



**Mburu v Musembi (Environment & Land Case E005 of 2023)  
[2023] KEELC 22145 (KLR) (7 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22145 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE E005 OF 2023**

**LN GACHERU, J  
DECEMBER 7, 2023**

**IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CAP.22 LAWS  
AND  
IN THE MATTER OF LAND PARCEL, NO KAKUZI/KIRIMIRI BLOCK 9/1011**

**BETWEEN**

**JOHANA NJUGUNA MBURU ..... PLAINTIFF**

**AND**

**JACKSON MAINGI MUSEMBI ..... DEFENDANT**

**JUDGMENT**

1. This matter was commenced vide Originating Summons dated 28<sup>th</sup> February 2023, stated to be brought under Section 38 of the *Limitations of Actions Act*, and Order 37 Rule 7(1) & (2), of the *Civil Procedure Rules*, wherein the Plaintiff/ Applicant sought the following Orders;
  - i. That the Plaintiff is entitled to be registered as the proprietor of 0.80 Acres in land parcels Kakuzi/Kirimiti 9/4956, 4957,4958 and 4959.
  - ii. That the titles issued in the name of the Respondent in respect to the land parcels Kakuzi/ Kirimiti 9/4956, 4957,4958 and 4959, be extinguished under Section 17 of the *limitation of action* cap 22.
  - iii. That the Plaintiff by way of adverse possession be declared the bonafide and registered owner of the parcels of the suit property.
  - iv. That an order be issued requiring and directing the Land Registrar at Murang'a Lands Registry to rectify and register the land parcels Kakuzi/Kirimiti 9/4956, 4957,4958 and 4959 and register under the Plaintiff's names.



- v. That costs of the application be provided for.
2. The Originating Summons is premised on the Supporting Affidavit of the Plaintiff herein sworn on 28<sup>th</sup> February 2023. The Originating Summons is anchored on two grounds set out on the face of it, and cited in the Applicant's sworn Supporting Affidavit and which grounds are; the Plaintiff has been living, farming and made extensive developments within the suit property for a period exceeding 17 years; and the Plaintiff has been in open, continuous, peaceful and uninterrupted occupation of the said respective portions of the suit property since 13<sup>th</sup> day of September 2006.
  3. The Plaintiff deponed that he entered into possession of the suit property through an agreement for sale and upon the purchase from the Defendant at the purchase price of Ksh.70,000/=. That upon taking possession, he made extensive developments such as building a permanent house on the suit property and conducting both crops and animal husbandry on the suit property.
  4. The Plaintiff further averred that the Defendant had sold the adjacent properties and effected transfer to the purchasers. However, the Defendant has to date failed or refused to transfer the suit property and have it registered under the Plaintiff's name. The official search conducted on 15<sup>th</sup> February 2023, indicates that the proprietary owner of the suit property is under Jackson Maingi Musembi, the Defendant herein.
  5. The Defendant was served by way of personal service, but failed to enter appearance or file a defence thus the suit is undefended. When the matter came up for hearing on 10<sup>th</sup> July 2023, the Defendant, though properly served with a Hearing Notice, was absent and the matter proceeded ex parte. The matter proceeded undefended and consequently the Court directed that the Plaintiff files written submissions.
  6. The Plaintiff through the Law Firm of Muturi Njoroge & Co Advocates, filed his written submissions dated 7<sup>th</sup> August 2023, and submitted that, it is not in dispute that the Plaintiff's claim is based on adverse possession and not contract. It is deponed by the Plaintiff that though the transaction started by way of purchase, his claim is anchored on a claim of adverse possession.
  7. The Plaintiff further submitted that on the 13<sup>th</sup> September 2006, he entered into an agreement for sale with Defendant to purchase 0.80 Acres out of his 1.10 acres, after the subdivision of Kakuzi/Kirimiti 9/1011. He paid the full purchase price of Kshs. 70,000/= and took possession of the land and has lived on the suit land since then.
  8. The Plaintiff further submitted that despite the numerous requests to the Defendant to effect transfer and have the titles of the suit property registered under his name, the Defendant remains adamant and has to date failed or refused to transfer the suit property and have it registered under the Plaintiff's name.
  9. The Plaintiff further submitted that he conducted searches on the adjacent properties Kakuzi/Kirimiti 9/4955 & 4960 sold by the Defendant to third parties and to his utter surprise, the results indicated that the Defendant had already effected transfers to the said third parties – purchasers.
  10. Relying on Section 7 of the *Limitation of Actions Act*, the Plaintiff also submitted that the doctrine of adverse possession extinguishes the title of a proprietor of land in favour of the adverse possessor upon the expiry of 12 years of occupation.
  11. While citing the case of *Maweu v Liu Ranching and Farming Cooperative Society* 1985 KLR 430, the Plaintiff contended that in law, possession is a matter of fact depending on all circumstances whereby in order to prove title by adverse possession, it was not sufficient to show that some acts of adverse



