



**Areri & 6 others v Nyakeri & another (Environment & Land Case
227 of 2015) [2023] KEELC 16896 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16896 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT & LAND CASE 227 OF 2015

JM ONYANGO, J

APRIL 20, 2023

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT CAP 22

OF THE LAWS OF KENYA

AND

IN THE MATTER OF ORDER 37 RULE 7 (1) OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF PLOT NOS. CENTRAL KITUTU/DARAJA MBILI/2484/115 AND

CENTRAL KITUTU/DARAJA MBILI/2483/117 OF LAND REGISTRATION ACT OF

2012 (SIC)

AND

IN THE MATTER OF ARTICLES 159, 162 (2) AND 40 OF THE CONSTITUTION OF

KENYA.

BETWEEN

BETWEEN

JOHN MOSOTA ARERI 1ST PLAINTIFF

MARY KWAMBOKA ARERI 2ND PLAINTIFF

SAMWEL ARERI NYABERI 3RD PLAINTIFF

WYCLIFFE MOSE ARERI 4TH PLAINTIFF

ANNA NYAMOITA ARERI 5TH PLAINTIFF

EVERLYNE ARERI 6TH PLAINTIFF

NANCY ARERI 7TH PLAINTIFF



AND

LAWRENCE NELSON NYAKERI 1ST DEFENDANT
NYARIKI JOSHUA MUCHERA LEGAL REPRESENTATIVE OF JAMES
NYARIKI OMONYENYE 2ND DEFENDANT

JUDGMENT

1. The Plaintiffs filed suit by way of Originating Summons dated 30th June, 2015 seeking the following reliefs:
 - a. That the Plaintiffs/Applicants who have been in adverse possession of plot numbers Cental Kitutu/daraja Mbili/2484/115 and Central Kitutu/daraja Mbili/2483/117 entered in sheet No. 4 of the District Land Registry original sub-division of plot No. Cental Kitutu/daraja Mbili/130 measuring approximately nought decimal seven (0.7) hectares for more than 12 years be declared as absolute owners thereof and the same be registered in their names.
 - b. That Lawrence Nyakeri and James Nyariki Omonyenyne the Defendants /Respondents herein who are the registered owners of plot numbers Cental Kitutu/daraja Mbili/2484/115 and Central Kitutu/daraja Mbili/2483/117 do transfer the said parcels of land to the Plaintiff as the beneficial owners thereof by virtue of adverse possession.
 - c. That the Deputy Registrar of this honourable Court be authorized to sign all the requisite documents on behalf of the Respondents herein to facilitate the transfer of the said plot numbers Central Kitutu/daraja Mbili/2484/115 and Central Kitutu/daraja Mbili/2483/117.
 - d. That the costs of this application be provided for.
2. The Originating summons is supported by the affidavit of John Mosota Areri, Samwel Areri Nyaberi, Wycliff Mose Areri and Anna Nyamoita Areri all sworn on the 30th June, 2015. The 1st, 3rd, 4th, 5th, 6th, and 7th Plaintiffs are siblings while 2nd Plaintiff is their mother. The gist of the Plaintiff's case is that they have been living on the suit property for more than 30 years and they still have the original title deed for land parcel no Central Kitutu/daraja Mbili/130 in the name of Agustino Areri Nyabera- deceased who was the husband of the 2nd plaintiff and father of all the other plaintiffs.
3. They aver that they were not aware that their land had changed hands until the 11th day of June 2015 when the 1st Plaintiff conducted a search at the Lands Registry and discovered that the said title was sub-divided into land parcels no. Central Kitutu/daraja Mbili/2484/115 and Central Kitutu/daraja Mbili/2483/117 in the names of the 1st and 2nd defendants respectively while land parcel no. Central Kitutu/daraja Mbili/2482/118 remained in the name of Agostino Areri Nyaberi.
4. They further aver that they have developed the said plots with permanent houses and lived on the suit property continuously for more than 12 years without any interruption hence they have acquired the same by virtue of adverse possession.
5. In response to the summons the 2nd Defendant filed a Replying Affidavit in which he stated that the suit filed against the 1st Defendant was a non-starter since the 1st defendant was dead at the time the suit was filed.
6. He averred that the original parcel number Central Kitutu/daraja Mbili/130 which was owned by Agostino Areri Nyabera was sub-divided into land parcels number Central Kitutu/daraja



Mbili/2482,2483 and 2484 pursuant to an order the court in Kisii HCCC No. 298 of 1994. Following the said orders of the court, the 2nd Defendant occupied parcel number 2483 while the Plaintiffs have been residing on parcel number 2482.

