



REPUBLIC OF KENYA



**KENYA LAW**  
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**Lumumba v Saidi (Environment & Land Case 12 of 2019)  
[2023] KEELC 151 (KLR) (25 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 151 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 12 OF 2019  
DO OHUNGO, J  
JANUARY 25, 2023**

**BETWEEN**

**CATHERINE KHANAKA NDUKU LUMUMBA ..... APPLICANT**

**AND**

**ASIMIN VUGUZA SAIDI ..... RESPONDENT**

**JUDGMENT**

1. The plaintiff/applicant moved the court through Originating Summons (OS) dated March 7, 2019 seeking determination of the following:
  1. Whether the applicant Catherine Khanaka Nduku Lumumba has been and is hereby declared to be in adverse possession of the whole of that title comprising land parcel No. Butsotso/Indangalasia/1586 by virtue of having been in occupation exclusively, peacefully and continuously for a period of 12 years and above.
  2. Whether the registration of Asimin Vuguza Saidi on 7<sup>th</sup> of July, 2017 was and is hereby extinguished by virtue of the adverse possession by the applicant as aforesaid.
  3. Whether the applicant should thus be registered as the absolute proprietor of LR No Butsotso/Indangalasia/1586 and the names of Asimin Vuguza Saidi be cancelled from the relevant land register.
  4. Whether the deputy registrar of this court should be authorized and empowered to execute all the relevant instruments in favor of the applicant.
  5. Whether costs of this cause should be awarded.
2. The OS was supported by an affidavit sworn by the plaintiff/applicant. She deposed that land parcel number Butsotso/Indangalasia/1586 (the suit property) was originally registered in the name of Saidi Kovoga Kongera (deceased) who entered into a sale agreement with the applicant's husband (deceased)



- on December 16, 2001 and that pursuant to the said agreement, the applicant's late husband's family and her took possession of the suit property towards the end of 2001 after constructing two semi-permanent houses on it. She added that she planted sugar cane on the suit property and that after her husband's demise, she and other family members continued to be in occupation of the suit property and extensively developed it up to date the date of her affidavit.
3. The applicant went on to depose that she learnt of the respondent in the year 2017 when she conducted a search on the suit property and discovered that the respondent had secretly filed succession and obtained registration of the suit property. That both her deceased husband and the vendor passed on without having gone to the Land Control Board and without transferring the suit property, but the suit property continued to be exclusively under her and her family's use.
  4. The respondent opposed the *OS* through a replying affidavit filed on June 10, 2019 in which she deposed that she is the registered owner of the suit property and that she was registered following a succession cause in respect of her late husband's estate. That she had been living and utilizing the suit property by planting various crops and trees thereon with her late husband and her children since 1994 until the year 2004 when she started experiencing problems regarding ownership of the suit property with the applicant who claimed purchaser's interest. That the applicant and her people took advantage of the fact that the respondent's husband had deserted their matrimonial home and with the backing of local administration, the applicant harassed the respondent by being violent forcing the respondent and her children to flee for safety to a rented house in Kakamega town where they were still staying as of the date of her affidavit.
  5. The respondent further deposed that the suit property remained uninhabited as she kept on checking on it until 2009 when she heard that the applicant's husband had passed on and she went to the suit property to confirm whether the applicant's husband would be buried on it, and she confirmed that he was not buried on it. That it was at that point that she further learnt that the applicant's sister was staying on the suit property, and that she reported the incident to the local administration but was never assisted. She also deposed that her late husband returned home in 2015 but passed on shortly after and was buried in Nandi where her co-wife resides. The respondent further stated that it is not true that the applicant and her family took possession of the suit property in 2001 and that the applicant's claim that she (the applicant) has developed the suit property and has been continuously, exclusively, and peacefully staying thereon is false.
  6. At the hearing, the applicant testified as PW1 and adopted her statement dated December 13, 2019 as her evidence in chief. She stated that sometime in 1999 her late father one Alex Nduku informed her and her husband through a friend that there was land available for sale in Shirakulu sub-location and that they travelled upcountry from Nairobi to inspect the land and to meet the seller, one Saidi Kuvoga Kongere. That the seller showed them around the land, confirmed that he was the registered proprietor and informed her that he had divorced his wife through Kadhi's court. That they negotiated the purchase price and agreed on KShs 295,000 for the suit property including a temporary semi-permanent structure on it. That she applicant went back to Nairobi and applied for an emergency loan from Afya Sacco and gave the money to her husband to top up and pay the purchase price. That they entered into an initial sale agreement dated November 29, 1999 and a second agreement dated December 16, 2001, both agreements being written by Alex Mutende Oremo who was the Assistant Chief of Shirakalu sub-location and also the applicant's cousin.
  7. The applicant further stated that payment of the purchase price to the seller was completed on December 16, 2001 and that she thereafter placed her sister Rose Musanga and her family on the land to take care of it as the applicant was still in gainful employment in Nairobi. That in 2002, the applicant and her late husband constructed a semi-permanent house and a toilet on the suit land upon which they