possession had been committed. Instead, one had to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner.

12. The Plaintiff also relied on the cases of *Chairman Board of Governors Murang'a College of Technology Primary School v Julius Ngigi Mujunga* [2015] eKLR & *Alfred Welimo v Mulaa Sumba Barasa* CA No. 186 of 2011 to support the submissions on adverse possession.
13. The Plaintiff also premised his submissions on the fact that the Sale Agreement had become repudiated when the Defendant failed to fulfil his contractual obligation to effect transfer. In light of this, the Plaintiff submitted that the contract became repudiated in which time lapsed and time of adverse possession started running from the year 2012. The case cited in support of this was *Samuel Miki v Jane Njeri Richu* CA No. 122 of 2001 & *Christopher Kioi & Another v Winnie Mukolwe & 4 others* [2018] eKLR.
14. On the issue of costs, the Plaintiff submitted that having brought out a strong case and having satisfied the evidentiary burden of proof on the balance of probabilities, he was entitled to costs. He relied on the decided case of *Cecillia Karuru Ngayu v Barclays Bank of Kenya & another* [2016] eKLR.
15. In concluding his submissions, the Plaintiff contends that he entered into occupation of the suit premises in 2006, on the basis of contract and his occupation continued to date openly without force and without interruption. That 12 years from 2006 lapsed in 2018.
16. The Defendant chose not to file submissions in this matter.
17. Where a Defendant fails to adduce evidence in support of the Defence, and fails to attend court to prosecute the case, the Plaintiff's evidence escapes the possibility of being controverted by defence evidence. It escapes the scrutiny of cross-examination by the Defendant. It therefore, stands unchallenged and uncontroverted.
18. However, Plaintiff does not escape the burden and standard of proof which he has to satisfy and discharge in accordance with the law in order for his claim to succeed.

Section 107(1) of the *Evidence Act* provides that

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

Section 108 provides;

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”

And section 109 provides;

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided for by law that the proof of that fact shall lie on any particular person.”

19. In the case of *Charter House Bank Limited (Under Statutory management v Frank N. Kamau* [2016] eKLR, the Court of Appeal when discussing the burden of proof upon the Plaintiff in a situation where the Defendant failed to adduce evidence stated that:

“we would therefore venture to suggest that before the trial court can conclude that the Plaintiff's case is not controverted or is proved on a balance of probability by reason of the



defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence from the defendant.

... The Plaintiff must adduce evidence, which in the absence of rebutted evidence by the Defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgement merely because the Defendant has not testified"

20. In the present case, the plaintiff has the burden to prove on a balance of probabilities, that he has acquired the prescriptive rights and that his possession of the suit land was as of right and in a manner inconsistent with the rights of the registered owner that is to say: the occupation has been open, actual, continuous, uninterrupted, peaceful, exclusive and with the knowledge but without the consent or permission of the registered owner for the prescribed period of 12 years. In *Kimani Ruchure v Swift Rutherford & Co. Ltd* (1980)KLR 10 Kneller J held that

“the Plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion)”

21. In the case of *Gabriel Mbui v Mukindia Maranya* [1993]eKLR, adverse possession was defined as;

“... the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owner's enjoyment of land for purposes for which the owner intended to use it.”

