



Rupia & 2 others v Wanzala & 3 others (Environment & Land Case 60 of 2019) [2024] KEELC 4747 (KLR) (19 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4747 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 60 OF 2019**

**DO OHUNGO, J
JUNE 19, 2024**

BETWEEN

**GEORGE MUSOLO RUPIA 1ST PLAINTIFF
EPHRAIM RUPIA 2ND PLAINTIFF
BONVENTURE OWOLO RUPIA 3RD PLAINTIFF**

AND

**BEN MONYO WANZALA 1ST DEFENDANT
SESIRIA AGOLA WANZALA 2ND DEFENDANT
LAZARUS MONYO WANZALA 3RD DEFENDANT
BUSIA SUGAR INDUSTRY LIMITED 4TH DEFENDANT**

JUDGMENT

1. The plaintiffs moved the court through Originating Summons dated 21st May 2019, which was replaced with Amended Originating Summons dated 16th April 2021 and filed on 5th April 2023. They sought determination of whether they had acquired title to the parcel of land known as N/Wanga/Koyonzo/823 (the suit property) by adverse possession. The Amended Originating Summons is supported by an affidavit sworn by the first plaintiff.
2. Hearing of the matter proceeded by way of oral evidence. George Musolo Rupia (PW1) adopted his witness statement which he filed on 23rd February 2021 and produced copies of item numbers 1 to 3 and 5 in plaintiffs' list of documents dated 19th February 2021. He stated in the witness statement that Musolo Rupia who was the plaintiffs' father purchased the suit property from one Nicholas Wanzala Monyo in the year 1968 at a consideration of 12 cows and Kshs 1,400 and that the plaintiffs have lived on the suit property with their families since then. That they have developed the land and built their



- homes on it and that Nicholas Wanzala relocated to Uganda with his family after the sale but before transferring the land parcel to the plaintiffs' father.
3. PW1 further stated that the plaintiffs occupied the suit property peacefully and without any interruption until the year 2018 when the sons of Nicholas Wanzala started interfering with their occupation. He also stated that they need the court's assistance to acquire title. Under cross examination, he stated that he was not aware of any Case Number 18 of 2019 at Mumias Law Courts but added that he had filed an appeal to the Court of Appeal concerning the suit property and that the appeal was pending. That his father purchased the suit property on 5th April 1968 through PExb. 2 which is dated 5th April 1968, yet within it, it is stated that balance of the purchase price was paid on 20th September 1974. He also stated that the correct consideration for the suit property was Kshs 700 and eight cows as opposed to what is stated in his witness statement. He further testified that all the plaintiffs reside on N/Wanga/Koyonzo/829 which is adjacent to the suit property and that there is no visible boundary between the two parcels.
 4. Protus Juma (PW2) adopted his witness statement which he filed on 23rd February 2021. He stated in the witness statement that on 5th April 1968, he was herding cattle in the first plaintiff's home when he saw Nicholas Wanzala Monyo visit John Rupia and Phenswa Rupia in their homestead. That John Rupia, Phenswa Rupia and Nicholas Wanzala approached the flock that he was herding and selected eight cows which were then given to Nicholas Wanzala in exchange for the suit property. He added that he was also a witness to the sale agreement dated 5th April 1968 where the applicants also gave Kshs 700 as consideration. PW2 went on to state that the eight cows were paid at a go and that he lived with the plaintiffs on the suit property from the year 1963 to 1974 when he left to start a family.
 5. The plaintiffs' case was then closed.
 6. Ben Monyo Wanzala, the first defendant, testified next as DW1. He adopted his witness statement dated 19th November 2019 and his replying affidavit which he swore on 20th June 2019. He produced copies of item numbers 1 to 7 in the defendants' list of documents dated 19th November 2019.
 7. DW1 stated in the witness statement that this suit was *sub-judice* in view of pendency of Mumias SPMCC No. 18 of 2019 where the plaintiffs entered appearance on 21st May 2019. He further stated that as the administrator of the estate of Nicholas Wanzala Monyo, he was aware that Nicholas Wanzala Monyo never sold the suit property and that the plaintiffs were trespassers who occupied a portion of the suit property since year 2016. That prior to the encroachment, the plaintiffs were residing on N/Wanga/Koyonzo/829 which was owned by their father. He concluded the statement by stating that the plaintiffs cannot claim adverse possession in respect of the suit property in view of the fact that a restriction placed by the Chief Valuer due to compulsory acquisition remains in force since the compulsorily acquired land is yet to be curved out.
 8. DW1 further testified that he used to live in Uganda with his father and siblings and that his father was buried in Uganda. That his family has had disputes with the plaintiffs over the suit property and that as of the date of his testimony, the suit property was vacant without any house.
 9. Bersa Piese Abarada testified next as DW2. He adopted his witness statement dated 5th October 2020. He further stated that there was no sale agreement as alleged by the plaintiffs and that there were no foolscaps in 1968, contrary to the plaintiffs' claim that an agreement was written on foolscap. He also stated that the plaintiffs encroached on the suit property in the year 2016.
 10. The first to the third defendants' case was then closed.



