



**Ondara v Njeri & 2 others (Environment & Land Case 38 of 2020)  
[2022] KEELC 3610 (KLR) (18 August 2022) (Judgment)**

Neutral citation: [2022] KEELC 3610 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 38 OF 2020  
FM NJOROGE, J  
AUGUST 18, 2022**

**BETWEEN**

**ESTHER NYABOKE ONDARA ..... PLAINTIFF**

**AND**

**SUSAN NJERI ..... 1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR NAKURU ..... 2<sup>ND</sup> DEFENDANT**

**GEORGE NJOROGE ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff's claim has been brought by way of an amended plaint dated 27/4/2021. In that pleading she seeks the following prayers:
  1. An order compelling the District Land Registrar Nakuru to issue a certified extract of title in respect of Kiambogo /Kiambogo Block 2/2103 (Mwariki) (hereinafter referred to as "the suit land") to the plaintiff forthwith;
  2. A declaration that title to the suit land registered in the name of the 1<sup>st</sup> defendant has been extinguished in favour of the plaintiff by the operation of sections 7, 13 and 17 of the *Limitation of Actions Act* chapter 22 of the laws of Kenya.
  3. A declaration that the plaintiff has acquired title to the suit land by adverse possession or prescription and that the 1<sup>st</sup> defendant is holding title to the suit land in trust for the plaintiff;
  4. A permanent injunction restraining the 1<sup>st</sup> and 3<sup>rd</sup> defendants whether by themselves their employees servants agents or otherwise howsoever from entering, taking possession occupying charging, or carrying on any development, disposing, or dealing with the suit land in any manner prejudicial to the interests of the plaintiff;



5. An order compelling the 2<sup>nd</sup> defendant to register the plaintiff as the proprietor of the suit land and issue her with a title forthwith;
  6. An order directing the Deputy Registrar this court to execute all instruments necessary to convey the title to the suit land to the plaintiff;
  7. Costs of the suit with interest;
  8. Any other or further relief that this court may deem fit to grant;
  9. Kshs 24,000/=.
2. The plaintiff's claim is that her husband acquired title number Kiambogo/Kiambogo Block 2/2104 (Mwariki) in 1998 and their family settled thereon; that she commenced utilisation of a nearby vacant plot title number Kiambogo/Kiambogo Block 2/2103 (Mwariki) for her subsistence needs and grazing of livestock; that when she inquired from her neighbours as to the whereabouts of the proprietor they said they did not know the owner and so she fenced the property and continued with her activities thereon; that she has been in visible, exclusive, open, notorious peaceful and uninterrupted possession or occupation of the suit land for 22 years; that she applied for an extract of title from the 2<sup>nd</sup> defendant on 16/4/2019 and paid the required fees but the 2<sup>nd</sup> defendant has unjustifiably declined to issue the said extract to date; that the 1<sup>st</sup> defendant purports to have purchased the property from one Daniel Mutua Kilonzo and is now offering it for sale; that she has sought help from the local administration to evict the plaintiff; that the plaintiff has legitimate expectation of being registered as proprietor; that the 3<sup>rd</sup> defendant is colluding with the 1<sup>st</sup> defendant to interfere with the plaintiff's peaceful occupation of the suit land; that various acts of waste and destruction have been committed by goons at the behest of the 1<sup>st</sup> and 3<sup>rd</sup> defendants and so the plaintiff has sustained special damages of Kshs 24,000/= hence the instant suit.

### **Defence**

3. In her defence dated 8/6/21 the 1<sup>st</sup> defendant denied the plaintiff's claim. She stated that she had purchased the suit land and had it transferred to her on 18/6/2019 and that she had been in exclusive possession thereof since then. She claimed to have erected a site house on the suit land in which she houses an employee and denied that the plaintiff is in occupation of the property. She further stated that she has not had title for more than 12 years and so the claim for adverse possession can not lie as against her.

