



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Njobe & another v Muri (Environment & Land Case E001 of 2021)
[2023] KEELC 19070 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19070 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E001 OF 2021**

LN GACHERU, J

JULY 27, 2023

BETWEEN

THERESIA MUTHONI NJOBE 1ST PLAINTIFF

GERALD CHEGE MWANGI 2ND PLAINTIFF

AND

FREDRICK MUIRURI MURI DEFENDANT

JUDGMENT

1. The Plaintiffs filed the instant suit against the Defendant vide an Originating Summons dated 12th October 2021, for Orders; -
 1. That the Plaintiffs be declared to have become entitled to land parcel Kakuzi/ Kiri-miri Block 9/262, registered under *Land Registration Act*, by having had adverse possession of the said land for over twelve (12) years.
 2. That the Defendant's title to the said land be declared extinguished and or invalid, null and void and the Plaintiffs be registered as proprietors of the land parcel Kakuzi/ Kiri-miri Block 9/262.
 3. That the Defendant do execute all the necessary documents to effect the transfer of the said land and in default, the Deputy Registrar do execute the necessary documents to transfer on behalf of the Defendant.
 4. That costs of this Originating Summons be provided for by the Defendant.
2. The Plaintiffs claim for adverse possession rests on the facts set out in the Supporting Affidavit jointly sworn by the Plaintiffs. They contended that they entered into the suit property in May 1990, having been allocated the suit land by Kakuzi Limited. That the Defendant became the registered owner of



the suit land and was issued with title on 2nd February, 1990. They further contend that the Defendant obtained eviction Orders against the 1st Plaintiff, in Thika Civil Suit No. 102 of 1991, but failed to execute the said orders. That further in 1998, the Defendant took out Orders for committal against the 1st Plaintiff, but failed to execute the Orders again. It is their contention that the orders cannot be executed since they are time barred and that their occupation on the suit land has been exclusive, open and continuous since 13th October 1994, thus extinguishing the Defendant's title.

3. The Defendant did not enter appearance despite service through a Newspaper and the matter proceeded for formal proof.

Plaintiffs' Case

4. PW1- Teresia Muthoni Njobe, the 1st Plaintiff adopted her Supporting Affidavit as her evidence chief and the annexures thereto as exhibits. She added that she is 100 years and has lived on the suit property all her life and that no one has ever evicted him.
5. PW2 – Gerald Chege Mwangi, the 2nd Plaintiff adopted the contents of the Supporting Affidavit as his evidence in chief. He added that he has been in occupation of the suit land since 1990, and which occupation was with the knowledge of the Defendant.
6. The Plaintiffs thereafter filed their written submissions through the Law Firm of J. K Ngaruiya & Co. Advocates, wherein they maintained that they have acquired title over the suit land by dint of adverse possession. The Plaintiffs invited this Court to the legal principles on adverse possession as set out in Sections 7, 13 and 38 of the Limitations of Actions Act. Further reliance was placed on the case of Mate Gitabi vs Jane Kabubu Muga & Others (Unreported), where the Court highlighted the principles for grant of orders for adverse possession as being in exclusive possession of the land, open and uninterrupted possession for over 12 years.
7. It was their submissions that time started running on 26th May, 1998, when the Order for committal was issued. In the end, they submitted that their occupation and possession of the suit property is akin to the principles of adverse possession set out above. They urged this Court to find in their favour against the Defendant.
8. This Court has perused a copy of a Green Card produced before it as exhibit and it shows that the suit land was registered in the name of Defendant on 2nd February 1990, and the said land measures 0.810 Ha. The Plaintiffs produced some two receipts which as per their testimony was issued to them by Kakuzi Limited, when the suit land was allocated to them. The receipts only bear the name of the 1st Plaintiff, and it is not clear how the 2nd Plaintiff acquired possession if any. There is a copy of judgment produced as evidence before this Court for Thika CMCC No. 102 of 1991, which informs the Court that the Defendant herein had filed a suit against the 1st Plaintiff over the suit property, and the matter had proceeded by way of formal proof and Judgment entered against the 1st Plaintiff herein.
9. From the scanty proceedings of Thika CMCC No. 102 of 1991, it is evident for this Court that the Defendant herein had sought eviction orders against the 1st Plaintiff herein, whom as he told the trial Court, had gained illegal ingress into his land in June, 1990. As per the attached proceedings of 30th June 1998, it is evident that the 1st Plaintiff had been successfully evicted from the suit land by Kagethe Auctioneers, but had thereafter gained entry into the suit land. There is no proceeding to show that the trial Court rendered its ruling on 4th August 1998, in line with the proceedings of 30th June, 1998. The Plaintiffs claimed that there were contempt orders against the 1st Plaintiff, but which were never executed. That alive to that, the Plaintiff have been in occupation of the land and have become adverse to the land.



