



REPUBLIC OF KENYA



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**Mburu v Karua (Enviromental and Land Originating Summons
E006 of 2021) [2023] KEELC 18446 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18446 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E006 OF 2021
LN GACHERU, J
JUNE 29, 2023**

BETWEEN

JOSEPH NDEGWA MBURU APPLICANT

AND

NDUNGU KARUA RESPONDENT

JUDGMENT

1. The Applicant filed the instant suit against the Respondent vide the Originating Summons dated 23rd September 2021, for orders:
 1. That the Honourable Court do make a declaration that the Applicant has acquired by way of adverse possession an absolute title to a portion of land measuring 0.2400 hectares, out of land title number Loc. 6/ Gikarangu/1258.
 2. That an order be issued directing the Respondent to execute all documents and take all steps necessary to effect transfer to the Applicant of the portion of land measuring 0.2400 hectares, out of land title number Loc. 6/ Gikarangu/1258, in default the said documents be executed by the Deputy Registrar of this Honourable Court.
 3. That the costs of this suit be granted to the Applicant.
2. The Summons are supported by the grounds stated thereon and the Supporting Affidavit of the Applicant – Joseph Ndegwa Mburu. He deponed that the suit land was previously registered in the name of the Respondent’s father before it was registered in the Respondent’s name. That in all this period, he has been in occupation of a portion of the suit land since 1985, where he has extensively developed. He further deponed that his portion is demarcated with a fence which was erected when the Respondent’s father was alive. It was his disposition that the Respondent presented a boundary dispute claim at the Land Registrar, which was meant to scuttle his possession.



3. The Respondent entered appearance and filed a Replying Affidavit opposing the Summons. It was his case that the Summons are meant to defeat the outcome of the boundary dispute, as well as the eviction orders sought in Murang'a CMCC No. 259 of 2019. He deponed that the Applicant's parcel of land being Loc. 6/ Gikarangu/ 1172, borders the suit land and has encroached on his land parcel being Loc. 6/ Gikarangu/ 1258, by 0.24HA. That it was after the findings of the Land Registrar that the Applicant filed the instant application.
4. It was his further disposition that the Applicant gained ingress into the suit land in 2017, and his occupation has been marred with chaos and complaints resulting in the lodging of a boundary dispute. He contended that he filed a suit in Kigumo PMC Civil Case No. 1 of 2018, where he sought the re-surveying of the suit land. That he filed another suit in Murang'a CMCC No, 259 of 2019, where he obtained orders against the Land Registrar and Land Surveyor which orders were granted. That as a result therefore, the Summon lacks merits and should be dismissed.
5. The matter was set down for hearing.

Plaintiff's Case

6. PW1 Joseph Ndegwa Mburu the Applicant, adopted his witness statement dated 9th May 2022, as evidence and relied on the documents filed as his exhibits. He told this Court on re-exam that he did not know about the suits referenced to by the Respondent. He testified that he gained entry into the suit land in 1960, and that he was born on the suit land in 1960, and only built a house in 1985. It was his testimony that he did not know the acreage of the land, but he was occupying ½ acre. He also testified that the land parcel No.1258, belongs to his neighbour while land parcel No.1172, is his. He further testified that he buried his daughter and grandfather on the suit land, and he is not in occupation of the Respondent's land.
7. On re-exam, he testified that he has been in occupation of a portion of land parcel 1258, since 1960 where he has planted crops thereon. It was his further testimony that he cannot differentiate between land parcel No. 1258 and No. 1172. He informed the Court that a fence was put up by the Respondent's father.

Defence Case

8. DW1 Ndungu Karua the Respondent, adopted his witness statement and Replying Affidavit dated 8th March 2021, as evidence in chief and relied on the documents contained in his bundle of pleadings as exhibits. He testified on cross-exam that he filed a dispute against the Land Registrar, but did not include the Applicant herein. He informed the Court that he started utilizing the suit land in the year 2018, and added that a conflict arose in 2018, after the Applicant demolished a house that was on the suit land. He also testified that the Applicant buried his grandfather when they had not rectified boundaries. He added that the Applicant has encroached on his land and put up a fence, with the intentions of taking his land.

Parties were thereafter, directed to file their submissions.

