



**Mbogo v Joreth Limited (Environment & Land Case E101 of 2020)
[2022] KEELC 2514 (KLR) (28 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2514 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E101 OF 2020**

MD MWANGI, J

JUNE 28, 2022

**IN THE MATTER OF CLAIM FOR TITLE TO LAND BY ADVERSE
POSSESSION OVER LR. NO. 13330/16 ALSO KNOWN AS
PLOT NO. 220 IN THE THOME FARMERS NO. 5 LIMITED**

BETWEEN

EDWARD MBOGO PLAINTIFF

AND

JORETH LIMITED DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit vide the Originating Summons against the Defendant and sought the following orders;
 - a) That Edward Mbogobe declared to have acquired title by adverse possession to the suit premises known as Plot No. 220 Thome Farmers No. 5 Limited and also known as L.R. No. 13330/16.
 - b) That the registration of Joreth Limited as proprietor of L.R. NO. 13330/16 and/or any other persons deriving title from Joreth Limited based on the land previously known as Plot No. 13330/16 be cancelled forthwith and the Chief Registrar of Titles do rectify the register to enter the name of the Plaintiff Edward Mbogo as registered proprietor of the said property L.R. No. 13330/16 in place of the Defendant or anyone deriving title from the Defendant.
 - c) The costs of these proceedings be borne by the Defendant.
2. The Originating Summons is supported by the Affidavit of the Plaintiff, Edward Mbogo, sworn on the 1st September, 2020. The Plaintiff deposes that he acquired one share from Warabe Ali Obeid the previous owner, in the entity known as Thome Farmers No. 5 Limited on or about the 21st September,



1987. The share acquired entitled him to a plot measuring half (1/2) an acre, the subject property of this suit. The Plaintiff avers that upon payment for the share in full, and the others dues owed to Thome Farmers No. 5 Limited, he was shown the Plot as per his share certificate, which Plot measures ½ an acre.
3. The Plaintiff avers that he thereafter paid the survey fees and was issued with a ballot card and a certificate which represented plot number 220 on the ground. He took possession of the suit property in the same year, 1987 and started cultivating on it, fencing and planting trees and other subsistence crops.
 4. Prior to filing the suit, the Plaintiff had been in possession of the suit property continuously, exclusively, openly and without interruption for a period of 33 years. On the said parcel of land, the Plaintiff has indeed built a family home. He constructed the same from 1992 and moved into the house with his family in 1997.
 5. The Plaintiff reiterates that he has been had actual, open, uninterrupted possession all through. No one including the Defendant has ever questioned his ownership or occupation since 1987. The Plaintiff therefore affirms that the Defendant's rights over the suit property have been extinguished by virtue of his acquisition by adverse possession.
 6. That the property is currently registered within the mother title L.R. No. 13330 in the name of the Defendant. Subdivisions had however been done and the suit property that the Plaintiff claims is clearly identifiable as L.R. No. 13330/16. The Plaintiff has attached a copy of the extract of the mother title L.R. No. 13330 as well as a Survey Plan identifying the suit property, L.R. No. 13330/16.

Defendant's Case

7. The Originating Summons was opposed by the Defendant who filed a Replying Affidavit sworn on the 3rd May, 2021 by one Peter Mungai. The deponent avers that he is a Special Manager of the Defendant Company.
8. The Deponent categorically affirmed that the defendant Company had never entered into a Sale Agreement with the Plaintiff for the purchase of the suit property. That no evidence of sale and/or certificate of share between the Plaintiff and the Defendant had been adduced.
9. Indeed, the deponent confirmed that the Defendant is the registered owner of all that parcel of land known as L.R. No.13330 having been so registered on the 19th December, 2000. The said Title was as a result of an amalgamation or consolidation of the defendant's two titles previously known as L.R. No. 4920/3 and 4921/3 which titles the Defendant held since 1950's. The suit property Plot No. 220 (L.R. No. 13330/16) is a subdivision of L.R. No. 13330 which has never been registered in the name of the Plaintiff or the alleged Thome Farmers No. 5 Limited.
10. The chronology of events as per the Defendant are that the Defendant was the lawful owner of the parcels of land known as L.R. No. 4920/3/2 and 4921/3/1 which were amalgamated into L.R. No. 13330. However, before the amalgamation, the property had been subdivided into 642 Plots. That some trespassers then invaded the land prompting the Defendant to institute a case at the High Court at Nairobi being HCCC No. 6206 of 1992 against all the trespassers on the land. The trespassers on the Defendant's land (L.R. No. 13330) just like the Plaintiff herein purported to have purchased the land from Thome Farmers No.5 Limited. A Consent Order was entered in the case before the High Court requiring the Defendants therein to pay to Joreth Limited an all-inclusive sum of Kshs. 200,000/- each in order to have their respective plots transferred to them individually. According to the Defendant,



the Plaintiff herein did not comply and is therefore not entitled to transfer of the title to his parcel of land as claimed.

