



**Muchiri v M’Magiri & 2 others (Environment & Land Case
51 of 2019) [2023] KEELC 18292 (KLR) (21 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18292 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 51 OF 2019**

**CK YANO, J
JUNE 21, 2023**

BETWEEN

LAWRENCE GICHURU MUCHIRI PLAINTIFF

AND

JOHN KABURU M’MAGIRI 1ST DEFENDANT

LUKA KIRIMI RUTERE 2ND DEFENDANT

JOHN MWIRIGI M’BAICHAU 3RD DEFENDANT

JUDGMENT

Plaintiff’s Case

1. By an originating summons dated 6th September, 2019 and filed in court on 11th September, 2019, the plaintiff is seeking determination of the following questions and orders -;
 - i. Whether the plaintiff has been in occupation of land Reference Nos. Ngusishi Settlement Scheme/953, 954, 971 and 972 formerly Ngusishi Settlement Scheme/ 266, openly, continuously, uninterruptedly and adversely to the defendants/respondent respective titles for a period in excess of 12 years.
 - ii. Whether each of the defendants/respondents title to parcels Nos. Ngusishi Settlement Scheme 953,954, 971 and 972 formerly 266 been extinguished by dint of Section 38 of Limitation of Actions Act Cap 22 Laws of Kenya.
 - iii. Whether the plaintiff/applicant has now acquired absolute ownership of Land Parcels Nos. Ngusishi Settlement Scheme/953, 954, 971 and 972.
 - iv. Whether the plaintiff/applicant is now entitled to be registered as the proprietor of land parcel No. Ngusishi Settlement Scheme/953,954, 971 and 972.



- v. Whether an order should be issued and the same be issued that the applicant be registered as the proprietor of land reference Nos. Ngusishi Settlement Scheme/953, 954, 971 and 972.
 - vi. Who pays the costs of this suit.
2. The summons is supported by the evidence and facts set out in the supporting affidavit of Lawrence Gichuru Muchiri, the plaintiff herein sworn on 6th September, 2021.
 3. The plaintiff avers that the original land reference No. Ngusishi /Settlement Scheme/266 was the property of one Margaret Nkima who sold it to him in September, 1993 and has annexed a copy of the agreement marked “LGM 1.”
 4. The plaintiff further avers that he took possession upon the signing of the said agreement and that he later discovered that the land had been registered in the name of one Jennifer C. Biriri and sub-divided and registered in the names of defendants as follows
 - a) 1st defendant – John Kaburu M’Magiri LR No. Ngusishi Settlement Scheme 971.
 - b) 2nd defendant - Luka Kirimi Rutere
 - i. LR. NO. Ngusishi/Settlement/Scheme/951
 - ii. LR. No. Ngusishi/Settlement Scheme 954.
 - c) 3rd defendant – John Mwirigi M’baichau
L.R no. Ngusishi Settlement Scheme/972.
 5. The plaintiff has annexed copies of the search certificates.
 6. The plaintiff states that he reported his interest to the Settlement Fund Trustees who only entered restriction but took no other action.
 7. The plaintiff further stated that he continued with occupation of the said parcels of land as they were originally even after 1998 when the defendant’s sub divided the same and that he has been living there openly, without interruption and adversely to the defendants’ title up to date.
 8. The plaintiff avers that he has carried out expensive developments which include building houses, growing or planting trees, cultivating and rearing livestock. That the said land is a source of livelihood for him and his wife, children and grandchildren.
 9. The plaintiff stated that the land officer has advised him to come to court and that he was advised by his advocate which advise he finds to be true that the defendant’s title to the respective parcels of land have been extinguished by operation of the law as far as the said parcels of land are concerned.
 10. The plaintiff further stated that he was advised by the said advocates that he was entitled to be registered as the proprietor thereof under the Limitation of Action Act and he so prayed.

