



**Toboso (Suing in his capacity as the legal representative of the Estate of Toboso Andati Malala)
v Mudogo (Sued in his capacity as the legal representative of Philip Mutoko) & 3 others
(Environment & Land Case 101 of 2019) [2024] KEELC 1426 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1426 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 101 OF 2019**

DO OHUNGO, J

MARCH 14, 2024

BETWEEN

**JOSEPH JUMA TOBOSO (SUING IN HIS CAPACITY AS THE
LEGAL REPRESENTATIVE OF THE ESTATE OF TOBOSO ANDATI
MALALA) PLAINTIFF**

AND

**ELFAS JUMA MUDOGO (SUED IN HIS CAPACITY AS THE LEGAL
REPRESENTATIVE OF PHILIP MUTOKO) 1ST DEFENDANT**

HENRY CHIMASIA 2ND DEFENDANT

JULIUS MUSUNGU 3RD DEFENDANT

JOSECK MUKHWANA 4TH DEFENDANT

JUDGMENT

1. Litigation in this matter commenced in the High Court as HCCC No. 3A of 2000 (OS) when John Toboso Andati, the plaintiff, filed an undated Originating Summons (OS) on 7th January 2000. The initial defendants were John Fredrick Andati (Sued as personal representative of the estate of Gabriel Andati) and Philip Mutoko. The matter was later transferred to this court, hence its current case number.
2. The initial OS underwent several amendments owing to parties passing away and addition of new parties, resting with Further Amended OS amended on 30th November 2020 wherein the parties are as per the heading of this judgment. The plaintiff averred in the Further Amended OS that John Toboso Andati had become entitled to a portion of the parcel of land known as Butsotso/Esumeyia/112 (suit property) measuring 5 acres through adverse possession. He prayed for the following orders:



1. The court orders that the interest of the late Philip Mutoko and the defendants above named in 5 acres out of land parcel No. Butsotso/Esumeyia/112 expired due to adverse possession.
 2. That the second Respondent do transfer title to the five acres to the Applicant in default the court do authorize the Deputy Registrar of the High court to sign the necessary documents to effect the transfer.
 2. The Respondents be ordered to transfer the respective portions stated above out of land parcel No. Butsotso/Esumeyia/112 to the Applicants respectively within 14 days from the date of this order.
 2. 5 acres out of land parcel number Butsotso/Esumeyia/112- be registered in the name of the plaintiff in trust for the family of the late John Toboso Andati.
 3. This Honourable court do grant any other relief it may deem necessary to grant in the circumstances.
 4. That in default of compliance the Deputy Registrar of this court be authorized to execute all the necessary documents so as to effect the transfers aforesaid.
 5. That the Respondents to pay costs of this summons to the Applicant.
3. For the avoidance of any doubt, I have reproduced the prayers as numbered by the Plaintiff, notwithstanding the confusion in the numbering.
 4. Hearing proceeded by way of oral evidence. Joseph Juma Toboso testified as PW1 and stated that John Toboso who was the initial plaintiff was his father. He adopted his affidavit which he swore on 30th November 2020 and filed on 2nd December 2020 as well as John Toboso's affidavit sworn on 26th October 2005 and filed on 8th November 2005 as his evidence. John Toboso stated in his said affidavit as well as the affidavit filed in support of the initial OS that Gabriel Andati purchased 5 acres of the suit property from Philip Mutoko who was the registered proprietor of the said parcel, and that Gabriel Andati later sold the 5 acres to him in January 1975. That he took possession in 1975 and remained in quiet possession up to the time of filing the initial OS.
 5. PW1 further testified that he (PW1) started occupying the suit property in 1975 and remained in occupation together with his brothers as of the date of his testimony. He also stated that there were tribunal proceedings concerning the land in 1994 and that Gabriel Andati purchased the land on 19th April 1968. That John Toboso passed away on 2nd July 2007 and that he substituted John Toboso on 26th November 2013 without revival of the abated suit. He further testified that he was among the creditors of Philip Mutoko's estate in Bungoma Succession Cause No. 262 of 2012.
 6. The Plaintiff's case was then closed.
 7. Elphas Juma Mdogo testified as DW1 and adopted his witness statement which he filed on 2nd November 2021. He stated therein that he is the eldest son of the late Mudogo Mufuana and that the Second to Fourth Defendants are his brothers. That his said father was the registered proprietor of the suit property which is adjacent to a parcel belonging to the late Joseph Nanzushi Keya who was allowed by his father to farm the land. That in 1978, Joseph Nanzushi Keya the authority given to him by allowing John Toboso who was his relative to build a house on the land. He denied that his father ever sold 5 acres to Gabriel Andati.
 8. DW1 further testified that his father was born on the suit property and lived on it until 1972 when he relocated to Bungoma where he passed away and was buried in 2009. That his father knew in 1978



that the Plaintiffs were in occupation and that his father commenced proceedings to evict them in Kakamega HCCC No. 70 of 1994. He also stated that his father was Mudogo Mafwana and not Philip Mutoko who was a stranger to him.

9. Other witnesses were Henry Chimasi Mutoko (DW2) and Julius Musungu Mdogo (DW3) who both confirmed that the Plaintiff was in occupation of the suit property as of the dates of their testimonies. The defence case was then closed.
10. Directions were then given that parties file and exchange written submissions. Only the Plaintiff filed written submissions. He argued that he had established adverse possession.
11. I have carefully considered the parties' pleadings, evidence, and submissions. The issues that arise for determination are whether there is a valid suit before the court, and if so, whether adverse possession has been established and lastly whether the reliefs sought should issue.
12. There is no dispute that John Toboso who was the initial Plaintiff herein is deceased. According to Joseph Juma Toboso's testimony, John Toboso passed away on 2nd July 2007 and that he substituted him on 26th November 2013 without revival of the suit.
13. The law makes elaborate provisions on what happens when a Plaintiff passes away. Order 24 rule 3 of the *Civil Procedure Rules* provides:
 - (1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.
 - (2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

Provided the court may, for good reason on application, extend the time.
14. I have perused the record herein and I have not found anything to show that any order for substitution of John Toboso was made prior to 2nd July 2008. The suit therefore stood abated on 2nd July 2008. Whereas the present Plaintiff filed an application dated 17th February 2012 through which he sought revival of the suit, he never sought to substitute the initial Plaintiff and when the application came up for hearing before G. Dulu, J. on 26th November 2013, no order for revival was made. I also note that the present Plaintiff did not annex to the affidavit in support of the application any letters of administration in respect of the estate of John Toboso and did not claim therein that he was an administrator of the estate. That perhaps explains why the suit was not revived. The suit having abated on 2nd July 2008, there is no valid suit before this court. In those circumstances, I need not determine the other issues that I had identified for determination.
15. In the result, I make the following orders:
 - a. This suit abated on 2nd July 2008.
 - b. The file be closed pursuant to Order 24 rule 3 (2) of the *Civil Procedure Rules*.
 - c. No order on costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 14TH DAY OF MARCH 2024.



D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Osango holding brief for Mr Amasakha for the Plaintiff

Mr Alovi holding brief for Mr Khakula for the Defendants

Court Assistant: M Nguyayi

