



**Muthuri v Mutiga & another (Environment & Land Case E007 of 2021)
[2023] KEELC 17075 (KLR) (26 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 17075 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E007 OF 2021**

CK NZILI, J

APRIL 26, 2023

BETWEEN

ROBERT MUTHURI PLAINTIFF

AND

JOHNSON KOOME MUUNGA 1ST DEFENDANT

TIMOTHY MWINGIRWA MUTIGA 2ND DEFENDANT

JUDGMENT

1. The plaintiff took out an originating summons dated January 18, 2021 in which he sought for the court to answer seven questions which been condensed into a single question of whether he and his family are entitled to 3.67 acres of land out of LR No's Uringu II/1633 and 2519, belonging to the defendants on account of adverse possession. He, therefore, prayed that he be declared as entitled to the two parcels of land and for the defendant to execute transfer documents in his favour and in default, the Deputy Registrar of the court to undertake the process.
2. The originating summons was supported by the grounds on its face and a supporting affidavit sworn by Robert Muthuri Charles dated January 18, 2021. Further, the originating summons was supported by his list of witness statements and issues all contained in the plaintiff's paginated bundle of documents dated May 23, 2022.
3. The originating summons was opposed by the 1st defendant through a replying affidavit sworn on February 4, 2022, on the basis that the plaintiff's father the late Charles M[']Nthaka hailed from the Mwimbi area far away from the suit land and he never occupied or lived therein. That he was gifted the land by his late father in 1980, the late Samson M[']Mutiga, who had inherited the same in 1948 as ancestral land belonging to the Bothanja clan. That the land adjudication record would show that he became the recorded owner and that some of the plaintiff's clan mates filed Meru HC JR 70 of 2010 touching on the suit land, leading to the A/R objection being reheard afresh and a decision made



- in his favour in March 2021. That around the time, the plaintiff started staying in one of the houses belonging to his clanmates to create an impression that he had been living there. That some of their plaintiff's clanmates had also filed Meru CMCC No 400 of 1994 against the 1st defendant's late father, but lost it and never appealed against the decision. The replying affidavit was also accompanied by the 1st defendant's list of witnesses and documents dated February 4, 2022.
4. Despite service with the originating summons, the 2nd defendant failed to respond to the suit hence a request for judgment dated September 12, 2022, was filed on October 21, 2022.
 5. At the trial, the plaintiff testified as PW 1. He adopted his supporting affidavit sworn on January 18, 2020 and witness statement dated March 8, 2022 as his evidence-in-chief. His evidence was that in the 1950s, his late father Charles M'Nthaka settled on an expansive land measuring approximately 7 acres which during the Adjudication process was reduced into 3.67 acres, where he established his home. Thereafter during the adjudication process, PW1 stated that he gathered the land *vide* serial No 895, Folio No 134. In addition, he went on to say that the defendants superimposed themselves on the land without his late father's knowledge and recorded the same as theirs in 1996, yet they had never set foot or occupied the same. Similarly, PW 1 told the court that the defendants have never evicted him from the suit land since they knew it belonged to him and his family. He produced copies of photographs showing his homestead as P. Exh No 1 (a), (b) & (c).
 6. In cross-examination, PW 1 said that he was born on the suit land on January 1, 1983 according to his identification card. Regarding his parents, PW 1 said that his father passed on in 2016 while his mother died on September 2, 2022, though he has not taken out letters of grant ad litem and therefore had them before the court. PW 1 also stated that all his siblings were alive but had not sought for their authority to sue on their behalf. He however insisted that the suit was brought for and on behalf of his family members. He said that he intended to share out the land with them.
 7. Concerning the alleged gathering of the land by his late father, PW 1 told the court that he lacked supporting documents from the land adjudication office to that effect. He however clarified that his late father was not buried on the suit land but elsewhere. He however stated that his late mother was buried on the suit land. Regarding the issue that the defendants took away his land, the plaintiff could not state the source of that information. Similarly, the plaintiff admitted that he lacked documents to show that his late father personally either filed an adjudication committee case or an arbitration board case against the defendants. PW 1 denied that the people who had filed the cases appearing in the 1st defendant's list of documents were his relatives or cronies. PW 1 denied being party to or having been aware of the previous court cases regarding the suit land as per D Exh No.'s 1-7. As regards occupation, PW 1 said that his late father had been on the land since the 1950s which was known by the area chief.
 8. Similarly, PW 1 also admitted to producing copies of records to show when the defendants became registered owners of the suit land. Similarly, PW 1 admitted that P Exh No 1 lacked any details to show the dates the photos were taken or developed. Additionally, the plaintiff acknowledged that his pleadings did not indicate the date he put up the houses on the suit land including the exact portion, size and acreage of the land he was occupying between the two suit premises.
 9. Lawrence Ntereba, Patrick Kobia Mutinga and Japheth Kubai testified as PW 2, PW 3 and PW 4 respectively. Relying on their respective witness statements dated March 8, 2022; all of them admitted that PW 2 and the father of PW 3 were parties to the Meru HC JR case, which among other parcels involved the suit land herein. In particular, PW 2 told the court that following the successful ruling in the JR case, the A/R objection was heard afresh as per the defendant's documents No (4,) and that no Minister's appeal was filed against the said decision.



