



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Njagi v Mugo (Environment & Land Case 42 of 2018)
[2022] KEELC 2635 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2635 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE 42 OF 2018**

**A KANIARU, J
JUNE 30, 2022**

BETWEEN

ITA NJAGI PLAINTIFF

AND

DANSON IRERI MUGO DEFENDANT

JUDGMENT

1. This suit before me was filed by the plaintiff on November 8, 2018 by way of originating summons dated November 6, 2018 which was later amended vide leave of court granted on May 20, 2021. The amended originating summons is dated 16.9.2021 and was filed on October 1, 2021. The plaintiff in the Amended Originating Summons is Ita Njagi and he is claiming ownership of land parcel No. Mbeere/Mbita/2418 measuring 1.91 Ha by way of adverse possession. The same is claimed against Peter John Kahuki Mwangi the registered proprietor of the land and defendant in the suit.
2. In the summons, the plaintiff claims that around the year 1986, one Jackson Kithumbu agreed to sell to him the suit parcel of land for a consideration of Kshs. 25,200/= which amount was paid by way of installments and part of it through barter arrangement, that is, by giving of a goat. At the time, it is alleged that the land was undergoing adjudication and that the adjudication officer had confirmed from his records that the land belonged to Jackson Kithumbu. The said Jackson Kithumbu is then said to have showed the plaintiff the boundaries to the land, which were marked by sisal and partly with euphorbia plants. He alleges to have then paid the full purchase price and he also followed up on registration of the property.
3. It is said that he discovered that the land was instead registered in the name of the defendant and that the vendor, Jackson Kithumbu, informed him that he had initially sold the same land to the defendant but due to some differences he had refunded the money to him. The vendor is said to have promised to follow up and ensure cancellation of the defendant's name but had died before that could be done.



4. According to the plaintiff, in the year of purchase of the land, he settled there with his family and extensively developed the property which is now said to have mature Miraa crop, indigenous trees, and he also cultivates seasonal crops therein. The plaintiff similarly states to have constructed a house on the land. He avers to have had peaceful, continuous, uninterrupted and exclusive possession for a period exceeding 12 years prior to filing the summons.
5. Four prayers were sought in the suit; the first was for the plaintiff to be declared as entitled to ownership of land parcel Mbeere/Mbita/2418 as against the defendant by virtue of Section 7 of the Limitations of Actions Act, the second is for an order that in the alternative a declaration that the defendant is holding the land for and in trust for him, the third is an order that the suit parcel Mbeere/Mbita/2418 be registered in the name of the plaintiff and finally, which is fourth, that the plaintiff be awarded costs of the suit.
6. The defendant neither entered appearance nor filed a response to the suit despite service being done via substituted service on the Daily nation on March 27, 2019 pursuant to court order issued on March 18, 2019. The matter was therefore set down for hearing February 24, 2022. PW1 was the plaintiff. In his testimony, he gave a chronology of the circumstances surrounding the purchase of the property just as stated in the originating summons, which I outlined earlier in this judgement. He stated that upon the demise of the vendor of the property, he sought to trace the defendant whom he was informed hailed from Thika. He said he had tried to trace him but to no avail. He also said he involved the office of the area chief in Thika but he was still not successful. He averred to have occupied the suit land when it was undeveloped and vacant and had now developed it by constructing a house and planting on the land. He testified that no one has ever chased him from the land or asked him to stop using it. He asked the court to grant him the prayers sought in the claim. He produced the green card as evidence in his case.
7. PW2 was Gavidencia Gacugu, wife to the plaintiff. She stated that she hailed from Mbita and was a peasant. She testified that she got married to the plaintiff in the year 1978 and that her husband had purchased the suit parcel of land from Jackson Kithumbu. She averred to have been present during the purchase to which the property was bought at Kshs. 25,200/= in the year 1988. But she was a bit unsure of the year of purchase. It was her testimony that they have been in occupation of the property from the year of purchase and have been cultivating on it by planting trees, miraa, maize and beans. Further that they have constructed on the shamba and no one has evicted them from it. She stated to be living peacefully on the land.
8. PW3 was Julius Njoroge Kimani, a neighbor and friend to the plaintiff. His testimony was that his land was near that of the plaintiff. He estimated his land to be at 200 metres from that of the plaintiff. He averred that the plaintiff cultivated land parcel No. 2418 on which he has planted crops which he even invited him to help in harvesting. According to him, nobody had chased the plaintiff away or come to claim the land. All the three witness had filed their respective witness statements in support of the plaintiff's case and they sought for the statements to be adopted as evidence in this case.
9. The plaintiff filed his submission on May 10, 2022. He identified two issues for determination. The first being whether he was entitled to ownership of parcel of land Mbeere/Mbita/2148 as against the defendant by virtue of adverse possession. He relied on the case of Mtana Lewa Vs kabindi Ngala Mwangandi (2015) eKLR which defined what adverse possession is and the essential prerequisites to be met for a claim on adverse possession to be sustained.
10. It was submitted that the plaintiff was entitled to the suit property by virtue of adverse possession, having occupied the suit property in the year 1986. It was stated that the plaintiff, upon purchase of the land, occupied it and developed it extensively, and that he had a home which he occupied with his family. In support of his case, he relied on the provisions of Section 7 and 17 of the Limitations



of Actions Act (Cap 22 Laws of Kenya). He further relied on the case of *Celina Muthoni Kitbinji Vs Safiya Binti Swaleh & 8 others* Mombasa ELC NO. 248 of 2016 where the court is said to have allowed a claim of adverse possession in a case where there was no evidence that had been availed to contradict the plaintiff's averments. It was reiterated that the plaintiff had enjoyed exclusive possession openly and without interruption by the defendant for a period of over 30 years. As such the defendant's right of action to recover the land had extinguished.

