



REPUBLIC OF KENYA



**KENYA LAW**  
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**Lutta v Olunga (Environment and Land Case Civil Suit 16 of 2020)  
[2024] KEELC 3481 (KLR) (29 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3481 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND CASE CIVIL SUIT 16 OF 2020**

**DO OHUNGO, J**

**APRIL 29, 2024**

**BETWEEN**

**HEZRON CHARLES LUTTA ..... PLAINTIFF**

**AND**

**FRANCIS JOMO OLUNGA ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff moved the court through Originating Summons (OS) dated 1<sup>st</sup> December 2017 wherein he averred that he had acquired a 2.5 acres portion of the parcel of land known as North Wanga/ Namamali/624 (the suit property) through adverse possession. The OS was supported by an affidavit sworn by the plaintiff. The defendant opposed the OS through a replying affidavit which he swore and filed on 23<sup>rd</sup> June 2020.
2. Hearing of the OS proceeded by way of oral evidence. The plaintiff testified as PW1 and adopted the affidavit that he swore in support of the OS as well as his witness statement dated 14<sup>th</sup> July 2022 as his evidence. He further produced the documents annexed to his said affidavit as annexures HCL-1 to HCL-3 as his exhibits. He stated in the affidavit that he was the administrator of the estate of Stephen Lutta (deceased) who was his father and that his father purchased a 2.5 acres portion of the suit property in 1969 from the defendant's father who was their neighbour. He added that they planted blue gum trees on the suit property in the 70s and were planting food crops on it until the year 2007 when after the demise of the parties' fathers the defendants started interfering with the 2.5 acres portion. That the dispute was determined by Matungu Land Disputes Tribunal through Award No. 149 of 2007.
3. The plaintiff further testified that he and his brothers reside in land parcel number Namamali North Wanga 550 which shares a boundary with the suit property. That he and his brothers have not built any structure in the suit property but were farming on it as of the date of his testimony. He also stated that his father passed away in 1996 and that he lodged a complaint against the defendant for cutting down blue gum trees leading to Criminal Case No. 1953 of 2009 being filed against the defendant but



the defendant was acquitted. He also stated that although the tribunal awarded him the suit property, the High Court quashed the award.

4. Harry Mumia Lutta (PW2) adopted his witness statement dated 14<sup>th</sup> July 2022 as his evidence. He added that their father purchased the land through a written agreement and that a dispute arose in 2006 when the defendant stopped Joseph George Lutta who is the plaintiff's and PW2's brother from cultivating the land.
5. Other witnesses who testified in support of the plaintiff's case were Joab Kadima Shiundu (PW3) and Pius Wekesa Ondere (PW4) who also stated that Stephen Lutta (deceased) purchased the 2.5 acres of the suit property.
6. The plaintiff's case was then closed.
7. The defendant testified as DW1. He adopted his aforesaid replying affidavit as his evidence and produced the documents annexed to it as FJO-1 and FJO-2 as his exhibits. He also produced the document annexed to his further list of documents dated 28<sup>th</sup> October 2022 as his other exhibit and stated that the plaintiff's father did not purchase the 2.5 acres but only leased it from 1969. That the plaintiff's father owned land which was adjacent to the suit property. DW1 further testified that the plaintiff's father used the 2.5 acres from 1969 under a lease until he passed away in 1986 after which the plaintiff continued using the land until 2005 when DW1 tried to evict him leading to a court case.
8. Lastly, Christopher Okanga (DW2) adopted his witness statement filed on 31<sup>st</sup> October 2022 as his evidence. He also stated that the plaintiff's father leased the 2.5 acres. The defence case was then closed, after which parties filed and exchanged written submissions.
9. I have carefully considered the pleadings, evidence, and submissions in this matter. The issues that arise for determination are whether adverse possession has been established and whether the reliefs sought should issue.
10. To succeed in a claim for adverse possession, the plaintiff must establish peaceful and uninterrupted possession for a period of 12 years. As the Court of Appeal stated in *Loise Nduta Itotia v Aziza Said Hamisi* [2020] eKLR:

In line with the Act, Kneller, J. (as he then was) in the case of *Kimani Ruchire vs Swift Rutherford & Co. Ltd.* [1980] KLR 10, outlined some tenets of adverse possession thus; "The plaintiffs have to prove that they have used this land which they claim as of right. Nec vi, nec clam, nec precario (No force, no secrecy, no persuasion). So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it or by way of recurrent consideration."

11. As the name suggests, adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. Thus, for a claim of adverse possession to succeed, the claimant must demonstrate that his occupation was without the proprietor's permission. Entry and occupation pursuant to a sale agreement is ipso facto by permission of the proprietor and does not therefore amount to adverse possession. Nevertheless, once a purchaser completes paying the purchase price, his possession and occupation of the property is no longer 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.
12. The plaintiff's case is that Stephen Lutta (deceased) who was his father purchased a 2.5 acres portion of the suit property in 1969 from the defendant's father who was their neighbour. Harry Mumia Lutta



(PW2) who is the plaintiff's brother testified that the purchase was through a written agreement. The plaintiff has neither produced the written agreement nor testified as to the terms of the agreement. We do not know what consideration the plaintiff's father was to pay under the agreement and if he paid it. In the absence of proof of full payment of a purchase price and full compliance with terms of the purchase transaction, the plaintiff's possession has not transited to being adverse possession. His presence on the suit property remains contractual and time for purposes of adverse possession cannot run in his favour.

13. I find that adverse possession has not been established. In the circumstances, the reliefs sought cannot issue.

14. I find no merit in the plaintiff's case, and I therefore dismiss it with costs to the defendant.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 29<sup>TH</sup> DAY OF APRIL 2024.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Mr Mondia for the plaintiff

Mr Nechesa Maina holding brief for Mr Wanyama for the defendant

Court Assistant: M. Nguyayi

