



REPUBLIC OF KENYA



**Riungu v Kirubua & another (Environment & Land Case 02 of 2020)
[2023] KEELC 21719 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21719 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 02 OF 2020
CK YANO, J
NOVEMBER 23, 2023**

BETWEEN

PAUL RIUNGU PLAINTIFF

AND

HENRY MURIIRA KIRUBUA 1ST DEFENDANT

SOLOMON MPEKETHU 2ND DEFENDANT

JUDGMENT

Introduction

1. The plaintiff filed an originating summons dated 15th January, 2020 claiming to have acquired land parcel Number Ntima/Ntakira/1910 by way of adverse possession. In support of the originating summons, the plaintiff filed an affidavit dated 15th January, 2020 in which he has annexed a copy of the green card and photographs.
2. The originating summons is opposed by the defendants through a replying affidavit dated 21st July, 2022 sworn by Henry Muriira Kirubua the 1st defendant herein. The suit was consolidated with Meru CMC case No. 61 of 2018 filed by the defendants against the plaintiff for orders of eviction from the suit land.

Plaintiff's Case

3. It is the plaintiff's case that the suit land was originally registered in the name of the plaintiff's late father, Ngiti Mugambi (deceased). The plaintiff avers that he was brought up and has carried out some developments on the said land. That despite the defendants being the current registered owners of the suit land, it is the plaintiff who has been in open exclusive continuous and uninterrupted occupation of the same for over 53 years. That the defendants and/or their family members have never occupied the suit land or laid any claim against the plaintiff until the year 2018 when they filed Meru CMC case



No. 61 of 2018. The plaintiff avers that he has filed this suit following advice from his advocate that this is the court empowered by law to hear and determine the plaintiff's claim for adverse possession pursuant to section 38 (1) of the *Limitation of Actions Act*.

4. The plaintiff testified as P.W 1 and relied on facts in his affidavit and called one witness. The plaintiff produced a copy of the green card and the photographs as P exhibits 1 and 2 in support of his claim. He testified that he did not know the defendants until when they filed Meru CMC ELC No. 61 of 2018. His testimony was that he was born on the suit land where he has put up a semi-permanent house and denied being a trespasser.
5. When the plaintiff was cross-examined by Mr. Ringera, learned counsel for the defendants he stated that the land is $\frac{1}{4}$ of an acre where he has put up a temporary structure where he lives and rears chicken, and that he has planted some crops which, however he had plucked out. He testified that the suit land belonged to his father Joseph M'Ngiti Mugambi and that is where he was born. He stated that he was not aware that the land was first registered in 1975 and whether his father sold it in the year 1980. He further stated that he was aware that there were other two parcels of land that had been sold, though the plaintiff argued that his father was conned. The plaintiff stated that he lives in his father's house together with his sister.
6. Solomon Bundi Rintari testified as P.W 2 and adopted his statement dated 11th November, 2022 as his evidence in chief and was cross examined and re-examined. His evidence mirrored that of the plaintiff.

Defendants' Case.

7. The defendants admit that they are the registered owners of the suit property which they claimed they purchased from one Julius Kirimi Maingi and one Albert Murungi M'Ndegwa. They averred that before purchasing the land, they carried out due diligence and that they were to take vacant possession on completion of the sale. The defendants aver that when the plaintiff trespassed on the land, they instituted Meru CMC ELC No. 61 of 2018 seeking eviction.
8. It is the defendants' case that the plaintiff has purposely put up a semi-permanent building on the land with the intention of staking a claim thereto. The defendants believe that the plaintiff has not established a case against them and pray that the plaintiff's suit be dismissed with costs.
9. Henry Muriira Kirubua, the 1st defendant testified on behalf of the defendants as D.w 1. He relied on his replying affidavit as his evidence in chief. He testified that the plaintiff has over 3 semi-permanent houses on the suit land as shown in the photographs. He urged the court to order the plaintiff to give them vacant possession of the land.
10. When D.w 1 was cross-examined by Ms Kiyuki, learned counsel for the plaintiff, the 1st defendant stated that they bought the suit land measuring 0.1740 Hectares from Julius Kirimi Maingi and Albert Murungi M'Ndegwa (both deceased) in the year 2005, but stated that he had not brought the agreement for sale before court. D.w 1 testified that they have the title deed for the suit property. The 1st defendant testified that in Meru CMC ELC no. 61 of 2018, they have pleaded that the plaintiff was illegally in possession of part of the suit land and prayed for his eviction. He further stated that they had never used the land from the time they bought it. That they filed ELC NO. 61 of 2018 seeking to evict the plaintiff which is a period of over 13 years from the time they purchased the land. He admitted that there are trees and some crops on the land that were planted by the plaintiff. He stated that the people they bought the land from had purchased it from Ngethi M'Ngethi.
11. When the 1st defendant was re-examined by Mr. Ringera, he stated that the people who sold them the land have never complained. That in the year 2018, they wanted to go and use and develop the land,



