



**Kinyanjui & another v Juma (Environment & Land Case  
8 of 2018) [2022] KEELC 2242 (KLR) (12 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2242 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT & LAND CASE 8 OF 2018**

**YM ANGIMA, J**

**MAY 12, 2022**

**BETWEEN**

**AMON KIMANI KINYANJUI ..... 1<sup>ST</sup> PLAINTIFF**

**PETER WAGURA MUIRU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JACKSON JUMA ..... DEFENDANT**

**JUDGMENT**

**A. INTRODUCTION**

1. The material on record shows that the 1<sup>st</sup> Plaintiff is the registered proprietor of the Title No. Nyandarua/Mawingo Salient/924, (parcel 924) whereas the 2<sup>nd</sup> Plaintiff is the registered proprietor of Title No. Nyandarua/Mawingo Salient 923 (parcel 923) both parcels of which are located within Nyandarua County. The material on record shows that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs purchased their respective parcels from the previous owners for valuable consideration in 2013 whilst the Defendant was still in occupation of the suit properties.
2. The material on record further shows that when the Defendant failed to vacate the suit properties upon demand the Plaintiffs filed separate suits seeking eviction orders and other reliefs against the Defendant in 2018. The 1<sup>st</sup> Plaintiff filed Nyahururu ELC No.8 of 2018 whereas the 2<sup>nd</sup> Plaintiff filed Nyahururu ELC No.18 of 2018. The material on record further shows that the Defendant later on filed a claim for adverse possession of parcel Nos. 923 and 924 vide Nyahururu ELC No.30 of 2018 (O.S.). The said 3 suits were ultimately consolidated for trial and disposal. It was directed that the Defendant's originating summons for adverse possession shall be treated as a counterclaim.



## **B. The Plaintiffs' Claim**

3. By a plaint dated February 1, 2018 the 1<sup>st</sup> Plaintiff pleaded that at all material times, he was the registered proprietor of parcel 924 measuring 4.3 ha which he acquired from one, Pauline Muthoni Gacheru for valuable consideration in 2013. He further pleaded that at the time of purchase the vendor introduced the Defendant as a caretaker of the property. It was further pleaded that despite demand the Defendant had refused to vacate parcel 924 hence the suit. The 1<sup>st</sup> Plaintiff consequently prayed for, inter alia, an eviction order, permanent injunction, mesne profits and general damages against the Defendant.
4. By his plaint dated February 27, 2018 the 2<sup>nd</sup> Plaintiff pleaded that he was the registered proprietor of parcel 923 measuring 4.3 ha which he acquired from one, Joseph Gacheru for valuable consideration in 2013. He similarly pleaded that at the time of purchase the vendor introduced the Defendant as a caretaker who was to vacate at the 2<sup>nd</sup> Plaintiffs' instance. It was pleaded that despite demand the Defendant had failed to vacate parcel 923 hence the suit. The 2<sup>nd</sup> Plaintiff consequently prayed for an eviction order, permanent injunction, mesne profits and general damages among other remedies against the Defendant.

## **C. The Defendant's Defence**

5. The Defendant filed a defence to both suits in which he denied liability. Save for his admission that the Plaintiffs were the registered proprietors of the suit properties he denied the Plaintiffs' claims in their entirety and put them to strict proof thereof. The Defendant denied that he was introduced as a caretaker of the suit properties. The Defendant also denied having entered the suit land properties as a caretaker, employee or licensee of the Plaintiffs or their predecessors in title.
6. The Defendant further pleaded that he had been in open, continuous and exclusive possession of the suit properties since 1987 and that he had settled and carried out economic activities thereon without interruption from any quarters. He further contends that he had acquired the suit properties through adverse possession and that the Plaintiffs' suits were statute barred under Section 7 of the *Limitation of Actions Act* (Cap.22). The Defendant consequently sought for dismissal of the 2 suits.

## **D. The Defendant's Claim For Adverse Possession**

7. By an Originating summons dated 12.06.2018 based upon Sections 7 and 38 of the *Limitation of Actions Act* (Cap.22), Order 37 rule 7 of the *Civil Procedure Rule*, 2010 and all other enabling provisions of the law, the Defendant sought determination of various questions relating to adverse possession of the suit properties. The Defendant consequently sought the following orders:
  - (a) That a declaration be issued declaring that the title of Peter Wagura Muiro, the 1<sup>st</sup> Defendant herein, in respect of Land Parcel No.Nyandarua/Mawigo Salient/923, and Amon Kimani Kinyanjui, the 2<sup>nd</sup> Defendant herein, in respect of Land Parcel No. Nyandarua/Mawigo Salient/924, have been extinguished through adverse possession.
  - (b) That a declaration be issued that the Plaintiff is entitled to be registered as the proprietor of the said Land Parcel No.Nyandarua/Mawigo Salient/923 and 924 by adverse possession of the said parcel of land for a period of twelve (12) years and above.
  - (c) That the Plaintiff be registered as the proprietor of the said Land Parcel No.Nyandarua/Mawigo Salient/923 and 924 in place of Peter Wagura Muiro and Amon Kimani Kinyanjui, the Defendants herein.



