



**Mburu v Kamami (Environment & Land Case 963 of 2015)
[2023] KEELC 19313 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19313 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 963 OF 2015**

**MD MWANGI, J
JULY 31, 2023**

BETWEEN

JAMES MBURU PLAINTIFF

AND

PETER WAWERU KAMAMI DEFENDANT

JUDGMENT

1. The Plaintiff's claim against the Defendant is for adverse possession over parcel of land L.R. No. 13754 (hereinafter referred to as the suit property). The Plaintiff had sued two Defendants. On 19th September 2022, the Plaintiff with the approval of the court withdrew the case against the 1st Defendant leaving Peter Waweru Kamami as the only Defendant in the case.
2. By way of the Originating Summons dated 2nd October 2015, the Plaintiff seeks answer to the questions: -
 - a. Whether the Plaintiff is entitled by adverse possession under section 38 of the Limitations of Actions Act Cap 22 to be registered as the proprietor of all that parcel of land known as L.R. No. 13754.
 - b. Whether the Defendants should execute all necessary documents and to do all acts necessary to have the Plaintiff registered as owner of parcel of land known as L.R. No. 13754 and in default Registrar of the High Court to be authorized to execute all necessary documents and to do all acts necessary on behalf of the Defendants.
 - c. Who pays the costs.
3. The Plaintiff's Originating Summons was supported by the affidavit of James Mburu sworn on the 2nd October 2015. The Deponent averred that he has been residing on the suit property since 1973



following an allocation by government to his grandmother, the late Miriam Wangui Munyiri. Again in 1985, the government carried out subdivision of the main title and the Plaintiff remained on the suit property separate from that of his grandmother.

4. The Plaintiff asserts that the suit property is clearly identifiable and well demarcated. It measures 0.204 hectares or thereabout. The Plaintiff has constructed his residential house therein where he lives with his nuclear family and has been cultivating on the land.
5. At all times, the Plaintiff deposes that no one had raised any issue regarding his occupation of the suit property. It was only on 24th September 2015 when he received a letter from the area Sub County Commissioner summoning him on allegations that he had trespassed onto the suit property following a belated complaint by the Defendant. Prior to that, he had enjoyed peaceful exclusive uninterrupted occupation and use of the suit property.
6. The Plaintiff further avers that as at September 2015 he had already developed the suit property fully. Upon enquiry, he learnt that the Defendant was the complainant. The Plaintiff deposed that he had never met or seen him previously. There had not been any prior attempts to remove the Plaintiff from the land or interfere with his occupation. He avers that he had been in peaceful, exclusive and uninterrupted occupation and use of the land. He prays that he be declared the lawful owner of the land by way of adverse possession.

Defendant's statement of Defence and Counter-claim

7. The Defendant's response to the Plaintiff's suit was by way of his statement of Defence and Counter-claim dated 1st July 2016. The Defendant asserts that he is the legal owner of the suit property, L.R N0. 13754 having acquired the title of the same free from any encumbrances, clean and without any 'human occupation and or settlement'.
8. The Defendant further averred that the Plaintiff encroached into his land after the year 2006. This was after the Defendant had already acquired title to the suit property. He averred that he learnt about the same when he was in the USA. He allegedly called the area chief requesting him to remove the occupants. It however, did not happen.
9. The Defendant denied that the Plaintiff has been in occupation of the suit property for 30 years and that he had acquired the land by adverse possession. He lodged a counter-claim against the Plaintiff. The Defendant termed the Plaintiff's claim of his land deceitful, fraudulent and dishonest. He seeks an eviction order, mesne profits and costs of the suit.
10. Of note is that the Defendant's Counter-claim was not accompanied by a verifying affidavit.
11. From the directions given by the court, parties were granted leave to file witness statements and bundle of documents when it was also decided that the case would be heard by way of viva voce evidence.

Evidence adduced on behalf of the Plaintiff

12. The Plaintiff testified in his case as PW2 and called 3 other witnesses. PW1 was one Vivian Jane Prince who, while adopting her witness statement dated 27.6.2022 confirmed that she has known the Plaintiff's family since 1989 when she was living in Karen, Nairobi. As far as she could tell, the Plaintiff's family had always lived on the suit property. The Plaintiff used to work for her looking after her race-course.
13. PW2 was the Plaintiff himself. He affirmed his pleadings in his testimony. He further adopted his witness statement dated 10th March 2021 as his evidence in chief. He produced as exhibits the



documents on his list of documents dated 10th March 2021. PW2 averred that he has built a home on the suit property where he lives with his family. He clarified that he had never been issued with allotment letters over the suit property; that is why he was claiming adverse possession over the land.

