



Ombiro (Suing on his own behalf and as the administrator of the Estate of Anjelina Wandeyi Rading – Deceased) v Mmboga (Environment & Land Case 13 of 2021) [2023] KEELC 15932 (KLR) (28 February 2023) (Judgment)

Neutral citation: [2023] KEELC 15932 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 13 OF 2021
DO OHUNGO, J
FEBRUARY 28, 2023**

BETWEEN

LUCAS OMBIRO (SUING ON HIS OWN BEHALF AND AS THE ADMINISTRATOR OF THE ESTATE OF ANJELINA WANDEYI RADING – DECEASED) PLAINTIFF

AND

KEZIEH MMBOGA DEFENDANT

JUDGMENT

1. By Originating Summons (OS) dated January 10 2014, the applicant claimed to have acquired the parcel of land known as S/Kabras/Shamberere/1653 (suit property) by adverse possession and sought the determination of the following issues:
 1. Whether the applicant has been in occupation, use and or in possession of land parcel no S/Kabras/Shamberere/1653 containing by measurement 0.63 hectares whose boundaries are clearly demarcated on the ground, comprised in the said parcel of land for a period of over 12 years exclusively, openly, peacefully, continuously and uninterrupted since 1990 to-date.
 2. Whether the respondent being the current registered proprietor of the said parcel of land measuring 0.63 hectares comprised in title no S/Kabras/Shamberere/1653 holds the said title which is in the use, possession and occupation of the applicant in trust for the applicant.
 3. Whether the respondent's title to the suit land S/Kabras/Shamberere/1653 measuring 0.63 hectares in occupation and use of the applicant became extinguished upon expiry of the period of 12 years from June, 1990.
 4. Whether the applicant has now acquired title to the said parcel of land no S/Kabras/Shamberere/1653 measuring 0.63 hectares by virtue of adverse possession.



5. Whether the respondent should be ordered to transfer title to the whole of the suit land which is in actual occupation and possession of the applicant to the applicant and in default thereof the deputy registrar of this honourable court be directed to do so on behalf of the respondent.
6. Who should be condemned to bear the costs thereof.
2. The Originating Summons was supported by an affidavit sworn by the applicant who deposed that he is the administrator of the estate of Anjelina Wadenyi Rading (deceased) having obtained limited grant *ad litem* and that sometime in June 1990, the deceased purchased the suit property at a consideration which she paid in full. That the deceased and him took possession of the suit property and developed it by planting trees and food crops on it peacefully and with the respondent's knowledge from 1990 to the date of the affidavit. He further deposed that despite numerous requests to transfer the suit property, the respondent had refused to do so.
3. The respondent opposed the OS through a replying affidavit which he swore on March 6, 2019. She deposed that she never sold the suit property to the deceased as alleged but that she sold it through one Christopher Siganga to Patrick Odera Rading who is since deceased and that Anjelina Wandeyi Rading merely signed the agreement on behalf of Patrick Odera Rading as the mother since Patrick was then working in Japan. The respondent further deposed that when Patrick came back to Kenya, he duly signed land transfer documents but unfortunately died before registration. She stated that Patrick was survived by a widow and children who ought to inherit the suit property. The respondent concluded by deposing that the applicant has never occupied the suit property at all and that the suit property has always been fallow and bushy without any agricultural exercise taken therein by the applicant.
4. The applicant filed a further affidavit sworn on May 16, 2019 in which he deposed that the respondent sold the suit property to the late Anjelina Wandeyi Rading through the late Christopher Siganga and not his late brother Patrick Rading. He re-iterated that he has been in occupation, possession and utilization of the suit property from 1990 to the date of his affidavit without any interruption and that the suit property is neither fallow nor bushy but has always been under cultivation by him.
5. Directions were given that hearing of the OS proceeds by way of oral evidence.
6. On the hearing date, which was fixed by consent, neither the defendant nor her advocate attended court. The hearing proceeded and the plaintiff/applicant testified as PW1. He adopted his witness statement dated February 4, 2022 as his evidence in chief. The said statement is essentially a rehash of his aforesaid affidavits.
7. James Makamu Shikanga testified as PW2 and adopted his witness statement dated February 4, 2022 as his evidence in chief. In the said statement, stated that he was the village elder of Chombeli Village from 1987 to 2020 and that he has known the plaintiff/applicants herein together with his parents who are both deceased. That in 1990, the plaintiff's mother Anjelina Wandeyi Rading purchased the suit property from the respondent who was represented by Christopher Waudo Siganga and that Anjelina Wandeyi Rading and the plaintiff took vacant possession, occupation and use of the suit property from 1990. That Anjelina Wandeyi Rading died in 1992 leaving the plaintiff in possession, use and occupation of the suit property to the date of his testimony.
8. The plaintiff/applicant's case was then closed. Owing to non-appearance, the defence case was closed upon an application by the plaintiff to that effect. Parties were ordered to file, and exchange written submissions. The defendant/respondent did not file any.
9. The plaintiff/applicant filed his submissions on September 6, 2022 and argued that he had established adverse possession. He urged the court to allow the OS as prayed.



