



M'mbijiwe (Suing as the Legal Representative of the Estate of Gilbert Kabeere M'Mbijiwe - Deceased) v Victoria (Environment & Land Case 132 of 2014) [2023] KEELC 16144 (KLR) (15 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16144 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 132 OF 2014
CK NZILI, J
MARCH 15, 2023**

BETWEEN

KINYUA M'MBIJIWE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF GILBERT KABEERE M'MBIJIWE - DECEASED) PLAINTIFF

AND

JOSEPH MBAYA VICTORIA DEFENDANT

JUDGMENT

1. The plaintiff, suing as the legal representative of the estate of the late Gilbert Kabeere M'Mbijiwe through an amended originating summons dated 27.11.2018 seeks to be declared entitled to 14 acres of land comprising LR No's. Nkuene/Mitunguu/Kithino/1522,1523,1524 and 1525 registered in the names of the defendant but which are subdivisions of LR No. Nkuene/Mitunguu – Kithino 8 registered in the name of the defendant's deceased father. The originating summons is supported by a further affidavit in support sworn by Kinyua Mbijiwe on 27.12.2018 and a list of documents dated 18.10.2017.
2. The defendant has opposed the suit through a replying affidavit sworn on 17.10.2014, witness statements dated 28.2.2019 and a list of documents dated 7.5.2018. The defendant's defense is that his father was an employee of the plaintiff's late father and a neighbor with an expansive land which has encroached on his land. He denied any alleged sale, subdivision, consent to subdivide or transfer the suit land in the names of M'Muguongo Muthige alias M'Muguongo M'Muthige, his late father, in favor of the plaintiff's late father. Additionally, the defendant averred that the deceased must have used his immense power and influence at the time to acquire the purported documents. Moreover, the defendant averred that it was unbelievable that the plaintiff would wait for his father to pass on in 1989 without effecting the alleged transfers and later on wait for 25 years after the death without demanding for the said land, a delay of 36 years. He averred that the current suit was triggered by the filing of an eviction suit in Tigania Law Courts lastly he termed the deceased as a mere licensee who



- was allowed to establish a tree nursery near a swamp during dry season(s), only to encroach upon the land and forcibly attempt to erect a fence.
3. Following an interlocutory application dated 10.9.2014 interim orders of injunction were issued in favour of the plaintiff. Eventually, another application dated 31.10.2014 was filed. Parties thereafter recorded a consent to maintain the status quo and agreed to undertake a scene visit through the Deputy Registrar of the court in the presence of the district land registrar. This was not done despite the extension of the said orders during the lifetime of this suit. Directions under the provisions of Order 18 of the Civil Procedure Rules and by consent of parties on 3.10.2022, this court took over the matter from where its predecessor had left the file.
 4. At the hearing, Kinyua Mbijiwe testified as PW 1 following the substitution of the initial plaintiff. He adopted the supporting affidavit dated 10.9.2014 by his deceased father together with his further supporting affidavit dated 27.12.2018 as his evidence in chief. Briefly, PW1 told the court that his late father and the defendant's late father were good neighbors to an extent that the latter sold to his late father land whereof both applied for the land control board consent for the 14 acres on 7.12.1978. PW1 said his late father took possession in 1978 and established a mango plantation therein until he passed on in 1989. The plaintiff testified that the defendant was all aware of the sale and the occupation prior to obtaining letters of confirmation of grant, acquiring the land through transmission and subdividing it into four portions. PW1 told the court that after taking over the land from his deceased father, he in 2001 added another plantation of mangoes to the existing one. PW 1 said that despite efforts to amicably settle the matter using Njuri Ncheke panel of elders, the defendant became adamant and rushed to court for eviction orders. PW 1 produced a copy of the official search for LR No's Nkuene/ Mitunguu-Kithino/1522, 1523, 1524 & 1525 as P. Exh No. (1), a copy of search for LR Nkuene/ Mitunguu – Kithino/8 as P. Exh No (2), an application for land control board consent as P. Exh No. (3), a letter of consent dated 6.12.1978 as P. Exh No. (4), a copy of a certificate for confirmation of grant and a grant of letters of administration as P. Exh No. (5), a letter by the National Supreme Council of Njuri Ncheke as P. Exh No. (6) and lastly pleadings in Nkubu CMCC No. 100 of 2014 as P. Exh No. (7).
 5. In cross-examination, PW 1 said that his late father used to buy the land in bits from the defendant's deceased father as per the land control board consents which in his view were genuine but could not tell how much an acre was bought at. He denied that the deceased had only been licensed to use a portion of the land to put up a nursery of trees near the swamp. PW 1 denied that the suit was that of an encroachment as opposed to a sale since at the time 'wazees' would not normally regularize their transactions to a formal agreement. Even though the consent indicated 18.4 ha of land, PW 1 clarified that his claim was only for 14 acres of the suit land which was what his late father explained to him.
 6. PW 1 also admitted that his late father did not object to the confirmation of grant in favor of the defendant nor apply for its revocation since at the time, he was not aware of it given that he was on treatment overseas. He denied that his late father used undue influence power or corrupt means to acquire the land. In re-examination, PW 1 said that the suit land was validly and legally bought from the defendant's late father after which vacant possession was handed over, developments were undertaken and that no efforts had been made to evict him from the land by the time the defendant's deceased father passed on and his own father passed on in 2017.
 7. DW 1 adopted his replying affidavit sworn on 17.10.2014 and a witness statement dated 28.2.2019 as his evidence in chief. He produced a copy of the plaint he had filed at Nkubu law courts as D. Exh No. (1), copy of a will by his deceased father as D. Exh No. (2), a translation of the will as D. Exh No. (3), a bundle of official searches as D. Exh No. (4) (a) – (d) and lastly, a couple of photographs as D. Exh No. (5). DW1 denied that any sale of land took place between the plaintiff's deceased father



