



**Mae v Mucheru & another ((Sued as Personal Representatives of John Mucheru (deceased))  
(Environment & Land Case 68 of 2020) [2022] KEELC 2756 (KLR) (20 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2756 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 68 OF 2020**

**BM EBOSO, J**

**JULY 20, 2022**

**BETWEEN**

**KAMAU MAE ..... PLAINTIFF**

**AND**

**JAMES MUNIU MUCHERU ..... 1<sup>ST</sup> DEFENDANT**

**GRACE WAMUYU MUCHERU ..... 2<sup>ND</sup> DEFENDANT**

**(SUED AS PERSONAL REPRESENTATIVES OF JOHN MUCHERU  
(DECEASED))**

**JUDGMENT**

1. The key question to be answered in this Judgment is whether Kamau Mae [the plaintiff] has regained title to land parcel number Limuru/Bibirioni/744 [the suit property] under the doctrine of adverse possession. The plaintiff was registered as proprietor of the suit property in 1958. In 1974, he used the suit property as a collateral to secure a loan of Kshs 3,000 owed to Kenya Commercial Bank [the Bank]. The Bank, in exercise of the chargee's statutory power of sale, auctioned the land. The late John Mucheru Muniu [the deceased] placed a successful bid for the land during the auction and purchased it in 1977. The deceased was subsequently registered as proprietor of the land in 1978. The plaintiff did not, however, vacate the land, despite title to the land having passed to the deceased.
2. In 1979, the deceased initiated Nairobi High Court Civil Case Number 3981 of 1979, seeking orders of eviction and mesne profits against the plaintiff. Nyarangi J [as he then was] conducted trial by way of formal proof on 5/5/1980. On the same day, he granted the deceased the orders that the deceased had sought in the plaint, namely: (i) an order of vacant possession; and (ii) an award of mesne profits from 14/12/1977 until date of delivery of vacant possession. The plaintiff did not vacate the land. The deceased did not evict the plaintiff from the land by way of enforcing the above Judgment of the High Court.



3. Subsequent attempts by the plaintiff to obtain orders setting aside the Judgment culminated in a ruling rendered by Angawa J on 6/6/2007, through which the High Court dismissed the plaintiff's application. Nothing was placed before this court to suggest that any other proceedings were taken in the High Court suit after the ruling of 6/6/2007. The plaintiff contends, and the estate of the deceased does not dispute the fact, that the plaintiff remained in possession of the land from 6/6/2007 to the date of initiating the present suit.

### **Originating Summons**

4. On 4/9/2020 [slightly more than thirteen years from 6/6/2007], the plaintiff took out an originating summons against the estate of the deceased, seeking orders of adverse possession against the deceased's estate in the following verbatim terms:
  - 1) A declaration that the title/right/interest of the said John Mucheru Muniu (deceased) and/or Grace Wamuyu Mucheru and James Muniu Mucheru (as personal representatives of John Mucheru Muniu, deceased and/or any other person succeeding the deceased or claiming under the defendants) in land parcel No Limuru/Bibirioni/744 has been extinguished by the plaintiff's adverse possession thereof for a period of more than 12 years in terms of Sections 17 and 38 of the *Limitation of Actions Act*.
  - 2) A declaration that the plaintiff has acquired the absolute proprietorship interest in land parcel No Limuru/Bibirioni/744 by his adverse possession thereof for a period of more than 12 years i.e. from at least 2007 to-date.
  - 3) An order do issue requiring and directing the Land Registrar Kiambu to register the plaintiff, Kamau Mae, as the absolute proprietor of land parcel No Limuru/Bibirioni/744 in place of John Mucheru Muniu (deceased) or his personal representatives and/or in place of any other person succeeding the deceased or claiming under the defendants.
  - 4) The costs of this suit be borne by the defendants.
5. When the originating summons came for trial directions on 30/11/2021, the parties' respective advocates informed the court that they had agreed that the originating summons be canvassed through affidavit evidence and written submissions. The court granted them their mutual request and gave appropriate trial directions.

