



**Lusigi v Miliza (Environment and Land Appeal E003 of 2022)  
[2023] KEELC 19826 (KLR) (19 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19826 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL E003 OF 2022  
DO OHUNGO, J  
SEPTEMBER 19, 2023**

**BETWEEN**

**HENRY KASONI LUSIGI ..... APPELLANT**

**AND**

**WYCLIFFE LIMONYO MILIZA ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the Chief  
Magistrate's Court at Kakamega (Hon. B. Ochieng, Chief Magistrate)  
delivered on 5th May 2021 in Kakamega MCELC No. 159 of 2019)*

**JUDGMENT**

1. The background of this appeal is that through plaint dated October 23, 2019, the respondent as a holder of letters of administration *ad litem* in respect of the estate of Sagwa Mayaya (deceased), filed Kakamega MCELC No 159 of 2019 against the appellant. He averred that the deceased was the registered proprietor of the parcel of land known as Kakamega/Kedoli/285 (suit property), that the respondent had trespassed onto the suit property and that the respondent had caused the registration of a restriction against the suit property. He therefore prayed for judgment against the appellant for removal of the restriction, eviction of the appellant together with his servants and agents and a permanent injunction restraining the appellant together with his servants and agents from entering, occupying, constructing upon or in any manner interfering with the suit property.
2. The appellant filed a defence and counterclaim in which he admitted that the deceased was the registered proprietor of the suit property. He further averred that the deceased sold a portion of the suit property measuring  $\frac{1}{4}$  of an acre to one Hudson Esendi Kivunaga who in turn sold the  $\frac{1}{4}$  acre portion to him. He went on to state that he had been in uninterrupted occupation of the portion for 25 years. He prayed that the respondent's case be dismissed and that the subordinate court declares that he had acquired title by adverse possession. He also sought a permanent injunction to restrain the respondent his servants and agents from occupying or interfering with the portion, an order that



nullifying the respondent's title and ordering creation of a title for the ¼ acre portion in his name. Lastly, he prayed for a mandatory injunction compelling the respondent to refund the purchase price and to compensate him for the work done in the ¼ acre portion.

3. Upon hearing the matter, the Subordinate Court (Hon B Ochieng, Chief Magistrate) delivered judgment on May 5, 2021 dismissing the counterclaim and entering judgment in favour of the respondent as follows:

1. That the restriction registered against the suit parcel on March 30, 2017 be and is hereby lifted and an eviction order to issue against the defendant, his servants, agents, employees and/or proxies and/or any other parties from the suit property.
2. A permanent injunction do issue restraining the defendant and/or any other third parties by themselves or their servants. Agents from entering upon, occupying, constructing and or in any other manner whatsoever from dealing with and or continuing in occupation of the suit land parcel.
3. Special damages of Kshs 5500 = to the plaintiff.
4. Costs of this suit and interest to the plaintiff.

4. The appellant was dissatisfied with the judgment. Since the statutory period within which to appeal had lapsed, he filed Kakamega ELC Misc Application No E020 of 2021 wherein on January 25, 2022, this court granted him leave to appeal out of time. He then filed this appeal on February 10, 2022, through Memorandum of Appeal dated February 8, 2022. He prayed that the appeal be allowed, and that the judgment of the Subordinate Court be set aside and be replaced with a proper finding by this court.

5. The following grounds of appeal are listed on the face of the Memorandum of Appeal:

1. That the Learned trial Magistrate erred in law and in fact in failing to find that the prescriptive period of 12 years had lapsed as the contract between Hudson Kivunaga Esendi and the beneficiaries of the Estate of Sagwa Mayaya (Deceased) was done in 1986, and the suit instituted in 2019; 33 years after Hudson Kivunanga had occupied the suit land.
2. That the learned trial magistrate erred in law and in fact in finding that the purchase of land by Hudson Kivunaga Esendi amounted to intermeddling yet he bought the land from the respondent's father who had the right to dispose the land.
3. That the Learned trial Magistrate erred in law and in fact in ignoring the evidence of the Defendant and his witness one Hudson Kivunaga Esendi, as to the validity of contract with the estate beneficiaries which act was confirmed by the above witnesses thereby confirming the doctrine of continuous and peaceful occupation on the suit land accordingly.
4. The Learned trial Magistrate erred in law and in fact for not considering the period the agreement was made by the family of the Respondent, when Hudson Kivunaga Esendi has been in open, continuous, exclusive and adverse possession and has developed the suit premises, putting up on it permanent



structures; and that, as a result, the appellant was forever barred by operation of section 38 of the *Limitation of Actions Act* from recovering it.

