



M’Inoti v Mwari & another (Suing as the legal administrator of the Estate of Nkabu Maingi – (Deceased) & another (Environmental and Land Originating Summons 49 of 2003) [2023] KEELC 21573 (KLR) (16 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21573 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 49 OF 2003**

**CK YANO, J
NOVEMBER 16, 2023**

BETWEEN

MUNYUA M’INOTI PLAINTIFF

AND

JANE MWARI AND JUSPER JAMES (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF NKABU MAINGI – (DECEASED) 1ST DEFENDANT

GLADYS NGARI JULIUS & KENNEDY KINOTI MUTWIRI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE JULIUS MUTWIRI NKABU) 2ND DEFENDANT

JUDGMENT

1. The plaintiff herein moved this court *vide* the originating summons dated 2nd May 2003 and which was amended on 14th April 2004 against the defendants herein in their capacity as the legal administrators of the estate of Nkabu Maingi (deceased) and Julius Mutwiri (deceased) respectively. The application was brought under Section 37 and 38 of the [Limitation of Actions Act](#), and order 37 rule 7 of the [Civil Procedure Rules](#) claiming to have become entitled to Ir no. abogeta/upper-chure/445 now abogeta/upper-chure/2387 and 2388 by way of adverse possession as well as an order of inhibition and costs of the suit.
2. The defendants filed replying affidavits sworn by the 1st defendant denying the plaintiff’s claim.

The Plaintiff’s Case

3. The plaintiff’s case was that he has occupied, lived and developed the suit land with his entire family since the year 1963. That his occupation on the land has been uninterrupted and undisturbed for all those years. He stated that he has extensively developed the land by constructing his home thereon,



- planted tea bushes and numerous trees and even buried his second child thereon. The plaintiff added that there are clear boundaries marking the portion of land he has been in possession and occupation for a period of over twelve years and therefore wants to be declared as proprietor of the land pursuant to the doctrine of adverse possession.
4. The plaintiff testified as PW 1 and adopted his statement dated 12th April 2021 wherein he reiterated his position that he entered the land and has lived thereon since the year 1963. That the land was initially land Parcel No. Abogeta/U/ Ochure/445 but was subdivided into LR NOS. Abogeta/U/ Ochure/2387 and 2388 in the year 2003 while the suit was pending in court. That parcel number Abogeta/U/ Ochure/2388 remained in the name of Nkabu Maingi, the original 1st defendant, while parcel No. Abogeta/U/ Ochure-2387 was registered in the name of Julius Mutwiri Nkabu, the original 2nd defendant and son to the 1st defendant who has also since passed on and after his demise, the present 2nd defendant got registered owner of the land on transmission.
 5. The plaintiff stated that he entered and settled on the land without the permission or consent of his late brother, Nkabu Maingi (deceased). That this was after his said brother refused to give the plaintiff a portion of parcel No. Abogeta/U/ Ochure/445 as they agreed. The plaintiff stated that his brother had agreed to share parcel No. Abogeta/U/ Ochure/309 (gifted to the plaintiff by their father) and parcel no. Abogeta/U/ Ochure/445 (gifted to the plaintiff's brother by their father)
 6. It was the plaintiff's testimony that they shared parcel No. Abogeta/U/ Ochure/309 whereby his brother got 7 acres, but declined to share parcel No. Abogeta/U/ Ochure/445. The plaintiff stated that he gained entry in the year 1963 and settled on a portion measuring 3 acres which he has remained on to date.
 7. The plaintiff produced the green cards of LR NOS. Abogeta/U/ Ochure/445, 2387 and 2388 and a KTDA verification certificate No. 35692 as P exhibit 1 -4 respectively.
 8. When he was cross-examined by Mr. Kithinji, learned counsel for the 2nd defendant, the plaintiff stated that his father was called M'Inoti and had two children, namely Muthoni M'Inoti (now deceased) and the plaintiff himself. He stated that Nkabu Maingi (deceased) was his uncle as he was a brother to the plaintiff's father.
 9. The plaintiff stated that he has one piece of land and had subdivided the land he had LR NO. Abogeta/U/ Ochure/257 amongst his children. That he gave Nkabu Maingi (deceased) 7.5 acres so that they could have equal land, but he had no agreement. He admitted that Nkabu Maingi (deceased) is the one who allowed him to enter the suit land in 1963 because they had discussed on how to share the land. That they agreed with Nkabu Maingi that the plaintiff be given 3 acres out of parcel No. Abogeta/U/ Ochure/445 which was subdivided into parcels No. 2387 and 2388, while Nkabu Maingi gets 7.5 acres out of Parcel No. 309. The plaintiff stated that he kept on asking Nkabu Maingi to transfer the land to him but stated that he had no money until he died. The plaintiff could not remember if Nkabu Maingi asked him to vacate from the land.
 10. When he was re-examined by Mr. Kiogora Nganga, learned counsel for the plaintiff, the plaintiff stated that he gave 7 acres to Nkabu Maingi out of parcel No. 309 and that Nkabu Maingi gave him 3 acres out of parcel No. 445. He further stated that he entered the suit land in 1963 with the permission of Nkabu Maingi. That he has sued Nkabu Maingi because he gave him the land but did not transfer it.