14. PW3 and PW4 too testified in support of the Plaintiff's case adopting their respective witness statements. The testimonies form part of the record of this court.

Evidence adduced on behalf of the Defendant

15. The Defendant testified that he is the owner of the parcel of Land L.R. No. 13754, Karen (the suit property). He acquired the title to the suit property in 1988. He avers that he acquired the land through an allotment that was given to 'Senior Civil Servants', then. He was one of the beneficiaries of the project. He asserted that at the time he was allotted the suit property, it was vacant. He subsequently fenced the whole land with a barbed wire fence. When he did it, he averred that, no one, not even the Plaintiff, raised any issue with him.
16. The Defendant alleged that he even knew the grandmother of the Plaintiff who lived in an adjacent plot.
17. The Defendant who now lives in the USA stated that by the time he left Kenya, in the year 2003, the fence he had put around the suit property was still intact; the beacons too. His Cousin, a Mr. Waweru who used to watch over the suit property has since passed on.
18. The Defendant insisted that the Plaintiff was not in his land when he was fencing it. Further that there were no structures on the land. He however admitted that the valuation report that he had produced as an exhibit, under the subheading 'developments' notes that the plot had a perimeter barbed wire on cedar posts fence and some 'temporary structures'.
19. DW2 was the valuer who had made the valuation report under instructions of the Defendant.
20. The Defendant's 3rd witness (DW3) was a government Officer; the Assistant Chief of Roysambu Kasarani, Njathaini Sub-location. Prior to his transfer to his current station, he was the assistant chief of Karen where the suit property is situated.
21. The witness confirmed that he came to know the Defendant around the year 2012/2013 when the then Nairobi Provincial Commissioner, one Njoroge Ndirangu requested him to help the Defendant evict the people who had allegedly invaded his land at 'Matopeni, Karen'.
22. In the endeavour to assist the Defendant, DW3 found people on the suit property as well as houses. He was unable to execute the request by the Nairobi Provincial Commissioner as they were confronted with a court order. There were semi-permanent structures on the land. They are still there to date. The Assistant Chief informed the Provincial Commissioner about his findings and they agreed that it was not possible to remove the people and the structures on the land then.
23. The witness, DW3, could not tell when the structures were built. Some structures were made of mud, others concrete, while others were mabati structures. The structures were over a big area of the land. The Assistant Chief confirmed that he used to take relief food to the residents there.
24. Under cross-examination from the Plaintiff's Advocate, DW3 confirmed that there were indeed people on the suit property including the Plaintiff who he was able to identify even in court. The Plaintiff's house was near the entrance to the land and he had a shop there as well.
25. From the photos produced as exhibits in this case, DW3 identified the Plaintiff on one of the photos next to the structure that was his house. The photo has a date on it being 1st January 1996.



26. From the letter produced by the Plaintiff as an exhibit on Page 41 of the Plaintiff's bundle, DW3 confirmed that it had originated from the office of the chief of Karen within whose jurisdiction the suit property is located. The name of the Plaintiff appears on the said letter. The letter dated 15th December 1993 was written by the Chief of Karen to the District Officer, Kibera identifying the people at the Matopeni village including the suit property herein, with a request to have them resettled elsewhere.

Submissions by the parties

27. At the close of the hearing, the court directed parties to file written submissions. Both parties complied. This court has had the opportunity to carefully read the submissions which now form part of the record of the court. Parties make reference to numerous decided cases which I will refer to in the course of this judgement.

Issues for determination

28. Having considered the pleadings filed by both sides, the evidence adduced and the submissions by the parties, the court is of the view that the issues for determination in this matter are: -

Analysis and determination

- A. Whether the Plaintiff has proved a case of adverse possession over the suit property against the Defendant.
- B. Whether the Defendant is entitled to the order of eviction and mesne profits sought in the Counter-claim against the Plaintiff.

