



Maniga (through his attorney in fact Maina Maniga) v Ochoki (Environment & Land Case 307 of 2018) [2023] KEELC 20444 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20444 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 307 OF 2018
A OMBWAYO, J
SEPTEMBER 29, 2023**

BETWEEN

**NYANGENYA ISABOKE MANIGA (THROUGH HIS ATTORNEY IN FACT
MAINA MANIGA PLAINTIFF**

AND

ANDREW M ISOE OCHOKI DEFENDANT

JUDGMENT

1. Nyangenyia Isaboke Maninga (through his attorney in fact Maina Maniga (hereinafter referred to as the plaintiff) has come to court by way of originating summons praying that a declaration be made by the Honorable Court that the plaintiff/applicant has acquired leasehold interest in the portion he occupies, being one and half (1.5) acres, to be excised from the parcel of land known as LR No 4730/114, IR N 57554/1 (hereinafter referred to as the suit property) in Lanet- Nakuru County by virtue of adverse possession thereof for a period of more than 12 years.
2. Moreover, he seeks a declaration that the title of the said Dr Andrew Mangate Isoe Ochoki (hereinafter referred to as the defendant) to the leasehold interest in the subject land, being one and half (1.5) acres, to be excised from the parcel of land known as LR No 4730/114, IR No 57554/1 in Lanet- Nakuru County, because it has been extinguished by the plaintiff's adverse possession thereof for a period of more than 12 years in terms of Sections 17 and 38 of the *Limitation of Actions Act*.
3. Futhermore, he prays for an order requiring and directing the Land Registrar Nakuru to register the plaintiff Nyangenyia Isaboke Maniga as the lessee of the subject land, being one and half (1.5) acres, to be excised from the parcel of land known as LR No 4730/114, IR No 57554/1 in Lanet-Nakuru County, in place of Dr Andrew Mangate Isoe Ochoki and in place of any other person succeeding the defendant. He prays that the costs be in the cause.



4. The suit is based on grounds that the plaintiff is the owner, through adverse possession, of a portion of suit land being one and half (1.5) acres, to be excised from the suit land. The plaintiff has been in occupation of an excised portion of the suit land, being one and half (1.5) acres, undisturbed for over 12 years. The plaintiff's claim for adverse possession arises from the fact that he has been in possession of the suit land form March 24, 2004.
5. The plaintiff had a sale agreement with the Defendant for in respect of a portion of the suit land on March 24, 2004. However, the sale collapsed as the parties failed to get the consent of the Land Control Board within 6 months of the transaction thus from September 24, 2004, the plaintiff became an adverse possessor of the said portion of the suit land.
6. The plaintiff's possession and user of the suit land has been quiet, in the open, and uninterrupted for over 12 years. In the supporting affidavit the plaintiff reiterates the grounds of the originating summons.
7. The defendant filed a replying affidavit stating that he is the proprietor of the suit parcel of land and that the plaintiff has no colour of right to claim the same. He contends that he entered into agreement with the plaintiff for sale of the land at a consideration of Kshs1,500,000. The land has a loan with Agricultural Finance Corporation which the defendant was to clear and transfer the suit land to the plaintiff. After execution of the agreement, he gave the plaintiff vacant possession but the plaintiff did not take actual possession. He has issues with the Agricultural Finance Corporation as he has not cleared the loan and he had issues with the bank. He states that the plaintiff has never been in actual occupation of the land as the same has never been excised. He states that he has been in actual occupation of the suit land. The plaintiff declined to take a refund and sought for specific performance in Nakuru ELC No 530 of 2013 and he states that this suit is res-judicata as the issues herein are similar to the issues in the former suit. He denies the allegations by the plaintiff that he has been in exclusive and un-interrupted possession of the suit land.
8. When the matter came up for hearing, the plaintiff testified that he has been in possession of the land since the year 2004. He has fenced the land and grown maize on the land. He is claiming on behalf of his brother. He has fenced the land and grown maize on the land. The defendant testified that he signed the agreement, he was to transfer 1.5 acres of the land after subdividing. The plaintiff sued him in-case number 530 of 2013 and the court ruled that he be paid the purchase price with interest. He is in occupation of the land as opposed to the claim by the plaintiff that the plaintiff is in occupation.
9. The plaintiff submits that he has proved he is entitled to the land by virtue of adverse possession whereas the defendant submits that the plaintiff is not entitled to the orders sought as the plaintiff filed suit number Nakuru ELC No 530 of 2013 before expiry of 12 years from the date of alleged possession and therefore a claim of adverse possession does not arise.
10. This court has time and again dealt with the issue of adverse possession. The party claiming adverse possession has to satisfy five basic minimums: -
11. Adverse Possession requires at a minimum five basic conditions being met to perfect the title of the adverse party. These are namely:
 - (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 (ie 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.
 - (e) Non-permissive possession- The adverse party must not have been given permission to enter the property.
12. In this case, the plaintiff has satisfied the court that he has been in actual possession of the suit property to-date. His possession has been open and notorious and exclusive but has it been like that for 12 years? This court finds that the possession was actual but was interrupted when the suit no Nakuru ELC No 530 of 2013 was filed because by filing a defence in the suit, the defendant was asserting his rights. Judgment was entered for the plaintiff for a refund of the purchase price and therefore the plaintiff was not entitled to possession but a refund. The plaintiff does not meet the 2nd basic minimum condition for the principle of adverse possession to apply because of the legal action he started that interrupted the adverse possession.
13. The requirements for Adverse Possession in Kenya has also been set out in the case of *Mbira -v- Gachubi* (2002) IEALR 137 in which the court held that:

“.....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 statutory prescribed period without interruption....”

Likewise, in *Jandu -v- Kirplal & Another* (1975)EA 225, it was held:

“.....to prove title by Adverse Possession, it is not sufficient to show that some acts of Adverse Possession must be adequate in continuity, in publicity and in extent to show that it is Adverse to the owner. It must be actual, visible, exclusive, open and notorious. ”



14. The conditions were succinctly discussed by the Court of Appeal in the case of *Mtana Lewa -v- Kabindi Ngala Mwangandi* (2005)eKLR where it was held that:

“Adverse Possession is essentially a situation where a person takes Possession of land, asserts rights over it and the person having title to it omits or neglects to take a action against such person in assertion of his title for a certain period, in Kenya 12 years.”

15. It is also a well settled principle that a party claiming Adverse Possession ought to prove that this Possession was “*nec vi, nec clam, nec precario*,” that is, peaceful, open and continuous. The Possession should not have been through force, no in secrecy and without the authority or permission of the owner.
16. This being a claim for Adverse Possession, the plaintiffs must show that they have been in continuous Possession of the land for 12 years or more; that such Possession has been open and notorious to the knowledge of the owner and that they have asserted a hostile title to the owner of the property and that there was no interruption.
17. However, this is a case with unique facts, thus the plaintiff has an existing judgment and decree on the same subject matter, between the same parties and has been awarded Kshs1,500,000/= being the purchase price of the suit property. This court finds that the filing of the suit Number Nakuru ELC No 530 of 2013 by the plaintiff herein and the filing of defence by the defendant herein stopped the time from running and therefore time is computed between the year 2004 and 2013 which is approximately 9 years. Moreover, nothing stopped the plaintiff from amending the plaint in ELC no 530 of 2013 to claim adverse possession. The filing of the suit by the plaintiff and the filing of defence by the defendant interrupted the period of adverse possession and therefore time begins running from the date of expiry of the judgment dated October 12, 2018 hence the plaintiff does not satisfy the second basic minimum of as adverse possession thus the one of continuous and uninterrupted possession.
18. The next question is whether the suit is res judicata. The substantive law on Res Judicata is found in Section 7 of the *Civil Procedure Act* Cap 21 which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”

The *Black's law Dictionary* 10th Edition defines “res judicata” as

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”

19. In that respect, the Court of Appeal held in The *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR), that:

“[F] or the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a) The suit or issue was directly and substantially in issue in the former suit.



- b) That former suit was between the same parties or parties under whom they or any of them claim.
- c) Those parties were litigating under the same title.
- d) The issue was heard and finally determined in the former suit.
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

20. The facts of this case are that the parties in this suit are the same in both suits and that the subject matter is the same and that the court is the same court of competent jurisdiction and there is the final decision of this court therefore the suit is against public policy as the issues being litigated were litigated or ought to have been litigated in the previous suit. The upshot of the above is that the suit is therefore dismissed with costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 29TH DAY OF SEPTEMBER 2023.

A O OMBWAYO

JUDGE

