Nthukire & 3 others v Gerishon & another (Environment & Land Case 49 of 2016) [2023] KEELC 22555 (KLR) (20 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22555 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ENVIRONMENT & LAND CASE 49 OF 2016

A KANIARU, J

DECEMBER 20, 2023

BETWEEN

NGUGI NTHUKIRE ..... 1ST PLAINTIFF

PETERSON NTHIGA KARANJA ..... 2ND PLAINTIFF

PIUS ERNEST NJIRU ..... 3RD PLAINTIFF

CHARLES NYAGA BIRICI ..... 4TH PLAINTIFF

AND

DAVID MUCHUNGU GERISHON ..... 1ST DEFENDANT

NYAGA GERISHON MICHAEL NGARI ..... 2ND DEFENDANT

JUDGMENT

1. The 1st to 4th plaintiffs - Ngugi Nthukire, Peterson Nthiga Karanja, Pius Ernest Njiru & Charles Nyaga Birici - filed this suit on 13.07.2016 by way of Originating Summons against the Defendants – David Muchungu Gerishon & Nyaga Gerishon Michael Ngari. As originally filed, the plaintiffs were applicants while the defendants were respondents. The Originating Summons went through some amendments pursuant to leave granted on 19.03.2018 and the final further amended originating summons was filed on 12.01.2022 and dated 07.01.2021.

2. The plaintiffs sought orders that the court be pleased to declare that the they have become entitled by way of adverse possession to 3 acres out of that land known as Mbeere/mbita/6101, 6102, 6103 and 6104 and that they be registered as sole proprietors of the land; that the court orders the Land Registrar, Embu, to register the plaintiffs as proprietors of the suit lands. They further prayed for costs of the suit.

3. In the supporting affidavit accompanying the summons, the plaintiffs deposed, interalia, that they are members of Nditi Clan whereas the defendants are members of Ikandi Clan, both of the Mbeere Community; that the two clans have historically had ownership and boundary disputes over a portion

of the suit land originally known as Mbeere/mbita/1830 of which the suit lands herein were the resultant subdivisions; that before adjudication, the plaintiffs grandfather known as Njiru Mbiriri of Nditi Clan instuted Siakago DM CC 400/51 against Mathuri Kagundu of Ikandi Clan over ownership of a portion of the said land and the suit was resolved in favour of their grandfather.

4. That in 1973 a boundary dispute was instituted by the Nditi Clan before the Land Adjudication Committee Appeals Board vide Appeal No. 67 of 1974 and the defendants clan herein won; that being dissatisfied with the Land Adjudication Committee Appeals decision, the plaintiff's clan appealed before the Minister vide Appeal Case 231/2000 where their Nditi clan won; that the said Ministers Award was quashed vide Kerugoya H.C Judicial Review Application 9/2012 and that on 21.07.2018, vide Embu High Court Succession 142/2012, Mbeere/mbita/1830 was transferred to Joseph Mbugi Ngari who later transferred it to the 1st & 2nd defendants on the same date. That the 1st & 2nd defendants further caused land parcel Mbeere/mbita/1830 to be subdivided into Mbeere/mbita/6101,6102,6103 and 6104, which are in their names.

5. They deposed further, that they, together with their families, have been in continuous, exclusive and adverse possession of 3 acres of the suit lands and have made developments on the land including planting miraa, mango trees, other fruit trees, and also a sacred tree where members of their clan perform traditional rituals; that they build houses; and that they have also buried family members on the said land parcels.

6. The defendants opposed the suit by way of a Replying Affidavit dated 28.01.2022 and filed 31.01.2022. They denied that the plaintiffs have houses on the suit parcels of land or that they have ever lived there. They deposed that the plaintiffs do not have a valid claim against them as it is not clear whether they are claiming on their own behalf or on behalf of the clan; that they are not clear among themselves who wants what and where; that it's unclear which developments are on which parcels of land, or when such development was done or even where the alleged trees were planted. They deny that there were people buried on the suit lands. They further deposed that the suit lands have been in their hands for many years without interruption and that they have given the land to some of their relatives to cultivate. They also claim not to have constructed on the said parcels and deny that there is any construction therein or any occupation.