11. The Defendant avers that Thome Farmers No. 5 Ltd has never owned the property known as L.R. No. 13330. The Plaintiff therefore had not established his ownership to the land, and had no title to produce as proof of ownership.
12. The Defendant averred that the Plaintiff's possession of the suit property was interrupted by the filing of the case at the High Court in Nairobi in 1992. The claim of adverse possession therefore cannot stand as the Plaintiff's occupation has not been continuous for a period in excess of twelve (12) years.

Plaintiff's Further Affidavit

13. In response, the Plaintiff filed a further Affidavit deponed on the 19th May, 2021 pursuant to leave granted by the court on the 6th May, 2021.
14. The Plaintiff contended that his case is founded on adverse possession. Further that the Defendant gave Thome Farmers No. 5 Limited possession of the land and the subdivision which the Defendant acknowledges in it reply was effected by Thome Farmers No. 5 Ltd. The Plaintiff further averred that he was not a party to the alleged proceedings in Nairobi HCCC No. 6206 of 1992 and any orders issued therein are not binding on him. The Consent Order alluded to by the Defendant could only bind the 6 Defendants who conceded to it and not anyone else.
15. The Plaintiff emphasized that he had placed sufficient evidence before the court proving his full physical possession. He even exhibited attached photographs of his home standing on the property since 1992. He got power connected to the property in 1997 and a telephone landline in his house.

Directions under Order 37 of the Civil Procedure Rules

16. On the 6th October, 2021, the Court directed that the matter to proceed by way of viva voce evidence. The Originating Summons and the Supporting Affidavit were to be treated as if they are the Plaintiff and the Replying Affidavit by the Defendant be treated as a Statement of Defence.

Plaintiff's Evidence

17. The Plaintiff, Edward Mbogo testified in his case. He adopted his Witness Statement dated 1st September, 2020 as his evidence in-chief and produced the documents on the Plaintiff's Bundle of Documents dated 1st September, 2020 as his exhibits, PE 1-8. He entirely affirmed the statements in his pleadings.
18. In cross-examination the Plaintiff stated that he is seeking orders to be declared as the owner of the suit property as against the Defendant. The Plaintiff reiterated that he has been in possession of the suit property since 1987 a total of 33 years by the time he filed the suit in court. The Plaintiff indeed confirmed that it was in deed true that he never entered into any agreement with Joreth Limited. He was aware that the property is still in the name of the Defendant. He denied knowledge of the High Court suit HCCC No. 6206/ 1992. He was not amongst people who were sued in the case.
19. In re-examination the Plaintiff stated that his plot was identifiable as at 1987 as there were beacons.

Defendant's Evidence

20. Mr. David Karanja Nderitu testified on behalf of the Defendant as DW1. He adopted his Witness Statement dated 14th January, 2022 as his evidence in-chief. He also produced the Bundle of Documents on the Defendant's List of Documents dated the 3rd May, 2021 as Defence Exh 1 -14.



21. DW 1 stated that the suit property is a subdivision of a larger property known as L.R. No. 13330 as shown on the mother title. Prior to the subdivision in 1999, as far as he could remember there were no people in Plot No. 13330/16. The witness averred that the Plaintiff has not produced any documents to confirm his being on the land as the Photographs produced have no dates. He confirmed that the Plaintiff in this suit was not sued in HCCC No. 6206 of 1992. The witness alleged that the reason why the Plaintiff had not been included in their case before the High Court was that he was no a trespasser according to their investigations. He nonetheless confirmed that the Plaintiff herein lives on the suit property.
22. In cross-examination, DW 1 confirmed that he was aware that the Plaintiff lives in his house on the suit property. He confirmed that the documents provided by the Plaintiff showed power connection and the telephone installation into the Plaintiff's house. He had no evidence to contradict the Plaintiff's evidence as to when the house was constructed. He had not laid any basis to dispute what the Plaintiff stated in court. Joreth Limited had not taken any action against the Plaintiff from 2005 even though the witness alleged that they became aware of his presence of the land then.
23. In re-examination, the witness stated that the mother title was issued on 20.4.2000. The date of January 23, 1987 was the date of approval of the scheme of subdivision. The power Contract exhibited by the Plaintiff did not refer to the suit property. Finally, the witness stated the Plaintiff has not produced Deed Plans of the area he is occupying.