10. The Defendant failed to defend his suit, and thus the Plaintiffs suit remained uncontroverted. However, this did not take away the statutory duty of the Plaintiffs as guaranteed in Sections 107 and 108 of the Evidence Act requiring the Plaintiffs to lead evidence as to their assertions. The Court in the case of Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR pronounced itself on the strength of uncontroverted evidence and which this Court wholly agrees. The Court held:

"I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not."

11. Further, in the case of Karugi & Another V. Kabiya & 3 Others [1987] KLR 347, the Court of Appeal held:

"[T]he burdens on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant.... The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim."

12. Despite the suit being undefended, the Plaintiffs had a duty to prove their claim on a balance of probability that they acquired title of the land by dint of adverse possession. The burden of proof remains with them throughout, and as such they must adequately discharge this burden. After all, both the Plaintiffs and the Defendant have a Constitutional right to property guaranteed by the Constitution under Article 40. Having been aptly guided on the position of uncontroverted evidence, this Court will then proceed to determine the claim for adverse possession.

13. Having analyzed the pleadings and annexures thereto, the testimonies by parties and having considered the submissions filed the issue for determination is

- i. Whether the Plaintiffs have established a claim for adverse possession
- ii. Whether the orders sought should be granted
- iii. Who should bear the costs for the suit



I. Whether the Plaintiffs have established a claim for adverse possession?

14. There is no dispute that the suit land is registered under the name of the Defendant and such registration confers upon him indefeasible rights over the land. However, this right is subject to the overriding interests declared by section 28 of the Land Registration Act which provides that:

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

- (a)
- (b)
- (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;”

15. Additionally, Section 7 of the Land Act contemplates that land can be acquired by inter alia prescription and any other manner prescribed by an Act of Parliament.

16. The Plaintiffs’ claim is anchored on the limitation of actions as is evident from the pleadings. The Law on adverse possession is set out under the Limitation of Actions Act Section 7, of the Act 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.”

17. Section 13, on the other hand provides;

- (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”.

18. Section 17 extinguishes the rights of a registered owner, where there is a successful claim for adverse possession. Section 38 on the other hand provides;

- “(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.”

19. The principles to satisfy for a grant of an order of adverse possession to issue were well elaborated by the Court of Appeal in the case of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR, where it was held:-

“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 licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

20. Further, in the case of *Mbira v. Gachuhi* (2002) 1 EALR 137 the court stated as follows;

“... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption...”

21. Similarly, in *Kisumu Civil Appeal No. 27 of 2013 Samuel Kihamba v Mary Mbaisi* [2015] eKLR, the court held:

“Strictly, for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, *nec vi, nec clam, nec precario*. The additional requirement is that of *animus possidendi*, or intention to have the land”

22. Further, the Court of Appeal in the case of *Richard Wefwafwa Songoi Vs Ben Munyifwa Songoi* [2020] eKLR, observed that a person claiming adverse possession, must establish:

- (a) On what date he came into possession.
- (b) What was the nature of his possession?
- (c) Whether the fact of his possession was known to the other party.
- (d) For how long his possession has continued and
- (e) That the possession was open and undisturbed for the requisite 12 years.

