



**Keresa v Nyamohanga (Environment & Land Case E005 of 2021)  
[2023] KEELC 17371 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 17371 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT & LAND CASE E005 OF 2021  
MN KULLOW, J  
APRIL 27, 2023  
IN THE MATTER OF LIMITATIONS OF ACTION ACT CHAPTER  
22 OF LAW OF KENYA  
IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION  
PURSUANT TO S.38 OF THE LIMITATION OF ACTIONS  
ACT AND  
IN THE MATTER OF LR NO BUGUMBE/MABERA/914**

**BETWEEN**

**SLYVANUS WAMBURA KERESA ..... PLAINTIFF**

**AND**

**SUSAN MENGE NYAMOHANGA ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff herein commenced this suit by way of an Originating Summons dated January 26, 2021 against the Defendants seeking the following Orders: -
  - i. That this honourable Court to declare the Applicant to have acquired Adverse Possession of all that parcel of land known as Bugumbe/mabera/914 measuring 1.70Ha.
  - ii. That this honourable court be pleased to order the transfer of the whole of Bugumbe/mabera/914 Measuring 1.70ha To Slyvanus Wambura Keres. In default the executive officer of this court to execute the application for the consent of the Land Control Board and the Transfer in favour of the Applicant herein.
  - iii. The court to order the Respondent to bear the costs of this application.



2. The Originating Summons is premised on the 17 grounds thereon and on the Plaintiff's Supporting Affidavit sworn on January 20, 2021. The Plaintiff avers that the original title L R No Bugembe/ Mabera/ 130 was registered in the name of his late father (hereinafter referred to as Deceased 1). That upon his death, his elder brother, John Nyamohanga (the Defendant's husband and hereinafter referred to as Deceased 2) instituted succession proceedings in respect of their late father's estate and he was appointed the Administrator of the estate. After the Confirmation of Grant, the original land was subdivided among all the beneficiaries.
3. It is his claim that he has lived on the suit land since the year 1994 after the subdivision of the original land among the beneficiaries and has extensively developed the same by constructing a permanent and a semi-permanent structures thereon.
4. He contends that the suit land is his rightful share and was only registered in the Defendant's name by virtue of transmission from deceased 2, who was the Administrator of their late father's estate. That he has lived on the suit land continuously for a period of over 12 years and has thus acquired prescriptive rights over the said land. He maintained that the Defendant has her rightful share of the land different from the suit land.
5. The Defendant filed Replying Affidavit sworn on March 11, 2021. She confirmed that the original land parcel L R No Bugembe/ Mabera/130 was registered in the name of her late father in-law deceased 1. The original land has since been subdivided and the new parcel numbers which emerged were as follows; L R Nos Bugembe/ Mabera/912, 913, 914, 915 and 916.
6. She further stated that Parcel No Bugembe/Mabera/912 measuring 2.67Ha, was allocated to one of his sons Mr Benedicto Mwikabe Kerasia by their late father; who later sold the said portion and migrated/ relocated to Tanzania. She subsequently effected the transfer to the said purchasers in her capacity as an Administrator of the Estate of her late husband Nyamohanga Kerasia deceased 2. She thus dismissed the averments by the Plaintiff that parcel No. 912 belonged to deceased 2 or that she inherited the same.
7. It was further her claim that deceased 2 was given land parcel No. Bugembe/Mabera/914 measuring approx. 1.70(ha) by their father Deceased 1, while the Plaintiff was given parcel No. Bugembe Mabera/915 measuring approx. 0.75(ha). She thus maintained that the Plaintiff had no reason to lay demand on her late husband's share and denied his claims of having lived on the suit land for a period of over 12 years as alleged.
8. On the contrary, it was her contention that the Plaintiff started threatening her and interfering with her occupation of the said parcel in the year 2018 and went further to chase her from the said land. She thus urged the court to dismiss the claims by the Plaintiff and to dismiss the Originating Summons with costs.

## **Trial**

9. The matter proceeded for the Plaintiff's case on June 27, 2022; the Plaintiff testified as PW1. He maintained that the suit land No.914 belongs to him however, the title deed was fraudulently transferred to the name of the Defendant who is his sister in-law.
10. It was his testimony that he was born on the suit land in the year 1963 and has lived on the land all his life and has never been evicted from the said land. He further stated that he has constructed a permanent house thereon and cultivates the same.
11. He produced the annexures on his Supporting Affidavit as PExhibits 1- 9 as follows, copy of the register as Pexh 1, proceedings, Grant and Certificate of Confirmation of Grant as Pexh 2, copy of the death



