Kenyambi v Kwamboka (Sued as Administrator of the Estate of David Ombeo) (Environment and Land Appeal E013 of 2023) [2024] KEELC 14187 (KLR) (24 October 2024) (Judgment)

Neutral citation: [2024] KEELC 14187 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT AND LAND APPEAL E013 OF 2023

M SILA, J

OCTOBER 24, 2024

BETWEEN

SAMWEL MOGIRE KENYAMBI ..... APPELLANT

AND

MARY KWAMBOKA ..... RESPONDENT

SUED AS ADMINISTRATOR OF THE ESTATE OF DAVID OMBEO

(Being an appeal from the judgment of Hon. P.K Mutai, Principal Magistrate, delivered on 25 October 2023 in the suit, Kisii CMCCELC No.23 of 2022 (OS))

JUDGMENT

(Appellant having filed suit for adverse possession claiming part of the suit land; appellant stating that he purchased the disputed portion from the deceased and that he took possession until the respondent cut his trees and crops; respondent who is administrator of the deceased refuting this position and asserting that she was not aware of any sale of the land and not aware of the appellant's alleged possession of the suit land; trial court dismissing the case of the appellant on the reasoning that he could not base a case of adverse possession on a sale agreement; whether a sale agreement cannot be used as a basis for adverse possession; sale agreement can indeed be used to lay a foundation for a case for adverse possession for it demonstrates how the claimant came into possession; erroneous for the trial court to dismiss the appellant's suit on this ground; court however not convinced that the appellant had proved that he was in adverse possession of any part of the suit land for the statutory period of 12 years; appellant not availing any surveyor's report to show what part and size of the suit land he occupied; no evidence led on when exactly the appellant came into possession; there being evidence of the dispute having been referred to a baraza in 2005 for resolution but not clear whether the appellant took possession after the resolution of the baraza which appeared to affirm his claim to purchase of part of the land; appeal dismissed)

1. The appellant commenced suit vide an Originating Summons filed on 30 March 2022 wherein he asserted that he has acquired title, by way of adverse possession, to a portion of land measuring 0.162 Ha, from the land parcel Central Kitutu/Mwamanwa/1XX5 (the suit land). The said land was registered in name of David Ombeo (deceased) of whom the respondent is legal representative, though the land was subsequently transferred to the individual name of the respondent on 27 September 2022. In his Originating Summons, and in the supporting affidavit thereof, the appellant averred that David Ombeo (the deceased) sold to him the parts of the suit land in bits. He claimed that on 15 October 2003 he purchased land measuring 35.6m by 20.6m equivalent to 0.073 Ha; that on 22 April 2004, the deceased sold to him a further portion measuring 53.4m by 20.6m, equivalent to 0.110 Ha ; that further on 5 June 2004, the deceased sold another portion measuring 8.9m by 20.6m equivalent to 0.037 Ha. He stated that in total, he purchased land measuring approximately 0.220 Ha. He deposed that he made the final payment of Kshs. 4,000/= on 23 July 2004 which he sent to the deceased in Nairobi through Linear Coach, a parcel delivery provider. He averred that the vendor passed on shortly thereafter sometimes in 2004 before they could obtain the necessary Land Control Board consent and effect transfer of the land sold. He averred that he nevertheless took possession, and continued being in possession, and carried out various farming activities including planting maize, trees and tea. He annexed various photographs which he stated depict his possession of the disputed land. He averred that the dispute went to a baraza (a meeting called by the Chief and which would ordinarily have some elders and is sometimes used to settle disputes) and he annexed the proceedings thereof. He stated that pursuant to the holding of the baraza the land was measured afresh and the total size came to 0.162 Ha. He averred to have continued possession until early 2022 when the respondent and her children encroached, cut down trees, and destroyed maize that he had cultivated. He lodged a report at the police and requested for a crop damage assessment report which he exhibited.

