



Muthuma & 3 others v Njenga & another (Environment & Land Case 338 of 2017) [2023] KEELC 16447 (KLR) (16 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16447 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 338 OF 2017**

**YM ANGIMA, J
MARCH 16, 2023**

BETWEEN

ANN WAMUYU MUTHUMA & 3 OTHERS PLAINTIFF

AND

GRACE NJERI NJENGA 1ST DEFENDANT

TITUS NDERITU MACHARIA 2ND DEFENDANT

JUDGMENT

A. The Plaintiffs' Claim

1. By an originating summons dated 22.03.2017 brought under the provisions of Section 38 of the *Limitation of Actions Act* (Cap.22), Order 37 rule 7(1), (2) & (3) of the Civil Procedure Rules, 2010 and all enabling provisions of the law, the Plaintiffs sought the following orders:
 - a. There be a declaration that the Defendants herein hold title No. Nyandarua/Kiriiti/Shauri Block 1 (Leshau Pondo)/1836 & 1837 in trust for the Plaintiffs.
 - b. That the titles to parcel No. Nyandarua/Kiriiti/Shauri Block 1 (Leshau Pondo)/1836 & 1837 registered in the names of Grace Njeri Njenga and Titus Nderitu Macharia respectively be declared to have become extinguished and that the Plaintiff be declared to have acquired title thereto by virtue of adverse possession having been in peaceful, open, uninterrupted and exclusive possession thereof for a period exceeding 27 years.
 - c. That the Plaintiffs be registered as proprietors of parcel No. Nyandarua/Kiriiti/Shauri Block 1 (Leshau Pondo)/1836 & 1837 having acquired the title by virtue of the doctrine of adverse possession thereof since 1990 and/or in the alternative the trust created in favour of the Plaintiffs in respect of the said land be determined in their favour.



- d. That the Defendants be ordered to apply for the requisite consents and execute the relevant transfer documents in favour of the Plaintiffs, and release to the Plaintiffs a copy of their PIN, ID and Passport photographs within Seven (7) days, of the date of judgment/ruling failing which the Deputy Registrar of this Honourable Court be authorized to execute the same.
 - e. That the Defendants be ordered to release and/or return the said original title deeds to the Land Registrar Nyandarua for the same to be cancelled within 7 days of the date of the ruling/ judgment and in their place the Land Registrar to issue titles in favour of the Plaintiff in respect of Nyandarua/Kiriita/Shauri Block 1 (Leshau Pondo)/1836 & 1837 and in default the Land Registrar to dispense with their production.
 - f. That the costs of this suit be borne by the Defendants.
2. The summons was based upon the grounds set out in the body of the summons and the contents of the supporting affidavit sworn by Ann Wamuyu Muthuma on 22.03.2017 on behalf of all the Plaintiffs. It was contended that the Plaintiffs had been in open, peaceful, continuous and uninterrupted possession and occupation of the suit properties since 1990. It was further contended that the Plaintiffs had developed and utilized the suit properties for over 27 years hence the Defendants had lost title thereto under the doctrine of adverse possession hence the suit. It was also the Plaintiffs' case that the suit properties legitimately belonged to the 1st Plaintiff in the suit instance but that the Defendants had fraudulently and wrongfully obtained title thereto.

B. The Defendants' Response

3. The Defendants filed a replying affidavit sworn by the 1st Defendant on 31.10.2017 in opposition to the application. It was denied that the Plaintiffs had been in open, peaceful and uninterrupted occupation of the suit properties as claimed in the summons. The Defendants contended that they were the absolute registered proprietors of the suit properties whose titles were free from any encumbrances.
4. The Defendants stated that sometime in 1994 the 1st Plaintiff claimed a portion of the suit properties to be hers but the dispute was subsequently resolved by the Land Registrar in their favour in 1999. It was further stated that the dispute among the parties was handled by the Location Chief and the District Surveyor whereby it was found that the Plaintiffs had encroached into the Defendants' property.
5. The Defendants consequently denied that the Plaintiffs had acquired the suit property on account of the doctrine of adverse possession and stated that the Plaintiffs only filed suit after being served with a notice to vacate the suit property. The court was consequently urged to dismiss the suit with costs.

C. Summary of Evidence at the Trial

- a. The Plaintiffs' Evidence
6. The Plaintiffs called one witness namely, Peter Muthuma who was the administrator of the estate of the 1st Plaintiff who was deceased at the time of trial. It was his evidence that the 1st Plaintiff bought parcel No. Nyandarua/Kirita/Shauri Block (Leshau Pondo) 1354 from Leshau Pondo Farmers Company. It was his evidence that they took possession of the land in 1990 and settled thereon. However, when the title deed was issued, it was discovered that there was a deficit of 2 acres which was then combined with their neighbour's land Parcel No. 1347. It was his evidence that a land dispute ensued with the 1st Defendants' late husband who was then the owner of Parcel 1347 but the dispute was never resolved. However, they continued in occupation of the entire land on which they had settled.