- and his late father over the suit land as alleged in the pleadings otherwise, his late father would have told him about it during his lifetime or would have appeared at the land control board with any of his children. Similarly, DW 1 told the court that the alleged bought land size kept on varying and that no land surveyors report was tendered, the plaintiff had failed to prove the land he was allegedly occupying or entitled to.
8. In cross-examination, DW 1 told the court that his late father passed on 2.9.1998 where after he took out letters of administration and upon transmission of the land, he subdivided it into four portions as Parcel No's 1522 – 1525. He denied that his late father sold the alleged 14 acres to the plaintiffs' father and or attended to the land control board as alleged in P. Exh No's 3 & 4, dated 7.12.1978. DW1 insisted the alleged transaction had no land control board consent on subdivision, there were missing names and signatures of the land control board chairman and no vacant possession took place. Further, DW 1 said that after the land was registered under his name, he filed an eviction suit on 29.8.2014 against the plaintiff. Further, DW1 said that though the plaintiff referred the dispute to Njuri Ncheke panel of elders, who allegedly wrote to him, he insisted to be supplied with supporting documents over the alleged sale which were not forthcoming. He insisted that the plaintiff ought to vacate his land and stop any farming activities therein. DW 1 also said that the plaintiff was only allowed to establish a nursery of trees on a small portion of the suit land near the swamp, but unfortunately used force in 2018 to illegally fence off his land as per the photographs produced as evidence before the court.
 9. At the close of their testimonies, parties were directed to file and exchange written submissions which they filed dated 11.2.2023 and 16.2.2023, respectively. The plaintiff submitted that a sale, excision and the taking up of vacant possession of the land took place in 1978 whereof the plaintiff started planting mangoes trees for export on the suit land which occupation was never interrupted, has been open, continuous and notorious for the last 35 years in line with the law on adverse possession, as evidenced by P. Exh No's. (2) and (3). Reliance was placed on [*Leonala Nerima Karani v William Wanyama Ndege*](#) (2012) eKLR, and in the matter of ascertainment of ownership of parts of LR No. 3036/5 (2012) 1 KLR.
 10. On the other hand, the defendant took a contrary view that the plaintiff is a licensee and a mere trespasser to the land after breaching a common boundary and whose claim has fallen short of establishing adverse possession. It is submitted that the plaintiff has failed to ascertain with certainty the land which he occupies out of the four subdivisions, whose size is more than 12 acres of land. Further, the defendant submitted that apart from being vague and based on an unascertainable area, the plaintiff relies on contested land control board forms and or consent based over an undivided piece of land. Relying on [*Mbui v Maranya*](#) (1993) eKLR, the defendant urged the court to find that occupation per se could not make an intruder the owner of the land, especially where he has forcibly interfered with a common boundary, employed force, cut down trees and unlawfully erected a fence on the land as depicted in the photographic evidence tendered. The defendant submitted such forceful entry and takeover could not amount to a peaceful occupation. Relying on [*Mtana Lewa v Kabindi Ngala Mwangandi*](#) (2015) eKLR, the defendant submitted that the pleadings and evidence tendered by the plaintiff were at variance on acreage, could not prove the extent of occupation, failed to prove any sale; was based on altered land control board consents; relied on scanty evidence as to the purchase price and lacked the dates of the alleged payments for the purchased land.
 11. Relying on [*Nduta Itiota v Aziza said Hamisi*](#) (2020) eKLR, the defendant submitted that the failure to produce a land surveyor's report to establish and prove occupation was fatal to the plaintiff's claim. As to the permissive entry and occupation, the defendant relying on [*Mbira v Vacholi*](#) (2002) EALR 131 submitted that the plaintiff failed to challenge his defense on the permissive entry to establish a tree



