



**Gitau v Macharia & another (Environment & Land Case
81 of 2017) [2022] KEELC 3691 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3691 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 81 OF 2017**

**YM ANGIMA, J
JULY 28, 2022**

BETWEEN

JESSE NJOROGE GITAU PLAINTIFF

AND

KIBUTHU MACHARIA 1ST DEFENDANT

PETER KABUTHI TURUTHI 2ND DEFENDANT

JUDGMENT

The Plaintiff's Claim

1. By an originating summons dated March 9, 2009 based upon Section 38 of the *Limitation of Actions Act* (Cap.22), Section 3A of the *Civil Procedure Act* (Cap.21), Order XXXVI rules 1, 2 & 3 of the *Civil Procedure Rules* (1948) Sections 17, 30 (f) and 142 of the *Registered Land Act* (Cap.300) and all other enabling provisions of the law, the Plaintiff sought the following reliefs against the Defendants:
 - a. A declaration under Section 38 of the *Limitation of Actions Act* (Cap.22) Laws of Kenya do issue that the Plaintiff has acquired Nyandarua/Kipipiri 486 formerly Nyandarua/Kipipiri 2123 hereinafter referred to as the suit property by adverse possession and the Title of Nyandaura/Kipipiri 486 be transferred in the name of the Plaintiff.
 - b. A permanent injunction restraining the Defendants, their agents, servants and or employees from alienating, selling, transferring, disposing or in any other manner interfering with the suit property.
 - c. Costs of this suit be provided for.
2. The said originating summons was based upon the grounds set out on the face thereof and the contents of the supporting affidavit sworn by the Plaintiff on March 11, 2009 and the exhibits thereto. The Plaintiff contended that he was the legitimate owner of the suit property by virtue of having been



allocated the same by Settlement Fund Trustees (SFT) in 1968 but the same had been wrongly and fraudulently acquired by the 2nd Defendant who was the registered proprietor thereof. The Plaintiff further contended that he had been in open, exclusive and continuous possession of the suit property for over 40 years without interruption from the Defendants hence had acquired it through the doctrine of adverse possession.

B.The 1st Defendant's Response

3. The 1st Defendant filed a replying affidavit sworn on April 22, 2009 in opposition to the originating summons. He stated that the suit was *res judicata* and an abuse of the court process because the issues directly and substantially in issue in the instant suit were also directly and substantially in issue in Nyahururu PMCC No. 144 of 2008 – Peter Kabuthu Turuthi v Jesse Njoroge Gitau and Others which was still pending determination before the magistrates' court. The 1st Defendant denied that the Plaintiff had acquired the suit property through adverse possession and prayed for dismissal of the suit with costs.

C. The 2nd Defendant's Response

4. The 2nd Defendant filed a replying affidavit sworn on April 22, 2009 in opposition to the originating summons. The 2nd Defendant contended that the instant suit was misguided and an abuse of the court process in view of the pendency of Nyahururu PMCC No. 144 of 2008 (the first suit). He denied that the Plaintiff had been in active occupation of the suit property or in occupation for at least the minimum statutory period of 12 years. The 2nd Defendant further contended that since he was registered as proprietor of the suit property only in 2007, the Plaintiff was not entitled to claim adverse possession thereof under the *Limitation of Actions Act* (Cap.22). He consequently prayed for dismissal of the suit with costs.

D. The Plaintiff's Further Affidavit

5. The Plaintiff filed a further affidavit sworn on November 5, 2015 in which he exhibited a copy of the land register for the suit property. He pointed out that in 2012 during the pendency of the suit, the 2nd Defendant had charged the suit property to Equity Bank to secure the payment of a loan of Kshs.400,000/=. The Plaintiff further contended that the suit property was fully fenced, developed and occupied at the material time hence if the bank had done due diligence it would not have given the 2nd Defendant the loan facility.

