



Kariuki (Suing as personal representative of the estate of Peter Kariuki Mukundi) v Wainaina (Environmental and Land Originating Summons E009 of 2021) [2023] KEELC 16974 (KLR) (27 April 2023) (Judgment)

Neutral citation: [2023] KEELC 16974 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E009 OF 2021
LC KOMINGOI, J
APRIL 27, 2023

BETWEEN

SIMON MUKUNDI KARIUKI APPLICANT
SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF PETER
KARIUKI MUKUNDI

AND

DAVID KIMANI WAINAINA RESPONDENT

JUDGMENT

1. This is the originating summons dated August 31, 2021 brought under;
(Order 37 rule of the *Civil Procedure Rules*, 2010 section 3A of the *Civil Procedures Act*, and all other enabling provisions of the law).
2. The applicant seeks the following reliefs;
 1. The honourable court to order specific performance by the respondent to complete the transfer of LR No KJD/Kaputei/1315 in favour of the applicant as per the agreement for sale dated November 9, 1989.
 2. In the alternative to (a) above, the honourable court to declare the applicant as the rightful proprietor of the property on account of adverse possession.
 3. In the alternative (a) and (b), the respondent be ordered to reimburse the applicant the current value of LR No KJD/Kaputei/1315 together with the value of the developments thereon.



4. That the costs of this application be borne by the respondent.
3. The grounds are on the face of the originating summons and are set out in paragraphs 1 to 18.
4. The originating summons is supported by the affidavit of Simon Mukundi Kariuki, the applicant herein, sworn on the September 9, 2021 and a further affidavit sworn on the January 25, 2022.
5. In response, David Kimani Wainaina filed a replying affidavit sworn on the October 29, 2021.
6. The originating summons proceeded by way of written submissions.

The Applicant's Case.

7. The applicant, who is the personal representative of the estate of Peter Kariuki Mukundi (deceased) stated that the deceased and the respondent entered into a sale agreement dated November 9, 1989 for the sale of a parcel of land known as Kajiado/Kaputiei/1315 measuring 6 acres for a consideration of Kshs.45,000/=
8. It is the applicant's contention that, pursuant to the agreement the deceased paid the full purchase price to the respondent, a fact that was acknowledged by both parties and attested to.
He further stated that the deceased aggressively followed upon the matter to have the title transferred to his name to no avail.
This led him to file a notice of registration of caution filed in the Kajiado Land Registry on the June 16, 1998.
9. The deceased died on July 24, 2003 without having the original title registered in his name. The applicant in his capacity as personal representative conducted a search over the property to no avail as he was advised that the title over the suit property had been closed after sub-division and the property given new numbers.
10. The applicant further stated that the deceased and his family have enjoyed quiet and notorious possession in full knowledge and acknowledgement of the respondent without any disturbance.
11. It is also his case that the deceased and his family be found to be entitled to ownership by adverse possession having been in quiet, exclusive and notorious possession and occupation of the land for a period exceeding thirty (30) years.
He has annexed to the further affidavit, photographs, letters from their neighbours showing the applicant's occupation of the suit property.
12. He has also stated that the deceased and his family enjoyed, quiet, notorious and open possession in full knowledge of the respondent and the third parties involved in ELC 462 of 2017, without any disturbance a fact that was attested by the area chief.
He prays that the respondent be restrained from interfering with the applicant's possession of the suit property.

The Respondent's Case.

13. In his replying affidavit, the respondent states that the applicant's claim for specific performance and compensation is bad in law as the same is caught up by the *Limitation of Actions Act*.



14. It is also his claim that the deceased nor the applicant has ever taken possession of the suit property as there is only a caretaker who has put up a mabati structure, on the land belonging to Beth Wanjiru Kamau.

He also stated that no land control board consent was ever applied and or issued. The sale agreement is therefore null and void hence no order for specific performance can issue.

15. The originating summons was canvassed by way of written submissions.

The Applicants Submissions.

16. They are dated April 25, 2022.

They raise two issues for determination

i. Whether the applicant acquired title by way of adverse possession.

ii. Whether the respondent can refund the purchase price at the current value of the suit property

17. Counsel submitted that Peter Kariuki Mukundi (deceased) entered into a sale agreement with the respondent on November 9, 1989 for the purchase of the suit property. After the agreement but before the transfer of title was effected into the deceased's name, the deceased took possession of the property together with his family and proceeded to develop and cultivate the land.

