



**Munyiti v Nguku (Environment & Land Case 342 of 2017)
[2023] KEELC 17444 (KLR) (15 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17444 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 342 OF 2017
CA OCHIENG, J
MAY 15, 2023**

BETWEEN

PHILIP NZUKI MUNYITI APPLICANT

AND

MULI NGUKU RESPONDENT

JUDGMENT

- 1 By an originating summons dated the August 15, 2017 the applicant sought for the following orders against the respondent:
 1. That the honourable court be pleased to declare that the applicant is entitled by virtue of adverse possession of over twelve (12) years since 1970 of all that parcel of land No Kangundo/ Mbusyani/975 against the respondent.
 2. Costs of this application.
- 2 The originating summons is supported by the affidavit of the applicant Philip Nzuki Munyiti.
- 3 The respondent though duly served on September 6, 2017 as evident in the affidavit of service, failed to enter appearance nor file a response to controvert the applicant's averments.
- 4 The matter proceeded for hearing where the applicant had one witness.

Evidence of the Applicant

- 5 The applicant has PW1 adopted his averments as per the supporting affidavit as his evidence in chief. He explained that he got into land parcel No Kangundo/Mbusyani/975, hereinafter referred to as the 'suit land' since he initially wanted to purchase it from Muli Nguku. He explained that one Mbatha had initially bought the suit land from Muli Nguku and he had to pay Mbatha for the said land. Further, they executed an agreement dated the February 17, 1978. It was his testimony that once he



paid Mbatha, he stopped claiming the suit land. He averred that he was paying for suit land on behalf of Muli who had never claimed it. It was his testimony that he took possession in 1970 and have resided thereon todate. He clarified that before he paid Mbatha, he had been residing on the suit land. Further, that Muli sold Mbatha land when he was residing thereon. He claims to have cultivated coffee on the suit land. The applicant produced the following documents as exhibits: sale agreement dated February 17, 1978 as well as a translated copy; search certificate dated December 13, 2016 and extract of title.

Submissions

- 6 The applicant in his submissions reiterated his averments as per the originating summons as well as supporting affidavit. He argued that when the due process of transferring land is not undertaken as is in this instance, the possession of the land becomes adverse. Further, that the sale transaction becomes void after six (6) months if consent is not obtained under the relevant provisions of the law and the stay becomes unlawful. He insists that from 1970 his stay on the suit land has been unlawful but open, uninterrupted and exclusive. He reiterates that he has made out a case for adverse possession. To support his averments, he relied on the following decision: *Stephen Mwangi Katunge v Edwin O. Wanjau* Muranga ELC Case No 7 of 2021 (OS).

Analysis and Determination

- 7 Upon consideration of the originating summons, testimony of the applicant, exhibits and submissions, the only issue for determination is whether the applicant is entitled to orders of adverse possession in respect to land parcel number Kangundo/ Mbusyani/975.
- 8 As to whether the plaintiff has acquired the suit land through adverse possession. Adverse possession is governed by the provisions of section 38(1) and (2) of the *Limitation of the Actions Act* which stipulates *inter alia*:
- 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.”
- 9 The applicant as PW1 testified that he had resided on the suit land, measuring 0.49 hectares from 1970. It was his testimony that he took possession of the suit land with the respondent’s consent and in 1978, he formally bought the suit land from one Mbatha who had initially purchased the said land from the respondent. The applicant explained that the respondent relocated to Kikomba area in Nairobi county before the formal procedure of transferring the suit land into his name was undertaken and efforts to trace him so as to effect the transfer had not been successful. It was the applicant’s contention that in the course of residing on the suit land, he had never faced intrusion from anyone, and not even the respondent. Further, that together with his family, they had been in open, continuous, exclusive, uninterrupted and peaceful possession of the suit land since 1970 to date. He insisted that the respondent had at no particular time resided on the suit land and he has lived thereon exclusively and remained in possession of the same. Further, that he has invested immensely on the suit land and undertaken substantive development as well as improvements thereon.
- 10 On adverse possession, in *Daniel Kimani Ruchine & others v Swift Lothberford & Co Ltd and Anor* (1977) eKLR the court held that:-
- The plaintiffs have to prove that they used the land as of right, *nec vi, nec clam, nec precario* (no force, no secrecy, no evasion).”



- 11 While in the case of *Wambugu v Njuguna* (1983) KLR 173 the Court of Appeal articulated the requirements a party is expected to fulfill in a claim for adverse possession and held thus:-
- Adverse possession contemplates two concepts: possession and discontinuance of possession. It further held that the proper way of assessing proof of adverse possession would 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 or she has been in possession for the requisite number of years.”
- 12 While in the case of *Public Trustee v Wanduru* (1984) KLR 314 at 319 Madan, J.A stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession.
- 13 From the evidence presented herein the applicant has occupied the suit land from 1970 to date which means he has been on the suit land for approximately 53 years. further, from 1978 when he paid purchase price to Mbatha, it is clear that no one interfered with his open and uninterrupted possession of the said land. I note the respondent who is still registered as the proprietor of the suit land though duly served severally, failed to enter appearance nor filed a response to controvert the applicant’s averments.
- 14 In *Peter Mbiri Michuki v Samuel Mugo Michuki* civil appeal No 22 of 2013, the Court of Appeal held that:-
- It is our considered view that when the appellant entered into a sale agreement with the plaintiff in 1964 and received the purchase price for the suit property, the appellant became a trustee holding the suit property in favour of the plaintiff. The plaintiff having paid the purchase price and took possession acquired an equitable beneficial interest in the suit property. Section 18(4) of the *Limitation of Actions Act* applies in the instant case and the right to recover the suit property was not extinguished by death of the plaintiff. The plaintiff having been in possession of the suit property, section 13 (1) of the *Limitation of Actions Act* applies as it provides 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.” emphasis mine
- 15 Based on the evidence presented in court while associating myself with the decisions cited above, I find that the applicant having paid the full purchase price to Mbatha who had bought the land from Muli Nguku and taken possession from 1970 to date, he indeed acquired an equitable beneficial interest on the said land. I hence find that the applicant has indeed proved he acquired the suit land, through adverse possession.
- 16 On the issue of costs, I note the respondent did not oppose the instant suit. Further, that he had already sold the land to Mbatha who was not a party to these proceeding. In the circumstances, I will not make any order as to costs.
- 16 It is against the foregoing that I find the applicant has proved his case on a balance of probability and will enter judgment in his favour. I will proceed to make the following final orders:
- i. The applicant Philip Nzuki Munyiti be and is hereby entitled to all that parcel of land No Kangundo/ Mbusyani/975 by virtue of adverse possession as against the respondent.
 - ii. There will be no order as to costs.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 15TH DAY OF MAY,
2023**

CHRISTINE OCHIENG

JUDGE

