



**Kioko v Ngomoli & another (Environment & Land Case
64 of 2008) [2022] KEELC 3653 (KLR) (11 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3653 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 64 OF 2008**

**A NYUKURI, J
MAY 11, 2022**

BETWEEN

MARTHA MUMBUA KIOKO PLAINTIFF

AND

MBITHI NGOMOLI 1ST DEFENDANT

DAVID KITAVI MONGU 2ND DEFENDANT

JUDGMENT

Introduction

1. Vide a Complaint dated May 23, 2008, the Plaintiff averred that she was the legal representative of the estate of Simeon Musau Kioko (deceased), in whose name land parcel Numbers Kibauni/Kitile/100, Kibauni/Kitile/119 and Kibauni/Kitile/121 (suit properties) were registered. She further stated that around January 2007, the Defendants trespassed on the suit properties and cut down trees, cleared vegetation, and began grazing cattle and cultivating thereon, which actions denied the Plaintiff access and utilization thereof. She therefore sought for the following orders:
 - a) A permanent order of injunction restraining the Defendants and/or their agents or persons claiming under them from encroaching, trespassing, grazing, cultivating, occupying or in any manner whatsoever from interfering with Land Parcel Numbers Kibauni/Kitile/100, Kibauni/Kitile/119 and Kibauni/Kitile/121.
 - b) Costs and interest.
 - c) Any other relief that this court may deem fit to grant.
2. On June 19, 2008, the Defendants entered appearance and on July 2, 2008, they filed Defence and counterclaim dated July 1, 2008. In the defence, they denied the Plaintiff's claim and stated that the registration of the suit properties in the deceased's name was done secretly, illegally, wrongfully and in



- breach of trust and that the same did not form part of the estate of the deceased. They also stated that the suit properties were family land held in trust by one Musau Muindi, for the Defendants and other descendants of their great grand-father the late Muli Mutumba.
3. The Defendants further asserted that Musau Muindi, who sold the land to the late Simeon Musau Kioko had no authority to sell as he held the suit properties in trust for the family. He also stated that over 150 members of the family of Muli Mutumba had acquired overriding rights and interests over the suit properties, having been in actual possession, established permanent homes and grazing and cultivating thereon, and therefore having been in occupation of the suit properties for over 12 years, they are entitled to ownership thereof by the doctrine of adverse possession.
 4. The defendants further contended that the suit was time barred and that neither the deceased nor the Plaintiff had been in actual possession of the suit properties. By way of counterclaim, the Defendants sought for the following orders;
 - a) The deceased's registration as proprietor of plot Nos Kibauni/Kitile/100, 119 & 121 is subject to the defendants' overriding rights and interests by virtue of actual occupation and possession, thus entitling them to protection against eviction and injunction And/OR;
 - b) A trust in favour of the defendants affecting Plot Nos. Kibauni/Kitile/100, 119 & 121 being the equitable/beneficial owners and the said trust be terminated and the lands be transferred and registered in to the Defendants names;
 - c) Any other just and equitable relief as the court may deem fit to grant in the circumstances.
 5. On July 29, 2008, the court directed that the Deputy Registrar of this court visits the suit land to confirm how each party occupies, uses, and utilizes the suit land including who else uses the land and file a report in court. On March 25, 2013, the Deputy Registrar visited the locus in quo, and filed the Report in court. From the Report, land parcel No. Kibauni/Kitile/121 had no homestead or trees on the land and the main activities on the same by the Defendants was grazing. The 2nd Defendant had planted maize and cowpeas on a section of the land. As regards parcel Kibauni/Kitile/100, there was no cultivation on the land and both the Plaintiff and the defendants grazed their livestock on the land. On parcel No. Kibauni/Kitile/119, parties stated that there was no dispute over the land as it was not part of the original land owned by the Defendants' family. There were no homes on the land but the same was used for grazing purposes. Further, the report noted that although the three plots were adjacent to each other, the Defendants were staying on parcel No. Kibauni/Kitile/124, which was adjacent to Plot No. Kibauni/Kitile/100.

