



Nyakoe (Suing as the Administrator and Personal Administrative of the Estate of Samwel Nyakoe Mogwambo) v Mochogwa (Enviromental and Land Originating Summons E005 of 2022) [2024] KEELC 13448 (KLR) (20 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13448 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E005 OF 2022
JM KAMAU, J
NOVEMBER 20, 2024
IN THE MATTER OF: A CLAIM FOR ADVERSE POSSESSION
PURSUANT TO
SECTION 38 OF LIMITATIONS OF ACTIONS ACT

BETWEEN

JERIAH NYAKOE (SUING AS THE ADMINISTRATOR AND PERSONAL ADMINISTRATIVE OF THE ESTATE OF SAMWEL NYAKOE MOGWAMBO) PLAINTIFF

AND

MARY NYANCHAMA MOCHOGWA DEFENDANT

JUDGMENT

- 1 This suit was commenced by an Originating Summons where the Plaintiff sought for the following Orders:
 1. A declaration that the Defendant’s rights to recover a portion of the Land known as L.R. West Mugirango/Bosamaro West/544 measuring 0.456 Ha is barred under the limitations of actions Act, Chapter 22 of Laws of Kenya, and her title thereto extinguished on the grounds that the Plaintiff herein has openly, peacefully and continuously been in occupation and possession of the aforesaid portion of land for a period exceeding 12 years.
 2. There be an order that the Plaintiff be registered as the proprietor of a portion of L.R. West Mugirango/Bosamaro West/544 measuring 0.456Ha in place of the Defendant who currently holds the title to the suit Land.



3. The portion measuring 0. 351 Ha out of Land L.R. West Mugirango/ Bosamaro West/544 be sub-divided and the Title in respect thereof be issued in favour of the Plaintiff.
 4. There be a permanent order of injunction restraining the Defendant either by herself, agents, servants and/or employees from interfering with the Plaintiff's peaceful possession and occupation of the said portion of Land measuring 0. 351 Ha comprising of all the parcel of Land known as L.R. West Mugirango/Bosamaro West/544 in any manner whatsoever and/or howsoever.
 5. The Deputy Registrar and/or the Executive Officer of this Honourable Court be directed and/or ordered to execute the transfer instruments and all attendant documents, to facilitate the transfer and registration of Land measuring 0. 351 Ha comprising the parcel of Land known as L.R. West Mugirango/Bosamaro WEST/544 in favour of the Plaintiff, in the event of default by the Defendant to execute the necessary transfer instruments.
 6. Costs of this originating summons be borne by the Defendant.
 7. Such further and/or other orders be made as the court may deem fit and expedient, in the circumstances of this case.
- 2 The grounds upon which the Plaintiff anchors his prayers are:
- i. That on or about the 14th day of April 1974, the Plaintiff's husband entered into a Land Sale Agreement with Siango Nyaata (Deceased), for a portion on Title No. West Mugirango/ Bosamaro/544 for a consideration of 15 cows.
 - ii. That on the 7th day of November 1978, the Plaintiff's husband further entered into a Land Sale Agreement with Mrs. Kwamboka Siango (Deceased) wife to Siango Nyaata(Deceased) for a portion on Title No. West Mugirango/Bosamaro/544 for a consideration of Kenya shillings two thousand (Kshs. 2,000/=) only.
 - iii. That further on 7th day of November 1978, the Plaintiff's husband paid to Mrs. Kwamboka a sum of Kenya shillings One thousand three hundred (Kshs. 1, 300/=) with an agreement to clear the balance.
 - iv. That on the 8th day of March 1979, the balance of Kenya shillings Seven Hundred (Kshs. 700/=) was paid to Mrs. Kwamboka together with a blanket and a sufuria.
 - v. That as at the time the Plaintiff's husband purchased the portions on suit parcel of land, the same was registered in the name of one Siango Nyaata the vendor herein.
 - vi. That subsequently, sometime in the year 1997, One Charles Ondari Siango (Deceased) and son to Siango Nyaata and Mrs. Kwamboka caused the entire suit parcel of land to be registered in his name.
 - vii. Nevertheless, the Plaintiff had entered upon and commenced possession of the suit property in the year 1974 and 1978 immediately after the portions of the suit parcel of land were purchased.
 - viii. The Plaintiff's occupation and possession of the suit property herein has been continuous and without interruption for a duration of over 48 years.
 - ix. Consequently, the Defendant's rights to recover the portions of the suit property herein have been extinguished by effluxion of time.



