



M’Inoti v Mwiti (Substituting Cyprian Mwiti M’Mburugu (Deceased) and legal representative of the Estate of Cyprian Mwiti M’Mburugu (Environment & Land Case 32 of 2014) [2023] KEELC 16475 (KLR) (22 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16475 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 32 OF 2014
CK YANO, J
MARCH 22, 2023**

BETWEEN

JAMES MUTHOMI M’INOTI PLAINTIFF

AND

EUGENIA NCERI MWITI (SUBSTITUTING CYPRIAN MWITI M’MBURUGU (DECEASED) AND LEGAL REPRESENTATIVE OF THE ESTATE OF CYPRIAN MWITI M’MBURUGU DEFENDANT

JUDGMENT

1. The plaintiff moved the court vide the originating summons dated February 25, 2014 and amended on May 31, 2022 seeking for determination of the following questions:
 - 1) Is the plaintiff in adverse possession of Land reference No. Nkuene/Taita/2473 by virtue of the provisions of section 38 of the *Limitation of Actions Act* Cap 22 Laws of Kenya.
 2. Is the plaintiff entitled to be registered as the proprietor of land Reference No. Nkuene/Taita/2473.
 3. Whether a permanent injunction restraining the defendant from interfering with the plaintiff’s possession and title to the suit property do issue.
 4. Whether the registration of the deceased Cyprian Mwiti M’mburugu as proprietor of Land Reference No. Nkuene/Taita/2473 or any other title derived from the said parcel be cancelled forthwith and the Land Registrar do rectify the register entry and do issue title in the name of the plaintiff as the registered proprietor of the suit property being reference No. Nkuene/Taita/2473 in place of Cyprian Mwiti M’mburugu or anyone deriving title from the defendant.
 5. Should orders be made to that effect.



6. Who should pay cost of this suit.
2. The defendant entered appearance on March 26, 2014 through the firm of Kiogora Ariithi and Associates Advocates but never filed a response to the summons nor attended court during the hearing. The matter therefore proceeded ex-parte.

The Plaintiff's Case

3. The summons is supported by the evidence and facts set out in the affidavit of James Muthomi M'inoti, the plaintiff herein in which he deposed that land Reference Number Nkuene/Taita/2473 (hereinafter referred to as the suit property) is registered in the name of Cyprian Mwiti M'mburugu (deceased). That the suit property herein is a subdivision of the original land reference No. Nkuene/Taita/480 that was registered in the names of four proprietors including the deceased who owned it in common but with each share defined thereof. That the share of the deceased defendant was about 0.022 Hectares.
4. The plaintiff averred that on July 15, 1992, he entered into a written agreement in which the deceased defendant sold the plaintiff a portion of his share measuring 16 feet by 34 feet. The plaintiff averred that he paid the agreed purchase price and was given actual possession by the deceased and that he began constructing a permanent commercial building thereon.
5. It is the plaintiff's contention that the deceased promised to transfer to him the portion sold after the original land is subdivided and shared amongst the owners in common. That further, by another written agreement made on December 14, 2000, the deceased sold another portion measuring 18 feet by 40 feet together with the developments thereon to the plaintiff at a consideration of Kshs. 246,000/= which was also paid and the plaintiff took actual possession and occupation.
6. The plaintiff's case is that since the execution of the said agreements he has been in open, peaceful, continuous and actual possession of the portions sold to him.
7. The plaintiff stated that in April 2011, and while he was still in occupation of the suit property, the original parcel known as Nkuene/Taita/480 was subdivided and shared out among the four proprietors and the deceased's ¼ share was registered in his sole name as land parcel No. Nkuene/Taita/2473. It is the plaintiff's contention that after taking possession of the suit property, he has been utilizing it without any interference by the deceased or anybody else. The plaintiff's claim is that he is entitled to be registered as owner of the suit property by adverse possession since the deceased's title has been extinguished. That he pursued the defendant to effect a transfer of the suit property to the plaintiff but the deceased was reluctant to do so prompting the plaintiff to file this suit. After the demise of the original defendant, his widow was substituted as a defendant.
8. The plaintiff testified as P.w 1 and did not call any other witness. He relied on the affidavit in support of the originating summons and produced the annexures thereto which include a copy of the register for the original land and of the suit property, copies of agreements dated July 15, 1992 and December 14, 2000, photographs showing the developments in the suit property, a copy of title deed in the name of the deceased, copies of letters dated May 8, 1993 and August 28, 1993 for application of electricity connection, electricity and water bills, copies of correspondence from Meru Water and sewerage services, copies of tenancy agreements, copies of business permits issued by the County Government of Meru, a copy of an order dated September 19, 2019 issued in Nkubu Principal Magistrate miscellaneous cause No. E019 of 2022 and a copy of the Limited Grant of letters of Administration Ad Litem issued on May 20, 2022 in the same cause.



