



**Telkom Kenya Limited v Namunyak Conservancy Ltd & another (Environment & Land Case E008 of 2021) [2023] KEELC 19010 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19010 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT & LAND CASE E008 OF 2021**

**YM ANGIMA, J  
JULY 27, 2023**

**BETWEEN**

**TELKOM KENYA LIMITED ..... PLAINTIFF**

**AND**

**NAMUNYAK CONSERVANCY LTD ..... 1<sup>ST</sup> DEFENDANT**

**SAPACHE GROUP RANCH ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**A. The Plaintiff's Claim**

1. By a plaint dated March 17, 2021, amended on May 8, 2021 and further amended on November 28, 2022 the Plaintiff sought the following reliefs against the defendants:
  - a. A declaration that the Plaintiff is the lawful owner of the parcel known as Ol-Donyo Sabachi Radio Repeater Station situated at coordinates 0.84955, 37.56236 on Ol-Donyo Sabachi Hill Samburu.
  - b. In the alternative, an Order or declaration that the Plaintiff is entitled by way of adverse possession to all that parcel of land known as Ol Donyo Sabachi Radio Repeater Station situated at coordinates 0.84955, 37.56236 on 01 Donyo Sabachi Hill Samburu which it has occupied adverse to the claim of the Defendant peaceably and without interruption and or protest from the Defendant as aforesaid.¶
  - c. An order of Permanent injunction to restrain the 1<sup>st</sup> Defendant and/or 2<sup>nd</sup> Defendant either by themselves, their agents, servants and/or personal representative from interfering with the operations on the suit property by denying the Plaintiff and its agents/tenants access to the said parcels.



- d. An order of permanent injunction to restrain the 1<sup>st</sup> Defendant and/or the 2<sup>nd</sup> Defendant, their agents, employees, workers and or representatives jointly and severally from doing anything that will prejudice limit or restrict the operations and use of the suit property by the Plaintiff and its tenants.
  - e. A mandatory injunction directing or requiring the 1<sup>st</sup> and/or the 2<sup>nd</sup> Defendants and or their servant, agent and or employees or any person claiming under them to grant the Plaintiff unlimited and unrestricted access to the suit property.
  - f. Costs of the suit.
  - g. Any other order or relief that the Honourable Court may find fit, deserved and necessary to grant in the circumstances of the suit herein.
2. The Plaintiff pleaded that at all material times it was the occupier of all that parcel of land known as Ol Donyo Sabachi Radio Repeater Station located on a rock outcrop in Samburu County measuring approximately 0.5 acres (the disputed property). Its co-ordinates were given as 0.84955 and 37.56236. The Plaintiff pleaded that it acquired the disputed property via a vesting order published in Kenya Gazette Supplement No. 59A dated 05.11.1999 which divested the same from the defunct East Africa Posts and Telecommunications Company (EAPTC) and vested it in the Plaintiff.
  3. The Plaintiff further pleaded that the disputed property was allocated to its predecessor in title (EAPTC) way back in 1973 vide a letter of allotment dated October 8, 1973 hence it was not available for subsequent allocation to the 2<sup>nd</sup> Defendant.
  4. It was the Plaintiff's case that the disputed property was developed and it had a Base Transmitter Station house, rest house and pit latrine thereon. The Plaintiff asserted that it had leased the said property to Safaricom Limited and ATC but the Defendants had sometimes in February, 2021 denied the lessees access to the facilities on the disputed land as they were claiming ownership of the land. The Plaintiff contended that the Defendants alleged actions had exposed it to the risk of being sued by the lessees for breach of contract.
  5. In the alternative, the Plaintiff pleaded that it had acquired the disputed property on account of adverse possession since it had been in open, peaceful, exclusive and continuous occupation thereof for a period exceeding 12 years.

## **B. The Defendants' Defence**

6. The Defendants filed a joint defence dated April 30, 2021, amended on June 28, 2021 and further amended on December 9, 2021 denying the Plaintiff's claim in its entirety and putting it to strict proof thereof. The 2<sup>nd</sup> Defendant pleaded that it was the sole and absolute registered owner of the suit property which was community land. It was denied that the Plaintiff had ever occupied the disputed land and asserted that there was no other registered owner of land within Sapache Group Ranch (the Ranch).
7. The 2<sup>nd</sup> Defendant pleaded that prior to its registration the land was trust land under the Trust [Land Act](#) (repealed) and that it was being held in trust by the relevant County Council on behalf of the local community hence neither the Council nor the Government of Kenya could alienate the land by merely publishing a vesting order in the Kenya Gazette.
8. The Defendants denied the Plaintiff's allegation of interference with the disputed property and of having denied access thereto to the Plaintiff and its tenants. It was, however, denied that ATC Kenya



Limited was the Plaintiff's tenant. It was contended that the said company was actually paying rent to the 2<sup>nd</sup> Defendant as owner of the property and not the Plaintiff.

