



M’Mwereria v Mbaabu & 3 others (Environment and Land Case Civil Suit 73 of 2019) [2022] KEELC 3930 (KLR) (27 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3930 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND CASE CIVIL SUIT 73 OF 2019**

**CK NZILI, J
JULY 27, 2022**

BETWEEN

JOYCE KARRAI M’MWERERIA PLAINTIFF

AND

JACOB MBAABU 1ST DEFENDANT

ROBERT KINYUA MUGWIKI 2ND DEFENDANT

GERALD MWOBODIA 3RD DEFENDANT

JOHN BUNDI MUGWIKI 4TH DEFENDANT

JUDGMENT

A. Pleading

1. The plaintiff took out an originating summons dated December 5, 2019 seeking for the court to determine; whether she had been in a continuous, exclusive and uninterrupted possession and or occupation of 2.11 acres out of LR No Nkuene/Kathera/1485, 1486, 1487 & 1488 formerly LR Nkuene/Kathera/187, for a period of over 12 years; whether the said occupation has been adverse to the registered owner; whether she had acquired absolute ownership and she should be registered as such; If the defendant should be ordered to transfer 2.11 acres out of the suit parcels and lastly whether the defendant should be ordered to pay costs of the suit.
2. The originating summons was supported by her affidavit sworn on the even date, attaching a copy of the register extract for LR No 187, copies of searches for the four parcels and bundle of photos marked as MKI – MK 2 (a) (b) (c) & (d) and MK3 respectively.
3. The defendants through a joint replying affidavit sworn on July 21, 2020 opposed the originating summons. It was averred that the plaintiff was a daughter of the late Ciokarema M’Mwereria who was a mere licensee on the suit land of their late father Mugwika s/o Makanga and was only allowed to stay



on the land with life interest and no more, hence they had no intention of disturbing her life interest. The defendants denied the allegations of the merger of the land during the adjudication of the record of existing rights. Further, it was pleaded that if at all her share of land had been merged during the adjudication exercise, she should not have waited until the death of their late father so as to lodge her claim especially after they had lawfully acquired the subject land on account of transmissions which grant has not been revoked or challenged before it was confirmed and thereafter the defendants also filed their witness statements dated September 25, 2020.

B. Evidence

4. The plaintiff adopted her affidavit in support of the originating summons as her evidence in chief and produced a copy of the green card, search certificates and a bundle of photographs as P exh 1-3 respectively. She stated she was born on the suit parcels of land by her biological mother, the late Kamere Mwereria who was buried on the suit land. She denied her occupation was with the permission of the late Mugwika the father to the defendants. As to the events during the demarcation process, she said she was already on suit the land at the time and her land was consolidated by the people who now wanted to unjustly take up her share.
5. In cross examination, the plaintiff insisted she was left in charge of the suit land by her late mother child since she was the only surviving heir which was way before Kenya gained independence. She insisted her late mother had gathered the land and sent the late Mugwika to bring her the title deed. Unfortunately, he only brought one title deed under his name. She denied she had been married off elsewhere and came back after separation with her husband. She denied she was only entitled to a life interest of the suitland and insisted she was demanding for her inheritance rights since the land initially belonged to her late parents, which was erroneously and without her consent merged with that of the defendant's late father. According to her, she was demanding 2.11 acres of the suit land. Further the plaintiff testified that even though she had no children of her own, had people who were taking care of her. She stated after the defendant's father passed on, the defendant declined teaming up with her so that she could get her share during the succession proceedings. She did not however know they were out to steal her share of the land. She admitted however that she did not apply for the revocation of the grant.
6. It was her evidence that she had been staying on the suit land as a matter of right being a child of her deceased parents who used to live on the said land as a matter of right, on a land clearly marked, and has never been chased away from the suit land by the defendant's late father hence, she was not and she could not be termed as licensee of the defendant's late father.
7. PW 2 adopted her witness statement dated December 5, 2019. As a neighbour of PW 1 she said she got married before the adjudication process started in the area whereof the late M'Mugwika's land was neighboring that of one M'Mwereria. However, during the adjudication process the two parcels of land were merged under the name of M'Mugwika since PW 1 was still young but her mother was still alive. She confirmed that PW 1 has always been on the suit land throughout except at the short time she got married, but upon divorce, she came back to her late father's land.
8. PW 2 confirmed that PW 1 had never been ordered out of the suit land by either the defendants or their late father. She testified that though she would not estimate the plaintiff's acreage, her land was distinct, identifiable and the boundaries were clear and next to the tarmac road. PW 2 insisted the plaintiff was on the land out of inheritance of the same from her late parents but not out of a licence from the defendant's late father.



