



**Obulemere v Mariko (Environment & Land Case 255 of 2014)
[2023] KEELC 20382 (KLR) (3 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20382 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 255 OF 2014
DO OHUNGO, J
OCTOBER 3, 2023**

BETWEEN

HARRISON MUTENDE OBULEMERE PLAINTIFF

AND

PAUL OMUMANANI MARIKO DEFENDANT

JUDGMENT

1. Proceedings in this matter commenced on March 27, 2007 when the plaintiff filed Originating Summons (OS) dated March 21, 2007 as Kakamega HCCC No 17 of 2007 (OS). The matter was later transferred to this court, hence its current case number.
2. The plaintiff averred in the OS that he was entitled, by adverse possession, to 3 acres out of the parcel of land known as Marama/Lunza/773 (suit property). He sought orders that the defendant subdivides the suit property and transfers 3 acres of it to him, that he be registered as the owner of the 3 acres and that the defendant be ordered to pay costs of this suit.
3. The Originating Summons was supported by an affidavit sworn by the plaintiff who deposed that the respondent is the registered proprietor of the suit property and that he was the administrator of the estate of Aggrey Obulemire Okwomi also known as Aholi son of Okwomi (deceased) who was the registered proprietor of land parcel number Marama/Lunza/762 which is adjacent to the suit property. He further deposed that during registration of the suit property, its acreage was erroneously increased by 3 acres on paper at the expense of parcel number Marama/Lunza/762 and that despite the said error, their occupation of the said 3 acres had been continuous, undisturbed, and adverse. He further deposed that his father's homestead stood on the suit property and that they had extensively developed the suit property by planting indigenous trees thereon.
4. The defendant opposed the OS through a replying affidavit filed on May 27, 2007 wherein he deposed that he was the administrator of the estate of Mariko Anekeya (deceased) which comprised the suit



property. That the plaintiff's late father never made any claim for land against the defendant's father and that the defendant's father never knew that the plaintiff's father was occupying the 3 acres. That he became the administrator of his father's estate in 1999 and that he too he never knew of the plaintiff's occupation of the 3 acres but only recalls that sometime in 2003, the plaintiff revealed that he was occupying the suit property and the defendant immediately sought determination of the boundary dispute. He concluded by deposing that the plaintiff's occupation of the suit property was not within his knowledge and therefore not adverse. He therefore prayed for the plaintiff's eviction from the suit property and sought for an order that the boundary dispute between the aforesaid parcels be determined by the district land registrar Kakamega.

5. The OS was heard by way of viva voce evidence. Prior to commencement of the hearing, the parties recorded a consent on March 3, 2021 to the effect that the Land Registrar Kakamega and the District Surveyor Kakamega visit the suit property and land parcel number Marama/Lunza/762 to establish and fix boundaries and thereafter file a report in court. The two officers complied and filed a report by the County Surveyor dated September 7, 2021 and another by the Land Registrar dated December 7, 2021.
6. At the hearing, the plaintiff testified and adopted his above supporting affidavit, his witness statement filed on October 27, 2020, and further witness statement filed on February 24, 2022 as his evidence. He stated that his late father bought parcel number Marama/Lunza/762 from one Richard Weche and that sometime in 1968, his father purchased a further piece of land measuring 5 acres which land bordered parcel number Marama/Lunza/762 from the said Richard Weche but the vendor passed away before he could transfer the said portion. That the portion that his father purchased is located between Marama/Lunza/762 and the suit property. That after the purchase, Richard Weche and his family went to live in Uganda but were deported back to Kenya in 1973, upon which they settled in Bungoma.
7. The plaintiff further stated that sometime in 1991, the defendant's father passed away and that following his demise, the defendant commenced succession proceedings and, in the process, discovered that there was unsurveyed land. That the unsurveyed land was the land that the plaintiff's father purchased from Richard Weche and that after the discovery, the plaintiff's family was ambushed by summons for survey which they tried to stop through a court order. That after they went to court, the defendant became uncooperative and started claiming that he was the owner of the unsurveyed land. He added that his family engaged a surveyor who went to the ground and established that the unsurveyed land was measuring 5 acres but later the parties herein realized that the map had a different measurement in that it indicated that Marama/Lunza/773 was measuring 10 acres instead of 5 acres. He also stated that the dispute started when the map revealed that Marama/Lunza/773 was measuring 10 acres and added that the District Surveyor and the Land Registrar visited Marama/Lunza/762 and Marama/Lunza/773 to establish and fix the boundaries and filed their reports in court. He urged the court to adopt the said reports and that the parties be directed to keep and maintain their boundaries without encroaching on each other's parcel.
8. The plaintiff's case was then closed.
9. The defendant testified as DW1 and adopted his witness statement dated February 18, 2016 as his evidence. He stated that the boundary dispute between parcel number 762 and 773 started sometime in 2003 when the plaintiff claimed that he was occupying the suit property. He added that he tried severally to have the boundary dispute resolved but the plaintiff frustrated the efforts by suing him and obtaining an injunction against him in Kakamega CMCC No 102 of 2006. That the plaintiff cannot claim to have been in adverse possession, yet the defendant had no knowledge that the plaintiff was unlawfully using the suit property and that the plaintiff having admitted the necessity of determination of the disputed boundary, the boundary should be determined so that each party keeps what belongs