7. The suit was set down for hearing. PW1 was Pius Ernest Njiru. He is the 3rd plaintiff in the suit. He adopted his witness statement as evidence in the suit. He stated that he was before court because of a portion of land which the defendants feel is theirs but which they also feel is theirs. He said that they have been living on that part of land for over 100 years. He asked the court to award them the land they were claiming, which is land parcels No. Mbeere/mbita/6101, 6102, 6103 and 6104 but only 3 acres, not all of them. He said that nobody has ever measured to see that the land they occupy is 3 acres as it is only an estimate. That if it happens to be more or less, they would be satisfied. That, that portion has a boundary marked by euphorbia plants and that they have miraa there which belongs to their children. That it is their children not them, who are living on the land and it is the children who have houses there.

8. On cross examination, he said that the 1st plaintiff also does not live on the suit land; that the 2nd plaintiff lives on a portion of the suit lands; and that the 2nd plaintiff has planted miraa on the same, has a semi-permanent house and that he has been living there for more than 20 years. That the 4th plaintiff also does not live on the suit lands. He said that they are representing their families in this case. He further said that the 3 acres are occupied by the 2nd plaintiff and his son; and that the other plaintiffs have no children there. He also stated that he did not have the Green Cards for the suit parcels of land or copies of searches. Further that they have had peaceful occupation even though there have been disputes in court. That there are no mango trees on the portion they are claiming; that the miraa on the land

they are claiming belongs to the 2nd plaintiff's son. He further stated that the people set out in their Supporting Affidavits are not buried on the 3 acre piece of land they are claiming.

9. On re-examination, he stated that it is their families that are living on the portion they are claiming and that they are representing other family members; that they want the suit lands to become family land; and that nobody has ever chased them from that land.

10. DW1 was Nyaga Gerishon Michael Ngari, the 2nd defendant. He adopted his witness statement as evidence in his case. He stated that he was in court on his behalf and that of the 1st defendant. He stated that he was a farmer and that the 1st defendant is his brother. He stated that he knows the 1st, 3rd and 4th plaintiff. He denied that the 2nd plaintiff has built on their land or that he is their neighbor. He stated that the 2nd plaintiff lives on a land that is different from theirs and that between them there is another person called Norman Nyaga. He denied that the 2nd plaintiff has planted miraa on the suit lands or that he has built structures therein.

11. On cross examination, he stated that if there is any structure on the suit lands it belongs to the care taker they have appointed to take care of the land and who is also farming there. He further stated that he had no photographs of the land. He stated also that succession was done and the parcels of land are their inheritance from their late father. That the land parcel was originally parcel No. 1830 and they subdivided the same into the suit parcels herein. That he had the records of the succession cause but they were not there in their trial bundle. That they subdivided the land and the administrator of their estate caused the surveyor to go to the site and place beacons. He stated that he was not aware that parcel no. 1830 was a subdivision of another parcel. That his father got the land from Ikandi Clan, which clan he also belongs to. That there were no people on the land when the judicial review application was decided.

Submissions

12. The suit was canvassed by way of written submissions. The plaintiffs filed their submissions on 23.05.2023. They gave brief facts of the case and identified three issues for determination. The first was whether the Applicants have acquired title by way of adverse possession. On this, they submitted that their clan has been in possession of the suit properties even when the different judicial bodies made their determination. That they have been in possession of 3 acres out of the suit property for more than 12 years without interruption, not even when the title in the property kept changing. They identified the second issue as when time started running. On this they submitted that it is trite law that time stops running the moment a suit is filed by the title owner. That none of the mentioned cases herein were instituted by the defendants clan but by the plaintiffs clan and that the said cases never stopped time from running.