From the pleadings filed, evidence adduced and submissions made by and on behalf of the Plaintiff as the Court determines the matter herein, it will answer the following questions; -

- i. Whether the Plaintiff has been in adverse possession, of all that parcels of land registered in the name of the Defendant as Kakuzi/Kirimiti 9/4956, 4957,4958 and 4959 for the requisite period of 12 years?
  - ii. Consequently, whether the Plaintiff is entitled under section 38 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya to be registered as the proprietor of parcels No.as Kakuzi/Kirimiti 9/4956, 4957,4958 and 4959 in place of the Defendant.
  - iii. Whether this Honourable court should order the Land Registrar Murang'a land registry to register the Plaintiff as the proprietor of parcel No. as Kakuzi/Kirimiti 9/4956, 4957,4958 and 4959 in place of the Defendant.
  - iv. Who should pay the costs of the suit?
22. On Whether the Plaintiff/Applicant has met the threshold for grant of orders for adverse possession, it is trite that a claim for adverse possession is attached to land and not title. This Court having laid the basis for the instant suit, will then proceed to delve into the issues outlined above.



23. The principle of adverse possession is well settled under *Limitation of Actions Act*. Section 7 of the said *Act* places a bar on actions to recover land after 12 years from the date on which the right accrued. Further section 13 of the same *Act*, provides that adverse possession is the exception to this limitation:

- “(1) 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.
- (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 again takes adverse possession of the land.
- (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this *Act*, the land in reversion is taken to be adverse possession of the land.”

Finally, Section 38 of the *Act* provides that:

“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.”

24. The principle of adverse possession was more elaborately set out in the case of *Wambugu v Njuguna* [1983] KLR 172, where the Court held that:

“In order to acquire by the statute of limitations 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.”

And that:

“The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.”

25. This right to be adverse to land does not automatically accrue unless the person in whose this right has accrued takes action. Section 38 of the *Act* gives authority to the claimant to apply to Court for orders



of adverse possession. See the findings of the Court in Malindi App No. 56 of 2014;- *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR, where it held;

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 licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.

26. Further, in the case *Mbira v. Gachubi* (2002) 1 EALR 137: the court stated as follows;
  - “.. a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption ...”
27. Therefore, to determine whether the Applicant’s rights accrued, the Court will seek to answer the following
  - i. How did the Applicant take possession of the suit property?
  - ii. When did he take possession and occupation of the suit property?
  - iii. What was the nature of his possession and occupation?
  - iv. How long has the Applicant been in possession?
28. It is not in dispute that the Plaintiff’s claim is based on adverse possession and not contract. It is deponed by the Plaintiff that though the transaction started by way of purchase, his claim is anchored on a claim of adverse possession.
29. The Court will further answers the following questions as it determines the issues herein: -
  - a) Whether the Plaintiff should be registered as the proprietor of parcels No. as Kakuzi/Kirimiti 9/4956, 4957,4958 and 4959 in place of the Defendant.
  - b) Whether this Honourable court should order the Land Registrar Murang’a land registry to register the Plaintiff as the proprietor of parcel No. as Kakuzi/Kirimiti 9/4956, 4957,4958 and 4959 in place of the Defendant?
30. On whether the Plaintiff should be registered as a proprietor of land parcels No.Kakuzi/Kirimiti 9/4956, 4957, 4958 and 4959, the Court finds, that that these parcels of land are subdivision of Kakuzi/Kirimiri/Block 9/1011, which parcel of land was registered in the name of Jackson Maingi Musembi, as proprietor on 2<sup>nd</sup> February 1990.
31. The Plaintiff herein has alleged that he purchased 0.80 acres from the Jackson Maingi Musembi on 13<sup>th</sup> September 2006. A Sale Agreement even dated was produced in Court by the Plaintiff. The Plaintiff further averred that after the said purchase, he took possession of the suitland and has developed it and has established his home where he has lived all along.
32. There is evidence from the green card produced in Court that this Parcel of land Kakuzi/Kirimiri/1011, was closed on 21<sup>st</sup> September 2020, on subdivision of the new titles No. 4950-4960. The Plaintiff



attached a Mutation Form which showed the field diagram of the subdivision of Kakuzi/Kirimiri/Block 9/1011. Indeed, the said parcel of land was subdivided into land Parcels No.4955-4960.