- to him. He further testified that the suit property measures 4.0 hectares and that he does not agree that its size is as is stated in the sketch map annexed to the report by the County Surveyor or that there is a permanent boundary between the two plots as is claimed in the report by the Land Registrar.
10. James Okwako Ngongo testified as DW2 and adopted his witness statement filed on February 23, 2016 as his evidence. He stated that the plaintiff is his nephew while the defendant is his grandson and that he chaired a meeting between the family of Aggrey Obulemire and Mariko Anekaya on October 2, 2010 over a boundary dispute in respect of the suit property and Marama/Lunza/762 and that both the plaintiff and the defendant were in attendance and that they agreed to resurvey the disputed boundary.
 11. David Masila Kimauro, a Deputy County Land Registrar Kakamega County, testified as DW3. He testified that he is also a land surveyor by profession and that after receiving the court order made on March 3, 2021, he visited the parcels on August 18, 2021 in the company of Josephine Chemutai who is a government surveyor and prepared a report dated December 7, 2021. That he their finding was that the map and the ground do not tally and that there was no boundary dispute but a land claim which could only be determined by the court. That he recommended in his report that the permanent boundary between the two parcels marked by a road which is supported by ground history ought to remain as it is.
 12. The defence case was then closed. Parties were ordered to file and exchange written submissions.
 13. The plaintiff relied on *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR and submitted that he had established adverse possession. He therefore urged the court to allow the OS and to dismiss the counterclaim at paragraph 11 of the replying affidavit.
 14. The defendant argued that the plaintiff lacks the locus standi to bring this suit since he did not produce any letters of administration and that adverse possession had not been established since the plaintiff's entry into the suit property was without his knowledge. He therefore urged the court to dismiss the suit with costs.
 15. I have carefully 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 by the parties should issue.
 16. Despite all the claims about boundary dispute, the plaintiff's suit as pleaded is one of adverse possession and no more. The law on adverse possession is settled. As the Court of Appeal stated in *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR, the party claiming adverse possession must assert hostile title in denial of the title of the registered proprietor. The process must start with a wrongful dispossession of the rightful owner and the proper way of assessing proof of adverse possession is whether the title holder has been dispossessed or has discontinued his possession for the statutory period of 12 years, as opposed to whether the claimant has proved that he or she has been in possession for 12 years. The plaintiff who claims adverse possession must demonstrate the date he came into possession, the nature of his possession, whether the fact of his possession was known to the registered proprietor and that the possession was open and undisturbed for the requisite 12 years.
 17. From the evidence on record, it is manifest that the suit property and land parcel number Marama/Lunza/762 are adjacent to each other. In other words, the parties are neighbours. In such circumstances, the plaintiff must show unmistakable evidence of an entry with an intention to dispossess the registered proprietor who is his neighbour. 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, 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.