### **Plaintiff's Evidence**

6. The plaintiff swore a supporting affidavit dated 20/8/2020 and a further supporting affidavit dated 12/3/2021. He outlined how he lost title to the suit property through auction by the Bank as summarized above. He added that his attempts to set aside the Judgment granted to the deceased in 1980 ended unsuccessfully on 6/6/2007. He further deposed that although he did not obtain any stay orders, the deceased did not execute the Judgment obtained against him in 1980. Neither did the administrators of the deceased's estate execute the Judgment subsequent to the death of the deceased in 2011. He added that despite the case and the Judgment, he had been in adverse possession of the suit property throughout [from 1958 to the date of taking out the originating summons]. He stated that he had been "in uninterrupted stay, use, enjoyment and possession of the" suit property, with his family, from 1958 to the date of taking out the originating summons.
7. In his further supporting affidavit sworn on 12/3/2021, he deposed that his adverse possession of the suit property commenced in the year 2007 when he lost his bid to set aside the Judgment of 1980. He reiterated that no attempt had been made by the deceased and/or the deceased's estate to interrupt



his adverse possession of the suit property from 6/6/2007 to the date of taking out the originating summons.

8. The plaintiff exhibited the following documents: (i) Certified copy of the Land Register; (ii) Legal Notice No 2692 of 15/4/2005; (iii) Copy of the Land Certificate; and (iv) Copy of the Ruling dated 6/6/2007 in Nairobi High Court Civil Case No 3981 of 1979. He urged the court to grant him the orders sought in the originating summons.

### **Defendants' Evidence**

9. The defendant opposed the originating summons through a replying affidavit sworn on 26/11/2020 by Grace Wamuyu Mucheru. She deposed that she was one of the personal representatives of the late John Mucheru Muniu [the deceased] who was her husband. She termed the originating summons as “misconceived, made in bad faith and devoid of any merit.” She contended that one cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the land. She added that it was absurd for the plaintiff to contend that the title held in the name of the deceased was unfairly acquired and at the same time claim the same parcel of land under the doctrine of adverse possession. She further deposed that for the plaintiff to acquire the suit land by adverse possession, he had to show that the deceased lost his rights to the land either by being dispossessed of it or by having discontinued his possession of the land. She added that dispossession is where a person comes in and drives another out of the land while discontinuance of possession is where the person in possession goes out and another person takes possession. It was the position of the defendants that for the plaintiff to be said to have acquired the suit property under the doctrine of adverse possession, he needed to demonstrate that the suit property was in possession of the deceased in the first place.
10. The defendants contended that it was not enough for the plaintiff to show that he had been in possession of the suit property for more than 12 years, adding that the plaintiff having admitted that the deceased and the deceased’s estate had never taken possession of the suit property, the defendants could not be said to have been dispossessed of the land or to have discontinued their possession of the land.
11. The defendants added that, upon the deceased being registered as proprietor of the suit property, the plaintiff refused to vacate the suit property despite being asked to do so. It was their case that the plaintiff’s refusal to vacate the suit property led to the filing of Nairobi High Court Civil suit No 3981 of 1979 by the deceased in which the deceased obtained Judgment for vacant possession and mesne profits against the plaintiff. She added that “during the years after the aforesaid Judgment was granted, the deceased made efforts to get the defendant to vacate the property by sending village elders to the defendant [sic] and seeking police assistance but he did not succeed on account of threats of violence by the defendant [sic] and his sons and reluctance of the police to get involved in the matter”.
12. She further deposed that the plaintiff filed an application dated 14/6/2004 seeking to set aside the Judgment but the application was dismissed on the ground that it was brought after inordinate delay. She contended that it was clear from the foregoing that time never began to run under the *Limitation of Actions Act* because the deceased was never in possession of the suit property and was never dispossessed of it. She added that even if it were the case that the deceased had been dispossessed of the suit property by the plaintiff, he [the deceased] had taken steps to assert his rights over the suit property hence time would have ceased to run under the *Limitation of Actions Act*. She concluded that a claim under the doctrine of adverse possession could not arise in the circumstances.



## Plaintiff's Submissions

13. The plaintiff filed written submissions dated 24/1/2022 and further submissions dated 22/2/2022, through the firm of Maira & Ndegwa Advocates. Counsel for the plaintiff cited the provisions of Sections 7, 17 and 38 of the *Limitation of Actions Act* and submitted that the plaintiff had been in adverse possession of the suit property from 2007 hence the deceased's title had been extinguished. Counsel added that the allegation that the defendants made attempts to get the plaintiff out of the suit property through elders and through the Police were not supported by any evidence. Counsel argued that time started running in June 2007 when the plaintiff lost his bid to set aside the Judgment of 1980.