7. It was the Plaintiffs' further evidence that they came to discover later on that the owner of 1347 had purported to subdivide his land into Parcel Nos. 1730 and 1731 and that Parcel 1730 was further subdivided into Parcel Nos. 1836 and 1837. It was those latter parcels which the Plaintiffs claimed to be theirs and which they claimed to have occupied since 1990. The Plaintiffs stated that they had developed the land by fencing it, cultivating it, planting trees and constructing houses thereon.
 - b. The Defendants' Evidence
8. The 1st Defendant testified that as the sole witness for the defence. The 1st Defendant disputed the Plaintiffs' claim for adverse possession in its entirety. She testified that the suit property was initially part of parcel 1347 which belonged to her late husband and that it was the Plaintiffs who had wrongfully encroached into her land. It was her evidence that although there was a dispute between the owners of Parcel 1354 and 1347 she did not know how the dispute was resolved since it was her late husband who was handling the matter. It was her evidence in re-examination that the Plaintiffs did not start utilizing the suit properties in 1990 but they started cultivating them in 2006 or thereabouts.
9. When the 1st Defendant was examined by the court, she stated that she had no crops or structures on the suit properties and that the last time she made use of them was in 2003 when she last grazed thereon. She, therefore, wanted the Plaintiffs to return the suit properties to her.

D. Directions on Submissions

10. Upon conclusion of the trial the parties were granted timelines within which to file and exchange their respective submissions. The record shows that the Plaintiffs' submissions were filed on 07.12.2022 whereas the Defendants' submissions were filed on 09.12.2022.

E. The Issues for determination

11. The court has considered the Plaintiffs' originating summons dated 22.03.2017, the Defendants' replying affidavit in answer thereto as well as the material on record. The court is of the opinion that the main issues for determination herein are as follows:
 - a. Whether the Plaintiffs have proved their claim for adverse possession over the suit properties.
 - b. Whether the Defendants and holding titles to the suit properties in trust for the Plaintiff.
 - c. Whether the Plaintiffs are entitled to the reliefs sought in the suit.
 - d. Who shall bear costs of the suit.

F. Analysis and Determination

- a. Whether the Plaintiffs have proved their claim for adverse possession over the suit properties
12. The court has considered the evidence and submissions on record on this issue. There is no doubt from the material on record that the Defendants were registered as proprietors of the suit properties in 2005 and 2007 respectively. The evidence on record shows that the parties made every effort to demonstrate that they were the legitimate owners of the suit properties. The court, however, shall confine itself to an examination of whether or not the Plaintiffs have proved their claims for adverse possession as required by law.



13. The elements of adverse possession were summarized in the case of Kasuve –vs- Mwaani Investments Ltd & 4 Others [2004] 1KLR 184 as follows:

“...and 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 dispossession of the owner or by the discontinuation of possession by the owner on his own volition, Wanja vs Sakwa No.2 [1984] KLR 284. A title by adverse possession can be acquired under the Limitation of Actions Act for part of the land...”

14. Whereas the Plaintiffs submitted that they had demonstrated their claim for adverse possession, the Defendants contended otherwise. The Defendants submitted that since they had denied the Plaintiffs’ occupation of the suit properties as from 1990, they (Plaintiffs) were obligated to call additional witnesses or evidence to demonstrate the year of occupation. The material on record shows that the 1st Defendants’ family was the first one to occupy their land Parcel 1347 in the area. They took possession of their land in 1973 or thereabouts. The Plaintiffs, on the other hand, took possession of their land, in 1990 and found that the 1st Defendants’ land was already fenced and occupied.

15. The material on record shows that the Plaintiffs have never moved from and they have never been evicted from the land they occupied when they settled on what they believed was Parcel 1354. According to the Defendants’ evidence it is the Plaintiffs who wrongfully occupied a larger portion of land than they were entitled to. Even assuming that it is the Plaintiffs who wrongfully occupied a longer portion of land than they were entitled to, that portion can form the legitimate subject of adverse possession under the Limitation of Actions Act, if the Defendants did not take steps for its recovery within the limitation period. The 1st Defendant conceded at the trial that she last grazed on the suit properties in 2003, that is, about 14 years before the filing of the instant suit for adverse possession.

16. The court is further satisfied that the Plaintiffs’ occupation of the suit properties was not with the consent or permission of the Defendants. The Plaintiffs were simply using, cultivating and developing the suit properties as if they were the legitimate owners thereof. Their occupation was adverse to the title of the registered owners hence the suit properties became liable to be acquired through adverse possession.

