



**Itaru v M’Gitoo (Environment & Land Case 44 of 2020)
[2023] KEELC 16284 (KLR) (15 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16284 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 44 OF 2020**

CK YANO, J

MARCH 15, 2023

BETWEEN

JULIUS MIRITI ITARU APPLICANT

AND

MICHAEL M’GITOO RESPONDENT

JUDGMENT

1. The plaintiff took out the originating summons dated September 17, 2020 and filed on November 10, 2021 under Order 37 Rule 7 and 8 of the [Civil Procedure Rules](#) claiming entitlement to land parcel LR NO. Nyambene/Kitheo/1273 by way of adverse possession.
2. The plaintiff testified that the suit land originally belonged to his family during the time of adjudication and a gap was created in their family land while they were still in occupation and the defendant was allocated the land there, but was not able to take possession since he had his own land elsewhere in a place known as Mucune Sub-location while the suit land is in Kitheo sub location.
3. That in the year 1998, the defendant sent one Peter Kaeche Limbiro, who was then a local Kitheo land Adjudication Section committee member to approach the plaintiff and ask him if he was interested in buying the suit land measuring 0.20 hectares and which is next to the plaintiff’s land. The plaintiff stated that he later met the defendant in the same year where they negotiated over the sale of the land at an agreed price of Kshs. 30,000/= which the plaintiff states he paid in full. That in return the defendant allowed the plaintiff to continue occupying the land which he said he has since developed by planting 30 macadamia trees, 24 grevillia trees, 20 bananas, 1000 tea bushes and coffee.
4. The plaintiff stated that when he applied for the transfer of the land into his name, the Adjudication Officer did not effect the transfer and never notified the decision to the plaintiff. That recently, he discovered that the land was registered in the name of the defendant and a title deed issued to him on August 5, 2011. The plaintiff stated that when he approached the defendant to transfer the land to



- him, the defendant became uncooperative and even refused to sign an application for consent of the Land Control Board, and also started looking for prospective buyers for the land.
5. It is the plaintiff's evidence that he is still in peaceful occupation of the suit land which he said he has been utilizing together with his family since 1998. That the defendant has been aware of the plaintiff's occupation of the land but has never taken any step to evict him from the land. In view of the foregoing, the plaintiff claims title of the suit land by way of adverse possession.
 6. The plaintiff produced copies of certificate of search, letter dated August 28, 2020, application to register a caution, Affidavit dated May 22, 2019 and demarcation book of the land as P exhibits 1, 2, 3, 4 6 and 7 respectively. He also produced photographs as P exhibit 8.
 7. When cross-examined by Mr. Muthomi, Learned Counsel for the defendant, the plaintiff stated that he did not know the description of the suit parcel in full, except the number 1273. He stated he was born in 1967 and that adjudication was carried out around 1997/1998 when he was about 31 years old. That he knew the process of how adjudication was being done, including people being shown their land. That he did not raise any objection over the suit land.
 8. The plaintiff maintained that he purchased the land from the defendant in 1998 when they entered into an agreement for sale and that he paid the purchase price and the defendant gave him the demarcation book and the land.
 9. The plaintiff confirmed that the letter he produced as P exhibit 2 stated that he discovered that a stranger had forged documents to fraudulently get registered as owner of the land and instructed his advocate to file suit for eviction orders. That the person he was referring to in the said letter was the defendant herein, who is said is an old man of about 79 years old. Plaintiff denied trying to defraud the defendant of his land. He confirmed that from 1998 up to 2020, he did not file any suit to compel the defendant to transfer the land to him and also did not make a report to the police over the allegation that the defendant forged documents.
 10. When re-examined by Mr. Atheru, the plaintiff insisted that the land was family land which they occupied even before adjudication. He also stated that he bought the land from the defendant in 1998 adding that the defendant stays about 5 kilometres from the suit land and which is a different sub-location.
 11. PW 2 was Peter Kaeche Limbiro who testified that he knows both the plaintiff and the defendant. His evidence was that it is the plaintiff who lives on the suit land and that initially, it is the plaintiff's father who was living therein, though he did not know when he entered the land. He stated that he was a land committee member during adjudication, and explained that they would allocate people land where they live.
 12. PW 2 stated that the defendant sent him to the plaintiff to request him to buy the land though immediately changed his testimony. He even disowned his own witness statement filed in court.
 13. The defendant filed a replying affidavit dated July 4, 2022 in response to the summons and admitted being the registered owner of the suit land. He stated that his real name is Michael M'etali M'Ito and as shown in the plaintiff's summons.
 14. It is the defendant's evidence that the plaintiff is a crook who wants to reap where he has not sown. He explained that the plaintiff's affidavit is full of falsehoods, self-contradictory and half-truths. For instance, the plaintiff's deposition that the suit land was originally their family land, that the defendant sold him the land and also accusing the defendant of being a stranger who forged documents to get registered as owner of the land, and wanted to file suit for eviction.



