



REPUBLIC OF KENYA



Muguongo & another v Karombori & another (Environment & Land Case E008 of 2023) [2023] KEELC 22206 (KLR) (13 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22206 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E008 OF 2023
CK NZILI, J
DECEMBER 13, 2023**

BETWEEN

GEOFFREY MBAABU MUGUONGO 1ST PLAINTIFF

GEOFFREY MBAABU MUGUONGO 2ND PLAINTIFF

AND

GEDIEL MURERWA KAROMBORI 1ST DEFENDANT

GEDIEL MURERWA KAROMBORI 2ND DEFENDANT

JUDGMENT

1. The plaintiff sued the defendant, claiming he was entitled to L.R. No. Abothuguchi/Upper Kaongo/682, (the suit land) under adverse possession. The originating summons was supported by a supporting affidavit of Geoffrey Mbaabu Muongo sworn on 5.4.2023. The plaintiff averred that on 1.8.2001, he bought 0.50 acres, which was to be excised from the suit land. However, he averred the seller, the late Fredrick Mutwiri Muthamia, passed on before he could subdivide and transfer the portion, though he had been paid the entire sum. The plaintiff averred he took vacant possession in 1981 and has since been in open, uninterrupted, exclusive, and quiet possession where he had undertaken farming and honey-making activities.
2. In a further supplementary affidavit dated 24.4.2023, the plaintiff averred the defendant had filed a suit in Githongo law Courts seeking an injunction to prevent him from entering the land or for the removal of building stones and bee hives from the land, which he opposed and filed a counterclaim leading to a judgment dated 3.3.2023. The plaintiff averred the suit land was agricultural land which required a land control board; hence the sale became void.
3. Through a replying affidavit dated 12.7.2023, the defendant admitted he owned L.R. No. Abothuguchi/Upper-Kaongo/682, which he acquired from Dennis Mugira Mutwiri on 8.3.2021, was vacant. He said he was unaware of the alleged previous land sale to the plaintiff. The defendant averred



- that he conducted an official search before buying the land, which showed the owner as Dennis Mugira Mutwiri; he proceeded with the sale since there was no caution or restriction against the title.
4. Further, the defendant averred that the seller had inherited the suit land from his deceased father through transmission.
 5. Similarly, the defendant averred that any alleged land sale by the deceased must have been illegal unlawful, unenforceable, and tantamount to intermeddling with the deceased's property since he could only acquire possession after the grant. Additionally, the defendant averred he filed a suit in Githongo Law Courts for trespass and acquired a judgment against the plaintiff and a permanent injunction; hence, the suit was res judicata. The defendant averred the sale occurred on 1.8.2001, long after the deceased died in 1968, and there was no indication that the total purchase price was cleared. He attached copies of the official search, title deed, sale agreement, copy of record, confirmation of grant, pleadings, decree in Gitongo SPMCC ELC No. E019 of 2021 and a copy of the chief's letter as GMK 1 -6, respectively.
 6. At the trial, Geoffrey Mbaabu Muguongo testified as PW 1. He adopted his witness statement dated 5.4.2022 as evidence in chief. His evidence was that he bought ½ of the land from Fredrick Mutwiri Muthamia, which was to be hived from the suit land. After payment of the whole purchase price, PW 1 said he took vacant possession and has since 1981 been on the suit land growing crops and keeping bees with full knowledge and approval of the defendant's family. He said the seller passed on before transferring the land to his name. He produced a copy of the sale agreement, photographs and an official search as P. Exh No. 1, 2 (a) & (b) & 3, respectively.
 7. In cross-examination, PW 1 admitted that he had been sued by the defendant in Githongo SPMC ELC No. E019 of 2021. He denied being restrained through a court order from entering the suit land, though his counterclaim was dismissed. PW 1 told the court that the defendant's father sold him the land. Though acknowledging that he bought the land when the registered owner was deceased, he said the defendant's father sold the land to him to educate his children; among them was the defendant, who had passed very well in his exams. He denied that he was merely leasing the land but not buying it. He, however, admitted he had been leasing out the land since 1981 until he acquired purchaser rights in 2001. PW 1 said he was unaware of the succession cause for the deceased's estate; otherwise, it was done secretly. As to evidence of occupation, PW 1 told the court the trees he had planted were now overgrown, and the building materials deposited on the suit land 15 years ago were still visible. He said he has been tilling the land since 1981.
 8. Gediel Murerwa Karombori testified as D.W. 1. Adopting his witness statements as his evidence in chief. D.W. 1 told the court he was the registered owner, of the suit land, which he bought from the then-registered owner Dennis Mugira Mutwiri on 8.3.2001 and took possession since it was vacant. He said he had conducted an official search, visited the land before purchasing it, and established that the seller was the official registered owner who had acquired the land from his deceased grandfather by transmission. He told the court that the alleged seller of the land to the plaintiff was never a registered proprietor; otherwise, the transaction was illegal, unlawful, and unenforceable.
 9. Further, D.W. 1 told the court that after the plaintiff trespassed onto his land and started planting crops, depositing building blocks, and keeping bees, he filed Githongo SPMC ELC No. E019 of 2021, against the plaintiff whose judgment was delivered. He insisted the sale against the plaintiff and Fredrick Mutiwri Muthamia was clear, he could only take possession after the grant was confirmed; adverse possession was inapplicable since 12 years had not lapsed by the time Dennis Mugira Mutwiri became the registered owner on 10.9.2020. he produced an official search for the land dated 1.10.2020 as P. Exh No. 1, the sale agreement dated 8.3.2021 as D. Exh No. (2) title deed dated 14.4.2021 as D.