- x. The Plaintiff proceeded to and fenced off the aforesaid portion of Land and commenced various farming activities including planting maize, napier grass, trees and rearing cows.
 - xi. Since acquiring the subject portion of land, the Plaintiff has been utilizing the same peacefully and uninterrupted until sometime this year when the Defendant sent an eviction notice to vacate from the parcel of land.
 - xii. Upon carrying out some due diligence, the Plaintiff found out that the Defendant had done Succession in respect to the Estate of Charles Ondari Siango (the husband to the Defendant) and subsequently obtained a grant and got registered as the proprietor thereof.
 - xiii. From the foregoing, it is thus evident that the Defendant is keen and intent to deprive the Plaintiff of the subject portion of Land merely on an account of having been appointed as the Administrator and Personal Representative of the Estate of her late husband.
 - xiv. Owing to the continuous occupation of the Plaintiff over the subject parcel of Land, he had acquired prescriptive rights over the same by way of adverse possession and thus the Defendant's rights to recover it as part of the Estate of the late Charles Ondari Siango has been extinguished by effluxion of time.
 - xv. In the premises, the Plaintiff's interest(s) over the suit property merits registration on account of adverse possession.
 - xvi. No prejudice at all shall be suffered by the Defendant in the event the orders sought herein are granted.
3. The Plaintiff also filed a Supporting Affidavit sworn on 11/11/2022 and filed in Court 3 days later to the effect that: -
1. I am the wife, legal administrator and personal representative of the estate of the late Samwel Nyakoe Mogwambo (deceased). Annexed hereto and marked "JN1" is a copy of the Grant evidencing the same.
 2. That my husband purchased a portion of the suit parcel of land from one Siango Nyaata (Deceased) on the 14th day of April, 1974 and which payment was made by 15 cows to Siango Nyaata. Annexed thereto and marked "JNA2 a and b" is a copy of a translated sale agreement and a copy of the agreement evidencing the same.
 3. That he also made a further purchase of a portion of the suit property from one Mrs. Kwamboka Siango wife to Siango Nyaata (deceased) on the 7th of November, 1978 at a consideration of Kenyan shillings two thousand (kshs, 2,000/=) only. Annexed hereto and marked "JN3 a and b" is a copy of a translated sale agreement and a copy of the agreement evidencing the same.
 4. That on the 7th day of November 1978, my husband paid to Mrs. Kwamboka Siango a sum of Kenya shillings one thousand, three hundred (kshs.1,300/=) only out of the consideration with an agreement to clear the balance.
 5. That on the 8th of March, 1979, my husband paid a balance of Kenyan shillings seven hundred (kshs.700/=) only to Mrs. Kwamboka Siango together with a blanket and a cooking pot. Annexed hereto and marked "JN4 a and b" is a copy of a translated payment acknowledgement and a copy of the payment acknowledgement evidencing the same.