## Defendants' Written Submissions

14. The defendants filed written submissions dated 14/2/2022 through M/s Mucheru Law LLP Advocates. Counsel for the defendants submitted that the issue to be determined in the application was whether adverse possession of the suit property by the plaintiff had been proved on a balance of probabilities. Citing the Court of Appeal decision in *Wambugu v Njuguna* [1983] KLR, counsel for the defendants submitted that, in order to acquire land by adverse possession, the plaintiff must show that the owner of the land lost his rights to the land either by being dispossessed of it or by having discontinued his possession of it. Counsel contended that the plaintiff could not be said to have acquired the suit property through adverse possession because the deceased had never been in possession of the suit property since he purchased it in the auction on 14/12/1977. Counsel reiterated the argument advanced in the affidavit of Grace Wamuyu Mucheru as outlined above.
15. Counsel argued that it was evident from the affidavit of Grace Wamuyu Mucheru that upon the deceased purchasing the suit property, the plaintiff refused to vacate it, prompting the deceased to institute legal proceedings to assert his rights over the suit property. Counsel argued that time never began to run under the *Limitation of Actions Act* because the deceased was never in possession of the suit property and was therefore never dispossessed of it. Counsel contended that even if the deceased had been disposed of the suit property, he took steps to assert his rights over the suit property, hence time "would have ceased to run under the *Limitation of Actions Act*".
16. Counsel contended that, by knowingly and willfully disobeying a court order requiring him to vacate the suit property, the plaintiff was in contempt of this court hence he had approached the court with "unclean hands". Counsel urged the court to dismiss the originating summons.

## Analysis and Determination

17. I have considered the originating summons together with the parties' affidavits and rival submissions. I have also considered the relevant legal frameworks and jurisprudence. The single question to be answered in the originating summons is whether the plaintiff has satisfied the criteria for acquisition of title to land under the doctrine of adverse possession.
18. The common law doctrine of adverse possession connotes possession which is inconsistent with and in denial of the title of the true owner of land. To establish adverse possession, a claimant must prove that he has both the factual possession of the land and the requisite intention to possess the land [animus possidendi]. Secondly, the claimant must prove that he has used the suit land without force, without secrecy, and without persuasion [nec vi, nec clam, nec precario] for the prescribed limitation period of twelve years. Thirdly, he must demonstrate that the registered owner had knowledge [or the actual or constructive means of knowing] that he, [the adverse possessor] was in possession of the suit property. Fourthly, the possession must be continuous; it must not be broken or interrupted. In *Titus Kigoro*



Munyi v Peter Mburu Kimani, CA No 28 of 2014, the Court of Appeal held that computation of time starts from when there is actual or constructive knowledge by the registered proprietor.

19. The doctrine of adverse possession has its statutory underpinning in Sections 7, 9, 13, 17, 37 and 38 of the Limitation of Actions Act. The Court of Appeal examined the constitutionality of the doctrine of adverse possession in the context of the Constitution of Kenya 2010 in Mtama Lewa v Kabindi Ngala Mwagandi, [2015] eKLR and held that the doctrine does not offend the spirit and letter of the present constitutional framework on protection of the right to property under Article 40 of the Constitution.
20. There is common ground in this suit that the plaintiff was registered as proprietor of the suit property in 1958. There is also common ground that the late John Mucheru Muniu [the deceased] purchased the suit property in an auction in 1977, and in 1978, he was registered as proprietor of the suit property. The plaintiff did not vacate the land after he lost his title to the land. This prompted the deceased to initiate Nairobi High Court Civil Case Number 3981 of 1979 seeking orders of vacant possession and mesne profits. It is not disputed that the deceased obtained Judgment against the plaintiff in 1980. The deceased did not, however, enforce the Judgment against the plaintiff. The last activity in the above High Court case was the ruling rendered by Angawa J on 6/6/2007, through which the High Court dismissed the plaintiff's bid to set aside the Judgment of 1980. There is common ground that the plaintiff has been in possession of the suit property throughout.
21. The defendants contend that time never began to run because the deceased and the deceased's personal representatives never gained possession of the land in the first place, and that dispossession never happened. To answer the question as to whether or not time started running for the purpose of adverse possession, one has to first examine the framework in Sections 4(4), 7, 17 and 38 of the Limitation of Actions Act. Section 4(4) of the Limitation of Actions Act provides as follows:

“(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

22. The Court of Appeal interpreted the above framework in Sebastian Nyamu v Gilbert Kabeere M'Mbijiwe and concluded as follows:

“The construction given to the corresponding Section 4(4) of the Act by the courts in this Country is much wider. All post-Judgment proceedings, including originating proceedings and interlocutory proceeding for execution of judgment are statute-barred after 12 years.”