Plaintiffs Case

6. PW1 Martha Mumbua Kioko, adopted her witness statement dated December 6, 2021 as her evidence in chief. She testified that she filed this case as the administrator of the estate of her deceased husband Simeon Musau Kioko who was the registered proprietor of parcel Nos. Kibauni/Kitile/100, 119 and 121. It was her testimony that the Defendants trespassed on the suit properties without her consent in January 2007, whereof they engaged in wanton destruction by cutting down trees clearing vegetation, cultivating and grazing on the suit properties, thereby denying the Plaintiff use and access of the same. She sought the orders stated in the Plaintiff and asked for dismissal of the counterclaim. She produced Grant of letters of administration as P-Exhibit 1, title deed for parcel No. Kibauni/Kitile/100 as P-Exhibit 2, title deed for parcel No. Kibauni/Kitile/119 as P-Exhibit 3, title deed for parcel No. Kibauni/Kitile/121 as P-Exhibit 4, letter of undertaking dated 16th November 1987 as P-Exhibit 5, the letter by Mueni Musyoka dated 13th June 1974 as P-Exhibit 6, translation of the said letter as P-Exhibit 7 and the Report by the Deputy Registrar of this court as P-Exhibit 8.



7. On Cross examination, PW1 stated that her deceased husband bought the suit properties in 1987, from Musau Muindi, who transferred title to her husband. She stated that she did not have the sale agreements in court; She stated further that she was not aware that the land belonged to one Muli Mutumba.
8. Pw1 further stated that among the persons granted the grant of representation, Albert Kelvin Mutua Koiko is her son who gave her authority to file the suit and therefore Mr. Albert does not appear as a party to the suit since she filed it alone.
9. It was PW1's evidence that the Defendants did not stay on the land, they only grazed and cultivated on the land. That the Defendants entered the suit properties without justification after the death of the seller and her husband. PW1 further stated that she reported the matter to the area Chief and the D.O of the trespass and was told to put beacons on the land.
10. On re-examination, PW1 stated that before the death of her husband, the Defendants had never trespassed on the land, that the titles were obtained lawfully and that she had never been sued for obtaining the titles. That marked the close of the Plaintiff's case.

Defence Case

11. The Defence case came up for hearing on January 17, 2022 when DW1 David Mukeke Kitavi Mongu the 2nd Defendant testified. He stated that he recorded a witness statement dated September 5, 2019 and filed on September 23, 2019 and prayed that the statement be adopted as his evidence in chief.
12. DW1 testified that it was not true that the three parcels Kibauni/Kitile/100, 119 and 121 belonged to the Plaintiff and that they belonged to Muli Mutumba. He further testified that the suit properties were his family's ancestral land which was owned by his great grandfather one Muli Mutumba, which though unregistered then, were passed on to his sons Mongu Muli and Ndolo Muli. He further stated that he was born and bred on the suit land just like his other kin. And that is where he grazes his livestock and cultivates. He further testified that he had planted trees and citrus plants on the suit properties.
13. He further testified that during adjudication process, Musau Muindi was registered as owner of the suit properties in trust for the family of Muli Mutumba. That the Plaintiff's husband got registered as owner of the suit properties without the knowledge and consent of the family of Muli Mutumba, who were in occupation thereof. He also stated that it was not true that he began occupying the suit property in 2007 as alleged by the Plaintiff as he had been in actual occupation of the same since his birth. It was his view that although their family was grazing, cultivating on and cutting trees on the suit land, that did not amount to wasting the same. It was his position that his occupation amounted to adverse possession. Further, it was his testimony that there had been previous litigation on the land where they filed a claim before the Land Disputes Tribunal at Machakos and that the Tribunal held that they were entitled to occupy and work in parcel Numbers Kibauni/Kitile/124 and 100. He urged the court to find that he was not a trespasser, but a rightful beneficiary entitled to occupation. He sought for the dismissal of the Plaintiff's claim and prayed that his counterclaim be allowed. He produced the claim filed in the Land Disputes Tribunal as D-Exhibit 1, proceedings before the Land Disputes Tribunal as D-Exhibit 2, the order of the court in Civil Misc. 119 of 2008 as D-Exhibit 3, and a certificate of official search for Kibauni/Kitile/124 as D-Exhibit 4.
14. DW1 complained that although they stayed in parcel Kibauni/Kitile/124, their family had never obtained the title thereto; and being a family of about 50 people, they were never involved in the purchase of the suit land by the Plaintiff and prayed that the titles be cancelled as they were wrongfully