2. The respondent filed a replying affidavit to oppose the suit. She deposed that the appellant had since the demise of her husband in 2004, been on a fraudulent scheme to arrogate himself a substantial chunk of the suit land, which is her ancestral land. She demanded that the appellant produces evidence to show which part of the suit land he purports to have been in adverse possession of and which he sought to safeguard. She averred that she was personally acquainted with the whole of the land and has lived there all her adult life. She deposed that the suit land habours several families who depend on it. She refuted the sale agreements displayed by the appellant and asserted that her family has been in possession of the whole of the suit land. She however deposed that in the years preceding her husband's demise, they, through her husband, had orally permitted and licenced the appellant, together with other persons, to cultivate some crops in a specified part of the land; that the appellant dutifully did so during the lifetime of her husband, and never at any point purported to assert exclusive possession or ownership of the land, and they have always freely entered and used the land. She deposed that it was only after the death of her husband on 30 August 2004 that the appellant emerged with a series of agreements purporting to have bought parts of the land and it is at this point that he demanded the said parts to be measured and allocated to him which she strongly contested. She averred that instead of instituting legal action, the appellant unilaterally convened an informal meeting of some persons to hear his claims which she strongly contested. She averred that even after the disputed findings the appellant never instituted any legal action and that it was on 28 February 2022 when she was harvesting timber and clearing the land that the appellant emerged with claims that he owns parts of the land. She emphasized that the appellant had not tendered any document or shred of evidence to prove that he is, or has ever been, in exclusive possession of any part of the suit land. She contended that the case of the appellant is a fraudulent means of defeating a valid title harbouring ancestral homes to several families.

3. The suit proceeded by way of viva voce evidence.

4. PW-1 was the appellant. He had a written statement which he adopted as his evidence. He also produced as exhibits the disputed sale agreements dated 15 October 2003, 22 April 2004, 5 June 2004 and 11 July 2004. He produced some photographs said to be of the suit land, the proceedings before the area Chief, and a receipt of Kshs. 4,000/= from Linear Coach which he averred proved that he sent the last installment to the deceased. He stated that he purchased the land in bits and that in the year 2004 the transfer was to be effected but the vendor died. He averred that on 24 March 2005, the respondent, whom he described as 2nd wife of Mr. Ombeo, made a complaint to the Chief alleging that he had illegally trespassed into the suit land and that she was not aware how he came to be in possession. He elaborated that a meeting was convened and witnesses who had attested the sale agreements were summoned and it was found that he was the rightful owner of the land. He stated that later, the land of Mr. Ombeo was subdivided and each owner, that is the buyers and the family, was issued with their rightful shares. He claimed that he was allocated a portion with other purchasers and that he fenced his land with a live fence and grevillea trees acting as beacons. He stated that he occupied the land and cultivated it, planted tea, trees, maize and napier grass. On 3 December 2019, he was informed that the respondent intended to sell his land and he proceeded to the Lands office and placed a caution which was however removed on 8 March 2021 through an order of court. In early 2022, the respondent and her sons wished to evict him and they uprooted the fence, and threw away his maize and fertilizer that he intended to use for planting. He reported the incident to the area Chief, Kiangoso Location, who convened a meeting. He averred that the dispute was resolved and the respondent compensated him for the damage caused. Later on, after planting maize, the respondent and her sons uprooted his fence and cut down his trees, which incident he again reported to the Chief who convened a meeting with the Chief, Sengera Location. The meeting held that the land belonged to the appellant and the respondent and her sons advised to seek legal redress if they had a concern. He stated that they later cut down his 25 trees and he reported the matter at Sengera, Manga Police Station. They were all summoned to the Police Station, together with the Chiefs who had heard their dispute, and the cut timber was collected from the land and taken to the Police Station. The OCPD and OCS recommended to the respondent to seek legal redress and the timber was returned to him. He stated that the respondent has never been in occupation or use of the land and that he has been in possession for 19 years since purchasing it. He contended that the respondent unlawfully continues to interfere with the land. Cross-examined, he inter alia testified that the land is divided into four portions ; that he has developments on his portion and the respondent has also developed her portion. He stated that the measurements are as depicted in the agreements that he produced. He did not raise issues when a succession cause was filed by the respondent as he was not aware of it and only came to know of it when the caution was removed.

5. PW- 2 was Charles Nyakundi. He also relied on a witness statement that he had recorded. In it, he stated that he was a worker of the late David Ombeo. He stated that in 2003 and 2004, David Ombeo requested him to witness land sale agreements between himself and the appellant and that he witnessed the sale agreements of 15 October 2003 and 22 April 2004. He stated that he was present when the appellant gave David Ombeo the money for the two portions depicted in those two sale agreements. He later came to learn that the respondent and her sons were alleging that the appellant had not purchased the land but had only leased it. He added that the respondent had never been in occupation of the land and that the appellant had since buying it been using it and planted tea, trees, maize and napier grass. Cross-examined, he testified that he was not aware of any dispute over the land. He did however state that the Chief visited the land. He averred that the respondent has been chasing the appellant. He was aware that the respondent had some produce on the land. Re-examined, he stated that the appellant was chased from the land when the respondent's husband died. He now stated that he attended the Chief's meeting. He added that the respondent had her separate land and her produce.