but they found the plaintiff in possession. He denied that the plaintiff was in possession at the time they purchased the land.

Plaintiff's Submissions

12. In their submissions dated and filed on 14th September, 2023, M/s John Muthomi & Company Advocates for the plaintiff submitted that on the evidence tendered by the parties herein it is not in dispute that by the time the plaintiff filed the instant suit on 16th January, 2020, he had been in occupation of the suit land for over 12 years since the defendants became the registered owners on 19th March 2005 as per P exhibit 1 and still remains in occupation. Further that by the time the defendants filed Meru CM ELC Case No. 61 of 2018 on 26th March 2018 seeking for eviction, the plaintiff had been in occupation of the suit land for over 13 years from the date the defendants became the registered owners on 19th March 2005.
13. Counsel for the plaintiff submitted that the defendants' inactivity to evict the plaintiff before the lapse of the statutory period are actions which are inconsistent with their enjoyment of the suit land for its intended purpose. That the plaintiff's possession of the suit land is admitted by the defendants in paragraphs 4 and 5 of the plaint dated 26th March 2018 in Meru CM case no. 61 of 2018 and in the 1st defendant's replying affidavit dated 21st July, 2022. They submitted that this is evidence that the defendants had the full knowledge that the plaintiff was in exclusive possession of the suit land and his occupation was open. Counsel for the plaintiff submitted that the plaintiff has proved that he has acquired the suit land by demonstrating that his occupation and possession has been exclusive, open, continuous and uninterrupted for the prescribed period of more than 12 years and urged the court to enter judgment in his favour. They also seek that the defendants be ordered to bear the costs of the suit and interest thereon.
14. The plaintiff's advocates relied on the case of *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR, *Titus Mutuku Kasuve v Mwaani Investments Limited & 4 others* [2004] eKLR and *Ramco Investment Limited v Uni-Drive Theatre Limited* [2018] eKLR.

Defendants' Submissions

15. In their submissions dated 27th September, 2023, M/s Gatari Ringera & Company Advocates for the defendants submitted that for the plaintiff to succeed in his claim for adverse possession he must establish that the entry is neither by force nor under the licence of the owner, that there has been exclusive and open possession of a defined portion of land by the adverse possessor and the dispossession of the owner or discontinuation of possession by the owner on his possession.
16. Learned counsel for the defendants submitted that the plaintiff readily admits that his possession of the land stems from his relationship as a son of a previous registered owner. That however, the plaintiff does not state his actual date of entry into the land and submitted that it is not open to the court to guess when the alleged entry into the suit land happened and that his claim should fail on this ground alone. That the plaintiff merely states that he was born and brought up on the land. That it is inconceivable that the plaintiff would stake a claim for adverse possession against his father dated back to his date of birth that was never disclosed.
17. It is further submitted that the evidence on record shows that ownership of the land changed from the plaintiff's father on 5th November, 1987. That there was a subsequent change in ownership on 19th March 2005 and the plaintiff was silent on all these changes and what actions, if any, he took to protect his alleged interest in the land.



18. The defendants' advocate further submitted that the plaintiff's failure to demonstrate that they had been in occupation of a defined portion of the land for the requisite period is fatal to this claim and relied on *Maroa Maroa Nyamboha v Charles Onyancha* [2019] eKLR.
19. It is further submitted that there is no evidence that the plaintiff dispossessed the owners or that the owners discontinued their possession of the land. That the evidence on record shows that the plaintiff remained a trespasser in the defendants' eyes and that they took legal steps to evict him from their land. It is the defendants' submission that the plaintiff has failed to prove his case to the required standards and urged the court to dismiss the same with costs.