10. PW 2 confirmed that the land belongs to the plaintiff who has been utilizing it since 1980. Similarly, PW 3 said that the plaintiff had developed the suit land for a long time to the exclusion of the defendants. As a neighbour to the plaintiff, PW 3 told the court that though the previous decisions were against the plaintiff's relatives, he nevertheless continued occupying and developing the land by building houses, erecting a cattle shed and establishing a fruit farm.
11. PW 4 on his part admitted that his late father Isaaya M'thambiri was a party to the Meru JR case alongside the plaintiff's late father.
12. The defendant called Josephat David Mwiraria and Joseph Tharimbu as DW 2 & 3 who adopted their witness statements dated February 4, 2022 respectively, as their evidence-in-chief. DW 1 after adopting his replying affidavit and witness statement dated February 4, 2022 as his evidence-in-chief, produced an extract of the adjudication records for parcel No 1633 as D Exh No (1), a copy of the order dated October 1, 2010 as D Exh No (2), a copy of a letter dated September 16, 2020 as D Exh No (3), proceedings in various A/R objections as D Exh No (4), copy and proceedings in Meru CMCC No 400/1994 as D Exh No (5), copy of a decree in the Meru CMCC suit as D Exh No (6), copy of findings in the arbitration board committee cases in 1980 as D Exh No (7) and lastly, a copy of proceedings dated December 19, 1976 as D Exh No (8). He denied that the plaintiff had been on the suit land for over 50 years as alleged or at all, since his entry, which he termed as illegal, occurred in March 2021 following the dismissal of an A/R dispute on August 18, 2020, which decision was never appealed to the minister. He thus urged the court to dismiss the suit with costs.
13. In cross-examination, DW 1 said that though his late father never used to live on the suit land, he had farm workers on the site since 1980 who he would occasionally visit since his homestead was situated elsewhere. He admitted that his late father had not erected any structures on the land for farming activities. DW 1 said that on his part, he started utilizing the land in 1980 until the time the plaintiff allegedly invaded the land on March 21, 2020. DW 2 confirmed that the land belonged to the 1st defendant even though his late father used to live elsewhere. He told the court that from 1980, the suit land used to be occupied by some third party who left it after losing the A/R objection in 2000 after which the 1st defendant took over the land in 2000.
14. DW 3, a neighbour of the defendant told the court that he had lived near the suit land for over 60 years which land used to be utilized by the late M'Thanka Charles who vacated it immediately after he lost the A/R objection, paving way for the 1st defendant to take full occupation on a year he could not remember. In his view, the land had no visible structures erected by either the plaintiff or the 1st defendant.
15. At the close of the testimonies, parties were directed to file and exchange written submissions which they did dated February 28, 2023 and March 3, 2023 respectively.
16. The plaintiff has submitted that his testimony has been consistent with the occupation and dispossession of the defendant from the suit land since entry in the 1950s through his late father's developments thereon to the exclusion of the defendant before and after the land was demarcated in 1996 and later on registered in favour of the defendants in 2015. Reliance was placed on section 7 of *Limitation of Actions Act*, *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* (2020) eKLR, *Maweu v Lin Ranching & Farming Co-operative Society* (1985) eKLR, *Kasuve v Mwaani Investment Ltd & 4 others* (2004) eKLR.
17. For his part, the 1st defendant submitted that whereas the plaintiff pleaded that the land had been gathered before the area was declared an adjudication section, no evidence of the alleged gathering *vide* Serial No 895 Folio No 134 was availed before the court.