The 1st Defendant's Case

11. The 1st defendant was absent during the hearing though he was duly served, and his case was therefore closed.



The 2nd Defendant's Case

12. The 2nd defendant are both administrators and/or legal representatives of the estate of Julius Mutwiri Nkabu (deceased) and joint registered proprietors of land parcel No. Abogeta/U/ Ochure/2387 having been registered in 2018 pursuant to orders in Meru High Court Succession Cause No.3 of 2015. It is their contention that they are in sole occupation and utilization of the said parcel of land wherein they have planted tea amongst other developments.
13. The 2nd defendant's case is that Julius Mutwiri Nkabu (deceased) was registered as proprietor of land Parcel No. Abogeta/U/ Ochure/2387 in the year 2004 after his father Nkabu maingi (deceased) subdivided his land parcel no. abogeta/uchure/445. that nkabu maingi (deceased) retained parcel No. Abogeta/U/ Ochure/2388. That the plaintiff who is a son to Munyua Inoti is a cousin to Nkabu Maingi (deceased) while Julius Mutwiri a son to Maingi s/o Inoti.
14. It is the 2nd defendant's contention that the plaintiff is in occupation of portions of land measuring one (1) acre in both parcel No. Abogeta/U/ Ochure/2387 and 2388 but as a licensee of the 1st defendant, Nkabu Maingi (deceased). That the plaintiff and the 1st defendant agreed that the 1st defendant gives the plaintiff a portion of land measuring one acre in land parcel No. Abogeta/U/ Ochure/455 and the plaintiff in turn would give the 1st defendant a portion measuring one acre in his land parcel No. Abogeta/U/ Ochure/357, but that the plaintiff failed to honour the deal since he sold his land Parcel No. Abogeta/U/ Ochure/357 to third parties thus frustrating the said agreement. That when the plaintiff sold parcel No. Abogeta/U/ Ochure/357 the 1st defendant vacated the same and demanded that the plaintiff also vacates from the 1st defendant's land Parcel No. Abogeta/U/ Ochure/445 prompting the plaintiff to file this suit. It is therefore the 2nd defendant's contention that the claim for adverse possession has no basis since the occupation was pursuant to some agreed conditions which the plaintiff never honoured. The 2nd defendant argued that the plaintiff's claim is out of greed.
15. The 2nd defendants filed Nkubu SPMCC NO. 31 of 2019 against the plaintiff herein seeking to restrain him from trespassing, encroaching, occupying and or taking possession of any part of land parcel No. Abogeta/U/ Ochure/2387. That suit was transferred to this court and consolidated and heard together with this suit. That other suit was treated as a counterclaim.
16. Kennedy Kinoti Mutwiri testified as D.W 1 and relied on his affidavit dated 14th February, 2020 and filed in court on 5th July, 2020 as his evidence. The said affidavit basically reiterated the 2nd defendant's case as outlined hereinabove.
17. D.W 1 was cross-examined by Mr. Kiogora Nganga and he stated that he had not produced the documents in meru high court succession cause no. 3 of 2015. he confirmed that parcel no. abogeta/u/ ochure 2387 is subdivision of parcel no. abogeta/u-chure/445 which gave rise to parcel nos. 2387 and 2388. that before subdivision, parcel no. abogeta/u/ ochure/445 belonged to nkabu maingi. he confirmed that the plaintiff was living on parcel no. abogeta/u/ ochure/2387 and occupied about 3 acres but stated that he came to know this when they did succession for their late father who was living on another parcel No.309 which is a few kilometres away from parcel 2387. D.w 1 also confirmed that the plaintiff had constructed three houses and planted tea bushes but was not aware if the plaintiff's daughter by the name Nketa Munyua died and was buried on the suit land. He stated that the plaintiff entered the land as a licensee but had no agreement. He also did not know when the plaintiff entered the land, but maintained that the plaintiff and the 1st defendant had a pact or agreement.
18. D.w 1 stated that the plaintiff sold his land parcel No. 357 and the plaintiff's father tried unsuccessfully to evict him from the suit land on several occasions. He confirmed that parcel No. 445 was subdivided



in 2004 while this case was already in court and despite injunctive orders. That the plaintiff has his land and should vacate from the suit land.