6. PW – 3 was Benson Angwenyi, a businessman and church elder. He also relied on a pre-recorded witness statement in which he stated that David Ombeo was his uncle. His evidence was that he witnessed the third land sale agreement exhibited by the appellant. He averred that on 24 June 2004, Mr. Ombeo took him to the land and showed him the two portions he had sold to the appellant and one Joseph Kerina, and also informed him that he intended to sell another portion to the appellant. They proceeded to the home of the appellant and a sale agreement for land measuring 17.8 by 20.6 metres for a price of Kshs. 22,500/= was entered into. He stated that on 5 June 2004, the appellant made a deposit of Kshs. 3,500/= and on 24 June 2004, he paid Kshs. 5,000/= which was included in the sale agreement. Subsequently on 11 June 2004, the appellant paid Kshs. 10,000/= and the balance of Kshs. 4,000/= was sent through Linear Coach on 23 July 2004. He continued that in the year 2005, the respondent made a complaint to the Chief alleging that the appellant had illegally trespassed into the land and that she was not aware of how the appellant came to be in possession. A meeting was convened and witnesses summoned and it was determined that the appellant was the rightful owner. He stated that the respondent had never been in occupation and that it was the appellant who occupied it since purchasing it. He stated that he planted tea, trees and maize. He added that the respondent unlawfully continues to interfere with the property and unless restrained she will likely alienate the appellant from the land. Cross-examined, he affirmed that no transfer took place. He stated that in 2005 the respondent wished to know her portion. He did not know about a land dispute. He testified that the appellant was chased out of the land. He elaborated in re-examination that in 2005 the respondent wished to be shown her portion of land by the Chief and that he heard of a dispute in the same year.

7. PW – 4 was Tom Magusa Maonga. He also relied on a witness statement that he had recorded. He mentioned that on 24 June 2004, the appellant requested him to witness a land sale agreement between himself and the late Ombeo, which he did. He stated that on 5 June 2004, the appellant made a deposit of Kshs. 3,500/= and paid Kshs. 5,000/= on 24 June 2004. Subsequently on 11 July 2004, Kshs. 10,000/= was paid and also the balance of Kshs. 4,000/=. He testified that the respondent has never been in possession of the suit property and that it was the appellant who was using it since purchase. He added that the respondent interferes with his possession. Cross-examined, he testified that he has never witnessed a dispute over the land. He acknowledged that the respondent had produce on the land. He did not know about the acreage. He stated that they (probably meaning respondent and her family) cut the trees of the appellant and that the appellant was no longer allowed to get to the land.

8. With the above evidence the appellant closed his case.

9. DW- 1 was the respondent. She relied on her replying affidavit as her evidence. She testified that the appellant has never been on the disputed land and they have never allowed him entry into it. She stated that she was the one using the land and had planted maize, bananas, tea and potatoes. She denied having a sitting before the Chief. Cross-examined, she testified that the first wife of Mr. Ombeo was one Divinah Mokeira who is deceased. She testified that her late husband had two parcels of land; the ancestral land at Manga Ritogo, and the suit land which he purchased. She refuted that her late husband sold the land. She stated that he used to live in Nairobi and died of a heart attack. She denied raising any issue with the Chief and denied giving any evidence before the Chief. She stated that she chased the appellant away from the land. On the trees, she asserted that these were her trees on the land.

10. DW – 2 was Justus Ombinya Mongeri, a step-son of the respondent. He also had a witness statement which he adopted as his evidence. In it, he stated that the whole of the suit land has been their home for decades and was not aware of any sale of any part of the land. He recalled that his father only leased some portions to neighbours for cultivation of crops through oral agreements made in presence of the family. He stated that upon the death of his father, the appellant purported to claim that he had bought portions of the land which claims were found to be baseless. He pointed out that the appellant had

not tendered any document to prove that he has ever been in exclusive possession of any part of the suit land. In court, he added that the appellant was chased out of the land. Cross-examined, he stated that there was only one buyer of the land called Happiness Mary who bought from the respondent. He did not know of a Joseph. Regarding the tea bushes, he stated that he found them at birth and they belonged to his father. On the trees, he stated that they belong to the respondent.