### **The 2nd and 3rd Defendants.**

4. I have perused the court record and I have found no defences filed on behalf of the 2<sup>nd</sup> defendant and the 3<sup>rd</sup> defendant. On 19/5/22 when the matter came up for hearing Mr Omae for the plaintiff applied to withdraw the suit as against the 3<sup>rd</sup> defendants which order was granted and the case thus proceeded only against the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

### **Evidence Of The Parties.**

5. The plaintiff testified on 19/5/2022. Her evidence followed the contents of the amended plaint: she produced pictures showing her family's house and the suit land, which border one another; she stated that she saw the 1<sup>st</sup> defendant for the first time in the year 2020; according to her the 1<sup>st</sup> defendant never resided on the suit land or took possession after purchase; she identified the crops in one picture as belonging to her. The pit latrine on the suit land as seen in one of the photographs was constructed by



the 1<sup>st</sup> defendant. So was the house in which the 1<sup>st</sup> defendant's worker stays. After she was advised by her advocate that she could get title to the land by way of prescription she unsuccessfully sought to get a copy of the green card from the 2<sup>nd</sup> defendant. However, in 2019 certain persons were brought to be shown the suit land and she obtained a restriction against the land.

6. Upon cross-examination by Mr Gakinya for the 1<sup>st</sup> defendant, she stated that her husband had purchased plot no Kiambogo/Kiambogo Block 2/2104 (Mwariki) from one Kangethe in 1998 who had lived near their home; that there were other persons who had purchased plots near her home and developed them at different times; that the suit land is the only plot that she had been cultivating; that she did not know the owner of the suit land; that even Kangethe did not know the owner thereof; that she never asked Kangethe whether he had ever transferred the suit land to any other person; that she inquired as to the ownership of the suit property from her neighbours but they answered that they did not know the owner; that she then fenced off the plot and grew crops thereon. However, someone appeared in 2020 and claimed the suit land. She did not know whether that person is the owner of the suit land then but now she has come to know that the 1<sup>st</sup> defendant is the owner; according to her, Kangethe at one time gave the name of the owner of the suit property as Mutua; that she had never seen the said Mutua; that Kangethe told her to continue utilising the suit land; that the title to the plot that her home is built is in the name of one Jomo Kamao Moya; that she took possession of her plot in 1998; that she had no intention of having a larger plot at the beginning; that the green card states that the suit land was previously owned by Kangethe who transferred it to one James Gathoe on 23/8/1995 but it reverted back to Kangethe on 28/7/1997; that thereafter it was transferred to Daniel Mutua Kilonzo on 4/9/1997 and then to Jomo Kamao Moya her husband, on October 13, 2016. She admitted that the green card reads that the title in her husband's name was cancelled for fraud. She admitted that during all those changes, her family were residing on the said plot. Later on October 26, 2018 the suit land was transferred to Alex Chege and on 18/6/19 it was transferred to the 1<sup>st</sup> defendant. She stated that she would not know how her husband had obtained the title to the suit land. Upon further cross-examination she admitted that her husband was aware that she had filed the instant suit. The 1<sup>st</sup> defendant later came to the land and uprooted the fence that the plaintiff had erected and erected her own fence and built a site house. There is a young man who now lives on the suit land. She made a report when the young man came to uproot her fence. She is not aware if her husband had ever had a dispute over the suit land with Daniel Mutua.
7. PW2, Maisiba Maranga Ondieki testified orally on 19/5/2022 and also adopted his written witness statement dated 10/3/2022. His evidence is that he knows the plaintiff who came to the area in 1998, that he found her settled in the area. That the suit plot is located about one plot away from his; that the plaintiff has been in continuous possession of the suit land and she has never vacated it.
8. Upon cross-examination by Mr Gakinya he stated that both he and the plaintiff were purchasers of their respective plots from Samuel Kangethe who had subdivided his land and sold it as sub-plots; that he settled on his plot in 2002; that Kangethe sold some plots at first and rested, then, after some time he began to sell the rest of the land in bits; that in 2020, he got information that some people had uprooted posts from the land. He confirmed that there was a maize crop and a site house on the land at the time of hearing. However, he does not know who planted the maize crop. After PW2 completed his evidence the plaintiff's case was marked as closed.
9. The 1<sup>st</sup> defendant testified on 19/5/2022 and adopted the contents of her sworn affidavit dated 9/6/2020 as her evidence-in-chief. Her evidence is that the suit land belongs to her; that the name was transferred to her from Alex Chege Mwangi, her husband in 2019; that her husband had purchased the suit land from one Daniel Mutua Kilonzo on 1/5/2015; that when they went to take up possession, they found that the suit land had been registered in the name of one Jomo Kamao Moya who alleged