- certificate as Pexh. 3, Grant in Migori Succession Cause No. 258 of 2018 as Pexh 4 (a & b), copy of the register in respect to the suit land as Pexh 5, copy of the register in respect of parcel No. 912 as Pexh 6, Chief's letter and Mutation as Pexh 7 (a& b), letter from the Defendant's advocate as Pexh.8 and bundle of photographs as Pexh. 9.
12. On cross-examination, he stated that succession proceedings were instituted in respect to deceased 1 estate vide Kisii High Court Succession Case No 30 of 1993. The land was divided amongst all the beneficiaries and they were all satisfied with the manner of distribution and the portion that each of them got. He reiterated that he was given the suit land No. 914.
  13. He however conceded that from the search certificate, it is clear that he was granted parcel No 915 and further that he neither had a Title Deed nor a Certificate of Official Search to show that he owned parcel No 914.
  14. It was his contention that the letter from the Area Chief showed that he owned parcel No 914 while the Defendant owned parcel No 912. He reiterated that his claim is in respect to parcel No 914 and further that parcel No 915 belongs to his brother and he therefore had no interest over the same.
  15. The Defence Case proceeded for hearing on November 14, 2022. The Defendant testified as DW1. She also stated that the plaintiff, who is her brother in-law had 3 brothers and each of them was allocated their respective portions by their late father (deceased 1).
  16. It was her testimony that the suit land No 914 was given to her late husband (deceased 2), whereas the Plaintiff was given parcel No 915 and had even used the said title to obtain a loan from KCB bank. She further claimed that the plaintiff chased her out of the suit land in the year 2018 after the death of her husband.
  17. She produced the annexures on her Replying Affidavit as DExhibits 1 – 4 in further support of her case as follows; copy of the Confirmed Grant with the list of beneficiaries as Dexh 1 Copy of the Certificate of Search in respect to parcel No 915 as Dexh 2, Copy of the green Card in respect to parcel No 916 as Dexh 3 and Copy of a demand notice as Dexh 4.
  18. On cross-examination, she stated that her late husband took out Letters of Administration in respect to the estate of deceased 1. Deceased 2 thereafter subdivided the original title No 130, which was originally registered in the name of his late father and divided the land among his siblings/ beneficiaries.
  19. She further stated that the suit land No 914 was registered in her name as well as parcel No 912. She however explained that parcel No 912 had since been transferred to other third parties who had purchased the same from one Benedicto Mwikabe Kerasia. She confirmed that the suit land is currently occupied by the plaintiff since the year 2018.
  20. On re-examination, she clarified that she transferred parcel No 912 in her capacity as the Administrator of the Estate of deceased 2 but she did not participate in the sale of the said portion. That the Confirmed Grant showed that the suit land No 914 was registered in her name while the Plaintiff inherited parcel No 915.
  21. Upon close of the defence case; both the parties filed their rival submissions and authorities which I have read and taken into account in arriving at my decision.

### **Analysis And Determination**

22. I have considered the pleadings, the evidence and the submissions filed herein and I find the issues arising for determination are as follows: -



- a. Whether the Plaintiff has proved his claim of Adverse Possession.
- b. Whether the Plaintiff is entitled to the reliefs sought.
- c. Who should bear the costs of the suit

**A. Whether the Plaintiff has proved his claim of Adverse Possession.**

23. The legal framework for adverse possession is provided under Sections 7,13, 17 and 38 (1) and (2) of the *Limitation of Actions Act* and Section 28 (h) of the *Land Registration Act*.

24. The court in *Samuel Kihamba v Mary Mbaisi* [2015] eKLR on the issue of adverse possession held as follows: -

“Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, *nec vi, nec clam, nec precario*. The additional requirement is that of *animus possidendi*, or intention to have the land” (emphasis mine)

25. It is the Plaintiff’s contention that he was born on the suit land and has lived on the said land since the year 1963 and has never been evicted. It is his claim that the suit land was originally owned by his late father (deceased 1) and after succession proceedings, he was allocated/ given the suit parcel No 914 as his rightful share. He thus accused the Defendant of fraudulently registering the said land in her name despite having been allocated parcel No 912 as her late husband’s (deceased 2) inheritance.

26. The Defendant on the other hand contends that her late father in-law (deceased 1) allocated/ distributed his original land parcel No. 130 amongst all his sons and the said allocation was adopted during the distribution in the succession cause. She maintained that her late husband (deceased 2) was rightfully given parcel No 914 measuring 1.70Ha while the Plaintiff was given parcel No 915 measuring 0.75Ha as his inheritance. She thus dismissed the claims by the Plaintiff that the suit land No 914 belongs to him and that he has been on occupation and use of the same for a period of more than 12 years.