11. DW-3 was Peter Oseko Omwange, a nephew of the deceased. He also relied on a pre-recorded witness statement wherein he inter alia stated that it is upon the demise of his uncle that the appellant started claiming the land and he was not aware of any sale of the land to him. Cross-examined, he testified that the late Ombeo was buried in his ancestral land and not the suit land. He stated that it was in 2004 that the appellant started claiming the land and the respondent made a report to the Chief but he did not know the details. He did not know of the decision made by elders. He stated that it was not possible that the appellant took possession in 2004. He denied that the appellant had tea and trees on the land and he asserted that these belonged to the deceased.

12. With the above evidence, the respondent closed her case.

13. Counsel were invited to file written submissions, which they did, culminating in the impugned judgment delivered on 25 October 2023. In the judgment, the trial Magistrate alluded to Sections 7 and 13 of the *Limitation of Actions Act*, Cap 22, Laws of Kenya, and the ingredients of adverse possession, that is open, quiet, continuous occupation of land for at least 12 years. He then proceeded to find that the appellant was claiming the land on the basis of a sale agreement and he then questioned if a party can claim adverse possession 'while waving sale agreements.' He concluded that the appellant cannot succeed on the basis of the sale agreement and on that ground he dismissed the case of the appellant. He did state that in his holding he was relying on the Court of Appeal decision in the case of Samuel Miki Waweru vs Jane Njeru Richu, Civil Appeal No. 122 of 2001.

14. Aggrieved, the appellant filed this appeal inter alia contending that the trial Magistrate erred in finding that a claim for adverse possession cannot be founded on a sale agreement; that he relied on irrelevant and distinguishable case law; that he erred in failing to find that all the legal elements of adverse possession had been satisfied; and that his judgment was against the weight of evidence. The appellant asks that the appeal be allowed and a finding be made that the appellant has proved his case.

15. I invited counsel to file submissions and I have taken note of the submissions filed by Mr. Ochoki, learned counsel for the appellant, and Mr. Bunde, learned counsel for the respondent.

16. The first issue I address myself on is whether the trial Magistrate was correct in dismissing the suit because the appellant relied on sale agreements. It will be observed that in his judgment, the trial Magistrate was of opinion that since the appellant was claiming the land on the basis of a sale agreement then adverse possession cannot lie. He in fact, as I have pointed out, stated that he was relying on the judgment in the case of Samuel Miki Waweru vs Jane Njeri Richu to support this conclusion.

17. Within this appeal, Mr. Bunde, learned counsel for the respondent, advanced the same argument, and relied on the Court of Appeal decision in the case of Muchanga Investments Limited vs Safaris Unlimited (Africa) Limited & 2 Others, and the decision of the Environment and Land Court in Homa Bay, in the case of Nicholus Ogelo Jabuya vs Sypriano Awino & Another, Homa Bay ELC OS No. 49 of 2021. Mr. Ochoki was of a contrary opinion and he also supplied authorities to fortify his assertion. He inter alia referred me to the Court of Appeal decisions in the case of Wambugu v Njuguna (1983) KLR 172; Public Trustee vs Wanduru (1984) KLR 314; Hosea v Njiru (1974) EA 526, and the same case of Samuel Miki Waweru vs Jane Njeri, that the trial court relied upon to dismiss the appellant's suit. I have considered the rival arguments on this point and also considered the authorities provided.

18. Let me start by asserting that it is not the legal position that one cannot found a case of adverse possession on the basis of a sale agreement. I have come across arguments, and it was argued herein, that when one enters into possession of land pursuant to a sale agreement, then he enters the land with the permission of the seller and therefore the possession cannot be adverse. That cannot be true. In fact, the legal position is that one can use a sale agreement as the foundation upon which to build a case for adverse possession. When one purchases land, and pays fully for it, he is now no longer in possession of the land with the permission of the seller. He is in possession of the land asserting his own right to it because he has bought it. If the title is still with the seller, the possession of the purchaser is clearly adverse to the title of the seller. The buyer in such instance is not in possession under a licence given by the vendor, and is not a licencee. Neither is he a tenant of the registered proprietor. He possesses the land as an owner by virtue of purchase, because once you buy something, then you own it from the date of purchase. If such purchaser continues to possess the land for a peaceful, open, continuous and uninterrupted period of 12 years, then he is entitled to claim it by way of adverse possession. After 12 years, he wouldn't be claiming it under the sale agreement, i.e he would not be suing to enforce the terms of the sale agreement through a prayer for specific performance, but he would be suing because he has clocked 12 years of continuous, quiet possession, and thus entitled to the land by virtue of adverse possession. The sale agreement will demonstrate how and when he got into possession and on what basis he continued being in possession of the land. In essence, he will build his case for adverse possession on the foundation of the sale agreement, which will show the manner in which the registered proprietor came to be dispossessed of the land, and how the claimant came to be in occupation of the land, but he will certainly not be enforcing the sale agreement. In any case enforcement of the sale agreement would have been time barred by virtue of Section 7 of the *Limitation of Actions Act*.