Court's Directions

24. After the close of the hearing of the case, the Court directed parties to file written submissions, which directions both parties complied with. The Plaintiff filed his submissions dated 8th May, 2022 whereas the Defendant filed its written submissions dated the 16th June, 2022. The court has had the opportunity to peruse the submissions and the authorities cited therein.

Issues for Determination

25. Having scrutinized the pleadings filed by the parties in this case, the testimonies presented during the hearing and the submissions filed, this court is of the view that the issues for determination in this case are:
 - a) Whether the Plaintiff has made a case for adverse possession of the suit property against the Defendant.
 - b) Whether the plaintiff is entitled to the orders sought.

Analysis and Determination

A. Whether the Plaintiff has made a case of adverse possession of the suit property against the Defendant.

26. The doctrine of Adverse Possession in Kenya is provided for in Section 13 of the [Limitation of Actions Act](#) aforesaid further provides that:

‘A right of action to recover land does not accrue unless the land is in the possession of some person in whose favor 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 the 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.’

27. Sections 37 and 38 of the [Limitation of Actions Act](#) stipulate that if the 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 he shall have obtained and registered a High Court Order vesting the land in him.
28. The Plaintiff has instituted the present suit seeking for a declaration that he has acquired title by adverse possession to the suit property known as Plot No. 220 Thome Farmers No. 5 Limited; also known as L.R No. 13330/16.
29. For a claim of Adverse Possession to succeed, a party must satisfy the now well settled criteria stated in numerous decided case including the case of [Maweu vs. Liu Ranching and Farming Cooperative Society](#) 1985 KLR 430 where the Court held;

“Thus, to prove title by Adverse Possession, it was not sufficient to show that some acts of Adverse Possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances.”

30. The Court of Appeal in the case of [Benjamin Kamau Murma & Others vs Gladys Njeri](#), CA No. 213 of 1996 held that:

“The combined effect of the relevant provisions of Sections 7, 13 and 17 of the [Limitation of Actions Act](#), Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of Adverse Possession of that land.”

31. The onus in a claim for adverse possession lies with the person claiming Adverse Possession. The Indian Supreme Court decision in the case of [Kamataka Board of Wakf vs Government of India & Others](#) (2004) 10 SCC 779 emphasized the well settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario” meaning, ‘no force, no secrecy, no evasion’. Differently put, the possession must be peaceful, open and continuous.
32. Further the Court of Appeal in the decision of [Wilson Kazungu Katana & 101 others vs Abdalla Bakshwein & Another](#) (2015) eKLR stated that for a claim of adverse possession to succeed,
 - i. The subject parcel of land must be registered in the name of a person other than the Applicant;
 - ii. The applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner; and
 - iii. The Applicant must have been in occupation for a period in excess of twelve (12) years having dispossessed the owner or there having been discontinuance of possession by the owner.
33. In the case of [Kasuve vs Mawaani Investments Limited & 4 others](#) 1 KLR 184, the Court of Appeal restated what a Plaintiff in a claim for Adverse Possession has to prove in the following words;

“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 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”.



