



Okusimba & another (Both suing as legal representatives of the Estate of the Late Henry Okusimba) v Wanyama & 2 others (Environment & Land Case 93 of 2019) [2023] KEELC 15673 (KLR) (21 February 2023) (Judgment)

Neutral citation: [2023] KEELC 15673 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 93 OF 2019
DO OHUNGO, J
FEBRUARY 21, 2023**

BETWEEN

**DICKSON MAYABI OKUSIMBA 1ST PLAINTIFF
BERNARD SAKWA OKUSIMB 2ND PLAINTIFF
BOTH SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE
HENRY OKUSIMBA**

AND

**GENEVEIVE NANJALA WANYAMA 1ST DEFENDANT
FREDRICK MUSUNGU JUMA 2ND DEFENDANT
JOSEPH WERE NYONGESA 3RD DEFENDANT**

JUDGMENT

1. Proceedings in this matter commenced on January 19, 2010 when Henry Okusimba filed Originating Summons dated December 23, 2009 as Kakamega High Court Civil Suit No 3 of 2010 (OS). The matter was later transferred to this court and acquired its current case number. Henry Okusimba passed away on September 25, 2002 and was substituted by the current plaintiffs, pursuant to an order made on October 6, 2014. The initial Originating Summons was replaced by Amended Originating Summons dated August 31, 2017 and filed on September 4, 2017.
2. Through the Amended Originating Summons, the plaintiffs sought determination of the following issues:
 - (a) If the first respondent on one hand and the second and third respondent jointly on the other hand are the registered proprietors of LR Nos East Wanga/



Mungángá/1123 and 1122 respectively formerly comprising of LR No East Wanga/Mungángá/204.

- (b) If the deceased applicant had been in full possession and occupation of LR Nos East Wanga/Mungángá/1123 and 1122 for a period in excess of 12 years in an open, peaceful and uninterrupted manner.
 - (c) If such full possession and occupation of LR Nos East Mungángá/1123 and 1122 for a period in excess of 12 years in an open, peaceful and uninterrupted manner has been adverse to the proprietary interests of the respondents severally and/or jointly.
 - (d) Who should be condemned to pay the costs to (sic) this suit.
 - (e) When did time necessary to constitute adverse possession in favour of the deceased applicant begin to run.
 - (f) If having been in possession and occupation of the parcel of land in an open, peaceful and uninterrupted manner for a period in excess of 12 years, whether the deceased applicant had acquired ownership of the same through prescription.
 - (g) If the proprietorship of the respondents with respect to the parcels of land in question is subject to the prescriptive rights of the applicant.
3. The Amended Originating Summons is supported by an affidavit sworn by Dickson Mayabi Okusimba who deposed that land parcel number East Wanga/Mungángá /204 measuring approximately 8 acres was originally registered in the name of the late Ali Otewu Musungu (deceased) who was the brother to Olengo Musungu, Nyongesa Musungu (deceased) and Juma Matendechere Musungu (deceased) and that on August 14, 1971, the said brothers disposed of 6 acres to Henry Okusimba. That although transfer of the 6 acres to Henry Okusimba proved futile, Henry Okusimba nevertheless established his home upon the 6 acres after purchase and resided thereon with his family wherein he delineated his homestead in approximately 1 acre of the 6 acres and used the remaining land for growing sugar cane and food crops such as maize, beans and vegetables. That land parcel number East Wanga/Mungángá /204 was later registered in the joint names of the surviving brothers Juma Matendechere Musungu and Nyongesa Musungu following probate and administration proceedings over the estate of the late Ali Otewu Musungu.
4. Dickson Mayabi Okusimba further deposed that upon the demise of both Juma Matendechere Musungu and Nyongesa Musungu, Florence Angara Juma who is the widow of Juma Matendechere and mother to the second defendant instituted Kakamega High Court Succession Cause No 455 of 1999 wherein East Wanga/Mungángá/204 was subdivided into parcel numbers East Wanga/Mungángá/1122,1123 and 1124. That East Wanga/Mungángá/1122 is registered in the joint names of the second and third defendants while East Wanga/Mungángá/1123 is registered in the first defendant's name. He went on to state that the 6 acres purchased by Henry Okusimba are located within East Wanga/Mungángá/1122 and East Wanga/Mungángá/1123 while the 1 acre where Henry Okusimba established his homestead is situated within East Wanga/Mungángá/1122. That Henry Okusimba had been in an open, peaceful and continuous occupation of the 6 acres from 1972 when he formally took possession.
5. At the hearing, Dickson Mayabi Okusimba testified as PW1 and adopted his above affidavit. He stated that he was born in 1979 and that Henry Okusimba who was his father moved into East Wanga/