6. The appeal was canvassed through written submissions. The appellant argued that Hudson Esendi Kivunaga who he purchased from had been in occupation of the suit property from the year 1986 until 2019, a total of 33 years prior to the filing of the suit. Relying on the decisions of the Court of Appeal in *Samuel Kihamba v Mary Mbaisi* [2015] eKLR and *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR, he argued that he is entitled to the suit property having acquired it from Hudson Esendi Kivunaga who had been in open, notorious, and continuous use of it from the year 1986. He further argued that there was no intermeddling with the deceased's estate since when Hudson Esendi Kivunaga purchased the suit property from the deceased in the year 1986, the deceased was alive and had the right to sell it. The appellant therefore urged this court to find that the appeal has merit and to allow it with costs.
7. In reply, the respondent argued that the appellant failed to establish adverse possession since the respondent had issued to the appellant a demand notice dated September 27, 2019 demanding that he gives vacant possession and since the appellant's testimony was that he purchased the suit property in the year 2015 and began developing it that year. That from the year 2015 to the year 2019 when the suit was filed, no more than 4 years lapsed. That the appellant's contention in his submissions that Hudson Esendi Kivunaga had occupied the suit property since 1986 was misguided since the respondent's cause of action before the Subordinate Court was against the appellant and not the said Hudson Esendi Kivunaga. That in any event, no sale agreement was produced to prove the alleged purchase.
8. The respondent further relied on Section 3 (3) of the *Law of Contract Act* and argued that in absence of a sale agreement the subordinate court properly found that the appellant's claims over the suit property were unfounded. In that regard, reliance was placed on the case of *Jonah Kabugo v Martin Mbaya & others* [2018] eKLR. On the issue of whether there was intermeddling, the respondent argued that in the absence of a sale agreement and a transfer in favour of the appellant, the appellant's activities on the suit property amounted to intermeddling. He cited the case of *In Re the Matter of The Estate of David Julius Nturibi M'itbinji (Deceased)* [2012] eKLR and concluded by urging the court to dismiss the appeal with costs for want of merit.
9. This being a first appeal, this court's mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect. See *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR.
10. I have considered grounds of appeal, the parties' submissions, and the entire record. The grounds of appeal can be collapsed into two: that the learned magistrate erred in not finding that adverse possession was established and that the learned magistrate erred in finding that there was intermeddling. Based on the parties' respective cases as pleaded before the subordinate court, the question of intermeddling is peripheral one that does go to the resolution of the dispute. Thus, the sole issue that arises for determination in this appeal is whether adverse possession was established.
11. The prerequisites of establishing 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 Sabebe 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."

12. The appellant's claim to the ¼ acre portion of the suit property is grounded on his contention that he purchased it from Hudson Esendi Kivunaga who had earlier on purchased it from the deceased. The rule, however, is that entry, and occupation pursuant to a sale agreement is by permission of the proprietor and does not therefore amount to adverse possession. Time however starts to run in favour of a purchaser from the moment of completion of payment of the purchase price. See *Public Trustee v Wanduru Ndegwa* [1984] eKLR.

13. Thus, a litigant who intends to ground his claim for adverse possession on a sale transaction must seriously consider his options. If he does not have clear evidence of faithful discharge of a purchaser's cardinal obligation – full payment of the purchase price before he starts reckoning the magical 12 years of open, peaceful, and uninterrupted possession, he is better off pursuing an ordinary claim for enforcing the contract of sale. As the Court of Appeal emphasised in *Samuel Kihamba v Mary Mbaisi* [2015] eKLR, occupation of land by consent or license does not accrue any right of adverse possession.

14. The appellant does not dispute that Sagwa Mayaya (deceased) was the registered proprietor of the suit property as of the date of trial. A copy of the title and a certified copy of the register were produced and confirm as much. Hudson Esendi Kivunaga, who was the appellant's witness, stated in his witness statement that the deceased passed away in 1985 and that he purchased the portion of the suit property the deceased's family on August 27, 1986. He did not produce any sale agreement and did not specify any purchase price. He did not also offer any evidence as to payment in full of any purchase price. It emerged from the witness statement and the testimonies on record that the deceased's family was yet obtain letters of administration as of the date of the alleged sale. It immediately becomes questionable whether there was any valid sale of an asset belonging to the deceased's estate.

15. A perusal of the record does not show any evidence that Hudson Esendi Kivunaga was in continuous possession of the portion from August 27, 1986 to December 11, 2015 when the appellant claims to have purchased it from him. I also note that Hudson Esendi Kivunaga stated in his witness statement that he constructed a house on the portion in 2009 and that he rented the house to the appellant at a monthly rent of Kshs 2,500. As the Court of Appeal stated in *Samuel Kihamba v Mary Mbaisi*



(*supra*) adverse possession does not apply where possession is by consent and consent may be through a tenancy agreement.

16. The appellant failed to prove that he had been in exclusive possession of the portion of the suit property openly, as of right and without interruption for a period of 12 years by the time the suit before the subordinate court was filed. In short, he did not establish adverse possession.
17. In view of the foregoing, I find no merit in this appeal, and I therefore dismiss it with costs to the respondent.

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

**D. O. OHUNGO**

**JUDGE**

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

No appearance for the appellant

Mr Mulama for the respondent

Court Assistant: E. Juma

