



**Bwana v Mamboleo & another (Environment & Land Case 85 of 2021)
[2023] KEELC 16538 (KLR) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16538 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE 85 OF 2021**

**JM KAMAU, J
MARCH 28, 2023**

BETWEEN

ZIRUEL ONDICHO BWANA PLAINTIFF

AND

SAMUEL MOGAKA MAMBOLEO 1ST RESPONDENT

THOMAS AREBA MOGERE 2ND RESPONDENT

JUDGMENT

- 1 This suit was commenced by an Originating Summons dated November 23, 2020 wherein the Plaintiff seeks against the Defendant:
 1. A Declaration that the Defendants' right to recover a portion measuring 3½ (3.5) Acres out of LR N Mwangori Settlement Scheme/146 (herein referred to as the suit property) is barred under the Limitations of Actions Act cap 22 of Laws of Kenya, and his title thereto extinguished on the grounds that the Plaintiff herein openly, peacefully and continuously been in occupation and possession of the entire of the suit property for a period of more than 35 years and thus exceeding the Statutory timeline for recovery of immovable property.
 2. There be an order that the Plaintiff be registered as the Proprietor of the portion measuring 3½ (3.5) Acres out of LR No Mwangori Settlement Scheme/146 in place of the Defendants and/or the Register thereof be rectified to reflect the Plaintiff as the lawful and legitimate owner thereof, that is, the portion measuring 3.5 Acres.
 3. The Honourable court be pleased to order and/or direct the Defendants herein to execute the Application for Land Control Board consent, the Transfer instrument and/or such other Transfer Instruments, as may be necessary and/or appropriate, to facilitate the sub-division of LR No Mwangori Settlement Scheme/146, transfer instruments and facilitate the registration



of the resultant sub-division thereof, measuring 3.5 Acres out of the suit property in the name of the Plaintiff.

4. In the alternative and without prejudice to prayer 3 hereof, the Deputy Registrar/Executive Officer of the Honourable court be mandated and/or authorize to execute the relevant Transfer Instrument/Documents, inter alia, Application for Land Control Board consent, Mutation and Transfer touching on and/or concerning the suit Property, to facilitate the sub-division thereof and consequential transfer of the resultant portion in favour of the Plaintiff.
5. There be granted an order of Permanent Injunction, restraining the Defendants by themselves, agents, servant and/or employees from interfering with the Plaintiff's peaceful possession and occupation of the portion measuring 3.5 acres currently falling and/or comprising part of the suit property and any portion, in any manner whatsoever and howsoever.
6. Costs of this originating summons be borne by the Defendants.
7. Such further and/or other orders be made as the court may deem fit and expedient, in the circumstances of this case.

He grounded the Summons with the following:

- a. The suit property herein, was hitherto part and parcel of LR No Mwangori Settlement Scheme/34, (hereinafter referred to as the original parcel of land) now sub-divided.
 - b. In any event, the original parcel of land belonged to and was registered in the name of Sabina Obonyo Magare, now deceased.
 - c. Prior to and/or before the death of the Deceased, same entered into land sale agreement, whereby same sold to and in favour of the Plaintiff two portions out of the original parcel of land.
 - d. Firstly, the Deceased sold to and placed the Plaintiff in occupation of a portion measuring 50 ft by 100 ft on the 16th day of January 1980.
 - e. Secondly, the Deceased sold to and placed the Plaintiff in occupation of a portion measuring 3¼ Acres in the year 1986.
 - f. The two portions of land, (details in terms of paragraphs (d) and (e) hereof), adjoined and/or border one another.
 - g. In any event, upon the purchase and/or acquisitions of the two portions, the Plaintiff fenced same and commenced occupation and use thereof. and a Supporting Affidavit sworn on the same date.
- 2 The Defendant filed a Replying Affidavit on 10/3/2021 and a written statement of Defence dated 8/3/2021 and filed on 11/3/2021. The 2nd Defendant filed his Replying Affidavit on 27/4/2021. On 11/5/2021 after a successful Application by the Plaintiff, the parties consented that the Originating Summons and its Supporting Affidavit as well as the Replying Affidavit of the 1st Defendant be converted into Plaintiff and Defence respectively and that the suit be disposed of by way of *Viva Voce* evidence. Parties were also directed to exchange written statements and bundles of documents they wanted to rely upon in the case. The case proceeded *ex parte* for Hearing on 19/1/2021 but before Judgment was pronounced, the Defendant arrested it and requested that the case be heard *de novo*. A consent to that effect was recorded on 22/4/2022.