The Plaintiff's Submissions

9. The plaintiff filed written submissions on December 6, 2022 through the firm of Kariuki Kiplang'at Lesagior & Associates Advocates. The plaintiff's counsel cited the provisions of Section 7, 37 and 38 of the *Limitation of Actions Act* Cap 22 Laws of Kenya and relied on the case of Wambugu vs Njuguna (1983) KLR 173, Mtana Lewa vs Kahindi Ngala Mwangandi [2015]eKLR, James Maina Kinya Vs Gerald Kwendaka [2018] eklr, Wanyoike Kahiri (1979) KLR 239 quoted in Wilson Njoroge Kamau vs Nganga Muceru Kamau [2020] eKLR, Public Trustee v Wanduru and submitted that he is entitled to a legal title over the suit property for having stayed thereon for a period of over 20 years. The plaintiff's counsel submitted that in determining when the period of limitation of actions in the current suit started running is from the date of the last sale agreement in 2000. That the plaintiff's possession was also well known to the deceased having been given possession of the property by the deceased and also having acknowledged through various correspondence that the plaintiff had control over the property. That the defendant did not demonstrate possession for the period when the plaintiff claims exclusive possession which was uninterrupted by anyone.
10. The plaintiff argued that after taking possession he erected permanent structures on the suit property and has continued to develop the same over the years. The plaintiff submitted that he is entitled to the reliefs sought plus costs of the suit.

Analysis And Determination

11. This court has carefully considered the pleadings, the evidence and the submissions filed by the plaintiff to buttress his assertions. The issues for determination, in my view are whether the plaintiff has acquired the property known as Land Reference No. Nkuene/Taita/2473 by adverse possession and whether he is entitled to the reliefs sought.
12. Adverse possession is a common law doctrine under which a person in possession of land owned by someone else may acquire title to it. In Kenya, the doctrine is anchored on specific sections of the *Limitation of Actions Act* Cap 22 and the *Land Registration Act, 2012*.

Section 7 of the *Limitation of Actions Act* states that-;

“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”

13. Section 13 of same Act states;
 - (1) A right of action to recover land does not accrue unless the land is in the possession of some person in which favour the period of limitation can run (which possession is in this Act referred to as adverse possession) and where under section 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless until some person takes adverse possession of the land.
 - (2) Where a right to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.



- (3) For the purpose of the section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to adverse possession of the land.”
14. Section 17 on the other hand states as follows;
- “Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action) in the title of that person to the land is extinguished.”
15. Section 38 (1) and (2) states;
- (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Act 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.
- (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this act.”
16. The law and requirements for adverse possession was laid down by the Court of Appeal in Titus Mutuku Kasuve vs Mwaani Investment Limited [2004] eKLR where it states as follows;
- “In order to be entitled to any land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right 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.”
17. In Wambugu vs Njuguna (1983) KLR 173, the Court of Appeal held that adverse possession contemplates two concepts. Possession and discontinuance of possession. It further held that the proper way of assessing proof of adverse possession would 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 or she has been in possession for the requisite number of years.
18. The ingredients were also discussed by the Court of Appeal in the recent case of Mtana Lewa vs Kahindi Ngale Mwangai [2015] eKLR where it was stated;
- “Adverse possession is essentially a situation where a person takes possession of land, 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.”
19. It is also well settled principle that a person claiming adverse possession ought to prove that his possession was “nec vi nec clam, nec precario” that is without force, without secrecy, without permission. The possession must be peaceful, open and continuous.
20. In this case, the plaintiff’s case is that he entered into a sale agreement with the deceased who was the proprietor of the suit property. That the last agreement was entered on December 14, 2000. The plaintiff took possession immediately after the purchase and is still in possession but the property has never been transferred to him.
21. In this case, the plaintiff stated that upon taking possession of the suit property, he has been utilizing it as though he was the actual owner, including undertaking massive developments which were done



without resistance from the owner. The plaintiff produced documents showing that he has been in actual possession and occupation and use of the property. The plaintiff testified that he has all along enjoyed a peaceful and exclusive possession of the suit property. The plaintiff also produced a copy of the title of the suit property in the defendant's name as required by law. As earlier stated, the defendant was served with the summons and entered appearance, but did not file any response. Among the documents produced by the plaintiff are letters for application for connection of electricity, water and bills for the said utilities. In addition, the plaintiff produced business permits and photographs showing the developments he said he has done on the suit premises. No doubt, such developments were undertaken over time and openly. The plaintiff's evidence remains uncontroverted.

22. Going by the threshold set out for adverse possession, and considering the totality of the evidence availed in this case, and applying the legal principles outlined above, I am satisfied that the plaintiff has proved his claim for adverse possession on a balance of probabilities. It is my finding that the plaintiff has brought himself within the limits of the doctrine of adverse possession.
23. In the result, the plaintiff's suit is allowed and I enter judgment as follows:
 - a) That the interest of Cyprian Mwiti M'mburugu (deceased) or anyone deriving title from him in land reference Number Nkuene/Taita/2473 has been extinguished.
 - b) That the plaintiff be registered as the proprietor of the said land reference No. Nkuene/Taita/2473 in place of Cyprian Mwiti M'mburugu or anyone deriving title from the defendant.
 - c) Considering that the defendant did not contest the plaintiff's claim, I order that each party to bear their own costs.
24. Orders accordingly.

Dated, signed and delivered at Meru this 22nd day of March 2023

In the presence of:

No appearance for plaintiff

No appearance for defendant

Court Assistant Kibagendi

C.K YANO

JUDGE

JUDGMENT

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