



REPUBLIC OF KENYA



KENYA LAW
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**Asengo & another v Tadayo (Enviromental and Land Originating Summons
1 of 2019) [2024] KEELC 6037 (KLR) (23 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6037 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 1 OF 2019
DO OHUNGO, J
SEPTEMBER 23, 2024**

BETWEEN

GEOFFREY ASENDO 1ST APPLICANT

ANDREW OLUNGA MUGUNDA 2ND APPLICANT

AND

LEVY MUDANYA TADAYO RESPONDENT

JUDGMENT

1. The Applicants moved the Court through Originating Summons dated 8th January 2019. They averred that they were in occupation of the parcel of land known as Kakamega/Lumakanda/287 (the suit property) and sought determination of the following questions:
 1. Whether the Applicants have been in occupation of L.R. No. Kakamega/Lumakanda/287 and have utilized and developed the said land peacefully for a period in excess of forty (40) years.
 2. Whether an order ought to issue that the applicants be registered as proprietors of the aforesaid land by reason of having been in occupation adversely for the stated period in terms of the provisions of section 1, 17 and 38 of the *Limitation of Actions Act*.
 3. Whether by reason of the above the Respondent's title to the land may be declared of having been extinguished.
 4. Whether the suit land ought to be registered in the names of the Applicants in place of the Respondent who has never been in occupation of the same land and owing to the fact that the Applicants have been in peaceful, uninterrupted adverse possession and without any evasion or secrecy for the period stated.
 5. Whether the Applicants would thus be entitled to an order as to costs of this cause.



2. The Originating Summons was supported by an affidavit sworn jointly by the Applicants on 8th January 2019. The Respondent opposed it through a replying affidavit which he swore on 20th March 2019.
3. Hearing of the matter proceeded by way of oral evidence. the First Applicant testified as PW1 and adopted his witness statement in which he stated that the suit property was given to his father Shadrak Kisagane in exchange for land parcel number Maragoli/Buyonga/510 which belonged to Matia Kisagane who was the Applicants' grandfather. That the Applicants entered the suit property in 1980 and that the parties stayed peacefully in the respective parcels until the death of their elders when the Respondent attempted to evict them from the suit property.
4. In his oral testimony, PW1 stated that he was born in 1977 in the suit property and that the Second Applicant is his brother. That his father Shadrack was buried in the suit property when he passed away in 2005. PW1 went on to state that the Respondent is his cousin, and that the Respondent has never lived on the suit property.
5. PW1 also testified that his family of more than 12 people including himself and the Second Applicant were residing on the suit property as of the date of his testimony and had built houses, planted trees, sugarcane and maize on it. That the Respondent never made any effort to evict them for 40 years until the year 2020 when he went with police after issuing a notice to vacate.
6. Under cross-examination and re-examination, PW1 stated that his mother who was called Phanice died in 2010 and was buried in another parcel belonging to PW1 and not in the suit property. He added that a case was filed at Vihiga Court by Rosa who was the Respondent's mother seeking to stop burial of the Applicants' mother on the suit property and that a consent was recorded in the case. That he was not aware of any meeting to settle the land dispute where they agreed to vacate the suit property or of any 1992 land case.
7. The Second Applicant testified as PW2 and adopted the aforesaid joint supporting affidavit. He further testified that the First Applicant is his younger brother, that he was not a party in Nairobi HCC No. 410 of 1992 and that the Plaintiff in the said case was Stanley Liveha Mudanyi who is the Applicants' cousin. He added that he was also aware of Vihiga CMCC No. 31 of 2010 which concerned whether the Applicants' mother should be buried on the suit property, and which was settled leading to burial on a different parcel.
8. PW2 stated that he was aware of a meeting at Vihiga village on 23rd December 2015 during which there were discussions on distribution of Tadayo Mwenge Lusamati's property including the suit property which was distributed to Festo Lisamadi Kavita who was PW2's uncle. PW2 also stated that he was not aware of any meeting on 29th December 2015 or of any agreement on that date that the Applicants vacate the suit property. When shown an agreement dated 29th December 2015, he conceded that it bore his name but denied signing it. He further testified that the suit property is ancestral land and that he is claiming his share of the ancestral land. He also stated that besides the Applicants, other persons reside on the suit property, including Stanley Liveha's family which is in occupation of 1.5 acres of it, and that once the Applicants get title, they will transfer to Stanley Liveha his fair share.
9. The Applicants' case was thereby closed. Subsequently, the Respondent passed away on 10th January 2022 and was substituted with Catherine Leah Mudanya, pursuant to an order made on 21st February 2023.