- Exh no. (3) green card as D. Exh no. (4) certificate of confirmed grant dated 25.9.2020 as D. Exh No. (5), pleadings in Githongo SPMC ELC No. E019 of 2021 as D. Exh No. 6 (a) (b) & (c), chief's letter dated 29.6.2019 as D. Exh No. (7).
10. In cross-examination, D.W. 1 told the court he bought the land from Dennis Mugira Mutwiri after conducting due diligence. He said he had enquired from the seller who owned the overgrown trees, bee hives, and building materials but was assured they would be removed; he said the seller told him whatever was on the land belonged to his late father. He denied there were any food crops when he bought the land.
 11. Dennis Mugira Mutwiri testified as D.W. 2. After adopting his witness statement dated 6.6.2023 as his evidence in chief, he told the court he sold and transferred the land to the defendant by an agreement dated 8.3.2021. Further, DW2 said the land initially belonged to Muthamia Mairuta (deceased), his grandfather, and that he had inherited it after obtaining a confirmed grant letter of administration. He termed the alleged sale agreement between the plaintiff and the late Fredrick Mutwiri Muthamia as illegal since Fredrick Muthamia was never a registered landowner.
 12. Further, he told the court the land was free of any encumbrances, such as a caution lodged by the plaintiff to stop the sale. He denied the plaintiff's alleged adverse possession claim. In cross-examination, D.W. 2 said he was born in 1986; he alleged that his grandfather had left a will before he passed on in 1968, bequeathing the land to him. D.W. 2 said he took the defendant to view the land before he sold it and observed the presence of overgrown trees that his late grandfather had planted. D.W. 2 said he started utilizing the land at the age of 15 years, and the plaintiff only came to the land following the sale and transfer to the defendant. He said he never made a report to stop him with the police but had sent him a demand letter.
 13. Additionally, D.W. 2 said he filed a succession cause at Githongo Law Courts before the sale. He said a suit was filed at Githongo law courts after the entry, where an injunction was issued. D.W. 2 told the court that no one filed an objection against the issuance of the confirmed grant.
 14. After the close of evidence, parties were directed to file written submissions. The plaintiff, by written submissions dated 31.10.2023, submitted that he acquired the land from a son of the then-registered owner on 1.8.2001, who passed on before he could comply with the term of the sale agreement of obtaining letters of administration. It was submitted that a son of the deceased seller acquired letters of administration for the estate of Muthamia Mairuta and had then confirmed but resold the land to the defendant while the plaintiff was in occupation and developing the land.
 15. The plaintiff submitted evidence of occupation and possession was provided by way of the building blocks, bee hives, fully grown trees, and growing crops, which occupation and developments have been open, exclusive, uninterrupted, and notorious with the full knowledge of the registered owner for a period of 22 ½ years.
 16. The plaintiff submitted that the purported registration, sale, and transfer to the defendant from D.W. 2 had no legal effect. The plaintiff submitted that after clearing the purchase price and taking vacant possession, time began to run in adversity since the license was terminated. Reliance was placed on *Public Trustee vs Wanduru Ndegwa* (1984) KLR 314 *Wambugu vs Njuguna* (1983) KLR 172.
 17. Regarding the evidence by D.W. 2, the plaintiff submitted that by the time he bought the land in 2001, D.W. 1 was only 15 years old and could not comprehend much; hence, the reason his evidence on ownership of the land was contradictory, especially on the owner of the building stones. On res judicata, the plaintiff submitted his counterclaim concerning the sale and transfer alleged as fraudulent, as opposed to adverse possession.