11. Lastly, Dickens Willice Makokha, an Agricultural Field Manager of the fourth defendant, testified as DW3. He adopted his witness statement dated 15th September 2022 and stated that the fourth defendant purchased the suit property from the first to the third defendants. He also stated that he inspected the suit property prior to the 4th defendant buying it in February 2021 and that the land was vacant both then and as of the date of his testimony. He further testified that the fourth defendant was not using the property as of the date of his testimony owing to the pendency of this case.
12. The fourth defendant's case was then closed. Parties thereafter filed and exchanged written submissions.
13. I have considered the pleadings, evidence, and submissions. The issues that arise for determination are whether adverse possession has been established and whether the reliefs sought should issue.
14. As the Court of Appeal stated in *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR, the party claiming adverse possession must assert hostile title in denial of the title of the registered proprietor. The process must start with a wrongful dispossession of the rightful owner and the proper way of assessing proof of adverse possession is whether the title holder has been dispossessed or has discontinued his possession for the statutory period of 12 years, as opposed to whether the claimant has proved that he or she has been in possession for 12 years. The plaintiff who claims adverse possession must demonstrate the date he came into possession, the nature of his possession, whether the fact of his possession was known to the registered proprietor and that the possession was open and undisturbed for the requisite 12 years.
15. The plaintiffs' case is that their father purchased the suit property from one Nicholas Wanzala Monyo in the year 1968.
16. The entry point in a claim for adverse possession is the requirement that the claimant demonstrates that he has dispossessed the title holder or that the title holder has discontinued his possession for the statutory period of 12 years. In that regard, PW1 stated in his witness statement that the plaintiffs have lived on the suit property with their families since 1968 and that they developed it and built their homes on it. However, under cross examination, he testified that all the plaintiffs reside on a different plot, N/Wanga/Koyonzo/829, which is adjacent to the suit property. There was even more contradiction: PW2 claimed that he lived with the plaintiffs on the suit property from the year 1963 to 1974. The plaintiffs did not demonstrate how PW2 achieved such a feat when they (the plaintiffs) were living elsewhere on N/Wanga/Koyonzo/829. The plaintiffs did not persuade me that they had possession for the statutory period of 12 years.
17. Even if the plaintiffs had established possession, they would have to surmount the next hurdle. By its very nature, adverse possession connotes non-consensual occupation. To succeed, the claimant must demonstrate that the occupation was without the proprietor's permission. Ordinarily, entry and occupation pursuant to a sale agreement is by permission of the proprietor and does not therefore amount to adverse possession. However, once a purchaser completes paying the purchase price, his possession and occupation of the property is 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.
18. A claimant basing his adverse possession claim on a sale transaction must establish the terms of the sale and his own compliance with them, especially the terms relating to purchase price and its payment. The plaintiffs' case is that they gained possession in furtherance of a sale transaction. I have reviewed the plaintiffs' evidence in support of the sale transaction. The plaintiffs have not established either the purchase price or its full payment. Instead, their case is replete with contradictions.



19. I note that PW1 stated in his witness statement that the consideration was 12 cows and Kshs 1,400. Under cross examination, he changed and stated that the correct consideration was Kshs 700 and eight cows. He relied on what he said was a sale agreement dated 5th April 1968 through which he maintains that the property was purchased on 5th April 1968. Curiously and inexplicably, it is stated within the said document that a balance of four cows and Kshs 700 was paid on 20th September 1974. How the transaction of 20th September 1974 was recorded ahead of time on 5th April 1968 is a mystery. The document also contradicts the evidence of PW2 who stated that he witnessed payment of 8 cows and Kshs 700 on 5th April 1968.
20. I am therefore not persuaded that the plaintiffs fully paid any purchase price. If, as they maintain, their entry into the suit property was through a sale transaction, time cannot run in their favour for purposes of adverse possession until they establish full payment of the purchase price.
21. One other matter caught my attention. The parties are neighbours, and the plaintiffs reside on N/Wanga/Koyonzo/829 which is adjacent to the suit property. That much is manifest from the testimony of the first plaintiff who further stated that there is no visible boundary between N/Wanga/Koyonzo/829 and the suit property.
22. In situations where a claim for adverse possession pits neighbours against each other and concerning adjacent plots, it is crucial that the claimant demonstrates unmistakable evidence of an entry with an intention to dispossess the registered proprietor who is his neighbour. The Court of Appeal stated in *Masambaga & 7 others v Malindi Holdings and Estate Limited* (Civil Appeal 165 of 2019) [2022] KECA 782 (KLR) (10 June 2022) (Judgment) as follows:

As explained in *Elements of Land Law*, 5th Edition by Kevin Gray and Susan Francis Gray at page 1179 “Possession is attributed to the squatter (and his possession is adverse) only if he has both factual possession (factum possessionis) and the requisite intention to possess (animus possidendi). These elements of factum and animus interact significantly and must coincide continuously throughout the entirety of the required period of possession.
23. The plaintiffs herein have not availed unmistakable evidence of an entry with an intention to dispossess the first to third defendants who are their neighbours.
24. I find that the plaintiffs have not established adverse possession. That being so, the reliefs sought cannot issue.
25. I find no merit in the plaintiffs’ case, and I therefore dismiss it with costs to the defendants.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 19TH DAY OF JUNE 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Lugulu for the plaintiff

Mr Ipapu holding brief for Mr Otsyula for the first to third defendants

Mr Ipapu for the fourth defendant

Court Assistant: M Nguyayi

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