7. He stated that the plaintiffs were aware of the sub-division of parcel 130 as they knew about the case the 2nd Defendant had filed against the late Agostino Areri and they had the original title which they refused to surrender to the Registrar for cancellation.
8. He refuted the allegation that the Plaintiffs had developed parcel number 2483 with permanent houses and connected electricity thereon. James Nyariki Omonyenyne the 2nd defendant died during the pendency of this suit and he was substituted by his son Joshua Nyariki Muchera. The said Joshua Muchera filed an affidavit in which he averred that Plaintiffs had not occupied parcels 2483 and 2484 peacefully as their father Agostino Areri had been sued over the original parcel number 130. He stated that his late father James had planted Napier grass on land parcel number 2483 and put up a semi-permanent structure where his worker stayed until 2005 when the plaintiffs became very hostile and chased him away.

Plaintiff's Case

9. The case was disposed of by way of viva voce evidence. The plaintiffs called the 1st Plaintiff as the only witness and he testified on his own behalf and on behalf of all the plaintiffs.
10. It was his testimony that he was born and bred on land parcel number 130 which belonged to his family and he had lived there ever since he was born 42 years ago. He stated that him and his brothers had built houses on the said parcel. He denied that his father had sold any portion of their land as he was of the opinion that it had been sold they would have been chased away by the new owner. He stated that he discovered that their land had been sub-divided into three portions in 2015.

Defendant's Case

11. Joshua Nyariki Machera (the 2nd defendant) testified and called two witnesses. He relied on the Replying Affidavit filed by his late father as well as his own Further Replying Affidavit. He substituted his late father James Nyariki Omonyenyne who died in 2019 during the pendency of this suit. He told the court that the plaintiffs' father had been sued by Lawrence Nyakeri Nchogo and James Nyariki Omonyenyne (2nd defendant's father). He produced a copy of the proceedings in HCCC No. 298 of 1994 and stated that the late Agostino had testified in the said suit and said that he sold land to James Nyariki Omonyenyne and that he received the full purchase price. He told the court that the said suit was determined in favour of the plaintiffs and an order of specific performance was issued directing Agostino to sub-divide the land and give the plaintiffs their portions of land. He confirmed that the said judgment was given effect and he referred to mutation forms and transfer forms contained in his bundle of documents. He said the transfer was registered on 11th June, 2003 when his late father became the owner of parcel 2483. His father then planted Napier grass and constructed a temporary structure which housed the worker who was taking care of the land. The said worker was subsequently chased away by the plaintiffs. He told the court that the plaintiffs had been hostile to them, making it difficult for them to visit the land.
12. In cross-examination he confirmed that his father obtained judgment against the plaintiffs' father in HCCC No. 298 of 1994. He said they had not evicted the plaintiffs after the said judgment. He confirmed that parcel no. 2483 was transferred to his late father after the judgment.
13. Joshua informed the court that the 1st Plaintiff- Lawrence Nelson Nyamoke died on 19.8.2009 before this case was filed. He produced a copy of the deceased's funeral programme as an exhibit.



14. Omatch Mekenye Israel who introduced himself as a retired chief testified as DW2. He stated that he was familiar with the dispute relating to the to the suit property. He said he was aware that the late Agostino had sold land to James Nyariki and Brigadier Nyakeri. He told the court that Brigadier Nyakeri fenced his land and put up a structure but Areri's sons demolished it. The matter was reported to him when he was a chief and he tried to resolve the dispute in vain. He told the court that the late James Nyariki bought the portion of land adjoining Brigadier Nyakeri's land but he was not allowed to occupy the said parcel owing to the hostility of the plaintiffs.
15. In cross-examination he said he was familiar with the suit property because his home was near the plaintiffs' home. It was his testimony that those who had bought land from the plaintiffs' father had not been able to occupy their land peacefully. He told the court that the original parcel of land was divided into 4 portions and the plaintiffs occupied the second portion from the river. He stated that Brigadier Nyakeri had put up a structure on the 3rd portion but it was demolished by the plaintiffs after which they constructed their own structures on the said portion. He stated that during Nyariki's funeral, the 2nd plaintiff acknowledged that he had bought land from her late husband.
16. Samwel Mandere who testified as DW3 stated that he was the late Brigadier Nyakeri's cousin and he was aware of the land dispute between the deceased and the plaintiffs. He said he was present when Brigadier Nyakeri fenced his land and they had to get police protection owing to the hostility from the plaintiffs' late father. He stated that the plaintiffs were very hostile to the deceased and they took over his land by force.
17. The court visited the suit property and noted that the plaintiffs were in occupation of the lower part of the land which had 4 semi -permanent houses. The portion next to the road had some shops. The portion between the shops and the houses was not occupied though there was some Napier grass on it.
18. After the close of the defence case both parties filed their submissions in which they articulated their positions supported by relevant authorities.

