



**Mogeke v Masese & 2 others (Environment & Land Case 347 of 2013)
[2023] KEELC 16897 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16897 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 347 OF 2013
JM ONYANGO, J
APRIL 20, 2023
IN THE MATTER OF AN APPLICATION UNDER SECTION 38 OF THE LIMITATION
OF ACTIONS ACT CAP 22 OF THE LAWS OF KENYA
AND
IN THE MATTER OF SECTION 28 (4) OF THE LAND REGISTRATION ACT, 2012
BETWEEN
BETWEEN
MARGARET MOKEIRA MOGEKE PLAINTIFF
AND
JEREMIAH MASESE 1ST DEFENDANT
VINCENT MATARA ONCHECKE 2ND DEFENDANT
HARON OBONY OKERO 3RD DEFENDANT**

JUDGMENT

1. The Plaintiff Instituted This Suit By Way Of Originating Summons dated August 13, 2013 and amended on 2September 4, 2014 seeking a determination of the following questions:
 - i. Has the Plaintiff been in possession and occupation of land title No. Central Kitutu/daraja Mbili/675 since 1974 todate against the title of the defendants?
 - ii. Has the plaintiff been in possession and occupation of the said land title No. Central Kitutu/daraja Mbili/675 against the title of the 1st defendant as the registered proprietor thereof openly, peacefully and as of right without any interruption and for a continuous period of over 12 years immediately preceding the filing of this suit?



- iii. If the answer to No. (ii) above is positive, did the 1st Defendant's rights of ownership become extinguished and did the plaintiff acquire the right to be registered as proprietor of the said land title Central Kitutu/daraja Mbili/675 by way of adverse possession?
 - iv. If the answer to question No. (iii) above is yes, could any subsequent registration on the title including those of the 2nd and 3rd defendants take away the Plaintiff's acquired right over the title or revive the extinguished rights of the 1st Defendant over the said land title no. Central Kitutu/daraja Mbili/675?
 - v. If the answer to No. (iv) above is in the negative, is the plaintiff entitled to a declaration that she is entitled by way of adverse possession to all that land parcel no. Central Kitutu/daraja Mbili/675 to be registered as the proprietor thereof in place of the registered proprietor?
 - vi. Whether an order can issue compelling the Defendants to execute transfer documents in favour of the plaintiff and in default whether the Deputy Registrar of the High Court can be authorized to execute the transfer forms on behalf of the Defendant to facilitate rectification of the register.
 - vii. Whether the transfer and registrations from the 2nd Defendant to the 3rd Defendant as proprietor of title No. Central Kitutu/daraja Mbili/675 is in contempt and/or disobedience of the court's order made on the 9th day of September 2013.
 - viii. Who is to bear the costs of this suit?
2. The Amended Originating Summons is supported by the Applicant's affidavit sworn on 24th September 2014 in which she deponed that she took possession of land parcel number Central Kitutu/daraja Mbili/675 (hereinafter referred to as the suit property) in 1974 against the title of the registered proprietor James Masese and she has been cultivating the said parcel of land openly, peacefully and as of right for more than 40 years. She deponed that on 18th November 2006 the 2nd defendant in disregard of the provisions of section 28 (1) of the *Land Registration Act* 2012, fraudulently caused himself to be registered as proprietor of the suit property and subsequently transferred the title to the 3rd defendant while the case was pending in court. She prayed for a declaration that she was entitled to the suit property against the title of the 1st defendant Jeremiah Masese.
 3. The 1st Respondent filed a Replying affidavit sworn 16th September, 2013 in which he deponed that the suit property originally belonged to one Jeremiah Masese and it was charged to ICDC after which it was sold. He stated that he became the registered owner of the suit property on 18th November, 2006. He further stated that the Applicant's attempt to possess the suit property was belated and it was not sanctioned by the law. He claimed that the Applicant was guilty of laches.
 4. Before the case was set down for hearing the Applicant filed an application for injunction dated 5th September 2013 and on 16th September, 2013, the court ordered that the status quo be maintained pending the hearing and determination of the main suit.
 5. The matter was subsequently fixed for hearing by way of viva voce evidence. The Applicant testified and called 3 witnesses. The first 3 witnesses testified before my predecessor Justice Mutungi.