- obtained. He stated that his family lived on parcel 124 and have cultivated on parcel 121 for over 30 years.
15. Upon cross examination by the Plaintiff's Counsel, DW1 stated that he did not have any documents to show that the land belonged to the family of Muli Mutumba and did not know the size of the family land; He stated that land parcel 124 was in the name of Musau Muindi but did not know the exact acreage. He further stated that the family land was to be shared equally between the family of Kitavi and the family of Musau Muindi. He confirmed that parcel No. 124 measures 37 Ha, while the suit properties measure 36.8 Ha. It was his evidence that parcel No. 124 was to be given to one family, while the suit properties were to be given to another family. He stated that since Musau Muindi was entitled to half share on each parcel including parcel Kibauni/Kitile/124, and Kitavi was entitled to half share thereof, he sought for half of each parcel of the suit properties, because the Tribunal gave him half of parcel 124 and 100. He confirmed that the case before the Tribunal was against Musau Muindi and he did not sue the Plaintiff nor her husband.
 16. On being cross-examined by the court, he stated that he was only interested with parcels 124 and 100 and stated that his family was to get 50% of the land while Musau Muindi was entitled to the other half, and that as long as they get their 50%, they have no claim over the other 50% which should be Musau Muindi's share. That marked close of the defence case.
 17. At the close of the Defence case, parties sought time to negotiate the matter out of court, but failed to agree and the court directed the parties file written submissions. The Plaintiff's counsel filed their submissions on 3rd March 2022 while the Defendants did not file submissions but indicated that he will rely on the evidence tendered.

Plaintiff's Submissions

18. Counsel for the Plaintiff submitted that the cause of action arose in 2007 when the Defendants encroached on the suit properties which are registered in the name of the late Simeon Musau Kioko. Counsel submitted that from the report on record prepared by the Deputy Registrar, upon visit to the said properties on March 25, 2013, it was evident that there was no homestead on the suit properties and the only activities on Parcel No. 121 was grazing and cultivation on a portion of the land, while there was no cultivation on Parcel 100. In regard to parcel No. 119, that the parties confirmed that there was no dispute over that property as it did not originate from the initial Parcel No. 100. and the only activity on the portion of land was grazing and cultivation and no structure stood on the land whether permanent or otherwise.
19. Counsel further contended that the cause of action arose in the year 2007 when the Defendants trespassed on the suit land and began grazing, cultivating and cutting trees thereon, while the Plaintiff filed the suit on May 26, 2008 within one year and thus it could not be said that the Defendants had acquired the suit properties by adverse possession. Counsel stated that grazing and collecting firewood as stated by the Defendant cannot confer rights of adverse possession. It was argued for the Plaintiff that the Defendants in their evidence in chief admitted committing the acts complained of by the Plaintiff.
20. Counsel also submitted that the documents produced by the Defendant show that the suit before the Land Disputes Tribunal was between the Defendants and Mary Musau, the wife of Muindi Musau, and that neither the Plaintiff nor her late husband were parties to that suit.
21. Counsel argued that the Defendants admitted that they were only entitled to 37 Hectares and could not in their counterclaim seek to dispossess the Plaintiff and the Estate of her late Husband another 36.8 Hectares purchased from Musau Muindi and thus have a total of 73.8 Hectares.



22. Counsel stated that their only other remedy would be to issue a citation to the family members of Musau Muindi to take out Letters of Administration towards having Plot No. 124 transferred and registered in their favour. Counsel prayed that the case be allowed as prayed with costs and the counterclaim be dismissed with costs.

