



**Ngura v Liganda (Environment & Land Case 19 of 2019)
[2022] KEELC 15661 (KLR) (30 March 2022) (Judgment)**

Neutral citation: [2022] KEELC 15661 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 19 OF 2019**

MN KULLOW, J

MARCH 30, 2022

**IN THE MATTER OF ORDER 37 RULE NO 7 OF THE CIVIL PROCEDURE
RULES AS READ WITH SECTION 38 OF THE LIMITATION OF ACTION ACT**

BETWEEN

DICKSON MIRUKA NGURA PLAINTIFF

AND

JOSEPH OTIENO LIGANDA DEFENDANT

JUDGMENT

1. The plaintiff herein commenced this suit by way of an originating summons dated March 6, 2019 against the defendant for a determination of the following issues: -
 - I. Whether Joseph Otieno Liganda, the defendant herein became registered as the proprietor of the above mentioned parcel of land fraudulently and/ or erroneously.
 - II. Whether the said Joseph Otieno Liganda or his next of kin has ever occupied the said parcel of land or any portion thereof?
 - III. Whether the plaintiff, Dickson Miruka Ngura and his kinsmen have occupied the suit parcel of land or not? And if so, for how long have they occupied the same or portion thereof and is the occupation continuous and uninterrupted?
 - IV. Whether the said occupation and possession of the said land by the plaintiff herein can now amount to adverse possession, and if so what is the effect thereof.
 - V. Whether an injunction should be issued against Joseph Otieno Liganda, the defendant herein, his agents, servants or anybody deriving authority from him, restraining him from eviction, dispossessing or in any way interfering with the plaintiff's occupation, use and quiet enjoyment of the said parcel of land No. Kamagambo/Kanyajuok/426".



- VI. Whether an order should be issued to the District Land Registrar at Migori to have the whole land parcel No. Kamagambo/Kanyajouk/426” that is occupied by the plaintiff herein and his kinsmen for the past 47 years be registered in the name of the plaintiff as the proprietor
- VII. That such orders may be issued by the honourable courts as may attain the ends of justice.
- VIII. Who is to bear the cost of this suit?
2. The originating summons is premised on the plaintiff’s supporting affidavit sworn on even date and a supplementary affidavit sworn on 29.05.2019. It is the plaintiff’s contention that the defendant herein caused the land adjudication officers to record his name as the registered proprietor of the suit parcel and was consequently issued with a title deed of the suit land in the year 1977.
 3. It is his claim that his father; Ngura Rota, objected to the said registration before the Chief Land Registrar in the same year of adjudication and a restriction was lodged on the suit land pending hearing and determination of the appeal. He however contends that the appeal did not consider the issue of adverse possession.
 4. It is his case even though the defendant is the registered proprietor of the suit land since 1977, he has not taken any action against him and his family and they have continued to peacefully occupy and use the suit land for subsistence farming and as a result have acquired titled thereto by way of adverse possession.
 5. In his supplementary affidavit, he deposed that sometimes on 29/1/2019, he obtained a copy of the adjudication record and a copy of the green card of the suit parcel which disclosed that the defendant started to commit fraud in 1974 during land adjudication.
 6. It was his contention that the decree and eviction orders made in Migori S.R.M.CC No. 496 of 1997 had never been brought to his notice neither was he made aware of the existence of the said suit filed against him nor the exparte judgement issued on 18/12/1998.
 7. In the alternative, he claims that the defendant has never asserted his title in execution of the said judgement and decree which ought to have been executed within 12 years and by dint of section 4(4) of the *Limitation of Action Act*, extinguished on 28/5/2011. It is however his claim that he has continued to live on the suit land openly, peacefully, continually and uninterrupted hence his claim on adverse possession.
 8. He denied failing or refusing to comply with the court order and maintained that he was neither served with a notice of the exparte judgement nor made aware of the said decree. He further denied that the present suit was res judicata since the previous suit was heard and determined exparte and not finally determined on merit.
 9. The defendant on the other hand filed a replying affidavit sworn on 18/4/2019. He contends that the plaintiff’s father owned a parcel of a land bordering his and which has since been subdivided into 4. He further stated that the plaintiff and his father were present the adjudication process and had their own share of land registered in their respective names.
 10. It is his claim that during all stages of adjudication process, the plaintiff raised objections which never saw light of the day. Further, the restriction lodged by the plaintiff was ultimately removed after due consideration.
 11. He added that after the plaintiff’s appeal was dismissed, he filed a suit before Migori SRM Court vide Civil Suit No. 496 of 1997; where the Plaintiff was ordered to give vacant possession and pay



Kshs. 15,000/= as general damages. That the court consequently issued an Order of eviction upon the Plaintiff's failure/ refusal to voluntarily vacate the suit land as ordered. Despite the valid court decree, order of eviction and several efforts to evict the plaintiff from the suit land; he has neglected/refused to comply and has remained in contempt of the said court orders and forcefully remained on the suit land.