19. When he was re-examined by Mr. Kithinji, D.W 1 stated that according to Entry No. 7 of P exh. 2, they are the registered owners of parcel No. 2387 while entry No.3 confirms that D.W 1's deceased father got his title before any inhibition orders were issued. That the suit was at time dismissed for want of prosecution and the inhibition orders then in place were lifted. D.W 1 stated that the plaintiff has sued the estate of his late father and not them as the registered owners of the suit land. He confirmed that together with his mother, they were issued with a Grant of Letters of Administration in respect of the estate of the late Julius Mutwiri alias Julius Mutwiri Nkabu on 24th April 2017 in Meru High Court Succession cause No.3 of 2015.

Plaintiff's Written Submissions

20. In their submissions dated 28th September,2023, M/s Mithega & Kariuki advocates for the plaintiff gave a brief background of the case and while relying on the case of *Kasuve v Mwaani Investments Limited & 4 others* 1 KLR 184, identified the issues for determination as whether the plaintiff is in possession of the suit land, whether the defendants title has been extinguished, whether the orders sought herein should be granted and whether the 2nd defendant proved his counterclaim.
21. It is their submissions that the plaintiff has proved that he has been in occupation of the suit land since the year 1963. The plaintiff's advocates submitted that the plaintiff moved into and settled on the suit land in the year 1963 after his brother failed to honour their agreement to share their respective lands and has lived therein todate. That the defendant admitted that the plaintiff has been in actual possession and use of the land and that neither he nor his late father has ever sought to recover possession of the same despite being the registered owners.
22. It is the submissions of the plaintiff's advocates that the plaintiff has not only proved that he has actual possession of the land, but also *animus possidendi* in that the use of the land is without force, without secrecy, without permission of the defendants who are the registered owner and has continued to occupy the land for more than 12 years. They relied on the case of *Munyaka Kuna Co.* (citation not given), *Nancy Wangari Munui* (citation also not given and [*Wilson Njoroge Kamau v Nganga Muceru Kamau* \[2020\] eKLR.](#)
23. It is also the plaintiff's submissions that the period of limitation herein started running from 1963 effectively extinguishing the defendants title in the year 1975. That the counterclaim filed at Nkubu was only an afterthought. Learned counsel for the plaintiff relied on the case of [*Joseph Gabumi Kiritu v Lawrence Munyambu Kabura* CA No. 20 of 1993.](#)
24. The plaintiff's counsel submitted that the mother title NO. Abogeta/U/ Ochure/445 was extinguished in favour of the plaintiff in 1975 having entered the suit land in 1963, and therefore Nkabu Maingi had no property rights whatsoever to transfer to Julius Mutwiri Nkabu from whom the 2nd defendant claims to have inherited. They relied on the case of [*Joseph Gabumi Kiritu v Lawrence Munyambu Kabura* \(*supra*\).](#) It was argued that the plaintiff secured inhibition orders against the disposal of the suit land which were duly registered on 31st May 2004, but that the 2nd defendants illegally and irregularly lifted those orders vide succession cause No. 3 of 2015 and subsequently transferred the land to themselves. It is therefore the plaintiff's submission that the counterclaim herein is an afterthought and a failed attempt in defeating the plaintiff's claim over the suit land. The plaintiff's counsel urged the court to dismiss the counterclaim with costs to the plaintiff.



2nd Defendant's Submissions.