Plaintiff’s Evidence

11. At the hearing the plaintiff testified as P.W 1. He was cross examined and re-examined. He stated that he lives in Ngusishi in Meru County and that he is a farmer.
12. The plaintiff adopted the averments in his affidavit in support of the originating summons dated 6th September, 2019 as well as his statement filed on 10th March 2020 as his evidence-in-chief and produced



- the documents in the list of P exhibit 1, 2 (1) (b) & (c) and 3 respectively and these are agreement dated 2nd September, 1993, search certificates and a letter dated 17th November, 1999.
13. The plaintiff also produced the additional documents filed on 25th January, 2022 as P exhibit 7, to 13. The plaintiff testified that he is claiming the parcel of land known as Ngusishi Settlement/ Scheme 266 originally allocated to Margaret Nkima and that in 1993 he bought that land from the said Margaret Nkima.
 14. The plaintiff stated that the land was fully developed and all the fees for fund trustee were paid and that he took possession of the land after attending the Land Control Board and obtained consent. The plaintiff further stated that they also entered into an agreement and that from 1994, he started putting more developments on the land by constructing houses for hire and continued developing the land up to date and that sometime in 1998, he realized that his land was registered under a different name and sub-divided into 4 parcels. He stated that he entered the land in 1993 and is still in possession to date.
 15. The plaintiff stated that he has only met the 1st defendant in court and reiterated that he has been in the land all the years but has not seen any of the defendants and that sometime around 1999 – 2002 they came with a tractor to plough the land but he could not allow them to enter. The plaintiff wants the court to order that the titles be changed into his names.
 16. When he was cross examined by Mr. Anampiu advocate for the 1st defendant the plaintiff stated that he bought the land from one Margaret Nkima and did not do a search then. The plaintiff stated that it is true that in 1998, he discovered that the land was registered in the name of one Jenniffer C. Biriri. That he also discovered that Jenniffer C. Birir had sub-divided and transferred the land to the original defendants including the 1st defendant. He denied that the 1st defendant has constructed houses on the land.
 17. The plaintiff admitted that in 1998, he filed a case against all the defendants including the 1st defendant. He further stated that he bought land which had already been developed and was completely fenced and farmed with irrigation water and big trees.
 18. The plaintiff insisted that the land was owned by Margaret Nkima and stated that he had the discharge sheet of the settlement.
 19. When he was re-examined by Mr. Mwenda the plaintiff stated that he signed the transfer from Margaret Nkima (P exhibit 4) and that the transfer was executed in 1993. He denied filing a case in 1998. He stated that he started from the Settlement Scheme where he made a complaint (P exhibit 3) dated the 17th November, 1999.
 20. The plaintiff stated that there are sub divisions done on the land but no boundaries are on the ground and stated that he has never seen any transfer by the defendants.
 21. The plaintiff stated that he knew Margaret Nkima who lives in Chuka but did not know Jeniffer Biriri. The plaintiff further stated that he knows the 1st defendants parcel is 0.5 acres as per the search but does not know on the ground.

Defendants' Case

22. The 1st defendant filed a replying affidavit dated 26th August 2021 wherein he opposed the plaintiff's claim. He stated that he did not know the member who he described as a stranger to him. The 1st defendant stated that he is the proprietor of the property known as L.R Ngusishi Settlement Scheme measuring 0.21 Ha having acquired the same lawfully after buying the same from one Jeniffer C. Biriri and paid full consideration.



23. The 1st defendant averred that the plaintiff has nothing to do with his property since they even attended Land Control Board and had the said land transferred to him. That he has at all times been in lawful occupation of his land and that the plaintiff has never occupied the same at any time.
24. The 1st defendant stated that the allegations by the plaintiff that he has developed his land and had piped water connected to his land is a total falsehood since the plaintiff has never lived or done anything on that land.
25. The 1st defendant further urged the honourable court to reject the plaintiff's claim which he termed as vexatious, frivolous and without any basis on facts or the law. He also requested the court to visit the locus in quo to verify the fact that the allegation by the plaintiff are a total falsehood.
26. At the hearing the 1st defendant reiterated the contents of his affidavit and was cross-examined and re-examined.
27. The 2nd and 3rd defendants were said to have passed on and the suit against them abated.
28. At the close of the plaintiff's case and the 1st defendant's case, the parties through their advocates on record filed written submissions which I have read and considered.