34. Guided by the above position of the law, the responsibility of this court is to determine whether the Plaintiff herein has the criteria vis-à-vis the evidence adduced before this court.
35. It is not in dispute that the suit property is currently registered within the mother title LR. No. 13330 in the name of the Defendant. The Plaintiff annexed a copy of the extract of the mother title LR. No. 13330 as well as a Survey Plan identifying the suit property. The Defendant has equally not disputed ownership of the suit property. In fact the Defendant's unequivocal evidence was that it is the registered proprietor of the suit property LR. No. 13330/16. That satisfies the first element – the land must be registered in the name of a person other than the Applicant.
36. The second requirement is for the Plaintiff to prove that he has been in open and exclusive possession of that piece of land in an adverse manner to the title of the owner.
37. It was the Plaintiff's evidence that he took possession of the suit property way back in 1987. He continued to use the plot openly without interruption from. Sometime in 1992, he built a family home on the suit property where he has since settled in with his family. He produced Photographs, PE 5 showing the well-established house. Further, he produced documents showing that he connected power and a landline telephone line into the house. He testified on oath that he has been in actual physical possession, open, uninterrupted and without interference from anyone including the Defendant. No one has ever questioned his possession and or occupation of the suit property since 1987.
38. The Defendant on the other hand contends that the that the Defendant is the proprietor of the suit property LR. No. 13330/16 after amalgamating some other properties. That it was after the amalgamation that some trespassers invaded the land. Consequently, the Defendant had to institute proceedings at the High Court; HCCC No. 6206 of 1992 against all the trespassers on the land. The trespassers on the Defendant's land (L.R. No. 13330) purported to have purchased the land from Thome Farmers No. 5 Limited. A Consent Order was then entered requiring them to pay Kshs. 200,000 to Joreth Limited who was to then transfer the land to them individually. The Plaintiff did not comply. Further, the Defendant contended that the Plaintiff had not sufficiently proved possession of suit property and even if he hasd been in possession, the same cannot have been for a continuous period of twelve (12) as the same was interrupted by suit at the High Court.
39. The Plaintiff however as it turned out during the hearing was not a party in the alleged case before the High Court. Having perused the Defendant's documents particularly proceedings at the High Court in HCCC No. 6206 of 1992, the Plaintiff was evidently not a party to the said proceedings. His occupation then cannot be said to have been interrupted by the High Court. The alleged consent was supposedly entered into in the year 2005. Fifteen years had since passed from that date before the Plaintiff filed his claim for adverse possession. From whichever side one looks at it, the period of 12 years had been surpassed.
40. On a balance of probabilities, I am persuaded that the Plaintiff has proved that he has indeed been in possession and occupation of the suit property.
41. The Defendant has termed the Plaintiff's entry into the suit property as trespass. It is in fact the said trespass that makes the Plaintiff's entry on the suit property adverse. Entry without the consent and or permission of the owner of the land.
42. The Plaintiff led evidence that he has been in exclusive control of the suit property since 1987 to date openly and without interruption by anyone, least of all, the Defendant. The Defendant had knowledge of the Plaintiff's occupation of the suit property all along. This court finds that the Plaintiff has proved



the second element to the required standard - open and exclusive possession of that piece of land in an adverse manner to the title of the owner.

43. The final requirement for a party claiming adverse possession is to prove that he has have been in occupation for a period in excess of twelve (12) years having dispossessed the owner or there having been discontinuance of possession by the owner.
44. The Plaintiff's evidence that he has been in possession of the suit property since 1987 has not been sufficiently controverted by the Defendant. Further, his evidence of occupation since 1992, when he built the house, has also not been challenged. The Plaintiff adduced evidence confirming that he in deed contracted Kenya Power and Lighting Company to supply electricity on the suit property in 1997. He even has a Landline connected to his home on the suit property connected way back in the year 2000. All this evidence confirms his possession and occupation of the land for over 12 years. The Defendant's argument that the case filed in the High Court interrupted the statutory period holds no water since the Plaintiff was not a party the case. The Plaintiff has therefore satisfactorily proved that he has continuously been in possession of the suit property for more than 12 years.

B. Whether the plaintiff is entitled to the orders sought.

45. In deciding the issue of Adverse Possession, the primary function of a Court is to draw legal inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of fact, the question whether that possession is adverse or not is a matter of legal conclusion to be drawn from the findings of facts as stated in the case of *Kweyu vs Omutu*, C A Civ Appeal 8 of 1990 (unreported). This position was re-stated in the case of *Wilson Njoroge Kamau vs Nganga Muceru Kamau* [2020] eKLR
46. This Court is satisfied that the Plaintiff has proved a case of Adverse Possession in respect of the suit property on a balance of probabilities. The court therefore allows the Plaintiff's case in the following terms:
 - a) That Edward Mbogois declared to have acquired title by adverse possession to the suit premises known as Plot No. 220 Thome Farmers No. 5 Limited, also known as L.R No. 13330/16.
 - b) That the registration of Joreth Limitedas proprietor of L.R. NO. 13330/16 and/or any other persons deriving title from Joreth Limitedbased on the land previously known as Plot No. 13330/16 be cancelled forthwith.
 - c) An Order be and is hereby issued directing the Chief Registrar of Titles to rectify the register to enter the name of Edward Mbogois registered proprietor of the said property L.R. No. 13330/16 in place of Joreth Limited or anyone deriving title from it.
 - d) The costs of this suit shall be in favour of the Plaintiff.

It is so ordered.

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

M.D. MWANGI

JUDGE

In the Virtual presence of:-

Mr. Kinga'ra for the Plaintiff.

Mr. Wagura h/b for Mrs. Koech for the Defendant.



M.D. MWANGI
JUDGE

