



REPUBLIC OF KENYA



**Mbaya v Kadima & another (Environment & Land Case 113 of 2019)  
[2024] KEELC 6024 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6024 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 113 OF 2019  
DO OHUNGO, J  
SEPTEMBER 19, 2024**

**BETWEEN**

**JAMES OBWAVO MBAYA ..... APPLICANT**

**AND**

**MWAMZAMBI JOHN KADIMA ..... 1<sup>ST</sup> RESPONDENT**

**AGRICULTURAL FINANCE CORPORATION ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Proceedings commenced in this matter on 9<sup>th</sup> October 2019, when the Applicant filed Originating Summons dated 24<sup>th</sup> September 2019, which he later replaced with Amended Originating Summons amended on 27<sup>th</sup> October 2020. The Applicant averred in the Amended Originating Summons that he had acquired title to the parcel of land known as Kakamega/Lugari/4277 (the suit property) by adverse possession.
2. The Applicant sought determination of whether the First Respondent's title to the suit property had been extinguished, whether he should be registered as the proprietor, whether the First Respondent should be ordered to transfer the suit property to him and in default the Deputy Registrar of this Court be empowered to execute all necessary documents on his behalf, whether it should be declared that the charge registered on the suit property "is subject to the prescriptive rights created by operation of law in favour of the Applicant and as such not capable of displacing the ownership of the said land by the Applicant by way of adverse possession," and lastly, whether it be declared that the charge be discharged and the Second Respondent be at liberty to pursue the First Respondent for recovery of the loan advanced. The Applicant also sought costs.
3. Hearing of the matter proceeded by way of oral evidence. The Applicant testified as PW1 and adopted his witness statement dated 24<sup>th</sup> September 2019 and his affidavits which he swore on 24<sup>th</sup> September



2019 and 27<sup>th</sup> October 2020 in support of the initial Originating Summons and the Amended Originating Summons.

4. The Applicant testified that Peter Mbaya (Peter) who was his father entered into an agreement dated 31<sup>st</sup> May 1989 with Joseph Kadima Adeli (Joseph) who has since passed away and was the father of the First Respondent, pursuant to which Joseph sold 2 acres of parcel number Kakamega/Lugari/21 to Peter at Kshs 52,000. That Peter paid a deposit of Kshs 20,000 and that he (PW1) was a witness. PW1 further testified that the balance of Kshs 32,000 was paid on 7<sup>th</sup> June 1990 and that on 8<sup>th</sup> April 1992, Joseph and Peter entered into an agreement for sale to Peter of an additional quarter of an acre. He added that Joseph wrote an acknowledgement in Maragoli language and produced both the acknowledgement and a translation to English.
5. PW1 went on to testify that he and Peter took possession in 1989 after being shown the land by Joseph and that Joseph passed away in 1993 without effecting any transfer to Peter. That he and Peter continued possession until Peter passed away and that Margaret Kadima (Margaret) who was Joseph's widow sold to him (PW1) an extra one acre through a sale agreement dated 20<sup>th</sup> December 2000, at purchase price of Kshs 130,000, which he fully paid. He added that the First Respondent was a witness to the agreement and that he took possession upon being shown the land by Margaret. That he conducted a search on 19<sup>th</sup> May 2016 which showed that the First Respondent had registered the land sold to him (PW1) and Peter as Kakamega/Lugari/4277 (the suit property).
6. Under cross-examination and re-examination, PW1 stated that they took possession with Joseph's permission pursuant to the sale agreement and that Peter passed away in 1995 while Joseph passed away in 1993. That after Joseph's death, he and Peter purchased land from Margaret without Joseph's estate being distributed. He further testified that Peter initially purchased 2 acres and a further 0.25 acres later while he (PW1) purchased 1 acre, thereby making a total of 3.25 acres. He also conceded that the agreement dated 31<sup>st</sup> May 1989, the acknowledgement dated 8<sup>th</sup> April 1992, and the agreement dated 20<sup>th</sup> December 2000 do not state the parcel numbers affected and that the suit property measures 1 hectare which is less than the total of 3.25 acres which he claims they purchased. That he and his family were in exclusive occupation of the suit property as of the date of his testimony.
7. Joshua Munzatsi Mbaya (PW2) testified that the Applicant is his younger brother. He adopted his witness statement dated 15<sup>th</sup> February 2020 and stated that neither the Applicant nor Peter ever resided on parcel number Kakamega/Lugari/21. That Peter was not buried on the suit property but at Lumakanda where the Applicant was also residing as of the date of PW2's testimony and that parcel number Kakamega/Lugari/21 was subdivided, and that the defendant and his siblings are living on the subdivisions.
8. When the matter came up for further hearing on 18<sup>th</sup> May 2023, Counsel for the Second Respondent informed the court that the Second Respondent had no interest in the suit since although the suit property had been charged in its favour by the First Respondent, a discharge had been registered on 29<sup>th</sup> November 2020. Upon an application by the Applicant, the claim against the Second Respondent was marked withdrawn with no order as to costs.
9. Mary Ingado Mbaya (PW3) adopted her witness statement dated 15<sup>th</sup> February 2020 and testified that the Applicant is her cousin. That as of the date of her testimony, the Applicant was not residing on the suit property. She added that she was staying on the suit property with the Applicant's permission and the Applicant was cultivating the suit property and overseeing the work on it and that the Applicant started using the suit property in the year 2005.
10. The Applicant then closed his case.