Analysis And Determination

29. The court has carefully considered the pleadings, the evidence and the submissions filed by the parties to buttress their assertions. I have also taken into account the legal authorities proffered by the parties. The court identifies the following issues for determination-:
 - i. Whether the plaintiff has acquired Land Reference Nos. Ngusishi Settlement Scheme 953, 954 971 and 972 formerly Ngusishi Settlement Scheme /266 through adverse possession.
 - ii. Whether the applicant is entitled to the reliefs sought.
30. In deciding whether or not the plaintiff has proved his claim for adverse possession to the required standard in Civil cases, the plaintiff must prove that he has been in occupation of the suit land for a period of over twelve (12) years, that such occupation was open, peaceful and continuous without interruption from the registered owner and that such occupation was adverse i.e inconsistent with the right of the registered owner.
31. In Wambugu vs Njuguna (1983) KLR 173 the Court of Appeal restated the principles for adverse possession and held as follows-;
 - “ 1. The general Principle is that until the contrary is proved, possession in law follows the right to possess.
 2. In order to acquire by the statute of limitation 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 for which he intended to use it. The Respondent could and did not prove that the appellant had either been dispossessed or had discontinued possession of the suit land for a continuous statutory period of twelve years to enable him, the respondent, to title to that land by adverse possession.



3. The *Limitation Of Actions Act*, on adverse possession contemplates two concepts dispossession and discontinuance of possession. 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 for the requisite number of years.”
32. In the case of *Mtana Lewa – Vs Kabindi Mangandi* [2015] eKLR, the Court of Appeal (Makhandia JA) stated 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 license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”
33. The doctrine of adverse possession is embodied in Section 7 of the *Limitation of Actions Act* which 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.”
34. Section 13 of the same Act further makes provisions for adverse possession as follows-;

“(1) A right of action 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 section 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 possession of the land.

3) 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.”
35. Section 38 (1) of the *Limitation of Actions 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.”
36. In this case, the plaintiff is claiming land parcel Nos. Ngusishi Settlement Scheme 953, 954, 971 and 972 by adverse possession. From the document produced, land parcel Nos. Ngusishi Settlement Scheme/953 and 954 are registered in the name of Luka Kirimi Rutere (deceased) the 2nd defendant herein and the case against him together with that of the 3rd defendant who is also deceased have abated.



Therefore the only claim pending is against the 1st defendant who is the registered owner of land parcel Nos. Ngusishi Settlement Scheme 971 and 972.

37. It is the plaintiff's case that the original land parcel No. Ngusishi Settlement Scheme/266 was sold to him by one Margaret Nkima in the September, 1993, and that he took possession upon signing he sale agreement, carried out extensive developments and is still in occupation. I have carefully perused the exhibits produced by the plaintiff. I have not seen any evidence in support of the alleged developments that the plaintiff claims he has done over the years. Moreover, there was no material produced by the plaintiff to support his alleged occupation.
38. On the other hand, the 1st defendant has not only explained how he acquired the said parcels of land, but he has also testified that he took possession of the said parcels of land and stated cultivating thereon. The 1st defendant has even produced exhibits in the form of photographs to support his occupation and developments on the land. In my view, it was not enough for the plaintiff to have pleaded and alleged that he was in possession and occupation. He ought to have tendered evidence that prove those facts to the satisfaction of the court.
39. Section 107 and 109 of the Evidence Act places the evidential burden upon the plaintiff to prove the facts pleaded. Section 107 provides that-;

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.”
40. Further, Section 109 stipulates that the burden of proof as any particular fact lies on the person who wishes the court to believe in its existence. In this case, the plaintiff did not discharge the burden and as section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.
41. Unlike the plaintiff who did not bring material evidence to support his claim of occupation and use, the 1st defendant produced evidence in form of photographs to show that he is the one in possession and occupation of the suit parcel of land. Whereas the plaintiff alleged that he is living on the land and carrying out farming activities thereon, there was no evidence adduced before this court to support the said occupation and use. It is trite law that he who alleges must prove.
42. In the result, it is my finding that the plaintiff has not proved his case on a balance of probabilities and the same is dismissed with costs to the 1st defendant.
43. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 21ST DAY OF JUNE 2023

In the presence of

Court assistant – V. Kiragu

Mwendwa for plaintiff

Gikunda Anampiu for 1st Defendant

No appearance for 2nd and 3rd defendants.

C.K YANO

JUDGE