- 3 The Plaintiff testified that he first bought what was originally LR. No. Mwongori Settlement Scheme/34 100 by 50 feet from one Sabina Obonyo Magare on 16/1/1980 at Kshs. 4,500 and later bought 3.3 Acres from the same person out of the same land in November 1986 at Kshs. 250,000/=. The 2 parcels of land border each other. The Vendor, Sabina later died in March 1993.
- 4 Unfortunately, the Defendants, Sabina's children took out letters of administration in respect to Sabina's Estate and transferred the entire land Mwongori Settlement Scheme/34 to themselves through transmission.
- 5 The Plaintiff has been on the suit land since 1980 which he has extensively developed by putting a fence all around it, planted bananas and eucalyptus trees and also put up 4 permanent houses. He therefore claims 3½ Acres where he has lived for over 40 years now. The 2 parcels. It was also asserted that the Deceased also sold other portions of L.R. No. Mwongori Settlement Scheme/34 to other purchasers. The parcel of land has since been sub-divided into L.R. No. Mwongori Settlement Scheme/146 and 147 respectively and L.R. No. Mwongori Settlement Scheme/146 is now registered in the joint names of the Defendants. This is where the Plaintiff occupies part of. It is the Plaintiff's evidence that he has occupied part of Mwongori Settlement Scheme/146 for over 40 years, openly, uninterruptedly, quietly and with the Defendant's knowledge and therefore the Defendants' right to recover or reclaim it have been extinguished under the limitations of Actions Act since the Plaintiff has adversely acquired prescriptive rights over the said 3½ (3.5) Acres. The Plaintiff produced a copy of the Sale Agreement dated 16/1/1980 between the late Sabina and himself in respect of the sale of the 50 by 100 feet of plot No. 34 Mwongori Settlement Scheme and copies of pleadings in the Principal Magistrate court at Keroka being ELC Suit No. 28 of 2020 between Samuel, the 1st Defendant herein as Plaintiff and the Plaintiff as the Defendant but it is not clear what became of the case.
- 6 He also produced a copy of the Green Card in respect to Mwongori Settlement Scheme/34 showing Sabina Obonyo Magare to have been the owner of the land with effect from 30/3/1987 and that the said land Register was closed on 3/4/1987 on sub-division of the land with new Titles 146 and 147 resulting therefrom. On cross-examinations, the 1st Defendant Mr. Bwana said that he did not have any sale agreement in respect of the 2nd agreement.
- 7 On cross examination by Mr. Maroko for the 2nd Defendant, Mr. Bwana said that Sabina died in 1993 having promised and assured him that she was going to get her the Title Deed for the 3½ Acres but that was not done due to her poor health.
- 8 The 2nd witness, John Ombuna Ogwaro, a retired chief of Mekenene Location said he knew all the parties to this suit as well as the late Sabina. He said he was aware of the land transaction between the late Sabina and the Plaintiff and the fact that the Plaintiff had extensively developed the land which he says is about 3 Acres but can't tell the exact acreage. The 50 X 100 feet is next to the road where the houses are built. He testified that by the time he was posted to the location in February 1990, the Plaintiff was already settled on the suit land and when he left in 2006, the Plaintiff and his family were still on the suit land. On cross-examination by the 1st Defendant, the witness said that he has never come across any sale documents between Sabina and the Plaintiff.
- 9 When answering questions from Mr. Maroko for the 2nd Defendant, Mr. Ogwaro said that nobody among the parties herein ever brought any complaint to his office for all the 17 years he served the location and that they co-existed peacefully but he was not certain of the acreage occupied by the Plaintiff.