19. The issue whether one who holds a sale agreement can sue for adverse possession is in fact settled by judicial authority. In the case of Wambugu vs Njuguna (1983) KLR 172, it was held that time in favour of the buyer starts running after he completes the purchase price. The court stated as follows :

> " Where a claimant pleads the right to land under an agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is : the claimant's possession is deemed to have become adverse to that of the owner after payment of the last instalment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least twelve years after such payment."

20. The question had in fact been earlier canvassed and settled by Simpson J in the case of Hosea vs Njiru & Others (1974) EA 526. In that case the plaintiff claimed the suit land by adverse possession on the basis of a purchase. Simpson J, held that his possession became adverse on 22 June 1957, the date on which the last payment of the purchase price was made.

21. In instances where the sale agreement is subject to the consent of the Land Control Board, it has been held that adverse possession commences from the date that the sale agreement becomes void. This was in fact the ratio decidendi of the Court of Appeal in the case of Samuel Miki Waweru vs Jane Njeri Richu (2007) eKLR. The court held as follows :

> " In our view, where a purchaser or lessee of land in a controlled transaction is permitted to be in possession of the land by the vendor, or lessor pending completion and the transaction thereafter becomes void under Section 6 (1) of the *Land Control Act* for lack of consent of the Land Control Board such permission is terminated by the operation of the law and the continued possession, if not illegal, becomes adverse from the time the transaction becomes void."

22. In the above case, the respondent filed suit for adverse possession on 27 January 1999. She claimed to have purchased one acre out of the land parcel Komothai/Igi/229 comprising of 3.9 acres on 15 April 1969 and that she paid the full purchase price. The trial judge found that the sale agreement became null and void after 6 months for lack of consent of the Land Control Board and was satisfied that the respondent had made a case for adverse possession. This decision was affirmed by the Court of Appeal.

23. With utmost respect, I do not see how the trial Magistrate could have held that the case of Samuel Miki Waweru vs Jane Njeri Richu supports the argument that one cannot sustain a case for adverse possession upon a sale agreement. On this issue the trial court was clearly wrong as I have laid out plainly what the ratio decidendi of the case was.

24. I have looked at the case of Muchanga Investment v Safaris Unlimited and Nicholaus Ogelo and Nicholus Ogelo Jabuya vs Syprianos Awino & Another (Jabuya vs Awino & Another) relied upon by Mr. Bunde. I think the case of Muchanga Investment was quoted out of context. That case was an appeal against an interlocutory order made by the High Court refusing to strike out an Originating Summons that sought prayers to extend the registration of a caveat. I am not persuaded that in the context of that case the Court of Appeal ever interrogated whether a purchaser can mount a case for adverse possession. However, the learned judge in the case of Jabuya vs Awino & Another appears to have decided that adverse possession cannot be founded upon a sale agreement. In the suit, filed in the year 2020, the plaintiff had urged that his father purchased the disputed land in 1968 and he and his family continued being in possession thereafter. In dismissing the suit, the court (Ong'ondo J), held as follows :

> "In light of the plaintiff's admission that his father purchased the suit property, adverse possession cannot arise. Indeed, it cannot co-exist with the purchaser's interest as held in Muchanga Investment Limited case (supra). In that scenario, the entry of the plaintiff into the suit property was consensual..."

25. With respect, I disagree with the above holding. I have already explained that a purchaser, on completion of the purchase price, or upon the sale contract becoming void if it was subject to issue of consent of the Land Control Board, no longer occupies the land with the permission or consent of the seller, but now occupies the land as if it was his own and that possession henceforth is adverse to the title of the proprietor. I have also demonstrated that judicial authority confirms this view. I have pointed out that the Muchanga Investment Limited case was not a substantive case where the issue of purchaser vis-à-vis adverse possession was decided upon a hearing but the Court of Appeal was dealing with a ruling on removal of a caveat. That is why, with respect, I am not persuaded by the view held by my brother in the case of Jabuya vs Awino & Another.