9. PW 3 adopted his witness statement dated December 5, 2019. He confirmed knowing PW 1 since 1958 just before the demarcation process started in the area between 1960 and 1961 at the time in which it was the only male gender which could be demarcated the land.
10. According to PW 3, PW 1 had called elders who subdivided the land between Mugwika and herself. According to him the area is known as Ciokarema stage along Nkubu Mariba Tarmac road in honour of the mother of PW 1 which was her “Nuturo”. PW 3 also confirmed that even though the late M’Mugwika and the late M’Mwereria were not blood brothers they belonged to the same clan. Further, PW 3 insisted PW 1 has been living on the land as of right and not as a licensee which occupation had not been objected to by either the defendants or their late father and no notice to vacate the land, had ever been issued to the plaintiff.
11. DW 1 adopted his replying affidavit as his evidence in chief, sworn on July 21, 2020 and produced a copy of a green card for LR No Nkuene/Kathera/187, official search for LR No Nkuene/Kathera/1884 and a bundle of photographs as D exh 1-2 respectively. He testified that his late father passed on in 1978 after which he subdivided the land and registered it under his name on January 13, 1999. He confirmed that he had never ordered the plaintiff to vacate the suit land. Further, he told the court the plaintiff she never objected to the succession proceedings despite being aware they were lodged.
12. Additionally, DW 1 confirmed having become aware from his relatives that the plaintiff’s late father had a share of land in the area. He testified that his late father never ordered the plaintiff to vacate the suit land though she had lived there all her life. As regards the plaintiff’s late mother, DW 1 testified it was true her late father gave the plaintiff land but with a condition that they be taking care of her during a meeting held around 1982 or thereabouts. DW 1 confirmed the plaintiff had permanent houses on the suit land with piped water and that her late mother was buried on the suit land. DW 1 also confirmed that the plaintiff had an independent access road and that the land was under wattle and banana trees.
13. As regards the length of stay on the suit land, DW 1 confirmed that the plaintiff had been on the land since 1969, occupying part of the land where he now had a title deed. Further DW 1 confirmed that the plaintiff has been on that portion before he was born in 1959.
14. As regards marriage, DW 1 told the court PW 1 had a short stint in marriage, but eventually came back and his late father gave her the land to occupy, for she had nowhere else to go. He however clarified she could only enjoy it as a life interest.

C. Written Submissions

15. At the close of evidence parties filed written submissions dated February 14, 2022 and February 10, 2022 respectively. The plaintiff submitted the defendants have acknowledged that she has occupied the suit land all her life but claims she was a licensee of their late father which claim the defendant failed to substantiate.
16. As to the law the plaintiff submits she has satisfied the requirements of sections 7, 9, 10, 11, 12, 13, 16, 17 & 38 of the *Limitation of Actions Act* for the grant of orders of adverse possession.
17. Further, the plaintiff submitted she has met the principles as regard the above provisions of the law as pronounced in the case law of *Kasuve v Mwaani Investment Ltd & 4 others* [2004] eKLR since she has had long occupation which has been open, exclusive, notorious, uninterrupted and has dispossessed both the previous registered owner as well as the defendants who are the successors in title in so far as the 2.11 acres thereof is concerned.