- 10 Joel Nyamora Ondieki, the 3rd Plaintiff witness testified that in 1986, the late Sabina, Defendant's mother called him and asked him to help her curve out 3 Acres out of the suit land which he did with the understanding that the same was being curved out for the Plaintiff.
- 11 Both Vendor and Purchaser were present during this exercise. He wound up his evidence by maintaining that immediately after curving out the 3½ Acres out of Mwangori Settlement Scheme/34 the Plaintiff took possession, fenced all round it and commenced developing it and has all along been living thereon. On cross-examination by the 1st Defendant, Mr. Ondieki told the 1st Defendant that even his (Mamboleo's) 3 paternal uncles were present during the exercise of handing over the parcel of land to the Plaintiff and on cross-examination from Mr. Maroko for the 2nd Defendant, Mr. Ondieki said that although he is not a qualified surveyor, he curved out the land in 1986. He said that when excising the 3½ Acres of land from Mwangori Settlement Scheme/34 the late Sabina's husband was present but was not actively involved since the land was registered in the name of Sabina. On re-examination, he said that his role was to help the parties excise 3½ Acres of land from Mwangori Settlement Scheme/34 out of the suit land for the same to be taken possession of by the Plaintiff and which he witnessed happen.
- 12 After the close of the Plaintiff's case, the 1st Defendant gave evidence to the effect that it is true that the Plaintiff bought part of the suit land i.e. 50X100 feet from his late mother, Sabina Obonyo in 1980. Nobody has told him to move out of the same. But that he never bought 3½ Acres.
- 13 On cross-examination by Mr. Maroko for the 2nd Defendant, Mr. Mamboleo said that it was the Plaintiff who sued him in Keroka P.M.C.C. ELC No. 28 of 2020 and that there is no development on the 3½ Acres out of Mwangori Settlement Scheme/146. On cross-examination by Mr. Otieno for the Plaintiff, the 1st Defendant said that he had no problem with the Plaintiff having the 50X100 feet.
- 14 Intriguingly, the witness disowned his Advocate Mr. Aoga who filed a case on his behalf in Keroka PMCC No. ELC 28 of 2020. He said that he was seeing him for the first time in this court. And that the Advocate wrote his own things. He also admitted that the Plaintiff has planted trees on the disputed land which he cannot harvest because they are not yet mature. While answering questions from the court, Mr. Mamboleo said that the Plaintiff has planted trees all around the 3½ Acres in dispute which he cannot cut since they belong to the Plaintiff and that the 3½ Acres were no other vegetation.
- 15 The 2nd Defendant testified that the Plaintiff occupies only 50X100 feet out of the L.R. No. Mwangori Settlement Scheme /146 and has not put up anything thereon. But he planted trees there when the 2nd Defendant was in jail having been convicted for robbery with violence. This is about 50 metres from where the 2nd Defendant occupies.
- 16 The 2nd Defendant in order to support his case produced a copy of the agreement dated 16/1/1980 between the Plaintiff and his late mother Sabina, a copy of the Title Deed and official search in respect of Mwangori Settlement Scheme/146 in the name of Sabina and the Defendants respectively and a copy of the minutes over Mwangori Settlement Scheme land dispute dated 14/11/1985.
- 17 On cross-examination from Mr. Otieno for the Plaintiff, Mr. Mogere said that the Plaintiff bought 50 by 100 feet from his mother in 1980 but that he was not present and was very young. He said that the Plaintiff occupies more than 50 by 100 feet where he has planted trees but he can't tell the number of acreage. He said that he has never filed any suit against the Plaintiff anywhere in any court.
- 18 On re-examination by Mr. Maroko, the 2nd Defendant said that the Plaintiff has put up a fish Aquarium since 2014/2015 outside the 50 by 100 feet.



