eviction.
 4. Hearing of the OS proceeded by way of oral evidence. Prior to commencement of the hearing, the parties recorded a consent that the Land Registrar and the Land Surveyor visit the parcels known as Marama/Shinamwenyuli/899 and Marama/Shinamwenyuli/817 to establish the boundaries and acreage and to thereafter file a report in court.
 5. Francis Eyinda Keya testified as PW1. He adopted his above-mentioned supporting affidavit and added that the Land Registrar and the Land Surveyor visit the parcels and filed a report dated 29th January 2019. He further stated that he was born in 1958 and that the first registration of the parcels was in 1964 when his father was residing on Marama/Shinamwenyuli/817 which neighbours Marama/Shinamwenyuli/899. That when the plaintiffs' father told the plaintiffs to construct houses on Marama/Shinamwenyuli/899, the defendant reported the matter to the area chief and later sought to evict the plaintiffs in the year 2013. He added that he has two houses: one on Marama/Shinamwenyuli/817 and another on Marama/Shinamwenyuli/899.
 6. John Orienyo Keya testified as PW2 while Josephine Chemutai who is a Land Surveyor working at the District Survey office Kakamega testified as PW3. PW3 stated that she visited the site on 28th November 2018 and prepared the report dated 29th January 2019. That since the land registrar was not present, she



dealt only with the sizes and established that the 8-acre area claimed by the plaintiffs is part of Marama/Shinamwenyuli/899.

7. The plaintiffs' case was then closed.
8. The defendant Juma Mangala Musa testified as the sole defence witness. He adopted his above-mentioned replying affidavit. That out of the 28 acres comprised in Marama/Shinamwenyuli/899, he has been in occupation of only 20 acres while the plaintiffs have been in occupation of 8 acres since 1994 when they constructed on the said portion. The defence case was then closed.
9. Parties filed and exchanged written submissions. I have duly noted the submissions. The issues that arise for determination are whether adverse possession has been established and whether the reliefs sought should issue.
10. The essentials of proving adverse possession were discussed by the Court of Appeal in [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.
11. The plaintiffs contend that they have been in possession of the disputed 8 acres from their childhood with the defendant's knowledge and that they have established their homes on it. They further contend that the defendant has acknowledged that they have been in possession since 1994 and that they have therefore established adverse possession.
12. Whereas it is true that the defendant has acknowledged that the plaintiffs have had exclusive possession of the 8 acres since 1994, it is trite that a party claiming title through adverse possession must not only establish exclusive possession for the requisite 12 years, he must also demonstrate an intention to dispossess the registered proprietor. The parties herein own adjacent parcels.
13. The 8-acre area that the plaintiffs claim abuts the plaintiffs' own Marama/Shinamwenyuli/817. Going by prayers (e) and (f) of the OS and the statement by the plaintiffs in the in affidavit in support of



the OS to the effect that 8 acres of land parcel number Marama/Shinamwenyuli/817 were erroneously included in the suit property during land adjudication, I am persuaded that the dispute between the parties is really a boundary dispute carried over from the adjudication process as opposed to a genuine adverse possession claim. Given that adjudication background coupled with the fact that the parties are neighbours, the plaintiffs needed to show unmistakable evidence of an entry with an intention to dispossess the registered proprietor. The Court of Appeal emphasised the importance of establishing intention to possess in *Masambaga & 7 others v Malindi Holdings and Estate Limited* (Civil Appeal 165 of 2019) [2022] KECA 782 (KLR) (10 June 2022) (Judgment) where it stated as follows:

"As explained in *Elements of Land Law*, 5th 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."

14. I also note that the defendant testified that he filed Kakamega ELC No. 378 of 2013 seeking the plaintiffs' eviction. PW1 confirmed this when he stated that the defendant sought to evict them in the year 2013. PW1 further testified that when the plaintiffs constructed houses on Marama/Shinamwenyuli/899, the defendant reported the matter to the area chief. This OS was filed on 5th May 2014, just about a year after the defendant had sought to evict the plaintiffs.
15. In view of the foregoing, the plaintiffs have failed to establish adverse possession. That being so, the reliefs sought cannot issue. In the circumstances, I dismiss the plaintiffs' case with costs to the defendant.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 19TH DAY OF SEPTEMBER 2023.

D. O. OHUNGO

JUDGE