33. Further, the said new parcels of Land are all registered in the name of the Defendant herein Jackson Maingi Musembi. As it were, at this juncture Land Parcel No.Kakuzi/Kirimiri/Block 9/1011, is not in existence. In its place, we have land parcels No.Kakuzi/Kirimiri/Block 9/4955-4960.
34. However, it is trite law that adverse possession attaches to land and not title. It does not matter that the original land has now been subdivided. The issue is whether the Plaintiff/Applicant has been able to demonstrate that he has acquired the suitland by adverse possession.
35. The Plaintiff alleged that he entered into the suitland via purchase. If that is the case, then his entry was with permission. However, he claims that after the payment of purchase price, the Defendant failed to transfer the land to him and thus the said sale agreement was repudiated and even after repudiation, the Plaintiff remained on the suit land.
36. In the case of *Samuel Miki v Jane Njeri Richu* C.A. No.122 of 2007, quoted with approved in the case of *Christopher Kioi and Another v Winnie Mukolwe & 4 others* (2018)eKLR, the Court of Appeal held: -

“ A purchaser of land under a contract of sale who is in possession of land with the permission of the vendor can only lay claim after the period of validity of the contract unless and until the contract has been repudiated, in which case adverse possession starts from the date of termination of the contract”

37. The Plaintiff alleged that he met his obligation under the Sale Agreement, but the Defendant failed to do so and therefore the contract was repudiated, then time started to run. The Defendant did not enter appearance nor file Defence. Therefore, the Plaintiff’s evidence remained uncontroverted.
38. The Plaintiff has produced photographs to show that he has built a permanent house on the suitland and he is also farming thereon. This is to the exclusion of the Defendant. The Plaintiff has thus proved that he is in possession of the suitland and that possession has dispossessed and discontinued the Defendant’s use of the land as was held in the case of *Wambugu v Njuguna* (*supra*).
39. For the above reasons, the Court finds that the Plaintiff has been able to prove that he is entitled to a claim of 0.80 acres through adverse possession out of land parcel No.Kakuzi/Kirimiri/Block 9/1011, which has now been subdivided into land parcels No. Kakuzi/Kirimiri 9/4956-4959. He should be registered as the proprietor of the said parcels of land by virtue of adverse possession.
40. On whether the Court should order the Land Registrar Murang’a to register the said parcels of land Kakuzi/Kirimiri/Block 9/4956-4959 in favour of the Plaintiffs;

Having found that adverse possession attaches to land and not to title, and having found that land parcel No.Kakuzi/Kirimiri/Block 9/1011, was subdivided in 2020, to give rise to the above parcels of land, which the Plaintiff has acquired by virtue of adverse possession, the Court finds that it is prudent to direct the Land Registrar – Murang’a lands office to register the said parcels of land in favour of the Plaintiff herein.

41. Who should bear costs of the suit?

It is trite law that costs are awarded at the discretion of the Court, but the general rule is that costs are awarded to the successful party. The Plaintiff is the successful party and he is thus awarded cost of the suit.



42. In the final analysis, the Court finds that the Plaintiff has been able to prove his case against the Defendant on the required standard of balance of probabilities.
43. Consequently, Judgment is entered for the Plaintiff against the Defendant herein in terms of prayers No.1,2,3, and 4 of the Originating Summons dated 20<sup>th</sup> February 2023. The Plaintiff is also entitled to cost of the suit.
44. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 7<sup>TH</sup> DAY OF DECEMBER,2023**

**L. GACHERU**

**JUDGE**

**Delivered online in the presence of**

**Mr. Muturi Njoroge for the Plaintiff**

**Defendant – Absent**

**JOEL NJONJO – COURT ASSISTANT**

