



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Muthui v M’Iburi & 3 others (Environment & Land Case 210 of 2016)
[2023] KEELC 21581 (KLR) (16 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21581 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 210 OF 2016**

CK YANO, J

NOVEMBER 16, 2023

BETWEEN

JAMES KIMATHI MUTHUI PLAINTIFF

AND

NTIBUKA M’MBURUGU M’IBURI 1ST DEFENDANT

CONSOLATA M’MBURUGU 2ND DEFENDANT

JOSEPH GATURU 3RD DEFENDANT

AND

LAWRENCE M’MBURUGU RESPONDENT

JUDGMENT

Introduction

1. The plaintiff commenced this suit by way of a plaint dated 28th October, 2016 seeking orders of eviction against the defendants from LR. No. Nyaki/Kithoka/1573 and an order of permanent injunction restraining them from entering the suit land. It is the plaintiff’s case that the suit land is the property of Eutyclus Muthui (deceased) and accused the defendants of trespass.
2. The defendants filed a joint defence and counterclaim dated 6th November, 2016. Whereas the defendants admit that Eutyclus Muthui (deceased) is the registered owner of the suit land since 1992, it is their contention that the registration was obtained through a process that was irregular and illegal and therefore contended that no good title was conferred to the said Eutyclus Muthui. The defendants further pleaded that the plaintiff’s cause of action that might have existed is time barred. They claim interest over the land by way of adverse possession.



The Plaintiff's Case

3. It is the plaintiff's case that at all material times, the suit land measuring 0.81 hectares or 2 acres was the property of Eutyclus Muthui (deceased) having so registered in the year 1992 and had been using it for farming until his demise in October, 2012. That the deceased had other properties including businesses and after his death, the family took time to organize itself and in the year 2016 found that the defendants were encroaching and trespassing on the said land.
4. James Kimathi Muthui the plaintiff initially testified on 29th January, 2019 before L. Mbugua J and was later recalled and he testified before me. The plaintiff adopted his witness statement dated 21st October, 2016 in which he states that he is the son and administrator of the estate of Eutyclus Muthui who owned and used the suit land before he died in the year 2012. That the defendants have encroached on the said land and want to develop the same and the reason the plaintiff is seeking the court's intervention.
5. The plaintiff testified that his father bought the land in the year 1992 from one Ndola M'Mburugu, an uncle of the defendants. That he used the land and the deceased took a loan of Kshs. 1.2 million in 1997 using the land as security. That when the Plaintiff's father was alive, the defendants who are his neighbours were not on the land, but only came after the deceased passed on. That Mburugu never filed a case against the deceased.
6. The plaintiff produced a green card, letters of administration and demand letter as P exhibits 1 to 3 respectively and urged the court to grant the orders sought.
7. When the plaintiff was cross-examined by Mr. Murango Mwenda, learned counsel for the defendants, he stated inter alia that the green card shows that the plaintiff's deceased father got the land on 7th October, 1992 and that the land was a subdivision of Nyaki/Kithoka/474 which was owned by Mburugu M'Imuri who was husband to the 1st defendant and father of the other 3 defendants. That before parcel No. 474 was subdivided, the land was the family land for M'Mburugu M'Imuri. The plaintiff stated that he did not know how many titles yielded from title 474. That land 1573 after subdivision was registered in the name of M'Mburugu M'Imuri on 9th May 1989 before it went to his brother, N'Ndatho M'Imbari then to the plaintiff's father. The plaintiff stated that he would be surprised if the defendants still held the original title as the same ought to have been surrendered after sub-division was done. The plaintiff further stated that the defendants had built temporary houses on the suit land and are using the whole land. The plaintiff stated that he had never entered inside that land. That his father never sued the defendants.
8. When he was re-examined by Mr. Muchiri, learned counsel for the plaintiff, the plaintiff stated that the defendants have not been on the land for over 24 years, and reiterated that they entered the land in 2012. The plaintiff stated that he did not know whether the photographs he was shown by the defendants' counsel depict what is on the land and court ordered for a scene visit and a report was later filed.
9. When the plaintiff was recalled, he produced copies of a letter dated 10th January, 2020 requesting for a judgment in Meru CMCC No. 61 of 1987, letter dated 22nd January, 2020 from Meru Law court indicating that files from 1967 to 2004 had been disposed as per Cap 14 Laws of Kenya Gazette No. 3900 dated 21st April 2017, Green Card and Mutation form as P exhibits 4 to 7 respectively. The plaintiff was again cross examined and re-examined.



