



REPUBLIC OF KENYA



**Sisa v Mabeta & 2 others (Environment & Land Case 8 of 2014)
[2023] KEELC 892 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 892 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 8 OF 2014
JM ONYANGO, J
FEBRUARY 16, 2023**

BETWEEN

JOSEPH ONSERIO SISA PLAINTIFF

AND

CHRISTOPHER ONDIEKI MABETA 1ST DEFENDANT

JULIUS NYAMIRA ONDIEKI 2ND DEFENDANT

GEOFFREY KENYANYA NTABO 3RD DEFENDANT

JUDGMENT

1. Joseph Onserio Sisa the plaintiff herein commenced suit by way of originating summons seeking the following orders:
 1. That the plaintiff is entitled by adverse possession of an identifiable portion of land measuring approximately 2.5 acres out of titles No. Wanjare/Bbogitaa/2989 and 2990.
 2. That the said plaintiff be registered as the sole proprietor of the said portion of the suit land in place of the defendants.
 3. That the defendants to pay the costs of this summons.
 4. Any other relief this court may deem just to grant.
2. The 2nd defendant filed a replying affidavit sworn on February 12, 2014 on his own behalf and on behalf of the 1st and 3rd defendants denying the plaintiff's claim. He averred that the plaintiff does not reside on the suit property nor is he in actual possession of the same. He added that the 1st defendant had subdivided the suit property between his sons. He stated that the transaction between the plaintiff and the 1st defendant over the suit property had been cancelled as the suit property was ancestral land and that the plaintiff had been refunded his money.



3. The case proceeded by way of viva voce evidence and both parties had occasion to testify and call their witnesses.
4. The case commenced before Justice Mutungi who took the evidence of the plaintiff and his witness. I then proceeded with the defence case.
5. The plaintiff testified and called one witness. It was his testimony that he entered into a sale agreement with the 1st defendant on December 20, 1977 for the purchase of a parcel of land measuring 2.5 acres at a consideration of Kshs.3250. He then took possession of the said parcel and planted bananas, Napier grass, maize and trees. He produced a copy of the sale agreement in respect of land parcel number Kisii/Wnajare/Bomariba/1224. He also produced copies of the Certificates of Official search for land parcels number Kisii/Wnajare/Bomariba/2989 and 2990 as well as the abstracts of title for the said parcels as Plaintiff's exhibits 1- 4(a) – (c) respectively. He told the court that that the 2nd and 3rd defendants were currently occupying his land.
6. Upon cross-examination, he stated that after the 1st defendant sold him the land, he migrated before he transferred the land to him and came back in 2010. He further testified that when he requested the 1st defendant to transfer the land to him he discovered that the 1st defendant had sub-divided the land and given it to the 2nd and 3rd defendants who are his sons. He stated that the defendants uprooted the crops he had planted on the suit property. He claims he reported the matter to the District Officer who in turn summoned the defendants but they did not show up. He stated that he used the land peacefully upto 2013.
7. PW2 adopted his witness statement as his evidence in chief after which he was cross-examined by the plaintiff's counsel. He stated that the 1st defendant sold land to the Plaintiff and he later sold him an additional portion of land measuring 8 feet by 547 feet in 1997.
8. In response to a question by the court, he explained that the 1st defendant's land borders his land and he sold a portion of his land to the plaintiff. He stated that the plaintiff planted some tea bushes, Napier grass and bananas which were later uprooted by the 1st defendant.
9. The 1st defendant died before the case was concluded. The Defence called two witness, Julius Nyamira Ondieki (2nd defendant) and Geoffrey Kenyanya Ntabo, the 3rd defendant.
10. The 2nd defendant adopted his witness statement which was filed in court on 8.2.2018 as his evidence. He further stated that he had been living on the suit property since he was born in 1960. He refuted the Plaintiff's claim that he had been in occupation of the suit property and that he had planted some crops thereon. He stated that the Plaintiff had leased a portion of the suit property between 1977 and 1980 and he had never come back.
11. He further testified that in the year 2011, his father sub-divided land parcel number Kisii/Wajare/Bomariba/1224 into two parcels, namely parcels number 2989 and 2990 and transferred parcel 2989 to him while his brother Geoffrey (3rd defendant) was given parcel number 2990. He produced the certificates of title for the two parcels and the certificates of official search as exhibits.
12. Julius informed the court that sometime in the year 2012, the plaintiff came to see his father (1st defendant) claiming that the suit property belonged to him but the 1st defendant told him that he had no right over the said parcel of land.
13. Upon cross-examination, he stated that he was not aware that his late father had entered into a sale agreement with the plaintiff. Upon being shown a copy of the sale agreement, he did not contest the same. He however maintained that he had been living on the suit property since he was born and that



the plaintiff had merely leased a portion of his father's land upto 1980. He denied that they had evicted the plaintiff from the suit property. He reiterated that the suit property had been divided between him and his brother Geoffrey. He denied that the plaintiff had ever occupied a portion of their land.

