



**Nyangweso v Otiende (Environment & Land Case 71 of 2019)
[2023] KEELC 28 (KLR) (17 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 28 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 71 OF 2019
DO OHUNGO, J
JANUARY 17, 2023**

BETWEEN

PATRICK LIPARI NYANGWESO PLAINTIFF

AND

JAMES MUGERE OTIENDE DEFENDANT

JUDGMENT

1. The plaintiff moved the court through Originating Summons (OS) dated May 29, 2019, averring that he had become entitled to the parcel of land known as Butsotso/Indangalasia/1459 (the suit property) by adverse possession.
2. The OS was supported by an affidavit sworn by the plaintiff. He deposed that he is a son to Philip Nyangweso who was the registered proprietor of the parcel of land known as Butsotso/Indangalasia/1064 which was later subdivided to result in parcel number Butsotso/Indangalasia/1459 (the suit property). That he was born and brought up on Butsotso/Indangalasia/1064 and that he had remained on it from June 1, 1962 to the date of his said affidavit. That he established his home as well as carried out farming activities on Butsotso/Indangalasia/1064. He added that he was surprised when on September 19, 2018, his father who was ailing was summoned by the area chief to his office on an allegation that the defendant had lodged a claim of ownership of Butsotso/Indangalasia/1459 (the suit property).
3. The plaintiff further deposed that he was surprised when he heard claims on the said date that his home was established on the defendant's land number Butsotso/Indangalasia/1459. That upon asking his father, his father told him that he (his father) had a land transaction in the late 1980's with the defendant but he (his father) did not recall going to the Land Control Board to transfer the land to the defendant. The plaintiff added that he obtained copies of land transfer documents from the lands office and that in his view, if the defendant obtained a title deed then he acquired it fraudulently for reasons that no consent of the Land Control Board was applied for or obtained for the transfer and



- that forged documents were presented to the lands office to facilitate subdivision and transfer of the land to the defendant. He urged the court to nullify the title in respect of Butso/Indangalasia/1459 on account of fraud.
4. The plaintiff went on to depose that he has resided on Butso/Indangalasia/1459 and established his home on it for a period in excess of 12 years without the defendant ever laying claim to the said parcel or settling on it.
 5. The defendant opposed the OS through a replying affidavit in which he deposed that on January 3, 1989, he purchased a portion of land parcel number Butso/Indangalasia/1064 from the plaintiff's father and fully paid the purchase price. That later the same year, the land was subdivided and the portion he bought became Butso/Indangalasia/1459. That relevant consents were obtained, transfer process was done, and he became the registered owner of Butso/Indangalasia/1459. He added that the plaintiff destroyed the boundary demarcation of Butso/Indangalasia/1459 and prevented him (the defendant) from using Butso/Indangalasia/1459. That whenever he (the defendant) appears to use the land the plaintiff chases him away and threatens him.
 6. The defendant further deposed that he reported the matter to the area chief and police for action to be taken against the plaintiff. That in December 2012, he discovered that a temporary structure had been erected on the suit property without his consent and that he, the plaintiff, and the plaintiff's father met at the chief's office in Lurambi in September 2018 where they agreed in writing to remove the structure by March 31, 2019 and to reinstate the demarcation boundaries.
 7. The OS was heard through oral evidence. The plaintiff testified as PW1. He adopted his aforesaid supporting affidavit and stated that he, his father, and the defendant met at the chief's office where they agreed to vacate the land and remove the houses on it.
 8. Next on the stand was Ernest Lipari Muchiti (PW2), a cousin to the plaintiff. He stated that the plaintiff was born on the suit property and continues to live on it. That the plaintiff has constructed a main house, a kitchen, and a pit latrine on the suit property. He added that the defendant is a stranger with no genuine claim to the suit property.
 9. Lastly, Johnson Muaka Nyangweso testified as PW3. He stated that the plaintiff is his elder brother, and that the plaintiff has resided on land parcel number Butso/Indangalasia/1064 since the plaintiff was born. That the defendant is a stranger and that he never witnessed his father selling any land to the defendant.
 10. The plaintiff's case was then closed.
 11. The defendant James Mugere Otiende opened the defence case by testifying as DW1. He adopted his aforesaid replying affidavit as part of his testimony. He stated that the plaintiff does not reside on the suit property and that there were disputes between him and the plaintiff's father over the suit property, which disputes were solved at the chief's office. He added that he intends to build on the suit property upon retirement and that he had fenced it, but the plaintiff removed the fence. That there is a house on the suit property which the plaintiff's father told him was built by one of sons.
 12. The defendant further stated that has never used the suit property. I however fenced it. That he wrote a letter to the land registrar in 1991 complaining about trespass on the suit property and that he lodged another complaint in 2004 through a letter from the chief.
 13. Hesbon Ozimbo Master testified next as DW2. He stated that he was present and witnessed the transaction in which the plaintiff's father sold the suit property to the defendant in 1989. He added