9. The 1<sup>st</sup> Defendant pleaded that it had been wrongly sued since it was not the owner of the disputed property but was merely appointed and mandated to manage and oversee the conservation of wildlife within the ranch. The 1<sup>st</sup> Defendant, therefore, contended that the Plaintiff had reasonable cause of action against it and prayed that the action against it be dismissed.
10. The Defendants disputed and denied the Plaintiff's alternative claim for adverse possession in its entirety. It was pleaded that prior to 2018, the disputed land was trust land held by the defunct County Council of Samburu hence a claim for adverse possession could not be sustained against trust land. It was further pleaded that the 2<sup>nd</sup> Defendant was first registered as proprietor of the group ranch land in 2018 hence the claim for adverse possession could not lie against it just a few years after registration. The court was consequently urged to dismiss the Plaintiff's suit with costs.

### **C. Summary of Evidence at the Trial**

#### **a. The Plaintiff's Evidence**

11. At the hearing hereof, the Plaintiff called one witness, its internal legal counsel, Anne Mwangi, to testify on its behalf as the sole witness. She adopted the contents of her witness statement filed on March 19, 2021 as her evidence in-chief and produced the 11 documents in the Plaintiff's list of documents as exhibits. Her evidence essentially mirrored the averments contained in the Plaintiff's further amended plaint.
12. The gist of the Plaintiff's evidence was that the disputed land was initially allocated to the EAPTC in 1973 and later on vested in KPTC and that upon restructuring of the latter, the property was vested in the Plaintiff in 1999 vide a vesting order published in the Kenya Gazette. It was the Plaintiff's case that it had some developments on the disputed land which had been there for several decades and that by the time the 2<sup>nd</sup> Defendant was issued with a title deed in 2018 the Plaintiff was already on the suit property. The Plaintiff also prayed for the alternative claim for adverse possession on account of its open, exclusive and continuous possession of the disputed land for over 40 years.

#### **b. The Defendants' Evidence**

13. The 1<sup>st</sup> Defendant called its Chairman, Kinyua Lengashor, as the sole witness to testify on its behalf. He adopted the contents of his witness statement dated April 30, 2021 as his evidence in-chief and produced the 1<sup>st</sup> Defendant's certificate of incorporation as an exhibit. The gist of his evidence was that the 1<sup>st</sup> Defendant was not the owner of the disputed land but was merely appointed and mandated by the 2<sup>nd</sup> Defendant to undertake wildlife conservation within the Ranch. He denied that the 1<sup>st</sup> Defendant had in any way interfered with access to the disputed land by the Plaintiff or its tenants.
14. The 2<sup>nd</sup> Defendant similarly called its Chairman, Jackson Lesiriko, to testify on its behalf as the sole witness. He adopted the contents of his witness dated April 30, 2021 as his evidence in-chief and produced the documents in the 2<sup>nd</sup> Defendant's list of documents as exhibits. He testified that the site claimed by the Plaintiff fell within the group ranch measuring 30,614 ha for which the 2<sup>nd</sup> Defendant was issued with a title deed in 2018.
15. The 2<sup>nd</sup> Defendant denied that the Plaintiff owned any portion of land within the ranch and stated that there were some telecommunication masts on the disputed land which were wrongfully installed



there. The 2<sup>nd</sup> Defendant further testified that ATC Kenya Ltd was its tenant and that it was paying rent to the ranch.

#### **D. Directions on Submissions**

16. Upon conclusion of the trial, the parties were granted timelines within which to file and exchange their respective submissions. The record shows that the Plaintiff's submissions were filed on May 18, 2023 whereas the Defendants' submissions were filed on May 7, 2023. The record further shows that the Plaintiff filed supplementary submissions on July 11, 2023 in reply to the Defendant's submissions.

#### **E. Issues for Determination**

17. It is evident from the material on record that the parties did not agree on the issues for determination in this suit. Whereas the Plaintiff filed a list of 7 issues, the Defendants filed a list of 5 issues for determination. In the event, the court shall frame the issues for determination as stipulated under Order 15 rule 2 of the Civil Procedure Rules, 2010. Under the said rule the court may frame issues from any of the following:
  - a. The allegations contained in the pleadings or in answers to interrogatories.
  - b. The allegations contained in sworn statements made by or on behalf of the parties.
  - c. The contents of documents produced by the parties.
18. The court has considered the pleadings, evidence and documents on record in this matter. The court is of the opinion that the following are the key issues which arise for determination herein:
  - a. Whether the Plaintiff has proved its ownership of the disputed portion of land.
  - b. Whether the Plaintiff has proved the alleged interference with access to the disputed land by the Defendants.
  - c. Whether the Plaintiff has proved its alternative claim for adverse possession.
  - d. Whether the Plaintiff is entitled to the relief sought in the suit.
  - e. Who shall bear costs of the suit.