18. As to the date of entry into and commencement of occupation, the 1st defendant submitted that the exact date was not pleaded, other than stating occupation by the family for over 60 years in paragraphs 9 & 10 of the supporting affidavit to the originating summons. On whether the evidence supports and proves the plaintiff's claim on adverse possession as required under sections 7, 13 (1), 17 and 38 of the *Limitation of Actions Act* as read together with order 37 rule 7 (2) *Civil Procedure Rules*, the 1st defendant submitted that the evidence tendered did not sufficiently and or satisfactorily meet the threshold since no certified extract of the title was produced or annexed to the originating summons, no letter of grant ad litem was produced for the estate of his deceased father to enforce any cause surviving the deceased; the date, month and year of entry were missing; any alleged occupation was with the collusion of clanmates who had previously lost a claim on the land. Reliance was placed on *Mombasa Teachers Cooperative Sacco Ltd v Robert Muthambi Katana & others* (2018) eKLR.
19. On the identity of the portions allegedly occupied, the 1st defendant submitted that no proof of the same was made in terms of sections 107, 108, 109 and 110 of the *Evidence Act* as held in *Mombasa Teachers* (supra), where the court cited with approval *Wilson Kazungu Katana & 101 others v Salimi Abdalla Babkshwein* (2015) eKLR and in *Githu v Ndeete* (1984) KLR 776.
20. As to whether the occupation has been peaceful and uninterrupted for the requisite period, the 1st defendant submitted that given his uncontroverted documentary evidence on a plethora of prior cases affecting the suit land with the latest decided on August 18, 2020, the said occupation, if any, has not been peaceful or continuous. Reliance was placed on *Loise Nkatha Muthuri v Kiogora Mburugu & another* (2018) eKLR. In conclusion, the 1st defendant urged the court to find and hold that the suit has not been proved to the required standard and proceed to dismiss it with costs guided by section 27 of the *Civil Procedure Act*.
21. The court has carefully gone through the pleadings, the evidence tendered and written submissions. The issues calling for the court's determination are:
 - i. If the plaintiff has the capacity to advance the case for the estate of his deceased parents and his siblings.
 - ii. If the plaintiff's suit is *res judicata* and or sub-judice.
 - iii. If the plaintiff has proved the ingredients of adverse possession to be entitled to the prayers sought.
 - iv. What is the order as to costs?
22. The primary documents to this suit are the originating summons dated January 18, 2021 and the replying affidavit by the 1st defendant dated February 4, 2022. In the said originating summons, the questions the plaintiff posed to this court is whether he and his other family members have occupied and are entitled to the suit properties under adverse possession, to be entitled to be declared as adverse possessors thereof and entitled to be registered as the bona fide owner.
23. In the body of the originating summons, the supporting affidavit and witness statements the plaintiffs have not plaintiff defined those family members living or deceased save for paragraphs 2, 3 and 4 of the supporting affidavits in which he averred that his late father Charles M'Nthaka had settled on the suit land before the adjudication process and had gathered the land *vide* serial No 895 Folio No 134 at the adjudication process. The defendants, unfortunately, were allegedly superimposed as theirs and were recorded as owners. The plaintiff further continued to aver that he and his family have been in occupation of the suit parcels of land before and after the land was demarcated.



