



**Mwonda v John & another (Environment & Land Case 1 of 2020)
[2023] KEELC 18965 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 18965 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE 1 OF 2020**

**A KANIARU, J
MAY 31, 2023**

BETWEEN

NJIRU MWONDU APPLICANT

AND

NAOMI WAMBETI JOHN 1ST RESPONDENT

JIM MURIITHI M'NJAUH 2ND RESPONDENT

JUDGMENT

1. The plaintiff herein – Njiru Mwonda – First Filed This Suit On 14/1/2020 Vide An Originating Summons (OS) Date 13/1/2020. He Impleaded The Two Defendants – Naomi Wambeti John - (1st Defendant) And Jim Muriithi M'njau (2nd Defendant) – Accusing Them Of Violating His Ownership Rights In Respect Of Land Parcel No Kagaari/kanja/3867 (“the disputed land” hereafter). The originating summons was later amended, re-dated 30/4/2022 and re-filed on 5/5/2022. The plaintiff brings the suit as a disseisor and the claim before the court therefore is one of adverse possession.
2. In the suit, the plaintiff desires that the following issues are determined: 0
 1. Whether he is entitled to an order under Section 38 of *Limitation of Actions Act* (cap 22) to be registered as absolute proprietor of the whole of Land parcel No Kagaari/kanja/3867.
 2. Whether the title deed held by the 2nd defendant on the aforesaid land parcel stands extinguished.
 3. Whether he is entitled to costs of the suit.



3. The plaintiff's expectation is that the issues will be determined in his favour. Therefore, consequent upon such determination, he wishes the court to enter judgement for him as follows:
 - a. That he is entitled under Section 38 of the *Limitation of Actions Act* (cap 22) to be registered as absolute proprietor of the whole of Land parcel No Kagaari/kanja/3867 by way of adverse possession.
 - b. That the title deed held by the 2nd defendant for the said parcel of land stands extinguished.
 - c. Costs of the suit; or
 - d. Any other relief or order as the court may deem fit to grant.
4. I have not seen the 1st defendant's response to the originating summons although she indicated while testifying that she made a response vide a replying affidavit dated 9/9/2020.
5. The 2nd defendant responded to the suit vide a replying affidavit dated 9/9/2020. He deposed, inter alia, that he purchased the land from 1st defendant and followed the requisite legal process to become its registered owner. He further averred that he has been carrying out farming activities on the land and that the plaintiff does not live there. The plaintiff was said to have taken advantage of the defendant's absence and put up a temporary structure at one end of the land. The 2nd defendant also talked of various suits filed by the plaintiff to claim the land without success.
6. Hearing of the matter started on 15/11/2022 and ended on the same day. The plaintiff testified and adopted his two witness statements – one dated 21/6/2021 and another dated 23/5/2022 – as his evidence. He also produced various documents – PEX No 1 to PEX No 7 – as exhibits. In his evidence he said that he is a step brother to 1st defendant's late husband – Mugo Mwendu. The Said Mugo Mwendu Was Allegedly Registered As Owner Of The Then Larger Parcel – Kagaari/kanja/1140 – not only on his own behalf but also on behalf of the plaintiff. The larger parcel was then later subdivided into parcels nos. 3867 and 3868, with parcel No 3867 being meant for the plaintiff. The plaintiff said he has been living on parcel No 3867 doing various farming activities including planting coffee, tea, and bananas.
7. Mugo Mwendu was said to have passed on without transferring the disputed land to the plaintiff. The 1st defendant became his legal representative. She then sold the land to the 2nd defendant after conducting succession proceedings secretly. The plaintiff's position is that he has lived on the land for a long time and has therefore become an adverse possessor.
8. Noting that the defendant expressed the view that there have been cases that interrupted the running of time, the plaintiff said that despite the cases and their outcome, he has continued living on the land.
9. The plaintiff called one John Njiru Maru as his witness. John testified as PW2 and like the plaintiff, adopted his written statement as his evidence. The written statement shows the witness saying, inter alia, that the 1st defendant's late husband was registered as owner of the entire larger parcel of land to hold a portion of it in trust for the plaintiff. That larger parcel was subdivided and the plaintiff was supposed to become the registered owner of a portion. But that never happened as the 2nd defendant conducted succession proceedings secretly after her husband died. She got registered as owner of the disputed land and later sold it to 2nd defendant.
10. When it was the 1st defendant's turn to testify, she testified as DW1. She adopted her written statement dated 17/5/2022 as her evidence. In the statement, DW1 avers, inter alia, that the plaintiff is a step-



