



**Naibae v Muriuki & another (Environmental and Land Originating Summons E018 of 2021) [2023] KEELC 20072 (KLR) (27 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20072 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E018 OF 2021  
CK YANO, J  
SEPTEMBER 27, 2023**

**BETWEEN**

**KIRIINYA NEWTON NAIBAE ..... PLAINTIFF**

**AND**

**PETER MURIUKI ..... 1<sup>ST</sup> DEFENDANT**

**MARGARET NTHURWA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. The plaintiff instituted the suit herein by way of an originating summons dated 11<sup>th</sup> May 2021 and filed in court on 13<sup>th</sup> May 2021 seeking adverse possession over land parcel No. Nyaki/nkabune/67. The plaintiff claims to have been in adverse possession for more than 12 years since the year 1990 and that the possession and occupation has been open, unhindered, notorious undisturbed and uninterrupted for all those years. The plaintiff filed an affidavit in support of the originating summons and attached various documents.
2. The defendants opposed the plaintiff's claim and filed a replying affidavit sworn by Peter Muriuki, the 1<sup>st</sup> defendant on 9<sup>th</sup> December, 2021 and a counter claim of even date claiming that the suit land belonged to the defendant's deceased father and the same is now devolved to the defendants. That the deceased had permitted/licensed/allowed the plaintiff who was a mason to occupy the land and the permission persisted until the year 2018 when the plaintiff purported to bar the defendants from accessing the land and started damaging the trees thereon. The defendant is seeking an order of eviction and permanent injunction against the plaintiff.



### **Plaintiff's Case**

3. The plaintiff adopted his witness statement filed on 13<sup>th</sup> May 2021 as his evidence in chief and produced a copy of records of the suit land, copy of ruling in succession cause no. 198 of 2002, copy of letter dated 30<sup>th</sup> March 2021 and photographs as P exhibits 1 -4 respectively. He was cross examined and re-examined.
4. It is the plaintiff's evidence that he entered the suit land in 1990 with the permission of M'Muremera M'Rinchuni who was the registered owner of the land and who adopted him as his son. That they lived happily until the year 2001 when the said M'muremera M'richuni passed on, following which the plaintiff filed succession cause No. 198 of 2002 and a grant was issued to the plaintiff on 13<sup>th</sup> June 2008. However, in the year 2018, the 1<sup>st</sup> defendant filed for revocation and the grant was revoked and a fresh one issued in the name of the 1<sup>st</sup> defendant to hold for himself and his mother, the 2<sup>nd</sup> defendant who is now deceased. It is the plaintiff's contention that from the year 2001 when M'muremera M'rinchuni died, his occupation on the land became adverse to the estate of M'Muremera M'Rinchuni.
5. The plaintiff called two witnesses to support his case. P.w 2 was Priscilla Mwiriki while Kimandi Eustace testified as P.w 3.

### **Defendant's Case**

6. The defendant testified as D.W 5 and called four witnesses. They all adopted their witness statements as their evidence in chief and were cross examined and re-examined. The defendant produced the ruling in Meru Hc succ Cause No. 198 of 2002, letter dated 30/3/2021, amended certificate of Grant, plaintiff's replying affidavit, judgment in Meru HC Succ no. 198 of 2002, Medical report dated 25/5/2021 and certificate of search as D exhibit 1 -8 respectively. In a nutshell it is the defendant's case that the plaintiff entered the suit land with the permission of the owner and that the issues raised in the suit have been settled in succession cause No. 198 of 2002 hence is res judicata.

### **Submissions**

7. The parties through their advocates on record filed written submissions which I have perused and considered and I need not reproduce herein.

### **Analysis and Determination**

8. The court has carefully considered the pleadings, the evidence and the submissions filed by the parties to support their respective positions. I have also taken into account the legal authorities cited by the parties. The issues for determination are whether the plaintiff has proved his claim for adverse possession to the required standards and whether the plaintiff is entitled to the reliefs sought.
9. In deciding whether or not the plaintiff has proved his claim for adverse possession, the plaintiff must prove that he has been in occupation for a period of over twelve (12) years, that such occupation was open, peaceful and continuous without interruption from the registered owner and that such occupation was adverse i.e inconsistent with the right of the registered owner.
10. In *Wambugu v Njuguna* (1983) KLR 173, the Court of Appeal restated the principles of adverse possession and held as follows-;

- (1) The general principle is that until the contrary is proved, possession in law follows the right to possess.



- (2) In order to acquire by the statute of Limitation title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued 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 or had discontinued possession of the suit land for a continuous statutory period of twelve years to enable him the respondent the title to that land by adverse possession.
- (3) 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 whether or not the claimant has proved that he has been in possession for the requisite number of years.”