14. Geoffrey Kenyanya Ntabo, the 3rd defendant relied on his witness statement filed in court on 8.2.2018 testified that he had been living on the suit .property since he was born in 1978 and he was not aware that the plaintiff had bought a portion of the same. He told the court that the plaintiff had not planted any crops of the suit property. He produced a copy of his title for land parcel number Kisii/Wanjare/Bomariba/2990 as defendant's exhibit 4 and the extract of the register for the said title as defendant's Exhibit 5.
15. Upon cross-examination, he reiterated that he had lived on the suit property since he was born in 1978 and that he was not aware that his father had sold a portion of the same to the plaintiff. He denied that the plaintiff had ever taken possession of a portion of their land or planted crops thereon. He stated that he had been cultivating his land for more than 20 years and that they had not uprooted any crops belonging to the plaintiff.
16. After the close of the defendants' case both parties filed their final submissions which I have considered.

Issues for determination

17. The following issues fall for determination:
 - i. Whether the plaintiff is entitled to a portion of land measuring 2.5 acres comprised in land titles number KISII/WANJARE/BOMARIBA/2989 and 2990 by way of adverse possession and if so, whether the same should be registered in his name.

Analysis and determination

18. Asike-Makhandia, JA described adverse possession in *Mtana Lewa v Kahindi Ngala Mwagandi* [2015] eKLR as follows:

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 certain period, in Kenya, is 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. This doctrine in Kenya is embodied in section 7 of the Limitation of Actions Act, which is in these terms:-

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

Section 13 of the Act provides that:

13. A right 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), and where under sections 9,10, 11 and 12 a right of action to recover land accrues on certain date and no person is



in adverse possession on that date, a right of action does not accrue unless and until some person takes possession of the land.

Additionally, section 38 of the Act provides as follows:

- (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

The courts have put the above provisions of the law and the doctrine of adverse possession into context. In the case of *Celina Muthoni Kithinji* (*supra*) the court held as follows:

“The requirements of adverse possession in Kenya have also been set out in the case of *Mbira v Gachubi* (2002) 1 EALR 137 in which the court held that

“.....a person who seeks to acquire title to land by the method of Adverse Possession for the applicable statutory period must prove non-permissive, or non-consensual actual, open notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption.

Likewise, in *Jandu v Kirpial & another* (1975) EA 225 it was held:

“.....to prove title by Adverse Possession it is not sufficient that some acts of Adverse Possession must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner, it must be actual, visible exclusive, open and notorious.

The ingredients were recently discussed by the Court of Appeal in the Case of *Mtana Lewa v Kabindi Ngala Mwangandi* (2005) eKLR where it was held that ;

Adverse Possession is essentially a situation where a person takes possession of the land, asserts rights over it and the person having title to it omits or neglects to take action against such a person in assertion of his title for a certain period, in Kenya, 12 years.

It is also a well-established principle that a party claiming Adverse Possession ought to prove that the possession was “nec vi, nec clam, nec precario” that is peaceful, open and continuous. The possession should not have been through force, nor secrecy and without the authority or permission of the owner”

19. In the instant case, it was the plaintiff’s evidence that he purchased a portion of land measuring 2.5 acres out of the original parcel known as Kisii/Wanjare/Bomariba/1224 from the deceased 1st defendant in 1977. He further claims that he immediately took possession of the land and planted some crops thereon. The alleged occupation of the suit property was therefore pursuant to a sale agreement and it was with the permission of the 1st Defendant who was the vendor.
20. Although the plaintiff claims to have been in possession of the said parcel upto 2013, he did not produce any document to show that he fenced the said parcel and planted crops thereon. His evidence that he was evicted from the said portion and his crops destroyed was equally unsupported as he did not produce any letter from the District Officer to whom he claims to have reported the incident.
21. In contrast to the Plaintiff’s evidence, the 2nd and 3rd defendants testified that they have been living on the suit property since they were born in 1960 and 1978 respectively. This means that the plaintiff



was not in actual, exclusive, open and uninterrupted possession of the suit property. They also testified that their father sub-divided the land in 2011 and each of them was given their respective titles.

22. The plaintiff apparently only discovered that the land was sub-divided and registered in the 2nd and 3rd defendants' names in 2013. It is inconceivable that having bought the land way back in 1977, he failed to take any steps to have it registered in his name.
23. The burden was upon the plaintiff to prove that his occupation of the suit property was adverse to the title of the registered owner and in my considered view he failed to discharge this burden. Consequently, the plaintiff has failed to prove his case on a balance of probabilities and the same is dismissed with costs to the defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16TH .DAY OF FEBRUARY 2023.

J.M ONYANGO

JUDGE

In the Presence of;

1. Miss Nyaenya for Mr. Bosire Gichana for the Plaintiff
2. Mr. Mokaya for the defendant
3. Court Assistant – Mr. Oniala