26. It will be remiss of me not to cite the case of Public Trustee vs Wanduru (1984) KLR 314 , if only to press the point home. In that case, the claimants purchased land through a sale agreement entered into on 16 March 1967. No consent of the Land Control Board was issued and the transaction therefore became void. They launched suit on 2 April 1979. On appeal, the Court of Appeal upheld the claim for adverse possession affirming that possession commenced when payment was made, and physical possession of the land taken up. The Court of Appeal was clear that the cause of action was not to enforce the agreement but one for title to land through the doctrine of adverse possession, but the sale certainly showed when and how the appellants had come into possession.

27. My holding therefore is that one can base a claim for adverse possession on a sale agreement. If he has completed the purchase price, or the contract is terminated, his possession starts being adverse to that of the registered proprietor. The purchase is not the cause of action, and the sale agreement is not

sought to be enforced through an order of specific performance, but that sale agreement elaborates how the plaintiff took possession and why he continued being in possession to the exclusion of the registered proprietor.

28. In essence, I do hold and find that the trial court was wrong in dismissing the suit of the appellant for reason that his case was founded upon a sale agreement.

29. What the court needed to do, and that is what I will proceed to do, is to assess whether the appellant had proved the ingredients for adverse possession, that is, whether he had proved possession that is nec vi, nec clam, nec precario, that is possession which is without violence (peaceful possession), without secrecy and without permission, for a continuous uninterrupted period of 12 years.

30. The appellant's claim of course had foundation in the sale agreements and he asserted that he had a series of them. To support his contention that he truly purchased several bits of the suit land, the appellant produced what he described to be the sale agreements that he had with the deceased and also called several witnesses to attest to the said sale agreements. He also availed minutes of a baraza that he said was held in attempt to settle the dispute. I have gone through the documentation and evidence on this point.

31. There are some handwritten agreements and some typed agreements. The typed agreements are two, shown to be drawn by M/s Siagi Magara & Company Advocates, Kisii. The first of the typed agreements is that dated 15 October 2003. That sale agreement avers that David Ombeo is selling to the appellant land measuring 35.6m by 20.6m out of the suit land at a consideration of Kshs. 45,000/= which is acknowledged as paid. The agreement has a clause that the purchaser shall take vacant possession of the purchased land as from 1 January 2004 and further that the parties will proceed to the Land Control Board for issuance of the requisite consent. The agreement has four witnesses being David Nyamasege, Charles Nyakundi, Ombogo Omwenga, and Magusa Onyango. The second typed sale agreement is dated 22 April 2004. The vendor is David Ombeo and the purchaser is the appellant. What is sold is land measuring 53.4 by 20.6 metres for a consideration of Kshs. 55,000/= which is acknowledged. Inter alia the sale agreement has a clause that the purchaser shall take vacant possession of the purchased land immediately without any precondition at all. The agreement also has a clause that the survey fees and the Land Control Board fees shall be shared equally. The witnesses noted in that agreement are Ombogo Omwenga and Charles Nyakundi.

32. The handwritten agreements are a bit difficult to follow. I first see an agreement dated 19 June 2003, selling land measuring 20.6 by 25m to the appellant out of the suit land for Kshs. 30,000/=. The witnesses are Magusa Onyango, Reuben Kenyambi, David Nyamasege, Petto Manyara, and John Kinanga. The second is an agreement dated 6 October 2003 which says that David Ombeo has sold to the appellant land measuring 20.6 x 10.6m for Kshs. 15,000/=. The witnesses noted are Charles Nyakundi, Omboga (the other name not clear) and Magusa Onyango. The third is an agreement dated 5 June 2004 which says that Kshs. 3,500/= is received from the appellant which the seller "will add to the third stage piece of land following the old measurements as the procesture of old agreement (sic)." It continues to say "and today day of 24/06/2004 I have received Kshs. 5,000 and he has remained with a balance of Kshs. 2,750/= to make a total of Kshs. 11,250/= to... (not clear) measurement 8.9x20.6 m being addition of a third piece of land." The witnesses are Benson A. Oseta and Thomas Magusa Maonga. On the same document where the above agreement is written appears to be a fourth agreement dated 11 July 2004 which says "today ...I have received Kshs. 10,000/= being another addition 8.7mx20.6 meters so Mr. Samuel as left with another balance of Kshs. 1,250/=. Total figure balance left to Samuel to pay is (2,750 + 1,250= 4,000/=.)" The witness is Benson A. Oseta. There was produced the receipt from Linear Coach dated 23 July 2004, indicating cash of Kshs. 4,000/= to be paid to David Ombeo.

