



**Mulama & 3 others v Viragi (Environment & Land Case 22 of 2020)
[2024] KEELC 7055 (KLR) (22 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7055 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 22 OF 2020
DO OHUNGO, J
OCTOBER 22, 2024**

BETWEEN

**AGNETA GAZEMBA MULAMA 1ST APPLICANT
PHARAS NYABERA ZAVANI 2ND APPLICANT
SIMON MUSYOKI MBINDYO 3RD APPLICANT
GOSPEL CENTRE - MBALE 4TH APPLICANT**

AND

STEPHEN SALAMBA VIRAGI RESPONDENT

JUDGMENT

1. The Applicants moved the Court through Originating Summons dated 17th April 2020 wherein they claimed that they had acquired the parcel of land known as Kakamega/Bugonda/2163 (the suit property) through adverse possession. They sought declaration that they had become proprietors of the suit property through adverse possession, an order that they be registered as proprietors and that the Deputy Registrar to execute all documents needed to effect transfer in their favour. They also prayed for costs of the suit.
2. Hearing of the Originating Summons proceeded by way of oral evidence. Bishop Pharas Nyabera Zavani (PW1) adopted the supporting affidavit which he swore and filed on 20th April 2020. He also produced documents annexed to the affidavit as exhibits. He stated that the Fourth Applicant had been in occupation of the suit property as a tenant since 1989 and that they use it for worship. That as of the date of his testimony, they were paying rent to the First Applicant. He added that there was an attempt to evict them in the year 2021 when people went to their church at 2.00am and broke down the main door and several windows. That when they called the police, they were informed that there was a court order allowing the demolition. He further testified that as far as the Fourth Applicant is concerned, the suit property is owned by Daniel Mulama, the First Applicant's late husband and that



- there had been a dispute concerning the suit property, but Daniel Mulama told the Fourth Applicant not to get involved in it.
3. Agneta Gazemba Mulama (PW2) adopted the supporting affidavit which she swore on 17th April 2020 and further affidavit which she swore on 6th November 2020 as her evidence in chief. Further, she produced copies of documents annexed to her said supporting affidavit. She deposed in the affidavits that she was the administrator the estate of her late husband Joseph Mulama who passed away on 21st July 2010 and who purchased the suit property from Shem Ndururu Viragi on 28th May 1983. That the deceased occupied the suit property from the date of purchase and that she continued occupying it from his demise until the date of the affidavit.
 4. PW2 further deposed that Shem Ndururu Viragi received payments of the purchase price both directly and through his second wife Dorcas Kusalani Viragi to whom he donated a power of attorney. That after the purchase both her husband and Shem Ndururu Viragi went to the Land Control Board and Shem Viragi transferred the suit property to her husband. She added that there was confusion in the parcel number sold which led to documents bearing Kakamega/Bugonda/1388 but the mistake was rectified after Dina Viragi who was Shem Viragi's first wife went to court whereupon it was established that the parcel her late husband Joseph Mulama had bought and occupied was the suit property.
 5. She also deposed that after Shem Ndururu Viragi passed away the Respondent obtained letters of administration through craft and fraud without mentioning her family. That her family's application to challenge the grant was dismissed and that there was an old building on the suit property which her husband the Fourth Applicant Church to occupy at a fee in 1989 after which he allowed the Church to erect a structure in 2002.
 6. Under cross examination and re-examination, PW2 stated that the first to third Applicants do not reside in the suit property and that the Fourth Applicant operates a church on the suit property. She also stated that her husband entered the suit property with Shem Viragi's permission and that the Second and Third Applicants are pastors in the Fourth Defendant. She further stated that the Fourth Defendant is her rent paying tenant.
 7. The Applicants' case was then closed.
 8. The Respondent adopted his replying affidavit which he swore on 22nd June 2020 and produced copies of documents annexed to it. He deposed in the affidavit that he became the registered proprietor of the suit property following succession proceedings in respect of the estate of his late father Shem Viragi and that the First Applicant's application for revocation of his grant was dismissed by the succession court. He also denied that the suit property was ever sold to the First Applicant's husband and added that the sale agreement that the Applicants relied on was in respect of a different plot. He further deposed that the suit property has been the subject of litigation in Hamisi SRMCC No. 40 of 2018, Kakamega ELC No. 318 of 2017 and the succession cause. He annexed copies of rulings.
 9. Under cross examination and re-examination, the Respondent stated that he was not in occupation of the suit property as of the date of his testimony and that instead the Second Applicant was in occupation as a tenant paying rent to the First Applicant. The Respondent's case was then closed.
 10. Directions were given that parties file and exchange written submissions. 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.
 11. The Court of Appeal discussed the law relating to adverse possession in the case of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR where it stated that 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.

12. The First Applicant's case is that her late husband purchased the suit property from Shem Viragi on 28th May 1983 and took possession on the said date.
13. 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 is 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.
14. A perusal of the agreement dated 28th May 1983 shows that it is in respect of "Plot No. 78." The First Applicant has explained that there was confusion in the parcel number sold which led to documents bearing Kakamega/Bugonda/1388. I note that just like "Plot No. 78", Kakamega/Bugonda/1388 is not the same as the suit property. Either way, the First Applicant's firm contention is that they took possession with Shem Viragi's permission, pursuant to a sale transaction. The First Applicant further conceded that she is no longer personally in possession, but has the Fourth Applicant who is her tenant, in occupation. Possession need not be personal, and constructive possession through a tenant can also count. See *Samuel Kihamba v Mary Mbaisi* [2015] eKLR.
15. Whatever the nature of possession, for time to start running in her favour for purposes of adverse possession, the First Applicant must clearly demonstrate that her possession is no longer with the permission of the seller. A purchaser's possession becomes hostile the moment she completes paying the purchase price. In this case, the First Applicant has referred to a multiplicity of documents, none of which gives clear details as to what the purchase price was and the date it was fully paid. Time could not run in her favour in the absence of proof of full payment of purchase price.
16. The Respondent contended that the suit property has been the subject of litigation in Hamisi SRMCC No. 40 of 2018 and Kakamega ELC No. 318 of 2017. He produced a copy of a ruling that was delivered in Kakamega ELC No. 318 of 2017 on 26th September 2019. A perusal of the ruling reveals that judgment was delivered in the case on 31st May 2018 and that the First Applicants' tenants were ordered to vacate the suit property within three months from the date of the judgment and in default be evicted. The First Applicants' application to join the suit and set aside the judgment was dismissed on 26th September 2019. I note this suit was filed on 20th April 2020, some seven months after the dismissal. Her tenants having been ordered to vacate, the First Applicant cannot base her claim for adverse possession on constructive possession through the same tenants.
17. I find that the First Applicant has not demonstrated the requisite 12 years of quiet possession. The requirements of establishing adverse possession pursuant to a sale transaction have not been met.



18. The Applicants have failed to establish adverse possession. I find no merit in their case. In the end, I dismiss the Applicants' case with costs to the Respondent.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 22ND DAY OF OCTOBER 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Ogolla for the Applicants

Mr Adeka holding brief for Ms Wilunda for the Respondent

Court Assistant: M Nguyayi

