



Sinokho v Wandabwa (Enviromental and Land Originating Summons E002 of 2021) [2024] KEELC 5088 (KLR) (27 June 2024) (Judgment)

Neutral citation: [2024] KEELC 5088 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2021
FO NYAGAKA, J
JUNE 27, 2024**

BETWEEN

JOHN SOITA SINOKHO PLAINTIFF

AND

MARTHA NASIMIYU WANDABWA DEFENDANT

JUDGMENT

1. By an Amended Originating Summons dated 10/5/2023 and filed on 12/5/2023, the Applicants, Titus Mzee Soita, Josephine Nekesa Wetondo and Gladys Naliaka Majuma, who were the administrators of the Estate of John Soita Sinokho, laid claim as proprietors of 21.25 acres of land being part of Bungoma/Ndalu/150 and prayed for registration as such through adverse possession. The summons was brought under Order 37 Rule 7(1)(2) and (3) of the *Civil Procedure Rules*, Sections 4(4), 17, 37 and 38(1)(2) and (4) of the *Limitations of Actions Act* and Section 28(H) of the *Land Registration Act*, 2012.
2. The plaintiffs sought a determination on questions, being, whether they (plaintiffs) had been in adverse possession of a defined portion measuring 21.25 acres of land Title No. Bungoma/Ndalu/561; whether the defendant's title to the said portion of land had been extinguished at the expiry of 12 years since the date the plaintiffs took possession; whether the plaintiffs were entitled to be declared the proprietors of 21.25 acres of land title number Bungoma/Ndalu/561 by virtue of his adverse possession for the period prescribed under the *Limitations of Actions Act* (Cap 22) Laws of Kenya; whether the County Land Registrar Bungoma should be directed that the order be made herein shall be an instrument of transfer of ownership of 21.25 acres of title number Bungoma/Ndalu/561 from the defendant to the plaintiffs; whether the defendant should be restrained from entering, wasting, damaging or in any way alienating Bungoma/Ndalu/561 until the hearing and determination of this matter; whether this Honourable Court should order the cancellation of the defendant's title to Bungoma/Ndalu/150 and order the reinstatement of the mutation registered in February/March 2001



and restore the title number Bungoma/Ndalu/561 which was registered on 16/11/2001 and whether the defendant should pay costs.

3. The Summons was supported by the affidavit of Titus Mzee Soita sworn on 10/05/2023 in which he adopts the contents of the affidavit sworn by John Soita Sinokho (hereinafter referred to as 'the deceased') on 08/02/2021 and filed in court on 10/02/2021. In the affidavit the deceased deponed that on 10/11/2000 by sale agreement he bought land measuring 21.25 acres of land from Erastus Simiyu Butala (hereinafter referred to as 'Erastus') contained in Bungoma/Ndalu/150 at a consideration of Kshs. 2,100,000 and immediately took possession with the full knowledge of the defendant herein. That prior to the said sale, the deceased conducted due diligence and the search confirmed that the land belonged to Erastus. He annexed the sale agreement and search as JSS 1 and 2 respectively.
4. He further deponed that the said parcel of land was subsequently sub-divided into three (3) portions of land and 21.25 acres of land were registered in favour of the deceased and a title issued in the deceased's name. That the deceased developed the land, built a permanent home, planted trees and fenced it off and that the defendant never visited the land or interfered with the deceased's possession. He annexed the Title Deed, Mutation and Photos showing the developments as JSS 3(a) and (b) and JSS 4 respectively.
5. He also deponed that Erastus caused the land to be allocated to the defendant's husband, Julius Wandabwa, now deceased, who sold the land to one Dismus Namisi without the consent of Erastus and that the latter and the Respondent herein were Respondents in Kitale Resident Magistrate Court, Misc. Application No. 4 of 1981 where Erastus redeemed the land by refunding the said Dismus a sum of Kshs. 48,810.00. He further deponed that he was a purchaser for value without notice and that it was not until 2015 that he learnt from his neighbour, one Stanley Mburu Muigai, that the respective parcel registers were cancelled and the title deed given to the defendant. That the cancellation was done without notice to them and that he was not a party to court proceedings pertaining the said cancellation. They annexed JSS 6 a green card showing the said cancellation.
6. He further deponed that entry No. 9 on the green card was closed on 16/11/2001 after sub-division on Bungoma/Ndalu/150 into Bungoma/Ndalu/561, 562 and 563 which parcels were registered in the names of the deceased herein, Stanley Mburu Mwigai and Jacob Wasike Wamacheche and that the same have not been closed by any court order. He annexed green cards for the said parcels as JSS 7(a-c). That he and his family lived on the said parcel of land peacefully, openly, uninterrupted and undertaken agricultural activities in a manner hostile to the interest of the defendant in excess of 12 years. He also argues that the judgment of 2002/2003 became time-barred in or around 2014/15 after expiry of 12 years by dint of Section 4(4) of the *Limitation of Actions Act* hence they are entitled to be registered as proprietors of the land measuring 21.25 acres of land that they occupy.
7. When summons were served, the Respondent caused to be filed a memorandum of appearance. He did not file any response afterward. This court having been satisfied of service effected on the Respondent's advocate set the suit down for hearing by way of formal proof.
8. PW1 laid foundation of his evidence by producing a Grant of Letters of Administration *Ad Litem* as P.Exhibit 1. He basically repeated and reiterated the above facts. He then produced the original Agreement as P.Exhibit 2 and Title Deed in respect of the said 5.5 Ha of land as P.Exhibit 3, copy of Search in Bungoma/Ndalu/150 as P.Exhibit 4 and copy of Green Card for Bungoma/Ndalu/150 as P.Exhibit 5. He further testified that his father had never had a case with the defendant. And that by 2003 they were on the land and had title deed to the sub-divided land and have never been evicted at all. He also produced photos of developments on the land as P.Exhibit 6(a-f). The plaintiffs pray that the titles be restored to them after survey.