- 19 The 2nd Defendant's witness, Mr. Yabesh Ogeto Ayiera, the current Senior Chief of Mekenene location where he has served since 2008 said he knows the parties herein and that the Plaintiff has only developed 50 by 100 feet out of the suit land.
- 20 On cross-examination by Mr. Otieno he said he has known the parties in this case for over 30 years and that the Defendant has also refused to transfer to other people land that their late mother had sold to them. He said that the Plaintiff has only planted 3 to 4 trees on the 50 by 100 feet. The entire land is about 80 Acres and that there is no dam or fish aquarium on the land. Finally, he said that the Plaintiff does not occupy more than 50 by 100 feet.
- 21 On re-examination the witness said that there is a well behind the Plaintiff's house which is on a 100 by 50 feet. He said he has never seen a fish pond on the suit land.
- 22 After the close of the Defendant's case, I invited the parties to file their written submissions which I have carefully considered.
- 23 I must point out the point of convergence which is that there is no dispute as to whether the Plaintiff bought 50 by 100 feet out of Mwangori Settlement Scheme/34 which is now Mwangori Settlement Scheme/146. We therefore need not go into any examination on that piece of land. What is in dispute is the balance of 3½ Acres after deducting the 50 by 100 feet, 3.3 Acres.
- 24 The 2nd Defendant is in agreement that what the Plaintiff occupies is more than 50 by 100 feet. He said he can't tell the exact acreage but that the same cannot be 3½ Acres. He further says that the Plaintiff has planted trees all over the portion of land he claims. He says that he was very young when his mother was selling the land to the Plaintiff and could therefore not have followed what was happening. Likewise, the 1st Defendant testified that the Plaintiff has planted trees all around the 3½ Acres he now claims. He also admits that the Plaintiff has had a fish pond outside the 50 by 100 feet since 2014/2015 where he has been doing fish farming. The 2nd Defendant's witness, Senior Chief Yabesh Ogeto Ayiera came and contradicted the above evidence. In the first place, he said that the Plaintiff has developed only 50 by 100 feet and in cross-examination by Mr. Otieno for the Plaintiff put more emphasis "and no more". Secondly, whereas the Defendants agree that the Plaintiff has planted trees all around the 3½ Acres in dispute, the Senior Chief testified that the Plaintiff has only planted 3 to 4 trees within the 50 by 100 feet. I wonder how only 3 to 4 trees can be said to be surrounding 50 by 100 feet. He also categorically said that there is no fish pond in the area in dispute and that the Plaintiff does not occupy more than 50 by 100 feet. This is a person who has served the area since 2008 and testified that he was called upon to help the parties settle the feud and even went to the land and that he has known the parties for over 30 years. The Senior Chief to me is not truthful and came to court to aid the Defendants but ended up contradicting their evidence so blatantly. I therefore find him to be a very unreliable and dishonest witness.
- 25 I also find it strange that the 1st Defendant, Samwel Mogaka Mamboleo claims that it is the Plaintiff who filed Keroka PMCC ELC No. 28 of 2020 when in fact documents produced in Court show that he was the Plaintiff. He even disowns the Advocate who filed his statement in the case and said that the Advocate did so without instructions. He said that what is contained in the pleadings of the case which was filed on 9/9/2020 is untrue and that his Advocate Mr. Aoga "wrote his own things". This is in spite of the Verifying Affidavit in the Keroka case bearing Mr. Mamboleo's signature as the Plaintiff giving instructions in the said suit. I equally find him to be very mendacious and dishonest.
- 26 From a careful perusal of the case, the evidence adduced, Parties' submissions and the analysis made by the Court, the main legal issue arising for determination is: whether the 3.3 Acres out of L.R. No. Mwangori Settlement Scheme/34 could have been sold to the Plaintiff herein by the late Sabina.



The agreement was unwritten hence an egregious infraction of the statutory requirement as to sale agreements and it is crucial to examine whether such an agreement could confer any legal rights.

27 Section 38 (1) of the Land Act No. 6 of 2012 provides in essence that no suit shall be brought upon a contract for disposition of an interest in land unless the contract on which the suit is founded is in writing, is signed by all parties thereto and the signature of each party has been attested by a witness who was present when the contract was signed.

28 Likewise, the Law of Contract Act, Chapter 23 of the Laws of Kenya provides in Section 3 that:

“No suit shall be brought upon a contract for the disposition of an interest in land unless-

- (a) the contract on which the suit is founded –
 - (i) is in writing.
 - (ii) is signed by all parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

29 In Civil Appeal Number 22 of 2013, Peter Mbiri Michuki v Samuel Mugo Michuki [2014] eKLR, the Court held;

“Section 3(3) of the Law of Contract Act provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is in writing, executed by the parties and attested. Section 3(7) of the Law of Contract Act excludes the application of Section 3(3) of the said Act to contracts made before the commencement of the subsection. Section 3(3) of the Law of Contract Act, came into effect on 1st June, 2003. Prior to the amendment of Section 3(3) of the Law of Contract Act in 2003, the subsection read as follows: -

- (3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-

- (1) Has in part performance of the contract taken possession of the property or any part thereof; or
- (11) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.”

30 The 2 conditions above must not be concurrent. They are ‘either’ ‘or’ and not ‘and’.

31 The Plaintiff and his family have been in possession of 50 by 100 feet on L.r. No. Mwangori Settlement Scheme/146, Previously L.r. No. Mwangori Settlement Scheme/34 since 1980 and 3.3 Acres of the same since November 1986. I believe the Defendants took advantage when they realized that their late mother, Sabina Obonyo Magare had not transferred the suit land to the Plaintiff by the time she died.



32 Notwithstanding the fact that the sale agreement made by the parties in November 1986 was not in writing, all that the Plaintiff had to do is to satisfy the court that he either took possession of the suit property in part performance of the said oral contract, or that being already in possession of the suit property, he continued in possession in part performance of the oral contract. Having re-evaluated the evidence, I find that the Plaintiff proved that he and his family had actual and or constructive possession of the suit property since 1980 and 1986 respectively and the possession was open, continuous and uninterrupted.

