



**Afandi v Lusiche (Environment and Land Case 67 of 2019)  
[2023] KEELC 165 (KLR) (25 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 165 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND CASE 67 OF 2019  
DO OHUNGO, J  
JANUARY 25, 2023**

**BETWEEN**

**HARUNA MWELESA AFANDI ..... APPLICANT**

**AND**

**SILVESTER MANGATI LUSICHE ..... RESPONDENT**

**JUDGMENT**

1. Proceedings in this matter commenced through Originating Summons (OS) dated 18<sup>th</sup> January 2013, which was filed in the High Court as Kakamega HCC No. 14 of 2013. The matter was later transferred to this court, hence its current case number. The plaintiff/applicant averred in the OS that he had become entitled to 3½ acres of the parcel of land known as Butsotso/Esumeyia/4213 (the suit property) by adverse possession. He therefore sought the following orders:
  - (a) An order that the respondent's right over a portion measuring more or less 3½ acres of land title No. Butsotso/Esumeyia/4213 got extinguished by adverse possession.
  - (b) An order that upon expiry of 12 years since 1981 when the applicant was in possession, the respondent held and currently holds the said 3½ acres of the land title No. Butsotso/Esumeyia/4213 in trust for the applicant.
  - (c) An order under Section 38 of the *Limitation of Actions Act* Cap 22 Laws of Kenya that the applicant be registered as owner of the said 3 ½ acres of Land Title Butsotso/Esumeyia/4213.
  - (d) An order that the respondent do execute all transfer documents in favour of the applicant to permit registration as sought in (c) above failing which the registrar or deputy registrar of this Honourable Court be empowered to execute any such documents on behalf of the respondent.



- (e) An order that the respondent be condemned to pay the costs of this suit.
  - (f) Such further order or relief as the Honourable Court may deem fit to grant.
2. The OS was supported by an affidavit sworn by the plaintiff/applicant on 18<sup>th</sup> January 2013. He deposed that the suit property was registered in the defendant/respondent's name as of the date of the affidavit and that his (the applicant's) father one Filimona Amandi (deceased) purchased 3½ acres of the suit property for the applicant from one Joseph Makokha through an agreement dated 8<sup>th</sup> March 1981 at KShs 6,200 which sum was fully paid. The applicant further deposed that the sale agreement erroneously quoted the property as plot number 779 and 1360 instead of plot number 777. That plot number 777 has been subdivided severally leading to the current Butsotso/Esumeyia/4213 (the suit property). That applicant's father put the applicant in possession of the 3½ acres of the suit property of the suit property in 1981 where the applicant established a home in 1981 and built a permanent house where he resided to the date of his affidavit together with his married adult sons who have built their own houses.
  3. The applicant added that he also has trees, a shallow well and commercial sugar cane on the suit property and that the 3½ acres of the suit property is distinct from the portion occupied by the respondent and other persons who the respondent sold land to. That Butsotso/Esumeyia/777 was 9½ acres and that the respondent who was not on the land when the 3½ acres were sold returned in 1983 and settled on the remaining portion of land without raising any issue about the applicant's possession of the 3½ acres until about 2005 when the respondent lodged a claim at the Lurambi Land Disputes Tribunal. That the tribunal ordered the applicant to vacate from the suit property, an order which the applicant successfully quashed through judicial review in Kakamega High Court Misc. Application No. 60 of 2006. The applicant concluded by stating that he has remained in possession of the suit property openly, continuously and exclusively to date and therefore prayed that the OS be allowed.
  4. The respondent opposed the Originating Summons through a replying affidavit sworn on 3<sup>rd</sup> April 2013 wherein he deposed that the applicant has not been in open and continuous occupation of the suit property since 1981 and that when he realized that the applicant had trespassed onto the suit property, he duly filed an eviction case against the applicant through Lurambi Land District Tribunal Case No. 56 of 2005. That he obtained eviction orders which were later quashed by the High Court after which filed an appeal to the Court of Appeal, which appeal was pending as of the date of his affidavit. The respondent therefore urged the court to dismiss the OS.
  5. At the hearing, the applicant testified as PW1 and adopted his aforesaid supporting affidavit as his evidence in chief. Under cross examination, he stated that he was born in 1955 and that his father bought plot number 779. At some point he changed and said his father bought plot number 1360 instead. He added that the original plot number 777 has been severally subdivided resulting among others into the suit property and that he does not know exactly how much land he is using and how much land the respondent is using.
  6. Wilfred Sakwa Shitandi testified as PW2 and stated that the litigants herein are his neighbours. That the applicant's father bought land for the applicant in 1981 from Joseph Makokha Malava who was the respondent's uncle. PW2 further stated that the applicant has built permanent houses on the land and resides thereon with his children and grandchildren. Under cross examination, he testified that he was not present during the transaction and that he does not know the plot number that was bought.
  7. The plaintiff's case was then closed.



