



Mithamo v Kimani (Civil Case 27 of 2019) [2022] KEELC 3043 (KLR) (10 June 2022) (Judgment)

Neutral citation: [2022] KEELC 3043 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
CIVIL CASE 27 OF 2019
EC CHERONO, J
JUNE 10, 2022
IN THE MATTER OF L.R NO. MUTIRA/KIRIMUNGE/1981
AND
IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT
CAP 22 OF THE LAWS OF KENYA
AND
ORDER 37 RULE 7 AND 14 OF THE CIVIL PROCEDURE RULES
BETWEEN
DANSON WANJOHI MITHAMO PLAINTIFF
AND
PETER KAMAU KIMANI DEFENDANT

JUDGMENT

1. The plaintiff instituted this suit by way of originating summons seeking determination of the following questions and/or prayers: -
 - a. That the plaintiffs be declared to have become entitled to land parcel number Mutira/Kirimunge/1981 (which is formerly part of title number Mutira/Kirimunge/295) registered under the provisions of the Registered *Land Act*, cap 300, Laws of Kenya measuring 0.70 Ha. or thereabouts by virtue of adverse possession thereof by the plaintiffs who have been in open, exclusive and continuous and/or uninterrupted possession or occupation for a period of over 12 years.
 - b. That the title, rights and interest of the defendant over the aforesaid land parcel number Mutira/Kirimunge/1981 are extinguished so that the defendant's title should be recalled and cancelled.



- c. That the land registrar- Kirinyaga do register the plaintiffs as the proprietors of land parcel number Mutira/Kirimunge/1981, free from all encumbrances.
 - d. That the costs of this summons be borne by the Defendant.
2. The respondent opposed the suit by way of a replying affidavit sworn on September 18, 2019.
 3. The suit was heard by viva voce evidence on various dates 18/11/2021 and 9/2/2022. After the close of their respective cases, this court, by consent of the parties gave directions on the filing of submissions. By the time of writing this judgment, none of the parties had complied.

Plaintiff's Case:-

4. The plaintiff was referred to his supporting affidavit sworn on July 2, 2019 which he adopted as his testimony. He also produced the documents annexed thereto as evidence.
5. The plaintiff's case is that he entered the suit land in 1973 whereby he constructed a temporary house where lived.
6. He testified that he later got married in 1983 and continued living on the suit land with his new family and in 1992, he constructed a permanent house using bricks where they are living to-date.
7. He stated that despite being in possession and occupation of the suit land continuously for more than 12 years, the defendant has never filed any suit to remove or interrupt his occupation from the suit land and has been cultivating various cash and food crops thereon openly with the knowledge of the Defendant.

Defendant's Case:-

8. The defendant on the other hand testified that the Plaintiff is the father to one Anthony Muthii Wanjohi who sold him the suit land after which he was issued with the title deed.
9. He testified that when he purchased the land, there was no one else living on the land apart from the Vendor and his wife.
10. He stated that after purchasing the suit land, he took possession of the same except a house with a small compound which was planted with grafted avocado trees.
11. He stated that upon enquiring why he had not demolished the house, the vendor told him that his mother was supposed to remove it which he understood to mean that the house belonging to his mother.
12. He stated that he went to court vide CMCC NO. 79/2017 seeking for the removal of the structures and was issued with eviction orders.
13. He stated that he has been the one in possession of the suit land from the time he bought in 2016 until the time he was issued with eviction orders in 2019. He denied that the plaintiff has been in possession and occupation of the suit land.
14. In conclusion, the defendant prayed that the plaintiff's suit be dismissed with costs.
15. DW2 was Mithamo Muchiri who is the father to the plaintiff and the initial owner of the suit land parcel No. Mutira/kirimunge/295.
 - a. He testified that in 2013 or thereabouts, he subdivided his land parcel NO. Mutira/kirimunge 295 into two portions to wit, L.R No. Mutira/kirimunge/1980 and



1981 respectively. He said that on 1st July 2015, he transferred the suit land parcel No. Mutira/kirimunge/1981 to his grandson, Anthony Muthii Wanjohii as a gift which he learnt later that he sold to one Peter Kamau Kimani, the defendant herein. He said that he had earlier given the suit land to the plaintiff but he refused saying that he wanted the whole land.

16. He stated that thereafter, he gave the land to his grandson, one Anthony Muthii Wanjohi who is the plaintiff's son and who thereafter sold the same to the defendant herein.
17. He testified that he has another land which he bought in Mwea and which he wishes to share among all his children.
18. He also stated that the plaintiff has not constructed a permanent house or built any structure on the suit land and that he does not cultivate thereon. He further said that the person utilizing the suit land is the defendant and his wife.
19. DW3 was Anthony Muthii Wanjohi who testified that the Plaintiff is his father and that he is the one who sold the suit land to Peter Kamau Kimani, the Defendant herein in the year 2016.
20. He stated that upon selling the land, the defendant took possession and started utilizing the same until 2019. He said that he was given six months to vacate together with his father the suit land and after the lapse of the said notice, he left but his father did not vacate but remained in the land.
21. He testified that he later heard that his father destroyed the avocado planted by the defendant on the suit land and was charged in court.
22. He stated that when he transferred the suit land to the defendant, his father, the plaintiff herein was living and cultivating the same.