that he had purchased the land from Daniel while the plaintiff and her husband were still in possession of an original title in the name of Daniel. The matter was taken up by the Criminal Investigations Department and Jomo Kamao Moya was summoned to the CID office where he stated that he was issued with the title in his name by the Land Registrar. Thereafter he disappeared and his title was cancelled. After that, Daniel Kilonzo signed the transfer and title was processed in the name of the Alex Chege Mwangi. When they went to the suit land they found a fence which they removed and erected their own and built a house thereon. A Mr Maingi resides in that house on the 1<sup>st</sup> defendant's behalf. In the current year the 1<sup>st</sup> defendant farmed a maize crop on the suit land. She asserted that the land was in her possession as at the time of the hearing. She testified further that at first when she met the plaintiff farming on the suit land, the latter acted and spoke amicably and she stated that the plot was not hers and so she and her husband purchased it. She asserted that the plaintiff had been farming on the land with the licence from the registered owners. She further stated that the plaintiff farmed on the land for only one year while the title was in her name and no rights under adverse possession can accrue to her. She maintained that she took up possession of the land immediately it was transferred to her on 18/6/2019.

10. Upon cross-examination by Mr Omae she stated that when she went to survey the land alongside her cousin between 2016 and 2017, there was a maize crop on the land. It was also fenced and the plaintiff was farming on it. At the chief's office the plaintiff was told to remove her crop. When the 1<sup>st</sup> defendant told her to stop farming, the plaintiff defied the order and the 1<sup>st</sup> defendant therefore removed her fence and constructed a pit latrine and a site house. She also uprooted some maize in the process. According to her, her husband and the plaintiff had never met.
11. At that juncture the 1<sup>st</sup> defendant's case was marked as closed. No evidence was called in the 2<sup>nd</sup> defendant's case and it was also deemed closed. Thereafter the court gave directions for the filing of submissions. The plaintiff filed her v submissions on 3/6/2022 and the 1<sup>st</sup> defendant filed her submissions on 31/5/2022.

### **Determination.**

12. I have considered the pleadings the evidence and the submissions of the parties in the instant case. The principal issue for determination in the instant suit is whether the plaintiff has established that she is entitled to be registered proprietor of the suit land by virtue of adverse possession.
13. I will deal with the issue of possession and dispossession first. Section 7 of the [Limitations of Actions Act](#) provides as follows: -
  - “(a) An action to recover land 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”.
14. It would be deemed that whoever owns land can not bring an action to recover it after 12 years. On the other hand, a person in adverse possession of another's land for a similar period may bring an action for declaration and registration as proprietor by prescription. The 12-year period requisite period for the claim of adverse possession under Kenyan law must be computed from the date of entry and in the instant it is 1998 since in her evidence the plaintiff stated that she has been in occupation of the land since that year. By then, the registered proprietor was one Daniel Mutua Kilonzo. There is therefore no doubt that up to the year 2010, 12 years had elapsed in the plaintiff's favour as against Daniel Mutua Kilonzo with respect to the suit land.