brother to her late husband. Her late husband, she said, was the registered owner of the original larger parcel of land – LR No Kagaari/kanja/1140 – Which He Subdivided Into Parcel Nos. Kagaari/kanja/3867 and 3868 before he died. She then became the personal representative of his estate and inherited Land parcel No 3867 as her own while parcel No 3868 was inherited by her children. Thereafter she sold parcel No 3867 to the 2nd defendant.

11. In order to become the personal representative of her late husband's estate, the 1st defendant filed Succession cause No 62 of 2012 and obtained the requisite grant. The plaintiff then challenged her ownership of land parcel No 3867 in the same succession cause but was unsuccessful. The 1st defendant then filed a suit – PMCC No 2 of 2014 at Runyenjes – seeking to evict the plaintiff from parcel No 3867. She was successful. According to the 1st defendant therefore, the plaintiff is a trespasser.
12. The 1st defendant further averred that the plaintiff was given land by his clan but he sold it and squandered the money through wasteful living. He became indigent and her late husband accommodated him on the land as a gesture of goodwill.
13. The 2nd defendant also testified and adopted his statement dated 17/5/2022 as his evidence. He said he is the registered owner of the land, having purchased it from the 1st defendant on 28/8/2014. Before purchasing it, he conducted due diligence including satisfying himself that the caution placed on the land had been removed. He further said he has been farming on the land since 2014.
14. Hearing over, each side filed written submissions. The plaintiff's submissions were filed on 25/1/2023. He submitted that he is an adverse possessor, having lived on the land and developed it for several decades. The 1st defendant was said to have fraudulently registered herself as owner of the disputed land before selling it thereafter to the 2nd defendant. He submitted that he “has been in occupation of the land without force, openly, and without secrecy and without evasion” and is therefore entitled to own it through adverse possession.
15. The defendants submissions were filed on 9/2/2023. According to the defendants, the plaintiff's entry into the disputed land and his subsequent possession and occupation was through permission of his late step-brother, who was also the 1st defendant's late husband. It was submitted that that being the case, the plaintiff was not an adverse possessor.
16. I have considered the suit as filed, the responses made, the evidence on record, and the rival submissions. It appears to me to be the plaintiff's position that the disputed land was meant to be his own right from the beginning. The 1st defendant's late husband was said to have been registered as owner of the original larger parcel to hold a portion of it – which is the disputed land – in trust for him. This would seem to suggest that there is a customary trust in favour of the plaintiff in regard to the disputed land. Even then however, the suit before the court is not based on customary trust.
17. The task before me then is to find out if the plaintiff has demonstrated that he is an adverse possessor. His evidence is that he has been on the land for over 60 years. He said he has developed it and planted various crops. But he didn't say how he entered the land. The evidence of the witness the plaintiff called does also not show how the plaintiff entered the land. The same evidence is also more suggestive of the plaintiff's ownership of the land through a customary trust rather than adverse possession.
18. The defence on its part had a ready explanation as to how the plaintiff entered the land. He was accommodated there on humanitarian basis by the 1st defendant's late husband. This is said to have happened after the plaintiff sold the land he was allocated by his clan. He used up the proceeds of sale, became poor, and was in need of help. His step-brothers had pity on him. He was first accommodated by one. He abused the hospitality accorded to him by becoming violent, and was chased away. Still, another one accommodated him. But he was chased away again when he became violent. Finally, the



1st defendant's late husband accommodated him. There was a period of harmonious co-existence but the plaintiff's violent tendencies ruined the peace.

