



**Mwangi v Kariuki (Environment and Land Case Civil Suit
20 of 2020) [2022] KEELC 2471 (KLR) (14 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2471 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND CASE CIVIL SUIT 20 OF 2020**

LN GACHERU, J

JULY 14, 2022

BETWEEN

DAVID WAMATU MWANGI PLAINTIFF

AND

PETER IREGI KARIUKI DEFENDANT

JUDGMENT

1. By Originating Summons dated August 18, 2020, the Plaintiff sought for the following orders;
 1. That the Plaintiff has acquired title by adverse possession to the whole parcel of land Loc. 14/ kiru/3129, situated within Murang'a County.
 2. That the said parcel of land be forthwith registered in the name of the Plaintiff and the Defendant do transfer the said parcel of land to the Plaintiff.
 3. That the costs of this suit be provided for.
2. The Originating Summons is supported by the Supporting Affidavit of David Wamatu Mwangi (the Plaintiff) sworn on August 18, 2020. It is the Plaintiff's disposition that he has been in exclusive, open, continuous and uninterrupted possession and occupation of the suit land since 1991. That he had planted nappier grass, trees and he had fenced off the land with cedar posts and barbed wire. That he has acquired the suit land by adverse possession, having taken possession of the same uninterruptedly for more than 29 yrs. and developed it.
3. The suit was not contested by the Defendant herein as he neither entered appearance nor filed any Defense and/or Replying Affidavit, even after service of Summons. As a result, this Court on December 1, 2021, made an Order for the suit to proceed for Formal Proof hearing.
4. The matter proceeded for Formal Proof hearing by way of viva voce evidence on April 27, 2022 wherein the Plaintiff gave evidence for himself and called no witness.



Plaintiff's Case

3. PW 1 Davis Wamatu Mwangi, the Plaintiff herein adopted his Witness Statement dated January 28, 2022, as his evidence in chief. The Plaintiff also produced the bundle of documents dated January 28, 2022 as his exhibits.
4. After *viva voce* evidence, the Plaintiff closed his case and the Court gave directions for the filing of written submissions. Through the Law Firm of Mindo & Co Advocates, the Plaintiff filed his written submissions dated May 9, 2022. The Plaintiff reiterated his averments in the Originating Summons and Supporting Affidavit dated August 18, 2020. He also relied on the case of *Wakaria Mboi Njaramwe & Another vs. Loise Kaguu Munge* (2013) eKLR, and urged this Court to allow the Originating Summons herein as prayed.
5. The Court has carefully read and considered the pleadings by the Plaintiff, the evidence adduced, written submissions, authorities cited and the relevant provisions of law and finds that the issues for determination are;
 - i. Whether the Plaintiff has met the threshold for grant of orders of adverse possession?
 - ii. Who should bear the costs of the suit?

1. Whether the Plaintiffs has met the threshold for grant of orders for adverse possession?

6. It is the Plaintiff's case that he has been in continuous, uninterrupted occupation and possession of the suit property for a period in excess of 12 years. The burden of leading the Court to ascertaining this rests with the Plaintiff.
7. This Court takes judicial notice of the fact that the instant suit was not contested and that the Defendant neither entered appearance nor filed a Defense. However, the law requires of the Court to look at the weight of the evidence adduced by the Plaintiff even where the same is uncontroverted. See the case of *Gichinga Kibutha vs Caroline Nduku* [2018] eKLR, where the Court held as follows;

“The hearing referred to above is the one commonly known as “Formal proof”. The Civil Procedure Rules do not define “Formal Proof”. Black’s Law Dictionary defines “Formal” as including “rules established by an institution according to certain processes”. This particular hearing is for the claimant to prove his claim. It is not automatic that in instances where the evidence is not controverted, the claimant’s claim shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”
8. It is trite that the burden of proof, according to Sections 107, 108 and 109 of the *Evidence Act*, is placed on the person alleging the occurrence of an event, and where there is no evidence to challenge the allegations, the standard of proof automatically is higher. Undoubtedly, owing to the nature and extent of orders for adverse possession to wit extinction of the right to property, the burden is particularly high.
9. In the instant suit, the burden of proof squarely rests upon the Plaintiff who has a duty to demonstrate that he has met the requirements for the grant of an order of adverse possession. (See *Gabriel Mbui vs Mukindia Maranya* [1993] eKLR, where the Court stated as follows;

“The burden of proving title by adverse possession rests upon the person asserting it. This is to say the burden of proof is upon the person setting up and seeking to prove title by



adverse possession (Mamuji v Dar [1935] 2 E A CA 111, Bwana v Ibrahim (1948) 15 EACA 7; and Forbes, JA, in Abdulkarim and another v Member for Lands and Mines and another 1 [1958] EA 436). He proves it on the usual standard of proof in civil cases namely, on a balance of probability. What does he prove? He proves three adequacies: continuity, publicity, and extent. For to prove title by adverse possession, it is not sufficient to show that some acts of adverse possession have been committed: the possession must be adequate in continuity, in publicity and in extent, to show that it is adverse to the rightful, paper title owner.”