- (d) That the Defendants be ordered to execute the transfer and all necessary documents to effect transfer of the said Land Parcel No.Nyandarua/Mawigo Salient/923 and 924 to the Plaintiff and in default the court do authorize the Deputy Registrar of this court to execute all such documents.
- (e) That the costs of this suit be borne by the Defendants.
8. The said summons was based upon the grounds set out in the body thereof and the contents of the supporting affidavit sworn by the Defendant on 12.06.2018 and the exhibits thereto. In a nutshell, the Defendant contended that he had acquired the suit properties on account of adverse possession and that the Plaintiffs' right to recover the same had been extinguished under the Limitation of Actions Act (Cap.22).
9. The Defendant asserted that he took possession of the suit property in May 1987 and that since then he had been in open, continuous and exclusive possession thereof. He asserted that he had settled on the suit properties, built dwelling houses thereon and undertaken farming activities thereon for periods exceeding 12 years and that neither the Plaintiffs nor their predecessors in title had taken steps to evict him from the suit properties.

#### **E. The Plaintiffs' Responses**

10. The 1<sup>st</sup> Plaintiff filed a replying affidavit sworn on November 16, 2018 in answer to the Defendant's originating summons for adverse possession. He reiterated that he was a purchaser for value of parcel 924 and that at the time of purchase the Defendant introduced himself as a caretaker of parcel 923 who was also interested in being engaged as a caretaker for parcel 924. He further stated that he contracted a casual labourer to erect a perimeter fence on his land which task was successfully undertaken without the Defendant laying any claim upon the land.
11. The 1<sup>st</sup> Plaintiff contended that his land was vacant in 2013 since the Defendant was residing on a temporary structure on parcel 923. It was his further response that in April, 2015 his advocates M/S Mutonyi Mbiyu & Co. Advocates issued a demand letter to the Defendants asking him to vacate his property. He further stated that the Defendant responded through M/S Kinyua Njogu & Co. Advocates that he was a caretaker or employee on the suit properties having been put in possession by one Titus Nguli and that he had never been asked by him to vacate the suit properties. It was the 1<sup>st</sup> Plaintiffs' contention that the Defendant did not claim adverse possession of parcel 924 at the time and that the originating summons was merely an afterthought.
12. The 2<sup>nd</sup> Plaintiff filed a replying affidavit sworn on 16.11.2018 in answer to the originating summons. He asserted that he was a bona fide purchaser for value of parcel 923 and that at the time of purchase in 2013 the Defendant was introduced by the vendor as a caretaker. It was contended that the Defendant had himself confirmed to be a caretaker at the material time. The 2<sup>nd</sup> Plaintiff contended that after purchase he hired a casual labourer to fence parcel 923 which fence was done without any objection by the Defendant. The 2<sup>nd</sup> Plaintiffs' response was more or less similar to the 1<sup>st</sup> Plaintiffs' response especially on the issuance of a demand letter and the Defendant's response thereto. It was contended that prior to the initiation of proceedings the Defendant's claim was confined to payment of his dues as a caretaker and that at no time did he seek to assert ownership rights over any of the suit properties.



## F. The Issues For Determination

13. The court has noted that the parties did not file an agreed statement of issues in the matter. They opted to file separate statements instead. Under Order 15 rule 2 of the Civil Procedure Rules a court may frame issues for determination from any of the following:
  - (a) The allegations contained in the pleadings.
  - (b) The statements made on oath by or on behalf of the parties.
  - (c) The contents of documents produced by the parties.
14. The court has perused the pleadings, evidence and documents in this matter. The court is of the opinion that the following issues arise for determination herein:
  - (a) Whether the Defendant has demonstrated his claim for adverse possession over the suit properties.
  - (b) Whether the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs are entitled to the reliefs sought in their respective suits.
  - (c) Whether the Defendant is entitled to the reliefs sought in the originating summons.
  - (d) Who shall bear the costs of the suit and counterclaim.

## G. Analysis And Determination

### (a) – Whether the Defendant has demonstrated his claim for adverse possession over the suit properties

15. The court has considered the material and submissions on record on this issue. Whereas the Defendant submitted that he had demonstrated his claim for adverse possession over the suit properties, the Plaintiffs contended otherwise. The Defendant's evidence was to the effect that in 1987 or thereabouts he was put in possession of the suit properties by one Titus Nguli whom he believed to be the owner. He further contended that the said person never returned to reclaim the suit properties.
16. The other material evidence on record, and which the court believes, is that the Defendant was put in possession of the suit properties as a caretaker and all along he took such as his status until a demand letter was done in 2015. The Plaintiffs produced a demand letter dated 22.4.2015 giving the Defendant notice to vacate the suit properties as Exhibit P.2(a). In the said letter, the Plaintiffs described the Defendant as a caretaker and indicated that they did not intend to retain his services. In his reply dated 5.5.2015 (Exhibit P.2(b) the Defendant conceded in paragraphs 1 and 5 thereof that he had been occupying the suit properties as a caretaker. The Defendant further stated that he has never been instructed by Titus Nguli to cease acting as a caretaker over the suit properties. The court accepts the Defendant's position in 2015 as caretaker of the suit properties since the two letters were written and exchanged by the parties before filing suit.
17. The court agrees with the Plaintiffs' submission that in his status as caretaker, the Defendant is incapable of claiming adverse possession of the suit properties since he was not claiming them as his own. In other words, he did not have *animus possidendi* to hold the suit properties as of right to the exclusion of all others including the true owner. See *Jandu v Kirpal & Another* [1975] EA 225 and *Wambugu v Njuguna* [1983] KLR 172. Since the Defendant considered himself a caretaker on the suit properties and was willing to vacate upon being instructed by Titus Nguli, the limitation period could not run in his favour between 1987 and 2015. The limitation period could only start running with