#### **F. Analysis and Determination**

- a. Whether the Plaintiff has proved its ownership of the disputed portion of land

19. The court has considered the material and submissions on record on this issue. Whereas the Plaintiff submitted that it had demonstrated its ownership of the disputed land as evidenced by an allocation letter to EAPTC and a vesting order to the Plaintiff the 2<sup>nd</sup> Defendant submitted that it was the absolute registered owner of the entire 30,614 ha of the ranch and that there was no evidence of allocation of the disputed land to the Plaintiff's predecessors in title. The 2<sup>nd</sup> Defendant submitted that the letter dated October 8, 1973 from the Commissioner of Lands was not a letter of allotment but merely an advisory letter on the process of acquisition of the desired sites.

20. The Plaintiff relied upon the letter dated October 8, 1973 and other correspondence between its predecessors and the commissioners as evidence of allocation of the disputed land. The said letter of October 8, 1973 from the Commissioner of Lands to the defunct EAPTC stated as follows:

Department of Lands,



O. Box 30089, Nairobi  
8<sup>th</sup> October, 1973,  
The Regional Director (Kenya),  
E.A. Posts and Telecommunications,  
O. Box 30301,  
Nairobi.

Sites For Pan African Microwave Stations

I refer to your letter dated September 6, 1973 and wish to inform you that the necessary assistance will be given by this Department to your Corporation in acquiring the required sites.

For the purposes of identifying these sites, I would require plans based on survey plans with scales for all the new sites. The photo copies of the plans you sent to me are not helpful for this purpose. For the existing sites, it appears that no action is required.

I would like to mention that where private land is involved, acquisition by negotiations is preferable as compulsory acquisition takes a long time to complete.

Signed

(F.N. Njogu Mathenge)

for: Commissioner Of Lands

FNNM/BWN:

21. The court is unable to agree with the Plaintiff that the said letter either taken alone or in conjunction with other correspondence from the Commissioner of Lands amounted to an allocation of the disputed land to EAPTC. The plain language of the letter simply indicates that the commissioner was requesting for plans based on survey plans for the purpose of identifying the required sites. He also advised on the process of acquisition where the affected land was private at. It is noteworthy, however, that the disputed rock outcrop was not private land at the material time. The material on record shows that it was trust land.
22. The Plaintiff's documents and letters subsequent to the letter of October 8, 1973 do not demonstrate that there was any allocation of the disputed land to EAPTC or its successors in title. For instance, there is a letter dated October 2, 1974 from the Director of Surveys to the Regional Director of EAPTC which stated, inter alia, that:

“ ...

From your letters, what I think you require are setting apart surveys so that sites can be granted to the corporation. On examining the site surveys carried out by your Mr. Buya, I find them good enough for setting apart – purposes and gazettement of the boundaries of the sites. When the microwave stations are built it will be enough to measure bearings and distances from the station tower to the corners of the plots. This will enable re-location of the plots from the towers in case of doubt.

To beacon by the sites will require accurate survey based on survey control which is not available in the area. Such surveys will also be very difficult and expensive as these stations



are situated on hill tops and would require the services of a Licensed Land Surveyor as we are heavily committed with Government Surveys.”

