



**Meringa v Mugaa (Sued as the Legal Representative of Mugaa Mugambi - Deceased)
(Environment & Land Case 36 of 2019) [2023] KEELC 19096 (KLR) (26 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19096 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 36 OF 2019**

CK NZILI, J

JULY 26, 2023

BETWEEN

WILSON KAJUKI MERINGA PLAINTIFF

AND

**MARTIN GITONGA MUGAA (SUED AS THE LEGAL REPRESENTATIVE OF
MUGAA MUGAMBI – DECEASED) DEFENDANT**

JUDGMENT

1. The plaintiff approached this court by an originating summons dated July 16, 2019 seeking to be declared entitled to the defendant's LR No. Kiegoi/Kinyanka/813 under adverse possession. By an affidavit by Wilson Kajuki M'Eringa sworn on 16.7.2019, the plaintiff averred that he bought suitland from the late Mugaa Mugambi in 1978 and took a vacant possession. The plaintiff further averred that the deceased passed on before a transfer was effected. He attached copies of the official search and grant of letters of administration ad litem as annexures marked WKM "1 (a) & (b)". He averred that upon taking vacant possession, he developed the land by planting assorted plants, among them tea plants, and became a registered tea grower with the Kiegoi Tea Factory growers Number K12 – 087 Auki Tea Buying Centre, since 1983 as per the demand letter annexed as WKM "2". The plaintiff averred that he fenced off the land whose boundaries were marked and occupied exclusively, openly, with no objection from the defendant, until December 2018, when he received a demand letter marked as WKM "2" and proceeded to the Njuri Ncheke panel of elders who established that the land was his as per its proceedings marked as WKM "3".
2. Lastly, the plaintiff averred that the defendant filed Maua Chief Magistrates ELC Case No. 95 of 2019 and obtained exparte orders without disclosing material facts. A list of documents, a case summary, and an application dated July 16, 2019, for interim orders of injunction and inhibition accompanied the summons, per the paginated bundle dated 10.6.2021.



3. The defendant opposed the originating summons through a replying affidavit sworn by Martin Gitonga Mugaa on September 24, 2019. The defendant averred that his late father, Mugaa Mugambi, became a registered owner of the suit land on March 10, 1980 as per the official search certificate attached as annexure MGM – “01”. He averred that his father passed on on April 10, 2005 while he was a minor and that after attaining the age of majority, he took over vacant possession of the land, uprooted overgrown tea bushes, and planted various trees. The defendant stated that he has exclusive control of his land as per photographs marked as annexure MGM – “02.” He denied the alleged occupation or developments by the plaintiff on the land for over 12 years. The defendant specifically denied his late father’s allegedly sold the land to the plaintiff since no sale agreement or witnesses to the same or any other evidence of occupation or possession was before the court.
4. Further, the defendant termed the claim by the plaintiff as farfetched, an afterthought, and unsustainable, given that between the years 1976 - 1980 and then up to 2005, no lawsuit was raised during the lifetime of his late father. The defendant averred that in March 2018, the plaintiff, in the company of some goons, stormed the land and ordered him to cease any acts on the land, alleging that the land was acquired from the deceased. The defendant averred that he made a report to the area assistant chief, who summoned the two parties for a meeting on 17.3.2018, but the plaintiff was unable to produce any sale agreement and kept away from the land as per the assistant chief’s letter dated March 17, 2018 and marked as MGM – “03”.
5. In addition, the defendant averred that he heeded to the assistant chief’s word and filed Maua CMCC ELC No. 5 of 2019 as per pleadings marked as MGM – 04, where he obtained orders to maintain the status quo that was yet to be appealed against, reviewed or varied. He annexed the same as an annexure marked MGM – “05”. The defendant denied any alleged harassment or findings by Njuri Ncheke in favor of the plaintiff. The replying affidavit was accompanied by a list of witnesses and documents dated January 25, 2023.
6. Following an application dated July 17, 2019, by a ruling dated January 22, 2020, the court granted temporary orders of injunction and prohibition and stayed any interim injunction orders issued in the Maua Chief Magistrate’s Court ELC No. 95 of 2019. Similarly, it transferred the Maua file for consolidation with this suit.
7. In the consolidated suit, the defendant as the plaintiff sued the plaintiff as the defendant by a plaint dated May 27, 2019, averring that he was the only son of the registered owner of the suit land, which the defendant had trespassed into in 2018 – 2019, without any color of right or justification. He prayed for a permanent injunction against the defendant, his agents, servants, or employees’ quiet occupation and possession of the suit land. The plaint was accompanied by a list of witness statements and a list of documents dated May 27, 2019. No defense was filed by the defendant to the counterclaim, despite the entry of appearance dated June 26, 2019, by the law firm of Ngunjiri Michael and Co. Advocates. Nevertheless, the trial court declined to allow an interlocutory application dated May 27, 2019, based on the replying affidavit dated December 18, 2018 to the effect that the plaintiff in the counterclaim was not in possession of the suit land.
8. At the trial, Wilson Kajuki M’Eringa testified as PW 1. He adopted his supporting affidavit and a witness statement sworn and dated July 16, 2019 as P. Exh No. (1), copy of the demand letter dated December 18, 2018 as P. Exh No. (2), certificate of official search for LR No. Kiegoi/Kinyanka/813 as P. Exh No. (3) and proceedings at Njuri Ncheke dated April 16, 2019 as P. Exh No. (4). His evidence was that he entered the suit land in 1976 and had never been removed or given the notice to vacate the land by the deceased until he passed on in 2005.



