



**Mugo v Ouko & 2 others (Environment and Land Case Civil Suit
419 of 2018) [2024] KEELC 13897 (KLR) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13897 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 419 OF 2018
LN MBUGUA, J
DECEMBER 17, 2024**

BETWEEN

JOSEPH WASHINGTON MUGO PLAINTIFF

AND

ROSALYN DORA OUKO 1ST DEFENDANT

AARON OUKO 2ND DEFENDANT

DAVID SCOTT ONGOSI 3RD DEFENDANT

JUDGMENT

1. This suit was commenced by way of Originating Summons dated 16.4.2014 and amended on 5.3.2019. The plaintiff seeks a declaration that by virtue of adverse possession, he is the owner of an acre of land known as 3589/61 curved out of land parcel Title 3569/6 I.R No. 23229 registered to the late Jason Atinda Ouko (deceased) who is herein referred to as the deceased. He also seeks a determination on whether he is entitled to ownership of the suit parcel as purchaser having allegedly entered into a sale agreement with the deceased and paid the full purchase price. The plaintiff also seeks a permanent injunction to restrain the estate of the deceased from interfering with the suit parcel, compensation by the defendants jointly and severally for interfering with his quiet possession as well as costs of the suit.
2. The suit is opposed by the defendants vide a Replying Affidavit sworn by the 2nd defendant on 11.10.2019, his further affidavit sworn on 13.1.2020 and a second further affidavit sworn on 4.8.2020. The defendants deny that the plaintiff is an adverse possessor and aver that his claim is of a purchaser's interest arising from the sale agreement dated 26.9.1994 between him and the deceased, adding that the plaintiff did not clear the balance of the purchase price being ksh.200,000/=, thus he should immediately deliver vacant possession of the suit land.
3. During the trial, the plaintiff testified as the sole witness in his case (PW1). He adopted his supporting affidavit sworn on 5.3.2019 as his evidence in chief and produced 11 annexures thereof as P.



- Exhibit 1-11. His case is that on 26.9.1994, he entered into an agreement with the deceased to purchase the suit land at ksh.1 million out of which he paid ksh. 320, 000/= vide cheque No. 653419 dated 20.1.1994, ksh. 80,000/= vide cheque No. 657631 dated 26.9.1994, Ksh. 400,000/= vide cheque No.662304 dated 26.6.1995 and ksh. 200,000/= vide cheque No.662308.
4. That having received the full purchase price, the deceased issued him with a receipt acknowledging receipt of ksh.1million Thereafter, he took possession of the suit land and finished construction of the family house on the suit parcel in 1996 and moved therein with his family. He has been in occupation of the suit land with his family for an uninterrupted period of over 20 years. He has also been paying rates in respect of his portion of land. He added that the deceased never asked for any additional payment.
 5. He avers that about 4.11.1995, the firm of M/s Kagwe & Co. Advocates who then represented the deceased wrote to him as the purchaser, inviting him for a meeting to discuss options to conclude the transaction, adding that minutes of the said meeting confirm he is a proprietor of the suit land.
 6. He contends that the deceased executed a transfer to him but it couldn't be registered because of caveats and restrictions placed on the mother title.
 7. That on 8.9.2011, he received a Notice from the firm of Ahmednasir, Abdikadir & Co. Advocates acting for the administrators of the estate of the deceased asking him to regularize his position on the suit land or face eviction, of which he complied by forwarding his various documents in support of ownership, but no response was forthcoming prompting him to file suit out of apprehension that he could be evicted.
 8. In cross-examination, PW1 stated that the sale agreement between him and the deceased has never been cancelled and that all payments were made via cheques. That after paying deposit of ksh.320, 000/=, he was at liberty to take possession. That there was a balance of ksh,200,000/= which he paid through cheque No. 662308 on 28.6.1995 which is the day the deceased gave a receipt acknowledging full receipt of the full purchase price.
 9. He averred that a transfer was prepared in his favour by Mr. Okubo who was the deceased's lawyer, but they were unable to register it because the original title was not available, adding that the transfer alluded to consideration of ksh. 350,000/= which was an error.
 10. Referred to the application for registration dated 29.11.2006 prepared by Ms. Kagwe Kamau Advocates at page 40 of his bundle, PW1 states that it does not relate to his parcel of land.
 11. He also averred that the letter of September 2011 from Advocates representing the estate of the deceased asked him to regularize his stay on the suit land, it did not ask him to pay ksh.200.000/=.
 12. In re-examination, PW1 averred that prior to receiving the letter of September 2011 from Ahmednasir, Abdikadir & Co. Advocates, the estate of the deceased had not approached him regarding the suit parcel, adding that there had been no claim of ksh.200,000/= from the deceased's family.
 13. He also stated that the duty to register the transfer was upon vendor's lawyers because the vendor is the one who held the title, adding that the deceased was present in all meetings held in the office of Kagwe Kamau Advocates who acted for the deceased in relation to the subdivision.
 14. The plaintiff's case was re-opened by consent of the parties following which on 8.2.2021, PW1 returned to the witness stand. He adopted his affidavit sworn on 22.5.2020 as his evidence and produced the 12 annexures thereto as P. Exhibit 12-23.