23. There is no evidence on record to demonstrate that the process of beaconing and setting apart of the required sites was ever undertaken by the concerned actors. The Director of Surveys must have been alive to the fact that the required land was trust land and that the setting apart process was required to be undertaken under the provisions of the Trust Land Act which was then in force and the former Constitution of Kenya.
24. Section 13 of the Trust Land Act (now repealed) provided elaborate procedures for setting apart of trust land which was required by any public body or authority for public purposes. There is no evidence on record to show that due process was followed and that any compensation was paid to the affected residents as required under Sections 117 and 118 of the former Constitution of Kenya. The court is thus of the opinion that the Commissioner of Lands could not lawfully bypass the provisions of the Trust Land Act and the Constitution then in force and issue a letter of allotment to EAPTC or its successors in title.
25. The court has considered the vesting order published on November 5, 1999 transferring and vesting various assets to the Plaintiff upon re-organization of Kenya Posts and Telecommunications Corporation (KPTC) under the Kenya Communications Act, 1998. The said vesting order did not, and could not, create any new rights which were not existing at the time of its publication. Serial No. 53 of the schedule to the vesting order indicates that Ol donyo Sapachi Radio Repeater station was one of the assets which was transferred from KPTC to the Plaintiff. The order presupposed that KPTC was the owner of the property at the time of re-structuring. In the absence of evidence of allocation of the disputed land to either EAPTC or KPTC then the vesting order of 1999 could not validity transfer and vest the disputed land upon the Plaintiff.
26. There is, however, no doubt from the material on record that Plaintiff and its predecessors have had possession, occupation and use of the disputed portion of 0.5 acres from the 1970s. There is also no doubt that the Plaintiff or its predecessors developed the land over the years and established a station house, rest house and other facilities thereon. It is also not in doubt that by the time the 2<sup>nd</sup> Defendant was issued with a title deed in 2018 the Plaintiff was in possession of the disputed land. Such occupation could only have created an overriding interest over the land but not ownership rights.
27. Although the 2<sup>nd</sup> Defendant is the current registered proprietor of the suit property and is entitled to enjoy the bundle of rights stipulated under Section 25 of the Land Registration Act, the court is of the opinion that in the circumstances of this case, the Plaintiff has an overriding interest over the portion of 0.5 acres which was in its occupation at the time the 2<sup>nd</sup> Defendant was registered as proprietor. The court is of the view that at the time the 2<sup>nd</sup> Defendant was registered as proprietor on 02.16.2018, the Plaintiff had already acquired the rights of a person in actual possession which are recognized as a constructive trust under Section 28(1)(b) of the Land Registration Act, 2012. The material on record shows that the disputed portion was at all material times earmarked for development of telecommunications infrastructure but the necessary legal steps of setting apart and allocation were not finalized. There is no doubt from the material on record that the 2<sup>nd</sup> Defendant was aware of the Plaintiff's possession at the time of title acquisition since the disputed land is developed with visible facilities. In the circumstances, the court finds and holds that the 2<sup>nd</sup> Defendant's title is subject to the Plaintiff's overriding interest.

b. Whether the Plaintiff has proved the alleged interference with access to the disputed land by the Defendants



28. The court has considered the evidence and submissions on record on this issue. Whereas the Plaintiff contended that the Defendants had wrongfully interfered with their tenants' access to the disputed land, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants denied any such interference at the trial. The 1<sup>st</sup> Defendant, in particular, asserted that it was solely concerned with wildlife conservation with the blessings of the 2<sup>nd</sup> Defendant as owner of the land hence it had nothing to do with the Plaintiff's activities on the disputed portion of 0.5 acres.
29. The court has noted that the Plaintiff did not call any witness from the 2 tenants whose access to the disputed portion of land was allegedly interfered with to testify at the trial. The Plaintiff did not even produce copies of any letters of complaint on the issue from the said tenants. As matters stand now, it is simply a matter of the Plaintiffs' word against that of the Defendants. The court is thus not satisfied that the Plaintiff has discharged its burden of proving on a balance of probabilities that their access to the disputed land was interfered with by either the 1<sup>st</sup> Defendant or 2<sup>nd</sup> Defendant or both.

c. Whether the Plaintiff has proved its alternative claim for adverse possession

30. The court has considered the material and evidence on record on its issue. The Plaintiff based its claim for adverse possession on the fact that it had been in occupation for over 40 years and that it had developed the said portion of land and installed telecommunication facilities thereon. The Plaintiff relied upon the case of *Kweyu vs- Omutu* [1990] KLR 709 in support of its claim for adverse possession.
31. The Defendants submitted that the Plaintiff's claim for adverse possession was untenable and should not succeed for at least 3 reasons. First, it was contended that the claim had been filed by way of plaint instead of an originating summons. Second, that the Plaintiff was a state corporation which was 100% owned by the government of Kenya hence adverse possession was not available to it. Third, that the disputed land was at all material times prior to its registration in 2018 trust land or community land hence could not be the subject of adverse possession.
32. Although the procedural aspect of seeking adverse possession is not well settled in Kenya, the court is unable to agree with the Defendants' contention that the claim is fatally defective because it was initiated by a plaint instead of an originating summons. The court is of the opinion that it would be contrary to the overriding objective of Sections 1A and 1B of the *Civil Procedure Act* if the court were to insist that a party who files a suit for recovery of land ought to file a separate originating summons if he has an alternative claim for adverse possession of the same property. The court ought to discourage multiplicity of suits if the claim in the subsequent suit can be conveniently handled in the previous suit.
33. The court is also aware of decided cases where the Court of Appeal has declined to nullify proceedings where such claims for adverse possession were commenced by plaint or counterclaim. For instance, in the case of *Gulam Miriam Noordin -vs- Julius Charo Karisa* [2015] eKLR the plea of adverse possession which was raised in the defence was upheld by the Court of Appeal.
34. The court is not aware of any authority to the effect that government owned companies, or companies in which the government is a majority shareholder are not eligible to seek adverse possession of landed property. The Defendants did not cite any statutory or precedent authority for that proposition. The court is also unable to find any evidence on record to demonstrate that the Plaintiff is 100% owned by the government of Kenya. Be that as it may, the court takes the view that the *Limitation of Actions Act* applies to the government of Kenya as it applies to private entities.