11. Mwanzambi John Kadima (DW1) adopted his Replying Affidavit and his witness statement, both of which he filed on 6<sup>th</sup> February 2020. He stated that parcel number Kakamega/Lugari/21 was originally owned by Joseph, his father, and that upon Joseph's demise, the parcel was registered in the joint names of DW1 and Margaret, his mother, as administrators of Joseph's estate, on 10<sup>th</sup> June 1998. That Margaret later transferred the parcel to DW1 who subdivided it to create Kakamega/Lugari/4277 to Kakamega/Lugari/4291 on 16<sup>th</sup> June 2014. He added that Kakamega/Lugari/4277 (the suit property) was registered in his name and that the Applicant had never been in occupation or use of the suit property.
12. DW1 went on to testify that the Applicant did not reside on the suit property but was instead residing in Kapsabet and Lumakanda. He added that there was no house, sugar cane crop or planted trees on the suit property and that Peter did not purchase the suit property. He also testified that Margaret passed away in 2018 and that he was not aware if she sold any extra land to the Applicant. When shown the agreement dated 20<sup>th</sup> December 2000 between the Applicant and Margaret, he conceded his ID number and signature were on it but added that it was a lease and not a sale agreement.
13. Defence case was then closed.
14. The Applicant then made an oral application through his Counsel, for a site visit. The First Respondent opposed the application. I allowed the application, for reasons stated in a ruling which I delivered on 18<sup>th</sup> May 2023. I ordered that the Deputy Registrar of the Court visits the suit property and files a report in Court.
15. The Deputy Registrar visited the suit property on 29<sup>th</sup> September 2023 in the presence of the parties together with their Counsels, Edith Ayodi who was the area Chief as well as PW3 and filed a report dated 6<sup>th</sup> October 2023. The Deputy Registrar recorded in the report that there was a semi-permanent two roomed house and a pit latrine in the suit property. She further recorded that there were trees, a sugar cane plantation and electricity connection pole next to the house. She also recorded that the Applicant stated during the site visit that he planted the trees in the year 2009, connected electricity to the house in the year 2018 and that he planted the sugar cane in the year 2018. That on the other hand, the First Respondent stated that the house was built by his father Joseph who also planted the trees to mark the boundary, and that the electricity was connected by World Bank.
16. The Deputy Registrar also reported that the area Chief stated that she did not know and had never met the Applicant and that the semi-permanent house had been in existence before the year 2008 although she did not know who constructed it. The area Chief further stated that she had seen PW3 living in the house since the year 2008 and that the parties to this case did not report any dispute to her office.
17. Parties filed and exchanged written submissions after receiving the Deputy Registrar's report. I have carefully considered the pleadings, evidence and submissions. The issues that arise for determination are whether the Applicant has established adverse possession and whether the reliefs sought should issue.
18. The law relating to adverse possession is settled. As the Court of Appeal stated 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 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 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.
19. The Applicant's case is that he and his father Peter entered the suit property pursuant to sale transactions. He in particular relied on sale agreement dated 31<sup>st</sup> May 1989, an acknowledgement dated 8<sup>th</sup> April 1992, and sale agreement dated 20<sup>th</sup> December 2000. A perusal of the sale agreement dated 31<sup>st</sup> May 1989 shows that it was between Peter and Joseph. Similarly, a reading of the acknowledgement dated 8<sup>th</sup> April 1992 and its certified translation to English shows that it was made in favour of Peter. The Applicant testified that Peter passed away in 1995.
  20. The Applicant has neither pleaded nor demonstrated that he holds any letters of administration in respect of Peter's estate. Consequently, he cannot validly agitate any cause of action vested in Peter's estate. See *Trouistik Union International & another v Jane Mbeyu & another* [1993] eKLR and *CKM v ENM & another* (Civil Appeal 250 of 2019) [2024] KECA 293 (KLR) (8 March 2024) (Judgment). It follows therefore that the Applicant's claim in so far as it is based on Peter's alleged occupation of the suit property is a nullity.
  21. The Applicant also claimed under his own right, pursuant to sale agreement dated 20<sup>th</sup> December 2000. I am aware that the First Respondent claimed that the said agreement was a lease as opposed to a sale agreement. I have perused the said agreement, and I note that the First Respondent admitted that it bears his signature and National Identity Card Number. I also note that the document was prepared by filling a previously typed form. The blank form was meant to be used either as sale agreement or a lease agreement. In the filled version that the parties produced, the words "lease" and "leaser" are crossed out. I further note that the document states: "Size of land sold 3¼ acres Plot No 21 Price Kshs 130,000." I am satisfied that the parties had a sale agreement.
  22. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It follows that for a claim of adverse possession to succeed, the claimant must demonstrate that his occupation was without the proprietor's permission. A person who enters another's land and occupies it pursuant to a sale agreement cannot deny that he had the proprietor's permission to remain on the land. Time for purposes of adverse possession cannot run in favour of such a person for as long as his presence on the land by permission of the proprietor. Nevertheless, once a purchaser completes paying the purchase price, his possession and occupation of the purchased 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.
  23. The Applicant contends he fully paid the purchase price of Kshs 130,000 in terms of the agreement dated 20<sup>th</sup> December 2000. The agreement itself states that the amount was paid in cash. I am satisfied that the purchase price was paid on 20<sup>th</sup> December 2000. Time for purposes of adverse possession could therefore run in favour of the Applicant after 20<sup>th</sup> December 2000, once he demonstrates entry and possession.
  24. Although the agreement refers to size of the land sold as 3.25 acres, the Applicant testified that he only purchased 1 acre through the agreement dated 20<sup>th</sup> December 2000 and that the 3.25 acres is arrived at by taking into account 2.25 acres which Peter purchased earlier.
  25. Regarding date of entry and occupation, the Applicant gave contradicting evidence. On the one hand, he claimed that he entered parcel number Kakamega/Lugari/21 with Peter pursuant to the sale agreement dated 31<sup>st</sup> May 1989 and acknowledgement dated 8<sup>th</sup> April 1992. On the other hand, PW2 testified that neither the Applicant nor Peter ever resided on parcel number Kakamega/Lugari/21.