9. The Applicant filed his submissions on 4th May 2023, through the Law Firm of Mwaniki Warima & Co. Advocates. He submitted that the Applicant is entitled to ownership of the suit land by dint of adverse possession. To buttress his submission for the claim of adverse possession, he relied on a number of cases. It was his submissions that this Court has no jurisdiction to determine boundary dispute as provided under Section 18(2) and 19 of the *Land Registration Act*. In the end, he submitted that he has established that he gained entry into the suit land in 1985 and he is thus entitled to the suit.



10. The Respondent through the Law Firm of Githaiga Kimani & Co. Advocates filed his submissions and raised three issues for determination. He submitted that the Applicant had encroached into his land sometime in 2017/2018, and the Applicants occupation has not been peaceful. It is his submissions that the Applicant has not made out a case for adverse possession and he is not entitled to orders sought. He submitted that the Applicant has failed to define the portion and having failed to clearly identify the land, he is not entitled to benefit from the claim. He relied on the case of *Wilson Kazungu Katana & 101 Others vs Salim Abdala & Another* {2015}, where the Court found that the appellant had not discharged the burden of identifying and describing the land. It was his further submissions that the Applicant had not attached a copy of an extract as required under Order 37 Rule 7 of the *Civil Procedure Rules* and in the end maintained that he Applicant's claim must fail
11. The Applicant is claiming 0.2400ha of L.R No. Loc.6/ Gikarangu/1258, which is registered in the name of Ndungu Karua as per the Search Certificate. It is evident from the annexures that the suit property had been subjected to a boundary dispute, where the Applicant did not participate. It is also evident that the Court in Murang'a CMCC No. 259 of 2019, had issued orders to the Land Registrar and the Surveyor to survey and fix boundaries in the suit land.
12. What comes out from the annexures and testimonies by parties is that the suit property borders L.R No. Loc 6/ Gikarangu/1172, which land is owned by Ndegwa Kamau. It is also evident that there has been a dispute between the Applicant and the Respondent arising from the Applicant's occupation and/ or alleged encroachment over the suit land. The Applicant now claims that he is entitled to 0.24ha of the suit land, having been in occupation of the same from 1985.
13. Both the Applicant and the Respondent have a right to proprietary right as guaranteed by Article 40 *the Constitution*. While the Applicant is claiming ownership of a part of the suit land by operation of law, the Respondent is claiming absolute ownership on the premise that the Applicant has encroached on his suit property. With this in mind and having analysed the pleadings and annexures thereto, the testimonies by parties and having considered the rival written submissions and considered the authorities cited thereto, the issues for determination by this Court are
 - i. Whether the Applicant has established a claim for adverse possession?
 - ii. Who should bear the costs?

i. Whether the Applicant has established a claim for adverse possession?

14. The *Land Act* contemplates under Section 7 that land can be acquired by inter alia prescription and any other manner prescribed by an Act of Parliament. A claim for adverse possession is hinged on the provisions of the *Limitations of Actions Act* under sections 2, 7, 13, and 38. Section 7 of the *Act* provides

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 said *Act* provides;-

- (1) 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 (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a 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 adverse possession of the land



- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
- (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land”.

Section 17 extinguishes the rights of a registered owner where there is a successful claim for adverse possession. Section 38 on the other hand provides;

- (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.”

15. It is trite law that a claim for adverse possession accrues on land and not title and for such claim to be granted a party has to move the Court. In case of *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR, the Court held 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, 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 nor 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.”

16. What an Applicant ought to demonstrate in order to succeed in a claim for adverse possession has been highlighted by several Courts in their pronouncement. In the case of *Mbira v. Gachuhi* (2002) 1 EALR 137: the court stated;

... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption...”

17. Again in the case of Kisumu Civil Appeal No. 27 of 2013 *Samuel Kibamba v Mary Mbaisi* [2015] eKLR, the Court held as follows; -

Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land”

18. This Court has pronounced itself elsewhere that in seeking to determine whether the Applicant has made out a case for adverse possession, this Court will seek to answer the foregoing

- i. How did the Applicant take possession of the suit property?