35. Section 43 of the *Limitation of Actions Act* stipulates that:

“Subject to:-

- a. Section 33 of the Kenya Regiment (Territorial Force) Act (Cap. 200);
- b. Section 136 of the Government Lands Act (Cap. 280) (as amended by this Act); and
- c. Sections 41 and 42 of this Act, this Act applies to proceedings by and against the Government as it applies to proceedings between private persons.”

this Act applies to proceedings by and against the government as it applies to proceedings between private persons.”

36. The court has considered the third aspect of the Defendants’ objection to the claim for adverse possession. The court is satisfied on the basis of the material on record that the disputed land falls within what was previously trust land. The material on record shows that the land register was first opened on February 16, 2018 when the land was registered in the name of the 2<sup>nd</sup> Defendant.

37. The court takes the view that time for purposes of a claim for adverse possession can only run once the land is registered in the name of a person against whom time can run under the *Limitation of Actions Act*. Time could not run while the suit land was unregistered. Moreover, time could not run with respect to trust land. The court is thus of the opinion that the earliest period from which time could start running was February 16, 2018. So, by the time the alternative claim for adverse possession was instituted in 2022 barely 4 years had lapsed since the registration of the land. In the premises, the court is not satisfied that the alternative claim for adverse possession is available the Plaintiff hence it does not require further consideration.

38. The court has noted that in its written submissions the Plaintiff has challenged the validity of the 2<sup>nd</sup> Defendants’ title to the suit property. It was submitted that the 2<sup>nd</sup> Defendant did not adduce any evidence to demonstrate that the title was obtained through legal means. The court has noted that in its further amended plaint, the Plaintiff did not plead any particulars of fraud, illegality or corrupt practice in the 2<sup>nd</sup> Defendant’s acquisition of its title. The Plaintiff only pleaded the alleged allotment and setting aside of the disputed land for its purpose. The court has already found and held that there is no evidence on record of either the allocation or the setting apart. In the circumstances, the 2<sup>nd</sup> Defendant was not obligated to prove that its acquisition of the suit property was not vitiated by fraud, illegality, procedural impropriety or corrupt practice.

a. Whether the Plaintiff is entitled to the reliefs sought in the suit

39. The court has already found that the Plaintiff has failed to demonstrate its ownership of the disputed land. The court has also found that the Plaintiff has failed to demonstrate the alleged interference with access to the disputed land. The court has further found that the Plaintiff has failed to demonstrate its alternative claim for adverse possession. In the premises, it would follow that the Plaintiff is not entitled to the reliefs sought in the suit save for a declaration that it has an overriding interest over the developed portion 0.5 acres of which it was in occupation at the time of the 2<sup>nd</sup> Defendant’s registration as proprietor. The Plaintiff shall also be entitled to access the said portion of land through the 2<sup>nd</sup> Defendant’s land.

b. Who shall bear costs of the suit



40. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court is of the opinion that given the peculiar circumstances of this case, each party should bear its own costs of the suit.

**G. Conclusion and Disposal Orders**

41. The upshot of the foregoing is that the court finds and holds that the Plaintiff has failed to prove its pleaded case on a balance of probabilities. Consequently, the court makes the following orders for disposal of the suit:

- a. A declaration be and is hereby made that the Plaintiff has an overriding interest over the portion 0.5 acres of the disputed land located at coordinates 0.84955, 37.56236 in Samburu County. Consequently, the Plaintiff has a right of access to the said portion through the 2<sup>nd</sup> Defendant’s land.
- b. The rest of the prayers in the suit are hereby dismissed.
- c. Each party shall bear its own costs of the suit.

It is so decided.

**Judgment dated and signed at Nyahururu this 27<sup>th</sup> day of July, 2023 and delivered** via Microsoft Teams platform.

In the presence of:

Mr. Muriithi holding brief for Mr. Kisilah for the Plaintiff

N/A for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

C/A - Carol

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**Y. M. ANGIMA**

**JUDGE**

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