



**Muchiri & 4 others v Mugane & 2 others (Civil Suit E001 of 2021)
[2023] KEELC 20070 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20070 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
CIVIL SUIT E001 OF 2021
A OMBWAYO, J
SEPTEMBER 22, 2023**

BETWEEN

**DUNCAN GITHAIGA MUCHIRI 1ST APPLICANT
BENSON WAMBUGU MUCHIRI 2ND APPLICANT
REUBEN MACHARIA MUCHIRI 3RD APPLICANT
JOSEPH NDIRANGU MUCHIRI 4TH APPLICANT
PETER KARIUKI MUCHIRI 5TH APPLICANT**

AND

**CHARLES NJUGUNA MUGANE 1ST RESPONDENT
MARGARET NGENDO GATUNE 2ND RESPONDENT
BISHOP JAMES GICHURU 3RD RESPONDENT**

JUDGMENT

Brief Facts

1. The Applicants filed the Amended Originating Summons herein against the Respondents on 21st March, 2023 under section 37 of the *Limitation of Actions Act* and rule 7 of the *Civil Procedure Rules* 2010 claiming to be in adverse possession of L.R No. 519/184 the suit property herein. He prays for the court to determine the following:
 1. That the proprietary rights if any of the late Meri Kairo and Mr. Asaph Njuguna in all that parcel of land known as LR No 519/184 situated in Njoro Township be deemed to have been extinguished through adverse possession by the Applicants.



2. That the Applicants herein be registered as the proprietors of the entire or otherwise of the portions of the said parcel of land that have hitherto been held by the late Meri Kairo and Asaph Njuguna.
3. That the Respondents herein do bear the cost of this application.
2. The application was supported by the affidavit of Benson Wambugu Muchiri the 2nd Applicant herein.
3. He states that the Applicants are the children of Erastus Muchiri Githaiga who had taken up lease ownership of the suit land in partnership with Meri Kairu and Asaph Njuguna for a period of 99 years from 1st February, 1973. He further states that after some time their father Erastus bought the shares of Meri Kairu and Asaph Njuguna over the suit property.
4. He states that the transfer process had then commenced but delays were later caused by the demise of Mr. Asaph and later his widow. He adds that notwithstanding the said delays, their late father continued to operate his sawmill business on the suit property without any interference for a period of over 30 years. That he also paid for the Land Rent and Rates and he even secured a loan against the suit property.
5. The 2nd Applicant states that they entered and took up actual occupation of the suit land after the demise of their father and that they have been in occupation for a period of 20 years without any interference. He states that the Applicants cannot move from the suit land unless they receive alternative settlement and compensation for the development made on the shares owned by Mr. Meri Kairu and Asaph Njuguna. He adds that the 1st Respondent moved the succession court claiming interest over the suit land on account of being a beneficiary to the estate of the late Meri Kairu which parcel was included as one of the deceased's assets in their rectified grant dated 30th July, 2020.
6. In conclusion, he states that the Applicant's herein are likely to suffer irreparable loss and harm in the event the said orders are not granted.

Response

7. The Respondent did not file any response to the application.

Submissions

8. The Applicant filed his submissions dated 19th July, 2023 on 20th July, 2023. He gave a brief background of the case and identified two issues for determination, whether or not the Applicants are entitled to the orders sought and the issue of costs.
9. He relied on various sections in the *Limitation of Actions Act* and the Court of Appeal case of *Samuel Kibamba v Mary Mbaisi* [2015] eKLR. The Applicants submitted that they established the requirements for adverse possession since they came into occupation of the suit land in the year 2001. They submitted that they have been carrying out the business of running a saw mill, leasing among farming without any secrecy and known to the Respondents. They added that the same was never challenged by the Respondents thus amounting to admission of facts. The Applicants also submitted that they enjoyed uninterrupted occupation of the suit land. They further added that the only time their occupation was challenged was when the 1st Respondent attempted to seek eviction orders against them in NAKURU CMCC E041 OF 2020 which was however dismissed. They submitted that the said suit does not affect the Applicants' claim since they were already in active occupation for more than 12 years and relied on the case of *Aggrey J.B Luvutse v Alexander Musa Limisi* (2009) eKLR.
10. The Applicants' submitted that they are entitled to costs as they are the likely successful party.



11. The Respondents on the other hand filed their submissions dated 14th July, 2023 on 17th July, 2023. They gave a brief background of the case and submitted that all the parties are children of their respective fathers who are registered as the joint proprietors of the suit land. They posed the question whether a child can bring an action for adverse possession of his or her father's land. The Respondents' cited numerous authorities including the case *Samuel Kihamba v Mary Mbaisi* [2015] eKLR and *Charles Kiplangat Bosuben v Willy Kipkemoi Kigen & 2 Others*.
12. It is the Respondents' argument that siblings have no rights to kins land as stated by John Olola J. They urged the court to dismiss both the Amended and Further Amended Originating Summons with costs to the Respondents.

Analysis and Determination

13. The law on Adverse Possession is well settled and the essential requirements that one has to meet in order to succeed in an application for Adverse Possession have been established by the courts.
14. In the case of *Wambugu v Njuguna* (1983) KLR 173, the Court of Appeal held that Adverse Possession contemplates two concepts: Possession and discontinuance of Possession. It held that the proper way of assessing proof of Adverse Possession would 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 or she has been in Possession for the requisite number of years.
15. The ingredients of Adverse Possession were recently 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.”
16. 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 secrecy and without the authority or permission of the owner.
17. The Applicants must show that they been in continuous possession of the land for 12 years or more and that such possession has been open to the knowledge of the owner and further that they have asserted a hostile title to the owner of the property.
18. In the instant case, I have perused the pleadings and I do find that the Applicants' have indeed proved on a balance of probabilities that they have been in open and uninterrupted possession of the suit property for a period of 20 years since their late father passed on. It is also not in dispute that the Applicants have been doing saw mill business, farming and even leasing the suit property without any interruption by the Respondents.
19. The Respondents contend that the Applicants being children of their deceased father have no authority to claim adverse possession on his behalf. This court finds the said argument rather misplaced since it is not in dispute that the Applicants have occupied the suit property for more than 12 years since their father passed on.
20. In view of the foregoing, I do find that the Applicants have proved their case on a balance of probabilities and I do grant orders that:
21. The Applicants now have overriding interest under section 28(h) and (j) of *Land Registration Act*, 2012 (Cap 284) Laws of Kenya of the land parcel LR No 519/184 which they occupy.



22. The Applicants are in adverse possession of the parcel of land known as LR No 519/184.
23. This court does hereby vest the suit land LR No 519/184 to the Applicants.
24. The Respondents are hereby ordered to execute the necessary conveyance documents to effect the registration of the Applicants as the proprietor of the suit land. Failure to execute, the Deputy Registrar is at liberty to sign all documents to transfer the rights and interests to the Applicants' upon LR No 519/184. The defendants to pay costs. It is so ordered.

JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 22ND DAY OF SEPTEMBER 2023.

A. O OMBWAYO

JUDGE