6. That the portions of the suit property purchased is equivalent to 0.351Ha comprised on all that parcel of land known as L.R West Mugirango/Bosamaro West/544.
7. That my husband (deceased) paid the 15 cows and the consideration as had been agreed between herself and the vendors.
8. That as at the time my husband was purchasing the said portions of land, the suit parcel of land was registered in the name of Siango Nyaata(deceased).
9. That on the 11th day of August, 1975, my husband paid a lands survey fee of Kenyan shillings one hundred (kshs.100/=) only for that parcel of land known as L.R. West Mugirango/Bosamaro WEST/544. Annexed hereto and marked “JN5” is a copy of the receipt for Lands Survey Fee evidencing the same.
10. That despite the purchase and payment of the Land Survey Fee, the vendors failed transfer the resultant and sold portions in favour of my husband.
11. That further despite the failure to transfer the suit portions of land, together with my children, we have continued to occupy the suit property which occupation has been one, continuous and uninterrupted.
12. That I later on came to discover that the said Charles Ondari Siango (deceased) and son to the vendors had in the year 1997 entirely caused the registration of the suit property initially registered in his father’s name into his name.
13. That despite the registration of the suit property in his name, we had already entered upon and commenced possession on the portions of the suit property in the year 1974 and 1978 immediately after my husband purchased the said portions.
14. That further, until his demise in 1988, my husband was in continuous possession of the portions of land in the suit parcel of land, and we have also equally been in continuous occupation since the same were purchased.
15. That together with my children, we have made significant development including building of our permanent homes on the suit parcel of land. Annexed hereto and marked “JN6” is a bundle of photographs evidencing the same.
16. That we have been carrying out various farming activities thereon by inter alia planting trees, maize, napier grass and tea and also have been rearing cows thereon. Annexed hereto and marked “JN7” is a bundle of photographs evidencing the same.
17. That I do recall, that my son Geoffrey Momanyi was served with a notice to vacate the suit parcel of land the same dated the 29th day of August, 2022. Annexed hereto and marked “JN8” is a copy of the Notice to vacate evidencing the same.
18. That upon being served with the notice, we carried out due diligence whereupon we found out that the defendant had commenced succession in respect to the estate of Charles Ondari Siango and got registered thereon as the proprietor. Annexed hereto and marked “JN9 ‘a’ and ‘b’ is a copy of the certificate of the confirmed grant and a copy of the certificate of official search, respectively.
19. That evidently, the defendant failed to disclose to the Court mine and family’s interests over and in respect to the subject portion of land which we had acquired legitimately after the purchase of the suit parcel of land by my husband (Deceased).



20. That the subject parcel of land constitutes a liability due to me as against the estate of the late Charles Ondari Siango (now deceased) and does not form part of his free estate.
 21. That the Defendant/Respondent has opted to refuse recognizing my interests over the subject parcel of land, despite being aware that the same had been sold to my husband by her late father in law and mother in law. Annexed hereto and marked “JN10” is a copy of the Chief’s letter evidencing the same.
 22. That owing to my continuous occupation of the subject parcel of land and now our possession of the same, we have acquired prescriptive rights over the same by way of adverse possession and thus the Defendant’s rights to recover it as part of the estate of the late CHARLES ONDARI SIANGO has been extinguished by effluxion of time.
 23. That in view of the foregoing paragraphs, together with my children, we have acquired adverse rights and/or interests over the portions of the suit land and hence same ought to be transferred and registered into my name.
 24. That I have further been advised by my advocates on record, which advice I verily believe to be true that the instant applicant is merited for reasons that;
 - a. I stand to suffer irreparable loss if the orders sought are not granted.
 - b. I have established a prima facie case against the Defendant/Respondent with overwhelming chances of success.
 - c. Further, the balance of convenience tilts in my favour.
 - d. Unless the orders sought are granted, we shall be denied and/or deprived of our rights and/or interest over the suit property.
 - e. The Defendant/Respondent will suffer no prejudice if the instant application is allowed.
 - f. This application has been filed timeously.
 25. That I know of my own knowledge that the Defendant/Respondent is bound to evict and/or trespass and/or interfere with the suit property, unless it is so restrained by this Honourable Court.
 26. That in the circumstances, it is necessary that this Honorable Court be pleased to grant orders of Temporary Injunction and/or mandatory injunction, so as to abate the offensive activities of the Defendant/Respondent.
4. On 13/3/2023 the Defendant filed a Replying Affidavit as follows: -
1. That I am a female adult of sound mind of and the defendant herein do hence competent to swear this affidavit.
 2. That my permanent place of abode is Mogwambo village Nyamira County and my address of service for the purposes of this suit is C/o Eroga Kuria & Co. Advocates, 2nd Floor, Kimathi Chambers, Suite No.6, Kimathi Street, P.o Box 50498-00200 Nairobi.
 3. That I that the plaintiff’s Notice of Motion and Originating Summons both dated 11th November 2022 have been read and explained to me by my advocate on record and I wish to respond to the same as follows.



