Asiebela v Vigatsi (Sued as the Administratrix of the Estate of Andrew L Vigatsi) (Environment & Land Case 23 of 2021) [2025] KEELC 525 (KLR) (12 February 2025) (Judgment)

Neutral citation: [2025] KEELC 525 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ENVIRONMENT & LAND CASE 23 OF 2021

DO OHUNGO, J

FEBRUARY 12, 2025

BETWEEN

MARY AKOMBA ASIEBELA ..... PLAINTIFF

AND

ELIZABETH MUJISA VIGATSI ..... DEFENDANT

SUED AS THE ADMINISTRATRIX OF THE ESTATE OF ANDREW L VIGATSI

JUDGMENT

1. Proceedings in this matter commenced in the High Court at Kakamega in 1998 when the Plaintiff filed Originating Summons dated 1st October 1998 against Andrew L. Vigatsi who later passed away and was substituted by Elizabeth Mujisa Vigatsi. The initial Originating Summons was replaced with Amended Originating Summons, amended on 25th January 2023. Prior to the amendment, the suit was transferred to this Court on 2nd November 2021.

2. The Plaintiff averred in the Amended Originating Summons that she had become entitled to the parcel of land known as Isukha/Shitochi/498 (the suit property) by adverse possession and prayed that the Court orders that she be registered as the proprietor.

3. Hearing of the matter proceeded by way of oral evidence. The Plaintiff testified as the sole witness in respect of her case. She adopted her supporting affidavit which she swore in support of the Amended Originating Summons as well as her witness statement dated 25th January 2023. She produced copies of the documents listed as item numbers 1 to 5 in her list of documents dated 25th January 2023 and a copy of the document in her further list of documents dated 26th May 2023.

4. The Plaintiff stated in the supporting affidavit that Andrew L. Vigatsi was her late husband's elder brother and the husband of Elizabeth Mujisa Vigatsi. That as of the date of swearing the affidavit, she was residing on land parcel number Kakamega/Khayega/516 but since 1979 she was in continuous use of the suit property to the exclusion of Andrew L. Vigatsi. She also stated that Andrew L. Vigatsi never

occupied or used the suit property since 1979 and that her late husband gave Andrew L. Vigatsi KShs 15,000 to buy for him land but since Andrew L. Vigatsi used the money for other purposes, he offered to give the suit property to her late husband in lieu of the money.

5. She further testified that after her husband died, Andrew Vigatsi tried to remove her from the suit property and that as of the date of her testimony, she was residing within her father-in-law's homestead and not on the suit property. She also stated that the suit property was not ancestral land but was purchased by Andrew Vigatsi. That Andrew Vigatsi allowed her and her husband to use the suit property since they did not have their own land and that in August 1997, one and a half months after her husband passed away, Andrew Vigatsi demanded the suit property from her.

6. The Plaintiff's case was then closed.

7. Elizabeth Mujisa Vigatsi testified as the sole witness in respect of the Defence case. She stated that the Plaintiff's late husband and her late husband Andrew Vigatsi were brothers. She adopted Andrew Vigatsi's replying affidavit sworn on 12th February 2002 and filed in this case on 14th February 2002 as her evidence in chief.

8. Andrew Vigatsi deposed in the affidavit that he was the registered proprietor of the suit property and that he allowed his parents and the Plaintiff's late husband who was his brother to cultivate the suit property since Kakamega/Khayega/516 was too small for them. He added that the Plaintiff and his parents used the suit property with his permission and that at no time did he ever discuss any sale of the suit property with his late brother.

9. Elizabeth Mujisa Vigatsi went on to testify that the Plaintiff had been using the suit property since 1981 with her late husband's knowledge. That out of sympathy, she allowed the Plaintiff to continue using the suit property since she had another parcel of land at Ileho. That her parents in law were using the land before the Plaintiff started using it and that even as the Plaintiff and her parents in law used the suit property, her husband Andrew and her would harvest trees from it and sell then use the proceeds for family needs. Additionally, her husband used to go to the suit property regularly to check on it. She stated that her husband never sold the suit property to the Plaintiff's husband and added that as of the date of her testimony, the Plaintiff was still using and farming on the suit property.

10. The Defence case was then closed, after which parties filed and exchanged written submissions. The Plaintiff filed submissions dated 20th April 2024 while the Defendant filed submissions dated 19th June 2024.

11. I have considered the parties' pleadings, evidence and submissions. The issues that arise for determination are whether adverse possession has been established and whether the reliefs sought are available.

12. 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.

13. It is not disputed that the suit property is registered in the name of Andrew Vigatsi and that, by Elizabeth Mujisa Vigatsi's admission, the Plaintiff and her late husband were in occupation of it since 1981. The Plaintiff remained in occupation as at the date of hearing of the suit. Occupation alone, however prolonged, is not enough to establish adverse possession. It must be demonstrated that the occupation was both exclusive and without the registered proprietor's consent. In this case, the Plaintiff testified that Andrew Vigatsi allowed her and her husband to use the suit property since they did not have their own land. That position is corroborated by the testimony of Elizabeth Mujisa Vigatsi and Andrew Vigatsi in his replying affidavit. In sum, the Plaintiff's use and occupation was permissive and not adverse.

14. Additionally, there is no dispute that the parties herein have close family relationship. The Plaintiff's late husband and Andrew Vigatsi were brothers. The Plaintiff's entry into the suit property flowed directly from that relationship. The Court of Appeal held in Samuel Kihamba v Mary Mbaisi [2015] eKLR that the doctrine of adverse possession does not apply within the family and closely related parties. The Court went ahead to hold that there would be havoc for families and the society of Kenya generally if the principle of adverse possession applied within families against close relatives.

15. In view of the foregoing discourse, adverse possession has not been established. It follows therefore that the reliefs sought are not available. I find no merit in the Plaintiff's case, and I therefore dismiss it. Considering the close family relationship between the parties, I make no order as to costs.

DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 12TH DAY OF FEBRUARY 2025.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

Mr Osango for the Plaintiff

No appearance for the Defendant

Court Assistant: B Kerubo