23. In applying these principles, this Court has often summarized the questions it will seek to answer in order to establish whether a claim for adverse possession has been made. These questions include:

- i. How did the claimant take possession of the suit property?
- ii. When did he take possession and occupation of the suit property?
- iii. What was the nature of his possession and occupation?



iv. How long has the claimant been in possession?

24. The Plaintiffs case is that they entered into the suit property in 1990, after being allocated land by Kakuzi Limited in May, 1990. To buttress this claim, they produced some copies of receipts issued by Presidential Commission on Large Scale Farms in Makuyu- Murang'a and the other by Kakuzi East Settlement Scheme. Both receipts do not indicate the purpose for the payment and even though in the former receipt it indicates number 262, it is not certain whatever the number was. As per the extract of green card, the land was a government land before it was registered in the name of the Defendant on 2nd February, 1990. There is no indication that it was ever registered in the name of Kakuzi Limited.
25. It is thus not convincible that the land belonged to Kakuzi Limited, who thereafter allocated to the Plaintiffs. However, it is trite law that adverse possession accrues on land, and not title as was well settled in the case of Maweu Vs. Liu Ranching & Farming Cooperative Society, [1985] eKLR: as quoted in the case of Gachuma Gacheru v Maina Kabuchwa [2016] eKLR, where the Court held:
- "Adverse possession is a fact to be observed upon the land. It is not to be seen in a title, even under cap 300."
26. The Plaintiffs occupation and possession over the land must have been non-permissive, which is the reason the Defendant had filed a suit against the 1st Plaintiff in Thika CMCC No. 102 of 1991, seeking to evict the 1st Plaintiff herein for being a trespasser. Undoubtedly, their entry into the suit land if any, was without permission or license from the Defendant.
27. The Plaintiffs claimed in the present Originating Summons that they gained entry into the suit land in 1990, but their occupation was subject to a civil claim filed by the Defendant in 1991. It is safe to conclude that time stopped running at the filing of the suit. As noted by the Court in the case of Peter Kamau Njau v Emmanuel Charo Tinga [2016] eKLR, the filing of legal proceedings stops time from running. The Court held:
- "In order to stop time which has started running, it must be demonstrated that the owner of land took positive steps to assert his right by, for instance taking out legal proceedings against the person on the land or by making an effective entry into the land."
28. The Plaintiffs occupation of the suit land was interrupted and as noted above, the Plaintiffs were evicted from the suit property by Kagehe Auctioneers in realization of the judgment of the Court in Thika CMCC No. 102 of 1991. However, as pointed out earlier, the Plaintiffs thereafter regained entry into the suit land and it is not certain whether they were ever evicted again.
29. The Defendant herein, had moved the Court in Thika CMCC No. 102 of 1991, for contempt and it is not definite whether the Court ever pronounced itself or not. The Plaintiffs seem to suggest that they continued living on the suit property even after the filing of the contempt proceedings. This Court has not been served with the entire proceedings in the Thika CMCC No. 102 of 1991, it is not clear whether it is by design or default.
30. The Plaintiffs in their submissions submitted that time started running from 26th May, 1998, when the Order for committal was issued. Interestingly, as per the proceedings of the said date, no Order was issued and it's not clear what nature of application was scheduled for hearing on 30th June, 1998. On the 30th June 1998, the Court after hearing parties gave directions that it would render its Ruling on 4th June 1998, over the application dated 28th September, 1993. Whether the said ruling was ever delivered or not, is not known to this Court.



31. It is also not certain whether the matter was concluded or not. There was no evidence to suggest that the Plaintiffs are in occupation of the property. Perhaps photographs showing structures or developments thereon or even any independent witness to support their stand of occupation. Even though there could be a triviality in relying on photographs not produced by an expert, it would at least aid the Court in arriving at a conclusion of a possible occupation. Even so, there was an option for filing a report by a land valuer detailing the possibility of occupation, and this was not done. The Court in the case of *Loise Nduta Itotia v Aziza Said Hamisi* [2020] eKLR, had this to say about existence of structures and developments on a disputed property. The majority held:

"My analysis of the evidence points, to the open existence of structures and developments on the disputed property, all of which the respondent claims belonged to her. Since, the appellant did not claim ownership of the structures or provide any explanation of how the structures came into existence, it can be concluded that the structures belonged to the respondent."