Analysis and Determination

- A. Whether the Plaintiff has proved a case of adverse possession over the suit property against the Defendant
29. In the case of *Peter Okoth vs Amrose Ochido Andajo and Benedict Odhiambo Oketch* (2021) eKLR the court in defining what amounts to adverse possession referred to the Court of Appeal decision in *Wilson Kazungu Katana & 101 others vs Abdalla Bakshwein & Another* (2015) eKLR, where the court had stated that for a claim of adverse possession to succeed:-
- i. The subject parcel of land must be registered in the name of a person other than the Applicant;
 - ii. The applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner; and
 - iii. The Applicant must have been in occupation for a period in excess of twelve (12) years having dispossessed the owner or there having been discontinuance of possession by the owner.
30. The Court of Appeal in the Wilson Kazungu Katana case (supra) had discussed other decided cases on the concept of adverse possession citing the case of Kasuve v Mwaani Investments & Wanje Vs Saikwa.
31. The court elaborated that a claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a 12 years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition.



32. In the Wanje case, the court expressed the view that in order to acquire 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.
33. Dispossession constitutes of acts done which are inconsistent with the proprietor's enjoyment of the soil for the purpose for which he intended to use. Therefore, a person who occupies another person's land with that person's consent, cannot be said to be in adverse possession as in reality he has not dispossessed the owner of the land and his possession is not illegal.
34. The Indian Supreme Court decision in the case of *Kamataka Board of Wakf vs Government of India & Others* (2004) 10 SCC 779 emphasized the well settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario" meaning, peaceful, open and continuous.
35. Similarly, in the case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, Kuloba J (as he then was) enumerated the elements that need to be proved by a party invoking the doctrine of adverse possession as follows;
 - a. The intruder resisting suit or claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for statutory period.
 - b. The entry and occupation must be with, or maintained under, some claim or colour of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.
 - c. The occupation of land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupant.
 - d. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with an evinced unmistakable animus possidendi. that is to say occupation with the clear intention of excluding the owner as well as other people.
 - e. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, given reason for notice to the owner and the community, of the exercise of dominion over the land,
 - f. The possession must be continuous uninterrupted, unbroken, for the necessary statutory period.
 - g. The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.
36. The Court of Appeal in the case of *Ruth Wangari Kanyagia vs Josephine Muthoni Kinyanjui* [2017] eKLR while acknowledging adverse possession is a common law doctrine restated the same by citing the India Supreme Court decision in the case of *Kamataka Board of Wakf vs Government of India & Others* [2004] 10 SCC 779 where the court stated thus: -

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't



affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

37. From the evidence adduced before the court, it is not in dispute that the Defendant is the registered owner of the suit property. It is also clear that the Plaintiff is in actual Physical possession of the suit property without permission from the owner. That is why the Defendant in his counter-claim seeks to remove him from the suit property anyway.
38. What then remains for the court to establish is whether the said physical possession was continuous, uninterrupted and unbroken for the necessary statutory period - ‘nec vi nec clam, nec precario’ and adverse to the Defendant’s ownership.
39. Regarding the issue when time starts running against the registered owner of the land, Kuloba J, in the case of Gabriel Mbui v Mukindia Maranya [1993] eKLR held that:

“As to the date from which the period of limitation or prescription begins to run against the owner of land, the Courts have held that it runs from the date when the owner was entitled to immediate possession and the squatter occupied the land under some colour of right. In the case of registered land, adverse possession dates from the granting of the certificate of title, for that is when the title holder is prima facie entitled to possession and, therefore, entitled to take action against any intruder to the land (Sir Joseph Sheridan, CJ, in *Alibhai v Alibhai* [1938] 5 E A C A 1 at 3, 4; Miles, J, in *Gathure v Beverly* [1965] E A 514; and Hancox, J (as he then was) in *Wandera and another v Attorney – General* [1976] Kenya L R 275, at 276).”
40. The evidence by the Plaintiff and his witnesses, was that the Plaintiff has been on the suit property even before the Defendant acquired title of the same in 1988. Even after the Defendant acquired the title, the Plaintiff remained on the land where he even put up his home and has been living there since. The time for purposes of adverse possession in this matter would then run from 1988.
41. I must note that the valuation report presented as evidence by the Defendant acknowledges the existence of structures on the land. The Defendant in his testimony was categorical that he had not put any structures in the land. The logical inference then is that the same were put up in the land by someone other than the Defendant and that can only be the Plaintiff as confirmed by the evidence adduced before the court. In spite of the knowledge of the existence of the structures, the Defendant did not take any action to remove them or the intruder who had put them up.
42. DW3 though called by the Defendant cemented the Plaintiff’s case. He confirmed the existence of the Plaintiff’s house on the suit property. He identified the Plaintiff next to the structure that was his house in the photograph of 1996, that was part of the evidence presented by the Plaintiff.
43. Looking at the totality of the evidence presented before the court, I am persuaded that the Plaintiff has proved his case on a balance of probabilities. He has proved that he has been on the suit property continuously, uninterrupted and unbroken for the necessary statutory period of over 12 years - ‘nec vi nec clam, nec precario’ and his possession has been adverse to the Defendant’s ownership of the land. The Plaintiff dispossessed the Defendant of the suit property by establishing his home therein and has