33. The baraza meeting of 24 March 2005 shows that it was convened to hear a case between the appellant and the respondent in respect of the suit land. Those present included the respondent, who is actually shown as the complainant, and the appellant who is indicated as purchaser. In that baraza the appellant is minuted as stating that he purchased land from the deceased in three purchases. He alludes to the two typed sale agreements of 15 October 2003 and 22 April 2004, and mentions a third purchase entered into on 24 June 2004 and 11 July 2004, where land measuring 17.8 by 20.6m was sold for Kshs. 22,500/=; and that he paid Kshs. 18,500/= leaving a balance of Kshs. 4,000/= which he sent through Linear Coach, and owed no balance. In that baraza, the respondent is minuted to have stated that she was only aware of one sale and was not aware of the other two sales mentioned. Some witnesses are shown to have spoken, including Charles Nyakundi, Magusa Onyango, David Nyamasege, John Kinanga, and Benson A. Onseta. The baraza ruled that the appellant should remain with the first portion that he had bought but the second and third portion should be measured afresh so that the appellant can take the upper portion of land which is remaining and the portion which is on the lower side should remain with the beneficiaries of the late David Ombeo. Any person who wished to appeal was given 14 days to do so. The baraza ended with a facilitation fee of Kshs. 2,000/= being paid by both appellant and respondent.

34. From the foregoing, I am persuaded that the appellant and the deceased did enter into some agreements of sale of part of the disputed land. However, only the first purchase, and that is the agreement of 15 October 2003, was said to be known to the respondent, and was acknowledged in the baraza. I do not believe the respondent, when she says that she never attended any baraza. The minutes speak for themselves and it is as clear as day that she was present and she indeed spoke and acknowledged only one sale of the land.

35. The appellant may have demonstrated purchase of some portion, but did he prove possession ? It is not clear whether the appellant ever took possession of the land that he claims to have purchased in the lifetime of David Ombeo or even thereafter. Despite the sale agreements stating that possession would be given immediately, there was no proof tendered that the appellant took possession of the portions shown in the sale agreements upon execution of the said agreements. The minutes of the baraza actually have no mention at all of the appellant being in possession and nowhere was it acknowledged by the disputants or the witnesses at the baraza that the appellant was in possession. Within that meeting, the appellant never mentioned that he was in possession and that he was undertaking any activities on the land. All he said was that he had bought several bits of the disputed land. At the baraza, the respondent stated that she was not aware of any sale apart from the first portion and never acknowledged possession by the appellant. The conclusion at the baraza was to the effect that the appellant was to remain with the "first portion" only and the other portions were to be measured, but it does not say that the appellant had commenced any activities on the agreed or disputed portions.

36. I have nothing before me to show whether the recommendation of the baraza was followed through or not. There is no evidence of any further meeting at the site or any other baraza convened to discuss the matter and it is not clear to me what happened after this baraza. In his statement, the appellant stated that later after the baraza, the suit land was subdivided and each owner was issued with their rightful shares, that is the buyers and the family, and that he was allocated a portion neighbouring another purchaser. It is not said when this subdivision was done and neither is the identity of this neighbour disclosed. Neither were such neighbours who had allegedly also gotten portions of the land called as witnesses. The appellant claimed that there was a fresh measurement undertaken which showed his possession to be 0.162 Ha. I have no evidence of this. One would expect that if there was some measurement done after the baraza decision, then there would be minutes of it but there are none. There is no follow up documentation affirming any such measurement.

37. Apart from the above, no specific date was given, as to when the appellant assumed possession. In fact, a question begs as to whether he took possession before the demise of the vendor, or after the baraza, or whether he took possession at all. There is no concrete evidence on this point and one cannot tell with finality when the appellant assumed possession of the settled "first portion", if at all.

38. Further in his statement, the appellant stated that he planted tea, trees, maize and napier grass. He does not say when he planted the tea. He did not produce any exhibit to show that he was ever harvesting the tea, for it is common knowledge that tea is continuously picked then sold to tea factories and there is documentation given to show the kilograms collected.

39. Moreover, if at all he took possession of the land, the appellant did not reveal what sort of occupation he had and how they related with the respondent given that they would be neighbours. The witnesses of the appellant only affirmed the purchase agreements and gave very general statements that the appellant has been in possession to the exclusion of the respondent. I am not persuaded by these sweeping non-specific evidence. It would probably have helped the appellant if he had called any neighbour who benefited from a subdivision of the land, or the Chief of the area, or other person who would confirm his possession of the land. All he did was bring persons who saw him buy the land and who were not clear in their evidence on the nature of possession of the appellant, if any.

