



**Munga & 2 others v Mugo (sued as the legal representative of the estate of Salome Ngonyo Mugo (Deceased) (Sued as the legal representative of the Estate of Salome Ngonyo Mugo (Deceased)) (Environment & Land Case 442 of 2017) [2022] KEELC 3474 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3474 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT & LAND CASE 442 OF 2017**

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

**BETWEEN**

**SAMUEL MACHARIA MUNGA ..... 1<sup>ST</sup> PLAINTIFF  
PETER WAKIAMA KARIUKI ..... 2<sup>ND</sup> PLAINTIFF  
EPHRAIM WANDERI MURAGE ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**JAMES NGUMO MUGO (SUED AS THE LEGAL REPRESENTATIVE OF THE  
ESTATE OF SALOME NGONYO MUGO (DECEASED)) ..... DEFENDANT  
SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SALOME  
NGONYO MUGO (DECEASED)**

**JUDGMENT**

**A. The plaintiffs' claim**

1. By an originating summons dated 06.06.2017 brought under Sections 7 & 38 of the *Limitation of Actions Act* (Cap.22), Order 37 rule 7 (1) & (2) of the *Civil Procedure Rules* and all other enabling provisions of the law, the Plaintiffs sought the following reliefs:
  - a. A declaration that the 1<sup>st</sup> to 3<sup>rd</sup> Plaintiffs are entitled to be registered as proprietors of 4 acres, 4 acres and 3 acres respectively out of Title No. Nyandarua/Simbara/235 by virtue of the doctrine of adverse possession.
  - b. An order for sub-division and transfer of the Plaintiffs' entitlements out of Title No. Nyandarua/Simbara/235 and in default the Deputy Registrar of this honorable court be authorized to execute all the necessary documents to facilitate the subdivision and transfer process.



- c. Costs of the suit plus interest thereon at courts rate.
2. The summons was based upon the grounds set out on the face thereof and the contents of the 3 supporting affidavits sworn by the Plaintiffs on 06.06.2017 and the respective exhibits thereto. The Plaintiffs contended that they had been in actual, open, exclusive and uninterrupted possession of 11 acres out of suit land and as a result they had acquired adverse possession thereof. They contended that they entered and occupied their respective portions of the suit property pursuant to agreements for sale but the transfer process was never completed even though they continued in possession.
3. According to the supporting affidavits the 1<sup>st</sup> Plaintiff was the son of the late Joel Munga Macharia who had bought 4 acres in 1986 from David Mugo who was a son of the registered owner, the late Salome Mugo. The 2<sup>nd</sup> Plaintiff's affidavit indicated that he had bought 4 acres out of the suit land in 1994 from James Mugo who was also a son of the registered owner, the late Salome. The 3<sup>rd</sup> Defendant on his part bought a portion of 3 acres in 1989 directly from Salome who was the registered owner. All the sale transactions appear to have taken place during the lifetime of Salome even though no transfers were effected to the Plaintiffs.

## **B. The defendant's response**

4. The Defendant filed a replying affidavit sworn on 11.07.2017 in opposition to the originating summons. He stated that the suit land was still registered in the name of his late mother Salome Mugo. He further stated that there was a pending Succession Cause for the estate of the deceased being Nyahururu SPM Succession Cause No.69 of 2013 in which the Plaintiffs were listed as creditors of the estate. It was contended that the Plaintiffs should direct their claim for the portions of land they bought to the respective vendors and not the estate of the deceased.
5. The Defendant further contended that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs were in possession with the consent of the vendors who sold the land to them and that the 3<sup>rd</sup> Plaintiff also took possession with the permission of Salome hence the issue of adverse possession could not arise. It was the Defendant's contention that the suit was frivolous, vexatious and an abuse of the court process and urged the court to dismiss the same with costs.

