



Nanzushi (Suing on her own and in her capacity as the administratrix of the Estate of Joseph Nanzushi Keya – Deceased) v Mudogo & 3 others (Environment & Land Case 62 of 2018) [2023] KEELC 19811 (KLR) (18 September 2023) (Judgment)

Neutral citation: [2023] KEELC 19811 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 62 OF 2018
DO OHUNGO, J
SEPTEMBER 18, 2023

BETWEEN

FLORENCE AYAKO NANZUSHI (SUING ON HER OWN AND IN HER CAPACITY AS THE ADMINISTRATRIX OF THE ESTATE OF JOSEPH NANZUSHI KEYA – DECEASED) PLAINTIFF

AND

ELPHAS JUMA MUDOGO 1ST DEFENDANT

HENRY CHIMASIA 2ND DEFENDANT

JULIUS MUSUNGU 3RD DEFENDANT

JOSECK MUKHWANA (DECEASED) SUBSTITUTED BY ENOCK JUMA MUKHWANA 4TH DEFENDANT

JUDGMENT

1. Litigation in this matter commenced through Originating Summons dated March 16, 2017, which was later replaced by Amended Originating Summons dated October 19, 2022. Initially filed in this court, the matter was transferred to the Subordinate Court and later back to this court. The plaintiff averred in the Amended Originating Summons that she had acquired title to 14 acres of the parcel of land known as Butso/Esameya/112 (the suit property) by adverse possession.
2. Both the initial Originating Summons and Amended Originating Summons were supported by affidavits sworn by the plaintiff. The defendants opposed it through a joint replying affidavit wherein they deposed that the plaintiff and her deceased husband were farming the suit property as caretakers pursuant to a gentleman's agreement. They counterclaimed for orders stopping the plaintiff from farming the suit property and a permanent injunction barring the plaintiff from entering the suit property.



3. Hearing of the matter proceeded by way of oral evidence.
4. The plaintiff testified as PW1 and adopted her witness statement in which she stated that she is the widow of Joseph Nanzushi Keya (Deceased) and the administratrix of his estate. That prior to the deceased's death, the deceased and her jointly purchased 14 acres of the suit property in 1973 from Philip Mutoko Mukhwana alias Mudogo Mufuana who is since deceased and who was the father of the defendants herein. That after purchasing the 14 acres at a consideration of KShs 6,000, the late Philip Mutoko Mukhwana handed vacant possession thereof to her late husband, her, and their children and that the boundaries of the 14 acres were clearly delineated. That they constructed their matrimonial home on the land, planted trees and cultivated it. She added that upon his demise in 2001, her husband was not buried on the suit property and that she does not reside on the suit property. That her husband was not a caretaker of the suit property but a purchaser thereof and that the defendants have not used the suit property since 1973.
5. The plaintiff further stated that the late Philip Mutoko Mukhwana sold the remaining 5 acres of the suit property to Gabriel Andati and relocated to Bungoma. That after the death of Philip Mutoko Mukhwana, the first defendant secretly carried out succession in respect of his estate through Bungoma High Court Succession Cause number 262 of 2010 then fraudulently transferred the suit property jointly to himself and the rest of the defendants.
6. Other witnesses who testified in support of the plaintiff's case were Wycliff Asala Sakayo (PW2) and Zablun Omurunga Wangwe (PW3) who both supported the plaintiff's claims of purchase and development of 14 acres of the suit property. The plaintiff's case was then closed.
7. During defence hearing, the first Elphas Juma Mudogo testified as DW1. He stated that the defendants are the registered proprietors of the suit property and the sons of the late Mudogo Mufuana. He denied that their father ever sold any portion of the suit property to the plaintiff and her late husband and added that the plaintiff and her late husband were farming the suit property as caretakers pursuant to a gentleman's agreement made in 1972. He added that his father moved his entire family to Bungoma in 1972 because, while living on the suit property, his children were dying every year. That the plaintiff and her family are still in occupation and use of the suit property.
8. Other defence witnesses were Henry Chimasi Mutoko (DW2), Julius Musungu Mdogo (DW3) and Enock Juma Mukhwana (DW4) whose testimonies were essentially like that of DW1. Defence case was then closed, after which parties filed and exchanged written submissions.
9. The plaintiff argued that she acquired title to the 14 acres of the suit property in 1985 upon expiry of 12 years from 1973 and that the defendants hold the suit property in trust for the plaintiff since their title has been extinguished by operation of law. Relying on the cases of Nairobi CACA No 213 of 1996 *Benjamin Kamau Murima & 3 Others vs Gladys Njeri* (Unreported) and *Gitbu vs Ndeete* CACA No 24 of 1979 (Unreported), she urged the court to allow her claim as prayed.
10. In response, the defendants argued that the sale agreement that the plaintiff relied on does not mention the plaintiff as a buyer and that the plaintiff has not established peaceful and uninterrupted occupation. That, consequently, the plaintiff's claim should fail, and the counterclaim be allowed.
11. 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.
12. The plaintiff's case is that the defendants are the registered proprietors of the suit property. I will start by determining whether adverse possession has been established. If the plaintiff succeeds on



that account, there would be no basis upon which to grant the orders sought in the counterclaim. Conversely, if the plaintiff fails to establish adverse possession, I will then determine whether the counterclaim should be allowed.

13. The law relating to adverse possession was 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 *SM 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.

14. The plaintiff's case is that together with her late husband, she jointly purchased 14 acres of the suit property in 1973 from Philip Mutoko Mukhwana alias Mudogo Mufuana at a consideration of KShs 6,000 and took possession pursuant to that transaction.

15. Entry and possession in furtherance of a sale agreement is deemed to be by permission of the proprietor and does not therefore amount to adverse possession. That said, possession and occupation by a purchaser who has completed paying the purchase price is by right and 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. Thus, time for purposes of adverse possession does not start to run in favour of a purchaser until she demonstrates full payment of the purchase price. Beyond asserting that the purchase price was KShs 6,000, the plaintiff herein has not proven full payment of the purchase price.

16. While pursuing a claim for adverse possession, the plaintiff herein seemed to also attack the defendants' title. Among others, she asserted that the first defendant secretly carried out succession then fraudulently transferred the suit property jointly to himself and the rest of the defendants in total disregard of the alleged purchase. A claimant asserting adverse possession cannot in the same breath maintain that the registered proprietor's title is defective. I think the plaintiff ought to have decided which way to go, either enforcing the sale transaction or claiming as an adverse possessor. She cannot enforce a sale transaction through adverse possession. I find that the plaintiff has failed to establish adverse possession.



17. As noted earlier, the plaintiff's case is that the defendants are the registered proprietors of the suit property. Indeed, the plaintiff produced a certified copy of the register in respect of the suit property which confirms as much. Further, the defendants produced a copy of a certificate of official search as on July 5, 2016 which confirms their proprietorship.
18. As registered proprietors of land, the defendants are entitled to the rights, privileges, and benefits under Section 24 of the [Land Registration Act](#). Further, Section 26 of the Act obligates the court to accept their certificate of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established. Beyond her allegations of fraud, the plaintiff did not seek nullification of the defendants' title.
19. I am persuaded that the defendants have established their counterclaim. On the other hand, the plaintiff has failed to establish her case. In the result, I make the following orders:
 - a. The plaintiff's case is dismissed.
 - b. A permanent injunction is hereby issued restraining the plaintiff, her agents, servants, and representatives from entering or farming the parcel of land known as Butso/Esameyia/112.
 - c. The defendants shall have costs of the suit.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 18TH DAY OF SEPTEMBER 2023.

D. O. OHUNGO

JUDGE