remained in possession openly and without any interruption for the statutory period of 12 years. By the time the Defendant was making attempts to retake possession in the year 2015, the Plaintiff's right of adverse possession had already crystallized.

44. I therefore allow the Plaintiff's case and find that the Plaintiff is entitled by adverse possession under section 38 of the *Limitations of Actions Act*, Cap 22 Laws of Kenya to be registered as the proprietor of all that parcel of land known as L.R. No. 13754.

B. Whether the Defendant is entitled to the order of eviction and mesne profits sought in the Counter-claim against the Plaintiff.

45. Having found that the Plaintiff has proved his case against the Defendant, the Defendant's claim against the Plaintiff automatically fails.
46. There was however an issue that the court noted and that was also raised by the Plaintiff against the counterclaim by the Defendant - the failure to have the same accompanied by a verifying affidavit.
47. The Defendant submitted that the omission was not fatal to the counterclaim. The Defendant urged the court not use the omission to strike out its case. He sought refuge in Article 159(2)(d) of *the Constitution* of Kenya that urges the courts not to give undue consideration to procedural technicality. The Defendant went further and blamed his Advocate for the omission. He urged the court not to punish him for the mistake of his Advocate. The Defendant too made reference to the Court of Appeal decision in *Luke Cheruiyot and 37 others vs National Oil Corporation* (2015) eKLR, that held that a party who failed to file a verifying affidavit may be given an opportunity to do so by the court.
48. While I agree with the position by the Court of Appeal in the Luke Cheruiyot case (supra), the Defendant in this case did not at any one time seek leave of the court to file a verifying affidavit to verify his counterclaim and remedy the omission. It is the responsibility of the party at fault to move the court appropriately.
49. So, as it is, the Defendant's counterclaim is not accompanied by a verifying affidavit contrary to the mandatory provisions of order 7 rule 5(a) of the *Civil Procedure Rules*. The Defendant has not bothered to move the court for leave to file one. I would strike out the counterclaim for non-compliance with the mandatory provision of Order 7 rule 5(a) of the *Civil Procedure Rules*.
50. Time and again, this court has expressed its displeasure to wanton disregard for rules of procedure by Advocates who are also quick to hide under the provisions of Article 159 of *the Constitution* loudly proclaiming that justice abhors technicalities.
51. This court fully associates with Kiage J.A in the case of *Nicholas Kiptoo Arap Korir Salat -Vs- IEBC & 6 others* where he categorically stated as follows in regard to the practice of circumventing rules; -

"I am not in the least persuaded that Article 159 of *the constitution* and the oxygen principles which both command courts to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an archical free-for-all in the administration of justice. This court, indeed all courts, must never provide the succor and cover to parties who exhibit scant respect for rules and timelines. These rules and timelines serve to make the process of Judicial adjudication and determination fair, just, certain and even handed. Courts cannot aid in the bending or circumventing of rules and shifting of goal posts for while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in dispassionate application of rules that



courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.”

52. On the issue of costs, the court, considering the circumstances of this case, orders that each party bears its own costs.

Final disposition

53. The final disposition is that the Plaintiff’s case is allowed while the Defendant’s counterclaim is dismissed. The Court makes the following orders: -

I. The Court finds that the Plaintiff is entitled by adverse possession under Section 38 of the *Limitations of Actions* Act, Cap 22 Laws of Kenya to be registered as the proprietor of all that parcel of land known as L.R. No. 13754.

II. The Defendant is hereby ordered to execute all necessary documents to have the Plaintiff registered as owner of the parcel of land L.R. No. 13754 in the next 30 days; in default whereof, the Deputy Registrar of this court is authorized to execute all necessary documents on behalf of the Defendant.

III. On the issue of costs, the court directs that each party bears its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY 2023.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Jomo for the Plaintiff.

No appearance for the Defendant.

Court Assistant – Yvette.

M.D. MWANGI

JUDGE