24. It is trite law that parties are bound by their pleadings and issues flow from the pleadings. In the case of [*LSK v Commission for Land and 2 others*](#) (2003) eKLR, the court held that *locus standi* refers to the capacity to advance a claim and for one to be said to have capacity he has to demonstrate sufficient interest in a suit. In this suit, the plaintiff is suing alongside other family members whom he has not defined. None of the alleged family or family members have been disclosed in the pleadings. The plaintiff did not state if the said family includes those entitled to the estate of his deceased parents.
25. In cross-examination, PW 1 admitted that he had not sought or obtained any letters of administration to represent the estate of his deceased parents. Similarly, the plaintiff did not produce any authority to plead or sue on behalf of the alleged family members. Sections 7 & 13 of the [*Limitation of Actions Act*](#) provide that a right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run. Under section 38, thereof it is provided that where a person claims to have become entitled to land registered under any of the Acts cited in section 37 of the Act, he may apply for an order that he be registered as the proprietor of the land in place of the registered owner.
26. To this end, my finding is that the plaintiff is only entitled to advance the claim on his own and cannot purport to plead for or claim for the undefined family which has not been pleaded and particulars given. He cannot also advance the claim on behalf of the estate of his deceased parents without letters of administration.
27. The next issue is whether the subject parcels of land are registered under any laws set out under section 37 of the [*Limitation of Action Act*](#) and whether the failure to attach a certified copy of the register was fatal to the claim. In [*Mtana Lewa v Kabindi Ngala Mwangandi*](#) (2015) eKLR, the court held that adverse possession is 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 for a period of 12 years. In [*Washe Mwalimu Majengo & 2 others v Mwalimu Mwangolo Nguyetu*](#) (2017) eKLR it was held that an adverse claim had been brought on the property which was unadjudicated or unregistered. A preliminary objection had been raised that no certification of title was in existence to enable the orders of adverse possession to issue and that there was non-compliance with order 37 rule 7 (2) of the [*Civil Procedure Rules*](#).
28. The court made a finding that adverse possession claims can only lay on registered land and where an extract of the title to the land was attached. The court struck out the suit for lack of consent to sue as well as for non-compliance with the cited law. The same position was obtained in [*Gatingu Njaumbe v Camiro Muthengi & another*](#) (2020) eKLR, where the court cited with approval *Sophie Wanjiku John v Jane Mwibaki Kimani* NRB ELC 490 of 2010 that in adverse possession, time can only run against a registered land. See [*Abdirashid Adan Hassan v Estate of W H E Edgley*](#) (2022) eKLR & [*Mutuku Kivuthi & another v Umoa Bus Services*](#) (2021) eKLR.
29. In this suit, the plaintiff did not attach a copy of the extract in compliance with the law showing that the suit land was registered in favour of any of the defendants. In the case of [*Agnes Nyaloya Lukwa suing as a legal representative of the estate of the late Julius Mahambi Amayi \(deceased\) v Anthony Panga Imbunsi*](#) (2021) eKLR, the court extended time for the applicant to comply with the law based on the overriding objective of the court to do substantive justice. In the said suit, the respondent had admitted being a registered owner of the suit land. The court said that the admission did not absolve the applicant from complying with order 37 rule 7 [*Civil Procedure Rules*](#). In [*Kweyu v Omunto*](#) (1990) KLR on page 709, the court held that such a requirement was mandatory.
30. A registered proprietor of land is defined under section 3 (a) of the [*Land Registration Act*](#) as the person named in the register as the proprietor. In this suit, there is no evidence tendered that the suit parcels of land are either registered land or do belong to the defendants. In the case of [*Michael Mwanzia Kitavi v*](#)



- Lukenya Unwinding Trust Registered Trustees and 3 others* (2017) eKLR the court cited with approval *Samuel Kipngeno Koech v Agnes Wambui Gitonga Kericho* ELC No 5 of 2015, where Munyao Sila J held that section 38 of the *Limitation of Actions Act* refers to the *Land Registration Act* or the statutes previously repealed on land registration and that an extract of a title has the significance of showing the history of the proprietorship which was key on the computation of time in terms of section 41 of the *Limitation of Actions Act*.
31. In *Symon Gatutu and 587 others v E.A Portland Cement* (2011) eKLR, the court held that the requirement of a certified extract was not a talismanic hoop to be jumped by an intended adverse possessor but the objective was to provide a means to the court to ascertain the existence and proprietorship of the suit land. Similarly, Kubo J, as he then was, held in *Githi Mwangi and 4 others* (2005) eKLR that the non-compliance with the mandatory requirements of order 38D (2) *Civil Procedure Rules* rendered the originating summons incompetent.
 32. In *Chevron (K) Ltd v Harison Charo Wa Sbutu* (2016) eKLR, the court held that whether the possession was adverse for 12 years was a burden imposed by law on the person claiming to prove not only the period but also that his possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession and that the adverse possessor had done acts inconsistent with the true owner's enjoyment of the soil for the purpose for which he intended to use it. The court further held that it was a settled principle of law that a claim for adverse possession could only be maintained against a registered owner and since the property in issue until 1994 was government property, time could not run or be computed until the land became registered in the name of the true owner said to have been disposed of adversely.
 33. The court also held that by building structures on the land without the permission of the appellant, the respondent had manifested *animus possidendi*, a clear mind and intention of dealing with the suit land as if it was exclusively his and in a manner that was a clear conflict with the appellant's rights.
 34. Applying the foregoing case law and principles to the instant suit, it is quite clear that the plaintiff failed to attach the extract of the title to the suit parcels to first and foremost establish if the parcels exist, fall under registered land and lastly that the defendants are the true owners of the suit parcels of land. It is trite law that he who avers must prove to the required standard under sections 107, 109 & 110 of the *Evidence Act*. Prove of land ownership is a matter of law and can only be done through ownership documents such as a title deed or a copy of records, which as provided under sections 24, 25 & 26 of the *Land Registration Act*, are to be taken by the court as *prima facie* evidence of ownership in absence of fraud, illegality or having been obtained through improper or corrupt means.
 35. In this suit, the plaintiff had the onus to do so at the filing of the suit and during his testimony that the land falls under a known land registration regime in Kenya and above all belongs to the defendants. In the absence of such evidence my finding is that suit offends order 37 rule 7 *Civil Procedure Rules* since the land is adjudicated as per D Exh No (1) & (4).
 36. As to whether the suit is *res judicata* and the plaintiff is litigating on the same title, subject matter, same issues but under the guise of new parties, the defendant 1st produced D Exh No's 2, 3, 4, 5, 6, 7 & 8 showing that there have been previous proceedings both in court and under the *Land Adjudications Act*. In *Maina Kiai & 2 others v IEBC & 2 others* (2017) eKLR, the court took the view that for the doctrine of *res judicata* to apply, compliance with section 7 of the *Civil Procedure Act* must be proved. In this suit, there is no evidence that a final decree of the court of competent jurisdiction over the same subject matter or issues between the same parties has been made on the subject of adverse possession, as a bar to the plaintiff from re-opening an already concluded case or matter. In absence of the same, I find that the suit is not *res-judicata* or sub-judice.