Plaintiff's Case

6. The Applicant testified as PW1. It was her evidence that she had been cultivating the suit property since 1974. She told the court that her mother-in-law Martha Moraa and one Jacob Simba were residing on the land but her mother-in-law died in 1979. She continued using the land peacefully until the



- year 2013 when the 2nd Respondent who was accompanied by some people came to the suit property with fencing poles with the intention of fencing the land. She reported the matter to the Chief, Daraja Mbili. The chief summoned the 1st defendant but he did not heed the summons. The Plaintiff then conducted an official search with regard to the suit property and discovered that it was registered in the name of Jeremiah Masese in 1974. However, a copy of the abstract of the register showed that the 2nd Defendant was registered as the first owner thereof on 18.11.2006. She produced the Certificate of official search and abstract of the register as plaintiff's exhibits 1 and 2.
7. She stated that she had been in continuous occupation of the suit property for 40 years. She told the court that after she filed suit, the court issued an order of status quo but the 1st defendant defied the court order and transferred the land to Haron Okero Obonyo, the 3rd defendant. She prayed that she be registered as the owner of the suit property by way of adverse possession as she had been in possession thereof for 40 years.
 8. Upon cross-examination she stated that she was born in 1961 and she was married when she was still in school. She further stated that the suit property was ancestral land and her father-in-law took over the land from his brother one Bonyunyu Omurwa after his death. She confirmed that the 3rd defendant was the current registered owner but at the time she filed suit, the 2nd defendant was the registered owner of the suit property.
 9. Margaret Gisemba Monari who testified as PW2 testified that she was the Plaintiff's neighbour at Daraja Mbili and that the plaintiff had been planting Napier grass on the suit property. She corroborated the plaintiff's evidence that the 2nd defendant wanted to fence the land in 2013.
 10. In cross-examination, she stated that the plaintiff was given the land by her grandfather one Bonyunyu Omurwa. She confirmed that the plaintiff only cultivated the land but she had not built any house on it. She said she did not know, Jeremiah Masese, or the 3rd Defendant.
 11. Kiage Onsabwa testified as PW3. He stated that the plaintiff was the daughter –in-law to his late brother Bonyunyu Omurwa who owned the suit property. He said his land was next to the suit property. He confirmed that the plaintiff is the one who had been cultivating the suit property. He stated that the plaintiff had sued the 2nd defendant because he tried to occupy the suit property. He said he did not know Jeremiah Masese or Samuel Nyanyuki.
 12. Upon cross-examination he stated that there was no structure on the suit property and the only person who had been using the suit property was the plaintiff.
 13. Steve Mokaya, the Land Registrar Kisii County testified as PW4. He stated that land parcel no. Central Kitutu/daraja Mbili/675 emanated from land parcel number Central Kitutu/daraja Mbili/361. He stated that land parcel number 361 was first registered on 9.8.1973 in the name of Bonyunyu Omurwa. Parcel 361 was sub-divided to give rise to parcels no.674 and 675. He told the court that the records for parcel 675 were subsequently destroyed from his office and someone prepared a fake green card which was planted in his records. He suspected that the said green card was a fraud as it had no supporting documents. For that reason, he said he was unable to tell who was the registered owner of parcel no. 675.
 14. Upon cross-examination, he stated that parcel no. 361 was closed upon sub-division on 21.1.1974. He said that according to the certificate of official search dated 13.5.2001, title No.675 was opened in the name of Jeremiah Masese. There was however a fake green card showing that parcel No. 675 was registered as a first registration on 21.1.1974 in the name of Bonyunyu Omurwa and also in the name of Jeremiah Masese. He said this was unusual. It was his testimony that the copy of the green



card annexed to the Plaintiff's supporting affidavit as MM2 was fake. He said he had no documents to show that Vincent Matara was ever registered as the owner of land parcel No .675. He confirmed that the only person who was registered on the said title was Jeremiah Masese.

Defendant's Case

15. Vincent Matara Onchoke (1st Defendant) testified as the only defence witness. He stated that he bought land parcel no. Central Kitutu/daraja Mbili/675 measuring 100 feet by 100 feet from one Samuel Nyanyuki Birauri in 2004. He thereafter fenced the land, planted trees and constructed a toilet thereon. He told the court that in 2013, he sold the land to Haron Obonyo Okero and it was still registered in his name. He stated that even though he had been sued alongside Haron Obonyo Okero, he did not have a title to the suit property which he could transfer to the plaintiff.
16. It was his testimony that Haron Okero had preferred criminal charges against him for the offence of obtaining money by false pretenses. He was convicted and jailed for 6 years. He subsequently appealed against the conviction and sentence vide Kisii HC Criminal Appeal No. 41 of 2020 and the appeal was determined in his favour in July 2021.
17. He further testified that Haron Okero also filed a civil case against him vide Kisii CMELC No.508 of 2015 for a refund of the purchase price but the said case was dismissed. He filed an appeal against the judgment of the lower court vide ELC Appeal No. 24 of 2019 which was equally dismissed. He stated that before he sold the suit property to Harun, he conducted an official search and established that the land had no problem.
18. Upon cross-examination, he stated that he bought the suit property from Samuel Nyanyuki Birauri though he did not produce any sale agreement. He stated that after he paid the purchase price, the vendor took him to the Land Control Board though he did not have the consent of the Land Control Board. He was subsequently issued with a title deed. He admitted that he sold the land on 18.9.2013 while this case was pending in court. He confirmed that Haron Okero sued him for refund of the purchase price but the case was dismissed. He denied that he was involved in fraud and blamed the Land registry for issuing Haron with a fake title.
19. At the close of the Respondent's case the parties were granted time to file their submissions and both parties filed their submissions which I have considered.

