



REPUBLIC OF KENYA



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**Wawire & 2 others v Makuba (Environment & Land Case 45
(OS) of 2019) [2023] KEELC 163 (KLR) (25 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 163 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 45 (OS) OF 2019
DO OHUNGO, J
JANUARY 25, 2023**

BETWEEN

AMINA WAWIRE 1ST PLAINTIFF

SAINABU ABUIRE NYONGESA 2ND PLAINTIFF

MUSA IBRAHIM WAWIRE 3RD PLAINTIFF

AND

JOHN WASIKE MAKUBA DEFENDANT

JUDGMENT

1. By originating summons (OS) dated June 8, 2019, the plaintiffs/applicants averred that they had acquired the parcel of land known as Bunyala/Nambacha/278 (the suit property) by adverse possession. They therefore sought the following orders:
 - a. That the applicants be declared the owners of the whole of land parcel No Bunyala/Nambacha/278 having purchased the same in 1981 whereafter they have lived on, occupied and used the said parcel of land from then to date and the applicants are hence entitled to the said parcel of land by virtue of adverse possession and the respondent be ordered to transfer title to the said parcel of land to the applicants.
 - b. That the court issues a declaration that the respondent is holding title to land parcel No Bunyala/ Nambacha/278 in trust for the applicants and the respondent be ordered to transfer title to the said parcel of land to the applicants and in default of the respondent transferring the same voluntarily the court do make an order authorizing the Deputy Registrar of the High Court of Kenya at Kakamega to execute all the documents necessary to effect the transfer of title to the aforesaid parcel of land in to the names of the applicants.
 - c. The respondent pays the costs of this originating summons to the applicants.



- d. That the honourable court does make further orders or grant any other relief deemed fit and just.
2. The OS was supported by an affidavit sworn on June 8, 2016 by Amina Wawire, the first applicant, who deposed that the suit property was originally registered in the name of Emanuel Khasiri (deceased) who was the father of Pius Makokha Wasike, Henry W Wasike and the respondent herein and that Henry W Wasike and the respondent herein were the ones entitled to shares of the suit property. The first applicant further deposed that through agreements made in 1981 and 1983, her deceased husband one Ibrahim Wawire Mwenya alongside his wives who included the first applicant, Agnes Wawire (deceased) who was the mother of the third applicant herein and the second applicant purchased the suit property from Henry W Wasike, the respondent and his mother one Anasitanzia Lyaka. That after purchasing the suit property, the respondent handed over vacant possession thereof to the purchasers and their children and that the purchasers constructed their homes thereon, planted trees and continued to plant crops such as sugar cane, maize, beans, and potatoes up to the date of the affidavit.
3. The first applicant went on to state that Agnes Wawire (deceased) bore seven sons all of whom are married and have constructed their homes on the suit property, have lived thereon and have buried some members of the family thereon. That the applicants' occupation of the suit property has been peaceful and open and with the knowledge of the respondent who lives on his parcel of land in the same village and who has never evicted the applicants or interfered with their exclusive and peaceful occupation. The first applicant further deposed that after the demise of Henry W Wasike, the applicants asked the respondent to transfer title to the suit property and he became evasive thereby prompting the respondent's elder brother one Pius Makokha Wasike who was aware of the transactions to carry out succession proceedings vide Kakamega HC Succession Cause No 247 of 1986 after which he transferred title to the suit property to the first applicant's elder brother one Francis Wawire in 1988 who was to hold the suit property in trust for all the rightful beneficiaries thereto and that upon learning of the development, the respondent in collusion with his mother successfully applied for revocation of the grant. That the grant and Pius Makokha Wasike's registration were revoked, and the suit property was afterwards registered in Anasitanzia Lyaka's name, who later transferred it to the respondent herein despite both of them being aware that the suit property had been sold to the applicants. She added that having purchased and occupied the suit property from 1983 to the date of her affidavit, the respondent's title had been extinguished.
4. The respondent opposed the OS through a replying affidavit which he swore on June 20, 2016. He deposed that he was not aware that the suit property was purchased by the applicants and denied that the applicants have had possession of the suit property. The respondent further deposed that indeed his deceased father was the owner of the suit property, and that the respondent's late father allocated the suit property to the respondent's mother which property was to be shared between the respondent and his brother Henry Wekulo (deceased). That his late brother was not in any capacity to transfer the suit property which was not in his name and that the agreement is a forgery. He added that when he realized that the applicants had invaded the suit property, he sued for their eviction in Kakamega High Court Case No 133 of 1996 which suit was dismissed for want of prosecution on May 9, 2008, after which he filed Kakamega Land & Environment Case Number 574 of 2014 which is still pending before the Environment and Land Court in Kakamega. He annexed copies of complaints in Kakamega High Court Case No 123 of 1996 and Kakamega ELC Number 574 of 2014.
5. Directions were given that hearing proceeds by way of oral evidence and that parties file written statements.