11. The second issue was whether a declaration ought to be made to the effect that the defendant was the registered owner of land parcel Mbeere/Mbita/2418 on behalf of and in trust for the plaintiff. On this, the plaintiff relied on the copy of green card which he had submitted in support of his case which evidenced that the defendant was indeed the registered proprietor of land parcel Mbeere/Kirima/2418 since the year January 14, 2020.
12. The plaintiff relied on the case of *Mtana Lewa Case (Supra)* which with regard to Section 37 and 38 of the *Limitations of Actions* Act is said to have stated that where land is registered under one of the registration Acts, then the title is not extinguished but held in trust for the person in adverse possession until that person obtains an order vesting the land in him. It is averred that the title held by the defendant had been so held in trust for the plaintiff since January 15, 2012, which is the period when the 12 years expired from the time the defendant became the registered owner of the land. The plaintiff was of the view that he had proved his case for registration of the land as proprietor of the suit parcel of land by virtue of adverse possession.
13. I have considered the Originating Summons, the evidence and the submissions by the plaintiff. The plaintiff herein seeks to be registered as owner of the suit parcel of land Mbeere/Mbita/2418 by way of adverse possession or in the alternative a declaration that the defendant is holding the land for and in trust for him.
14. I will first consider the prayer on adverse possession and if the same fails, I will then determine whether the alternative prayer on trust is tenable. His claim is that he purchased the land from Jackson Kithumbu in the year 1986 and paid the entire purchase price of Kshs. 25,200/= paid partly in cash and partly through barter, that is, by way of a goat. The land at the time was to have been subject to adjudication and that payment was made upon confirming in the adjudication records that the land belonged to the vendor. However, at the time of registration of transfer it is claimed that the plaintiff discovered that the land was registered in the defendant's name and upon enquiring from the vendor he was informed that the defendant had initially purchased the land from the vendor but the parties had had some differences thus necessitating the vendor to refund the purchase price to the defendant.
15. The vendor is said to have committed to follow up and ensure cancellation of the defendant's name but he had died shortly. The name was never changed and the defendant was said not to have been traced by the plaintiff though his residence is said to have been in Thika. Even with the help of the area chief the plaintiff had not been in a position to trace him. His claim is anchored on grounds that he has been in open, exclusive and uninterrupted occupation of the land for a period exceeding twelve years, hence deserving of the orders for registration of the land by way of adverse possession.
16. What entails Adverse Possession was defined by the Court of Appeal in the case of *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR where it was stated thus;

“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*, which is in these terms:- “An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

17. The other legal provisions with regard to Adverse possession is section 38 of the *Limitations of Actions Act*. Which 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.
18. As pointed out, a claim on adverse possession can be sustained when one takes possession of land and asserts rights over it against a registered owner who fails to take any action for a period of over twelve years. Such possession must be without force or under a license. It must be continuous, open and adverse to the owner. The possession must also be without permission of the owner and should be with the knowledge of the owner of the land.
19. From the pleadings, the entry to the land by the plaintiff was indeed by way of purchase from the vendor who was the initial owner of the land. It is alleged that unknown to the plaintiff, the vendor had sold to the defendant the suit land and that the records indicated the defendant’s name. It was the plaintiff’s case that the vendor had promised to ensure cancellation of the defendant’s name from the records but that this never came to pass as the vendor died shortly after. The parcel of land is therefore in the name of the defendant. It is trite law that adverse possession is claimed against a registered owner of the land hence the institution of the claim against him. The first element is therefore established.
20. The other element is whether there has been actual occupation of the land, and whether such occupation has been open, exclusive and continuous. The evidence by the plaintiff and his witness is that he has been in possession of the land from the year 1986. His wife seemed to be of the view that the year was 1988 but she was not so sure of this. The chronology by the plaintiff seems believable and the court can point the year of purchase and entry of land to be the year 1986. The plaintiff and his wife concur that the purchase of the land was at a consideration of Kenya Shillings Twenty Five Thousand Two Hundred (Kshs.25,200/=) which amount was paid in full and they were granted possession thereafter after payment of the purchase price.
21. The plaintiff and his wife aver that upon such occupation his stay there has been open and exclusive. It is further said that the plaintiff has never been evicted from the land by any person. He is equally alleged to have developed the land by planting crops on it and even constructing a house on it. The evidence by the plaintiff has been corroborated by PW3, his neighbor, who confirm that there is actual occupation by the plaintiff and his family and similarly that from the time of occupation, he has never been evicted from the land by any person. In my view, the plaintiff, based on the testimony by himself and his witnesses, has established the requirement for open, exclusive and continuous occupation.



