



Mumia & 2 others v Koech & 4 others (Environment & Land Case 70 of 2018 & 351 of 2022 (Consolidated)) [2024] KEELC 3925 (KLR) (30 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3925 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 70 OF 2018 & 351 OF 2022 (CONSOLIDATED)
DO OHUNGO, J
APRIL 30, 2024**

BETWEEN

FRANCIS MASINDE MUMIA APPLICANT

AND

JOSEPH KOECH 1ST RESPONDENT

JOSHUA KIPKEMBOI CHEPSIOROR (SUED AS LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE CHEBSIOROR ARAP KOKO) 2ND RESPONDENT

SALI KOGO 3RD RESPONDENT

DINAH C CHEPSIOROR 4TH RESPONDENT

AS CONSOLIDATED WITH

ENVIRONMENT & LAND CASE 351 OF 2022

BETWEEN

DINAH C CHEPSIOROR 1ST PLAINTIFF

SELI KOGO 2ND PLAINTIFF

AND

FRANCIS MASINDE MUMIA DEFENDANT

JUDGMENT

1. Francis Masinde Mumia (the applicant) moved the court through Originating Summons dated 18th October 2018 which was later replaced with Amended Originating Summons dated 1st February 2022. He averred in the Amended Originating Summons that he had exclusively, peacefully, continuously,



- openly, and uninterruptedly occupied the parcel of land known as Kakamega/Sango/131 (the suit property) from 1976 to the date of filing the Amended Originating Summons. He therefore sought to be declared the owner of the suit property by virtue of adverse possession.
2. On the other hand, Dinah C. Chepsiror and Seli Kogo (the plaintiffs in ELCC No. 351 of 2022) filed a plaint dated 24th May 2022 in which they averred that they were the registered proprietors of the parcel of land known as Kakamega/Sango/131 (the suit property) and that the applicant had trespassed onto the said property. They therefore sought judgment against the applicant for a permanent injunction restraining him from cultivating, occupying, interfering with, alienating or in any other way dealt with the suit property, eviction of the applicant from the suit property, mesne profits from the time the plaintiffs obtained title until vacant possession, costs, and interest.
 3. The two suits were consolidated by consent and ELCC No. 70 of 2018 chosen as the lead file.
 4. At the hearing, the applicant testified as PW1 and adopted his supporting affidavits filed on 18th October 2018, 4th January 2022, and 1st February 2022 as well as his supplementary affidavit filed on 13th June 2022. The summary of the contents of those affidavits is that he stated that on 17th February 1976 he entered into a written sale agreement with Chepsiror Kogo through which he purchased the whole of the suit property. That Chepsiror Kogo was the father of the first and second respondents and husband to the third and fourth respondents. That he first paid KShs 8,070 in cash together with 8 cows which were valued KShs 3,430 in total. That on 28th April 1977 he paid to Chepsiror Kogo KShs 4,000 and that they agreed that he gives the seller beans in lieu of cash in respect of balance, which he did immediately.
 5. The applicant further stated that he took possession in 1976 and that he enjoyed quiet and peaceful possession and use without any interruption whatsoever from any person. That the respondents later conducted succession proceedings in respect of the suit property without his knowledge and that when he approached the first and second respondents who were joint administrators of the estate of the late Chepsiror Arap Koko to transfer the suit property to him, they refused and instead distributed the suit property to the third and fourth respondents. He added that he paid a balance of over KShs 84,000 to the seller and KShs 4,000 to the Settlement Fund Trustees to settle settlement loan. The applicant also produced copies of the documents listed as numbers 1 to 10 in his list of documents dated 1st February 2022 as his exhibits.
 6. William Kemboi Chepsiror (PW2) adopted his witness statement dated 1st February 2022. He further testified that he did not witness the making of the agreement between the applicant and Chepsiror Kogo since he was only 11 years old in 1976. He further stated that the suit property was originally owned by the Settlement Fund Trustees.
 7. Nabangi Paul Makete (PW3) adopted his witness statement dated 10th June 2022. He stated that he was Assistant Chief of Sango Sub-Location between 1987 and 1995 and that he was promoted to Chief of Kongoni Location, a position which he held until he retired in July 2016 as. He added that the applicant hailed from his jurisdiction and that the applicant had been occupying and using the whole of the suit property from 1976 to the date of his statement. He also stated that Chepsiror Koko passed away in 1984.
 8. The applicant's case was then closed.
 9. David Masila Kimauro (DW1), the Deputy Land Registrar Kakamega County, produced a certified copy of the register of the suit property and stated that the said register was opened on 18th July 1975. That the first registered owner of the suit property was Settlement Fund Trustees (SFT) who were registered on 18th July 1975 and that SFT discharge was registered on 8th October 2019. That the