11. In the case of *Mtana Lewa v Kabindi Mwangandi* [2015] eKLR the Court of Appeal (Makhandi J.A) stated as follows-;

“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 in action of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate to the title owner.”

12. The doctrine of adverse possession is embodied in Section 7 of the *Limitation of Actions Act* which 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.”

13. Section 13 of the same Act further makes provisions for adverse possession as follows-;

“(1) A right of action to recover land does not accrue unless the land is in 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 “Section 9,10,11 and 12 of this Act a right of action to recover land accrues and 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 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 not 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.”



14. Section 38 (1) of the *Limitation of Actions Act* provides that-;
- “ 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 or lease in place of the person then registered as proprietor of the land.”
15. Order 37 Rule 7 of the *Civil Procedure Rules* states that-:
- “(1) An application under Section 38 of the *Limitation of Actions Act* shall be made by originating summons.
- (2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.
- (3) The court shall direct on whom and in what manner the summons shall be served.”
16. In the instant case, the court has noted that the plaintiff is claiming the land through the doctrine of adverse possession. The plaintiff alleges that he has been in occupation of the suit land together with his family since the year 1990 which is a period of more than 12 years. The plaintiff testified that he has made substantial developments on the suit land, to wit built permanent houses, planted trees which are now mature, done farming and generally developed the suit land and that he has lived with his family on the suit land for over 30 years and that the defendant has never set foot on the suit land. On his part defendant stated that he is the beneficial owner of the suit land Nyaki/Nkabune/67 pursuant to a certificate of confirmation of grant in Meru HC Succession No. 198 of 2002. The defendant testified that a previous grant that was issued to the plaintiff was revoked. This fact is confirmed by the plaintiff.
17. At the hearing the plaintiff testified that he entered the suit land with the permission of the owner who allegedly adopted him as his son. The plaintiff’s claim of the land as an heir to the estate of the owner of the suit land was dismissed by the ruling delivered in Meru High Court succession cause No. 198 of 2002.
18. It is trite law that to acquire land by way of adverse possession, one has to prove that he entered the land without the consent of the registered owner, that he remained there in open, peaceful, continuous, exclusive and uninterrupted possession for the requisite period, which is twelve years.
19. It is therefore clear that the occupation of the land by an intruder who pleads adverse possession must be non- permissive use, that is without permission from the true owner of the land occupied. In the case of *Gabriel Mbui v Mukindia Maranya* (1993) eKLR, Kuloba J. stated as follows-:
- “It has been held many times that acts done under licence or permitted by, or with love of the owner do not amount to adverse possession and do not give the license or permitted entrant any title under the limitation statute. If one is in possession as a result of permission given to him by the owner, or if he is in possession of the land as a licensee from the owner, he is not in adverse possession. Permissive occupation is inconsistent with adverse possession. The stranger must show how and when his possession ceased to be permissive and became adverse. The rule on permissive possession is that possession does not become adverse before the end of the period during which one is permitted to occupy the land. Accordingly, where a permissive possession or occupation accorded on the ground of charity or relationship



was intended, limitation operates from the time when possession first became adverse, a licensee (whose possession is only permissive) cannot claim title only by possession was adverse to that of the licensor to his knowledge and with his acquiescence, where possession was consensual or contractual in its inception, it cannot be called adverse....”

20. In the instant case, the plaintiff’s own evidence is that his entry was with the permission of the registered owner who had allegedly adopted the plaintiff as his son. It is worth noting that the material on record indicates that the plaintiff’s claim as an heir to the estate of the deceased in succession cause No. 198 of 2002 was unsuccessful. Going by the threshold set out for adverse possession, it is my view that the plaintiff cannot claim to have had quiet possession when the material on record clearly confirms that there was a dispute in particular in succession cause No. 194 of 2002. If the plaintiff genuinely had a claim for adverse possession, then the question that arises is why did he have to claim the same land as an heir to the estate of the registered owner of the land? More importantly it is quite apparent that the plaintiff’s possession and occupation was with the permission of the registered owner and therefore his claim for adverse possession must fail.
21. It is therefore my finding that the plaintiff has failed to bring himself within the limits of the doctrine of adverse possession.
22. Consequently, it is my findings that the plaintiff’s claim is without merit and the plaintiff’s suit is dismissed with costs to the defendant. Orders are issued in favour of the defendant in terms of the counterclaim.

**DATED, SIGNED AND DELIVERED AT MERU THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2023**

**IN the presence of:-**

Court Assistant Kiragu V/Lena M.

Ms Kajuju holding brief for Thangicia for defendant

Ms Gachohi holding brief for Mutuma for plaintiff

**C.K YANO**

**JUDGE**