- ii. When did they take possession and occupation of the suit property?
 - iii. What was the nature of her possession and occupation?
 - iv. How long have the Applicants been in possession?
19. The Applicant contends that he has been in occupation of the suit land since the year 1985, and which occupation was within the knowledge of the Respondent's father. It is not clear for this Court how the Applicant gained entry into the suit land, but based on the pleadings it is apparent that his entry if any was non-permissive.
 20. The Applicant maintains that he entered into the suit land in 1985, while the Respondent holds out that the Applicant "encroached" into the suit land in 2017. The Applicant in his witness statement dated 9th May 2022, stated that his grandfather had constructed a semi-permanent house on the suit property. That in 1985, the Applicant put up a permanent structure and he and his family have been in occupation of the suit land to date. He added that there was a fence that clearly demarcated the suit land that was put up during the lifetime of his grandfather and that the father of the Respondent.
 21. In his testimony, the Applicant further told the Court that his land is L.R No. 1172, and he lives therein and the title is registered in his father's name, Ndegwa Kamau. He however testified that he buried his daughter and grandfather on the suit land. In re-exam, he yet again testified that he lives on a portion of 1258, but he did not know the portion that he is utilizing. It was his further testimony that he could not differentiate between L.R No. 1172 or L.R No. 1258. He maintained that there is a fence on the suit property that was put up by the Respondent's father.
 22. The Respondent on the other hand maintained that the Applicant gained ingress into the suit land in 2018. He informed the Court that the Applicant buried his grandfather on his parcel of land which is 1172. He added that there was no conflict between them until 2017, when the Applicant encroached into his suit land. He also testified that they had lived on the suit property with the Applicant's grandfather peacefully. There was no other evidence placed before this Court to determine whether the Applicant gained entry into the suit property in 1985 or 2017.
 23. This Court has perused a number of photographs which shows there is some form of occupation and utilization of land and unfortunately, while the Applicant testified that the developments are on the suit property, the Respondent testified that the developments are on L.R No. 1172. This Court has perused a copy of a map which shows that L.R No. 1172 and L. R No. 1258, border each other. According to the Land Registrar's report, that was produced before this Court, it was the findings of the Land Registrar that there was some encroachment on L.R No. Loc. 6/ Gikarangu/1258 by L.R No. Loc. 6/ Gikaranga/ 1172. The Land Registrar stated in the report that they were unable to fix the boundaries due to some hostility between the parties. This was the findings of the Surveyor too, who concluded that both proprietors of the land have been disputing ever since the original demarcation.
 24. This Court has perused some correspondence that intimates the existence of some boundary disputes between the parties. As per the proceedings of the Court in Kigumo CMCC No. 01 of 2018, the Respondent herein filed a suit against the Applicant herein seeking orders for re-survey of the suit property. The Applicant claimed he was not aware of the suit and this Court is not aware the stage the suit is in at the moment.
 25. It is a statutory requirement under Section 107-108 of the Evidence Act, which places a burden of proof on the person who claims the existence of certain facts. The burden of proving a claim for adverse



possession rests with the Applicant. This position was regurgitated in the case of Raphael Kabindi Kawala v Mount Elgon Beach Properties Limited [2018] eKLR, where the Court held:

"In face of the conflicting and contradictory evidence relevant to proving adverse occupation of the suit property by the appellant, the law on legal and evidential burden of proof sets in. The burden of proving title by adverse possession rests upon the appellant being person so asserting."

26. The burden of establishing that the Respondent's title is adverse rests with the Applicant. Presently, the Applicant testified that he has been in occupation of the land since 1985, and no independent witness was called before this Court to buttress the foregoing. The Respondent on the other hand claimed that the Applicant gained entry into the land between the year 2017-2018. In an attempt to prove his claim, the Respondent attached proceedings and correspondences that shows indeed there was a conflict between the two parties herein. This Court ought to have been sufficiently guided by the Applicant as to when he entered into the suit land.
27. This Court has perused photographs which depict occupation of land, but what is not clear for this Court is whether the photographs were in respect of L.R no. 1172 or L.R No. 1258. This Court observes that the Applicant ought to have produced evidence either through documents or an independent witness to establish that the photographs represent the true position on the ground. This is due to the conflicting information as to the true occupation of the Applicant. The Court in Gachuma Gacheru v Maina Kabuchwa [2016] eKLR, when considering whether to allow an appeal by a claimant of adverse possession held;