37. On whether the plaintiff has proved adverse possession, the law requires that two key concepts be proved, possession by the adverse possessor for 12 years and discontinuance of possession by the true owner. The date of entry into possession by the plaintiff to the exclusion of the defendants is not clear or has not been proved. Even though the plaintiff denied knowledge of and or participation in the A/R objection proceedings, in the arbitration board cases, the judicial review case and the Meru Chief Magistrate's case which was determined in 2020, PW 2, 3 & 4 contradicted him and admitted having been parties or privy to the said disputes and or proceedings including the plaintiff's father.
38. Further to this, the 1st defendant's evidence was that the plaintiff's entry into the land was on March 21, 2021 after his clansmen vacated the land following the unsuccessful re-hearing of the A/R objection case.
39. To my mind therefore, the plaintiff was unable to prove his date of entry, the peaceful existence on the land for a period of 12 years, uninterrupted use and occupation of the land to possess or own and in a manner inconsistent with the rights of the true owners. Further, evidence tendered before the court is that the defendants have been asserting an interest in the land to the extent of having them reduced into recorded interest as evidenced by D Exh Nos 1 & 4 alongside other documents under the [Land Adjudication Act](#).
40. In my considered view, the defendants continued to assert their rights on the suit land and cannot, therefore, be termed as having abandoned the land to the plaintiff. It is trite law that possession alone or abandonment of occupation by the true owner does not entitle one to adverse possession. See [Wellis' Cayton Bay Holiday Camp Ltd v Shell Mex & BP Ltd](#) (1997) QB 94.
41. Further to this, the plaintiff was unable to specify the nature, particulars and identity of the land said to be exclusively under his possession out of the two parcels of land. The law is that the land under adverse possession must be identified including its size, particulars and the manner of ownership by the true owners. Since the plaintiff has been unable to prove who among the defendants own the two parcels of land through an extract of the title, my finding is that he has failed to establish either through a scene visit report, agricultural officers record or a land surveyor's map that he has been undertaking any development activities there and the extent of the said developments on the suit land. Lastly, the plaintiff has also failed to prove that the 1st & 2nd defendants were aware of his possession of the suit land for a total period of 12 years and took no action to either evict him or make an effective entry to the land. PW 2, 3 & 4 were unable to ascertain for how long the land was occupied by the plaintiff and the parcel numbers of their land if at all they were neighbours to the suit land. Similarly, the plaintiff was unable to prove what action he or his late father took once the land was demarcated in 1996 in favour of the defendants. At the very least, one would have expected an objection to have been filed against the recording of the land in favour of the defendants. Similarly, even though the plaintiff pleaded that the gathering of the land was done by his late father, he never produced the gathering book or any other report from the land adjudication office about serial No 895 Folio No 134. The upshot is that the plaintiff failed to prove his case on a balance of probability. The suit is hereby dismissed with costs to the 1st defendant.
42. Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 26TH DAY OF APRIL, 2023

HON. C.K. NZILI

ELC JUDGE



In presence of:

C/A: John Paul

C.P Mbaabu for 1st defendant

Kimotho for Kiyuki for plaintiff

