



**Nyangweso v Echesa & another (Environment & Land Case
36 of 2019) [2024] KEELC 255 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 255 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 36 OF 2019
DO OHUNGO, J
JANUARY 31, 2024**

BETWEEN

PETER WABWIRE NYANGWESO PLAINTIFF

AND

FRANCIS SHIBIA ECHESA 1ST DEFENDANT

EDWIN JEREMIAH 2ND DEFENDANT

JUDGMENT

1. Litigation in this matter commenced in the High Court as HCCC No. 68 of 2007 (OS) when the plaintiff filed Originating Summons (OS) dated 1st September 2007. The matter was later transferred to this court, then to the Subordinate Court and finally back to this court.
2. The plaintiff averred in the OS that he had become entitled to a portion the parcel of land known as N. Wanga/Matungu/1593 measuring 100 feet by 70 feet (suit property) through adverse possession. He prayed for the following orders:
 - a. The plaintiff/applicant be declared the owner of the portion of land measuring 100ft by 70ft out of land parcel No. N. Wanga/Matungu/1593, whose boundaries are clearly marked on the ground and which he occupies and to which he is entitled by virtue of adverse possession and the defendant/respondent, jointly or severally be ordered to transfer title to the said portion of land to the plaintiff/applicant.
 - b. That the honourable court be pleased to declare that the 2nd defendant/respondent is holding title to the portion of the suit land parcel No. N. Wanga/Matungu/1593, measuring 100ft by 70ft in trust for the plaintiff/applicant.
 - c. That in default of the 2nd defendant/respondent transferring the suit title voluntarily the court do make an order authorizing the Deputy Registrar, High Court of Kenya to execute all and



any documents necessary to effect the subdivision and transfer of the suit portion of land measuring 100ft by 70ft, to the plaintiff/applicant.

- d. The honourable court do make further orders or grant any other relief deemed fit and just.
 - e. The defendant/respondents be ordered to pay the costs of this summons to the plaintiff/applicant.
3. The OS was supported by an affidavit sworn by the plaintiff on 1st September 2007. The first defendant responded to the OS through a replying affidavit which he swore on 20th September 2007 while the second defendant also reacted to it through a replying affidavit which he swore on 20th September 2007.
 4. Hearing of the OS proceeded by way of oral evidence. Prior to the hearing, counsels for the plaintiff and the second defendant informed the court on 7th March 2022 that the first defendant passed away on 28th June 2016. Since he had not been substituted, the case against him was marked abated.
 5. The plaintiff testified as PW1 and stated that pursuant to an agreement dated 6th May 1994, he purchased a portion of land parcel number N. Wanga/Matungu/809 measuring 100 feet by 70 feet from the first defendant, being the first defendant's share or inheritance in respect of the said parcel. That he paid the full purchase price and took immediate possession and that land parcel number N. Wanga/Matungu/809 was later subdivided into new parcels including N. Wanga/Matungu/1593 which belonged to the first defendant. He added that he started erecting a permanent structure for a church on the land when the second defendant told him to stop the construction, demolished his wall and also asked him to vacate. He further stated that the second defendant served him with a notice to vacate dated 17th August 2007 and claimed that he (the second defendant) had purchased the land. That he filed the OS herein upon receiving the notice and that he was using the plot as a church as of the date of his testimony.
 6. Boniface Odindo Shiundu testified as PW2 and stated that the plaintiff purchased land measuring 100 feet by 70 feet from the first defendant in 1994 and immediately started using it as a church. That the plaintiff planted trees and erected latrines and that the plaintiff was served with notice to vacate in the year 2007.
 7. The plaintiff's case was then closed.
 8. The second defendant, Edwin Jeremiah Muruka, testified as DW1. He stated that he is the registered proprietor of the parcel of land known as N. Wanga/Matungu/1593 and that he purchased it from the first defendant through a sale agreement dated 12th July 2007. He added that the first defendant obtained title in 1998 and that although the plaintiff had been utilizing the land, 12 years had not lapsed from 1998. He also stated that the first defendant put him in possession when he purchased the land and that there was a small semi-permanent structure on the land which was used as a church. That the first defendant informed him that there were people in occupation.
 9. Lastly, Michael Otieno Onyango testified as DW2. He stated that he was a witness to the sale agreement dated 12th July 2007 and that he visited the suit property on the date of the agreement and found a temporary iron sheet structure on it.
 10. The second defendant's case was then closed, after which parties filed and exchanged written submissions. 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 should issue.