6. At the hearing, Musa Ibrahim Wawire, the third plaintiff/applicant, testified as PW1 and stated that the first and second applicants are his stepmothers. He adopted his witness statement filed on February 19, 2020 as his evidence in chief. The said statement is essentially a repetition of the aforesaid affidavit of Amina Wawire, the first applicant. He added that the respondent has another plot where he resides with his family some 400 metres from the suit property. PW1 further denied any knowledge of the respondent ever suing the applicants. He produced copies of the register in respect of the suit property (PExb 1), sale agreement made in 1981 (PExb 2), sale agreement made in 1983 and letter forwarding payment (PExb 3), Chief's letter dated December 29, 1985 (PExb 4), Assistant Chief's letter dated June 8, 2016 and two burial permits (PExb 5), and a replying affidavit sworn by Pius Makokha Wasike in Kakamega HC Succession Cause No 247 of 1986 (PExb 6).
7. Amina Wawire, the first applicant, testified as PW2. She adopted her witness statement filed on February 19, 2020 as her evidence in chief. The statement is essentially a repetition of her aforesaid affidavit in support of the OS.
8. Lastly, Ainea Ng'ombe testified as PW3. He too adopted his witness statement dated February 17, 2020 as his evidence in chief. He stated in the statement that he was the village elder of Sienga village in 1983 and that Ibrahim Wawire Mwenya (deceased) who lived in Sienga village with his three wives approached PW3 in 1983 and informed him that he wanted to buy a piece of land from Anastanzia Lyaka and that he wanted PW3 to be a witness to the agreement. That the parties met at the deceased's home, agreed on the terms of the sale, prepared an agreement which was witnessed by PW3. PW3 further stated that the deceased purchased the suit property from Anastanzia and paid the full purchase price whereupon he and his family took exclusive and vacant possession thereof and lived on it up to the date of his testimony.
9. The plaintiffs/applicants' case was then closed. The defendant/respondent sought and was granted an adjournment for purposes of defence hearing. Despite the defence hearing date being taken by consent, the defendant/respondent was absent during his hearing. The defence case was therefore closed. Parties were ordered to file and exchange written submissions. The defendant/respondent did not file any.
10. The plaintiffs/applicants filed their submissions on May 11, 2022 and argued that they paid the full purchase price, took possession in 1983, and have occupied the suit property openly, peacefully, and uninterruptedly. That the defendant's title stood extinguished by operation of the law in 1995. The plaintiffs/applicants therefore prayed that the OS be allowed as prayed.
11. I have carefully considered the parties' pleadings, evidence, and submissions. The issues that emerge for determination are whether adverse possession has been established and whether the reliefs sought should issue.
12. 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 vs 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 1st 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 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. ...”

13. From the material on record, it is apparent that the defendant is the registered proprietor of the suit property, having been registered as such on January 20, 1994, as is manifest from entry number 8 in the proprietorship section of the register in respect of the suit property. The plaintiffs/applicants’ case is that they entered the suit property in 1983 following a purchase transaction, that they paid the full purchase price as at 1983 and that they retained possession of the whole of it until the time of filing this case. The defendant did not offer any evidence to controvert the plaintiffs’ case.
14. For a claim for adverse possession to succeed, the claimant must demonstrate that the occupation was without the proprietor’s permission. Ordinarily, entry and occupation pursuant to a sale agreement is by permission of the proprietor and does not therefore amount to adverse possession. However, once a purchaser completes paying the purchase price, his possession and occupation of the property is not by permission of the seller. In such a scenario, time for purposes of adverse possession starts to run in favour of the purchaser from the moment of final payment of the purchase price. See *Public Trustee v Wanduru Ndegwa* [1984] eKLR.
15. Thus, time started running in this case from 1983. The defendant effectively conceded in his replying affidavit that the plaintiffs are in possession. That is why he sued them seeking their eviction in Kakamega High Court Case No 133 of 1996 which suit he contends was dismissed for want of prosecution on May 9, 2008. The defendant offered nothing to challenge the plaintiffs’ case that they have used the suit property peacefully, continuously and with the defendant’s knowledge for the duration. The requisite period of 12 years was therefore attained by 1995. In those circumstances, the defendant’s Kakamega High Court Case No 133 of 1996 did not have any effect on the plaintiffs’ claim in view of the provisions of section 7 of *Limitation of Actions Act* which bar the filing of such a suit after the end of twelve years from the date on which the right of action accrued.



16. In view of the foregoing, I am persuaded that the plaintiffs have established adverse possession and that they are entitled to judgment in their favour. I therefore make the following orders:
- a. It is hereby declared that the plaintiffs/applicants are the owners of the whole of the parcel of land known as Bunyala/Nambacha/278, having become entitled to it by virtue of adverse possession.
 - b. It is hereby declared that the defendant/respondent is holding title to the parcel of land known as Bunyala/Nambacha/278 in trust for the plaintiffs/applicants.
 - c. The defendant/respondent is hereby ordered to transfer title to the parcel of land known as Bunyala/Nambacha/278 to the plaintiffs/applicants within 90 (ninety) days from the date of delivery of this judgment.
 - d. In default of the defendant/respondent transferring the title as ordered above, the Deputy Registrar of this court shall be at liberty to execute all necessary documents on behalf of the defendant/respondent to effect the transfer.
 - e. 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:

Ms Aligula for the plaintiffs/applicants

No appearance for the defendant/respondent

Court Assistant: E. Juma