9. In cross-examination, PW 1 told the court that he only moved out of the land in 2019 and that, currently, it was the defendant utilizing the land. On the sale agreement, PW 1 told the court that it was an oral agreement with several witnesses, including neighbors who knew about it. PW 1 also clarified that the dispute was handled by the area assistant chief and the chief per the letter dated March 17, 2018. He denied informing the chief that he would vacate the land. However, he said he only left the land in October 2019 for the law to take its course; otherwise, the chief had no powers to settle land disputes.
10. Ezekiel Ithanga Imunya testified as PW 2. The area assistant chief of the Ithima Sublocation PW 2 told the court that he was the author of the letter dated March 17, 2018, directing the parties to move to court for the dispute to be legally resolved. He produced MFi P No. 3 as P. Exh No. (3). He confirmed that the plaintiff had used the land since 1975, though recorded under the name of the late Mugaa Mugambi. PW 2 confirmed that the tea and some assorted plants on the land belonged to the plaintiff.
11. Cross-examined by the defendant's counsel, PW 2 told the court that none of the parties availed any sale agreement or ownership document when he handled the land dispute at his office. He testified that the plaintiff voluntarily offered to vacate the land pending determination in either a court or Njuri Ncheke's panel of elders, as he proposed to the parties. PW 2 said that he was unaware of any court order which had directed the plaintiff to stay away from the land; otherwise, to the best of his knowledge, the plaintiff had opted to keep away from the land to avoid a physical confrontation. PW 2 also told the court that he had no mandate to determine land ownership and that he was confident that he merely referred the parties to the relevant avenues for dispute resolution.
12. Martin Gitonga Mugaa, the defendant, testified as DW 1. He adopted his replying affidavit dated September 24, 2019 as his evidence in chief and produced a copy of the search for the suit land as D. Exh No. (1), photographs showing the land's development as D. Exh No. (2), (a) & (b), chief's letter dated March 17, 2019 as D. Exh No. (3), pleadings in Maua law courts as D. Exh No. (4), an order made at the lower court as D. Exh No. (5), payslips from Kenya Tea Development Authority (KTDA) as D. Exh No. (6) and a Bank Statement as D. Exh No. (7). His evidence was that he was the one who had been utilizing the suit land.
13. Cross-examined by the plaintiff's counsel, DW 1 told the court that he was born in 1985, whereas his father passed on in 2005. He admitted issuing a demand letter dated December 18, 2018 through his lawyers, calling upon the plaintiff to vacate the suit land, which indicated that the occupation had been for over 20 years, some of which his late father was still alive. He believed that the disputes over the land at the time were on though he had no record.
14. DW 1 told the court he was not given a fair hearing before the Njuri Ncheke panel of elders. He admitted that by the time he was born, the plaintiff was still in occupation of the land, though he had no permanent structures thereon. DW 1 clarified that the KTDA payslips were for 2022 after the plaintiff vacated the land in 2018. He denied using force to regain entry to the land since he was unaware of any order to the contrary issued by the court. His evidence was that the Maua Court ruled in his favor, which was never appealed against by the plaintiff. The defendant said the plaintiff voluntarily moved out of the land in 2018. DW 1 noted that this was the only land his father owned and was entitled to own, as a matter of right.
15. With leave of court, parties were directed to file written submissions by 5.6.2023. The plaintiff submitted that he had satisfied the ingredients of adverse possession as per the principles elucidated in several cases, including *Mtana Lewa vs. Kahindi Ngala Mwangandi* (2015) eKLR and Sir Fredrick Pollock's theory of possession since the entry has been open, continuous, hostile, exclusive, notorious and for a period over 20 years which was acknowledged in the demand letter. The plaintiff submitted