effect from May, 2015 or thereabouts hence by the time he filed his originating summons for adverse possession in 2018, barely 3 years had lapsed from the date of his refusal to honour the Plaintiffs' demand letter. Accordingly, the court finds that the Defendant has failed to prove his claim for adverse possession as required by law.

**(b) – Whether the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs are entitled to the reliefs sought in their suits.**

18. The basis of the Plaintiffs' claim is that they are the current registered proprietors of the suit properties hence entitled to enjoy all the rights of a proprietor including immediate possession thereof. Their evidence was that they were bona fide purchasers for value from the previous owners and that they were not legally obligated to keep the Defendant as a caretaker of the suit properties. Although the Defendant counterclaimed for adverse possession of the suit properties, the court has already found that his claim is not tenable in the circumstances.
19. The court is thus of the opinion that the Plaintiffs have proved their claim for ownership of the suit properties. However, the court is of the opinion that they are not entitled to all the reliefs sought in their respective suits. The court is of the view that the Plaintiffs are entitled to declarations that they are the absolute proprietors of their properties and for orders of eviction against the Defendant. The prayer for a permanent injunction would not serve any useful purpose in view of the orders the court is inclined to grant.
20. The court is further of the opinion that the Defendant should not be held liable in trespass for at least two reasons. First, the Defendant's entry into the suit properties as a caretaker was not unlawful and he does not appear to have been aware of the change of ownership until a demand letter was issued in 2015. Second, the Defendant had raised a counterclaim seeking adverse possession of the suit properties. In those circumstances, the Defendant ought not to be condemned as a trespasser before determination of his counterclaim.

**(c) – Whether the Defendant is entitled to the reliefs sought in the originating summons:**

21. It is evident from the pleadings and evidence on record that the Defendant's claim was based solely on adverse possession. All the 5 reliefs sought in the originating summons were hinged upon the counterclaim for adverse possession being successful. Since the court has already found and held that the Defendant has failed to prove his claim for adverse possession, it would follow that the Defendant is not entitled to the reliefs sought or any one of them.

**(d) – Who shall bear costs of the suit and counterclaim:**

22. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful parties should not be awarded costs of the actions. Accordingly, the Plaintiffs shall be awarded costs of the suit and costs of the counterclaim as well.

**H. Conclusion And Disposal**

23. The upshot of the foregoing is that the court finds that the Plaintiffs have proved their respective claims on a balance of probabilities as required by law. On the other hand, the court finds that the Defendant has failed to prove his counterclaim for adverse possession as required by law. Accordingly, the court makes the following orders for disposal of the matter:



- (a) A declaration be and is hereby made that the 1<sup>st</sup> Plaintiff, Amon Kimani Kinyanjui is the sole proprietor of Title No.Nyandarua/Mawigo Salient/924 measuring approximately 4.3 ha and neither the Defendant nor the previous owner has any interest in it.
- (b) An eviction order be and is hereby granted for the eviction of the Defendant from Title No.Nyandarua/Mawigo Salient/924. However, the Defendant shall have a grace period of 45 days within which to voluntarily vacate in default of which he shall be forcibly evicted.
- (c) A declaration be and is hereby made that the 2<sup>nd</sup> Plaintiff, Peter Wagura Muiru, is the sole proprietor of Title No.Nyandarua/Mawigo Salient/923 measuring approximately 4.3 ha and neither the Defendant nor the previous owner has any interest therein.
- (d) An eviction order be and is hereby granted for the eviction of the Defendant from Title No.Nyandarua/Mawigo Salient/923. However, the Defendant shall have a grace period of 45 days to vacate voluntarily in default of which he shall be forcibly evicted.
- (e) The Defendant's originating summons for adverse possession dated 12.06.2018 is hereby dismissed in its entirety.
- (f) The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs are hereby awarded costs of the suit and counterclaim to be borne by the Defendant.
- (g) Any prayer or relief sought in the pleadings but not specifically granted herein is deemed to have been denied.

**JUDGMENT DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 12<sup>TH</sup> DAY OF MAY, 2022 AND DELIVERED**

via Microsoft Teams platform.

In the presence of:

Mr. Maina Kairu for the Plaintiffs

No appearance for the Defendant

CA- Carol

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**Y. M. ANGIMA**

**JUDGE**