15. The second issue is whether the plaintiff proved an intention to dispossess the owner of the use of the suit land in a manner consistent with the doctrine of adverse possession. In brief, was the possession adverse to the title held by Daniel Mutua Kilonzo?
16. In the case of *Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees* [2016] eKLR the Court of Appeal held as follows:
  - “ 16. A claim for adverse possession arises where land owned by a person is claimed by a trespasser on the basis that the trespasser, with the knowledge of the owner, has occupied it adversely to the title of the owner continuously for an interrupted period of not less than 12 years.” (Emphasis mine)
17. According to *Halbury’s Laws of England*, 4th Edition Volume 28, paragraph 768: -
  - “No right to recover land accrues unless the land is in the possession of some person in whose favour the period of limitation can run. What constitutes such possession is a question of fact and degree. Time begins to run when the true owner ceases to be in possession of his land.”
18. Was the plaintiff a person in favour of whom time could run for the purposes of adverse possession? The plaintiff’s evidence was that she did not know the owner of the suit land even as she squatted on it, that she had never met him, and that the very first person she met who claimed the suit land was the 1<sup>st</sup> defendant. The plaintiff never obtained a certificate of official search from the land registry or an extract of title, and that further stresses the fact that she never knew the proprietor of the suit land. As a prominent mark of her failure to find out who was the registered proprietor before the filing of the instant suit, she included in her amended plaint a prayer for an order compelling the Land Registrar to issue her with an extract of title in respect of the suit land. It appears that Daniel Mutua Kilonzo did not know the plaintiff. The plaintiff also never established that Daniel knew her and of her occupation of the suit land. Her own evidence therefore renders the plaintiff incapable of ever having had the intention to deprive Daniel of the use and occupation of the suit land in a manner that would befit her claim of adverse possession.
19. The upshot of the foregoing is that since the plaintiff never knew the registered proprietor in the first place she can not and has not established before this court that she intended to possess and exercise power over the suit land in a manner that was inconsistent with and adverse to the rights of that owner; she lacked the *animus possidendi*. Lack of proof of intent to totally dispossess the paper title holder of their land is fatal to her claim under adverse possession. The plaintiff was thus not a person in whose favour time could run in adverse possession.
20. It is therefore the case that the plaintiff has not proved adverse possession against Daniel, which proof would have been a prerequisite to the deeming of her period of possession as transcending Daniel’s proprietorship and continue to run adversely into the tenure of those subsequently registered as proprietors of the suit land.
21. Daniel’s proprietorship of the land ended on October 26, 2018 with the transfer of the suit land into the name of Alex Chege Mwangi who later transferred the suit land to the 1<sup>st</sup> defendant. The plaintiff did not also know the said Alex Chege Mwangi and has not pleaded any case against him. On the same principle that the claim of adverse possession against Daniel has been declined, this court also notes that no *animus possidendi* has been proved as against Alex Chege Mwangi and the plaintiff’s possession and use of the suit land can not therefore be found to have been adverse against Alex.



22. The period of possession while the land was registered in the names of Daniel and Alex having been disqualified from the relevant computation earlier, it is clear that the 12-year period requisite for adverse possession must now be computed with effect from the date the plaintiff met the next registered owner; therefore, the very first inquiry that arises is whether the plaintiff attained that period as against the next proprietor. Consequently, the plaintiff's occupation must be computed from the date she met the 1<sup>st</sup> defendant in her capacity as the registered proprietor of the suit land, for she was next in line to Alex, and also the date when the 1<sup>st</sup> defendant as a registered proprietor obtained knowledge of such possession and failed to evict the plaintiff. Owing to the evidence of both parties given at the hearing, those events must be assumed to have taken place on the same date.
23. The plaintiff has admitted that the very first time she met the 1<sup>st</sup> defendant, and was in 2020, by which time the plaintiff was still seeking details of proprietorship of the suit land from the Land Registrar. Computation of time for the purposes of adverse possession must therefore be commence from April 2020. This suit was lodged in June 2020 and it is clear as day that the 12-year period of possession by the plaintiff while the land was registered in the 1<sup>st</sup> defendant's name, or from the date they knew one another and the 1<sup>st</sup> defendant learnt of the plaintiff's occupation, has not expired. I find that from the date that the plaintiff got to know the registered owner of the suit land to the date of the filing of the instant suit, the period fell hopelessly short of the 12-year period requisite for accrual of rights under adverse possession. It is therefore not necessary to inquire into the rest of the ingredients of the plaintiff's claim of adverse possession as against the 1<sup>st</sup> defendant.
24. In any event, within a short time after the plaintiff and the 1<sup>st</sup> defendant met, the latter asserted her right to title in the property by uprooting the plaintiff's fence and erecting her own, building a site house which subsequently accommodated her worker, who still lived on the suit land as at the date of hearing. In her submissions the plaintiff states that the defendant erected a site house on the suit premises on 24/5/2021 during the pendency of the instant suit; she further stated that the 1<sup>st</sup> defendant only occupies the site house while the plaintiff farms on the rest of the land. In the case of *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another* [2015] eKLR the Court of Appeal held as follows:
- “Besides adversal entry into the land, the applicant must also demonstrate exclusive physical possession of the land and manifest unequivocally the intention to dispossess the owner. The occupation must be open, uninterrupted, adverse to the title of the owner, adequate, continuous and exclusive as already stated. The burden of proving all these is on the person asserting adverse possession.”
25. In the case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR the court held that possession must be continuous. It stated as follows:
- “(7) The possession must be continuous, uninterrupted, unbroken, for the necessary statutory period. This element means that the possession by the adverse possessor must continue without significant interruption for a solid block of time at least as long as the period of limitation, being at the moment twelve years before the filing of suit. What is a significant interruption depends upon the nature of the land.” (Emphasis mine.)
26. The suit land appears to be a residential plot of 0.089 ha which size would not ordinarily inform any meaningful or extensive agricultural enterprise. The plaintiff does not reside thereon and appears to