Analysis:-

23. I have considered the originating summons, replying affidavit, exhibits, testimony by the parties and the witnesses as well as the applicable law. Flowing from the pleadings, proceedings, documentary evidence and submission of the parties, I have deduced the following as the probable issues for determination:-
 - a) Whether the plaintiff has established the principles for acquisition of the suit land parcel No. Mutira/kirimunge/295, now subdivided into resultant portion No. Mutira/kirimunge/1981 by adverse possession?
 - b) If the answer to paragraph (a) above is in the negative, whether the plaintiff from the pleadings, proceedings, documentary evidence and the submissions can be discerned to have become entitled to the suit land parcel No. Mutira/kirimunge/295, now subdivided into resultant portion No. Mutira/kirimunge/1981 by any law other than by way of adverse possession?
 - c) Who should bear the costs of this suit?

a. Whether the plaintiff has established the Requirements in law to be declared to have acquired by Adverse possession the suit land parcel No. Mutira/kirimunge/295, now subdivided as resultant portion No. Mutira/kirimunge/1981?

24. Adverse possession or homesteading is a doctrine founded in law that allows a person who has unlawfully occupied another person's land for a continuous period of at least twelve years to legally apply for the rights over the property.



25. In the case of *Kasuve Vs Mwaani Investments Limited & 4 others* 1 KLR 184, the Court of Appeal held that: -

“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”.

26. From the above decision and numerous other decisions by the superior courts, it is clear that, for a party seeking to be declared as having acquired another person’s land by adverse possession, she must prove that she has been in open, continuous non-permissive and exclusive possession of the land in question for a at least twelve years. Exclusive possession was defined in the case of *Gabriel Mbui v Mukindia Maranya* [1993] e KLR where the Honourable Court held that: -

“Exclusive possession means that the exercise of dominion over the land must not be shared with the disseised owner, the land being in actual possession with intent to hold solely for the possessor to the exclusion of others.”

27. The plaintiff in his testimony stated that he took possession and occupation of the suit land in the year 1973 whereby he constructed a temporary house in which he lived until he got married in 1983. He further stated that he continued living with his family until 1992 when he constructed a permanent house using bricks and continued living together with his family there to-date.

28. During cross examination, DW1 admitted that before purchasing the suit land, he went to the ground but did not find out the person who owned the houses on the suit property, but only assumed that the seller would demolish the same within six months.

29. From the photographic evidence tendered by the plaintiff, it is clear that the Plaintiff has been in exclusive possession and control of the suit land and demonstrated his *animus possidendi* in developing the same by building of a permanent house and cultivating cash and food crops thereon. He stated that he has been doing the same since 1973 to date openly, continuously and without interruption by anyone. The plaintiff in his evidence further stated that when the original owner Mithamo Muciri subdivided the original land title No. Mutira/kirimunge/295 in the year 2013 and thereafter transferred the resultant parcel No. Mutira/kirimunge/1981 to Anthony Muthii Wanjohi on 1/7/2015 and subsequently to the defendant on 20/12/2016, he was not involved and therefore, the purported sale and transfers are a nullity and of no legal effect as title to the suit land was already extinguished by operation of the law.

30. The statutory period for adverse possession to crystallize in Kenya is 12 years from the time the claimant takes possession of the disputed property.

31. The plaintiff in his evidence on oath stated that he took possession and occupation of the suit property in 1973 and has been living thereon openly and continuously without interruption by the defendant to-date. From the evidence adduced, it emerged that the plaintiff is the Father to Anthony Muthii Wanjohi (DW3) who sold the suit land to Peter Kamau Kimani, the defendant herein. It also transpired that the plaintiff’s father is Mithamo Muchiri (DW2) who is the original registered owner of the suit land L.R No Mutira/kirimunge/295. From my evaluation of the evidence, I take judicial notice that the said Mithamo Muchiri was registered as proprietor of the suit land during the land Adjudication and demarcation period in 1959. It is clear from the evidence that, by the time the proprietor subdivided and transferred the resultant parcel No. Mutira/kirimunge/1981 to his grandson Anthony Muthii Wanjohi and subsequently to the defendant herein, the plaintiff was in possession and occupation.



That was confirmed by the plaintiff's father Mithamo Muchiri during cross examination when he said that he was not living on the land and that it was the Plaintiff and his wife who were living, cultivating and utilizing the land.