- Mungángá/204. That as at the date of his testimony, the plaintiffs were occupying 1 acre of the suit property which they started occupying in the year 2004. That Henry Okusimba was a party in several cases related to the suit property and was once convicted and fined in a criminal case concerning the suit property. He added that Henry Okusimba once obtained an injunction restraining order against the defendants herein from Mumias Court.
6. Beneah Chimeleni Nyapola testified as PW2 and stated that he translated from Wanga language to English language, an agreement through which Henry Okusimba purchased the 6 acres. He added that he never saw the original of the agreement but only translated from a copy that did not bear any signature of the persons listed in it.
 7. The plaintiffs' case was then closed.
 8. During defence hearing, Genevieve Nanjala Wanyama testified as DW1 and adopted her replying affidavit sworn on May 11, 2010. She deposed that the purported agreement which was translated by PW2 is illegible and that in 2002 she purchased 1.20 hectares of land which was curved out of land parcel East Wanga/Mungángá/204. That she conducted a search which confirmed that the parcel was free from encumbrances, after which the land surveyed, boundary erected, and a title issued in her name on April 21, 2004 in respect of the resultant land parcel East Wanga/Mungángá/1123. That she thereafter planted food crops therein and that in August 2004, Henry Okusimba served her with a court order issued in Mumias Misc Application No 5 of 2004 prohibiting her from dealing with the parcel. She added that she later successfully moved the court to lift the injunction on November 24, 2009 and that there was also Criminal Case No 5 of 2004 against Henry Okusimba concerning the plot. That Henry Okusimba did not occupy any part of her land parcel East Wanga/Mungángá/1123 but occupied of part of land parcel East Wanga/Mungángá/1122 where the plaintiffs' homestead stands. She further stated that she has used her plot since 2002.
 9. Fredrick Musungu Juma testified as DW2 and adopted a joint replying affidavit which he swore with Joseph Were Nyongesa on January 11, 2013. He stated that Henry Okusimba occupied less than $\frac{1}{4}$ an acre of the land and not 6 acres as alleged and that his occupation was neither continuous nor peaceful as there were suits relating to the suit property. He conceded that the family of Henry Okusimba have been residing on land parcel East Wanga/Mungángá/1122 for a while.
 10. The defence case was then closed. Parties thereafter filed written submissions.
 11. The plaintiffs submitted that since it is agreed that the deceased purchased 6 acres from parcel 204 in the year 1971, then prescriptive rights accrued in favour of Henry Okusimba as regards the 6 acres the year 1983, upon expiry of 12 years from 1971 and that any litigation thereafter could not extinguish his rights.
 12. The first defendant submitted that the plaintiffs have no case for adverse possession in respect of her land parcel East Wanga/Mungángá/1123 since they are not in occupation of the parcel and that there has been acrimony and both civil and criminal cases against the plaintiffs. That, consequently, the plaintiffs have not proved their case on a balance of probabilities. She therefore urged the court to dismiss the suit with costs.
 13. The second and third defendants filed joint submissions in which they argued that there is no competent case against them as the plaintiffs' occupation of East/Wanga/Mungángá/1122 has neither been peaceful nor continuous as there have been several cases relating to the suit property up to the year 2009 and that 12 years had not lapsed by the time of filing this suit in 2010, a year after conclusion of the last case. They therefore argued that the plaintiffs have not proved their case on a balance of probabilities and urged the court to dismiss it with costs.



14. I have 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.
15. The Court of Appeal restated the essentials of adverse possession 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.'
16. Thus, the burden of proof lies with the who plaintiffs must prove that they have had peaceful and uninterrupted possession for 12 years. The plaintiffs admitted that they have not been in possession of East Wanga/Mungángá/1123. Consequently, their claim for adverse possession in respect of the said parcel ends there.
17. The plaintiffs' case is that their father took possession of a portion of land parcel East Wanga/Mungángá/204 pursuant to a sale agreement. They however did not produce any agreement. What PW2 produced and claimed to be a translation of the sale agreement is of no avail to the plaintiffs in the absence of the actual agreement. I note that PW2 stated that he never saw the original of the agreement.
18. Even if the plaintiffs would have produced the alleged sale agreement, they would still need to 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 completion of payment of the purchase price. See [*Public Trustee v Wanduru Ndegwa \[1984\] eKLR*](#). In the absence of a sale agreement, it is impossible to ascertain both the purchase price and the date of completion of its payment so as to calculate time. I further note that PW1 who is the only witness who testified as to the running of time, stated that his family entered the suit property in 1971 yet he was born in 1979. He did not offer any valid basis as to how he knew the supposed date of entry.
19. One other requirement of establishing adverse possession is peaceful use of the land in line with 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). PW1 conceded that they have had several court cases over the issue of ownership and occupation of the land including a Mumias case in which his father obtained a restraining order against the defendants and a criminal case in which his father was convicted. The first defendant confirmed in her affidavit that Henry Okusimba obtained an injunction in Mumias SRMCC Number 5 of 2004 on July 19, 2004 restraining her from ploughing the land. A perusal of the order shows that all the defendants herein were parties to the said case. The plaintiffs have not established occupation with no force, no secrecy, no evasion.
20. In view of the foregoing, the plaintiffs have failed to establish adverse possession and are thus not entitled to the reliefs sought. I find no merit in the plaintiffs' case and I therefore dismiss it. No order on costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 21ST DAY OF FEBRUARY 2023.

D. O. OHUNGO



JUDGE

Delivered in open court in the presence of:

Mr Okali holding brief for Ms Ikhumba for the plaintiffs

Ms Luseno holding brief for Mr Mukisu for the defendants

Court Assistant: E. Juma