## **C. Summary of evidence at the trial**

### **a. The Plaintiffs' Evidence**

6. At the trial hereof, each of the 3 Plaintiffs testified on their own behalf. The 1<sup>st</sup> Plaintiff adopted his witness statement dated 31.05.2019 as his evidence in-chief. He also relied on the supporting affidavit sworn by the original 1<sup>st</sup> Plaintiff on 06.06.2017. The 2<sup>nd</sup> Plaintiff similarly adopted the contents of his witness statement dated 06.06.2017 and supporting affidavit as his evidence. The 3<sup>rd</sup> Plaintiff also adopted the contents of his witness statement dated 31.05.2019 and supporting affidavit as his evidence in-chief. They all sought adverse possession of their respective portions on account of open, exclusive and uninterrupted possession for periods exceeding 12 years.
7. It was the Plaintiff's evidence that the deceased and her family members were all along aware of their occupation of the suit land but they never raised any objection. They stated that the registered owner never commenced any proceedings for their eviction and that they had occupied and developed their respective portions of land for very many years.



## **b. The defendant's evidence**

8. The Defendant testified on his own behalf as the legal representative of the late Salome who was the registered proprietor of the suit land. He testified that the late Salome acquired title to the suit property in 1994. He conceded during cross-examination that all the 3 Plaintiffs had been in occupation of portions of the suit property at least since 1994. He further conceded that no proceedings for their eviction had been instituted since they took possession. He further stated that even though it was his wish that the Plaintiffs should obtain their land through succession proceedings, some of the beneficiaries had raised objection since they wanted the Plaintiffs to obtain their land from the respective vendors and not the estate of the late Salome.

## **D. The issues for determination**

9. The court has considered the pleadings, evidence and documents on record in this matter. The court is of the opinion that the following issues arise for determination herein:
  - a. Whether the Plaintiffs have demonstrated their respective claims for adverse possession.
  - b. Whether the Plaintiffs are entitled to the reliefs sought in the suit.
  - c. Who shall bear costs of the suit.

## **E. Analysis and determination**

### **a. Whether the Plaintiffs have demonstrated their respective claims for adverse possession**

10. The court has considered the material and evidence on record on this issue. The elements of adverse possession were summarized in the case of *Kasuve -vs- 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 vs 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...”

11. There is no doubt from the material on record that the Plaintiffs have been in occupation and possession of the respective portions of land they bought from the late Salome and her two of her sons for a considerable period of time. The operative date for purposes of the limitation of actions is 1994 when the late Salome was registered as proprietor. The Defendant himself conceded at the trial that he was aware that all the Plaintiffs had been in possession at least since 1994 and that no attempts had been made to evict them.
12. It is evident from the material on record that the two sons of the late Salome who purported to sell 8 acres of the suit land to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs did not have title to the land. Even the late Salome appears to have been registered as proprietor only in 1994 hence by the time she was selling 3 acres to the 3<sup>rd</sup> Plaintiff in 1989 she did not have a valid title thereto. The material on record further shows that Salome did not even obtain the consent of the Land Control Board for the sale transaction with the 3<sup>rd</sup> Plaintiff hence it became null and void upon expiry of 6 months from the date of the sale agreement. In the premises, the court is unable to agree with the Defendant's contention that the Plaintiffs' possession and occupation of the suit property was with the consent of the true owner.



13. The court is also unable to agree with the Defendant’s contention that the Plaintiffs ought to have pursued the persons who sold them portions of the suit property instead of the estate of the deceased. It must be remembered that this is a suit for adverse possession and not a suit for specific performance of the various sale agreements the Plaintiff signed. The court is of the opinion that in a suit for adverse possession, the claim can only be directed against the registered proprietor or his estate where the owner is deceased. Consequently, the Plaintiffs were entitled to proceed against the registered proprietor or his estate.
14. Although the Defendant contended that the Plaintiffs ought to have vindicated their rights before the succession court, the court is of a different opinion for at least two reasons. First, the succession court has no jurisdiction under the law to entertain and determine claims for adverse possession. Secondly, even if the Plaintiffs had the option of filing their claims either before this court or the succession court, they were entitled to make their election as they did by filing suit before this court. The High Court in the case of *In re-Estate of Kinogu Mukiria (deceased)* [2022] eKLR had occasion to deal with a similar situation whereby purchasers had raised an alternative claim for adverse possession in a succession cause. The court in holding that it had no jurisdiction to determine the claim stated as follows:

“Pursuant to Article 165(5) of *the Constitution*, this court lacks jurisdiction in matters to do with the use and occupation of, and title to, land. It is also apparent that when a dispute regarding ownership in respect of the property of a deceased person arises, then the court can set aside the share in dispute to await the outcome of the resolution of the dispute from the court with jurisdiction. As such, the dispute as to ownership of land can only be determined by the Environment and Land Court. Once the ownership of the suit property is ascertained by the Environment and Land Court, the probate court may proceed to distribute the said property to the rightful dependants. Furthermore, the probate court cannot deal with issues of adverse possession which the 2<sup>nd</sup> and 3<sup>rd</sup> protestors claim as an alternative remedy. For such a claim of adverse possession, the claim must be taken to the right forum being the Environment and Land Court. Notably, the 1<sup>st</sup> protestor, attached sale agreements and an agreement acknowledging balance of the purchase price as his evidence to show that he bought the land from the deceased. The applicant however disputes the sale stating that the protestors did not obtain the requisite land consent pursuant to *Land Control Act*. These issues cannot be resolved by this probate court.”
15. The court is satisfied from the material on record that the Plaintiffs’ possession of their portions of land has never been interrupted in the legal sense. It was held in the case of *Githu –vs- Ndeete* [1984] KLR 776 that interruption occurs only when the owner makes an effective entry into the land or when he takes legal proceedings for recovery thereof. The court does not consider the succession proceedings for the distribution of the estate of the deceased to be a suit for recovery of the portions of the suit land from the Plaintiffs. See *Stephen Mwangi Gatunge –vs- Edwin Onesmus Wanjau (sued in his capacity as the administrator of the estates of Kimingi Wariera (deceased) and Mwangi Kimingi (deceased))* [2022] eKLR.
16. The court is thus satisfied from the material on record that the Plaintiffs have proved their respective claims for adverse possession of the various portions of the suit land which they occupy. The court is further satisfied that the Plaintiffs have been in exclusive and uninterrupted possession thereof in a manner adverse to the title of the true owner. In the premises the first issue is answered in the affirmative.



## **b. Whether the Plaintiffs are entitled to the reliefs sought in the suit**

17. The court has considered the material and submissions on record on this issue. The court has already found that the Plaintiffs have proved their respective claims for adverse possession pleaded in the originating summons. It would therefore follow that they are entitled to the reliefs sought in the suit. It is interesting to note that during the trial the Defendant indicated that he had no objection to each of the Plaintiffs getting their respective portions of land but he wanted them to obtain that remedy only in succession proceedings!

## **c. Who shall bear costs of the suit.**

18. 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 Plaintiffs should not be awarded costs of the suit. Accordingly, the Plaintiffs shall be awarded costs of the suit.

## **F. Conclusion and disposal**

19. The upshot of the foregoing is that the court finds and holds that the Plaintiffs have proved their respective claims for adverse possession. The court also finds and holds that the Plaintiffs are entitled to the reliefs sought in the suit. Accordingly, the court makes the following orders for disposal of the suit:

- a. A declaration be and is hereby made that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs are entitled to be registered as proprietors of 4 acres, 4 acres and 3 acres respectively out of Title No. Nyandarua/Simbara/235 on account of adverse possession.
- b. That the Defendant shall cause sub-division and transfer of the Plaintiffs' entitlements out of Title No. Nyandarua/Simbara/235 within 30 days with effect from the date hereof in default of which the Deputy Registrar of the court is hereby authorized to execute all the necessary documents and instruments to facilitate the sub-division and transfer process.
- c. The Plaintiffs are hereby awarded costs of the suit.

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:

Mr. Gakuhi Chege for the Plaintiff

Mr. Muchiri wa Gathoni for the Defendants

C/A - Carol

**Y. M. ANGIMA**

**JUDGE**