11. 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 *S. M. Kenni alias Tamanna Sabeb – 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 plaintiff's case is that he purchased a portion of land parcel number N. Wanga/Matungu/809 measuring 100 feet by 70 feet from the first defendant, who is since deceased, through an agreement dated 6th May 1994 and that he paid the full purchase price and took immediate possession. At the time of the transaction, the seller was not the registered owner of land parcel number N. Wanga/Matungu/809 but it is claimed that the portion sold was the first defendant's share or inheritance in respect of the said parcel. According to the plaintiff, land parcel number N. Wanga/Matungu/809 was later subdivided, presumably following succession proceedings, into new parcels including N. Wanga/Matungu/1593 which belonged to the first defendant.
13. 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 he demonstrates full payment of the purchase price.
14. As noted earlier in this judgment, the first defendant responded to the OS herein through a replying affidavit which he swore on 20th September 2007. I have perused the said affidavit and I note that the first defendant confirmed that the plaintiff indeed purchased the said portion of land parcel number N. Wanga/Matungu/809 measuring 100 feet by 70 feet. He did not dispute that he was paid the purchase price in full. In any case, the sale agreement dated 9th May 1994 which the plaintiff produced states



that payment was made in full. I am thus satisfied that the plaintiff fully paid the purchase price on 9th May 1994.

15. Further, the first defendant confirmed in the replying affidavit that land parcel number N. Wanga/Matungu/809 was later subdivided. He annexed a copy of the register in respect of the parcel and upon its perusal, I note that the first defendant together with Joseph Calcano Nanjira became joint registered proprietors of the parcel on 13th August 1998 as administrators. The register was closed on 10th November 1998 upon partition of the parcel into N. Wanga/Matungu/1570 to 1573. A perusal of the register in respect of N. Wanga/Matungu/1593 (the suit property) shows that the said parcel which measures approximately 0.1 hectares is a subdivision of N. Wanga/Matungu/1573 and that the first defendant became the first registered proprietor thereof on 25th March 1999. He later transferred the suit property to the second defendant on 9th August 2007.
16. The plaintiff has maintained that he was put in possession of the portion of land parcel number N. Wanga/Matungu/809 measuring 100 feet by 70 feet by the first defendant immediately upon purchase. Although the first defendant denied in his replying affidavit that the plaintiff took possession immediate possession, I note that he conceded at paragraph 9 of the said affidavit that he stopped the plaintiff from constructing a permanent structure on the portion. I doubt that the plaintiff would have embarked on constructing a permanent structure if he did not have possession. I also note that both the second defendant and his witness conceded in their testimonies that the plaintiff was in possession and running a church on the portion when the second defendant purchased the suit property and even as of the date of trial.
17. The defendants did not offer their own version of the date when the plaintiff took possession. Going by the description of the activities on the ground, I am satisfied that the portion of land parcel number N. Wanga/Matungu/809 measuring 100 feet by 70 feet which the plaintiff purchased is now comprised in N. Wanga/Matungu/1593 (the suit property) and that the plaintiff has been in continuous possession thereof from 9th May 1994 to date. He had accumulated the requisite 12 years of continuous occupation by 9th May 2006. Partition of land parcel number N. Wanga/Matungu/809 and subdivision of N. Wanga/Matungu/1573 did not stop time from running in favour of the plaintiff. By 2007 when the defendants attempted to stop him from constructing on the suit property, the plaintiff had established 12 years of continuous and peaceful possession of the suit property. I find that the plaintiff has established adverse possession and is thus entitled to relief.
18. In the result, I enter judgment in favour of the plaintiff as follows:
 - a. The plaintiff is hereby declared the owner of the portion of land measuring 100 feet by 70 feet out of land parcel No. N. Wanga/Matungu/1593, which he is in occupation of, by virtue of adverse possession.
 - b. It is hereby declared that the second defendant is holding title to the portion of land measuring 100 feet by 70 feet out of land parcel No. N. Wanga/Matungu/1593 in trust for the plaintiff.
 - c. The second defendant is hereby ordered to transfer title to the plaintiff, in respect of the portion of land measuring 100 feet by 70 feet out of land parcel No. N. Wanga/Matungu/1593, which the plaintiff is in occupation of, within one hundred twenty (120) days from the date of this judgment.
 - d. The plaintiff shall bear all costs related to survey, subdivision, and transfer of the portion to him.



- e. In default of the second defendant transferring the portion as ordered above, the Deputy Registrar of this court shall be at liberty to execute, on behalf of the second defendant, all documents necessary to effect the above orders.
- f. No order as to costs of this suit.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 31ST DAY OF JANUARY 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Munyendo for the Plaintiff

No appearance for the Defendants

Court Assistant: E. Juma

