



Naitipa v Meroka (Environmental and Land Originating Summons E007 of 2021) [2023] KEELC 21724 (KLR) (14 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21724 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E007 OF 2021
EM WASHE, J
NOVEMBER 14, 2023**

BETWEEN

JOSEPH OLOINYEYIE NAITIPA PLAINTIFF

AND

JEFF OMWOYO MEROKA DEFENDANT

JUDGMENT

1. The Plaintiff moved this Honourable Court by way of an Originating Summons dated 30th September 2021 (hereinafter referred to as “the present O.S”) seeking for the determination of the following issues;-
 - a. Whether the Plaintiff has been in adverse possession of the Defendant’s parcel No. TRANSMARA/MOITA/252 for a period of 12 years.
 - b. Whether the Plaintiff should be registered as proprietor of parcel No. TRANSMARA/MOITA/252.
 - c. Whether the District Land Registrar should be ordered by this Honourable Court to cancel the name of the Defendant in title No. TRANSMARA/MOITA/252 and register the Plaintiff herein as the proprietor of the said parcel herein.
 - d. Whether the Deputy Registrar of this Honourable Court may be directed to sign all transfer documents in favour of the Plaintiff.
 - e. Whether the Defendant and the Interested Party should be restrained by an order of injunction from selling, transferring, entering or in any other way whatsoever interfering with the Plaintiff’s peaceful use, occupation and/or



enjoyment of Parcel No. TRANSMARA/MOITA/252 both pending the hearing and determination of the suit and after the determination hereof.

- f. Who should bear the costs of this suit?
2. The prayers hereinabove have been supported by the Affidavit sworn on the 30th September 2021 by the Plaintiff.
 3. The Plaintiff in the Affidavit in support of the summons has advanced the following reasons as to why the present O.S is merited;-
 - i. The Plaintiff has been in occupation of the suit property for over 30 years.
 - ii. The Plaintiff's occupation on the suit property was way before adjudication of the Masurura Adjudication Section and Moita Adjudication Section.
 - iii. However, during the Adjudication of Moita Adjudication Section, some parcels of land within Masurura Adjudication Sections were wrongly adjudicated and titled under Moita Adjudication Section including the suit property.
 - iv. The suit property which was in Masurura Adjudication Section was then allocated to one Bernard Salim Aroka who later disposed it off to the current Defendant on the 10th of December 1997.
 - v. However, dispute the suit property being registered in the name of the Defendant in the year 1997, the Plaintiff has continued to enjoy occupation and use of the same without any interruption for over 12 years.
 - vi. The Plaintiff therefore prays that the Defendant's ownership rights over the said suit property be extinguished by an order of adverse possession and the same be registered in his name.
 - vii. Further to that, the Land Registrar, Transmara East, West and South be directed to cancel the Defendant's name in the Register and enter the Plaintiff's name as the registered and beneficial owner of the said suit property.
 4. The present O.S was served by way of substituted service through a newspaper advertisement published on the 22nd May 2022 but there was no appearance or defence filed by the Defendant.
 5. The suit was then fixed for hearing on the 18th of September 2023 where the Plaintiff testified in support of the present O.S.
 6. According to the testimony of the Plaintiff, the Defendant has never been in occupation and/or use of the suit property.
 7. The Plaintiff informed the Honourable Court that he has been in occupation of the suit property since 1978.
 8. However, during adjudication of Masurura Adjudication Section And Moita Adjudication Section, the suit property was adjudicated as under Moita Adjudication Section yet it was within Masurura Adjudication Section.



9. As a result of this overlap of Moita Adjudication Section into Masurura Adjudication Section, the suit property was allocated to a stranger known as Bernard Salim Aroka who later sold it to the current Defendant on the 10th of December 1997.
10. However, both registered owners never took possession and/or used the suit property which was and still is in the occupation or use by the Plaintiff.
11. The Plaintiff further testified that he brought this issue to the attention of relevant Land Officers who undertook an investigation of this omissions and based on a report dated 30th September 2004 recommended that any person who was affected by the overlap should file a suit in Court to seek the appropriate orders.
12. It is on the basis of the actual occupation as well as the Government Report of 30th September 2004 that the Plaintiff has moved this Honourable Court for an order of adverse possession and have the suit property registered in his name.
13. The Plaintiff then produced three exhibits which were the Letter dated 6th February 1998 from the Chief Land Registrar to the District Land Registrar, Transmara District, the Ground Report dated 30th September 2004 from the District Land Registrar to the District Commissioner, Transmara and lastly a copy of an Official Search of the suit property dated 3rd March 2017.
14. The issue for determination therefore is whether or not the Plaintiff has satisfied the mandatory requirements for the granting of an order of adverse possession.
15. In the case of Tabitha Waitherero Kimani-versus- Joshua Nganga (2017) eKLR, the mandatory requirements of adverse possession were identified and expounded as follows;-
 - (A) Open And Notorious Use Of The Property. For this condition to be met the adverse party's use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim. The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If a legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about.
 - (B) Continuous Use Of The Property – The adverse party must, for Statute of Limitations purposes, hold that property continuously for the entire limitations period, and use it as a true owner would for that time. This element focuses on adverse possessor's time on the land, not how long true owner has been dispossessed of it. Occasional activity on the land with long gaps in activity fail the test of continuous possession. If the true owner ejects the adverse party from the land, verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party return. He cannot count the time between his ejection by the true property owner and the date on which he returned.
 - (C) Exclusive Use Of The Property – The adverse party holds the land to the exclusion of the true owner. If, for example, the adverse party builds a barn on the owner's property, and the owner then uses the barn, the adverse party