18. On his part, the defendant, relying on written submissions dated 31.10.2023, isolated three issues for determination. On res-judicata, the defendant submitted the suit offered Section 7 of the Civil Procedure Act since the ownership issue was vital in the former suit. Reliance was placed on C.K Bett Traders Ltd & others vs. Kennedy Mwangi & another (2021) eKLR IEBC vs Maina Kiai & other (2017) eKLR, Black Laws Dictionary 10th Edition, Kennedy Mokuia Ongiri vs John Nyasende Mosioma & another cited with approval in Siri Ram Kaura vs M.J.E Morgan C. 71/60 (1961) E.A 462, Republic vs. A.G & another exparte James Alfred Koroso (2009) eKLR.
19. The defendant submitted that the court in Githongo had jurisdiction to hear the suit since it was duly gazetted under Section 26 of the Environment and Land Court Act with pecuniary jurisdiction. Reliance was placed on Patrick Ndegwa Munyua vs. Benjamin Kiiru Mwangi and another (2020) eKLR.
20. On adverse possession, the defendant submitted that the ingredients had not been proven on a balance of probability. Reliance was placed on Alphonce Agutu Dera vs. Fanuel Dera Achongo (2022) eKLR, where the court cited with approval Sammy Mwangangi and others vs Commissioner of Land and others (2021) eKLR.
21. Further, the defendant submitted vacant possession guided by the sale agreement P. Exh No. (5), could only have started from 25.9.2020 reliance was placed on Kyeyu vs Kyeyu C.A No. 8 of 1990 on occupation, the defendant submitted that the plaintiff did not reside on the suit land; he had no structures therein, and mere photographs of seasonal crops, beehives, and trees were insufficient to prove adverse possession. Reliance was placed on Joseph Macharia Kairu vs Kenneth Kimani Muiruri (2021) eKLR, citing with approval Samwel Kihamba vs Maray Mbaisi (2015) and eKLR Mbui vs Maranya (1997) eKLR.
22. The defendant submitted that the plaintiff bought land from the seller, who was not a registered owner then and after the registered owner had already died. So, the defendant submitted that there was nobody to be dispossed of. Therefore, the right of action could not have accrued as there was nobody against whom it could be enforced.
23. The defendant submitted that the sale was illegal, unlawful, and unenforceable since the seller had no valid title or authority to sell the land. The defendant submitted any sale, entry into, or possession as a contravention of the law of succession act to form a basis for claiming the land under adverse possession.
24. On the purchase price, the defendant submitted, there was no proof that the total purchase price paid to Fredrick Muthamia for the acknowledgment receipts was only for Kshs.40,000/= out of Kshs.45,000/=, there can be no adverse possession if the last payment was not made.
25. The issues calling for determination are:
 - i. If the suit is res judicata.
 - ii. If the plaintiff has proved adverse possession.
 - iii. If the plaintiff is entitled to the reliefs sought.
26. The plaintiff's claim is that of adverse possession. His evidence is that he purchased the suit land from a son of the late Muthamia Mairuta, one Fredrick Mutwiri Muthamia, in 2007, who put him into possession while awaiting the process of succession to transfer the land. Unfortunately, the son passed on before he could undertake the process. The plaintiff averred and testified that as a grandson of the