18. The plaintiff submitted that as at 1978 when the defendants' father passed on, she had already occupied the land for a total of 15 years with effect from the date of first registration on April 3, 1963 and that his death did not interrupt her occupation as held in *Karuntimi Raiji v M'Makinya M'Itunga* [2013] eKLR.
19. The plaintiff submitted the defendants have not been able to substantiate their claim that she entered and has remained on the land as a licensee as required of them going by the *Raiji* case (*supra*), more so taking into account that the defence conceded that there has been no interruption or notice to vacate the suit land given either by the defendant or their deceased parents.
20. The plaintiff urged the court to find she entered the land without permission or consent from the defendant and has used the land with no force, no secrecy, no persuasion and without any break since her birth.
21. On their part the defendants submitted that the plaintiff has failed to explain why her late mother never sued their deceased father during her lifetime. Similarly, they submitted that the plaintiff gave no explanation why she had to wait from 1978 to date to sue the defendants especially given they have acquired the suit land through transmission which was not challenged at all.
22. The defendants submitted their late father allowed the plaintiff to reside on the land as a friendly gesture, and out of that generosity she was not chased away during his lifetime and soon after 1978 to present, since the deceased had instructed them to let her enjoy her life interest on the land.
23. Relying on *Peter Okoth v Ambrose Odbido Andajo & Benendict Odhiambo Oketch* [2021] eKLR, *Jandu v Kirpol & another* [1975] EA 225 *Karuntimi Raiji v M'Makinya M'Itunga* [2013] eKLR citing with approval *Mwinyi Hamisi Ali v AG & Philemona Mwaisoka Wanaki* Civil Appeal No 125 of 1991 as well as *Benjamin Kamau Murimia & others v Gladys Njeri* Civil Appeal No 213 of 1996, the defendants take the view the plaintiff has failed to satisfy the principles set therein as to adequacy in continuity, publicity, lack of consent and agreement by the registered owner.
24. Therefore, the defendants urged the court to find that the plaintiffs occupation given the obtaining circumstances has not been adverse to them.
25. Lastly, the defendants urged the court to find that the plaintiff is being driven by other people seeking to lay a claim on the land and disinherit them more so when she is over 90 years with no heirs.

D. Determination

26. In *Wilson Kazungu Katana & 101 others v Salim Abdalla Badshwein & another* [2015] eKLR the Court of Appeal set the parameters of what amounts to adverse possession as that; the parcel of land must be registered in the name of the person, the applicant must be in exclusive possession of that piece of land in an adverse manner to the title of the owner and lastly, he must have been in that occupation for a period in excess of twelve years, having been dispossessed the owner or there having discontinuance of possession by the owner.
27. In *Wambugu v Njuguna* [1983] KLR 172 the Court of Appeal held adverse possession denotes two key concepts namely possession and discontinuance of possession. Further the court held the proper way to assess the proof of adverse possession would be whether or not the title holder has been disposed or the claimant has continued his possession for the statutory period of and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.



28. In *Kipketer Togon v Isaac Cipriano Shingore* [2012] eKLR, the court took the view that the registered owner must assert his right to title by physically entering onto the land and evicting or ejecting the trespasser from the suit land for interruption to occupation to occur.
29. As regards the survival of a claim over a deceased person, the Court of Appeal in *Karuntimi Raiji supra* and *Peter Thuo Kairu v Kuria Gacheru* [1988] 2 KAR 111 held that adverse possession subsists not only against the present holders of title but also their predecessors in title.
30. Further, in *Maweu v Liu Ranching & Farming Coop Society Ltd* [1985] KLR 430 the court held that in law, possession is a matter of fact depending on all the circumstances.
31. What is coming out of the following case law is that the intruder must physically be on the land for the requisite period of 12 years as a matter of right, in good faith, in a non-permissive manner, in an exclusive manner and with the intention of excluding the owner as well as other people.
32. In other words, the intruder must exercise dominion over the land solely with the intent to retain it, solely for his or her own use, at the expense of anyone else including the registered owner, in a manner that is visible, open, notorious, to all and sundry, in a continuous and an uninterrupted or unbroken period of 12 years.
33. Further, it must also be clear that the owner knows that he has been ousted from possession and or ownership.
34. Applying the above principles to the instant suit, the plaintiff averred and testified that she came into the land by virtue of being the daughter of the late M'Mwereria who lived on her own land alongside the defendants deceased father prior to the land adjudication process. The plaintiff's testimony was that her late mother send the defendants' deceased father to get or collect her title deed but unfortunately, he consolidated her land with his and one title deed came out in his name for parcel No 187 on March 1, 1963. The plaintiff she takes the view she has been on the land as of right, with full knowledge of the defendants as an adverse owner and not a license only entitled to a life interest.
35. In defence, the defendants have at paragraph 4 of the replying affidavit acknowledged her roots to an extent that her late mother Ciokarema M'Mwereria was allowed onto the suit land after her late husband allegedly disappeared during the 2nd world war.
36. This admission in my view gives to credence to the plaintiff's evidence that her late mother and herself started occupying the land pre-independence and before the land adjudication process commenced and registration was effected in favour of the defendants' deceased father on March 1, 1963.
37. The point of departure by the two parties in this suit is in which capacity the plaintiff has been occupying the suit land. On her part PW 1 pleaded and has testified that it was a matter of right and or inheritance while on the other hand, the defendants claim she is a mere licensee and or due to the wishes of their deceased, father, she is only entitled to have a life interest to the land.
38. Sections 2 & 40 of the *Land Act, 2012* defines a license as a permission given by a proprietor in respect of his land which allows the licensee to do some act in relation to the land which would otherwise be a trespass but does not include an easement or profit. An easement means a non-possessory interest allowing the holder to use the land for a particular extent and shall not include a profit. A profit is a right to get into someone's land and take away some benefit. As regards a life interest, it is defined not to be an estate of inheritance and it cannot continue forever. It determinates and does not descend to the tenant's heir. See TO Ojienda *Conveyancing Principles and Practice*, Law of Africa Publishing (K) Ltd Rev ED 2010 at pages 30, 31 & 289.