4. That allegations of purchase made by the plaintiff in the said application and summons and the entire plaint are false.
 5. That the Plaintiff is not an adverse possessor as alleged but rather is being used by his son Geoffrey Momanyi to try to sanitize the latter's attempt to unlawfully alienate a portion of West Mugirango/Bosamaro East/544 where he (Momanyi) has been occupying since in or around 2015.
 6. That I know of my own knowledge that the plaintiff's son family is among may other families that my family has over the years licensed mutually to enter upon West Mugirango/Bosamaro East/544(hereinafter called 'our family land" and cultivate only.
 7. That I know of my own knowledge that my family adopted the aforesaid mutual arrangement in or around the year 1990 in order to ensure that no part of our family land was left unutilized thereby keeping land grabbers away.
 8. That the aforesaid arrangement was a common practice in the area and used by poor families like ours (who nonetheless had large parcels of land) as a way of protecting their parcels of land from being grabbed by wealthy/powerful individuals.
 9. That know of my own knowledge that during land adjudication my mother in law (Kwamboka Siango) being the first wife of Nyaanga Siango was allocated a bigger parcel of land than her other co-wives and that triggered rivalry leading to long standing land suit.
- 5 On 16/3/2023 the Court gave Directions to the effect that the Originating Summons dated 11/11/2022 be treated as a Plaint and the Replying Affidavit sworn on 15/2/2023 a Defence, parties file their witness statements and bundle of documents in readiness for the viva voce evidence which was complied with by both parties in readiness for the Hearing of the case that commenced on 17/10/2023. The Plaintiff Jeriah Nyakoe, the Administrator and personal representative of the Estate of Samwel Nyakoe Mogwambo adopted her statement dated 17/4/2023 as her evidence in chief. She testified that she is the widow of the late Samwel Nyakoe Mogwambo who died on 8/10/1988 having purchased from the late Siango Nyaata the suit parcel of land first on 14/4/1974 at 15 cows, secondly on 7/11/1978 another parcel at kshs.2,000/= . On 7/11/1978 the same date he paid kshs.1,300/= and the balance of kshs.700/= on 8/5/1979 and also gave him a blanket and a cooking pot to symbolize the sale. All the above equal to 0.351Hectares out of L.R. West Mugirango/Bosamaro West/544. The Deceased husband to the Plaintiff also paid for the Lands Survey Fees for the suit property but the Deceased did not transfer the suit land to the Plaintiff's late husband. But the Plaintiff and her late husband and their children have continued occupying the 0.351Hectares out of WEST Mugirango/Bosamaro West/544 openly, continuously and uninterrupted.
- 6 That in the year 1997 the, as then Plaintiff discovered, the son to the late Charles Onderi Siango had had the property transferred from his father's name to himself in spite of the Plaintiff having settled on the suit land since 1974 and 1978. The Plaintiff said she, her late husband and their children have made major developments on the suit property and have been carrying out farming activities thereon.
- 7 On 29/8/2022 about 3 months before this suit was filed, the Plaintiff's son was served with a Notice to vacate the suit land by the Defendant. The land was bought from the Defendant's father in law Siango Nyaata. On cross-examination by Mr. Karita for the Defendant, the Plaintiff admitted that she had not produced a copy of the Title Deed nor search thereof. Dw2 Henry Mogusu Nyanchana in his evidence said he was not present when either of the transactions was taking place. He was not even a witness to any. Pw3 Christina Kwamboka Nyariki, said that the Plaintiff is the widow of Samwel Nyakoe Mogwambo and who has lived in her neighbourhood since the early 70s and to be exact since