However, it would have been prudent to prove occupation by adducing not just oral evidence but also documentary evidence in support of his claim. That notwithstanding, that requirement may not be so necessary as the plaintiffs evidence has no rebuttal.

22. The other element is that the entry should not be permissive and should be hostile. Regarding the issue of permission this was addressed in the case of *Samuel Miki Waweru vs. Jane Njeru Richu*, Civil Appeal No. 122 of 2001, where the Court of Appeal delivered the following dictum:

“...it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise.

23. However, even then, there is an exception in that adverse possession begins to run when the permission granted comes to an end or when the license is determined. See the case of *Jandu v Kirpal* [1975] EA 225. Further in the case of *Wambugu vs Njuguna* (1983) KLR 172 the Court held; “Where the claimant is in exclusive possession of the land with leave and license of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined”. The other instance is where the land in dispute is a controlled transaction and the parties fail to obtain land board consent within six months from the date of the agreement. Then, the transaction becomes void by operation of law and the occupation therein become adverse.

24. It is worth noting that the plaintiff or his witness did not address the issue as to whether the land is a controlled transaction or whether or not they had obtained the land control board consent. That notwithstanding, the plaintiff had stated that at the time of acquiring the land it was subject to adjudication, hence the issue of obtaining the land control board consent at the time was not applicable.

25. With regard to the issue of permission, it is worth noting that the claim by the plaintiff herein is against the owner of the land who is the defendant and no permission was granted by him to occupy the land. The permission was instead by the vendor. Nevertheless, I will still address this issue of permission as the entry was by purchase of the land.

26. The concept of permission terminates when the occupier of the land fulfils his obligation by making full payment of the purchase price. That is when his possession of the land becomes adverse. This was stated in the case of *Peter Mbiru Michuki v Samuel Mugo Michuki* [2014] eKLR where the Court of Appeal cited with approval the case of *Public Trustee – v- Wanduru*, (1984) KLR 314 at 319 where Madan, J.A. stated thus:

“adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed of possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run”.

27. The plaintiff avers to have paid the full purchase price in the year 1986. No evidence has been adduced to the contrary. Time for purposes of a claim of adverse possession by way of purchase, starts running after the full purchase price is paid. The occupation is considered adverse twelve years thereafter. However as already stated, the land at the time of purchase and payment of the full purchase price was subject to adjudication and therefore no title had been issued to the land. In my view a claim of adverse possession can only be against one who is a registered owner of the land and existence of a title to land



is key in such a claim. I say so for reason that such a claim is directed to a title owner and a specific portion of land recognized or in existence under the register.

28. With regard to a claim of adverse possession in a land subject to adjudication the court, in the case of *Samuel Kipngeno Koech v Agnes Wambui Gitonga* [2016] eKLR

“The reason why it is so drawn is that a case of adverse possession is one directed at acquiring specific land, or a portion of that land, and the land needs to have been registered and to have a title. If the land in issue is yet to be registered, then that land cannot be the subject of a case for adverse possession; rather, it will be a case falling under the provisions of the *Land Adjudication Act*, Cap 284 Laws of Kenya. Such land needs to await the ascertainment of rights through the process of adjudication and one cannot claim adverse possession over it, for there will be nobody to sue, since there will be nobody holding any title”

29. The issue of when time starts running in the circumstances was clarified to be on the date of registration of title. This was as stated in the case of *Koech Kangogo v Chebii Yego* [2018] eKLR where the court stated thus;

“Prior to that, there was the process of consolidation, demarcation and adjudication. This court finds that time does not run during consolidation, demarcation and adjudication. Time starts running on the date of registration”.

30. In our case then, time can only be said to have started running on January 14, 2000 when the defendant was granted title to the land as shown in the copy of green card attached in support of the plaintiff's case. It therefore follows that the occupation by the plaintiff became adverse twelve years after that period which is on January 14, 2012. The suit herein was filed on November 6, 2018 which was past the twelve year period required under the law.

31. The other thing that would affect the running of time would be whether the registered owner of the land filed a claim asserting his right to the land. This is not the case here. The defendant seems not to have tried to regain possession of the land. This court can say the defendant seems disinterested in the land. He was served with summons to appear by way of substituted service but has never defended this case. The plaintiff avers to have tried tracing him physically but has been unable to. In my view, the occupation was continuous and time has never stopped running. I find that the Plaintiff has met all the elements required to sustain registration of the suit land by way of adverse possession. As the first prayer sought is successful, I need not consider the prayer in the alternative. I make orders to the effect that the plaintiff be registered as owner of Land parcel Mbeere/Mbita/2418. He is an adverse possessor.

I make no orders as to costs of the suit.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 30TH DAY OF JUNE, 2022.

In the presence of Kiongo for Rose Njeru for plaintiff and defendant present in person.

Court Assistant: Sylvia W.

A.K. KANIARU

JUDGE