33 I find that the proviso to Section 3 (3) of the Law of Contract Act also applies in this case but even more importantly, Section 3 (3) of the Law of Contract Act came into effect in 2003 and does not apply to oral contracts for sale of land concluded before Section 3 (3) of the Act came into force and I hold that the sale agreement between the Plaintiff and the Defendants' mother did not violate or offend the provisions of the Law of Contract Act. Even if there was no written sale agreement, the Plaintiff has satisfied the Court that he had taken possession of the suit land in part performance of the contract and has done some other act in furtherance of the contract, such as developing it.

34 This is also a claim based on adverse possession premised upon Section 17 and 38 of the Law of Limitations of Actions Act. Section 38 (1) of the Act provides: -

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 or land comprised in a lease registered under any of these 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”

35 Section 28(h) of the new Land Registration Act, 2012 recognizes adverse possession as one of the overriding interests in land:

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register:-

(h) “rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription”.

36 Similarly, Section 7 (d) of the new Land Act, 2012 provides as follows: -

“Title to land may be acquired through –

- a. -----.
- b. -----.
- c. -----.
- d. prescription”

37 In determining whether or not to declare that a party has acquired land by adverse possession, there are certain principles which must be met. It suffices to refer to the case of Wambugu =vs= Njuguna (1983) K.L.R. p. 172 in which the court of Appeal held as follows:

1. In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession



of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed or had discontinued possession of the suit land for a continuous statutory period of twelve years as to entitle him, the respondent, to title to that land by adverse possession.

2. The Limitation of Actions Act, on adverse possession, contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.
3. Where a claimant pleads the right to land under an agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is: the claimant's possession is deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least twelve years after such payment.

38 In Kasuve VS Mwaani Investment Limited & Four Others 2004 1 K.L.R 184, the Court of Appeal re-stated what a plaintiff in a claim of adverse possession has to prove in the following terms: -

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”

39 And it doesn't matter that the land has since changed hands from the original owner, Sabina, to her descendants. In Githu Vs Ndeete 1984 K.L.R 776, the Court of Appeal held as follows: -

“The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession”.

40 The case of Githu Vs Ndeete (*supra*) is also authority that a party can claim only a portion of the land and not necessarily the whole land as long as possession of that portion is exclusive and it can be identified. It is obvious therefore that the portion of the suit land occupied by the Plaintiff is well defined by the development thereon and also it is fenced and identifiable.

41 The Defendants and their witnesses seem to know nothing about the suit land hence the contradiction by their witnesses. I am not persuaded the Defendants' evidence is well founded. On the flip side, I find that the Plaintiff has proved his case on a balance of probabilities and consequently and I hereby enter judgement for the Plaintiff against the Defendants jointly and severally in the following terms:

1. A Declaration be and is hereby issued that the Defendants' right to recover a portion measuring 3½ (3.5) Acres out of Lr. No. Mwangori Settlement Scheme/146 is barred under the Limitations of Actions Act cap 22 of Laws of Kenya, and his Title thereto extinguished.
2. The Plaintiff be registered as the Proprietor of the portion measuring 3½ (3.5) Acres out of LR. No. Mwangori Settlement Scheme/146 in place of the Defendants and the Register thereof



be rectified to reflect the Plaintiff as the lawful and legitimate owner of the portion measuring 3.5 Acres thereof.

3. The Defendants are hereby directed to execute the Application for Land Control Board consent, the Transfer documents and such other Transfer Instruments as may be necessary and appropriate to facilitate the sub-division of LR. No. Mwangori Settlement Scheme/146, transfer and registration of the resultant sub-division thereof, measuring 3.5 Acres out of the suit property in the name of the Plaintiff.
4. In the alternative and without prejudice to 3 above, the Deputy Registrar of this Court is hereby mandated and authorized to execute the relevant Transfer Instruments/Documents, inter alia, Application for Land Control Board consent, Mutation and Transfer touching on and concerning the suit Property, to facilitate the sub-division thereof and consequential transfer of the resultant portion in favour of the Plaintiff.
5. An order of Permanent Injunction restraining the Defendants by themselves, agents, servant and/or employees from interfering with the Plaintiff's peaceful possession and occupation of the portion measuring 3.5 Acres currently falling and/or comprising part of LR. No. Mwangori Settlement Scheme/146 or any portion, in any manner whatsoever and howsoever.

42 Costs follow the event and I therefore order that the Defendants pay the Plaintiff's costs of this Suit.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 28TH DAY OF MARCH, 2023

MUGO KAMAU

JUDGE

In the Presence of: -

Sibota – Court Assistant

Ms. Opondo for the Plaintiff

1st Defendant in person

Mr. Maroko for the 2nd Defendant