13. The defendants filed their submissions on 25.05.2023. They submitted that Mbeere/mbita/1830 came into being on 14.01.2000 as per the green card in the plaintiffs trial bundle; that at the time of institution of Siakago DM CC 400/1951 and Appeal No. 67/1974 the land in question had not been registered in the name of a party for time to start running. That the plaintiffs annexed a mutation form in respect of Mbeere/mbita/1830 which is prima facie evidence that subdivision was done but they failed to describe to the court which part of the land the 2nd plaintiff has built on. They are of the view that the plaintiffs have failed to prove their case of adverse possession and pray that the same be dismissed with costs.

Analysis And Determination

14. I have considered the pleadings, the evidence, and the submissions by the parties. I find the issues for determination to be:

    i. Whether the plaintiffs have met the threshold for grant of orders for adverse possession over 3 acres out of that land known as Mbeere/mbita/6101, 6102, 6103 and 6104.

    ii. Who should bear the costs of the suit.

15. On the first issue, the statutory anchor on adverse possession is Section 7 of the Limitations 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."

Further Section 13(1-2) of the *Limitation of Actions Act* provides that:

> " A right of action to recover land does not accrue unless the land is in the 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 sections 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 adverse possession of the land. 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 adverse possession of the land."

16. The Court of Appeal in the case of Wilson Kazungu Katana & 101 others v. Salim Abdalla Bakshwein & another [2015] eKLR as cited in Wainaina v Macharia ((Suing as the Administrator of the Estate of Macharia Kimani)) (Environment & Land Case E013 of 2021) [2022] KEELC 2656 (KLR) (21 July 2022) (Judgment) sought to define what constitutes adverse possession. The Court stated as follows:-

> " From all these provisions, what amounts to adverse possession? First, the parcel of land must be registered in the name of a person other than the Applicant, the Applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner."

17. Further, the court of appeal in the case of Samuel Kihamba v Mary Mbaisi (2015) Eklr stated as follows:

> " Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is without force, without secrecy, and without licence or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario."

18. Adverse possession then arises when a person occupies the land openly, freely and without force or secrecy. This occupation should be with the knowledge of the registered owner but without his

permission. The occupation should be continuous for a period of at least 12 years and it ought to be adverse to that of the registered owner. An adverse possession suit should be brought against the registered owner of the land. However, it is clear that adverse possession is defeated when the registered owner makes effective entry into the land or ejects the adverse possessor. It is also defeated if a case is filed against the adverse possessor.

19. The first element to be established in a suit of this nature is whether the suit is filed against the registered owner of the land. From the material presented in court, which includes the mutation form produced by the 3rd plaintiff as Plaintiff's Exhibit No. 8, the suit parcels of land being Mbeere/mbita/6101, 6102, 6103 and 6104 are resultant sub divisions of land Parcel Number Mbeere/mbita/1830. From the plaintiff's testimony, original land parcel Mbeere/mbita/1830 was transferred vide Embu High Court Succession 142/2012 to a Joseph Mbugi Ngari who later transferred the same to the 1st & 2nd defendants on 21.07.2018. The defendants then caused the land to be subdivided as set out above. The plaintiffs testified that the said subdivisions are now registered in the 1st & 2nd defendants names.

20. From hearing the parties, it is not in dispute that the 1st & 2nd defendants are the registered proprietors of the resultant subdivisions. The plaintiffs do not also say who was the registered proprietor of land parcel Mbeere/mbita/1830 before it was transferred to Joseph Mbugi Ngari in the Succession Cause.

21. Nevertheless, the 1st & 2nd defendants acquired the suit land from the said Joseph Mbugi on 21.07.2018. The law is clear that a right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run. The 1st and 2nd defendant were registered as proprietors on 21.07.2018, meaning that is when the suit land came into possession of the plaintiffs for time to be said to start running against defendants on 21.07.2018.