- deceased, D.W. 2, took out letters of administration while aware of his occupation and instead resold the land to the defendant.
27. The plaintiff testified that since he was in possession, the defendant sued him in Githongo ELC Case No. E019 of 2021 seeking entitlement to ownership and a permanent injunction. In his defense, the defendant averred that the issue of ownership of the suit land was directly and substantially in issue in the former suit and was heard and determined to finality by a competent court gazetted under section 26 of the Environment and Land Act.
28. Therefore, the defendant produced the judgment, decree, and pleadings in the former suit. The defendant relied on *C.K Bett Traders Ltd & others vs Kennedy Mwangi and another (supra)* where the court cited with approval *IEBC vs Maina Kiai & others (supra)*.
29. In *IEBC vs Maina (supra)*, the court said that to raise and uphold the doctrine of *res judicata*, there must be evidence that:
- i. The suit or issue was directly and substantially in issue in the former suit.
 - ii. The former suit was between the same parties or parties under whom they or any of them claim.
 - iii. The parties are litigating under the same title.
 - iv. The issue was heard and finally determined in the former suit.
 - v. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue was raised.
30. In *John Florence Maritime Services Ltd & Another vs. C.S Transport and Infrastructure and others (2021) KESC 39 (KLR) (Civ) 6th August (2021) (Judgment)* the court cited with approval *Kenya Commercial Bank vs Muiri Coffee Estate Ltd (2016) eKLR*, that *res judicata* entails the concept that once the legal rights of parties have been judicially determined such edicts stand as a conclusive statement as to those rights. The court said the doctrine, in effect, allows a litigant only one bite of the cherry and prevents him or persons claiming under the same title from returning to court to claim further reliefs not claimed in the earlier action. The court said the doctrine aims to unclog courts with multiple suits, burden parties with unnecessary costs, and ensure that litigation ends and the verdict duly translates into fruit for one party and liability for another party conclusively.
31. The court cited with approval *Henderson vs Henderson (1843) 67 ER 313*, that the court requires the parties to the litigation to bring forward their whole case and will not, except under exceptional circumstances, permit the same parties to open the same subject matter of litigation in respect of a matter which might have been brought forward as part of the subject in contest but which was not brought forward only because they have out of negligence, inadvertence or even accident, omitted part of their case.
32. The court said the plea of *res judicata* applies except in exceptional cases not only to the point upon which the court was required by the parties to form an opinion and pronounce a judgment but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence, might have brought forward at the time. The court said once a plea of *res-judicata* is raised, a court will look at the decision claimed to have settled the issues in question, the entire pleadings and record of the previous case, and the instant case to ascertain the issues determined in the previous case and whether these are the same in the subsequent case. Further, the court said it should be ascertained if the parties are the same or are litigating under the same title and whether the previous suit was



- determined by a court of competent jurisdiction as held in *Benard Mugo Ndegwa vs James Nderitu Githae* (2010) eKLR. The court cited with approval *E.T vs Attorney General & another* (2012) eKLR on vigilance to guard against litigants evading *res judicata* by introducing new causes of action to seek the same remedy before the court; the test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction or by adding new parties as held in *Omondi vs National Bank of Kenya and others* (2001) E.A 177.
33. Applying the binding caselaw cited herein, from the previous pleadings produced as D. Exh No. 6(a), (b) & (c), the two parties herein were the same in the previous suit. The subject matter was trespass to L.R. No. Abothuguchi/Upper-Kaongo/682. The claim was for permanent injunction, removal of building stones and bee hives on the land, and general damages for trespass. In his defense and counterclaim, the plaintiff herein had pleaded purchaser rights of 0.50 acre, fraud, and misrepresentation in the subsequent sale and transfer and registration of title. By way of counterclaim; the plaintiff had averred he owned or was in occupation of the suit land as of right. He had prayed for a permanent injunction, invalidation of the sale transfer, registration, a declaration that he was entitled to ownership, vacant possession and cancellation of registration be and replaced with his name.
 34. The premises decree shows that D.W. 2 was a third party in the suit. His pleadings were not attached to thereto. Unfortunately, the decision of the previous suit was not produced by the defendant to sustain the defense that the adverse possession or ownership formed or was a substantial issue that was determined to finality and conclusive in the former suit.
 35. The evidential burden was on the defendant under Sections 107 and 112 of the Evidence Act to produce material to back the facts as pleaded. From the pleadings shared herein, the plaintiff had not pleaded the issue of adverse possession as part of his defense and counterclaim. The issues isolated by the parties before the trial court were not shared with this court. The reply to the defense and defense to the counterclaim by the defendant herein was not produced. The third-party notice against D.W. 2 was not shared either. The issues between the plaintiff and D.W. 2 were not stated. In *Lotta vs Tanaki* (2003) 2 E.A 556, the court held there should be a competent court's final judgment between the parties. There is nothing before this court to show that the trial court in the former suit pronounced itself on the points in this suit.
 36. The defendant has not shown that the plaintiff is litigating in installments. See *Apondi vs Canald Metal Packages* (2005) 1 E.A 12. The claim for trespass was the only issue in the former suit and not a declaration of ownership as submitted by the defendant. There is nothing before this court to show that the plaintiff is re-opening the previous litigation by offering additional facts that could reasonably have been brought in the former suit. Accordingly, the plea of *res judicata* fails.
 37. As to adverse possession in *Mtana Lewa vs Kahindi Ngala Mwangandi* (2015) eKLR, the majority court settled the constitutionality of Sections 7, 9, 13, 37, 38 of the Limitations of Action Act vis a vis Article 40 (2) (a) & (b) of the Constitution. It is where an intruder takes possession, and the actual owner omits or neglects to act. To find adverse possession, an applicant has to prove two concepts: dispossession and discontinuance of possession.
 38. In *Kasuve vs Mwaani Investment Ltd & another* (2004) 1 KLR 184, the court said the claimant must prove that he has been in exclusive possession of the land openly as of right and without interruption for 12 years, either after the dispossession of the owner or by the discontinuance of possession by the owner out of his own volition.
 39. In *Munge vs Munge* (KECA) 75 (KLR) 3rd February (2023) Ruling, the court cited with approval *Samuel Miki Waweru vs Jane Njeri Richu* (2017) eKLR, that a claim for adversity cannot succeed if