18. It is further submitted that the deceased's stay after purchase of the suit property was open, peaceful, notorious and uninterrupted until his demise in the year 2003, after which his family continued occupying and utilizing the suit property.

The applicant claims title to the suit property on account of adverse possession.

Counsel has put forward the cases of *Wanje & others v A.K Saikwa & others* (1984) eKLR; *Tabitha Waitberero Kimani v Joshua Ng'ang'a* (2017) eKLR.

19. It is submitted that the deceased after purchase of the suit property moved into and developed the suit property to which his estate now claims. The deceased was in open and notorious use of the property evidenced by putting up a semi-permanent home, digging a bore hole, cultivating on the land as well as fencing the suit property.

He has relied on sections 7 and 13, 16, 17 and 38 of the *Limitations of Actions Act*.

20. It is also submitted that section 28(h) of the *Land Registration Act* 2012 recognizes overriding interests on land, some of which are rights acquired or in the process of being acquired by virtue of any written law relating to the Limitation of Actions or by prescription.

He has put forward the cases of *Mwangi Githu v Livingstone Ndeete* (1980) eKLR where the Court of Appeal quoted with approval the case of *Gatimu Kinguru v Muya Gathangi; Gabriel Mbui v Mukindia Maranya* (1993) eKLR.

21. It is submitted that the deceased was in adverse possession of 6 acres out of the expansive mother title that was LR No Kajiado/Kaputiei/1315. The 6 acres portion is easily identifiable and the applicant herein has fenced, dig up a bore hole, put up structures and cultivating crops as glaring signifiers of their portion of land.

22. It is further submitted that there is no evidence presented before this honourable court of the respondent or the alleged third parties making claim to the suit property in ELC 462 of 2017 or the original title owner asserting their title before the lapse of the 12 years ending on June 15, 2002.



- He has put forward the case of *Wilson Njoroge Kamau v Nganga Muceru Kamau* (2020)eKLR.
23. It is submitted that by the time the respondent was supporting to pass title to the third parties after contracting with them as confirmed through judgement entered by consent dated July 30, 2020, the title had long passed to the deceased and subsequently devolved to his estate upon his demise.
- He has put forward the case of *Kasuve v Mwaani Investments Limited & 4 others* 1KLR 184 which quoted with approval the case of *Gitbu v Ndeete* (1984) KLR 776.
24. The applicant has adduced evidence to show that he has been in exclusive possession of the suit property and further demonstrated his *animus possiderdi* in developing the suit property through cultivating, digging a borehole and setting up a shelter as though it was as of right.
25. Counsel further submitted that the deceased paid the full purchase price to the respondent, a fact that was acknowledged by the respondent. The deceased carried out his main contractual obligation which was the payment of consideration but the respondent reneged on this agreement by failing to fulfil his obligations. The respondent willfully and purposefully failed to get the consents necessary to complete the transfer.
- He has put forward the cases of *Magdalene Nyokabi Guandai v Charles Maato Metiaki & another* (2018)eKLR; *Lipkin Garma v Karpanale Ltd* (1992) 4 ALL ER 512; *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* (1943)AC 32 (HL).
26. It is submitted that in the alternative the court to order the respondent to restitute the applicant by reimbursing the purchase price at the current market value of the 6 acre portion of LR No Kajiado/Kaputiei/1315 subject to the survey and valuation of the suit property.
27. Counsel also submitted that the applicant has presented factual evidence to satisfy all the requisite elements to claim title by adverse possession having taken possession of the suit property nec vic, nec clam, nec precario without interruption since 1989.
- He prays that the prayers on the originating summons be granted.

The Respondent's Submissions.