32. The Court further held;

"More importantly however, even after the structures were found to be in existence, nothing in the evidence is suggestive of any steps having been taken or effort made by the appellant to take up physical occupation or to utilize the land."

33. To this end, it would be difficult to discern the nature of occupation or even tell when the Plaintiffs gained entry into the suit land. It was the duty of the Plaintiffs to lead evidence that their re-entry into the suit land continued despite the orders of Court if any. It is not enough to say that the orders of the trial Court were never executed, and as such adverse possession can issue. There was no evidence that the Plaintiffs herein dispossessed of the Defendant of the suit property.

34. As rightly held by the Court in the case of *Wambugu vs Njuguna* [1983] KLR 172, where the Court held that:

"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 of the requisite number of years."

35. It is not enough that no evidence of possession and occupation were placed before this Court, there was no evidence that the Defendant was denied use and occupation of the suit land as a result of the Plaintiffs' occupation. It is also relevant to point out that this Court was not notified on whether Plaintiffs were occupying the entire parcel of land or a specific portion of it. The need to lead evidence on this was elaborated by the Court in the case of *Mount Elgon-Beach Properties Limited v Kalume Mwanongo Mwangaro & another* [2019] eKLR where the Court held:

"...the property measures 6.00 ha. There was no evidence presented to show that the respondents are in exclusive possession of the entire property and neither was evidence presented as to what portion, if any, the respondents occupy. In *Ramco Investment Limited vs. Uni-Drive Theatre Ltd* [2018] eKLR the Court expressed that:

"The principles that guide the court when determining whether a claim for adverse possession against the respondent met the legal threshold or not required the appellant as the claimant for adverse possession to demonstrate existence



of exclusive possession and control over the disputed portion and to have dispossessed the respondent as the undisputed legal owner.”

36. Kuloba, J. (as he then was) expounded extensively on the requirement for “exclusive possession” as an essential ingredient in maintaining a claim for adverse possession in the case of Gabriel Mbui vs. Mukindia Maranya [1993] eKLR, where he stated that

“exclusive possession means that the exercise of dominion over the land must not be shared with the disseized owner, the land being in actual possession with intent to hold solely for the possessor to the exclusion of others.

The evidence in this case fell short of establishing that the respondents were in exclusive possession of the entire property during the relevant period. It is not clear which part or portion of the property, if at all, the respondents allegedly occupy.”

37. This Court cannot be guided otherwise. The burden of leading evidence rested with the Plaintiffs and the Plaintiffs have failed to demonstrate their occupation became adverse to the Defendant’s land.
38. To this end, it is the findings of this Court that the Plaintiffs failed on a balance of probabilities to establish the principles for grant of orders of ownership through Adverse Possession.

II. Whether the orders sought should be granted?

39. The legal burden of proof rested with the Plaintiffs throughout the trial. In adverse possession, the burden of proof rests with the person claiming this right. This has been reiterated by several Courts. (See the case of Raphael Kahindi Kawala v Mount Elgon Beach Properties Limited [2018] eKLR).
40. Having failed to lead evidence to the satisfaction of this Court, the Plaintiffs are not entitled to the orders sought and it follows therefore that the Originating Summons dated 12th October 2021, and filed on the 18th January 2022, be and is hereby dismissed.

III. Who should bear the costs for the suit?

41. The award of costs is a discretionary power donated to any Court. It is also trite law that costs shall follow the events and the successful party is entitled to costs. While the Defendant is the successful party, he never entered appearance and it awarding costs to him may not be in the interest of justice as he never participated in the proceedings. This Court will exercise this discretion and direct each party to bear its own costs.
42. Having carefully analysed the available evidence, the Court finds and holds that Plaintiffs herein have failed to prove their case on the required standard of balance of probabilities.
43. Consequently, the instant Originating Summons is dismissed entirely with an order that each party to bear its own costs.
44. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 27TH DAY OF JULY, 2023.

L. GACHERU

JUDGE