- moved from the initial temporary structure into the semi-permanent house and demolished the initial temporary structure. The also stated that they have lived in the suit property with the assistance of her late sister until her demise in 2006 after which the applicant settled on the suit property from 2009 when her husband died and fully in 2015. That after purchasing the suit property, they subsequently built two more buildings, fenced the land, planted trees on it and resided on it continuously. That in 2017, with a view of obtaining title to the suit property, she applicant conducted a search and learnt that the suit property had been registered in the respondent's name following succession proceedings.
8. Under cross-examination and re-examination, the applicant testified that there was a caution on the suit property in the year 2000 and added that she neither destroyed the defendants house nor evicted her. That instead, the applicant and her family built their house and demolished the older one.
  9. Nicholas Omolo Manyasa testified as PW2 and adopted his witness statement dated September 29, 2021 as his evidence in chief. He stated that he is a retired senior chief of East Butso location in Lurambi Division, Kakamega Central sub-county and that the respondent went to his office and requested for a succession letter to administer the estate of Saidi Kovoka Kongere (deceased) which PW2 gave her on January 18, 2017 without knowing that the land had been sold by Saidi Kovoga Kongere (deceased) to the applicant's husband. That later, PW2 learnt that he had given a succession letter to the wrong person after the applicant went to PW2's office to complain and that PW2 reported the matter to Kakamega Police Station through OB No 18/06/018 and further wrote a letter to the Deputy Registrar Kakamega requesting for nullification of the succession cause. Under cross-examination, PW2 stated that he was not involved in the sale while he was in office and that he was neither informed of any marital differences between the respondent and her deceased husband nor that the Alex, the area assistant chief was involved in the eviction of the respondent as well as the sale of the suit property. That he went to the suit property for the first time in January 2018 after the applicant's complaint and that he confirmed that the applicant was on the suit property when he visited it.
  10. Alex Mutende Oremo testified as PW3 and stated that he is the Senior Assistant Chief of Shirakalu sub-location and has been the Assistant Chief since March 1996. He adopted his witness statement dated December 13, 2019 wherein he stated that the applicant is a subject of his sub-location and his maternal cousin. That the respondent and her deceased husband had persistent domestic quarrels which led to the respondent deserting their home which was on the suit property and as a result of which PW3 wrote a letter to the Chief Kadhi on November 30, 1999 giving background of the dispute. That the respondent never returned to the suit property and that the desertion devastated the respondent's late husband leading him to sell the suit property. That the respondent's deceased husband approached PW3 with a buyer and that PW3 wrote the handwritten agreement dated November 29, 1999 as well as the one dated December 16, 2001. That the applicant's family took vacant possession of the suit property immediately after the agreement dated December 16, 2001.
  11. The plaintiff/applicant's case was then closed.
  12. The respondent testified as the sole witness in her case. She adopted her aforesaid replying affidavit and her witness statement dated November 29, 2019 as her evidence in chief. She stated that she became registered proprietor following grant of letters of administration issued to her in HC Succession Cause No 87 of 2017 and that the applicant had filed an application for revocation of the grant. That the applicant entered the suit property and demolished her house in 2009 and that she did not get help despite reporting the matter to PW3 who was the area Assistant Chief. She also stated that she moved away from the suit property for her safety following threats against her.
  13. The defence case was then closed. Parties filed and exchanged written submissions.