15. He avers that on 28.6.1995, he issued a cheque of ksh.200, 000/= from his company's account known as Agricultural Appliances (k) Ltd in favour of the deceased, being the last balance of the purchase price. He annexed a copy the said cheque folio.
16. He explained that he had obtained the Photostat copy of cheque leaf No. 662308 from National Bank of Kenya Ltd who forwarded it through a letter dated 19.5.2020 confirming that ksh.200,000/= in respect of cheque No.662308 (Account No.041000226) was duly debited from the account of Agricultural Appliances (K) Limited. He also annexed a certified copy of the original statement of the account of Agricultural Appliances (K) Limited for the month of July 1995, showing details of the said cheque.
17. PW1 also told the court that he would rely on his affidavit sworn on 24.7.2020 and another one of 21.12.2020 but both affidavits are not available in the court file and the CTS (digital filing system).
18. In cross-examination, PW1 stated that the bank statement shows the cheque of ksh.200, 000/= was cleared but it does not indicate the name of the payee though it was issued to the deceased. He reiterated that he took possession of the land upon signing the agreement but he did so with consent of the deceased, (Jason) who died in 1996.
19. In re-examination, PW1 stated that there were no special acknowledgments for the instalments paid, it was just 1 acknowledgement receipt for the entire purchase price of ksh.1 million. He reiterated that he took possession of the suit property in 1995 with the consent of the deceased.
20. The 2nd defendant testified as DW1 and he produced the following affidavits as his evidence in chief; Replying affidavits sworn on 11.10.2019, Further Affidavit sworn on 13.1.2020, 2nd Further Affidavit sworn on 4.8.2021. He produced annexures to the Replying affidavit of 11.10.2019 as D. Exhibit 1-3.
21. He avers that the deceased who was his father is the registered owner of LR No. 3589/6. He is aware that in 1994, the plaintiff approached the deceased seeking to purchase 1 acre out of the aforementioned parcel of land, resulting in a sale agreement between the two, whereby the purchase price of the one acre was ksh.1 million.
22. That out of the agreed purchase price, the plaintiff paid ksh.320,000/= at the signing of the agreement and subsequently made further payments of ksh.80,000/= and ksh.400,000/= leaving out a balance of ksh.200,000/= which he defaulted in paying, but continues to be in occupation of the suit parcel in belief that the agreement would be honored.
23. He avers that the plaintiff's contention that the deceased issued him with a receipt on 18.6.1995 acknowledging receipt of ksh.1 million is false since the signature on the said receipt does not match that of the deceased as per a forensic document examiner's report which he annexed. That having defaulted to pay the purchase price, the plaintiffs cannot in effect obtain an order for specific performance disguised as adverse possession as against the defendants.
24. In his second further affidavit sworn on 4.8.2020, DW1 avers that the deceased did not counter sign anywhere to signify that he ever received the alleged cheque No. 662308 for ksh.200,000/= and that the bank statement produced save to suggest that a sum of ksh.200,000/= was cleared from the plaintiff's account does not show where the funds were directed to.
25. DW1 told the court that upon the death of his father, they wrote to all the people staying on his land including the plaintiff to explain how they entered thereon adding that the defendants' position is that the plaintiff should pay ksh.200,000/=.