plaintiffs in ELCC No. 351 of 2022 became registered proprietor on 8th October 2019 through entry number 6 and that title deed was issued to them on 11th October 2019.

10. Joseph Koech (DW2) stated that he was one of the sons of Chepsiror Kogo and a joint administrator of his estate together with the second respondent. He adopted his witness statement which he filed on 17th March 2022 and produced copies of documents listed as item numbers 1 to 11 in the respondents' list of documents dated 16th March 2022 and those listed as item numbers 3 and 4 in the respondents' supplementary list of documents dated 3rd March 2023, as the respondents' exhibits. He denied that the applicant had been in occupation since 1976 and added that their father was in possession and use of the suit property until 1984 when he passed away. That they found the applicant in the suit property in 2014 and that they registered a restriction. He added that their father was illiterate and used affix his thumb print on documents as opposed to signing. That the payments that the applicant claimed to have made to SFT were not reflected in SFT statement. He further stated that he suspected that PW2 (his brother) conspired with the applicant and that initially the applicant leased the suit property from PW2. That PW2 was initially an administrator but he was bitter after being removed and had conspired with the applicant out of revenge.
11. The defence case was then closed. Thereafter, parties filed and exchanged written submissions. 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 law on 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 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."
13. Registered proprietorship of the suit property and its background is not in dispute. I have perused the certified copy of the register of the suit property which was produced by DW1. The said register was opened on 18th July 1975. The first registered owner of the suit property was Settlement Fund Trustees



(SFT) who were registered as such on 18th July 1975 and remained proprietor until 8th October 2019. On 8th October 2019, the plaintiffs in ELCC No. 351 of 2022 became registered proprietors and title deed was issued to them on 11th October 2019.

14. The applicant filed this suit on 18th October 2018. At that time, SFT was still the registered proprietor. SFT was a statutory corporation established under Section 167 of the Agriculture Act (repealed). Its successor is the Agriculture and Food Authority (AFA), another statutory corporation established under Section 3 of the *Agriculture and Food Authority Act*, 2013. The *Agriculture and Food Authority Act*, 2013 came into operation on 17th January 2014.
15. As a state corporation, Section 41 of the *Limitation of Actions Act* protects SFT and AFA land from acquisition by adverse possession since such land is in fact “Government land or land otherwise enjoyed by the Government.” The Court of Appeal affirmed that position in *Kennedy Nyamumbo Sese v Settlement Fund Trustees & 2 others* [2017] eKLR where it held:

... the disputed portion belonged to SFT, until it was transferred to Daniel in May 1995. In *Gitu v Ndungu & 2 others* [2001] eKLR, this Court in a 5 Bench decision, departed from its decision in *Eliud Nyongesa Lusena and Another vs Nathan Wekesa Omocha Civil Appeal No 134 of 1993* in which the Court had decided that the plaintiff after 12 years of exclusive possession of the suit property in regard to which the Settlement Fund Trustees had title, acquired title to it and the SFT became his trustee. The 5 Judge Bench reiterated its earlier holding in *Boniface Oredo vs Wabomba Mukile Civil Appeal No 170 of 1989* (unreported) delivered in 1992, that the interest of SFT in the suit property is not extinguishable under the *Limitation of Actions Act*, Cap 22 of the Laws of Kenya in view of section 175 of the Agriculture Act Cap 318 that provides that a suit by SFT cannot be defeated by the defence of limitation.
16. Consequently, although the applicant claims to have been in possession since 1976, time for purposes of adverse possession could not run between 18th July 1975 and 8th October 2019 when SFT was registered proprietor. By the time the applicant filed this suit on 18th October 2018, he had clocked nil years of adverse possession. That alone is enough to bring an end to the applicant’s adverse possession claim.
17. There is however more reason why the applicant’s adverse possession claim cannot succeed. The applicant’s position is that he acquired possession in furtherance of a sale agreement dated 17th February 1976 through which he purchased the whole of the suit property from Chepsiror Kogo.
18. Entry and possession of land in furtherance of a sale transaction is deemed to be by permission of the proprietor and does not therefore amount to adverse possession. Nevertheless, 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.
19. The respondents have disputed that Chepsiror Kogo executed the agreement. According to the sale agreement, the purchase price was KShs 18,500. The agreement states that there was an outstanding balance of KShs 7,000 which the applicant was to pay to Chepsiror Kogo to complete payment of the purchase price. The applicant produced another document dated 28th April 1977, which he claims to show payment of a further KShs 4,000 to Chepsiror Kogo. I have serious doubts about authenticity of the document dated 28th April 1977 since the document bears a signature that is claimed to be Chepsiror Kogo’s yet in the sale agreement dated 17th February 1976, Chepsiror Kogo did not sign



but affixed his thumb print. No valid basis was laid to explain the disparity. I take note of DW2's testimony that Chepsioror Kogo was illiterate and used affix his thumb print on documents as opposed to signing. The applicant failed to demonstrate full payment of the purchase price. As long as the applicant maintains that he is a purchaser, his occupation of the suit property, if any, would be with the consent of the proprietor until he demonstrates full payment of the purchase price. Possession which is not adverse to the title of the proprietor cannot be a valid basis for claiming title by way of adverse possession.

20. In view of the foregoing, the claim for adverse possession is not merited and is therefore dismissed.
21. In their capacities as registered proprietors of the suit property, the plaintiffs in ELCC No. 351 of 2022 are entitled to the rights, privileges, and benefits under Section 24 of the [Land Registration Act](#). Section 26 of the Act obligates the court to accept their certificate of title as conclusive evidence of proprietorship. By virtue of his own pleadings and evidence, the applicant has confirmed that he is in occupation of the suit property. In those circumstances, the plaintiffs in ELCC No. 351 of 2022 are entitled to the reliefs of permanent injunction and eviction which they have sought.
22. The plaintiffs in ELCC No. 351 of 2022 also sought judgment for mesne profits. Mesne Profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates when he entered the suit property and when he leaves. Mesne Profits must be pleaded and proved. See Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees [2020] eKLR. The plaintiffs in ELCC No. 351 of 2022 did not specifically plead the mesne profits that they seek and did not tender evidence and make submissions to form a basis for both liability for mesne profits and quantum thereof. In the circumstances, the prayer for mesne profits fails.
23. In the result, I make the following orders:
 - a. Francis Masinde Mumia's (the applicant's) suit in ELCC No. 70 of 2018 is dismissed.
 - b. Francis Masinde Mumia (the applicant) to vacate the parcel of land known as Kakamega/Sango/131 within 60 (sixty) days from the date of delivery of this judgment. In default, an eviction order shall issue.
 - c. A permanent injunction is hereby issued restraining Francis Masinde Mumia (the applicant) from cultivating, occupying, interfering with, alienating or in any other way dealt with the parcel of land known as Kakamega/Sango/131.
 - d. Dinah C. Chepsioror and Seli Kogo (the plaintiffs in ELCC No. 351 of 2022) shall have costs of the consolidated suit and interest thereon.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 30TH DAY OF APRIL 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Sang holding brief for Ms Kesei for the Applicant

No appearance for the Respondents

Court Assistant: M Nguyayi