- nursery at the wetland which essentially estops the plaintiff from turning around to advance a claim on prescription.
12. Lastly, the defendant submitted that the plaintiff failed to discharge the burden of proof as a definite and an identifiable user of 12 or 14 acres of the suit land or on account of a sale. Reliance was placed on *Gerishon Mundi Baruthi v Willys Gatnku Mukobwa & another* CA No. 98 of 1998 and *Peter Njau Kairu v Stephen Ndungu Njenga and another* CA of 1997.
 13. The court has carefully gone through the pleadings, the evidence tendered and written submissions filed by both parties. The issues calling for determination are;
 - i. If the facts and evidence tendered by the plaintiff sit well with the law and the ingredients to find a claim based on adverse possession.
 - ii. If the plaintiff deserves the reliefs sought.
 - iii. Who bears the costs?
 14. A party who professes and contends a claim on adverse possession has to plead and prove two key concepts; - dispossession and discontinuance of possession of the true owner. Therefore, the proper way of assessing proof of adverse possession is whether or not the title holder has been dispossessed or has discontinued his possession in favor of an alleged adverse possessor. In the case of *Kasongo & another v Ochieng and 2 others* (civil appeal) 123 of 2017) (2022) KECA 145 (KLR) 11th February (2022) judgment, the court said that in assessing adverse possession, the court must consider two questions;- whether the owner has been dispossessed openly or willingly and whether the claimant has been in an uninterrupted possession of the land for 12 years with an intention to own it, without the consent either expressly or in a non-verbalized manner by the true owner. See *John Baraza Ojiambo v Veronica Auma Ojiambo and 3 others* (2013) eKLR.
 15. In the case of *Ruth Wangari Kanyagia v Josephine Muthoni Kinyanjui* (2017) eKLR, the court said that the law on adverse possession as anchored under Sections 7, 13, 17 & 38 of the *Limitations of the Actions Act* remains constitutional by virtue of Article 40 of the *Constitution*. This was confirmed by the court in *Mtana Lewa (supra)*. The court took the view that the onus is on the person claiming adverse possession to prove use of the land claimed, as of right, with actual or constructive knowledge of the true owner, in a continuous manner, uninterruptedly for a period of 12 years and in a manner hostile to the true owner.
 16. Regarding adverse possession out of an aborted sale, in the case of *Peter Mbiri Michuki v Samuel Mugo Michuki* (2014) eKLR the court cited with approval *Public Trustee v Wanduru* (1984) KLR, 314 on the proposition that provisions of the *Land Control Act* have no application where the claim to title to agricultural land is by operation of law such as adverse possession.
 17. In this suit, the plaintiff's main contention is that entry into the suit land was on account of sale agreements entered into in 1978 which were followed by P. Exh No's. 2, 3 & 4 alleged to have been signed by the defendant's deceased father. On the other hand, the defendant has insisted that the plaintiff's father was a mere licensee for a small portion of land to establish a tree nursery in a wetland only during dry seasons, but who unlawfully encroached on the common boundary, which he discovered after he became the owner of the land out of the transmission and filed an eviction suit at Nkubu law court, which triggered the filing of the instant suit.
 18. Section 3 (7) of the *Law of Contract Act* excludes the application of Section 3 (3) of the said *Act* to contracts on land made before the commencement of the subsection on 1.6.2003. So in 1978 when the sale agreements allegedly took place, all that was required was a memorandum or note in writing



