



REPUBLIC OF KENYA



KENYA LAW
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**Masinzaji v Museve & 2 others (Environment & Land Case 9 of 2020)
[2024] KEELC 5945 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 5945 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 9 OF 2020
DO OHUNGO, J
SEPTEMBER 19, 2024**

BETWEEN

FABIAN LIYAYI MASINZAJI APPLICANT

AND

CYPRIANO IMBISI MUSEVE 1ST RESPONDENT

KIZITO KHATSIKA IMBISI 2ND RESPONDENT

ALEX MUSENYE MUKHONO 3RD RESPONDENT

JUDGMENT

1. The Applicant moved the Court on 16th March 2017, through Originating Summons dated 13th March 2017. The Originating Summons was supported by an affidavit sworn by the Applicant on 13th March 2017.
2. Later, the Applicant replaced the initial Originating Summons with Amended Originating Summons, amended on 20th January 2023 wherein he averred that he had acquired title to the parcel of land known as Idakho/Shivakala/2254 (the suit property) through adverse possession. He sought judgment for the following orders:
 - a. A declaration that the applicant has acquired the land parcel by adverse possession.
 - b. A declaration that the 1st respondent hold (sic) the suit property Idakho/Shivakala/2254 in trust for the applicant.
 - c. An order for transfer of land parcel Idakho/Shavakala/2254 from the 1st respondent to the applicant.
 - d. An order for eviction against the 3rd respondent.
 - e. An order of costs against the respondent.



3. The First Respondent opposed the initial Originating Summons through his Replying Affidavit sworn on 17th May 2017. Similarly, the Third Respondent opposed the initial Originating Summons through a Replying Affidavit which he swore on 17th May 2017.
4. The matter was heard through oral evidence. The Applicant testified as PW1 and adopted his above mentioned supporting affidavit. He further produced copies of the documents annexed to the affidavit, as his exhibits. He stated that in 1994, he purchased a portion of land parcel number Kakamega/Shivakala/936 which was then registered in the names of the First and Second Respondents. That he immediately moved into the property, commenced cultivation, erected structures and exercised all rights of ownership.
5. The Applicant further stated that on selling the portion, the First Respondent moved to Ileho since he was not in good terms with the Second Respondent who was his (the First Respondent's) brother. That upon conducting succession in respect of their late father's estate, the First and Second Respondents subdivided Kakamega/Shivakala/936 into other portions including Idakho/Shivakala/2254 (the suit property) which they registered in their joint names. That the First Respondent returned from Ileho in the year 2002 and sold the remaining portion at a consideration of Kshs 161,000 and that it was not until the year 2011 that the First Respondent forcefully moved back into the suit property and started interfering with the Applicant's quiet possession.
6. The Applicant went on to state that as a result of the First Respondent's interference, he filed a claim before the Ikolomani Land Disputes Tribunal and that when the Tribunal ruled in his favour, the First Respondent successfully challenged the outcome through Judicial Review. He also stated that the First Respondent purported to sell a portion of the land to the Third Respondent who moved into the portion. That the First Respondent had on several occasions admitted his claim on the suit property including through a letter from Akwala Advocate dated 26th July 2010.
7. Under cross-examination and re-examination, the Applicant stated that he stopped using the suit property in 2011 and that he was not in use or occupation as of the date of his testimony. That as of the date of the sale agreement in 1994, parcel number Kakamega/Shivakala/936 was registered in the name of Imbisi Wonekha who was already deceased and the vendor in the agreement had not obtained any letters of administration. He also conceded that as of the date of his testimony, he had not completed paying the purchase price and that there was a balance of Kshs 13,000.
8. Eustace Muljibhai Butichi (PW2) adopted his witness statement dated 7th February 2022 wherein he stated that he retired in the year 2021 as Senior Chief of Shirumba Location where Shivakala Sublocation was situated. That he started working in the area in 1996 and that he knew the suit property since it was located in his village and his jurisdiction. He also stated that the Application was already in possession when he started working in the area an Assistant Chief.
9. PW2 went on to state under cross-examination and re-examination that in the year 2009, he was a witness in a sale agreement pursuant to which the Applicant purchased Idakho/Shivakala/2254 (the suit property) from the First Respondent. He also added that as of the date of his testimony, the Applicant was no longer using the suit property.
10. On 28th June 2022, Counsel for the Applicant informed the Court that the Second Respondent passed away on 25th April 2022. Subsequently, upon an application by Counsel for the Applicant, the claim against the Second Respondent was marked withdrawn on 31st January 2023. Thereafter, the Applicant closed his case.



