



**Mwita v Mugo (Sued as the administrator of the Estate of Benjamin Mugo Muita (Deceased)
(Environment & Land Case 3 of 2022) [2023] KEELC 19255 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19255 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 3 OF 2022
A OMBWAYO, J
JULY 28, 2023
IN THE MATTER OF LAND REGISTERED ACT
IN THE MATTER OF THE LIMITATION OF ACTIONS
ACT CAP 22 LAWS OF KENYA SECTION 37 AND 38**

BETWEEN

EUNICE MWERU MWITA PLAINTIFF

AND

**JAME MUTHONI MUGO (SUED AS THE ADMINISTRATOR OF THE ESTATE
OF BENJAMIN MUGO MUITA (DECEASED) DEFENDANT**

JUDGMENT

1. Eunice Mweru Mwita (hereinafter referred to as the plaintiff) has come to this court against Jane Muthoni Mugo sued as the administratrix of the estate of Benjamin Mugo Mwita deceased (hereinafter referred to as the defendant) by way of an Originating Summons praying for a declaration that the Plaintiff is entitled to be registered forthwith as owner of parcel Solai Ndungiri Block 3/879 (Wanyororo) and which the Plaintiff has been in adverse possession for more than twelve (12) years immediately preceding the presentation of this suit and on which she has occupied openly and continuously as of right and in adverse possession and without any interruption from the Defendant or her agents or servants in the above title and that the Defendants' title to the said parcel of land has been extinguished in favour of the Plaintiff under section 37 and 38 of the *Limitation of Actions Act*.
2. That the Defendant do transfer Title Solai Ndungiri Block 3 / 879 (Wanyororo to the Plaintiff and in default the Deputy Registrar be authorized to do and or sign all documents to effect transfer of Title Solai Ndungiri Block 3/879 (Wanyororo "B") to the Plaintiff herein. That the caution registered by the Defendant against the said title on 21st July 2016 be removed. An order for costs of this summons.



3. The plaintiff claims that she was initially appointed administratrix of the estate of Benjamin Mugo Muita but the defendant took over the administration of the estate.
4. That she has been in actual occupation of title No. Solai Ndungiri Block 3/879 since 1996 to date which is a period in excess of 12 years prior to the filing of this suit. That she has been enjoying quiet, open and uninterrupted possession of the suit land with the full knowledge of the defendant herein. That she has been utilizing the suit land exclusively to her benefit since 1996. That she been in actual possession and use of the subject parcel of land since 1996 and has extensively developed the said property. That she initially obtained the suit land through purchase from the late Benjamin Mugo Muita and has remained on the suit land for more than 12 years from the date the contract between her and the late Benjamin Mugo Muita became bad in law and unenforceable.
5. The respondent filed a replying affidavit stating that she knows the plaintiff very well and that her late husband gave the plaintiff permission to use on their parcel of land as a care taker since they were living in Nairobi. That they developed the plot and when her husband passed on she was unable to complete the structures due to financial constraints which the applicant is much aware of. That the applicant is a step-sister to her late husband and that she is out to deprive the respondent and her children of what is rightfully theirs especially when she knows the reason why the respondent never followed on the parcel was because she has a child living with disability and knowing that she was occupying their parcel as a caretaker. The plaintiff denied having been given permission by her late brother but that she purchased the land.
6. When the matter came up for hearing, the plaintiff relied on her affidavit in support and supplementary affidavit together with the statement filed on 30th September 2022. On cross examination she states that the defendant is a sister in law and that the land is in the names of Benjamin Mugo deceased. She purchased the land from Benjamin Mugo and paid Ksh23,000 and that the balance was Kshs7,000. He denied having been given permission. PW2, the plaintiff sister and sister in law to the defendant relied on her statement and asserted that her sister developed the land has done a permanent house. She took possession in 1996.
7. DW1, the respondent on her part relied on her statement and further testified that the plaintiff asked for permission to till the land and was allowed. When her husband died she refused to leave. On cross examination by Mr Waiganjo counsel for the plaintiff she states that she lives in Nairobi. The land is in Wanyororo and that she does not know her neighbours. It was her husband who constructed on the land. She disputed the agreement between her husband and her sister in law. She did not participate in the sale but she gave her photo, ID and P.I.N to enable power be connected on her land. She has not given any demand letter.
8. In her submissions, the plaintiff contends that she has been in possession of the property since 1996 and that she obtained the land through an agreement dated 12th April 1996. The agreed purchase price was 30,000, she paid 23,000. The defendant never acted to recover the land even after the death of her husband in 2004.
9. The defendant on her part submitted that it is evidenced that the plaintiff is in exclusive possession of the land with leave and license of the defendant. The mode of entry was by agreement hence a permissive one. He was permitted to enter the land.
10. I have considered the evidence on record and do find that on 12th day of April 1996 Benjamin Mugo Muita of ID No.5177460/68 and Box 3787 Nakuru entered into a land sale agreement with his sister Eunice Mweru Mwita of ID No.74015615, the plaintiff herein. The agreement was witnessed by Eva Wanjiru Mwita PW3. I am persuaded that the agreement is genuine as it was signed by the