- that the defendant had not shaken the evidence produced as the occupation was not challenged by the defendant's late father during his lifetime up to 2005 and between 2005 and 2018 by the defendant himself. The plaintiff submitted that there was evidence of control or utilization to the exclusion of the defendant between 1976 & 2018, which the defendant has not rebutted.
16. Further, the plaintiff submitted that the occupation was actual, going by the tea bushes, identified by the Njuri Ncheke elders and the area chief. As to whether there was an interruption of occupation, the plaintiff submitted that the demand letter could not have interrupted occupation. Reliance was placed on *Isaac Cypriano Shingore v Kipketer Togom* (2016) eKLR, which cited with approval *Mount Carmel Investment Ltd v Peter Thurlow Ltd and another* (1988) 3 ALL ER 12.
 17. On the sale of land, the plaintiff submitted that the *Law of Contract Act* in 1976 did not require a written sale agreement, and as held in *Felicity Mutete Mutula vs. James Ndambuki* (2020) eKLR as in this case, the suit was not on enforcement of a sale agreement, but adverse possession where the defendant, the area chief and the Njuri Ncheke panel of elders agreed as to who was in occupation of the land. Reliance was placed on *Peter Mbiru Michuki vs. Samuel Mugo Michuki* (2014) eKLR, on the proposition that permissive entry out of a sale agreement becomes adverse from the final date of payments of the purchase price.
 18. On whether the plaintiff was entitled to be registered as the new owner of the land, the plaintiff drawing comfort from section 7 of the *Land Act*, article 40 of the *Constitution*, sections 24 & 25 of the *Land Registration Act*, urged the court to find that the registration in favor of the defendants deceased father was subject to his overriding rights by operation of law. Therefore, the plaintiff urged for a vesting order to be issued in his favor together with costs as per Kuloba J, *Judicial Hints on Civil Procedure* 2nd Ed Nairobi Law Africa, Vol 1 page 94 and as held in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* (2014) eKLR.
 19. The issue flowing from the pleading and evidence for this court's determination is whether the plaintiff is entitled to adverse possession and costs of this suit. The constitutional and legal underpinning of adverse possession is discussed in the case of *Mtana Lewa* (*supra*). The court after reviewing majority of past decisions observed that the doctrine of adverse possession was recognized in most civil and common law jurisdictions as the public policy value of extinguishing the registered proprietor's title to land.
 20. The court said that a party seeking adverse possession has to prove that the possession has not been through force or in secrecy, was uninterrupted, without authority or permission of the true owner for 12 years, and was with the animus possidendi to own the land.
 21. In the case of *Kimani Ruchine v Swift Rutherford & Co.* (1980) KLR, the court observed that the plaintiff had to show that the true owner knew or had means of knowing actual or constructive possession or occupation. In *Wachuka Wachira v Mwangi Wachiru* (2003) eKLR, the court observed that the proof of adverse possession includes the fencing and or cultivation on the suit land. In *Isaac Cyprian Shingore v Kipterer Togom* (*supra*), the court cited with approval *Githu v Ndeete* (1984) KLR 776, that assertion of rights occurs when the true owner takes legal proceedings or makes an effective entry into the land and that the giving of a notice to quit could not amount to an effective assertion of right for purposes of stopping time from running under adverse possession.
 22. On permissive entry out of an oral agreement of land, the court in *Felicity Mutete vs. James Ndambuki* (*supra*) cited with approval *Peter Mbiru Michuki vs. Samuel Mugo* (2014) eKLR, that before the enactment of section 3 (3) of the *Law of Contract Act* (2003), all that was required was part performance, being in possession or some other act in furtherance of the contract.