Analysis and Findings

23. I have carefully considered the pleadings, testimonies of witnesses and submissions by Counsel. The issues for determination are; -
- a) Whether the suit is time barred?
 - b) Whether the Defendants have trespassed on the suit properties?
 - c) Whether the suit properties were subject to a trust?
 - d) Whether the Defendants have acquired the suit properties by the Doctrine of Adverse Possession?
24. On the issue as to whether this suit is time barred, the Defendant averred in their defence that the Plaintiff's suit is time barred and contrary to the provisions of the Limitations of Actions Act. No submissions were made by the defendants on this issue. He only stated in his evidence that he was born and bred on the suit properties. He did not specify when this happened. The Plaintiff testified that the Defendants trespassed on the suit properties in January 2007. There is no evidence on record to show that the Defendants trespassed on the suit property before 2007. Having considered the evidence on record, on when the Defendants encroached on the suit properties, I am satisfied that as per the Plaintiff's evidence, the cause of action arose in 2007.
25. Section 7 of the *Limitation of Actions Act* provides that an action for recovery of land may not be brought after the lapse of twelve years from the date the right of action accrued. In the instant suit, the cause of action arose in 2007 and the suit was filed in 2008. Therefore, this suit was filed within time. I therefore find and hold that this suit is not time barred.
26. The plaintiff testified that the suit properties are registered in the name of her late husband the late Simeon Musau Kioko. She produced copies of title deeds to demonstrate that indeed the suit properties are registered in the deceased's name. Registration of the Defendant's late husband as proprietor of the suit land is not disputed by the Defendants who allege that the registration was secretive and without their knowledge and consent. The Plaintiff further stated that the defendants trespassed on the suit properties in January 2007, by grazing, cultivating, cutting trees and clearing vegetation on the suit properties.
27. In his evidence, the Defendant testified that in 1988 when the Plaintiff's husband was purportedly registered as proprietor of the suit properties, his parents and families were in the land and making use of it as they have always done and continue residing thereon with their families, cultivating, cutting down trees and exercising their rights as actual occupiers in possession of the land. He however contented that those actions do not amount to wastage but was rather normal, lawful and traditional land exploitation practices done pursuant to their right as owners thereof. In my view, by the defendant's own evidence, they admitted that they indeed committed the acts complained of by the plaintiff.
28. Blacks Law Dictionary defines trespass as an unlawful act committed against property of another or a wrongful entry on another's property. As the defendant's entry on to the suit property, and grazing,



cultivating and cutting down trees thereon, was without the consent and authority of the Plaintiff, the same amounted to trespass.

29. The Defendant contended that the suit properties had been held by Musau Muindi in trust for the family. He however did not give any evidence to show that the three parcels herein were held by Musau Muindi in trust for the family of the late Muli Mutumba. This is because the Defendant stated that the suit property originally belonged to their great grandfather Muli Mutumba and therefore the family of Kitavi, which is their family was entitled to 50% of the land while the family of Musau Muindi was entitled to the other 50%. They confirmed that they live on parcel No. 124 which measures 37 Ha., while the suit properties measure 36.8 Ha. It was the Defendant's testimony that as long as they get their 50% they have no claim over the other 50% which ought to belong to Musau Muindi. In my considered view, the defendants cannot be heard to argue that they are entitled to 50% while Musau Muindi is entitled to 50% and at the same time claim that the 50% property held by Musau Muindi which was consequently sold to the plaintiff's husband, was held in trust for their family and that sale of the same to the Plaintiff needed their consent. It is my view that as the total land was about 74 Ha, and the Defendants live on Parcel Kibauni/Kitile/124, which is 37 Ha, then they had already received their 50%. The Defendant's main complaint that they had no title even to parcel No. 124, in my view, is a grievance that ought to be raised with the family of Musau Muindi, who have given them possession and failed to give them title; and not the Plaintiff. In any event, the acreage of parcel No. 124 where the Defendants reside is approximately slightly more in size than the suit properties and therefore it will amount to double speak for the Defendant to allege that he has no claim over Musau Muindi's 50% entitlement and at the same time claim that the same 50% sold by Musau Muindi was family land, held in trust for the family. I therefore find and hold that the suit properties are not subject to trust, neither were they held in trust for the defendant's family.

30. The law on adverse possession is settled. Sections 13, 17 and 38 of the *Limitation of Actions Act* are among the legal provisions that provide for adverse possession as follows;

Section 13 provides as follows;

- (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.

Section 17 provides as follows;

Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.