12. It is also his claim that the court having made a determination that he is the actual owner of the suit land; he sold the land to one Vivan Atieno and hence the filing of the instant suit is aimed at preventing the new owner from taking possession of the land. He further contended that the issues raised in the instant suit are res-judicata hence ought not to be entertained by this court. He thus urged the court to dismiss the Plaintiff's suit with costs.

Trial

13. On 27.06.2022 the matter proceeded for hearing of the plaintiff's case. The plaintiff testified as PW1, he adopted his supporting affidavit dated 06/3/2019 as his testimony in chief.
14. He also produced the following documents; bundle of photographs as Pexh 1(a & b), Adjudication record as Pexh 2 and copy of the Title of the suit land/ Green Card as Pexh 3 as exhibits in further support of his case.
15. On cross-examination, he confirmed that he lost the objection/ appeal lodged at the Land Office which was heard and determined. He denied having knowledge of the previous case or the orders of eviction issued against him. He further denied being summoned by the D.O to be served with the court orders or being asked to vacate the suit land and relocate to another land.
16. On re-examination, he reiterated that he stills lives on the suit land and has never received any eviction order. He thereafter closed his case.
17. The Defence case proceeded for hearing virtually on the 28/09/2022. The defendant testified as DW1, he adopted his replying affidavit dated 18/04/2019 as his testimony in chief. He further stated that upon the conclusion and determination of the case he previously instituted, he sold the suit land to Vivian Atieno Otieno.
18. He also produced the documents attached to the said Affidavit as exhibits in support of his case as follows; copy of the sketch map as Dexh 1, copy of the Decree in Migori SRM CC No. 496 of 1997 as Dexh. 2, copy of the eviction Order as Dexh. 3, copies of D.O's letters as Dexh 4 (a & b)
19. On cross-examination; he confirmed that the land was registered in his name in the year 1977 and at the time of registration he was still a minor. He however stated that he lives on the suit land but the plaintiff has also constructed a house on a portion of the land.
20. He maintained that the court issued an order of eviction against the plaintiff in respect of the suit property. The defendant thereafter closed his case.
21. Upon close of the defence case, I issued directions on the filing of submissions. Both parties filed their rival submissions together with authorities which I have read and considered in arriving at my decision.

Analysis and Determination

22. Having looked at the originating summons, the response filed thereto, the respective exhibits and submissions in totality, it is my considered opinion that the issues arising for determination are: -
 - a. Whether the claim of Adverse Possession has been proved by the plaintiff.
 - b. Whether the plaintiff is entitled to the reliefs sought.



23. The legal framework for adverse possession is provided for in various statutory provisions to wit; sections 7,13, 17 and 38 (1) and (2) of the [Limitation of Actions Act](#) and section 28 (h) of the [Land Registration Act](#).
24. The law on adverse possession is now settled; for one to succeed in a claim of adverse possession he must satisfy the conditions set out in the case of [Mtana Lewa v Kabindi Ngala Mwangandi](#) [2015] eKLR where Makhandia JA described the doctrine of adverse possession as follows: -
- “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 or 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. This doctrine in Kenya is embodied in Section 7 of the [Limitation of Actions Act...](#)”
25. The facts and circumstances of the instant suit present a lot of legal intricacies. This court will therefore discuss the issues arising on account of res judicata, the eviction orders issued on 12/2/1998 in Migori SRM CC No. 496 of 1997 and the plaintiff’s possession and occupation of the land and whether the same has met the necessary conditions in a claim of adverse possession.
26. The Defendant has challenged the jurisdiction of this court to determine the suit as filed on account of the doctrine of res judicata. It is his claim that the dispute between the parties had been heard and determined by the court in Migori SRM CC No. 496 of 1997. The doctrine of res judicata goes to the root of the case and jurisdiction of a court to hear and determine a matter. Section 7 of the [Civil Procedure Act](#) provides as follows: -
- “No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”
27. I have looked at Dexh. 1 and 3 as produced by the defendant and the originating summons filed by the plaintiff; and I do note that the issue for determination in the current suit is whether or not the plaintiff has established ownership by way of adverse possession. Even though it is evident that in both suits there was/is a pursuit of the right of ownership of the same subject land, the point of divergence in my considered view is the issue of adverse possession. As I have held in previous cases, adverse possession as provided under the Limitations of Actions Act can only be filed and entertained in the High Court and by virtue of article 162 (2) (b) of [the Constitution](#) of Kenya, the Environment and Land Court. Be as it may, no proof has been adduced that the issue of adverse possession was heard and finally determined on merit in the previous suit, which was instituted in the year 1997.
28. In conclusion thereof, this court finds that the causes of action in both cases are different and I see no bar to the jurisdiction of this Court in determining the matter before it in the instant suit.
29. Having addressed the issue on jurisdiction, I will now proceed to analyse the merits of the Plaintiff’s claim on adverse possession and the effect of the eviction orders issued in SRM CC No. 496 of 1997.