Plaintiff's Submissions

10. In his submissions dated 8th August 2023 filed through the firm of Maitai Rimita & Co. Advocates, the plaintiff gave a background of the case and submitted that his father, Eutyclus Muthui (deceased) is the owner of the suit land and is thus entitled to the protection of the law. The plaintiff's counsel cited Sections 24 and 26(1) of the Land Registration Act and relied on the case of Keiyian Group Ranch v Samwel Oruta & 9 others [2021] eKLR and Gichuki v Njoroge [2021] eKLR.
11. The plaintiff's counsel further submitted that it is clear that there was a court case with regard to the suit property in 1989 leading to the subdivision of parcel No. 474 into parcels 1573 and 1574 and referred to the letter dated 22nd January, 2020 and the entries in the green card produced as exhibits.
12. It is also the plaintiff's submissions that the plea of adverse possession has not been proved and submitted that the defendants are trespassers. The plaintiff's counsel cited Section 107 and 109 of the Evidence Act and relied on the case of Robert Ouma Njoga v Benjamin Osana Ondoro [2016] eKLR, Gabriel Mbui v Mukindia Maranya [1993] eKLR and Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshweni & another [2015] eKLR and urged the court to find in favour of the plaintiff with costs of the suit.

Defendants' Case

13. Ntibuka M'Mburugu M'Iburi, the 1st defendant testified as D.W 1 and stated that the 2nd to 4th defendants are her children. D.W 1 stated that she did not know the plaintiff as she only got to hear of him in court. The 1st defendant adopted her witness statement dated 3rd April 2018 as her evidence in chief wherein she states that she has lived on the land since she got married to M'Mburugu M'Iburi and all their children were born and brought up on the suit land which they have developed extensively. That the plaintiff has never been to the land nor disturbed the defendants' occupation.
14. The 1st defendant was cross-examined by Ms Maeli, learned counsel for the plaintiff and stated that she was not aware if the land had a case in court nor whether the land had been charged or subdivided. That she did not know Eutyclus Muthui. She maintained that they have a house and trees on the land.
15. Lawrence M'Mburugu, the 4th defendant testified as D.W 2 and adopted his statement dated 3rd April 2018. He too denied knowing the plaintiff. His evidence was that they are living on their father's land. He produced the green card and photographs as D exhibit 1 and 2 (a) – (j) respectively. He testified that in their counterclaim, they are seeking a declaration that they have acquired the suit land from Eutyclus Muthui and want it transferred to them for having been in exclusive possession for over 12 years. He too was cross-examined by Ms Maeli and re-examined by Mr. Murango Mwenda.
16. Consolata M'Mburugu, the 3rd defendant testified as D.W 3 and adopted her statement dated 3rd April 2018 and was cross-examined and re-examined. Her evidence basically mirrored that of the other defendants.

Defendants' Submissions

17. The defendants' counsel also gave a brief background of the case including a summary of the evidence. He also referred to the report by the Deputy Registrar who visited the suit land. Learned counsel for the defendants submitted that from the evidence of the defendants, the admission by the plaintiff and the report by the Deputy Registrar, the long occupation of the suit land by the defendants is not in doubt.
18. It is the defendants' submissions that the plaintiff lacks the locus standi to institute this matter. That the suit is incompetent as the plaintiff lacked legal capacity to institute the same as he did not hold a



valid Grant of Letters of Administration of the estate of Eutyclus Muthui (deceased), nor is he the legal or personal representative for purposes of instituting and prosecuting the suit. Learned counsel for the defendants pointed out that the Grant of Letters of Administration issued on 3rd October, 2012 produced as P exhibit 2 is invalid and fraudulent on the ground that it was issued when the deceased was still alive as he is shown to have died on 21st October, 2012. The defendants' advocate relied on the case of *Rajesh Pravjivan Chudasama v Sailesh Pranjivan Chudasama* [2014] eKLR and *Julian Adoyo Onyunga & another v Francis Kiberenge Abanao* Migori Civil Appeal No. 119 of 2015 and submitted that the plaintiff's suit is incompetent, null and void and ought to be struck out.

19. It is also the defendant's submission that the plaintiff's claim of trespass is untenable for failure by the plaintiff to disclose the date of the alleged cause of action. The defendant's advocate argued that the tort of trespass has a limitation and that by concealing from the court the date when the cause of action arose, the plaintiff deprived himself of the opportunity to bring his cause of action within the limitation period. That his attempt during cross examination to state that the defendants entered the land in 2012 is not supported by evidence.
20. It is the defendants' submission that the evidence on record proves their claim for adverse possession as they have been in exclusive and continuous occupation of the suit land for over 12 years. Learned counsel for the defendants cited Section 7 of the *Limitation of Actions Act* which bars any action brought to recover land after the end of twelve years from the date on which the right of action accrued to him. That the plaintiff's father got registered as owner of the suit land in 1992 when the defendants were still in occupation and are still in occupation of the land to date. That the limitation period ended in 2004 upon which the plaintiff's title to the land was extinguished by operation of Section 17 of the *Limitation of Actions Act*. They relied on the case of *Kasuve v Mwaani Investments Ltd & 4 others* [2004] eKLR and submitted they have proved their claim for adverse possession. Learned counsel for the defendants urged the court to dismiss the plaintiff's suit and enter judgment in favour of the defendants in terms of the counterclaim.
21. As earlier stated the court (Mbugua J) on 29th January, 2019 issued an order for scene visit. The learned judge was to attend the scene visit. However, this order was later amended to the effect that the Deputy Registrar, County Surveyor and the Land Registrar visit the scene and prepare a report. The Deputy Registrar, the County Surveyor and the Land Registrar complied with the said orders as directed and visited the scene on 31st March 2021. The Deputy Registrar, Hon. M.A Odhiambo filed her report giving the background, scope and observations/findings as well as conclusions. I note also that there was an earlier report dated 6th December, 2019 by the Deputy Registrar, Hon. E Tsimonjero. The County Surveyor, Meru and the Land Registrar Meru Central also filed their report dated 8th April 2021 together with a sketch map outlining the utilization of the land.