26. In cross-examination, DW1 stated that he came to know about the agreement dated 26.9.1994 after the case had started, adding that the deceased was selling various plots to people including the plaintiff and that he was not involved in the deceased's transactions, thus he is not aware of how the various payments were made, but all he is disputing is a sum of ksh.200,000/=. He also did not come across any letter written by the deceased asking for ksh.200,000/= though he had told him that he was owed ksh.200,000/= by the plaintiff.
27. He stated that he has never written to the plaintiff demanding for the 200,000/= and never filed a suit against him to make that demand.
28. He explained that as a layman, the rationale of writing to the plaintiff and 20 other persons the letter of 8.9.2011 was so that he (plaintiff) could formalize his stay on the suit land by producing documents, adding that there is no mention of ksh.200,000/= in the said letter.
29. Referred to the letter dated 19.5.2020 from National Bank of Kenya and addressed to the plaintiff, he stated that the bank confirmed that cheque 662308 of ksh.200,000/= was issued on 13.7.1995, but it doesn't indicate that the money was paid to the deceased adding that he does not know if the deceased's bank was in credit/debit and could not recall if he had a Barclays bank account as he had no bank statements to that effect.
30. He averred that they are good neighbors with the plaintiff for more than 30 years but plaintiff took possession through the deceased's permission.
31. He stated that the agreement dated 26.9.1994 was supposed to be completed within a period of 90 days, thus there was no completion adding that he relies on expert opinion that the transfer and signature acknowledging receipt of ksh.1 million is not that of the deceased's.
32. He acknowledges that his father died in 1996, while the suit was filed in year 2011, hence a 15 years period in between.
33. In re-examination, DW1 stated that the information he had about the suit land was relayed to him by the deceased.
34. The defendant's 2nd witness DW2 was Emmanuel Karisa Kenga, a forensic document examiner. He produced a comparison chart and report dated 25.9.2019 as D. Exhibit 4. He told the court that on 25.9.2019, he received a letter from Ahmed Nassir advocates requesting him to examine Exhibits A, B and D which are questioned against Exhibit C which bears a known signature and find their authenticity. He did the analysis by comparing signatures on Exhibit A & D with the known signature marked C and found no agreement in the 2 signatures as they were written by different authorities.
35. That on comparison of Exhibit B and C, he found some similarities indicating that they were made by the same author
36. On cross examination, DW2 stated that he was only dealing with signatures on the documents. That document "A" is a receipt dated 28.6.1995 for ksh.1 million, "B" is an agreement for sale, of which he formed the opinion that "B" and "C" have similarities of individual characteristics. That further, he used photocopies for his analysis as originals were not available.
37. In re-examination, DW2 stated that he did an in-depth analysis based on availed documents on the same date he got the documents, and that the photocopies of the documents were legible and clear.
38. The submissions of the plaintiff are dated 27.2.2024 where it is argued that while the defendants admit that the plaintiff took possession and occupation of the suit premises in the year 1995 they dispute the



last payment of a ksh.200,000/= instalment, yet they had no evidence to that effect, in contrast to the plaintiff who demonstrated that he paid the entire purchase price of ksh.1 million.