"That being the case, the burden is upon the person claiming adverse possession to prove his claim on a balance of probability. This Court in Francis Gicharu Kariri V Peter Njoroge Mairu, (2005) eKLR cited with approval the decision of the High Court in the case of Kimani Ruchine V Swift Rutherford & Co Ltd, (1980) KLR wherein it was stated on this point that:

The plaintiffs have to prove that they have used this land which they claim, as of right: nec vi, nec clam, nec precario (No force, no secrecy, no evasion). So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration; See Wanyoike Gathire v Beverly, (1965) EA 514, 518, 519 per Miles, J."

28. The Court further considered the pronouncement in Kim Pavey & 2 Others V Loise Wambui Njoroge & Another, [2011] eKLR where the Court observed:

"Thus to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also necessary to prove that the possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law possession is a matter of fact depending on all circumstances – see R.E. Megarry & Wade – The Law of Real Property 4th Edition page 1014."

29. The Respondent did to the satisfaction of this Court establish that there was a conflict between him and the Applicant. The Applicant did not lead any evidence to show that the suits referenced to by the Respondent were filed when he was already adverse to the title. The mere fact of availing photographs without attaching the said photographs onto the suit property did no aid the Applicant's case. This is



for the reason that the Applicant was not consistent, in his testimony. During cross-exam, he told this Court that he lives on L.R No. 1172, and testified also that “I have never lived on the Defendant’s land”. On re-exam, he told the Court that “I cannot differentiate a portion on 1258 and 1172” Indisputably, the Applicant is not certain as to his occupation and possession.

30. While the Respondent contended that the Applicant has encroached on his property by erecting a fence, the Applicant testified that the fence was put up by the Respondent’s father. There was a lot of conflicting information over the suit property, and the Applicant did not do much to aid his claim for adverse possession. This Court cannot establish when the Applicant gained entry into this land and whether his occupation has been for a period of over 12 years.
31. Respectfully, the Applicant cannot feign ignorance of the boundary disputes or the Kigumo suit. This Court has perused the Surveyor’s report as well as that of the Land Registrar, and it is clear for this Court that the issues leading to conflict between the parties is a boundary dispute that can best be addressed by the Land Registrar. While a claim for adverse possession is a distinct and separate cause, this Court finds that the issue raised by parties shows evidence of land brawl between the parties. The only challenge is this Court has not been adequately guided as to when the Applicant encroached into the suit land. The Court in *Bakari Sheban & 39 others v Said Bin Rashid Khamis* [2017] eKLR observed that in a claim for adverse possession it is critical to prove the date of entry and which burden rests with the Applicant.
32. It is thus the findings of this Court that the Applicant has failed on a standard of balance of probability to establish that he has become adverse to the Respondent’s title over land. In concluding so, this Court is guided by the pronouncement in *Kweyu V Omutut* (1990) KLR 709, as quoted by the Court in *Bakari Sheba & 39 Others* supra, where the Court held:

The adverse character of the possession must be proved as a fact; it cannot 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.....the intention of the dispossessor is 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.”

33. To this end and having been sufficiently guided, this Court finds and holds that the Applicant has not established a claim for adverse possession. Consequently, the Court finds and holds that the Applicant’s Originating Summons dated 23rd September 2021, and filed on 24th September 2021, is not proved on the required standard and thus not merited. The same is dismissed entirely for lack of evidence.

II. Who should bear the costs ?

34. Awarding of costs is the discretionary right of a Court. It is also trite law that costs shall follow the events and the successful litigant is entitled to costs. The Respondent was the successful party and this Court has no reason not to exercise such discretion in his favour and proceeds to award costs to the Respondent.
35. Having carefully considered the available evidence herein, the Court finds that the Applicant’s claim is not merited nor proved on the required standards of balance of probabilities. Consequently, the suit herein is dismissed entirely with costs to the Respondent.
36. It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 29TH DAY OF JUNE, 2023.

L. GACHERU

JUDGE

Delivered online in the presence of; -

N/A for the Applicant

Githaiga Kimani for the Respondent

Joel Njonjo – Court Assistant

L. GACHERU

JUDGE

29/6/2023