10. 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.
11. The essentials of adverse possession were restated by the Court of Appeal in [Loise Nduta Itotia v Aziza Said Hamisi](#) [2020] eKLR as follows:

In line with the Act, Kneller, J (as he then was) in the case of *Kimani Ruchire vs Swift Rutherford & Co Ltd* [1980] KLR 10, outlined some tenets of adverse possession thus; "The plaintiffs have to prove that they have used this land which they claim as of right. Nec vi, nec clam, nec precario (No force, no secrecy, no persuasion). So the plaintiffs must show that the company 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 purposes or any endeavours to interrupt it or by way of recurrent consideration."
12. Consequently, the burden of proof lies with the plaintiff/applicant who must prove that he has had peaceful and uninterrupted possession for 12 years. There is no dispute that the defendant is the registered proprietor of the suit property. She conceded as much in her replying affidavit. Further, the copy of register which was produced shows that the defendant became the registered proprietor on September 7, 2000 and that on August 31, 2009, a caution was registered in favour of the plaintiff who was claiming beneficiary interest.
13. From the evidence adduced, it is manifest that the defendant admitted to selling the suit property, even though she claimed she sold to the plaintiff's deceased brother. The defendant did not appear at trial to assert her position on oath considering that trial was by oral evidence. On a balance of probabilities, the plaintiff's version of events carries the day.
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. The plaintiff adduced evidence showing that payment of the purchase price was completed by his deceased mother on January 19, 1992. Both the plaintiff and PW2 testified that the plaintiff and his deceased mother took possession in 1990 and that the plaintiff remained in possession as at the date of his testimony. I find that time started running against the defendant from January 19, 1992 and that by January 20, 2004, the plaintiff had attained the requisite period of 12 years of uninterrupted peaceful possession. On the other hand, Anjelina Wandeyi Rading who died on June 13, 1992, had not met the requisite period.
16. In view of the foregoing, the plaintiff has established adverse possession and is thus entitled to relief personally. I make the following orders:
 - a. The defendant's title to the parcel of land known as S/Kabras/Shamberere/1653 measuring 0.63 hectares became extinguished by adverse possession in favour of the plaintiff on January 20, 2004.
 - b. The defendant is holding title to the parcel of land known as S/Kabras/Shamberere/1653 measuring 0.63 hectares in trust for the plaintiff.



- c. The plaintiff has acquired title to the parcel of land known as S/Kabras/Shamberere/1653 measuring 0.63 hectares by virtue of adverse possession.
- d. The defendant is hereby ordered to transfer title to the parcel of land known as S/Kabras/Shamberere/1653 measuring 0.63 hectares to the plaintiff within 90 (ninety) days from the date of delivery of this judgment. In default, the Deputy Registrar of this court to sign all necessary documents on behalf of the defendant so as to effect the transfer.
- e. No order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 28TH DAY OF FEBRUARY 2023.

D O OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Akwala for the plaintiff

No appearance for the defendant

Court assistant: E Juma