39. It is pointed out that the letter dated 8.9.2011 which triggered the suit did not make any mention of ksh.200,000/= which is allegedly disputed and not a single letter was written to the plaintiff by the deceased to demand the alleged ksh.200,000/=.
40. The plaintiff also submits that the hand writing expert's evidence is inadmissible for reasons that it is just an opinion, DW2 used photocopies for his analysis, he did not consider the age of the specimen for his analysis and did not bring out the age aspect in his evidence. To this end, the case of Kagina v Kagina & 2 Others (Civil Appeal 21 of 2017) KECA 242 (KLR), Mutonyi & Another v Republic [1982] eKLR as well as Iskorostinskaya Svetlana & Another v Gladys Naserian Kaiyoni [2019] eKLR are relied upon.
41. It is also submitted that while there is a requirement under Order 37 Rule 7 (2) of the civil procedure rules that an extract of title should be annexed to the originating summons, the plaintiff should be exempted from the requirement as no documents of title are available as the legal transfer for the suit parcel was yet to be registered.
42. Reliance is placed on the case of Jaswantkumarba Benesingh Jethwa v Postal Corporaton of Kenya [2015] eKLR, Mageta Enterprises Limited v Tilak Company Ltd [2020] eKLR as well the case of Leonard Okome Onyango v George Ouma Euko [2022] eKLR. The court is also urged to consider the findings in the case of Rose Waruinu Muthemba v Rosalyn Dola Ouko & 2 Others [2020] eKLR.
43. On their part, the defendants filed submissions dated 30.4.2024, where they argue that plaintiff did not meet the threshold as set out in the case of Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] eKLR for a declaration to be made that he had acquired the suit property by way of adverse possession. It is submitted that the plaintiff is entitled to possession of the suit property pursuant to the sale agreement between him and the deceased, thus the element of consent negated the aspect of adverse possession which is supposed to be non-consensual and /non-permissive. To this end, reliance is placed on the cases of Gabriel Mbui v Mukindia Maranya [1993] eKLR, Erick Chepkwony Aengwo v Jonathan Rutto Kibieasang [2013] eKLR, Waweru v Njuguna [1983] KLR 172 as well as Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others [2009] eKLR.
44. It is also argued that the pleas of title and a claim for adverse possession are mutually inconsistent and that the plaintiff never cleared the balance of ksh.200,000/= adding that the evidence of DW2 was not controverted. On the use of photocopies used in the analysis by DW2, it is submitted that the photocopies availed were clear, legible and suitable for comparison purposes.
45. On whether the plaintiff should have attached a certified extract of title over the suit property, it is submitted that the plaintiff cannot purport to seek an exemption of meeting the requirement under Order 37 Rule 7 (2) at this stage as he ought to have filed a formal application, adding that failure to produce a certified extract of title is fatal to a suit claiming adverse possession. To this end, the defendants rely on the case of Wilson Kazungu Katana & 101 Others v Salim Abdalla Bakshwein & Another [2015] eKLR and Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR amongst other cases.
46. In response to the defendant's submissions, the plaintiff filed further submissions dated 22.8.2024 where the court is urged to consider the decision of this court in Fredrick Ayigo Amisi v Roselyn Dola Ouko & 2 Others [2023] eKLR as well as the case of Leonard Okome Onyango v George Ouma Euko [2022] eKLR where the claim for adverse possession was allowed despite allegations that the balance of the purchase price remained unpaid.



47. On the issue of extract of title over the suit premises, it is submitted that the facts of this case are distinct from the authorities relied on by the defendant and that in similar cases, the court upheld claims of adverse possession even on the face of lack of extract of title such as *Salesio Mati Mwirichia v Geoffrey N. Thuita* [2012] eKLR among others.