40. To prove adverse possession, particularly where one seeks to be declared adverse possessor of a portion only of the claimed land, it is necessary for the applicant to demonstrate the exact size and location of what he occupies within the larger parcel of land. This has been affirmed in various decisions. In the case of Joseph Macharia Mwangi v Jonah Kabiru (2008) eKLR, the plaintiff filed suit alleging to have acquired 3 acres out of 5.1 acres of the disputed land. The court was not however persuaded that he had put forth sufficient evidence of what he was in occupation of. The court (Kasango J) held as follows :

> " It was essential in the plaintiff's claim for him to state in the evidence the exact or definite and distinct land he was claiming out of the five acres of the suit property. Such identification is an integral part of proving a claim for adverse possession. Although in his originating summons plaintiff said he occupied 2 acres, in oral evidence he said that he did not know the exact acres he cultivated but he knew it was bigger than defendant's. The plaintiff's claim for that reason does fail."

41. In the case of Titus Mutuku Kasuve vs Mwaani Investments & 4 Others, Court of Appeal at Nairobi, Civil Appeal No. 25 of 2002 (2004) eKLR, the appellant had filed an originating summons claiming two portions of land measuring 40 acres and 20 acres respectively by way of adverse possession. His suit was dismissed. The Court of Appeal upheld the dismissal, the claim for 20 acres being premature, and the claim for 40 acres being unmaintanable, inter alia for reason that the appellant had not proved exclusive possession of "any definite and distinct land ascertained to be 40 acres."

42. One cannot come to court with an amorphous general claim for adverse possession to land that cannot be specifically identified and expect to get judgment in his favour. The plaintiff must give evidence of the particular land that he is in possession of. If he is in possession of only part of the land, he must be specific as to what size he is claiming, and he must produce proof of occupation of the size that he claims. For example, you cannot come to court and say that you occupy 5 acres and hope that by that mere statement the court is going to believe that you have proved occupation of 5 acres. You could as well have said 3 acres, or 10 acres for that matter. Merely stating that one occupies a certain acreage without something to back that up, is not sufficient. You would expect such claimant to be keen enough to bring a ground report prepared by a surveyor or other authorized expert, which identifies clearly the land that he is in possession of, the size that he is in possession of, and the activities

undertaken therein. If courts do not insist on this, then there is a big risk of people losing their land to litigants who are not even in possession, or if they are in possession, the possession may not be as alleged.

43. In our case, a surveyor's report would have gone a long way in demonstrating the actual size of land occupied by the appellant (if he occupied any), the location of it in the suit land, and the activities undertaken therein. There was none produced in this case. It will be recalled that the respondent vehemently denied that the appellant was ever in possession. She in fact challenged the appellant to point out exactly which part of the suit land he was in possession of. The appellant never rose to that challenge. He never pinpointed any area of the suit land that he was in possession of. He merely mentioned sizes in meters that cannot be ascertained and produced photographs showing tea and trees. Such photographs cannot help him. The photographs do not speak to say that he was the one who planted the tea and trees and when he did so. Neither do the photographs provide the size of the land being claimed or which the appellant may have been in possession of. Photographs, in a case such as this, are not a substitute for a solid surveyor's report.

44. Apart from not being able to point out the actual land that he was in possession of, I have already mentioned, but it is worth repeating, that the appellant was not clear on when his possession started. He never provided a date of when he came into possession. There is in fact no evidence that he ever took possession when the deceased was still alive. After his demise, we know that there was a dispute that was presented before the baraza, and we know that there was a resolution for him to take possession of the land noted in the first typed sale agreement. The appellant did not offer evidence that he took possession after the baraza and if so, when exactly he did that. Without being clear on the date of possession, one cannot even calculate the length of time that the appellant was in possession before he filed suit.

45. I am afraid that the evidence of the appellant regarding possession was too thin to enable him succeed. If at all he was ever in possession, it was never clear what land he possessed and it was never clear when he came into possession.

46. I would dismiss the case of the appellant based on reason that he never proved actual possession of a particular specific portion of the suit land for an ascertainable duration of time that is 12 years and beyond, but not on reason that the claim was founded on a sale agreement.

47. The result is that this appeal fails and it is hereby dismissed with costs.

48. Judgment accordingly.

DATED AND DELIVERED THIS 24 DAY OF OCTOBER 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Ms. Chepkorir h/b for Mr. Ochoki for the appellant;

Mr. Were for the respondent;

Court Assistant : David Ochieng'.