11. The First Respondent testified as DW1 Cypriano Imbisi Museve and adopted his Replying Affidavit sworn on 17th May 2017 and his witness statement dated 31st March 2021 as his evidence in chief. He also produced copies of the documents in his list of documents dated 31st March 2021.
12. The First Respondent stated in the affidavit and statement that through an agreement made on 31st August 1994, the Applicant agreed to purchase from him a portion of parcel number Kakamega/Shivakala/936 at a consideration of Kshs 86,000 out of which he paid Kshs 76,000 in instalments, leaving a balance of Kshs 10,000 which remained unpaid despite several reminders and demands. That instead of paying the balance, the Applicant filed Ikolomani Division Land Disputes Tribunal Case No 1 of 2011 against him for the whole of the suit property and that the Tribunal purportedly awarded the Applicant the parcel.
13. The First Respondent further stated that the Applicant had never been in occupation or use of the suit property and had never developed it. He added that he sold the suit property to the Third Respondent on 17th June 2009 and handed vacant possession to him.
14. Lastly, Alex Musonye Mukhono (DW2) adopted his witness statement dated 31st March 2021 as his evidence in chief. He stated therein that he purchased the suit property from the First Respondent on 17th June 2009 and paid the purchase price in full. He added that he took immediate possession, erected houses and started cultivating. He added that he remained in possession as of the date of his statement and that the Applicant had never been in possession of the suit property.
15. The defence case was then closed. Thereafter, the Applicant and the First and Third Respondents filed written submissions.
16. I have carefully 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. The ingredients of adverse possession were discussed by the Court of Appeal in the case of *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 Sabeel 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.

18. The Applicant herein testified that he stopped using the suit property in 2011 and that he was not in use or occupation both as of the date of filing this case and on the date of his testimony. Both the First Respondent and the Third Respondent confirmed that the Applicant is not in possession and had not been in possession as of the date of filing the case. The applicant's prayer for an order for eviction against the 3rd Respondent is testament to the fact that he is not in possession. Absence of possession is a key deciding factor against a claimant in adverse possession proceedings.
19. The Applicant's case is also grounded on claims that he purchased the suit property in 1994. He conceded that he has not completed paying the purchase price and that there remains a balance of Kshs 13,000.
20. Even if the Applicant had demonstrated that he had possession, which he has failed to do, he would still need to prove that his possession was hostile to the title of the registered proprietor. A claimant in adverse possession must demonstrate hostile possession by clearly asserting hostile title in denial of the title of the true owner. For such a claim to succeed, the claimant must demonstrate that his occupation was without the proprietor's permission.
21. Entry and occupation pursuant to a sale agreement is ipso facto by permission of the proprietor and does not therefore amount to adverse possession. That notwithstanding, once a purchaser completes paying the purchase price, his possession and occupation ceases to be by permission of the seller. In that case, 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.
22. To the extent that the Applicant has conceded that he has not completed paying the purchase price and that there remains a balance of Kshs 13,000, his possession, if any, would not qualify as adverse possession.
23. I find that the Applicant has failed to establish adverse possession. It follows therefore that he is not entitled to the reliefs sought.
24. The Applicant's case is without merit. I dismiss it with costs to the First and Third Respondents.

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

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the Applicant

Mr Shiloya holding brief for Mr Akwala for the First and Third Respondents

No appearance for the Second Respondent

Court Assistant: M Nguyayi