23. Regarding when time starts to run out of a permissive entry, the court in *Public Trustee v Wanduru Ndegwa* (1984) eKLR observed that it would begin to run on payment of the last installment. In *Mugune v Mugune* (Civil Appeal) Application 36 of 2020/2023 KECA 75 (KLR) 3rd February (2023) (Ruling), the court cited with approval *Samuel Miki Waweru v Jane Njeri Richu* (2007) eKLR, that a claim on adverse possession could not succeed if the occupation had been permitted by the true owner out of an agreement for sale or lease.
24. In *Songoi vs. Songoi* (2020) eKLR, the court observed that adverse possession must start with wrongful dispossession of the rightful owner. The court cited with approval *Alfred Welimo v Mulaa Samba Barasa* C A No 186 of 2011, that the abandonment of possession and stoppage to use of the land by the true owner could not establish adverse possession unless coupled with the claimant taking possession of the land to possess and an assertion of rights inconsistent with those of a true owner. The court said that the physical part of exclusive possession and the animus possidendi to hold as the owner were essential factors in a claim for adverse possession.
25. Further, the court cited with approval *Wambugu v Njuguna* (1983) eKLR 173 that the proper way by a court in assessing a proof of adverse possession was whether or not the title holder had been dispossessed or had discontinued his possession for the 12 years and not whether or not the claimant had proved to have been in possession for the 12 years. The court set out some of the parameters a claimant in adverse possession must establish as:-
- i. What date he came into possession?
 - ii. What was the nature of his possession?
 - iii. Whether the fact of his possession was known to the other party.
 - iv. For how long had his possession continued and
 - v. That the possession was open and undisturbed for the required 12 years.
26. As to an effective entry or legal proceedings to stop the time from running, in *Losie Nduta Itotia v Aziza Said Hamisi* (2020) eKLR, the court cited with approval *Joseph Gachumu Kiritu v Lawrence Munyambu Kabura* Civil App No 20 of 1993, that the true owner has to make a peaceful or effective entry or sue for the recovery of the land. The court observed that filing a suit after the expiry of 12 years had come after the title was extinguished under section 17 of the *Limitation of Actions Act*.
27. So, applying the foregoing guiding principles and binding caselaw to the instant suit, the plaintiff pleaded that entry into the suit land occurred in 1976. He stated that the occupation of over 12 years was known and admitted by the defendant in P. Exh No. 2. Further, he said that by the time the defendant's late father passed on April 10, 2005 as per P. Exh No. (1), his occupation was known and uninterrupted between 1976 – 2005, up to the issuance of P. Exh No. (3) in 1980. Further, the plaintiff averred that his occupation of the land was established by the Njuri Ncheke panel of elders as per P. Exh No. (4). The plaintiff said that by the time the defendant filed Maua ELC No. 95 of 2019, it was known that he was in occupation and therefore his adverse rights had matured; with no interruption.
28. On the other hand, in his replying affidavit and testimony, the defendant agreed that his late father became the registered owner of the land on March 10, 1980 as per D. Exh No. (1) and died on 10.4.2005, while he was a minor and that he only took possession of the land when he became an adult as per photographs produced as D. Exh No. (2). The photographs were not dated, nor did the defendant state when he became an adult. Though the defendant had invited the court to make a scene visit, no formal application or a scene visit report was produced showing that the defendant had