10. Catherine Leah Mudanya (DW1) stated that Levi Mudanya Tadayo (the Respondent) was her husband and that he passed away on 10th January 2022. She adopted her witness statement dated 6th June 2023 and the Respondent's replying affidavit sworn on 20th March 2019.
11. The Respondent deposed in the affidavit that the Applicants' occupation of the suit property was not peaceful but had been filled with acrimony, disputes, court cases and violence. He referred the Court to judgment in Nairobi HCCC No. 410 of 1992 as well as a consent dated 5th July 2010 recorded in Vihiga CMCC No. 31 of 2010 and added that all disputes concerning the suit property were settled through an agreement dated 29th December 2015 which was signed by the Second Applicant. The Respondent further deposed that his father Tadayo Mwenge Lisamadi who died on 22nd February 2006 purchased the suit property from Settlement Fund Trustees in late 1980 and completed paying the purchase price on 30th November 1990.
12. DW1 stated in her witness statement dated 6th June 2023 that the Respondent was the registered proprietor of the suit property and that the Respondent obtained title from his late father Tadayo Mwenge Lisamadi. She added that the Applicants trespassed into the suit property and were farming in it.
13. Under cross-examination and re-examination, DW1 stated that neither her nor her husband ever resided in the suit property and that the Applicants were in occupation as of the date of her testimony.
14. Richard Mwanje (DW2) adopted his witness statement dated 6th June 2023. He stated that he is the Respondent's nephew and that he attended the meeting of 29th December 2015.
15. The Respondent's case was then closed. Thereafter, directions for filing and exchange of written submissions were given. Only the Respondent filed submissions.
16. 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.
17. Adverse possession is anchored on Section 7 of the Limitations of Actions Act which provides:

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.
18. Pursuant to Section 13 (1) of the Act, a right of action in recovery of land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run. Further, the procedure for moving the Court is found at Section 38 (1) of the Act which provides:

Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.
19. In terms of the holding of the Court of Appeal in *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR, a 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. 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 party 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.

20. From the copy of certificate of official search that was put on record, I note that the Respondent is the registered proprietor of the suit property, having been so registered on 31st July 2015 and title deed issued to him on the same date. It is not in dispute that the Respondent's predecessor in title was Tadayo Mwenge Lisamadi, his late father.
21. The parties herein have a close family relationship. The First Applicant testified that the Respondent is his cousin. The suit property is also part of the family relationship since the Applicants testified that it is ancestral land. In fact, part of the reason they lay claim to it is grounded on their assertion that it is their ancestral land.
22. The Court of Appeal dealt with the issue of whether adverse possession could apply within families against close relatives in *Samuel Kihamba v Mary Mbaisi* [2015] eKLR where the Court stated as follows:

The suit filed by the respondent against the appellant was founded on adverse possession where the respondent claimed to have acquired adverse rights over the suit land having occupied the same for over twelve years. Could the doctrine of adverse possession apply against the parties to the suit before the learned Judge who were related by being mother and step-son? We think not. We are persuaded by various dicta which we have quoted and relied upon in this judgement and must state that it would create havoc for families and the society of Kenya generally if the principle of adverse possession applied within families against close relatives.

23. In view of the close family relationship between the parties herein, adverse possession is inapplicable. This is in line with Section 13 (1) of the Limitations of Actions Act which stipulates that a right of action in recovery of land does not accrue unless the land is in possession of a person in whose favour the period of limitation can run. I am not persuaded that in the circumstances, the Applicants have demonstrated any wrongful dispossession of the rightful owner. Their presence on the suit property is attributed not to any possession of the proprietor or discontinuance of possession. Instead, they are in the suit property by virtue of their relationship with the Respondent and due to the exchange with parcel number Maragoli/Buyonga/510. As pleaded and prosecuted, their case suggests both a contractual and family relationship, thereby precluding adverse possession.
24. The foregoing aside, there are other reasons why, as I will now show, the Applicants have not established adverse possession. To sustain a claim for adverse possession, a claimant 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."

25. The Applicants conceded that a meeting was held involving them, their clan and the Respondent, concerning who would be entitled to the suit property. While the Respondent contends that the



meeting took place on 29th December 2015 and that it resulted in an agreement that was signed by the Second Applicant, the Applicants contend that a meeting took place on 23rd December 2015. The dispute on dates notwithstanding, there is concurrence that a meeting took place in December 2015 and that ownership of the suit property was the subject. This suit was filed on 11th January 2019, less than five years after the meeting. The requisite 12 years had not accrued by then.

26. Further, there is no dispute that there was prior litigation between the two sides. In particular, Nairobi HCCC No. 410 of 1992 between Stanley Liveha Mudanyi and Tadayo Mwenge Lisimadi. Judgment was delivered in the said case on 25th February 2005 wherein Stanley Liveha Mudanyi was ordered to vacate the suit property. PW2 testified that Stanley Liveha is the Applicants' cousin. There was also Vihiga CMCC No. 31 of 2010 between the parties herein, which case concerned the suit property herein. In view of those two cases, the Applicants did not have 12 years of quiet possession prior to filing this case.
27. Arising from the foregoing, I find that the Applicants have failed to establish adverse possession. In those circumstances, the reliefs sought by the Applicants cannot issue.
28. I find no merit in the Applicants' case, and I therefore dismiss it. Considering the family relationship between the parties, I make no order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 23RD DAY OF SEPTEMBER 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the Applicants

No appearance for the Respondent

Court Assistant: M Nguyayi