27. It is not in dispute that the suit land herein is an ancestral land, having originally been registered in the name of Wangukio Matiko (deceased 1), the Plaintiff’s father and the Defendant’s father in-law. The parties herein are brother and sister in-law. The question that therefore follows is whether a claim of adverse possession can accrue on an ancestral land between the beneficiaries of an estate.

28. It is also not in dispute that succession in respect to the estate of the late Wangukio Matiko (deceased 1) was done and the original land parcel No 130 subdivided and distributed amongst the 4 sons. As a matter of fact, the Plaintiff in his testimony confirmed that the succession was done and they were all satisfied with the mode of distribution and each of the beneficiaries got their respective share of the land.

29. What however appears to be in dispute is who was allocated the suit parcel herein. The Plaintiff contends that the suit land No 914 is his rightful share and that he has lived on the said land since birth in the year 1963 to date. It was his claim that the land was registered in the name of the Defendant by way of transmission on the one hand and in his testimony in court, he claimed that the land was fraudulently registered in the name of the Defendant. He maintained that the Defendant’s share is parcel No 912.



30. The Defendant on the other hand maintained that parcel No 914 was his late husband's rightful share whereas the Plaintiff was allocated parcel No 915. With regards to parcel No 912, it was her testimony that the same was allocated to one of the sons, Benedicto Mwikabe Kerasia, who sold his portion to various third parties and relocated to Tanzania. It is her position that she transferred the said parcel No 912 in her capacity as the Administrator of the estate of deceased 2 but did not in any way participate in the sale of the said land. she produced Dexh.1 to prove the said averments.
31. This court is mindful not to delve on the merits and the mode of distribution of the estate of the deceased, which is a preserve of the succession court and any issue arising therefrom ought to be handled by the said court, which is vested with the requisite jurisdiction to handle the same.
32. The question that follows is whether the Plaintiff can be declared to have acquired adverse and prescriptive rights over the suit land, capable of registration by virtue of his occupation and use of the suit land. When did the said occupation and possession become adverse and at what point did time for adverse possession start running. In answering these questions, this court will critically consider the said occupation by the Plaintiff and whether there was a dispossession of the title holder or discontinued possession for the statutory period of 12 years and whether the same sufficiently meets requirements to be proved in a claim of adverse possession.
33. The court of Appeal in *Wambugu vs Njuguna* [1998] KLR 173 held as follows;

“..... The proper way of assessing proof of adverse possession would then 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 has been in possession for the requisite number of years....”
34. In view of the foregoing and the circumstances of the case, it is my considered opinion that the Plaintiff has not satisfactorily proved his claim of adverse possession, no proof of the key elements/ requirements of adverse possession. There has not been an acknowledgment of who is the rightful title holder of the suit land; it is his claim that the land is his rightful share of inheritance and that the registration in the name of the defendant was done fraudulently.
35. He has also not sufficiently demonstrated his wrongful dispossession of the rightful title holder since birth in the year 1963, when he allegedly started occupying the land.
36. Further, from his claim it is not clear who the actual title holder is since he contends that the suit land is his rightful share of inheritance, the same having been his late father's property. He has also not demonstrated when his possession became adverse; was the same upon the death of his late father, upon final distribution of the estate of his late father, after the registration of the suit land in the name of the Defendant herein or in the year 2018 as alleged by the Defendant.
37. As indicated in the *Wambugu* case (*supra*) dispossession of the title holder is what must be determined in a claim of adverse possession. In the instant case, the Plaintiff has failed to demonstrate when he dispossessed the title holder of the suit land. It is also trite law that long possession is not necessarily adverse possession.
38. It is therefore this court's opinion that the Plaintiff has failed to prove his claim on adverse possession to the required threshold or to demonstrate that the Defendant acquired the title to the suit land fraudulently.



**B. Whether the Plaintiff is entitled to the reliefs sought**

39. In view of the foregoing, having held that the Plaintiff has not proved his claim on adverse possession, it therefore follows that he is not entitled to the reliefs sought.

**Costs of the Suit**

40. Costs generally follow the event and in this case, having held that the Plaintiff is not entitled to the reliefs sought, I find that the Defendant is entitled to costs of the suit.

**CONCLUSION**

41. In the premises, I accordingly find that the Plaintiff has failed to prove his claim on adverse possession and I hereby dismiss the Originating Summons dated January 26, 2021 with costs to the Defendant. It is so ordered!

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 27<sup>TH</sup> DAY OF APRIL, 2023.**

**MOHAMMED N KULLOW**

**JUDGE**

**In presence of; -**

**.....for the Plaintiff**

**.....for the Defendant**

**Court Assistant - Tom Maurice/ Victor\*\***