- effected any developments on the suit land. As to the admission of occupation in the demand letter, the defendant refuted this and stated in paragraph 9 of his replying affidavit that his lawyers had not read to him the contents for any verification.
29. On the aspect of the sale, in paragraphs 10, 12, 13, 14 & 15 of the replying affidavit, the defendant refuted it for lack of any supporting documents and wondered why there was no transfer request made before his father passed on.
 30. On the alleged re-entry to the land in 2018, in paragraphs 20-22 of the replying affidavit, the defendant averred that he had obtained injunctive orders from the Maua Law Court, which the plaintiff had not appealed against.
 31. The Maua Law Courts file was transferred and consolidated with this suit following a ruling made on January 22, 2020. In the ruling, the court established that the plaintiff was on the land as of December 2018, going by the chief's letter dated February 17, 2018, attached to the defendant's replying affidavit. The court proceeded to stay any orders previously made by the lower court at Maua.
 32. In the case file from Maua Law Courts, the claim was for a permanent injunction to stop the plaintiff from entering, occupying, plucking tea, cultivating, building wasting, or interfering with LR No. Kiegoi/Kinyanka/813. The plaint was silent on when the defendant had allegedly entered the land and the nature of his developments therein. He termed the entry by the plaintiff herein to have occurred between 2018 and 2019. The averment was entirely in conflict with what the defendant testified before this court, that the plaintiff was on the land by the time he was born in 1985 and up to when his late father passed on in 2005.
 33. As part of his list of documents in the Maua case, the chief's letters dated March 17, 2018 and April 2, 2019. The 1st letter was clear that the defendant was seeking the chief's intervention for the plaintiff to vacate his land. This letter was also consistent with what the defendant later on put in the demand letter.
 34. In the supporting affidavit by the defendant sworn on May 27, 2019 to the application at Maua Law Courts for interim orders dated May 27, 2019, he averred in paragraph 4 thereof that he allegedly entered into the land after the age of majority to take care of a tea plantation. The trial court only issued an order to maintain the status quo on May 31, 2019 and not injunctive orders. The plaintiff in this instant filed a replying affidavit sworn on July 6, 2019 and raised a defense of adverse possession claiming to have been on the land for over 43 years. He attached the defendant's demand letter and the Njuri Ncheke proceedings as annexures marked WK "1" & WK "2". The trial court on July 17, 2019, confirmed that the defendant herein had lived on his uncle's land since 2005, lacked a coffee growers' number, and used someone else number to pluck the tea plants.
 35. The trial court declined to allow the application dated May 27, 2019 because of the contents of the plaintiff's affidavit in reply dated December 18, 2018. The trial court established that the defendant was not on the land at the time. Therefore, for the defendant to testify before this court and claim that he entered the suit land in 2018 or 2019 after a court order was misleading and to say the least unsupported by any evidence. To the contrary, the defendant in this suit sought by an application dated February 18, 2020 for a stay of execution of the ruling delivered on January 22, 2020. The court declined to review its injunctive and inhibition orders since it had established the plaintiff as the one on the land. The defendant subsequently filed a notice of appeal dated February 11, 2021. The defendant had also previously appealed against the ruling made on January 22, 2020 by a notice of appeal dated January 23, 2020. While aware of all these facts, it cannot be true that the defendant has been in occupation of the land out of a court order issued in Maua Law Courts.



36. Therefore, the court finds no interruption of the plaintiff's occupation or possession of the land since entry in 1976 to the time this suit was filed. The demand notice and the lower court case in Maua Law Courts did not in any way interrupt time from running. In his testimony before this court, the defendant, while aware of the consolidation of his suit, failed to advance his claim. The plaint dated May 27, 2019 remains mere statements of facts which has not been substantiated. The same is dismissed with costs.
37. As to whether the plaintiff has proved acts on the suit land which are inconsistent with the true owner's use of the soil, he testified that entry occurred in 1976 and has since been planting and tending tea and other assorted trees on the land. The area chief and PW 2 corroborated this evidence. DW 1 also acknowledged in cross-examination that the plaintiff was on the land by the time he was born in 1985 until his late father obtained a title deed in 1980 and passed on in 2005. DW 1 acknowledged the demand letter which was written to the plaintiff.
38. Further, DW 1 admitted that his Kenya Tea Development Authority receipts and bank slips had been recently issued. In his evidence before the court, the defendant failed to produce rival documents that his late father had planted the tea trees or was a registered tea grower for the suit land during his lifetime. The plaintiff's testimony was clear and corroborated that he had exclusively possessed and discontinued the initial owner from the land and the subsequent owner upon the death of the initial owner. No evidence was tendered before the court that the defendant had ever made an effective entry into the land, ordered the plaintiff to vacate it or sought and obtained an eviction order against the plaintiff. Similarly, no evidence was tendered that the defendant wrote to the tea factory and or made a complaint with the police or any enforceable detainer of his land by the plaintiff if at all the plaintiff had used force to enter, remain, develop, occupy, and utilize the land in a manner inconsistent with the rights of the true owner(s).
39. Therefore, my finding is that the plaintiff has possessed and occupied the suit land for since 1976 with the full knowledge of the initial owner and the subsequent owner. The upshot is that I find the plaintiff entitled to the reliefs sought. The defendant shall execute the transfer forms in favor of the plaintiff within two months from the date hereof. In default, the same shall be completed by the Deputy Registrar of this court. Costs to the plaintiff.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 26TH DAY OF JULY 2023

HON. CK NZILI

ELC JUDGE