22. Again, in order for a party to succeed in a claim for adverse possession, another element that must be proved is whether the plaitniffs have been in occupation of the suit parcels of land for a continuous and uninterrupted period of 12 years. The 1st to 4th plaintiffs aver that they have been in occupation of the suit land for over 100 years. While giving testimony, the 3rd plaintiff who testified on behalf of the other plaintiffs however testified that it is their families that are in occupation of the suit land, and not them as they themnselves live on other parcels of land. In the same breath, he also said that it is the 2nd plaintiff who is said to be in occupation of the part of the land they are claiming. He is there together with his son who has planted khat/miraa on the said portion and built a semi-permanent house and that the other plaintiffs have no children there. On re-examination, he changed his story again and said that it is their family members who are in occupation of the suit land and that as the plaintiffs they were representing their family members.

23. From all these contradictory averments, I have been unable to make out the plaintiffs case clearly. Are they the ones who have been in occupation of the suit land or is it their family members? Or is it even the 2nd plaintiff only? For how long, if at all, have they been in such occupation? The Respondents denied any such occupation or even that there are any structures on the suit land belonging to the plaintiffs or that any miraa/khat is planted therein. They say that the only structure on the suit land belongs to their caretaker whom they have appointed to take care of the land and who also farms there.

24. The burden of proving that the plaintiffs are or have been in occupation of the suit land at all times was upon the plaintiffs. In this case, I am not persuaded that the plaintiffs or their families or the 2nd plaintiff and his son have been in occupation of the 3 acres of land that they are claiming. The evidence on this is so inconsistent and contradictory that one can only conclude that they are not being honest with the court. They did not even call any witnesses to corroborate their story that they live on the land. It is also not clear where the three acres of land are among or within the four parcels of land. The true dimensions of the three acres and the extent to which they cover the four parcels needed to be

made clear. In Kasuve Vs Mwaani Investments Limited & 4 others, the court held, interalia, that the identification of the land claimed by an adverse possessor is an important and integral part to proving adverse possession.

25. I have mentioned that only one plaintiff testified. No other witness was called. It is important to appreciate that a person or persons claiming as adverse possessors must bring out the true character of adverse possession. In this regard, the case of Gabreil Mbui Vs Mukindia Maranya: HCC No. 283 of 1990, Meru [1993] eKLR is instructive. The court observed thus:

> " The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community, of the exercise of dominion over the land. The idea of open and notorious possession entails possession that gives visible evidence to one on the surface of the possessed land. The purpose of this element is to afford the owner an opportunity for notice."

26. From the above observation, it seems to me that the aspect of notoriety in adverse possession requires more than the evidence of the claimant himself. To suffice in "giving reasonable notice to the owner and the community of the exercise of dominion over the land" evidence needs to be brought to court to show that the fact of ownership by the claiming party is known to some or all in the community or the world at large. It serves also to show that such ownership is not in secret or by stealth. Another pertinent observation in Mbui's case (supra) is as follows:

> " The nature of the acts on the ground usually determine if they are notorious, but weight may be given also to the possessor's reputation as owner or his having public records evidencing ownership."

27. In my view, it was a tactical blunder by the plaintiff to make available only his evidence to prove adverse possession. The aspect of notorious or open possession needed corroboration from independent witnesses. Matters are not made any better by the fact that even the evidence made available is wanting in believability because of material and/or glaring contradictions.

28. It is due to all this that I feel impelled to hold, which I hereby do, that the plaintiffs case for adverse possession is not proved on a balance of probabilities. I therefore dismiss the case with costs to the defendants.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 20TH DAY OF DECEMBER, 2023.

In the presence of Munene Muriuki for respondents and M/s Muturi for Magee for applicants.

Court assistant: Leadys

Interpretation: English/Kiswahili

A.K. KANIARU

JUDGE