18. The plaintiff’s case is that the 3 acres that he claims are part of land measuring 5 acres which his father purchased from Richard Weche in 1968. That during registration of the suit property, its acreage was erroneously increased by 3 acres on paper at the expense of parcel number Marama/Lunza/762 and that despite the error, his family have occupied the 3 acres continuously and undisturbed. The plaintiff did not offer unmistakable evidence on the date of his family’s entry into the portion that he claims. Although he relied on some sale agreements, I note that the agreements are neither in English nor Kiswahili and that no translation was availed. They are of no help to the court.
19. It however emerged from the plaintiff’s testimony that all along, the plaintiff’s family did not know that they were occupying the 3 acres until the defendant attempted to survey the boundary area between the suit property and Marama/Lunza/762 after the defendant’s father passed away in 1991. Clearly, a dispute ensued with the result that the plaintiff’s family received boundary dispute summons dated February 15, 2006 from the District Land Registrar. Unamused by the summons, the plaintiff filed Kakamega CMCC No 102 of 2006 under Certificate of Urgency on February 24, 2006, seeking an injunction to restrain the District Land Registrar and the District Surveyor from proceeding with the survey. Following the filing of the case, the plaintiff had the land surveyed and that is when the parties realized that ground measurements of the suit property were at variance with those on the map. The variance was confirmed by the District Surveyor and the District Land Registrar through their reports dated September 7, 2021 and December 7, 2021, respectively.
20. From the above chronology, it is safe to conclude that prior to the year 2006, the plaintiff did not think that the 3 acres was part of the suit property. All along, the plaintiff assumed that he and his family were squarely within their land, Marama/Lunza/762. Prior 2006, the plaintiff had no intention to dispossess the defendant of any portion of the suit property. Equally, it cannot be said that the defendant had discontinued his possession in favour of the plaintiff since the defendant did not think that the plaintiff was on his land. This suit was filed on March 27, 2007, hardly a year after the parties made the discovery. The requisite twelve years of continuous possession had not been reached as of the date of filing.
21. Even if I were to be wrong in using the year 2006 as the date from which to count the years, it is most likely that the parties had a dispute on the boundary soon after the defendant’s father passed away in 1991. Existence of a dispute over the 3 acres automatically excludes adverse possession.
22. In view of the foregoing, I find that the plaintiff has not established adverse possession and is therefore not entitled to the relief which he sought.
23. The defendant included a counterclaim at paragraphs 10 to 13 of his replying affidavit wherein he prayed for the plaintiff’s eviction from the 3 acres of the suit property and an order that the boundary dispute between the aforesaid parcels be determined by the District Land Registrar Kakamega.
24. There is no dispute that the defendant is the registered proprietor of the suit property. In fact, the plaintiff has built his claim for adverse possession on that foundation. In his capacity as a registered proprietor of land, the defendant is entitled to the rights, privileges, and benefits under Section 24 of the *Land Registration Act* and Section 26 of the Act which obligates the court to accept his certificate



of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established. Those rights, privileges, and benefits must however be confined within the proper boundary of the suit property.

25. What the parties have referred to as a boundary dispute is not a boundary dispute but a claim for land, as indeed both the District Surveyor and the District Land Registrar have stated through their reports dated September 7, 2021 and December 7, 2021. The two officers agree that there exists a permanent boundary between the two plots which has existed from the time of adjudication in the 1960s. It seems to me that the 3 acres that the plaintiff claim are part of Marama/Lunza/762, in terms of the boundary established by the District Land Registrar in his report. Predictably, the defendant rejected the reports, even after filing the application that led to the order pursuant to which they were prepared. The parties need to observe that boundary which exists on the ground, as ascertained. There is no need to order any fixing of the boundary. The plaintiff and his family should remain where they are, as confirmed in the two reports.
26. It follows therefore that the orders of eviction of the plaintiff from the 3 acres and fixing of the boundary cannot issue, as sought by the defendant. Overall, I find that the counterclaim is not merited.
27. In the result, I make the following orders:
 - a. The plaintiff's suit is dismissed.
 - b. The defendant's counterclaim is dismissed.
 - c. The plaintiff and his family should remain in occupation of the area where they currently occupy, as confirmed in the report by the Land Registrar dated December 7, 2021 and in the report by the County Surveyor dated September 7, 2021.
 - d. Considering the outcome, I make no order as to costs.

Dated, signed, and delivered at Kakamega this 3rd day of October 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Ligare holding brief for Mr Samba for the Plaintiff

Defendant present in person

Court Assistant: E. Juma

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