have been farming. The 1<sup>st</sup> defendant on the other hand has already constructed a dwelling and has her agent residing thereon.

27. In this court's view, the plaintiff's possession of the suit land was interrupted by entry and assertion by the 1<sup>st</sup> defendant of her title to the suit land by the uprooting of her fence and the erection of a house and the 1<sup>st</sup> defendant's worker's residence thereon. In the case of *Gitbu v Ndeete* [1984] KLR 776 the Court of Appeal held as follows: -

“Time ceases to run under the *Limitation of Actions Act* either when the owner takes or asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land; (See Cheshire's Modern Law of Real Property, 11th Edition at p 894). Giving of notice to quit cannot be an effective assertion of right for purposes of stopping running of time under the *Limitation of Actions Act*.”

28. Time in the instant suit ceased to run in April 2021 if we go by the plaintiff's evidence or in 2019 if by the 1<sup>st</sup> defendant's evidence, but in either case, it had not run for 12 years and the plaintiff's claim does not lie.
29. Finally, and without prejudice to the finding that the plaintiff failed to prove *animus possidendi* against Daniel, this court has also noted the undisputed fact that the suit land was in 2016 registered in the name of the plaintiff's husband, Jomo Kamao Moyah, a registration that was cancelled by the Land Registrar for fraud upon which the title reverted to Daniel who later sold the same to the plaintiff's husband. It therefore appears that ownership of the suit land by Daniel ceased briefly in favour of the plaintiff's husband, and in such a manner that, barring the Land Registrar's finding of fraud, perchance the plaintiff had decided to sue for adverse possession, she would have had to join her own husband to her suit as the registered proprietor. This issue is vital because it is doubtful that a claim for adverse possession by a wife against her husband would succeed in law. The Court of Appeal case of *Samuel Kihamba vs Mary Mbaisi* (2015) eKLR is relevant in this regard. I am not in the least persuaded that the plaintiff was not aware that her husband had secured title to the suit land in the year 2016. The registration of the suit land in the name of the husband to the plaintiff therefore must be deemed to have obviated the need to file a claim for adverse possession on the part of the plaintiff, for they belonged to one family. Had this court not found earlier there was no proof of *animus possidendi* against Daniel, the plaintiff's husband's claim over the land as a registered owner would have been fatal to her claim.
30. In the final analysis, I find that the plaintiff's claim in the amended plaint dated 27/4/2021 lacks merit and it is hereby dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

It is so ordered.

**DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 18TH DAY OF AUGUST, 2022.**

**MWANGI NJOROGE**

**JUDGE, ELC, NAKURU.**

