



**Ngari v Muhidin (Environmental and Land Originating Summons  
95 of 2018) [2023] KEELC 19006 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19006 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 95 OF 2018**

**NA MATHEKA, J**

**JULY 27, 2023**

**BETWEEN**

**MICHAEL SAFARI NGARI ..... PLAINTIFF**

**AND**

**SHIEKH NUREIEN MUHIDIN ..... DEFENDANT**

**JUDGMENT**

- 1 The Plaintiff claims to be the proprietor of 0.0375 Hectares of land, being Plot No 11864 (Original No 11703/137) Section 1 Mainland North, CR No 1704/13 Mombasa by adverse possession for the determination of the following questions;
  1. Is the Plaintiff/Applicant entitled to be declared as the proprietor of 0.0375 Hectares of land, being Plot No 11864 (Original No / 1703/137) Section I Mainland North, CR No 1704/13 Mombasa which he has by adverse possession after staying and/or occupying and/or residing on the plot for over 12 years?
  2. Is the Plaintiff/Applicant entitled to be registered as the owner of Plot No 11864 (Original No 11703/137) Section 1 Mainland North, CR No1704/13, and be issued with certificate of title?
  3. Is the Plaintiff/Applicant entitled to the cost of this suit?
- 2 PW1, the Plaintiff testified that he moved onto the suit land in 2004 and applied for power and water in 2007. He has put up his house and lives there. He produced electricity and water receipts in his name dated 2007.
- 3 DW1, the Defendant testified that that he is the registered owner of the suit premises, being plot No 11864/1/MN (original No 11703/137), CR No 1704/13, Which originally was Plot No31 situate Bamburi Kadarajni/Jishikilie within Mombasa County. That he entered onto a sale agreement in the year 2015 and the plot was vacant. He put up a fence and a structure. DW2, DW3 and DW4 all Wazee



wa Mtaa corroborated his evidence. DW3 was a signatory to the sale agreement. This suit was filed in 2018.

4 This court has carefully considered the evidence and submissions therein. The *Land Registration Act* is very clear on issues of ownership of land and Section 24(a) of the *Land Registration Act* provides as follows:

Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

5 Section 26 (1) of the *Land Registration Act* states as follows:

The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

6 The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. This court in considering this matter referred to the case of *Elijah Makeri Nyangw’ra v Stephen Mungai Njuguna & Another* (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The court in the case while considering the application of section 26(1) (a) and (b) of the *Land Registration Act* rendered himself as follows:-

-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

7 It is not in dispute that the Defendant is the registered owner of the suit property. The issue for determination is whether or not he holds good titles by virtue of the Plaintiff’s, claim of adverse possession. Be that as it may, in determining whether or not to declare that a party has acquired land by adverse possession, there are certain principles which must be met as quoted by Serгон J in the case of *Gerald Muriithi v Wamugunda Muriuki & Another* (2010) eKLR while referring to the case of *Wambugu v Njuguna* (1983) KLR page 172 the Court of Appeal held as follows;

1. In order to acquire by statute of limitations title to land which has a known owner the owner must have lost his right to the land either by being dispossessed of it or by having continued 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 of the suit land for a continuous period of twelve years as to entitle him, the respondent to title to the land by adverse possession.
2. 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 the claimant has proved that he has been in possession for the requisite number of years.

3. Where a claimant pleads the right to land under an agreement and in the alternative seeks adverse possession, the rule is: the claimant's possession is deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least 12 years after such payment.
- 8 The court was also guided by the case of Francis Gicharu Kariri v Peter Njoroge Mairu, Civil Appeal No 293 of 2002 (Nairobi) the Court of Appeal approved the decision of the High Court in the case of Kimani Ruchire v Swift Rutherfords & Co Ltd (1980) KLR 10 where Kneller J, held that;
- 9 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 persuasion)".
- 10 So the Plaintiffs must show that the Defendant 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 purposes or any endeavours to interrupt it. In applying these principles to the present case, PW1 the Plaintiff testified that he moved onto the suit land in 2004 and applied for power and water in 2007. He has put up his house and lives there. He produced electricity and water receipts in his name dated 2007. I have perused the said documents and find that they are indeed dated 2007 however the plot number is not indicated meaning these would relate to any other plot. The Defendant stated that when he bought the suit plot in 2015 it was vacant and indeed all his witnesses who are area elders confirmed this. I find that the Plaintiff invaded the suit land after 2015 and filed this matter in 2018. This habit of grabbing vacant land at the Coast region is very rampant and should be discouraged. It is in evidence that Plaintiff has put up rental premises and collects rent from the suit property. This is indeed unjust enrichment and illegal. I find that the Plaintiff has failed to establish that his possession of the suit land was continuous and not broken for any temporary purposes or any endeavours to interrupt it for a period of 12 years. I find that the Plaintiff has failed to prove his case on a balance of probabilities and I dismiss the same with costs.
- 11 It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27<sup>TH</sup> DAY OF JULY 2023.**

**N.A. MATHEKA**

**JUDGE**