17. It is also clear from the material on record that although the 2nd Defendant was registered as proprietor in 2007, his parcel of land was a sub-division of Parcel 1730 which was in turn a sub-division of Parcel 1347. It was held in the case of Githu –vs- Ndeete [1984] KLR 776 that mere change of ownership does not stop time from running and it does not interrupt possession for purposes of adverse possession. Consequently, the court is of the opinion that the 2nd Defendants’ parcel of land is properly the subject of the claim for adverse possession. The court is thus satisfied that the Plaintiffs have demonstrated their claim for adverse possession on a balance of probabilities as required by law.

b. Whether the Defendants are holding the suit properties in trust for the Plaintiff

18. It is evident from the pleadings and evidence on record that the Plaintiffs sought an alternative relief to the effect that the Defendants were holding titles to the suit properties in trust for them. The court is of the opinion that having determined the issue of adverse possession in favour of the Plaintiffs it is not necessary to determine the issue of trust in the circumstances.

19. It is, however, doubtful if the claim of trust to land can properly be ventilated in a claim for adverse possession under Section 38 of the Limitations of Actions Act. The court is of the opinion that a claim for adverse possession and a declaration of trust are mutually exclusive and contradictory claims. In



the former, the applicant concedes the registered proprietor's ownership of the suit property coupled with a plea that his right to recovery has been extinguished due to limitation of time. In the latter claim, however, the applicant disputes the ownership of the registered proprietor and pleads that he was merely registered to hold it on his behalf and not as absolute owner.

20. As was held in the case of Wasui –vs- Musumba [2002] 1 KLR 396 the only legitimate question for determination in an originating summons of the nature filed herein is the issue of adverse possession. In the said case Ringera J (as he then was) held as follows:

“Lastly, I desire to say that the applicant’s claim that he may have an overriding interest over the respondent’s land under the provisions of the Registered *Land Act* cannot be a matter for adjudication in this originating summons as the only relief sought in an originating summons of this nature was the registration of the applicant as proprietor of the suit land by virtue of adverse possession. I will therefore express no opinion on the merits or otherwise of that claim.”

21. The court is further of the opinion that an originating summons under Order 37 of the Civil Procedure Rules is designed to deal with resolution of simple and straightforward matters which are not highly contested. See Kenya Commercial Bank Ltd –vs- Osebe [1982] KLR 296 and Kibutiri –vs- Kibutiri [1983] KLR1. In the former case it was held, inter alia, that:

“The procedure of originating summons is intended for simple matters and enables the court to settle them without the expense of bringing an action. The procedure is not intended for determination of matters that involve serious questions. The procedure should not be used for the purpose of determining disputed questions of fact.

The procedure of originating summons is designed for the summary or ad hoc determination of points of law, construction or certain specific facts for obtaining of specific directions of the court such as trustees, administrators or the courts execution officers.”

The court is thus of the opinion that a claim for a declaration that the respondent is holding a parcel of land in trust for another ought to be tried in an ordinary suit by way of plaint or counterclaim.

c. Whether the Plaintiffs are entitled to the reliefs sought in the suit

22. The court has found and held that the Plaintiffs have proved their claim for adverse possession of the suit properties to the required standard. It would, therefore, follow that the Plaintiffs are entitled to the reliefs relating to the claim for adverse possession to facilitate their registration as the proprietors of the suit properties.

d. Who shall bear costs of the suit

23. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287. The court finds no good reason why the successful parties should be deprived of costs of the suit. Consequently, the Plaintiffs shall be awarded costs of the suit.



G. Conclusion and Disposal Orders

24. The upshot of the foregoing is that the court finds and holds that the Plaintiffs have proved their case claim for adverse possession against the 1st and 2nd Defendants to the required standard. Consequently, the court makes the following orders for disposal of the suit:
- a. A declaration be and is hereby made that the Plaintiffs have become entitled to be registered as proprietors of Title numbers Nyandarua/Kiriita/Shauri Block 1 (Leshau Pondo) 1836 and 1837 on account of adverse possession under Section 38 of the Limitation of Action Act (Cap.22).
 - b. The Defendants are hereby ordered to transfer suit properties to the Plaintiffs within 21 days from the date hereof in default of which the Deputy Registrar of the court shall execute all necessary forms, documents and instruments to facilitate the registration of the Plaintiffs as the proprietors of the suit properties.
 - c. The Land Registrar - Nyandarua shall dispense with production of the original title deeds for the suit properties and all documents in the possession, custody or control of the Defendants while transferring the suit properties to the Plaintiffs.
 - d. Any relief sought in the originating summons which has not been granted is deemed to have been denied.
 - e. The Plaintiffs are hereby awarded costs of the suit.

It is so ordered.

JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 16TH OF MARCH, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. David Kaburu for the Plaintiffs

Ms. Wanjiru Muriithi holding brief for Mr. Waichungo for the Defendants

C/A - Carol

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Y. M. ANGIMA

JUDGE