10. Having said that, this Court will proceed to look at the issues outlined above.
11. It is trite that adverse possession is defined as the non-permissive, physical control over land, coupled with the intention of doing so, by a stranger, having actual occupation solely on his own behalf or on behalf of some other person, to the exclusion of all others including the true owner of that land.
12. The doctrine of adverse possession is enshrined under the *Limitation of Actions Act*. Section 7 of the Act provides:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

Further, Section 13 provides;

- “(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act, a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land
- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
- (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land”.

13. This right though provided for, does not accrue automatically and must be invoked through a Court of Law, by the person who wishes to benefit from it.



14. Section 38 of the *Limitation of Actions Act* gives authority to the claimant to apply to Court for orders of adverse possession. In the case of *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR the Court held;

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

15. The period of twelve years starts to run from the moment the trespasser and/or stranger takes adverse possession of the land and the registered proprietor is regarded as having been dispossessed or having discontinued his possession. In the case of *Wambugu v Njuguna* (1983) KLR 173, the Court of Appeal held thus:

- “1. The general principle is that until the contrary is proved, possession in law follows the right to possess.
2. In order to acquire by the statute of Limitations title to land which has a known owner, that owner must have lost his right to, the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.
3. The *Limitation of Actions Act*, on adverse possession, contemplates two concepts; dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”

16. To determine whether the Plaintiff’s right to adverse possession has accrued, this Court will seek to answer the following;

- i. How did the Plaintiff take possession of the suit property?
- ii. When he took possession and occupation of the suit property and for how long he has remained in possession?
- iii. What was the nature of his possession and occupation?

17. It is the Plaintiff’s averment that he gained entry into the suit land sometime in 1991 and he has been in occupation of the same to date. Further, the Plaintiff averred that he had since fenced the suit land and has been conducting farming thereon. That he did all this thing openly and his occupation had never been interrupted and/or interfered with.

18. This Court has perused the Plaintiff’s bundle of documents dated January 28, 2022, and notes that it only contains the pleadings filed herein and a certificate of official search confirming that the suit land is registered in the name of the Defendant.



19. This Court notes that while the Plaintiff alleges to have gained entry into the suit land sometime in 1991 and to have been in occupation of it for about 29 years, but he has not established how he gained the said entry. This Court is unable to tell from the evidence produced and from the Plaintiff's pleadings whether the said entry was permissive or non-permissive. Further, this court notes that while the Plaintiff alleges to have been in possession of the suit land for over 29 years since 1991, he has not adduced any evidence including but not limited to photographs to support his claim. In addition, the Plaintiff did not even call any witnesses to corroborate and substantiate his averments about the nature of his possession.
20. This Court has herein above stated that the burden of proof was squarely upon the Plaintiff's ambit, as he is the one who claims to be in adverse possession of the suit land. Further, this Court has also stated that this being an undefended claim, the Plaintiff's duty to proof was higher. Therefore, this duty Court is bound to thoroughly investigate all the evidence adduced as though the claim was defended even if it was not. The Court is of the view that the Plaintiff failed to appreciate his evidentiary burden of proof and very lightly presented his case. The Plaintiff's claim is premised on allegations, which allegations he seems to have put little or no effort to substantiate and/or proof with the help of evidence including but not limited to documents, witnesses and photographs.
21. As stated herein above, a claim for adverse possession is not to be taken flippantly as the nature and extent of orders for adverse possession amount to extinction of a right to property of the registered owner of the said property.
22. Based on the above, this Court finds and holds that the Plaintiff has failed to meet the required burden of proof to warrant the grant of order for adverse possession over the whole parcel of land known as Loc. 14/kiru/3129, situated within Murang'a County.
23. The upshot of the above is that the Plaintiff herein has failed on a balance of probability to prove his claim for adverse possession against the Defendant herein on the required standard. It follows therefore that the Originating Summons dated August 18, 2020 is found not merited and the same is dismissed entirely.

2. Who should bear the costs of the suit?

24. It is trite that costs shall follow the events, and that the successful party be awarded costs. It is no doubt that the Defendant herein is the successful party. However, this Court notes that the said Defendant failed and/or neglected to participate in this suit despite service. This Court therefore shall exercise its discretion and grants no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 14TH DAY OF JULY, 2022.

L. GACHERU

JUDGE

In the presence of; -

Joel Njonjo – Court Assistant

Mr Mindo for the Plaintiff

N/A for the Defendant

L. GACHERU



JUDGE

14/7/2022