E. Summary of Evidence At The Trial

(a) The Plaintiff's Evidence

6. The Plaintiff's evidence at the trial essentially mirrored the contents of his supporting affidavit sworn on 11.03.2009, his witness statement dated June 25, 2012 and further affidavit sworn on November 5, 2005. He testified that he was allocated the suit property by SFT in 1968 and that he had occupied and developed it since then. It was his testimony that he had fenced the land, built houses, and planted trees and crops thereon. It was his further evidence that he had peacefully occupied the suit property without any issues until 2001 when the 2nd Defendant sent him a demand letter claiming ownership of the suit property. It was his further testimony that the Defendants had never occupied or utilized the suit land at any given time.



(b) The 1st Defendant's Evidence

7. The 1st Defendant adopted the contents of his replying affidavit sworn on April 22, 2009 and the witness statement dated October 27, 2021 as his evidence in-chief. He testified that although he was the original allottee of the suit property he had never occupied or utilized it between 1962 and 2007 when he transferred it to the 2nd Defendant. He further stated that prior to the transfer of 2007, there was nobody occupying or utilizing the suit property.

(c) The 2nd Defendant's Evidence

8. The 2nd Defendant adopted the contents of his replying affidavit sworn on April 22, 2009 and witness statement dated July 15, 2021 as his evidence in-chief. He testified that he acquired the suit property from the 1st Defendant in 2007 through a transfer. He disputed that the Plaintiff was in occupation of the suit property and stated that he was residing on his own parcel No. 487. He stated that the suit land was not cultivated and that it had no crops or houses thereon. It was his case that the Plaintiff was only harvesting trees which grew naturally on the suit land.

F. Directions on Submissions

9. Upon conclusion of the trial, the parties were given timelines within which to file and exchange their respective submissions. The record shows that the Plaintiff filed his submissions on April 22, 2022 whereas the Defendants filed theirs on May 31, 2022.

G. The Issues For Determination

10. The court has considered the Plaintiff's originating summons, the Defendants' replying affidavit, the Plaintiff's further affidavit as well as the documents on record. The court is of the opinion that the following issues arise for determination:
- a. Whether or not the Plaintiff has proved his claim for adverse possession.
 - b. Whether the Plaintiff is entitled to the reliefs sought in the suit.
 - c. Who shall bear costs of the suit.

H. Analysis And Determination

a. Whether or not the Plaintiff has proved his claim for adverse possession

11. The elements of adverse possession were summarized in the case of *Kasuve v Mwaani Investments Ltd & 4 Others* [2004] 1KLR 184 as follows:

“...and 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 and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, *Wanja v Sakwa* No.2 [1984] KLR 284. A title by adverse possession can be acquired under the *Limitation of Actions Act* for part of the land...”

12. The court has considered the evidence and submissions on record on the issue of adverse possession. The court is satisfied that the Plaintiff has been in occupation of the suit property for a long time contrary to the Defendants' contention. The court believes the evidence of the Plaintiff and his



neighbour (PW2) that he has been occupying and utilizing the suit property for periods exceeding 12 years since its first registration. Although the evidence on record indicates that the Plaintiff's dwelling house stands on parcel 487 there is evidence on record to demonstrate that it is the Plaintiff's son who has a house on the suit property.

13. The court has taken note of the contents of the 2nd Defendant's demand letter dated March 20, 2008 to the Plaintiff. The said letter stated, *inter alia*, that:

“I request you to stop any other activity on the land with immediate effect. I also request you, your family and or your servants to vacate from the said land and not to interfere anymore. Action will be taken in case of default.”

14. The court has further noted that in their letter dated April 10, 2008 the 2nd Defendant's advocates addressed the Plaintiff as follows:

“That in the circumstances we have been instructed to demand, which we hereby do, your prompt and immediate preparation to give vacant possession to the said premises.

Take Notice that unless you deliver vacant possession of the said premises within the next 90 days from the date hereof our mandatory instructions are to institute appropriate legal proceedings against you for your forcible eviction therefrom at your own risk as to costs incidental thereto and other consequences ensuing therefrom without any other or further reference to you whatsoever.”