39. In *Runda Coffee Estate Ltd v Ujagar Singh* (1966) EA 564, the court held a license is personal to the licensee and creates no interest which can be disposed of by the licensee.
40. In *Faraj Mabarus v JB Martin Glass Industries & 3 others* [2005] eKLR the court held a license comes to an end with the death of the licensee and the widow's continued occupation of the land amounted to trespass as against the registered owner.
41. The burden of proof is always on he who alleges. It was the duty of the defendants to prove that the plaintiff was a licensee who is only entitled a life interest and that she was on the land with the permission of the registered owner.
42. Since the law is that a licensee determinates with the tenant, assuming that the plaintiff's late mother was the tenant and she passed on, the question is under what capacity has the plaintiff been allowed to occupy and live on the land and under what terms?
43. The defendant's testimony is that their late father gave express instructions and wishes that the plaintiff should not be disturbed or ordered to vacate the land as long as she was alive.
44. The plaintiff has testified that the land she has been occupying is distinct, identifiable and exclusively hers on account of inheritance and ownership prior to the adjudication section hence could not have been out of any permission by the defendant deceased father as alleged. The plaintiff has also testified that she has been occupying the land openly, notoriously and exclusively to the detriment of the rights of the absolute owner since 1950 and up to present.
45. The plaintiff's witnesses have also confirmed that her boundary and access road is distinct from that of the defendants. The defendants have also confirmed that she has a permanent home and developments on the suit land which were put up by her and are controlled exclusively by her.
46. In *Charles Mukoma Kimaru v Johnstone Muchomba Kaguyu* [2018] eKLR the court held where a party has never exercised control of the suit land after registration under his name his rights became extinguished. The court made a finding that he had lost his proprietary rights to the one who was in control for more than 12 years.
47. In this suit, the evidence by the plaintiff is clear that the defendants or their predecessor's in title have never exercised proprietary control over the 2.11 acres she has been occupying for over 30 years.
48. To my mind the evidence given by the defendants falls short of proving any licensee or life interest status so as to dislodge the plaintiff's evidence as to the status of her occupation on the suit land.
49. I find the evidence of the plaintiff more credible and believable unlike the defendants on the issue of the events prior to the adjudication and the circumstances under which she came on the land by virtue of birth.
50. The upshot is that the plaintiff has proved her claim on a balance of probabilities and proceed to declare she has acquired 2.11 acres out of LR No Nkuene/Kathera/1485, 1486, 1487 & 1488 formerly Nkuene/Kathera 187 by virtue of adverse possession and she should be registered as such. The defendants are ordered to transfer the said portion to her within 60 days from the date hereof in default the Deputy Registrar to execute the transfer documents in her favour.

Costs to the plaintiff.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 27TH DAY OF JULY, 2022

In presence of:



C/A: Kananu

Mwirigi Kaburu for plaintiff

Plaintiff

Defendants

HON CK NZILI

ELC JUDGE

