



**Kamutu v Ngunjiri & 3 others (Environment and Land Appeal  
89 of 2017) [2022] KEELC 3927 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3927 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT AND LAND APPEAL 89 OF 2017**

**YM ANGIMA, J**

**JULY 28, 2022**

**IN THE MATTER OF L.R. NO. NYANDARUA/ABERDARE FOREST NORTH BLOCK 1/822  
IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA**

**BETWEEN**

**JOHN KIMINI KAMUTU ..... PLAINTIFF**

**AND**

**JOSEPH MACHARIA NGUNJIRI ..... 1<sup>ST</sup> DEFENDANT**

**NATHAN NGARUIYA GITONGA ..... 2<sup>ND</sup> DEFENDANT**

**FRANCIS WACHIRA MARARO ..... 3<sup>RD</sup> DEFENDANT**

**NDIANGUI NGINGA K ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**A. The Plaintiff's Claim**

1. By an originating summons dated May 9, 2013 and amended on July 24, 2014 brought under order XXXVII rule 7 of the *Civil Procedure Rules* and section 38 of the *Limitation of Actions Act* (cap 22), the plaintiff sought determination of the following questions:
  - a. Whether the plaintiff has acquired title by adverse possession over LR No Nyandarua/Aberdare Forest North Block 1/2130, 2131, 2132, 2133, 2134 and 2135 which are a subdivision of LR Nyandarua/Aberdare Forest North Block 1/822 measuring approximately 2.59 Ha.
  - b. Whether the title deeds for LR No Nyandarua/Aberdare Forest North Block 1/2130, 2131, 2132, 2133, 2134 and 2135 should forthwith be cancelled and revert to LR Nyandarua/Aberdare Forest North Block 1/822.



- c. whether LR Nyandarua/Aberdare Forest North Block 1/822 should forthwith be registered in the names of the plaintiff and the 1<sup>st</sup> defendant be ordered to sign all the necessary transfer instruments and in default the Executive Officer of the court be authorized to sign the same.
  - d. Who should bear the costs of the suit.
2. The said summons was supported by an affidavit sworn by the plaintiff on June 24, 2014 and the exhibits thereto. The plaintiff contended that he was a member of Gatararwa Farmers Co Ltd which had allocated him parcel 822 in 1977. He further stated that he took possession of the said property in 1978 whereby he constructed a dwelling house and planted trees. The plaintiff contended that he had been in open, exclusive and continuous possession of the property since 1978 but later on came to learn that the 1<sup>st</sup> defendant had obtained title to a portion of the suit property in 1987. It was further contended that the 1<sup>st</sup> defendant then proceeded to sub-divide the land and transfer portions thereof to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. The gist of the plaintiff's claim was that he had acquired adverse possession of the properties registered in the names of the defendants hence the suit.

### **B. The Defendants' Response**

3. The 1<sup>st</sup> defendant swore a replying affidavit dated April 18, 2014 on his own behalf and on behalf of his co-defendants. The defendants disputed the plaintiff's claim for adverse possession in toto. The 1<sup>st</sup> defendant denied that the plaintiff had been in continuous or uninterrupted occupation of the suit properties. He contended that the plaintiff only occupied a small portion of the land which had temporary structures which he called shanties. The defendants further contended that the suit land had been the subject of Ndaragwa Land Dispute Tribunal Case No NDA/3/2008 in which the plaintiff had acknowledged that the 1<sup>st</sup> defendant was the rightful owner of the land.
4. The defendants contended that the plaintiff had his own land nearby which he had sold and opted to squat on the suit land which did not belong to him. It was contended that he had even sold a portion of his land to the 2<sup>nd</sup> defendant in the suit. The 1<sup>st</sup> defendant further stated that he had since sub-divided the suit land and sold and transferred it to the 2<sup>nd</sup> – 4<sup>th</sup> defendants who were now the legitimate owners of their respective portions.

### **C. The Plaintiff's and Defendants' Further Affidavits**

5. The plaintiff filed a supplementary affidavit sworn on April 27, 2015 in response to the defendants' replying affidavit. The plaintiff contended that he was not aware of the tribunal's proceedings at Ndaragwa and that he did not participate in the proceedings. It was contended that the 1<sup>st</sup> defendant had never settled on the suit land and that the 2<sup>nd</sup> – 4<sup>th</sup> defendants were aware of this fact but they proceeded to purchase the land from him whilst there was a subsisting caution against it.
6. The defendants filed a further affidavit sworn by the 1<sup>st</sup> defendant on June 11, 2015 in response to the plaintiff's supplementary affidavit. The defendants disputed the contents of the plaintiff's supplementary affidavit. The 1<sup>st</sup> defendant insisted that the plaintiff participated in the tribunal's proceedings and stated that the plaintiff was a liar whose evidence could not be trusted. The court was consequently urged to dismiss the suit with costs.



## **D. Summary of Evidence at the Trial**

### **(a) The Plaintiff's Evidence**

7. At the trial hereof, the plaintiff testified on his own behalf as the sole witness. He adopted the contents of his supporting affidavit and supplementary affidavit as his evidence in-chief. He also produced the documents in his list of documents and further list of documents as exhibits. The plaintiff maintained that he had been in open, exclusive and uninterrupted possession of the suit land since 1978. During cross-examination by the defendant's advocate, he stated that he had a house on the suit land and he had buried 3 of his relatives on the suit land over the years. It was the plaintiff's case that the defendants had never occupied or utilized the suit property.