15. The defendant states that he gathered the land and underwent all legal processes including demarcation and adjudication and the same was registered in his name and was issued with the title deed on September 9, 2020. The defendant stated that during the entire process, no one, including the plaintiff filed any objection including AR/Objection. He argued that he has the constitutional right to own land in other places. He denied sending anyone to approach the plaintiff to buy the land and further denied that the plaintiff is in occupation or has developed it as alleged. The defendant produced copies of his identity card, title deed and sketch map as D exhibits 1 and 2(a) and (b) respectively.
16. When cross examined by Ms Matiri advocate for the plaintiff, the defendant admitted that the plaintiff is using the land but was not sure if he lives there. The defendant stated that he has been occupying the upper side of the land and denied receiving any money from the plaintiff for purchase of the land.
17. The parties filed written submissions through their advocates on record which I have read and considered and I need not reproduce here.
18. The court has carefully considered the pleadings, the evidence on record and the submissions filed by the parties to buttress their assertions. I have also taken into account the legal authorities proffered by the parties. The only issue for determination is whether the plaintiff has acquired the suit land through adverse possession and costs.
19. Adverse possession is a common law doctrine under which a person in possession of land owned by someone else may acquire valid title to it. In Kenya, this doctrine is alive in section 7 of *Limitation of Actions Act* cap 22 Laws of Kenya that states;

“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.”
20. Section 17 of the *Limitation of Actions Act* provides 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) the title of that person to the land is extinguished.”
21. The period of twelve years starts to run from the moment the trespasser takes adverse possession of the land and the registered proprietor is regarded as having been dispossessed or having discontinued his possession.
22. In *Wambugu v Njuguja* (1983) KLR 173, the Court of Appeal held inter alia that-;
 - “1. The general Principle is that until the contrary is proved, possession in law follows the right to possess.
 2. In order to acquire by the statute of limitation of 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 of which he intended to use it...”



23. The ingredients were recently discussed by the Court of Appeal in the case of *Mtana Lewa v Kabindi Ngala Mwagandi* [2015] eKLR where it was stated:

“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 nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner”

24. The plaintiff has to prove that he has used the suit land as of right: *nec vi nec clam, nec precario*. He must show that the registered owner of the land had knowledge (or means of knowing, actual or constructive) of the possession or occupation. Further, the possession must be continuous.
25. In this case, there is no denial that the defendant is the registered proprietor of the suit land. The evidence on record shows the defendant was allotted the land through adjudication and later issued with title to the suit property on September 9, 2020 in accordance with the *Land Registration Act* No. 3 of 2012. Whereas the plaintiff’s claim that he has acquired the suit property by way of adverse possession, the defendant adduced documentary evidence to prove that he asserted his ownership right to the property in 2020 after acquiring title.
26. The plaintiff’s evidence is that he entered into possession of the suit land pursuant to an agreement of sale entered into in the year 1998 for a consideration of Kshs. 30,000/= which he says he paid in full. However, the plaintiff’s contention to this effect is not anchored on any evidence. The plaintiff did not provide any sale agreement in support of his allegation. There was also no evidence to confirm the alleged payment. From the material on record, it is also not clear when the alleged contract was repudiated for purposes of calculation of the time for adverse possession. Even if there was such an agreement, which in this case has not been proved, it is apparent that any such possession was with the permission of the defendant pursuant to the alleged agreement.
27. The court has further observed that the plaintiff has given contradictory accounts of how he claims the suit land. On the one hand, the plaintiff claims that the suit land originally belonged to his family and that during the time of adjudication, the defendant was granted the land while it was being occupied by his family. Secondly, the plaintiff alleged that the defendant sold him the land. In addition, the plaintiff had through his advocates on record written a letter dated 28th August 2020 alleging that the defendant was a stranger who forged documents to fraudulently get registered to the suit land and wanted to file suit for eviction orders.
28. In this case, I find that the plaintiff’s evidence is full of contradictions. The evidence of the plaintiff, in my view, is not credible and the claim appears to be one of trial and error.
29. Further, I note from the material on record, and in particular the certificate of official search produced by the plaintiff and the title deed that was produced by the defendant, that the registration of the defendant as owner of the suit land was on August 5, 2011 and title issued on September 9, 2020. The suit herein was only filed in the year 2020 which is only 9 years from the date of the registration of the defendant as proprietor of the land. This is a period of less than 12 years. An order for adverse possession made in favour of a trespasser is enforceable against the person who is registered as proprietor and whose title has been extinguished by adverse possession. In my view, the time of 12 years could not run before August 5, 2011.



30. Based on the material on record, I find that the claim of adverse possession by the plaintiff has certainly not been proved to the required standard. The evidence by the plaintiff is full of contradictions. It is therefore my finding that the plaintiff has not met the threshold to warrant this court to grant an order of adverse possession. I find and hold that the plaintiff has failed to prove his case against the defendant on a balance of probabilities.
31. The upshot is that the plaintiff's suit is dismissed with costs to the defendant.

DATED, SIGNED AND DELIVERED AT MERU THIS 15TH DAY OF MARCH 2023.

In the presence of

J. Muthomi for defendant

No appearance for plaintiff

C.K YANO

JUDGE