Analysis and Determination

20. The court has carefully considered the pleadings, the evidence adduced and the submissions filed. I have also taken into account the legal authorities cited. The issues for determination are whether the plaintiff has proved his claim for adverse possession and whether the defendants have proved their claim for eviction and what reliefs should be granted. I will discuss these issues together.
21. In deciding whether or not the plaintiff has proved his claim for adverse possession to the required standard, the plaintiff must prove on a balance of probabilities that he has been in occupation of the suit land for a period exceeding 12 years, that such occupation was open, peaceful, and continuous without interruption from the registered owners and that such occupation was adverse or inconsistent with the right of the registered owners. This is in line with the established principles and requirements for a claim for adverse possession as discussed by the courts.
22. The doctrine of adverse possession is embodied in section 7 of the *Limitation of Actions Act* which provides that-;

“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.”
23. Section 13 of the same *Act* provides that-;
 - “(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 8, 10, 11 and 12 of this *Act* a right of action to recover land accrues on 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 no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes possession of the land.”
24. Section 17 of the same *Act* provides that-;

“Subject to section 18 of this *Act* at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action) the title of that person to the land is extinguished.”



25. In addition, Section 38 (1) of the same *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.”

26. Similarly, order 37 rule 7 of the *Civil Procedure Rules* provides as follows;

“(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.”

27. In the case of *Mtana Lewa v Kabindi Ngala Mwangandi* (*supra*) the Court of Appeal 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 inaction by the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force nor stealth nor under the licence of the owner.

It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

28. In this case, it is not in dispute that the defendants are the registered owners of the suit land. The plaintiff readily admits that his possession of the land stems from his relationship as a son of the previous registered owner thereof, one Ngiti Mugambi (deceased) who appears to have sold the same to some other person. The evidence on record indicates that the defendants purchased the land from Julius Kirimi Maingi and Albert Murungi M’Ndegwa and title issued in the names of the defendants on 19th March 2005.

29. It is the plaintiff’s case that he was born and brought up on the suit land and that even after the land changed hands, the defendants never took steps to evict him from the land until they filed CMC Case No 61 of 2018. From the year 2005 upto the year 2018, that is a period of about 13 years. Section 7 of the *Limitation of Actions Act* is clear that 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. In this case, the right of action accrued to the defendants on 19th March 2005 when the land was registered in their names and title issued. From the evidence on record, the defendants never took steps to have the plaintiff evicted from the land before the expiry of twelve years. The defendants claim for eviction in CMCC No. 61 of 2018 is in my view, statute barred since it was filed 13 years from the date the right of action accrued to them. The defendants’ inactivity to evict the plaintiff upon purchasing the land and before the lapse of the statutory period of twelve years means their suit No 61 of 2018 is barred by limitation, and their title has been extinguished and their case must therefore fail.



30. In this case, the plaintiff's possession of the suit land is admitted by the defendants. Indeed, the defendants have filed a claim against the plaintiff for eviction, but which claim has failed. The plaintiff has tendered evidence that has not been challenged or controverted by the defendants. If anything, the defendants' own evidence support the plaintiff's case that he has been using the suit land without sharing control with the defendants or anyone else for a period exceeding twelve years. The plaintiff has been using the land at the exclusion of the defendants who are the actual registered owner since the year 2005. Having purchased the land in the year 2005, the defendants had the full knowledge that the plaintiff was in exclusive possession of the land and his occupation was open and continuous.
31. From the evidence on record, I find and hold that the plaintiff has proved that he has acquired the defendants land parcel No Ntima/Ntakira/1910 by adverse possession after demonstrating that his occupation and possession has been exclusive, open, continuous and uninterrupted for the prescribed period of more than 12 years. From the material presented before this court, I find that the plaintiff has on a balance of probabilities proved his case. I find that all the questions for determination in the originating summons dated 15th January, 2020 are in the affirmative. I enter judgment as follows-;
- a. The plaintiff is hereby declared to have become entitled to land parcel Number Ntima/Ntakira/1910 by virtue of adverse possession and is entitled to be duly registered as proprietor thereof.
 - b. The defendants right over the suit land has been extinguished and their case is dismissed.
 - c. Costs of the suit are awarded to the plaintiff as against the defendants.
32. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 23RD DAY OF NOVEMBER, 2023

C.K YANO

JUDGE

In The Presence Of

Court assistant V. Kiragu/Lena M

J. Muthomi for plaintiff

Gatari Ringera for defendant

