



**Muchau & 2 others v Kirehu (Environment & Land Case
1473 of 2013) [2022] KEELC 3194 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELC 3194 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1473 OF 2013**

LC KOMINGOI, J

APRIL 28, 2022

BETWEEN

FRANCIS KAMAU MUCHAU 1ST PLAINTIFF

JAMES KINUTHIA MUCHAU 2ND PLAINTIFF

**JOHN KARIUKI MUCHIAN ALSO KNOWN AS JOHN KARIUKI
MUCHAU 3RD PLAINTIFF**

AND

GICHAMU KIREHU DEFENDANT

JUDGMENT

1. The Originating Summons dated November 28, 2013, brought under order 37 rule 7(1) of the [Civil Procedure Rules](#) and under section 38 of the [Limitation of Actions Act](#) 22 Laws of Kenya.
2. Let Gichamu Kirehu of P. O. Box 4423-00200 Nairobi within 21 days from the date of service of this Originating Summons enter appearance to this summons for the determination of the following questions: -
 1. That the plaintiffs have since July 1977 been in adverse possession of 1.64 acres out of a portion of 3 acres in Land Reference Number Limuru/Ngecha/50 "A" registered in the name of the defendant as a co-owner with, openly peacefully and as of right that is to say for a period of over a period of 12 years preceding the presentation of this summons in court.
 2. That the plaintiffs are entitled to an order under section 38 of the [Limitation of Actions Act](#) 22 to be registered as the proprietors in common in equal share of 1.64 acres to be excised out of the defendant's share of 3 acres in the said land Reference Number Limuru/Ngecha 50 "A" in place of the defendant.
 3. That the costs of the suit be awarded to the plaintiffs.



3. The Originating Summons is supported by the affidavit of Francis Kamau Muchau, the 1st plaintiff herein sworn on the November 28, 2013.
4. By an application dated November 28, 2013, the plaintiffs sought that the defendant be served by way of advertisement in the Standard newspaper. The orders were granted by Hon. J. Mutungi on the April 2, 2014. The orders granted were:-
 - “1. That the plaintiff be and is hereby allowed to serve the defendant by way of substituted service once in the Standard Newspaper and during a working day.
 2. That the Originating Summons be also posted at Nyahururu Magistrate’s Court Notice Board and Nyahururu County Government Notice Board.
 3. That the matter be mentioned on June 12, 2014 for further directions.
 4. That the costs be in cause”.
5. The matter proceeded by viva voce evidence.
6. PW1 Francis Kamau Muchau, the 1st plaintiff pleaded and testified on behalf of the 2nd and 3rd plaintiffs. There is a consent signed by the co-plaintiffs dated 28th November 2013. He told the court that Paul Muchau was his late father. That his late father bought 1.64 acres from the defendant in 1964. He produced the sale agreement as exhibit in this case.
7. He told the court that his father passed on in 1977. That by this time the plaintiffs had taken possession of the land and are still in possession to date. They seek that they be registered as the owners of a portion measuring 1.64 acres out of Land Parcel Number Limuru/Ngecha/50 “A”.
8. The sale agreement was captured in Gikuyu language but which the plaintiffs had translated into English.
9. Upon the death of their father, the plaintiffs obtained a death certificate and Grant of Letters of Administration intestate. The plaintiffs have had possession or continuous possession of the said portion since 1977.
10. It is the plaintiff’s case that they have not seen the defendant since 1964 and they do not know whether he is alive or not. Neither the defendant nor anyone claiming under him has interfered with, challenged or interrupted the plaintiffs continuous and exclusive stay, possession, occupation, development, quiet use and enjoyment of the portion of 1.64 acres out of land parcel number Limuru/Ngecha/50 “A” since 1977.
11. The plaintiffs’ evidence has not been challenged. They have been on the suit parcel for over twelve (12) years. I have considered the principles governing the claim for adverse possession:-
 - (a) That the plaintiff must have clear possession of the property.
 - (b) That the occupation of the land/property must be without the consent of the owner of the property.
 - (c) That the occupation must be uninterrupted for a continuous period of more than twelve (2) years.
 - (d) That the plaintiff must exhibit an extract copy of the title under litigation.



12. I find that the plaintiff's facts as presented meet the above conditions. The facts are undisputed. In the case of *Wilson Kazungu Katana & 101 others v Salim Adalla Bakshwein & another* [2015] eKLR, the Court of Appeal relied on the case of *Kasuwe v Miwani Investments Ltd & 4 others* [2004] eKLR where it was stated:-

“.....in order to be entitled to land by adverse possession the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

13. Similarly, in the case of *Peter Mberi Michuki v Samuel Mugo Michuki* Civil Appeal No 22 of 2013 the Court of Appeal held that:-

“This court in *Francis Gicharu Kariuki v Peter Maina* Civil Appeal No 2930 of 2002 Nairobi approved the decision of the High Court in the case of *Kimani Ruchire v Swift Rutherford Co Ltd* [1980] KLR where Kneller J held...the plaintiffs have to prove that they used this land which they claim as of right, *nec vi, nec clam, nec precario* (no force, no secrecy, no persuasion) so the plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to attempt it by way of recurrent consideration.”

I am guided by the above authority.

14. The plaintiffs have been in open uninterrupted, continuous and adverse possession of the portion measuring 1.64 acres and have acquired rights to it over those of the registered proprietor, the defendant.

15. In conclusion, I find that the plaintiffs have satisfied the conditions set out in their claim for adverse possession to succeed. I find that they are entitled to the prayers sought in the Originating Summons.

16. Accordingly, judgment is entered for the plaintiffs as against the defendants as follows:-

(a) That a declaration is hereby issued that the plaintiffs have since July 1977 been in adverse possession of 1.64 acres out of a portion of 3 acres in Land parcel No Limuru/Ngecha/50 “A” registered in the name of the defendant.

(b) That the plaintiffs are entitled to be registered as proprietors in common in equal shares of 1.64 acres to be excised out of the defendant's share of 3 acres in the said Land parcel No Limuru/Ngecha/50 “A” in place of the defendants.

(c) That the plaintiffs do have cost of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 28TH DAY OF APRIL 2022.

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L. KOMINGOI

JUDGE

In the presence of:-

Mrs. Maira for the Plaintiffs



No appearance for the Defendant

Steve - Court Assistant