cannot claim exclusive use. There may be more than one adverse possessor, taking as tenants (i.e. owners) in common, so long as the other elements are met.

- (D) Actual Possession Of The Property – The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not establish actual possession.”

16. Applying the above principles in the facts of this case, the Honourable Court will proceed to make the following determinations;

(A) Open And Notorious Use Of The Property

17. The first principle for the Plaintiff to prove is that his occupation has been open and notorious to the registered owner of the suit property.
18. In this suit, the Plaintiff has tendered evidence that he has been in open and notorious occupation and use of the suit property since 1978.
19. In the Honourable Court’s considered view, the Plaintiff’s occupation on the suit property which includes his family qualifies to be one which was open and notorious and to the knowledge of the Defendant by virtue of the Ground Report by the Lands Department officials dated 30th September 2004.
20. In essence therefore, this Honourable Court is satisfied that indeed the Plaintiff’s occupation and/or use of the suit property has been open and notorious as required in this principle.

(B) Continuous Use Of The Property

21. The second principle is whether or not the Plaintiff has proved continuous use of the suit property for a period of over 12 years continuously.
22. In this case, the Plaintiff testified that he has been in occupation of the suit property since 1978.
23. This evidence by the Plaintiff has not been disputed and/or rebutted any office and/or party.
24. In other words, the Honourable Court is satisfied that the Plaintiff has been in continuous possession and use of the suit property for a period of over 12 years since the Defendant was registered as the owner on the 6th of January 1998.
25. The Plaintiff has again satisfied this principle of adverse possession.

(C) Exclusive Use Of The Property

26. The third principle is one that requires the Plaintiff to have been in exclusive use of the suit property for the mandatory period of 12 years.
27. The Plaintiff herein has indeed testified before this Honourable Court that his occupation commenced in the year 1978 and has been going on up to date.
28. Since the Defendant was registered as the owner of the suit property in the year 1998, he did not make any entry into the suit property and or disrupted the Plaintiff’s exclusive possession up to date.



29. Consequently therefore, this Honourable Court is satisfied that indeed the Plaintiff's occupation on the suit property has been exclusive for the last 12 years after the registration of the Defendant as the owner of the suit property.

(D). Actual Possession Of The Property

30. The last principle is one that requires the Plaintiff to have been in actual possession for a period of 12 years continuously.
31. The Plaintiff has testified and without any contradiction that he has been in occupation of the suit property since 1978.
32. The Defendant herein acquired the suit property in the year 1998 while the Plaintiff was in occupation.
33. However, there is no evidence of the Defendant disrupting the Plaintiff's actual possession after the suit property was registered in his name.
34. The Ground Report dated 30th of September 2004 also point out to the fact that most title holders in Moita Adjudication Section do not actually stay in their titles they hold.
35. Clearly therefore, the Plaintiff having given evidence that he has been in actual possession of the suit property since 1978, this Honourable Court is satisfied that the actual possession of the suit property has been with the Plaintiff for more than 12 years from registration of the Defendant.

Conclusion

36. In conclusion therefore, this Honourable Court is satisfied that the Plaintiff has met all the ingredients of adverse possession and the present O.S is merited.
37. This Honourable Court therefore makes the following Orders in determination of the Originating Summons dated 30th of September 2021;-
- A. The Originating Summons dated 3rd september 2021 is merited
 - B. The ownership of the defendant over the property known as L.R.NO.TRANSMARA/MOITA/252 be and is hereby extinguished by a claim of adverse possession
 - C. The district land registrar, transmara be and is hereby ordered to cancel the defendant's name as the registered owner of the property known as LR.NO.TRANSMARA/MOITA/252 and instead enter the name of the plaintiff as the registered owner of the said property
 - D. Upon registration of the plaintiff as the owner of the property known as LR.NO.TRANSMARA/MOITA/252, the district land registrar, transmara is hereby directed to issue the plaintiff with the relevant ownership documents as provided for in law
 - E. There will be no order as to costs

DATED, SIGNED & DELIVERED VIRTUALLY INMILIMANI LAW COURTS ON 14TH NOVEMBER 2023

EMMANUEL.M.WASH



JUDGE