defendant's husband. She stated that the signature was computer generated but did not give evidence. She agreed that the signature belonged to her husband. The defendant claimed that the plaintiff was given permission to enter the land however, there was no evidence of such permission. The law on adverse possession is that found in section 7 of the Limitation of Action Act which provides

7.	<p>Actions to recover land</p> <p>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.</p> <p>Section 13 provides: -</p>
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13.	Right of action not to accrue or continue unless adverse possession	
(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.
(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.

11. In the case before me, it is evident that the plaintiff was in exclusive possession because she constructed a permanent building and has in possession of the same. For the plaintiff to succeed on adverse possession



should prove five minimum basic conditions to perfect title of the adverse possession. These are namely: -

Open and notorious use of the property

For this condition to be met the adverse party use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim. The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If legal owner has knowledge this element is met. This condition is further met by fencing, opening or closing gates or any entry to the property, posted signs, crops buildings, or animal that a diligent owner could be expected to know about.

Continuous use of the property

The adverse party must for statute of limitations purposes, hold that property continuously for the entire limitations period, and use it as a true owner would for that time. This element focuses on adverse possessor's time on the land now how long true owner has been dispossessed of it. Occasional activity on the land with long gaps in activity fail the test of continuous possession. If the true owner ejects the adverse party from the land verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party return. He cannot count the time between his ejection by the true property owner and the date on which he returned.

Exclusive use of the property

The adverse party holds the land to the exclusion of the true owner, if for example, the adverse party builds a barn on the owner's property, and the owner then used the barn, the adverse party cannot claim exclusive use. There may be more than one adverse possessor, taking as tenants (i.e. owners) in common, so long as the other elements are met.

Actual possession of the property

The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not establish actual possession.

Non - permissive use of the property

The use of the property is without the permission of the land owner.

I do find that the plaintiff has been in open and notorious use of the property where is so visible and apparent. The same is continuous as nobody has ever attempted to stop the plaintiff from use of property. The use is actual, exclusive, non –permissive as there is no evidence of permission. I do find that the plaintiff has proved her case on a balance of probabilities and I do grant the following orders thus:

1. A declaration that the Plaintiff is entitled to be registered forthwith as owner of parcel Solai Ndungiri Block 3/879 (Wanyororo) and which the Plaintiff has been in adverse possession for more than twelve (12) years immediately preceding the presentation of this suit and on which she has occupied openly and continuously as of right and in adverse possession and without any interruption from the Defendant or her agents or servants in the above title



and that the Defendants' title to the said parcel of land has been extinguished in favour of the Plaintiff under section 37 and 38 of the *Limitation of Actions Act*.

2. That the Defendant do transfer Title Solai Ndungiri Block 3 / 879 (Wanyororo to the Plaintiff and:-
3. In default the Deputy Registrar be authorized to do and or sign all documents to effect transfer of Title Solai Ndungiri Block 3/879 (Wanyororo "B") to the Plaintiff herein. That the caution registered by the Defendant against the said title on 21st July 2016 be removed. An order for costs of this summons.
4. Cost of the suit to the plaintiff.

JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 28TH DAY OF JULY 2023.

A .O. OMBWAYO

JUDGE