- that he resides far from the suit property and that he did not know what was going on there as at the date of his testimony.
14. The defence case was then closed. Parties thereafter filed and exchanged written submissions. The plaintiff argued that he had been in uninterrupted occupation of the suit property for 28 years and that he had established adverse possession. He relied on *Tabitha Waitherero Kimani v Joshua Ng'ang'a* [2017] eKLR and urged the court to allow his case as prayed.
 15. In response, the defendant argued that demonstrated that there have been disputes on trespass between him and the plaintiff as well as the plaintiff's father at the local administrators' offices and that consequently there has been no peaceful occupation or adverse possession for that matter. Relying *inter alia* on the cases of *Pauline Mpaka v Mark Mungiria Muguna* [2018] eKLR and *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR he urged the court to dismiss the claim for adverse possession.
 16. I have considered the parties' respective pleadings, evidence, and submissions. The issues for determination are whether adverse possession has been established and whether the reliefs sought should issue.
 17. The ingredients of adverse possession were discussed by the Court of Appeal in *Mtana Lewa v Kabindi Ngala Mwangandi (supra)* where the court stated that adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a period of twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.
 18. The parties made some references to alleged fraud and irregularities in the acquisition of title by the defendant. I note however that fraud and irregularities in the acquisition of title are not considerations in a claim for adverse possession. Ordinarily, the plaintiff in a claim for adverse possession starts his case on the basis that the defendant is the registered owner of the suit property. There can be no valid claim for adverse possession where the plaintiff does not recognize the defendant's title.
 19. There is no dispute that the defendant herein is the registered proprietor of the parcel of land known as Butsotso/Indangalasia/1459 (the suit property). From the material on record, it is apparent that the defendant became the registered proprietor of the suit property on November 2, 1990 and that a title deed was issued to him on the same date. The suit property is a subdivision of Butsotso/Indangalasia/1064 whose registered owner was the plaintiff's father and whose title was closed on October 31, 1990 upon subdivision into Butsotso/Indangalasia/1458 and Butsotso/Indangalasia/1459.
 20. One of the hurdles that the plaintiff must surmount is to establish that he had peaceful possession of the suit property for an uninterrupted period of twelve (12) years prior to filing his claim. The plaintiff is required to demonstrate the date of his entry into the suit property coupled with an intention to dispossess the defendant. According to the plaintiff, he has been on the suit property since he was born. He did not however tender any evidence to demonstrate his date of birth. Even if he had proven his date of birth, the earliest he would have shown any intention to dispossess the defendant independent of any claim by his father would be upon attaining the age of 18 years. The defendant stated in his testimony that he discovered that a temporary structure had been erected on the suit property without his consent in December 2012. In the absence of any proof by the plaintiff of his date of entry into the suit property, I take December 2012 as the time when time began to run in favour of the plaintiff. The plaintiff filed this suit on June 9, 2019. By that date, only six and a half years had lapsed since time



began to run in favour of the plaintiff. In other words, the plaintiff has not shown that uninterrupted possession for a period of 12 years.

21. The plaintiff's own evidence which is also confirmed by the evidence put on record by the defendant, is that on September 19, 2018 he and his father as well as the defendant were at the area chief's office following a complaint lodged by the defendant who asserted ownership of the suit property and who wanted the plaintiff to remove a house that the plaintiff had constructed on the suit property. By that action of the defendant, time which had begun to run was interrupted.
22. One other aspect of the case which is worth noting is that the defendant testified that the plaintiff removed the defendant's fence and that whenever he (the defendant) showed up to use the suit property the plaintiff would chase him away and threaten him. The plaintiff did not controvert that evidence. It is trite that a claim for adverse possession can only be sustained if the possession of the adverse possessor is not by force.
23. In view of the foregoing discourse, the plaintiff has failed to establish adverse possession. That being the case the reliefs sought cannot issue. Consequently, I dismiss the plaintiff's case with no order on costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 17TH DAY OF JANUARY 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the plaintiff

Ms Wilunda for the defendant

Court Assistant: E. Juma