14. The applicant argued that her late husband took possession of the suit property in 2001 after entering into a sale agreement dated December 16, 2001 and that time started running in 2001 after the agreement became void for want of consent of the Land Control Board. She relied on *Samuel Miki Waweru v Jane Njeri Richu* [2007] eKLR. She further argued that her sister was on the suit property on the applicant's instructions and that the applicant herself entered the suit property in 2009 upon the demise of her husband and fully in 2015 after leaving her job as a social worker. That by the time the respondent became the registered proprietor of the suit property, the applicant had already acquired the suit property by adverse possession for about 17 years and the title had already been extinguished by operation of law in favour of the applicant.
15. The respondent submitted that it is a settled principle that a party claiming adverse possession ought to prove that her possession was peaceful, open, continuous and without the authority or permission of the owner. In further submitting that adverse possession is a fact to be observed on the land and not on title, the respondent relied on *Gachuma Gacheru v Maina Kabuchwa* [2016] eKLR and argued that the applicant took possession of the suit property in 2009 through her sister and that by the time of filing the suit the applicant had only been in possession for ten years and had not yet acquired title by way of adverse. The respondent therefore prayed that the applicant's suit be dismissed with costs to the respondent.
16. I have carefully 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 should issue.
17. 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 Berverly* [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. ..."

18. The applicant contends that she entered the suit property in the year 2001 pursuant to vide a sale transaction comprised in sale agreements dated November 29, 1999 and December 16, 2001. For a claim for adverse possession to succeed, the claimant must demonstrate that the occupation was without the proprietor's permission. Needless to state, entry, and occupation pursuant to a sale agreement is by permission of the proprietor and does not therefore amount to adverse possession. Time however starts to run in favour of a purchaser from the moment of final payment of the purchase price. See *Public Trustee v Wanduru Ndegwa* [1984] eKLR.
19. A perusal of the agreement dated November 29, 1999 shows that it was between Saidi Kovoga Kongere who was the then registered proprietor as seller and Oronje Omuhaka as buyer. The applicant herein was neither a signatory nor a witness to the agreement. The purchase price was stated as KShs 290,500 out of which KShs 100,000 was paid leaving a balance of KShs 190,500. The second agreement dated December 16, 2001 is not signed by Oronje Omuhaka although it states that he was still the buyer. It further states that as of December 16, 2001, a total of KShs 202,00 had been paid and that KShs 118,000 was paid on December 16, 2001 thereby bringing the total purchase price to KShs 320,000. The agreement also claims that the initial purchase price was KShs 290,000 which is a departure from the KShs 290,500 stated in the agreement dated November 29, 1999. Although the applicant has claimed that she was party to both agreements, in the absence of Oronje Omuhaka's signature in the agreement dated December 16, 2001, I am not persuaded that an agreed purchase price has been proven or even that full payment has been established. In saying so, I bear in mind that the applicant has not brought this suit as an administrator of Oronje Omuhaka's estate.
20. As regards the applicant's contention that that time started running in 2001 after the agreement became void for want of consent of the Land Control Board, I note that for a transaction to be void under Section 6 of the *Land Control Act*, it must first be established that the transaction was a "controlled transaction" as defined under Section 2 of the *Land Control Act*. Simply put, it has to be shown that the transaction concerned agricultural land which is situated within a land control area. The applicant herein did not lead any evidence to show that the suit property herein is agricultural land and that it is located within a land control area. She has thus not demonstrated when time began to run in her favour.
21. A further requirement of adverse possession is that the claimant must demonstrate peaceful occupation. Any possession and occupation forcefully sustained through violence or threats does not count since it is neither quiet nor peaceful. The respondent herein filed her replying affidavit way back on June 10, 2019 and stated at paragraph 6 thereof that:

"The applicant and his people took advantage of the fact that my husband had deserted our matrimonial home and with the backing of the-local administration they harassed me and



became extremely violent which led to me and my children fleeing for safety and went to stay in a rented house at Kakamega Town where I still stay todate."

22. There is evidence on record that Alex Mutende Oremo who testified as PW3 and who authored both sale agreements was not only the area Assistant Chief but also the applicant's cousin. The burden of demonstrating quiet and peaceful occupation was on the applicant. I am not persuaded that she discharged the burden.
23. In view of the foregoing, I find that adverse possession has not been established. That being so, the reliefs sought cannot issue. In the end, I dismiss the plaintiff/applicant's case. Considering the circumstances of the case, I make no order on costs.

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

**D. O. OHUNGO**

**JUDGE**

**Delivered in open court in the presence of:**

**Mr Nyikuli holding brief for Mr Amasakha for the plaintiff/applicant**

**The defendant/respondent**

**Court Assistant: E. Juma**