19. It was the defence evidence that the plaintiff was never accommodated to own the land or a portion of it. The accommodation was temporary and intended as a reprieve as he organized to acquire his own place to live in.
20. Faced with this kind of defence evidence, the plaintiff was duty-bound to mount a strong case for adverse possession. More particularly, he needed to bring out the essential character of adverse possession. In *Kweyu Vs Omutut* [1990] KLR 709, the court underscored the need to bring out the true character of adverse possession by stating as follows:

“The adverse character of the possession must be proved as a matter of fact; it can not be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms (“claim or colour of right”) mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right ...”
21. Further, in *Richard Wefwafwa Songoi Vs Ben Munyifwa Songoi* [2020] eKLR, the court pointed out, inter alia, that an adverse possessor needed to demonstrate the following:
 - a. On what date he went into possession
 - b. What was the nature of his possession
 - c. Whether the fact of his possession was known to the other party and;
 - d. For how long the possession had continued.
22. As I pointed out earlier, the plaintiff has not stated how he entered the land. In fact, even the actual time or date of entry is not stated. If anything, it is the defence side that explained that the plaintiff was actually permitted to be on the land on humanitarian grounds. This happened after the plaintiff had sold his own land, spent the proceeds of sale, thus rendering himself both landless and homeless.
23. Of course, the plaintiff would not wish the court to believe this story. But his own version of events leave many questions un-answered. His own evidence suggest that the land he is claiming was meant to be his right from the beginning. This is also the position that emerges from the witness he called. If this be true, this would mean that the initial registered owner held that portion of land in trust for the plaintiff. But this claim is not based on trust. It is based on adverse possession. Adverse possession normally rests on the assumption that the registered owner of the land is actually the true owner but that the adverse possessor went into possession intending to defeat that ownership.
24. Further, it is clear that the plaintiff and the 1st defendant have been having cases revolving around ownership of the land. One such case is Succession cause No 62 of 2012 where the plaintiff sought revocation of grant issued to the 1st defendant. He was contesting the ownership of the same portion of the land by 1st defendant. The grant seemed to have vested it in her. The plaintiff was not successful. Another case is PMCC No 35 of 2014, Runyenjes, where the 1st defendant was contesting the placement of a caution on the land by the plaintiff and seeking the removal of the said caution. The 1st defendant was successful. Yet another case was PMCC No 2 of 2014, Runyenjes, in which the 1st defendant was seeking to evict the plaintiff from the same portion of land. Evidence that the plaintiff has not rebutted has it that the 1st defendant was successful.



25. The cumulative thrust of all these suits is that the 1st defendant has been emerging the winner on issues relating to ownership. It is also the considered view of this court that were it even to be accepted that there was adverse possession in respect of which time could run, the suits mentioned had the effect of stopping the running of such time. Crucially, it is important to appreciate specifically that in PMCC No 35 of 2014, Runyenjes, the caution placed on the Land Register by the plaintiffs shows that he did so in his capacity as a licensee. A licensee is obviously somebody on the land with permission or consent of the owner. The plaintiff needed to tell the court when he ceased being a licensee in order to become an adverse possessor. This kind of evidence from him is lacking.
26. It is necessary to appreciate that adverse possession can never arise where a person is on the land with the permission or consent of the owner. In *Samuel Miki vs Jane Njeri Richu* C.A. No 122 of 2001, the court expressed itself as follows:
- “It is trite law that a claim of adverse possession can not succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement of sale, or lease, or otherwise.”
- It is the same position that emerges in the case of *Mwinyi Hamis Ali vs General & Philemon Mwaisaka Wanaka* C.A. No 125 of 1997 where the court observed thus:
- “Adverse possession does not apply where possession is by consent and in a court of law sympathy does not take a second stand as the court is governed by statutes.”
27. It is apparent from all the foregoing that the plaintiff did not do a good job of proving his case. And when the evidence he made available is weighed vis-à-vis the evidence proffered by the plaintiff, the court’s considered view is that the plaintiffs’ side is more credible.
28. The upshot is that the plaintiff has not proved adverse possession against any of the defendants. His case is therefore for dismissal and I hereby dismiss it. When it comes to costs, I realise that this is a family land feud. My considered view is that each side should bear its own costs and I so order.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 31ST DAY OF MAY, 2023.

In the presence of M/s Mwinja for Njeru Ithiga for applicant/plaintiff and Njiru Eddie for respondents
Court Assistant: Esterina

A. KANIARU

JUDGE