8. During defence hearing, the respondent testified as DW1, the sole defence witness. He adopted his aforesaid replying affidavit as his evidence in chief and further stated that the plaintiff/applicant never purchased any portion of Butso/Esuseyia/4213. That through an agreement dated 2<sup>nd</sup> May 1981, the applicant's father purchased parcel number 1360 which was a subdivision of parcel number 779 and that in 1995 the applicant transferred parcel number 1360 to himself. That parcel number 4213 (the suit property) was totally separate and different from parcel number 779. He added that when he returned home in 1983, he found the applicant living on the land with his family, but he (DW1) does not know the size that the applicant is occupying. That the applicant's homestead occupies part of DW1's land and that the applicant is cultivating the land by force. According to him, what the applicant's father bought was parcel 1360 and that there was no error on the sale agreement. He suggested that the District Surveyor should go and establish the original boundary between parcels 779 and 1360.
9. Defence case was then closed. Parties were ordered to file written submissions.
10. The applicant filed his submissions on 19<sup>th</sup> April 2022 and argued that he has been in uninterrupted possession of the suit property since 1981 and that despite the respondent being registered as proprietor of the suit property in 1987, he did nothing to dispossess the applicant. The applicant further submitted that the error in the sale agreement does not vitiate his claim. Relying on *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR, he submitted that he had proven adverse possession and urged the court to allow the OS.
11. The respondent filed his submissions on 9<sup>th</sup> June 2022 and submitted that the applicant's claim ought to be for 3 ½ acres of land within title number Butso/Emuseyia/1360 as opposed to the suit property since the sale agreement does not refer to the suit property. He reiterated that the District Surveyor should go and establish the original boundary between parcels 777 and 1360.
12. I have carefully considered the parties' pleadings, evidence, and submissions. The issues for determination are whether adverse possession has been established and whether the reliefs sought should issue.
13. The law and principles relating to adverse possession are well settled and are founded on Sections 7, 13, 17 and 38 of *Limitation of Actions Act*. In the case of *Wines & Spirits Kenya Limited & another v George Mwachiru Mwangi* [2018] eKLR, the Court of Appeal discussed the circumstances under which the cause of action accrues as follows:

So when does the cause of action accrue? Section 13 provides that:

" (1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession....." ...

Further, under Section 17, if the registered proprietor fails to recover the land within 12 years of uninterrupted adverse occupation, the proprietor's title to the land stands extinguished. The legal implication of the doctrine was well summarized by this Court in the case of *Benjamin Kamau Murima & Others v Gladys Njeri*, C A No. 213 of 1996 where it was held that:

" The combined effect of the relevant provisions of sections 7, 13 and 17 of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor



of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.”

...

- (13) Having the above pre-requisites in mind, it therefore follows that the onus is on the person or persons claiming adverse possession to prove that they have used this land which they claim as of right. This is the Latin maxim of *nec vi, nec clam, nec precario* (which means that the occupation of the land must have no force, no secrecy, no evasion). Accordingly, the respondent herein was beholden to not only show his uninterrupted possession, but also that the 1<sup>st</sup> appellant had knowledge (or the means of knowing) actual or constructive of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration; (See *Wanyoike Gathure v/s Beverly* [1965] EA 514, 519, per Miles J.)
- (14) Consequently and as rightly submitted by the appellants’ counsel, the burden of proof in adverse possession lies primarily with the adverse possessor who wishes to rely on the doctrine.

...

14. The plaintiff/applicant’s claim is that he has become entitled to 3½ acres of the parcel of land known as Butsotso/Esumeyia/4213 (the suit property) by adverse possession and that he entered it in 1981 after his father purchased it for him through a sale agreement dated 8<sup>th</sup> March 1981. The applicant contends that the sale agreement erroneously quoted the property as plot number 779 and 1360 instead of plot number 777. The respondent maintains that there is no error and that the land that the applicant’s father purchased is within plot number 1360 and not the suit property. In his testimony, the applicant stated that he does not know exactly how much land he is occupying and how much land the respondent is occupying.
15. In a claim of adverse possession, it is imperative that the land being claimed is clearly identified. It is for that reason that Order 37 Rule 7 of the *Civil Procedure Rules* specifically requires that OS be supported by an affidavit to which a certified extract of the title to the land in question has been annexed. The Court of Appeal sated in *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another* [2015] eKLR thus:
- The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of *Githu v Ndele* [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them...
16. This is a claim for adverse possession and not one for enforcement of the sale agreement. As I understand it, the sale transaction is only for purposes of showing identity of land and computing time. The burden of completely identifying the land in his possession as well as its size is upon the applicant. In this case, the applicant’s evidence is conflicting as to which parcel was purchased. Even the size of land in his occupation has not been established since he did not present any survey report or sketch. Even though the respondent has conceded that the applicant is in occupation of a portion of the suit property, the unanswered question remains: what size?
17. In view of the foregoing discourse, I find that the plaintiff/applicant has failed to establish adverse possession and that the reliefs sought cannot issue. Consequently, I dismiss the Originating Summons. No order on costs.



**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 25<sup>TH</sup> DAY OF JANUARY 2023.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Mr Nyikuli for the plaintiff/applicant

The defendant/respondent present

Court Assistant: E. Juma