23. The Court of Appeal rendered itself further as follows:

“It is logical from the scheme of the Act, that a judgment for possession of land, in particular should be enforced before the expiration of 12 years because Section 7 of the Act bars the



bringing of action for recovery of land after the end of 12 years from the date in which the right of action accrued. By the definition in Section 2 (2) (3) of the Limitation Act:

‘Reference in this Act to a right of action to recover land include reference to a right to enter into possession of the land and reference to the bringing of an action in respect of such right of action include reference to making of such an entry’.

According to that definition the institution of proceedings to recover possession of land including proceedings to obtain a warrant for possession is statute – barred after the expiration of 12 years.”

24. The Court of Appeal reiterated the above interpretation in the year 2014 in *Willis Onditi Odhiambo v Gateway Insurance Co Ltd* in the following words:

“Execution of judgments and or decrees is governed by Section 4(4) of the *Limitation of Actions Act* which is in the following terms..... The Judgment which the appellant sought to execute was passed on 26th August 1996. The judgment should therefore have been executed on or before 27th August 2008.”

25. The import of the framework in Section 4(4) of the *Limitation of Actions Act* is that execution proceedings relating to the Judgment and decree issued on 5/5/1980 in Nairobi HCCC No 3981 of 1979 became statute-barrd upon expiry of 12 years from 5/5/1980. This means that, barring any ensuing litigation, effective from June 1992, for purposes of adverse possession, time would run.
26. Sections 7 and 17 of the *Limitation of Actions Act* on the other hand extinguish the registered owner’s title to land upon expiry of 12 years from the date when the right to initiate a suit for recovery of land accrued.
27. The above view is partly informed by the decision in *M’ikiara M’Rinkanya Sebastian Nyamu v Gilbert Kabeere M’Mbijiwe* [2007] eKLR where the Court of Appeal held as follows:-

“From the above analysis, it is clear that a judgment for possession of land should be enforced before the expiry of the 12 years limitation period stipulated in Section 7 of the Act. If the judgment is not enforced within the stipulated period, the rights of the decree holder are extinguished as stipulated in Section 17 of the Act and the judgment debtor acquires possessory title by adverse possession which he can enforce in appropriate proceedings. So, quite apart from the authority of *Lougher v Donovan*, which we consider as still good law in this country, and the previous decisions of this court, there is a statutory bar in Section 7 of the Act for recovery of land including the recovery of possession of land after expiration of 12 years. It follows, therefore, that, to hold that execution proceedings to recover land are excluded from the definition of “action” in Section 4(4) of the Act would be inconsistent with the law of adverse possession.”

28. In the present suit, the plaintiff’s challenge against the registration of the deceased as proprietor of the suit property ended on 6/6/2007 when he lost his bid to set aside the Judgment rendered in 1980. He had no right to be on the suit property. He had no permission from the deceased to be on the land. He nonetheless remained on the land as an adverse possessor. In my view, time for the purpose of adverse possession started running from 6/6/2007, the day the plaintiff lost his bid to set aside the Judgment of 1980.
29. The defendant’s contention that time never started running because the deceased was never in possession of the land is, in my view, a mis-apprehension of what constitutes possession. The deceased was given vacant possession of the suit property by the court through the Judgment of 5/5/1980. What



was expected of the deceased was the enforcement of the Judgment. He dispossessed himself of the land by failing to enforce the Judgment. Put differently, by failing to enforce the Judgment, he let the plaintiff stay on the land as an adverse possessor. That is the import of the framework in Sections 4(4), 7 and 17 of the *Limitation of Actions Act*.

30. Consequently, my finding on the single question in this originating summons is that the plaintiff has satisfied the criteria for acquisition of title to land under the doctrine of adverse possession. The originating summons dated 28/8/2020 is allowed in terms of prayers 1, 2 and 3. Because of the background of this originating summons, parties shall bear their respective costs of this suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 20TH DAY OF JULY 2022**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Mrs Maira for the Plaintiff

Mr Sala holding brief for Mr Gadhu for the Defendant

Court Assistant: Ms Lucy Muthoni