1974 and that the Defendant got married in 1992. The last witness Mr. Solomon Njoga came to Court and gave evidence to the effect that on 17/4/2023 he was instructed by the Plaintiff to visit the suit land i.e. West Mugirango/Bosamaro West/544 to determine the acreage and location which he did the same day and made a Report which he produced in Court.

8 The Plaintiff produced the following documents to buttress her case.

1. Limited Grant of Administration Ad litem in respect of the Estate of Samwel Nyakoe Mogwambo who died on 8/10/1998.
2. Certificate of confirmation of the Grant.
3. Sale agreements dated 14/4/1974, 7/11/1978 and in Abagusii language 8/3/1979 with their respective translations.
4. Receipts of survey fees of kshs.100/=.
5. Photographs of the development on the suit land.
6. Notice to Vacate dated 29/8/2022 for the Defendant herein.
7. Copy of the official search in respect of WEST Mugirango/Bosamaro West/544.
8. Letter from the Chief introducing the beneficiaries of the Estate of the late Charles Onderi Siango.
9. Survey's Report dated 17/4/2023.

9 The Court heard the Plaintiff's evidence and no evidence at all from the Defendant who had recorded witness statements together with her witness Jane Barongo Auka on 1/3/2023 but who for reasons unknown to the Court did not turn up to testify.

In this case, the Plaintiff's husband, herself and children have proved beyond reasonable doubt that her husband has been on the suit land since 1974 and 1978 till 1988 when her husband passed on. Her children and herself have continued their occupation on the land to date openly, uninterrupted and continuously and although the relationship started as a contract of sale, that contractual relationship ended in 1975 when the Defendant's late husband refused to transfer the suit land to the Plaintiff's late husband. Consent to occupy the land was there until this date when the Plaintiff's husband's stay together with his family was adverse to the Title Holder.

10 As long as it was without the consent of the Vendor, and Title Holder, uninterrupted and continuous, it became adverse to the Title Holder's Title to the same. In the case of Amos Weru Mungai -vs- Merata Wangari Karubi & another (NRB HCC SUIT NO.33 of 2002 Justice B.M. Kairuki (as he then was) had the following to say with regards to Adverse Possession and interruption of time:-

“.....A letter by the proprietor, even if it be through an Advocate or the Chief of the area does not amount to assertion of Title in law and cannot therefore interrupt the passage of time for purposes of completing the period of Adverse Possession.....”

11 The letter dated 29/8/2022 christened “Notice to vacate” by the Defendant herself Mary Nyanchama Mochogwa to one Benard Auka and 4 others giving them demand to vacate the suit land and copied to the Deputy County Commissioner, Nyamira South Sub-County and Sub-County Police Commander, Nyamira South Sub-County does not at law interrupt the passage of time for purposes of computing the period of Adverse possession that commenced in 1975 bringing the total to over 47



years by the time of filing the suit in 2022, a period of more than 12 years occupation and possession openly, without consent, continuously from the late Samwel Nyakoe Mogwambo through his family after 1988 to date. The Plaintiff has therefore met the threshold of Adverse Possession and it is so ordered. The prayers in the Plaintiff's Original Summons dated 11/11/2022 are hereby granted as prayed. The Plaintiff shall also have the costs of the suit. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 20TH DAY OF NOVEMBER, 2024.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Brenda

Plaintiff's Counsel: Ms. Ndemo

Defendants' Counsel: Mr. Kavita