PW2 also testified that Peter was not buried on parcel number Kakamega/Lugari/21 but at Lumakanda where the Applicant was also residing as of the date of the hearing.

26. I further note PW3's testimony that the Applicant started using the land in the year 2005. She did not however specify in what manner the Applicant used the land from 2005. The Applicant himself did not testify on any use and occupation in 2005. During the site visit by the Deputy Registrar, the Applicant stated that he planted trees in the property in the year 2009 and sugar cane in 2018. On the same occasion of the visit, the area Chief stated that she had never met the Applicant and that she had seen PW3 living in the semi-permanent house since the year 2008.
27. What is manifest from the foregoing is that the Applicant was not personally in occupation of the suit property and even its predecessor, parcel number Kakamega/Lugari/21. His claim to occupation and use are through planting trees and sugar cane and installing PW3 in the suit property. While possession need to be personal, and constructive possession can also count, (See *Samuel Kihamba v Mary Mbaisi* [2015] eKLR) the requisite 12 years of uninterrupted possession must be established, whether personal or constructive.
28. From the material on record, the earliest that any occupation can be attributed to the Applicant is from 2008 when PW3 moved into the suit property. If anything, the Applicant's own testimony gives later dates since he stated that he planted trees in the property in the year 2009 and sugar cane in 2018.
29. The Applicant filed this suit on 9<sup>th</sup> October 2019. The requisite 12 years of quiet and uninterrupted possession had not been established as of the date of filing this suit.
30. While it is manifest that the Applicant had a purchase transaction with Margaret in connection with 1 acre of parcel number Kakamega/Lugari/21, it must be emphasised that adverse possession is not a procedure for enforcing sale of land transactions. A party moving the court for adverse possession must strictly establish all the ingredients of a claim for adverse possession. If he fails, the claim will equally fail, notwithstanding any sale agreement.
31. In view of the foregoing discourse, I find that the Applicant has not established adverse possession. It follows that the reliefs sought are not available to him.
32. In the result, I dismiss the Applicant's case. Considering the circumstances, I make no order as to costs.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Mr Amasakha for the Applicant

Mr Osango for the First Respondent

No Appearance for the Second Respondent

Court Assistant: M Nguyayi