Section 37 provides as follows;



This Act applies to land registered under the Government Lands Act (cap 280), the Registration of Titles Act (Cap 281), the Land Titles Act (Cap 282), or the Registered *Land Act* (Cap 300), in the same manner and to the same extent as it applies to land not so registered, except that-

(a) Where if the land were not so registered, the title of the person registered as proprietor would be extinguished, such title is not extinguished but is held by the person registered as proprietor for the time being in trust for the person who, by virtue of this Act, has acquired title against any person registered as proprietor, but without prejudice to the estate or interest of any other person interested in the land whose estate or interest is not extinguished by this Act;

(b)

Section 38 provides as follows;

(1) 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.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

(3)

(4)

(5)

31. In the case of *Mtana Lewa v Kabindi Ngala Mwangandi* (2015) eKLR, it was held 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, 12 years.

32. Similarly, in the case of *Mbira v Gachubi* (2002) IEALR 137, the court held 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 statutory prescribed period without interruption.

33. Principles governing adverse possession are settled. The party claiming adverse possession must show that they have been in peaceful, continuous, open, exclusive and notorious occupation of land for a period of not less than 12 years. They must prove that the possession is “*nec vi, nec clam, nec precario*” which means that the possession ought not to have been through force, not in secrecy and ought to have been without the owner’s permission.

34. In the instant suit, the Defendant testified that his family have been in occupation of the suit properties before 1988 when the Plaintiff’s late husband was registered as proprietor thereof. They argued that they had already occupied the suit property for over 12 years before registration and also after registration. They also testified that they were born and bred in the suit properties. These allegations notwithstanding, the report of the Deputy Registrar who visited the suit properties, indicates that no homesteads were on the suit properties. The only activities on the land was grazing and cultivation



on some portion of the one of the parcels of the suit properties. The Defendants had also stated that they had put up permanent homes, planted trees and citrus plants on the suit properties, but no such evidence was disclosed in the Deputy Registrar's report. Besides, the Defendants have been unable to state the exact date when the period of adverse possession began to run.

35. In view of the fact that there is no actual possession of the suit properties by the Defendants, I find that the Defendants did not prove having acquired the suit properties by adverse possession. In my view, grazing on another's land, does not confer rights of adverse possession. There is no evidence on record to show that the Defendants occupied the suit property before 2007 as alleged or at all. It is therefore my finding that the defendants have not proved having acquired the suit properties by way of adverse possession.
36. The Plaintiff has proved that her late husband was the registered proprietor of the suit properties and that the Defendants trespassed thereon as they had no right to enter thereon. The said property was registered under the repealed Registered *Land Act* Cap 300 Laws of Kenya. Under Sections 27 and 28 of the said Act, which are similar to the provisions of Sections 24 and 25 of the *Land Registration Act* No. 3 of 2012, registration conferred absolute ownership in the person registered as proprietor of the land, which rights are protected in law. As the Defendants have not shown any justifications for their trespass on the suit properties, their actions are unlawful and the Plaintiff is entitled to protection of the law against the Defendants in accordance to Article 40 of *the Constitution* that protects the right to property.
37. The Plaintiff has sought for a permanent injunction against the Defendants to stop them from interfering with the suit properties. As the Plaintiff has established ownership and shown that the Defendants have no legal entitlement to trespass on the suit properties, the Plaintiff is entitled to the orders sought.
38. In conclusion, I find no merit in the counterclaim and I dismiss the same with costs. I find that the Plaintiff has proved her case on a balance of probabilities and I allow the same and enter judgment for the Plaintiff against the Defendant as follows;
 - a. A permanent order of injunction be and is hereby issued restraining the Defendants and/or their agents or persons claiming under them from encroaching, trespassing, grazing, cultivating, occupying or in any manner whatsoever from interfering with Land Parcel Numbers Kibauni/Kitile/100, Kibauni/Kitile/119 and Kibauni/Kitile/121
 - b. Costs of the suit shall be borne by the Defendants.
39. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 11TH DAY OF MAY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Ngolya for the Defendant

Mr. Mbindyo for the Plaintiff

Ms Josephine Misigo – Court Assistant