15. The contents of the said letters from the 2nd Defendant and his advocates requiring the Plaintiff to vacate from the suit property and threatening to take legal action in the event of his failure to yield possession constitute admission that the Plaintiff was in possession of the suit property. There is adequate evidence on record from both the 1st and 2nd Defendants that they had never occupied, utilized or developed the suit property. All the material evidence points only to the Plaintiff's possession and occupation of the suit property.
16. The court is satisfied that the Plaintiff's occupation of the suit property was not with the consent or permission of the owner. It was without the consent of the 1st Defendant who was the previous proprietor and 2nd Defendant who is the current registered proprietor. The court is further satisfied that the Plaintiff's possession was without force, without secrecy, and without persuasion. It was open, notorious and continuous. The court is thus satisfied that the Plaintiff has demonstrated his claim for adverse possession.
17. The court is not persuaded that the Plaintiff's possession was interrupted by the filing of the first suit before the Magistrate's Court in 2008. The court is of the opinion that by the time the 2nd Defendant filed the said suit, the Plaintiff's claim for adverse possession had already arisen or crystallized. The computation of time for purposes of the limitation of actions must commence in 1975 when the suit property was first registered and not 2007 when it was transferred to the 2nd Defendant. It has been held that change of ownership does not stop time from running since adverse possession is a prescriptive right which runs with the land. See *Githu v Ndeeti* [1984] KLR 776.
18. The court is not persuaded that the instant claim for adverse possession is *res judicata*, misguided or an abuse of the court process on account of the pendency of the first suit before the Magistrate's Court. The Plaintiff's claim for adverse possession is quite distinct from the 2nd Defendant's claim in the first suit. The first suit could not legally preclude the Plaintiff from litigating his claim for adverse possession which could only be entertained by this court.



b. Whether the Plaintiff is entitled to the reliefs sought in the suit

19. The court has already found and held that the Plaintiff has demonstrated his claim for adverse possession of the suit property. This court has also found that this possession of the suit property has never been interrupted since the first suit was filed after his right had already crystallized. The court has further found that Plaintiff was entitled to ventilate his claim for adverse possession despite the pendency of the first suit before the Magistrate's Court. It would, therefore, follow that the Plaintiff is entitled to some of the reliefs sought in the suit but not all of them.
20. Whereas the court is inclined to grant the Plaintiff a declaration that he is entitled to adverse possession of the suit property and any consequential orders to facilitate his registration as proprietor, the court is not inclined to grant him the order of permanent injunction sought. There is no legal basis for granting the injunction since there is no material on record to demonstrate that the Defendants intend to alienate, transfer, dispose of the suit property, or interfere with it upon implementation of the decree. The court is further of the opinion that the claim for adverse possession can only be directed at the 2nd Defendant who is the current proprietor of the suit property. Accordingly, the prayer for a permanent injunction is not warranted in the circumstances.

c. Who shall bear costs of the suit

21. 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 litigant should not be awarded costs of the suit. Accordingly, the Plaintiff shall be awarded costs of the suit against the 2nd Defendant. However, the 1st Defendant shall not be awarded costs in view of the mischievous role he played in transferring the suit property to the 2nd Defendant whilst it was in the possession of the Plaintiff.

I. Conclusion And Disposal

22. The upshot of the foregoing is that the court is satisfied that the Plaintiff has proved his claim for adverse possession to the required standard. Accordingly, the court makes the following orders for disposal of the suit:
 - a. A declaration be and is hereby made that the Plaintiff has become entitled to be registered as the proprietor of Title No. Nyandarua/Kipipiri/486 on account of adverse possession.
 - b. The 2nd Defendant shall sign all documents and instruments to facilitate the transfer of the suit property to the Plaintiff within 30 days from the date hereof in default of which the Deputy Registrar of the Court shall do so on his behalf.
 - c. The claim against the 1st Defendant is hereby dismissed with no order as to costs.
 - d. The Plaintiff is hereby awarded costs of the suit to be borne by the 2nd Defendant only.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 28TH DAY OF JULY, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Ms. Rose Ogano holding brief for Mr. Mosongo for the Plaintiff



Mr. Kihoro for the Defendants

C/A - Carol

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Y. M. ANGIMA

JUDGE