Issues For Determination

19. The following issues fall for determination:
 - i. Whether the suit against the 1st defendant is tenable in law
 - ii. Whether the plaintiffs have been in adverse possession of land parcels no. 2483 and 2484.
 - iii. Whether the plaintiffs are entitled to the reliefs sought.

Analysis And Determination

20. The first issue I have to determine is whether the suit against the 1st defendant is tenable in law. Although this suit was filed against two defendants, it is not in dispute that Lawrence Nelson Nyakeri the 1st defendant died on 19.8.2009. This emerged from the evidence of DW1 who produced the funeral programme of the deceased. This evidence was not controverted by the plaintiffs. This case was filed on 30th June, 2015 which was about 6 years after the 1st defendant died. In the case of Japhet Nzila Muangi v Hamisi Juma Malee (2022) eKLR the court held that the only option available to a court of law with respect to a suit filed against a person who was dead at the time of institution of the suit is to strike out the suit. The Court of Appeal was of the same view in the case of Geeta Bharat Shah & 4 Others v Omar Said Mwatayari & Another Court of Appeal at Mombasa Civil Appeal no. 46 of 2008 (2009) eKLR.



21. Bearing in mind the above cited authorities, I find and hold that case against the 1st defendant having been filed against a dead man cannot be sustained as the same is null and void and I hereby strike it out.
22. I will now move on to determine the next issue which is whether the plaintiffs have proved that they are entitled to land parcels no. Central Kitutu/daraja Mbili/2484/115 and Central Kitutu/daraja Mbili/2483/117 by way of adverse possession.
23. The law pertaining to adverse possession is now settled. Section 7 and 38(1) of the [Limitation of Actions Act](#) provide as follows:

“7. 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.

38(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”
24. In the case of *Ann Itumbi Kiseli V James Muriuki Murithi* 2013) eKLR the court restated the position on adverse possession as follows:

“ Adverse possession has been defined as a method of gaining legal title to real property by actual, open, hostile possession of it to the exclusion of its owner for the period prescribed by statute. For one to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his rights to the land 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 which he intended to use it”.
25. The ingredients of adverse possession were discussed by the Court of Appeal in the case of *Mtana Lewa v Kahindi Ngala Mwangandi* (2005) eKLR where it was held that:

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

It is also a well-established principle that a party claiming Adverse Possession ought to prove that the possession was “nec vi, nec clam , nec precario” that is peaceful, open and continuous. The possession should not have been through force, nor secrecy and without the authority or permission of the owner”
26. It is the plaintiffs’ case that they have been residing on the what they believed was land parcel number Central Kitutu/daraja Mbili/130 for more than 40 years as the land belonged to the husband of the 2nd defendant and the father of the 1st, 3rd, 4th, 5th, 6th and 7th defendants. In his testimony, the 1st plaintiff said that they still held the title for land parcel number Central Kitutu/daraja Mbili/130. He said that they were not aware that their land had changed hands and he only realized that when he conducted an official search in 2015 when they wanted to divide the land among themselves. He claimed that they were living on the entire parcel of land and had built permanent houses thereon. Upon being shown the proceedings in HCCC No. 298 of 1994 where his father testified that he had sold a portion of land



parcel no. 130 to Lawrence Nyariki who in turn put up a rental house on the land he said that was not the correct position. He further denied that Lawrence had fenced his portion.