Analysis And Determination

22. I have carefully considered the pleadings, the evidence adduced together with the exhibits, the submissions made and authorities relied on as well as the reports filed by the Deputy Registrar, the Surveyor and the Land Registrar. It is this court's considered view that the following issues arise for determination-;
 - a) Whether the plaintiff is entitled to an order of eviction and permanent injunction against the defendants.
 - b) Whether the defendants have acquired the suit land by way of adverse possession.
 - c) who meets the costs of the suit.



23. Before I consider the above issues, I want to start with an issue raised by the defendants' counsel in their submissions to the effect that the plaintiff lacked the locus standi to institute the suit. It is the defendants' submissions that the suit as filed is incompetent because the plaintiff did not hold a valid Grant of Letters of Administration of the estate of Eutyclus Muthui (deceased). I have perused the exhibits produced by the plaintiff. There is a Grant of Letters of Administration intestate in respect of the estate of Eutyclus Muthui (deceased) which was produced as P exhibit 2. The same was issued on 3rd October, 2012 in Meru High Court Succession Cause No. 398 of 2012. This suit was filed on 2nd November, 2016. I therefore find that the defendants' argument that the plaintiff did not have the capacity to institute the suit is unfounded. It is clear that by the time the plaintiff filed suit, he had been issued with a Grant of Letters of Administration Intestate in respect of the estate of the deceased.
24. From the evidence on record, it is not in dispute that the suit land LR No. Nyaki/Kithoka/1573 has been the property of Eutyclus Muthui (deceased) who was the plaintiff's father. The exhibits produced including PExhibit 1 indicate that the land was registered in the name of the deceased in the year 1992. The land is measuring 0.81 hectares. It is the plaintiff's evidence that the deceased had been using the land for farming until his demise in 2012 and that the defendants who are neighbours trespassed onto the land and put up semi-permanent structures thereon. It is the plaintiff's evidence that the family of the deceased discovered the encroachment in the year 2016. However, the defendant's evidence is that they have been on the land for over 12 years. The defendants' evidence is that the plaintiff has never stepped on the land nor carried out any activity thereon. It is the defendants contention that their occupation of the land has been in exclusive, continuous and uninterrupted possession of the land and that the plaintiff's right over the land has been extinguished and his claim is statute barred. The defendants who are a mother and her children are claiming ownership of the land by way of adverse possession.
25. The 1st defendant testified that she has lived on the suit land since she got married to her late husband, M'Mburugu M'Ibuuri. That the 2nd, 3rd and 4th defendants who are the 1st defendant's children were born and grew up on the suit land. The defendants testified that they got to know of the plaintiff when he filed this case.
26. When the plaintiff testified, he adopted his statement filed on 2nd November, 2016. I have perused the said statement which is very brief. He states that
- “I am the son and administrator of the Estate of Eutyclus Muthui. My father owned and used land Reference No. Nyaki/Kithoka/1573. He died in 2012
- The defendants have encroached on the said land and want to develop the same. The court has to help me to stop them. That is all I wish to state.”
27. From the evidence on record, it is clear that the plaintiff does not know when the defendants entered the land. He however admitted that the defendants were on the whole land and have constructed what he termed as temporary houses.
28. The court has also perused the reports filed by the Deputy Registrars and the Land Registrar. In their report dated 8th April 2021, the surveyor and land registrar gave their results and findings as follows-;
- “The current land utilization type on the suit land is farming. The dormant crops type being grown on the said land are arrow roots, sugarcanes, sukuma wiki, maize, cassava, avocado and nappier grass. Some exotic trees have also been planted in the suit land. See attached map annexed 1 which shows utilization of land by each defendant for faming purposes. The defendants are also practicing dairy, chicken and sheep farming but on a small scale which



is localized within the built-up area. The defendants have semi-permanent houses which occupies the northern part of the suit land. The dwellings are both wooden houses with iron sheets roofing. Each of the defendants have got their own houses but they are concentrated in one location within the suit land as clearly mapped on the drawing annexed 1 and named built-up section...”