25. In their submissions dated 16th October, 2023, M/s Kithinji Kirigiah & Co. Advocates for the 2nd defendant submitted that the plaintiff in cross-examination admitted that he is in occupation of a portion of land measuring 3 acres in parcels LR. Nos Abogeta/U/ Ochure/2387 and 2388 with the consent of the 1st defendant. That this evidence was corroborated by the 2nd defendant and that in a nutshell, the plaintiff was a licensee, thus cannot claim adverse possession.
26. It was further submitted that the plaintiff averred of an oral exchange agreement that he had with the 1st defendant. That the plaintiff, however, could not explain why he declined to exchange his land with the 1st defendant, and instead transferred it to his sons. The 2nd defendant's advocates pointed out that in the initial pleadings, the plaintiff had indicated that he was claiming land as a relative of the 1st defendant, but later changed tune during cross-examination to allege there was an oral land agreement. It is their submission that the plaintiff is insincere and his evidence is shaky to be admitted. That the claim also fails because the plaintiff is claiming more than the portion he has occupied.
27. Learned counsel for the 2nd defendant submitted that the 2nd defendant are the registered owner of land Parcel Lr. No. Abogeta/U/ Ochure/2387 yet they have joined in the suit as administrators of the estate of Julius Mutwiri Nkabu. It is their submissions that this mistake is incurable since the plaintiff has failed to sue the registered owners of the land. That the 2nd defendant's title was registered in the year 2018 and therefore the plaintiff cannot claim an order of adverse possession.
28. It is the 2nd defendant's submission that the plaintiff cannot be granted orders of adverse possession because he is a licensee of the 1st defendant. That the plaintiff's suit lacks merit and should be dismissed with costs. They also pray that the 2nd defendant's counterclaim ought to be allowed with costs.

Analysis And Determination

29. The court has carefully considered the pleadings, the evidence adduced and the submissions filed. 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 and whether he is entitled to the reliefs sought and whether the counterclaim has merit or not.
30. In this case, the plaintiff is claiming for adverse possession over LR. NO. Abogeta/U/ Ochure/445 now Abogeta/U/ Ochure/2387 and 2388 measuring 3 acres. The plaintiff has sued the 1st and 2nd defendants herein in their capacity as the legal administrators of the estate of the late Nkabu Maingi and Julius Mutwiri Nkabu respectively. The application was brought under Section 38 of the *Limitation of Actions Act* and Order 37 Rule 7 of the *Civil Procedure Rules*. In their counterclaim, the 2nd defendant are seeking eviction orders against the plaintiff herein from land Parcel LR NO. Abogeta/U/ Ochure 2387.
31. 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 of over 12 years, that such occupation was open, peaceful and continuous without interruption from the registered owner(s) and that such occupation was adverse or inconsistent with the right of the registered owner. It is also trite law that another element of adverse possession is that it ought to be hostile and without the permission from the true owner of the land.



32. The doctrine of adverse possession is embodied in Section 7 of the *Limitation of Actions Act* which states 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 it first accrued to some person through whom he claims, to that person.”

33. 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 9,10,11 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 against takes adverse possession of the land.

34. 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 claim), the title of that person to the land is extinguished.”

35. Further, Section 38 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.”

36. Order 37 Rule 7 of the *Civil Procedure Rules* provides that an application under Section 38 of the *Limitation of Actions Act* shall be by originating summons supported by an affidavit to which a certified extract of the title to the land has been annexed.

37. In this case, it is not in dispute that the defendants are the registered owners of the suit parcels of land. The plaintiffs testified that he entered the land in the year 1963 and has been using it ever since, having constructed some structures and carrying out farming. From the evidence on record, it is apparent that the parties are related. From his own testimony, the plaintiff admitted that he entered into an agreement with his brother, the late Nkabu Maingi (deceased) wherein they agreed to exchange their parcels. That the plaintiff was to give the deceased 3 acres out of parcel No. Abogeta/U/ Ochure/445 which was subdivided into parcel Nos. Abogeta/U/ Ochure/2387 and 2388 while Nkabu Maingi (deceased) was to be given 7.5 acres by the plaintiffs out of land LR. NO. Abogeta/U/ Ochure/309. The evidence on record further indicates that the plaintiff owned land parcel LR. No. Abogeta/U/ Ochure/357 which he divided amongst his children. The evidence further shows that whereas the plaintiff was given 3 acres by the late Nkabu Maingi (deceased), there was no evidence availed to the court to confirm that the deceased was ever given the 7.5 acres by the plaintiff out of the Parcel No. Abogeta/U/ Ochure/309.



That aside, it is clear to me that from the evidence on record, the plaintiff entered the suit land pursuant to an agreement with the deceased brother in which they were to exchange portions of their parcels of land. In my view, the plaintiff entered the suit land with the consent or permission of the then registered owner of the land. In their submissions, learned counsel for the plaintiff also admit that the plaintiff entered the land with permission.

38. The law on adverse possession is clear that the entry of the adverse possessor should not be with the permission or consent of the owner. In *Ndiema Samburi Soti v Elvis Kimtai chekeses* [2010] eKLR, the Court of Appeal held that:-

“A person who occupies land with the consent of the owner cannot be said to be in adverse possession as in reality he has not dispossessed the owner and the possession is not illegal.”