### **(b) The Defendants' Evidence**

8. The 1<sup>st</sup> defendant testified as the sole witness on his own behalf and on behalf of the rest of the defendants. He adopted the contents of his replying affidavit and further affidavit as his evidence in-chief. He produced the annexures to his replying affidavit as exhibits in the suit. The gist of his evidence was that he was the original owner of parcel No 822 and that the plaintiff had no right to claim any portion thereof.
9. During cross-examination, he stated that he entered or utilized the suit land about 1978 – 1979 and that he only discovered the plaintiff's occupation in 2008. He could not, however, tell the year when the plaintiff took possession of the land. He conceded to have sold portions of the suit land to the 2<sup>nd</sup> – 4<sup>th</sup> defendants who were subsequently registered as proprietors.

## **E. The Issues for Determination**

10. The court has considered the pleadings, evidence and documents on record. The court is of the opinion that the following issues arise for determination herein:
  - (a) Whether the plaintiff has proved his claim for adverse possession of the suit land.
  - (b) Whether the plaintiff is entitled to the reliefs sought in the suit.

## **F. Analysis and Determination**

### **(a) Whether The Plaintiff Has Proved His Claim For Adverse Possession Of The Suit Land**

11. The court has considered the evidence and submissions on record on this issue. The court is satisfied from the material on record that the plaintiff and his family have been in occupation of the suit land for a period exceeding 12 years prior to institution of the suit. There is evidence on record to demonstrate that the plaintiff has a dwelling house on the suit property and that he buried some of his deceased relatives thereon. The copies of the death certificates show that one of the deceased persons died in 2002 whereas the other one died in 2007.
12. The 1<sup>st</sup> defendant conceded during cross examination that he could not tell when the plaintiff entered the suit land but he only discovered his occupation in 2008. The court has noted from the proceedings before the tribunal that the 1<sup>st</sup> defendant had asked the tribunal to order removal of the remains of the plaintiff's relatives from the suit land. The 1<sup>st</sup> defendant was therefore not being truthful when he claimed at the hearing hereof that he was unaware of the existence of any graves on the suit land.



13. The court is further of the opinion that the plaintiff has been in open, exclusive and uninterrupted possession of the suit land since 1978 and that he has been utilizing and developing the same as if it was his own. The court is satisfied that such occupation was without the consent of the registered owners hence it was adverse in the legal sense. The 1<sup>st</sup> defendant has never occupied, utilized or developed the suit land as the material on record shows that he was busy with work related business since the 1990's. Accordingly, the court finds that the Plaintiff has proved his claim for adverse possession of the suit land.

**(b) Whether The Plaintiff Is Entitled To The Reliefs Sought In The Suit**

14. The court has considered the evidence and submissions on this issue. It is evident that the parcel 822 was sub-divided in 2014 or thereabouts to give rise to parcel Nos 2130 – 2135 some of which were transferred to the 2<sup>nd</sup> – 4<sup>th</sup> defendants. The court agrees with the plaintiff's submissions that a change of ownership of land does not defeat a claim for adverse possession which has crystallized. This is because adverse possession is in the nature of a prescriptive right which runs with the land irrespective of any change of ownership. See *Githu v Ndete* [1984] KLR 776. The court is thus of the opinion that the plaintiff is entitled to the reliefs sought in the amended originating summons. The 2<sup>nd</sup> – 4<sup>th</sup> defendants can only have themselves to blame for purchasing portions of the suit land in 2014 without inspecting it to ascertain who was in occupation thereof.

15. The court is, however, not persuaded that the plaintiff is entitled to an order for cancellation of the titles for parcel Nos 2130 – 2135 and their amalgamation into one parcel. The court is of the opinion that the plaintiff is only entitled to the existing parcels but he shall be at liberty to apply for their consolidation or amalgamation into a single parcel on his own. Consolidation of contiguous parcels of land is a matter of convenience hence it cannot be the legitimate subject of the claim for adverse possession.

**G. Conclusion and Disposal**

16. 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. The court is further satisfied that the plaintiff is entitled to the reliefs sought. Accordingly, the court makes the following orders for disposal of the suit:

- a. A declaration be and is hereby made that the plaintiff has acquired title Nos Nyandarua/ Aberdare Forest North Block 1/2130, 2131, 2132, 2133, 2134 and 2135 which are subdivisions of title No Nyandarua/Aberdare Forest North Block 1/822 on account of adverse possession.
- b. The defendants shall sign all the necessary forms, documents and instruments to facilitate the transfer thereof to the plaintiff within 21 days from the date hereof in default of which the Deputy Registrar of the court shall do so on their behalf.
- c. There shall be no order as to costs.

It is so decided.

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

**In the presence of:**

Ms Wanjiru Muriithi for the plaintiff.

Mr Gakuhi Chege holding brief for Ms Ndegwa for the defendants.



C/A - Carol

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**YM ANGIMA**

**JUDGE**