28. They are dated October 24, 2022. They raise three issues for determination;
- i. Whether an order for specific performance can issue to order the respondent to transfer land title number Kajiado/Kaputiei/1315 as per the alleged sale agreement dated November 9, 1989.
 - ii. Whether the applicant has been in occupation of the suit property land title number Kajiado/Kaputiei/1315 since the year 1989 and whether an order for adverse possession should issue.
 - iii. Whether the applicant is entitled to a refund of the current market price of the suit property.
29. Counsel submitted that the applicant's claim for specific performance to me barred and caught up by *Limitation of Actions Act*. He has put forward the case of *Sobanlaldurgadass & another v Divisional Intergrated Development Programmes Co Limited* Machakos ELC No 50 of 2020.
30. It is further submitted that no land control board consent was obtained either to have the land subdivided to hive off a portion measuring six (6) acres from the suit property and or for transfer to the applicant's late father and it is therefore clear that the sale agreement is void for want of land control board consent hence no order for specific performance can issue.



He has put forward the case of *Harambee Co-operative Savings & Credit Society v Mukinye Enterprises Ltd* civil appeal No 25 of 1981.

31. Counsel also submitted that the claim for a refund of the purchase price and or the current market value is caught up by the *Limitation of Actions Act*.

No valuation has been attached to guide the court on the current market value of the suit property.

32. It is further submitted that the applicant has not been able to prove that he has been on the suit property for a continuous period of at least twelve (12) years.

He has never taken possession of the suit property as it is only a caretaker who does cultivation and on a small portion of the land measuring ½ an acre.

Kajiado/Kaputiei North/1315 has been sub –divided into several portions as per the court order issued in ELC 462 of 2017.

33. It is also submitted that for the doctrine of adverse possession to apply the claimant should have entered into possession of the suit property without the owner’s consent or the consent should have lapsed.

34. He prays that the applicant’s claim be dismissed with costs to the respondent.

Analysis and Determination.

35. I have considered the pleadings, the evidence, the written submissions and the authorities cited. The issues for determination are;

- i. Whether the applicant has acquired title by way of adverse possession.
- ii. Whether the respondent ought to refund the purchase price at the current market value of the suit property.
- iii. Who should bear costs of this suit?

36. It is the applicants case that upon paying the full purchase price the deceased took possession of the six (6) acres in 1989.

In the case of *Wanje & others v A.K Saikwa & others* (1984) eKLR the Court of Appeal held;

“In *Littledale v Liverpool College* (1900) 1CL 19 at p 21, Lindley MR put it correctly that in order to acquire by the statute of limitations a title to land which has a known owner, that owner must have lost his right to the land either by being disposed of it or by having discontinued his possession of it, and, in answering the questing what constitutes dispossession of a proprietor? Bramwell L.J said in *Leigh v Jack* (1879) Ex D 264 at p 273:-
to defeat a title by dispossessing the former owner acts must be done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.”

Similarly in *Tabitha Waittherero Kimani v Joshua Ng’anga* (2017) eKLR the court held;

“Adverse possession requires at a minimum five basic conditions being met to perfect the title of the adverse party. These are namely;

- a. Open and notorious use of the property.

For this condition to be met the adverse party use of the property is so visible and apparent that it gives notice to the legal owner that someone may



assert claim. The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If legal owner has knowledge, this element is met. This condition is further met by fencing opening or closing gates or an entry to the property, posted signs, crops, buildings or animals that a diligent owner could be expected to know about.

b. Continuous use of the property.

The adverse party must, for statute of limitations purposes, hold that property continuously for the entire limitations period, and use it as a true owner would for that time. This element focuses on adverse possessor's time on the land, not how long true owner has been disposed of it. Occasional activity on the land with long gaps in activity fail the test of continuous possession. If the true owner ejects the adverse party from the land, verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party return. He cannot count the time between his ejection by the true property owner and the date on which he returned.

c. Exclusive use of the property.

The adverse party holds the land to the exclusion of the true owner. If, for example, the adverse party builds a barn on the owner's property, and the owner then uses the barn, the adverse party cannot claim exclusive use. There may be more than one adverse possessor, taking as tenants (i.e. owners) in common, so long as the other elements are met.

d. Actual possession of the property.

The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not establish actual possession.

37. In the case of *Mtara Lewa v Kahindi Ngala Mwangandi* (2015) eKLR the Court of Appeal defined adverse possession as;

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period in Kenya, twelve (12) years.

The process springs into action essentially by default or in action of the owner. The essential prerequisites being that 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 shows that possession is adverse to the title owner”.