30. The Plaintiff contends that the defendant fraudulently caused the land adjudication officers to record his name as the registered proprietor of the suit land and to consequently issue him with a title deed. However, despite the said registration, he has remained on the suit land since 1977 and continues to occupy the same with his family and use the same for farming to date. He denied the knowledge of the previous suit SRM CC No. 496 of 1997 or the eviction orders issued in the case. It is his claim that despite the said orders of eviction issued in 1998, he has remained in possession and occupation to date.
31. The defendant on the other hand stated that the plaintiff's possession and occupation has been forcefully, despite all the objections raised during the adjudication exercise being dismissed and the restriction lodged against the title being removed, the plaintiff refused to vacate the suit land. He filed a suit which was heard ex-parte and judgment issued in his favor and whose effect was to order for the eviction of the plaintiff from the land. Despite being served with the said order, the plaintiff has refused to vacate the land and has remained in contempt of the said orders.
32. Possession and occupation are some of the key elements in a claim for adverse possession. It is the plaintiff's claim that he has been in possession and occupation of the land since the year 1977 and by the time the civil suit was filed in 1997 and eviction orders obtained against him, he had been in occupation of the land for a period of 20 years and thus he had already acquired the same by virtue of adverse possession. The question that therefore follows is whether the said possession between 1977 to 1997 gave rise to prescriptive rights and overriding interests in favor of the plaintiff and extinguished the defendant's title.
33. It is not in dispute that PW1 has been in possession and occupation of the suit land since 1977 to date, a fact that was confirmed by the DW1 in his testimony. However, it is important to determine whether the said occupation was adverse. It is trite law that long possession is not necessarily adverse possession; Justice Kuloba J, (as he then was,) in Nairobi Civ No. 283 of 1990 *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, held that: -
- “The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown”
34. Possession in a claim of adverse possession must be adverse to rights of the true owner. I have noted that the plaintiff herein is seeking adverse possession on the one hand and challenging the title of the defendant on the other hand. That despite the land being registered in the name of the defendant, it is claim that the defendant fraudulently caused the Land Adjudication Officers to register the said land in his favor even though the same originally belonged to his late father Ngura Rota.
35. From the foregoing, this court is of the considered opinion that the plaintiff's occupation of the suit land between the year 1977 – 1997 was not adverse to rights of the defendant since his entry and subsequent occupation was on the pretext that the subject land rightfully belonged to him and thus there was no intention to dispossess since according to him, he was the true owner. There is no demonstration that his entry into the land and occupation was adverse as a matter of fact and he cannot now allege that his occupation was adverse merely because the defendant was issued with a title deed over the suit parcel in the year 1977.
36. Secondly, an ex-parte judgment was entered in Migori SRM CC No. 496 of 1997 in favor of the Defendant and whose effect was to order for the eviction of the plaintiff from the suit land. It is the Defendant's assertion that despite the plaintiff being served with the said eviction orders, he has refused to vacate the land and has remained in contempt of the said orders issued in 1998. He further alleged



that the efforts to try and evict the plaintiff has been frustrated as the plaintiff constantly threatens to kill him. The Plaintiff on the other hand maintains that despite there being orders against him, he has remained in occupation and use regardless.

37. The eviction orders in question were issued on 12/2/1998; DW1 produced a copy of the said order as Dexh 3 and demonstrated the efforts made in trying to execute the same in terms of Dexh 4 (a & b). It is further his claim that the plaintiff has remained in contempt of the said orders. He has however not adduced any evidence of contempt proceedings commenced against the plaintiff despite the alleged wilful disobedience of valid court orders issued in 1998.
38. Section 4 (4) of the *Limitations of Actions Act* bars the enforcement of decree and orders after a period of 12 years and provides as follows: -

- (4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.

39. From the foregoing, it is clear that the decree and the eviction order in question were issued in the year 1998; there being no demonstration that the same were adequately executed within the requisite 12 years, the said orders have extinguished by operation of the law in the year 2010.
40. Further, it is my considered view that upon lapse of the said valid court orders in the year 2010; nothing barred the Plaintiff's continued possession and occupation of the suit land. Thus, in my opinion, time for adverse possession started to run from the year 2010 and at the time of filing the suit in 2019; his occupation and use of the land had been for a period of 9 years. The requisite period of 12 years in a claim of adverse possession thus had not crystallized and is claim is therefore premature.

B. Whether the Plaintiff is entitled to the reliefs sought

41. In view of the foregoing, having held that the plaintiff has not proved his claim on adverse possession to the required standard, I find that he is not entitled to the reliefs sought.

Conclusion

42. The upshot of the above is that the plaintiff has not proved his claim on adverse possession and I accordingly dismiss the originating summons dated March 6, 2019 with costs to the defendant. It is so ordered.

DATED, SIGNED AND DELIVERED ELECTRONICALLY VIA EMAIL AT MIGORI ON 30TH DAY OF MARCH, 2023.

MOHAMED N. KULLOW

JUDGE

In presence of; -

Court Assistant - Tom Maurice/Victor