27. On his part Joshua Nyariki who is the son of the deceased 2nd defendant testified that his late father had sued the Plaintiffs' late father and obtained an order of specific performance for the transfer of a portion of parcel 130 to his father. He stated that pursuant to the court order parcel no. 130 was subdivided and his father was registered as the owner of parcel no. Central Kitutu/daraja Mbili/2483. He testified that his father subsequently planted Napier grass and built a semi-permanent structure on the said parcel. He hired a worker who lived in the said structure and tilled the land upto 2005 but the plaintiffs were very hostile to him, forcing him to move out. He testified that he had visited the suit property on a number of occasions in the company of his late father but the plaintiffs had been very hostile to them. He said that on one occasion they had to be escorted by police officers.
28. From the evidence on record, it is clear that the 1st plaintiff is not being candid when he feigns ignorance about the fact that his late father sold a piece of land to the late Lawrence Nyariki. The fact that he tried to contradict his father's evidence in HCCC No. 298 of 1994 shows that he is not an honest witness. The outcome of HCCC No. 298 of 1994 was that the court issued an order of specific performance compelling the 1st Plaintiff's father to sub-divide land parcel no. Central Kitutu/daraja Mbili/130 and transfer the portions sold to Lawrence Nyakeri and James Nyariki Omonyeny. The court also issued an injunction restraining the 1st Plaintiff's father (Agostino Areri), his agents and servants from in any way whatsoever dealing with the said parcel of land. The plaintiffs held onto the title for parcel No.130 hoping it would not be transferred without the title. However, the 1st Defendant testified that the transfer form was signed by the Executive Officer of the Court pursuant to a court order.
29. What emerges from the evidence is that even though the plaintiffs have been in occupation of what they believed was parcel No. Central Kitutu/daraja Mbili/130 for more than 40 years, their stay thereon from 1997 was in violation of the judgment of the court and they can therefore not be allowed to benefit from it. Furthermore, the evidence of the 2nd defendant and his witnesses shows that the plaintiffs openly resisted any attempts by the 2nd defendant's father and the late Lawrence Nyakeri who had purchased what later became known as parcels 2483 and 2484 from occupying and developing their properties. In the case of Abu Chiaba Mohammed v Mohammed Bwana Bakari & 2 Others [2005] eKLR it was held that:

“.....no man can be allowed to rely on his own wrong to defeat the otherwise valid claim of another man.....he cannot be allowed to take advantage of his wrong.....the law will not and cannot permit such a party to rely on his own wrong to defeat an otherwise valid petition.”

30. The principle of adverse possession was more elaborately set out in the case of Wambugu vs Njuguna [1983] KLR 172, where the Court held that:

“In order to acquire by the statute of limitations 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.”

And that:

“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 of the requisite number of years.”

31. Justice Kuloba J, (as he then was,) in Nairobi Civil Case No. 283 of 1990 Gabriel Mbui v Mukindia Maranya [1993] eKLR, where the Court held:

“The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown”

32. The 1st Plaintiff testified that he had been in possession of the suit property since he was born more than 40 years ago. Him and his co-plaintiffs had therefore occupied the suit property as of right as they knew that it belonged to them. He even claimed that they still had the title deed for parcel No. 130. It was therefore incumbent upon the plaintiffs to prove when their occupation of parcels No. 2483 and 2484 became adverse. The mere fact that they found out that the title was registered in the names of the defendants in 2003 is not enough. The plaintiffs ought to have adduced evidence to demonstrate when they entered the suit property and what steps they took to assert their right to the suit property in a manner that was adverse to the rights of the defendants.
33. When the court visited the suit property on 19.2.2021 it was noted that there were 4 residential houses on the lower portion of the land (parcel 2482). There were no houses on land parcels no. 2483 and even though there was some Napier grass on the said parcel, no evidence was adduced to show when it was planted and by whom. It was also not clear when the shops on parcel no. 2484 were constructed. The question that begs for an answer is at what point did the plaintiffs dispossess the defendants or put differently, when did time start running for purposes of proving adverse possession? The 2nd Plaintiff testified that their workers stayed on parcel No.2483 upto 2005 when he was chased away the Plaintiffs. This evidence was not controverted by the Plaintiffs.
34. The burden of proving that the plaintiffs are entitled to the suit property by way of adverse possession lay on the plaintiffs and I am not satisfied that they have discharged that burden. Consequently, the plaintiffs’ suit fails and it is dismissed with costs to the 2nd Defendant.

DATED SIGNED AND DELIVERED VIRTUALLY VIA MS TEAMS PLATFORM THIS 20TH DAY OF APRIL 2023

.....

J.M ONYANGO

JUDGE

In the presence of;

1. Mr. Ondieki for the Plaintiffs

2. No appearance for the Defendants

Court Assistant: A. Oniala