entry was permissive under an agreement of sale, lease or otherwise. In *Karuntimi Raiji vs M'Makinya M'Itunga* (2013) eKLR, the court observed that adverse possession can be made against the estate of a deceased.

40. Further, in *Githu vs Ndeete* (1984) KLR 776, the court said the land alleged to be held in adversity must be identified. Similarly, in adverse possession of an aborted sale agreement, in *Sisto Wambugu vs Kamau Njuguna* (1983) eKLR and *Samuel Miki Waweru vs Jane Njeri Richu* supra, the court cited with approval *Jandu vs Kilpal* (1975) E. A 225 that adverse possession where there was a sale agreement for the person in possession of the land with the permission of the vendor pending completion cannot lay a claim during the validity of the contract unless and until the contract of sale has first been repudiated or rescinded by the parties, in which case adverse possession starts from the date of termination of the contract.
41. In *Simon Nganga Njoroge vs Daniel Kinyua Mwangi* (2015) eKLR, the court said that where a party pleads the right to land based on a sale agreement and in the alternative adverse possession, the claimant's possession is deemed to have become adverse after the payment of the last installment of the purchase price and upon prove of occupation for 12 years after such payment.
42. On time in *Public Trustee vs Wanduru Ndegwa* supra Madan J.A held 12 years would be counted before the institution of the suit calculated from the date of payment of the purchase price. On acts inconsistent with the actual owner's rights, the adverse possessor must show he was on the land as of right with the actual owner's knowledge. In *Mbui vs Mukindia Maranya* (1993) eKLR, the court said the entry must be non-permissible, non-consensual, living on the land, cultivating, building, or grazing. Further, in *Michuki vs Michuki* (2014) eKLR, the court said possession need not be actual but could be constructive.
43. Applying the preceding, the plaintiff produced a sale agreement dated 1.8.2001. Further, he produced acknowledgment notes for the money, the last one being on 27.6.2003. He also produced photographs for development on the land, showing beehives and building blocks on the suit land.
44. In his plaint before the former court, the defendant had admitted that there were some materials belonging to the plaintiff who had refused to vacate the land. In the sale agreement dated 8.3.2021, in clause 6, the seller had admitted to the said building materials. The parties knew they were inconsistent acts on the land belonging to the plaintiff; otherwise, the defendant would not have filed a suit based on trespass. There was evidence that the right of the trespasser and adverse possession goes with the land but not the title holder.
45. Adverse possession applies to both predecessors and successors in title. The letters of administration taken by D.W. 2 relate to the death of the registered owner. The transfer from the deceased owner against whom time was running was not interrupted by D.W. 1 as a successor to the title and the defendant after he became a valid owner on 14.4.2021. DW 1 was a mere trustee for the plaintiff regarding the 0.50 acres that the plaintiff was occupying occupied. In my view, the plaintiff's evidence shows that after his last payment on 27.6.2003 and with failure to take out letters of administration, the sale agreement came to a halt. He remained on the land as an adverse possessor from 27.6.2003.
46. As of 27.5.2021, twelve years had elapsed without interruption by either forceful entry or eviction by D.W. 1 and the predecessor in title.
47. The upshot is that the plaintiff has proved his case to the required standards. A declaration is hereby issued that the plaintiff is entitled to 0.50 acres out of LR No. Abothuguchi/Upper Kaongo/682 by virtue of adverse possession. The defendant shall sign subdivisions and transfer forms for the same in



favour of the plaintiff within 2 months from the date hereof in default of which the Deputy Registrar of this court shall execute the same. Costs to the plaintiff.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 13TH DAY OF DECEMBER 2023.

HON. CK NZILI

JUDGE

In presence of

C.A Kananu/Mukami

Parties

Mr. Gitonga for defendant

Mr. Mungania for the plaintiff