9. At the end of the testimony, counsel for the Plaintiffs closed the Plaintiff's case and the defence case. He elected not to submit on the pleadings and evidence and left it for the court's determination.

Analysis And Determination

10. Upon considering the pleadings, the evidence on record and the law, it is the opinion of this court that the key issue for determination is whether or not the plaintiffs have acquired title by way of adverse possession. If yes, when did time start running for purposes of determining these rights.
11. The law in respect to adverse possession is now settled. In *Maweu v Liu Ranching and Farming Cooperative Society* 1985 KLR 430, it was held:-

“Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”
12. Also, in the case of *Samuel Miki Waweru v. Jane Njeru Richu*, Civil Appeal No. 122 of 2001, the Court of Appeal delivered the following dictum:

“...it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in *Jandu v Kirpal* [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted.”
13. The record shows that the Plaintiff entered into the suit property pursuant to a sale agreement signed on 10/11/2000. This mode of entry was permissive. However, once the 21.25 acres of land were registered and title deed issued to the deceased, he ceased being in possession of the same with permission or consent of Erastus but as of right. He enjoyed proprietary rights over the said 21.25 acres of land then contained in Bungoma/Ndalu/561. The deceased, John Wandabwa, was not in occupation or possession of the same but the Applicant was.
14. This court notes that entry No. 9 and 11 was to the effect cancelling the proprietary rights of the deceased or the said Erastus over the said 21.25 acres of land. The registered owner of the 21.25 acres of land now became the Defendant. Further, the cancellation had the effect of making the Defendant herein the registered proprietor since the time of the earlier registration. The deceased, thus, could only possess the suit land with permission or consent from the Respondent or in adverse to her rights over the said parcel of land. However, no such permission or consent has been availed to this court.
15. Besides the cancellation, no other evidence was adduced by the Defendant to show any other steps she undertook to remove the plaintiffs or the deceased from possession or occupation of the said parcel of land. Hence, the time of adverse occupation of the land began running against the defendant in the said 2002.
16. This court further notes that the alleged court order was obtained in 2001 also expired by operation of the law. Nonetheless, the said court orders did not remove the deceased from possession of the suit land. There was no subsequent action by the Defendant asserting ownership rights over the suit property. Neither has the Defendant adduced evidence to show that the Plaintiffs' possession and occupation and use of the suit property, after cancellation of entry 9 and 11 was subject to her permission or consent.



17. It is therefore an uncontroverted fact and or evidence that the Plaintiffs have been in continuous open and uninterrupted possession of the suit land for over 12 years. There is no evidence to suggest that the Defendant sought or retook possession or that the Plaintiff relinquished possession to the Defendant. One thing is clear in the law of adverse possession: one cannot seek a declaration of being an adverse possessor against himself as a registered owner. In the instant case, the Plaintiff was initially registered as proprietor as evidenced by P.Exhibit 3. But he led evidence that the title was cancelled by the Court order as stated above. It means he ceased to have title to the land and was therefore only an adverse possessor. Thus, given the evidence presented to me in this matter, I find that the Plaintiff has proved the case on a balance of probabilities and I enter judgment for him against the Defendant in terms of positive answers to the questions he posed to the Court for determination. Accordingly, I make the following determination: -

- a. That the plaintiffs have been in adverse possession of a defined portion of land measuring 21.25 acres of land in Title No. Bungoma/Ndalu/561.
- b. There be a declaration and it is hereby ordered that the Defendant's title to parcel No. Bungoma/Ndalu/561 was extinguished at the expiry of 12 years, since 2002 and it is cancelled forthwith.
- c. The Plaintiffs, as the Estate of the late John Soita Sinokho, are hereby declared the proprietors of the said 21.25 acres of land by virtue of adverse possession.
- d. An order is hereby issued that the Register be rectified and amended accordingly to read the Estate of John Soita Sinokho as the proprietors of the suit land measuring 21.25 acres, and the mutation be amended accordingly.
- e. Since this suit was undefended, each party is to bear own costs.

18. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE ONLINE VIA MICROSOFT TEAMS THIS 27TH DAY OF JUNE, 2024.

HON. DR.IUR F. NYAGAKA,

JUDGE, ELC KITALE