32. That being the case, it is this court's view that the plaintiff cannot therefore succeed on a claim for adverse possession since his possession and/occupation as a member of the family, clan or group could only have been express or implied consent. This is so because under African customary law, when a boy become an adult, he is allowed to move out from his parent's house and construct his own house within the family/clan/ancestral land. The consent by the father may not necessarily be express but implied. That is the scenario obtained in the circumstances of this case.
33. In the case of *Gabriel Mbui v Mukindia Maranya* (1993) e KLR, Kuloba J (as he then was) at para.3 held as follows-;

“The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied. It has been held many times that acts done under licence or permitted by, or with love of the owner do not amount to adverse possession and don't give the licensee or permitted entrant any title under the limitation statute.”

34. I agree entirely with the observation by the learned judge in the above decision. The plaintiff cannot, in my respective view, claim entitlement by adverse possession as his possession and occupation of the suit land is an act of love (implied) by a father/parent which is not adverse and does not therefore give the plaintiff any title under the statute of limitation.

b. If the answer to paragraph (a) above is in the negative, whether the plaintiff from the pleadings, proceedings, documentary evidence and the submissions can be discerned to have become entitled to the suit land parcel No. Mutira/kirimunge/295, now subdivided into resultant portion No. Mutira/kirimunge/1981?

35. Having found that the plaintiff cannot succeed in a claim for adverse possession in the suit land which is a clan land, I also find that the defendant on his part failed to conduct due diligence to establish the person in actual possession and occupation of the suit property before purchasing the same. From the evidence on record, I take judicial notice that the suit property is a family/clan/ group land which is passed from generation to generation under kikuyu Customary law. That being the case, Anthony Muthii Wanjohi's right of inheritance is inter-generational which has not crystallized compared with the plaintiff's intra-generational rights which have crystallized. It is therefore my view that the disposal of the suit land by Anthony Muthii Wanjohi which was in possession, occupation, and control of the plaintiff without his consent was illegal and unprocedural. It was also reckless for the defendant to buy from the said Anthony Muthii Wanjohi without establishing the identity, interests, and rights, if any, of the plaintiff who was in possession, occupation and control of the suit property.
36. The Court of Appeal in the case of *Titus Kigoro Munyi v Peter Mburu Kimani* (2015) e KLR, cited with approval the decision in *Maweu v Liu Ranching & Farming Society Ltd*, (1985) e KLR 430 at 434 where it was held:-
- “Any man who buys land without knowing who is in possession of it risks his title, just as he does, if he fails to inspect his land for twelve years after he had acquired it”.
37. The defendant's conduct upon knowing that the plaintiff was in possession and occupation of the suit land and his assumption that the seller, Anthony Muthii Wanjohi was going to remove and demolish



the structures later was risking his title. Section 26 (1) of the land Registration Act No 3 of 2012 provides as follows-;

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

- (a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

38. By purchasing a property from a person who was not in possession, occupation, and control and whose right of inheritance had not crystallized was illegal and unprocedural. The defendant’s title is therefore not protected and the same is out for cancellation.

(c) Who will bear the costs of the suit?

It is trite that costs follow the cause unless the court, for good reason directs otherwise. I have no good reason to depart from ordinary. I therefore order costs to be borne by the defendant.

CONCLUSION:-

In view of my analysis and evaluation hereinabove, I find that the plaintiff has proved his claim on the required standard and enter judgment as follows-;

- (1) A declaration that Anthony Muthii Wanjohi held land parcel No. Mutira/kirimunge/1981 in trust for himself and the Plaintiff.
- (2) The trust referred in paragraph (1) above is determined in favour of the Plaintiff for the entire land parcel No. Mutira/kirimunge/295, now subdivided into resultant portion No. Mutira/kirimunge/1981.
- (3) The registration of the Defendant as proprietor of the suit land parcel No. Mutira/kirimunge/1981 be and is hereby cancelled.
- (4) The Land Registrar, Kirinyaga County is hereby directed to rectify the register to reflect the plaintiff as the owner of the suit land parcel No. Mutira/kirimunge/1981.
- (5) The Defendant to surrender the original title deed and to execute all statutory documents of transfer to reflect the Plaintiff as the owner, failing which the Land Registrar is directed to dispense with the production of the original certificate and any other statutory requirements and proceed to register the plaintiff as the owner of the suit land parcel No. Mutira/kirimunge/1081.
- (6) The costs of this suit shall be borne by the Defendant.

READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 10TH JUNE, 2022.

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HON. E.C. CHERONE



ELC JUDGE

In the presence of-;

1. M/S Makazi H/B for C.S Macharia
2. M/S Wambui H/B for Ngigi Gichoya
3. Kabuta – Court Assistant.

