



**Nyamburi v Gathecha (Environment & Land Case 8 of 2022)
[2023] KEELC 19112 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19112 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 8 OF 2022**

**A OMBWAYO, J
JULY 28, 2023**

BETWEEN

MICHAEL NYAKUNDI NYAMBURI APPLICANT

AND

JAMES GITAU GATHECHA RESPONDENT

JUDGMENT

- 1 Michael Nyakundi Nyamburi has filed an originating summons on 6th May 2022, dated 2nd February 2022 for determination of the issued on the weather the Applicant is entitled to be registered as the proprietor of land parcel number Nakuru Municipality/Block 25/145 measuring 0.080 hectares under section 38 of Limitation of Action Act Cap 22 Laws of Kenya on the ground that since the year 1999 the Applicant has been openly peacefully and of right in possession and occupation of the above-mentioned parcel of land, that is to say for a period of over 12 years immediately preceding presentation of this originating summons in court.
- 2 The Respondent's title deed to the said parcel of land has been extinguished under Section 17 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya.
- 3 The Applicant be registered as the owner of that parcel of land known as Nakuru Municipality/Block 25/145 under section 38 of the *Limitation of Actions Act* Cap 22 Laws of Kenya.
- 4 In the alternative a declaration, be made that upon payment of the full purchase price of land parcel number Nakuru Municipality/Block 25/145 measuring 0.080 hectares by the Applicant, a constructive trust was created in favour of the Applicant.
- 5 A declaration be made that consequent upon such constructive trust, the Applicant is entitled to the whole of land parcel number Nakuru Municipality/Block 25/145 measuring 0.080 hectares.



- 6 An order do issue directing the Respondent to promptly execute transfer documents and any relevant forms in favour of the Applicant herein with respect to the whole of land parcel number Nakuru Municipality/ Block 25/145 and in default, the court's deputy registrar do execute the said transfer forms and any relevant forms as will ensure the Applicant is registered as the absolute proprietor of the suit land. Costs of the suit be borne by the Respondent.
- 7 The grounds of the Originating Summons is that Since the year 1999 the Applicant has been openly, peacefully, continuously and as of right in possession and occupation of the above-mentioned parcel of land, that is to say for a period of over 12 years immediately preceding presentation of this originating summons in court. The Respondent's title to the said parcel of land was extinguished under Section 17 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya upon payment of the full purchase price by the Applicant with respect to the whole of land parcel number Nakuru Municipality/Block 25/145 and subsequently taking active possession and extensively developing the said parcel of land, therefore creating a constructive trust in favour of the Applicant herein.
- 8 The applicant is entitled to be the registered proprietor of that parcel of land known as Nakuru Municipality /Block 25/145 under section 38 of the *Limitation of Actions Act* and or in the alternative under the equitable doctrine of constructive trust. The supporting affidavit reiterates the grounds and states that that the applicant has been in occupation and possession of the parcel of land known as Nakuru Municipality/Block 25/145 since the month of November, '1999 cultivating it, planting trees and generally carrying on a living.
- 9 The defendant was served but did not enter appearance or file a replying affidavit. Directions were taken that the Originating summons was to be heard by way of written submission. I have considered the evidence on record and submissions filed by the applicant and do find that the plaintiff has proved on a balance of probabilities that he has been in possession of the land for more than 12 years exclusively using the same without any interference by any person and without permission from any person and therefore satisfied the conditions required to prove adverse possession. The law on adverse possession is hinged on five basic maximums thus :-
- (A) 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 an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about.
 - (B) 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, not 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.

- (C) 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 uses 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.
- (D) 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.

10 I do find that the plaintiff has satisfied the basic maximums and is therefore entitled to orders sought and do grant them thus that:-

1. The applicant is entitled to be registered as the proprietor of land parcel number Nakuru Municipality/Block 25/145 measuring 0.080 hectares under section 38 of Limitation of Action Act Cap 22 Laws of Kenya on the ground that since the year 1999 the Applicant has been openly peacefully and of right in possession and occupation of the above-mentioned parcel of land, that is to say for a period of over 12 years immediately preceding presentation of this originating summons in court.
2. The Respondent's title deed to the said parcel of land has been extinguished under Section 17 of the Limitation of Actions Act, Cap 22 Laws of Kenya.
3. The Applicant be registered as the owner of that parcel of land known as Nakuru Municipality/Block 25/145 under section 38 of the Limitation of Actions Act Cap 22 Laws of Kenya.
4. The Respondent to promptly execute transfer documents and any relevant forms in favour of the Applicant herein with respect to the whole of land parcel number Nakuru Municipality/ Block 25/145 and in default, the court's deputy registrar do execute the said transfer forms and any relevant forms as will ensure the Applicant is registered as the absolute proprietor of the suit land.
5. Costs of the suit be borne by the Respondent.

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

A O OMBWAYO

JUDGE