DETERMINATION

48. The plaintiff's case is that he purchased an acre of land carved out of land parcel Title No. 3569/6 I.R No. 23229 from the deceased (Jason) and has built his home thereon. That his possession was peaceful until 2011 when the defendants' advocates demanded that he regularizes his stay thereon or vacates the suit parcel. On their part, the defendants admit that the plaintiff is in possession of the suit land since 1994 but contend that his possession was permitted by the deceased adding that he did not pay ksh.200,000/= being the balance of the purchase price.
49. I find that there is no controversy that the plaintiff was purchasing a portion of parcel LR No. 3589/6 to the tune of one acre whose title is known, the same being an annexure in the affidavit sworn on 11.10.2019 by the 2nd defendant and adopted as evidence herein. The same indicates that Jason Atinda Ouko (deceased) owns the said parcel. The defendants admits that the suit parcel was not transferred to the plaintiff owing to caveats registered on the mother title. It would be absurd if this court would dismiss this suit at this stage on account of failure to annex a title extract owing to the circumstances herein; being that it was impossible for the plaintiff to obtain a title which was in possession of the rival party. Further, there appears to be no dispute that the suit parcel is demarcated and measures 1 acre identified as L.R. No. 3589/61. This far, I reject the defence contention that plaintiff's claim must fail for failure to produce a title.
50. I now come to the question as to whether plaintiff's occupation of the land meets the threshold of an adverse possessor, keeping in mind that the occupation of the suit land by the plaintiff since 1994 or thereabout is not disputed. The court of appeal stated as follows in *Mate Gitabi v Jane Kabubu Muga Alias Jane Kaburu Muga & 3 Others* [2017] eKLR:
- “For one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is without secrecy, without force, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin maxim *nec vi, nec clam, nec precario*.....”
51. This court has to determine whether the plaintiff's entry was non-consensual and/or non-permissive. I find that plaintiff's evidence was consistent that he entered the suit property vide a sale agreement dated 26.9.1994, which agreement is not disputed. PW1 led firm and consistent evidence that he paid ksh.320,000/= on execution of the sale agreement and made further instalments of ksh.80,000/= and ksh.400,000/=. He produced a cheque of ksh.200,000/= paid as the last instalment and led evidence that on 28.6.1995 the deceased issued him with a receipt acknowledging that he had been paid ksh.1 million being the entire consideration in respect of sale of the suit parcel.
52. I find that the evidence of DW2 that the signature on the receipt issued by the deceased was a forgery does not hold water, noting that what DW2 refers to as a known signature of the deceased is a document from Maize and Produce Board bearing several dates (16.4.71, 4.2.71) as well as several signatures. Further, the said evidence is immaterial since there is evidence of the cheque foil that ksh.200,000/= was paid to the deceased. Further DW1 told the court that there was no evidence that the plaintiff did not pay the balance of the purchase price and admitted that the deceased never demanded ksh.200,000/=



from the deceased. Similarly, the defendants have never demanded the alleged balance of Ksh 200,000. What more DW1 stated in cross examination that he was not involved in transactions of the deceased. That being the case, how can DW1 cast aspersions on those transactions undertaken by deceased, yet the said transactions were not challenged by deceased during his lifetime?

53. I find that even though the entry of the suit land by the plaintiff was with the consent of the seller, the actual transfer was not effected. Thus plaintiff's possession then became adverse on 28.6.1995 after the deceased had accepted the last instalment. When computed to the time of filing this suit, a period of over 20 years had lapsed. The plaintiff's possession was also continuous and uninterrupted.
54. In the circumstances, I find that plaintiff's case on adverse possession is merited and I proceed to grant the following orders;
- i. It is hereby declared that the plaintiff is entitled to parcel being L.R. 3598/61 being ONE ACRE out of parcel L.R.3589/6 by way of adverse possession.
 - ii. An order is hereby issued directing the Land Registrar to register parcel L.R. No. 3589/61 being ONE ACRE out of parcel L.R.3589/6 in the name of STEPHEN KENGERE MANOTI.
 - iii. The plaintiff shall meet the costs incidental to registration of the suit property into his name.
 - iv. Each party is to bear their own costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17th DAY OF DECEMBER 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:

J.P Machira for Plaintiff

Lukoye for Defendant

Court Assistant: Vena