- signed by the party to be charged or by some person authorized by him to sign or part performance or willingness to perform his part of a contract, including the taking of possession of the property or any part thereof or being already in possession, continued possession in part performance of the contract and or having done some other act in furtherance of the contract.
19. In *Michuki v Michuki* (*supra*), the court took the view that notwithstanding that the sale agreement made by the parties was not in writing, the plaintiff/respondent had to satisfy the trial court that he either took possession of the suit property in part performance of the said oral contract or that by being already in possession of the suit property, he continued in possession in part performance of the oral contract. As concerns entry out of a contract, the court held that possession of land or any part for that matter needed not be actual and or physical but could also be constructive such as by putting a representative to live therein, constructing a house or occasionally visiting or living in the house. The court stated that in law, actual possession of any property by a licensee amounted to constructive possession thereof by the licensor. As regards when time started to run on account of adverse possession, the court took the view that it could take various forms such as the year; - of the sale agreement, of construction of the house, of visiting the land office and or the change of mind to sell the property, while the alleged buyer was either in actual or constructive possession. The court cited with approval *Wambugu v Njuguna* (1983) KLR 172 that where a claimant is in exclusive possession of land with leave and license in pursuance to a valid agreement, possession becomes adverse and time begins to run at the time the license is determined.
 20. Applying the foregoing caselaw and guiding principles to the instant suit, the plaintiff takes the view that entry occurred out of a sale agreement in 1978. The plaintiff did not plead or tender evidence on the terms and conditions of the sale agreements, whether they were oral or in writing, what the consideration was, if at all the consideration was ever paid or cleared and lastly on the date of completion of the sale agreements. Further, P. Exh No's 3 & 4 do not specify the exact date vacant possession was to be granted, the exact locality and the size of the land, the consideration and its mode of payments and lastly, whether there was a prior land control board consent for the subdivision. PW 1 in his testimony was unable to clarify all these facts so that the court could establish when exactly time started running from the last date of payment of the purchase price for the dispossession of the true owner, going by the case of *Public Trustee v Wanduru* (*supra*).
 21. As at the time the defendant's late father passed on in 1989, he had not transferred the alleged purchased land to the plaintiff's deceased father. No evidence and or reasons were advanced why it took that long for the plaintiff to follow up on the transfer or the clearance of the purchase price so that before that date, the plaintiff could be said to have terminated the permissive occupation, or demanded for the transfer of the land into his name. There was also no evidence tendered that the plaintiff's deceased father actuated the consent to transfer the land through transfer forms duly executed by the then-registered owner on top of the land control board consents. Similarly, even after the initial owner passed on, no evidence was tendered to the effect that the plaintiff's late father before he passed on in 2017, had demanded or asserted any hostile acts against the estate of the initial registered owner as a bona fide purchaser for value which then the defendant would be said to be holding in trust for the plaintiff. See *Public Trustee v Wanduru* (*supra*).
 22. As to whether the plaintiff has defined the area he claims adversity over and the nature of his hostile acts, in *Loise Nduta Itotia v Aziza Said Hamisi* (2020) eKLR the court cited *Wambugu v Njuguna* (*supra*), that acts must be done which are inconsistent with the enjoyment of the soil for the purpose for which the true owner intended to use the land.
 23. In this suit, the plaintiff averred and testified that his late father planted mango trees for export and that in 2001, PW 1 added an extra mangoes plantation. The only evidence tendered by the plaintiff



were photographs showing a fence being erected in 2018, which the defendant termed as evidence of a forceful and or violent takeover of the land out of an encroached boundary. Unfortunately, the plaintiff failed to produce a land surveyor's map or report, an agricultural officer's report, farm produce permits or farm inputs invoices, or farm produce, export permit for this particular land in support of his occupation and developments on the suit property. Further to this, no evidence was led on the specific area of physical occupation out of the four portions of the suit land including the exact acreage under developments belonging to the plaintiff.

24. Coming to whether there was any interruption of the alleged occupation, in *Joseph Gachumi Kiritu v Lawrence Munyambu Kabura* (1996) eKLR and *Gulam Miram Nordin v Julius Charo Karisa* (2015) eKLR, the court held that time which has begun to run is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor which includes the taking of legal proceedings or the making of an effective peaceful entry into the land.
25. In this suit, the plaintiff admitted that the defendant not only became a registered owner but also visited the land following the subdivisions, gave him a notice to vacate the encroached portion and eventually filed legal proceedings in Nkubu Law Courts for eviction and in seeking to stop him from encroaching on the land.
26. In my considered view and given these moves, the defendant cannot be said to have abandoned or have been dispossessed of the land. The plaintiff knew that the defendant was the true owner of the land hence the reason he was engaging a panel of elders to amicably settle the dispute. If the plaintiff had the intention to dispossess and knew his adverse rights had accrued, he would not have rushed to violently fence off the property, even when he knew that there was a court suit. As soon as he noticed the encroachment, the defendant asserted his rights and initiated recovery proceedings. Therefore, the mere occupation of the land by the plaintiff did not extinguish either the rights of the successor in title nor those of the defendant for the statutory period of 12 years. The upshot is I find the plaintiff has failed to establish the ingredients of adverse possession, and hence is not entitled to the reliefs sought. The suit is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 15TH DAY OF MARCH, 2023

HON. C.K. NZILI

ELC JUDGE

In presence of:

C/A: John Paul

Mwanzia for plaintiff

Kimotho for the defendant