Issues for Determination

1. Whether the Plaintiff has been in adverse possession of land parcel No. Central Kitutu/daraja Mbili/675.
2. Whether the 1st defendant's right to the suit property became extinguished and if so, whether the Plaintiff acquired the right to be registered as the proprietor of the suit property by way of adverse possession.
3. Whether any subsequent registration in the names of the 2nd and 3rd defendants took away the plaintiff's acquired right over the suit property.
4. Whether the plaintiff should be declared the owner of the suit property by way of adverse possession.



Analysis and Determination

20. In the case of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR Asike Makhandia J (as he then was) described adverse possession as follows:

“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, it 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 or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner”.

21. The doctrine of adverse possession is embodied in Section 7 of the *Limitation of Actions Act*, which provides as follows:-

“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.”

Section 13 of the Act further provides that:

“A right to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run, (which possession is in this Act referred to as adverse possession), and where under sections 9,10, 11 and 12 a right of action to recover land accrues on certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes possession of the land”.

Additionally, section 38 of the Act provides that:

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.”

22. In the instant case, the plaintiff testified that she had been in peaceful and continuous possession of land parcel number Central Kitutu/daraja Mbili/675 from 1974 to 2013 when the 2nd Defendant entered the land with the intention of fencing it. She stated that she had been ploughing and growing various crops on the suit property without any interference. After the 2nd defendant attempted to fence it she reported the matter to the Chief, Daraja Mbili location. She then conducted an official search at the Kisii Lands office where she discovered that the title was registered in the name of Jeremiah Masese on 21.1.1974. However, the copy of the extract of the register (green card) indicates that the title was first registered in the name of Vincent Matara (Defendant) on 18.11.2006. This is what prompted her to sue the defendants.
23. The plaintiff's witnesses, PW2 and PW3 corroborated her evidence with regard to her use and possession of the suit property. However, the defendant claims that he bought the land from one Nyanyuki Birauri in 2004 after which he fenced it, built a toilet and planted some trees.



24. Although the plaintiff's use and occupation of the suit property for a period of more than 12 years is not disputed, it is evident that the title did not remain in the name of one person. The manner in which title changed from Jeremiah Masese who was the first registered owner to the Vincent Matara and eventually to Haron Obonyo Okero is quite suspicious. The Land Registrar who testified as PW4 categorically stated that the transfer of title from Jeremiah Masese onwards was unlawful as he did not have the supporting documents in his custody. He concluded that he did not know who the current lawful registered owner of the title was.
25. In *Mwangi & Another -v- Mwangi*, (1986) KLR 328, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights. Adverse Possession is thus more about the equitable interest of a party in possession than a substantive declaration as to the legal right or validity of ownership.
26. Under section 30 of the *Land Registration Act*, 2012, the Applicants possessory rights are recognized as overriding interests that are attached to the land.
27. In the case of *Kweyu v Omutu*, Court of Appeal, Civil Appeal No. 8 of 1990 The Court held that :
- “in deciding the issue of Adverse Possession, the primary function of a Court is to draw legal inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of fact, the question whether that possession is adverse or not is matter of legal conclusion to be drawn from the findings of acts”.
28. In the instant case Adverse Possession should be calculated from 1974 when the Plaintiff entered into the suit land upto the year 2013. This means that by 1986 adverse possession had crystallized and accrued to the Plaintiff, while Jeremiah's right to the suit property was extinguished. He was therefore holding his title in trust for the Plaintiff. The subsequent transfers that took place after 1986 were of no consequence and did not affect the Applicant's rights as an adverse possessor. The fact that the said transfers are not supported by the Land Registrar does not help the 2nd and 3rd defendants. In particular, the transfer from the 2nd to the 3rd Defendant was in violation of the order of status quo issued by the court on 16th September, 2013.
29. In view of the foregoing I find and hold that the Plaintiff has proved her case on a balance of probabilities. Consequently, I enter judgment for the Plaintiff and make the following final orders:
- a. A declaration is hereby issued that the Plaintiff is entitled by way of adverse possession to all that parcel of land known as Central Kitutu/daraja Mbili/675 by way of Adverse Possession.
 - b. The Deputy Registrar of this Honourable Court is hereby mandated to execute all documents necessary to effect the transfer of land parcel No. Central Kitutu/daraja Mbili/675 to the Applicant.
 - c. The Land Registrar Kisii is hereby ordered to register the Plaintiff as the proprietor of the suit land in place of the 3rd Defendant
 - d. The costs of this suit shall be borne by the Defendants/Respondents.

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

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J.M ONYANGO



JUDGE

In the presence of;

1. Mr. Ombachi for the Plaintiff

2. No appearance for the Defendant

Court Assistant: A. Oniala=