29. The reports by the two Deputy Registrars also found that it is the defendants who are both in occupation and use of the land. It was also their observation that the said occupation and use has been for a long period judging from the age of houses and trees thereon. This corroborates the defendants claim that they have been on the land for over twenty years, which is a period in excess of 12 years.

30. From the material on record, and especially based on the evidence adduced and the exhibits as well as the reports on record, it is my finding that whereas the suit land is registered in the name of Eutyclus Muthui (deceased) who was the plaintiff’s father, it is the defendants who have been in possession, occupation and use of the land for a long time. The evidence on record confirms that the defendants trespassed on the suit land and the registered owner did not take any steps to remove them before the expiry of 12 years.

31. Section 7 of the *Limitation of Actions Act* provides as follows;

“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.”

32. Section 17 of the *Limitation of Actions 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.”

33. In my view, and based on the evidence on record and the law as stated above, the plaintiff’s claim herein over the suit land is untenable and his title to the land has been extinguished by operation of the law. Therefore, the plaintiff’s suit must fail on that account.

34. The next issue to consider is whether the defendants are entitled to the orders sought in the counterclaim. The defendants’ claim is basically for adverse possession. In order to succeed, the defendants must demonstrate that the land is registered in the name of the plaintiff and must provide evidence that they have been in open, continuous and exclusive possession of the land for over twelve years in a manner that is adverse to the registered owner.

35. In the case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, it was held that:-

“The statutory provisions show clearly that adverse possession is a statutory method of acquiring title to land by occupation of the land for a statutory period for ones own use inconsistent with the owner’s interest under certain conditions, without buying or paying for the land in the traditional sense, and doing so not under a licence from the owner, and consciously intending to exclude all persons from the land...”

It is self-evident from the enactments that adverse possession extinguishes the title of the dispossessed unregistered owner, while by virtue of adverse possession a registered owner becomes a bare trustee for the stranger in occupation. Consequently, in either case, if the stranger has possession does not transfer title to the stranger. It does not give the intruder



any title, but prevents the owner from assessing his title, and forms a basis for applying to have the title registered in his name...”

36. It was further stated that possession must not be clandestine, it ripens into a prescriptive title only if it is juridical, and must have none of the vicia possessionis such as clam vi, ant precario (by stealth, violence or supplication).
37. In Wambugu v Njuguna [1983] KLR 173, the court of appeal held *inter alia*, that:
- “The general principle is that until the contrary is proved, possession in law follows the right to possess. In order to acquire by the statute of limitation of 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 of which he intended to use it...”
38. The ingredients were also discussed by the Court of Appeal in the case of Mtana Lewa v Kabindi Ngala Mwangandi [2015] eKLR where it stated;
- “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 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 in continuity, in publicity and in extent to show that possession is adverse to the title owner.”
39. In this case, there is no denial that the defendants have been in occupation and use of the suit land for a period that exceeds twelve years. The evidence on record is sufficient to show that the defendants are in possession and occupation and have over the years put up structures and cultivated the suit land. It has not been shown that the registered owner of the land had no knowledge (or means of knowing, actual or constructive) of the possession or occupation since 1992. The possession has also been shown to be continuous. The defendants are all members of one family, being a mother and her children. The material on record confirm that each of the defendants has got their own houses and are utilizing the whole land. Whereas the plaintiff attempted to show that the deceased owner had charged the land and that there was a case No. 61 of 1987 at Meru Law Court, none of the documents produced by the plaintiff proved that there was any such charge or that there was such a case in court. I find that the said documents are suspect and unreliable and I reject the same.
40. Based on the material on record, the claim of adverse possession by the defendants has certainly been proved to the required standard. It is therefore my finding that the defendants have met the threshold to warrant this court to grant an order of adverse possession. The counterclaim is therefore merited and must be allowed.
41. The upshot is that judgment is entered for the defendants against the plaintiff in the following terms-;
- a. The plaintiff’s suit against the defendants is dismissed.
 - b. The defendants’ counterclaim be and is hereby allowed.
 - c. Declaration is hereby made that the defendants have acquired title LR No. Nyaki/Kithoka/1573 by way of adverse possession.



- d. The defendants are entitled to be registered as proprietors of the said land LR No. Nyaki/Kithoka/1573.
- e. Costs of the suit and counterclaim are awarded to the defendants.

42. Orders accordingly.

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

IN THE PRESENCE OF:-

Court Assistant – V. Kiragu/Lena M.

Ms Gacheri Mwiti holding brief for Murango Mwenda for defendants

No appearance for Maitai Rimita for plaintiff

C.K YANO

JUDGE