39. In *Beatrice Syokau Gathumba v Kenya Airports Authority & 2 others* [2012] eKLR, Lenaola J. (as he then was) stated that;

“I must emphasize that it is an element of adverse possession that it ought to ‘hostile’ and without permission from the true owner of the land. The fact that the petitioner’s husband was permitted occupancy of the suit premises at one time as a manager of the animals and in the second time as a licensee is inconsistent with the doctrine of adverse possession because an intruder who is given permission or a license has no cause of action during the period of his permission or license.”

40. In the case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, Kuloba J in a persuasive decision stated inter alia as follows-;

“The keeping on our land of landless relatives, clansmen, friends and purchasers under avoided arrangements for long periods of time until they are able to buy or otherwise acquire by gift, will or trust, their own land is custom we all know. And it is well-known, a custom grounded on a certain and reasonable cause superseded the common law...”

... The certain and reasonable foundation of this custom is African socialism as expounded in this country in sessional paper No. 10 of 1965. And the doctrine of adverse possession being a common law doctrine, it is superseded by this custom ...

... The court takes Judicial notice, and does not feign ignorance, of the prevalent customs and usages under African socialism whereby relatives, friends, clansmen, the landless and increasingly, purchasers under annulled and voided agreements and transactions, are allowed to remain in possession of one’s land for indefinite lengths of time for as long as the owner does not immediately require the land so occupied, on everybody’s understanding that at one time or other, the person so accommodated shall have to leave and go away. This court shall not punish good-naturedness and reward law- violators, usurpers, and in short, what I may call possessors de son tort demesne, under nobody’s compulsion to do wrong...”

41. In the instant case, the plaintiff conceded that he had entered into an arrangement with the defendants whereby they agreed to exchange each others portions of land. It is conceded that the plaintiff entered the suit land pursuant to that arrangement or agreement and remained in possession of the land which would have been given to him in that agreement. It however came out that the plaintiff did not fulfil his part of the agreement. Instead, he shared his land amongst his children, including the portion he was to give out in the exchange arrangement. Therefore, the plaintiff does not say under what colour



of right he continued in possession while he had reneged on the agreement. The owner's permission of the plaintiff to remain in possession has not been shown to have been unconscionable.

42. From the evidence on record, it is my finding that the plaintiff has not proved his claim of adverse possession on a balance of probabilities. This is because the plaintiff entered the land with the permission of his late brother Nkabu Maingi (deceased) following their arrangement to exchange their lands, but which agreement was not actualized in full. Having been permitted to enter the land by his own brother, the plaintiff cannot therefore be allowed to turn around and assert his right over the suit land against the owners who permitted him to enter the land, and when he himself has not shown that he honoured his end of the bargain between him and his late brother. It is therefore my finding that the plaintiff has not proved his case on a balance of probabilities and his claim for adverse possession must fail.
43. In this case, it is factual that the defendants are the registered owners of the suit properties which is *prima facie* evidence of ownership. From the material on record, it is apparent that the defendants got registered as proprietors through transmission upon filing succession cause No. 3 of 2015 in respect of the estate of the late Nkabu Maingi.
44. Section 24, 25 and 26 of the [Land Registration Act](#) stipulates as follows-;

24.

- (a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto, and
- (b) The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and principles belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-

- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register, and
- (b) To such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

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- (1) the certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute



and indefeasible owner, subject to the encumbrances easements, restrictions and conclusions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –

- (a) on account of fraud or misrepresentation to which the person is proved to be a party, or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

45. In this case, there was no evidence to prove that the defendants’ titles were acquired fraudulently, or illegally. The plaintiff’s claim for adverse possession having been unsuccessful, it is my considered view, and I so find, that the defendants’ counterclaim has been proved on a balance of probabilities and ought to be allowed.

46. In the result, I enter judgment for the defendants against the plaintiff in the following terms-;

- a. The plaintiff’s suit is hereby dismissed.
- b. The 2nd defendant’s counterclaim is allowed as prayed.
- c. Costs of the suit and of the counterclaim are awarded to the 2nd defendant.

47. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 16TH DAY OF NOVEMBER, 2023

In the presence of

COURT ASSISTANT- V. KIRAGU/LENA M

Kithinji for 2nd Defendant

Kiogora Nganga for plaintiff

No appearance for 1st defendant