38. It is the applicants evidence that the deceased entered the suit property after purchase and occupied it. That the deceased was in open and notorious use of the property evidenced by putting up a semi-permanent house, digging a borehole, cultivating on the land as well as fencing the property. The applicant has annexed to his further affidavit photographs of the suit property to show the said possession. He also annexed two letters from the neighbours which is a confirmation that the deceased and his family have been in occupation of the said property since 1989.



39. It is clear that the entry of the deceased to the suit property was on the basis of the sale agreement dated November 9, 1989 between him and the respondent.

The respondent does not deny the existence of the said sale agreement save for the claim that the consent from land control board was not obtained.

40. The respondent in his replying affidavit confirms that there is a caretaker on the suit property who has put up a mabati structure and only occupies half an acre.

He however did not challenge the applicant's claim that his family is in possession of the six (6) acres.

In the case of *Wilfred Kegonye Babu v Henry Mose Muko* (2019) eKLR the Court of Appeal while quoting with approval *Wambugu v Njuguna* (1983) KLR 172 held that;

“Where the claimant is a purchaser under a contract of sale of land.....the possession can only therefore become adverse once the contract is repudiated”.

The court went further to state;

“Where the claimant pleads the right to land, under an agreement and in the alternative seeks an order based on adverse possession, the claimant's possession is deemed to have been adverse to that of the owner after the payment of the last instalment of the purchase price. The claimant will succeed under adverse possession, upon occupation for atleast twelve years after such payment”.

41. Similarly in the case of *Peter Mbiri Michuki v Samuel Mugo Michuki* (2014) eKLR the court relying on *Public Trustee v Wanduru* (1984) KLR 334 stated that;

“adverse should be, calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date the true owner is dispossessed of possession. A purchaser in possession of the land, after having paid the purchase price, is a person in whose favour the period of limitation can run”.

In the instant suit the respondent does not dispute that he received the final payment by June 16, 1990.

42. It is the respondent's evidence that Kajiado/Kaputiei – North/1315 has now been sub-divided. The applicant has however proved that his family is in possession of six (6) acres out of the whole parcel. That the said of portion of six (6) acres is easily identifiable as the same is fenced, has a bore hole, a semi-permanent structure and crops thereon.

In the case of *Kasuve v Mwaani Investments Limited & 4 others* IKLR 184 the Court of Appel while quoting *Githu v Ndeete* (1984) KLR 776 held;

“A title by adverse possession can be acquired under *Limitation of Actions Act* for a part of the land and the mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such person's adverse possession”.

I agree with the applicants submissions that section 28 (h) of the *Land Registration Act*, 2012 recognizes overriding interests on land, some of which are rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.

43. It therefore goes without saying that the respondent did not have title to pass to the third parties.



44. In the case of *Gatimu Kinguru v Muya Gathangi* (1976) KLR 253 the court observed that;

“the land or portion of land adversely possessed must be definitely identified, defined or at least an identifiable portion with a clear boundary.....”

The applicant herein is claiming six (6) acres out of Kajiado/Kaputiei North/1315.

45. I find that the applicant’s right of adverse possession was not terminated by the subdivision and transfer to third parties.

46. In conclusion I find that the applicant has presented factual evidence to satisfy all the requisite elements to claim title by adverse possession having taken possession of the suit property *nec vic, nec clam, nec precario* without interruption since 1989.

Having found so, I need not go into the alternative prayer for refund of the purchase price at the current market value.

47. I find that the applicant has proved his claim on adverse possession on a balance of probabilities.

I hereby make the following orders;

a. That the applicant is hereby declared the absolute owner of a portion of land measuring six (6) acres out of the land known as Kajiado/Kaputiei North/1315 by virtue of being in adverse possession thereof in excess of the prescribed period.

b. That the respondent is hereby ordered to execute all documents of transfer in respect of the portion measuring six (6) acres out of land parcel number Kajiado/Kaputiei North/1315 within sixty (60) days from the date of this judgement.

Failure to which the Deputy Registrar of this court do execute the requisite documents in place of the respondent.

c. That the applicant shall have costs of this suit.

DATED SIGNED AND DELIVERED VIRTUALLY ON 27TH APRIL, 2023 AT KAJIADO.

L. KOMINGOI

JUDGE.

In the Presence of:

Mr. Shikanda for the Applicant.

Mr. P. Gachuhi for the Respondent.

Court Assistant – Mutisya.

