



**Kirima v M’Mungania (Environment & Land Case 95 of 2014)
[2022] KEELC 12604 (KLR) (28 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12604 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 95 OF 2014**

**CK NZILI, J
SEPTEMBER 28, 2022**

BETWEEN

MARK MURIUKI KIRIMA PLAINTIFF

AND

ISABELLA KATHUNI M’MUNGANIA DEFENDANT

JUDGMENT

A. Pleadings

1. The plaintiff took out an originating summons dated June 18, 2014 under section 7 (2) of the [Land Act](#), section 28 (b) of the [Land Registration Act](#) seeking the court to determine:- if he has acquired 1.488 acres being a subdivision of the defendant’s LR No Nkune/Ngonyi/624 by virtue of adverse possession;- if any purported sale and transfer by the defendant to third parties is valid or legal in view of question (1) above; if the plaintiff has occupied the said portion open and continuously since 1990; if the plaintiff should be registered as the owner of the said portion in place of the defendant; if the defendant should be restrained from interfering, evicting or in any way whatsoever interfering with the plaintiff’s quiet and peaceful occupation of the said portion and lastly if the purported sale to third parties was fraudulent.
2. The originating summons was supported by the grounds on the foot of the summons and an affidavit sworn on the even date by Mark Muriuki Kirima attaching a copy of the extract of the title, a sale agreement dated August 27, 1990 and a photograph of the suit premises.
3. Further, the plaintiff relied on her list of witnesses, witnesses’ statements and a list of documents dated June 18, 2014 and filed on June 19, 2014.
4. Through a replying affidavit sworn on July 23, 2018, the defendants opposed the originating summons on the basis that the said land was inherited from his late father and registered on October 11, 1990 which he has been in occupation.



5. The defendant denied having the capacity to sell any land on August 27, 1990, executing or receiving the alleged Kshs 50,000/= from the plaintiff out of any alleged sale agreement. Further the defendant denied that the plaintiff had ever taken possession of his land as alleged ever making a promise to transfer any of his land to the plaintiff as alleged or at all.
6. The defendant averred he had sued the plaintiff in Nkubu PMCC No 68 of 2014 for the removal of a wrongful caution and on the same day he filed this suit as per the attached plaint and summons to enter appearance. That on July 2, 2014, the defendant averred he amended his plaint and sought for injunctive orders against the plaintiff which were granted on July 2, 2014. He therefore urged the court to find the originating summons unmeritorious.
7. Similarly, the defendant filed a list of witnesses and witnesses' statements and list of documents dated July 23, 2018.

B. Testimony

8. The plaintiff adopted his witness statement dated June 18, 2014 as his evidence in chief and produced a sale agreement dated August 27, 1990, a copy of a green card for LR No Nkuene/Ngonyi/624 and 783, a demand notice and an affidavit of service as P. exhibit 1-5 respectively. He emphasized he had been on the suit land since 1990.
9. The plaintiff said that the sale agreement was witnessed by a lawyer as he paid the consideration. Further he said there was no problem even if the defendant had not signed the sale agreement since gave him vacant possession. As regards Nkubu suit, the plaintiff acknowledged its existence. Regarding P. exhibit 2, PW 1 admitted the names of the owners were Isabella and Ntatiba in equal shares though the indication was that the land was already surveyed. PW1 confirmed that there were no signatures by the seller on the sale agreement nor could it be ascertained from the sale agreement. Similarly, PW 1 admitted that it could not be ascertained from the sale agreement if Kshs 50,000/= was ever paid. However, he insisted he paid the money in cash form before the advocate who witnessed the sale agreement.
10. PW 1 confirmed the suit land in 1990 was Parcel No 624 which was later partitioned into two with the defendant's portion being registered on October 11, 1990, who declined to sign a new sale agreement afterwards, despite several efforts to do so leading to the caution placed on June 4, 2014. This was done after the defendant started harassing the plaintiff and refused to transfer the land. Eventually PW 1 said he wrote a demand letter – (P exh (4)) the defendant.
11. PW 1 admitted that he had defended himself in the Nkubu matter though the defendant in the suit was not claiming an eviction order but an injunction. PW 1 stated he was the one tilling the suit despite failing to produce before court water connectivity and receipts of payments. He produced photos showing other developments on the land.
12. In addition, PW 1 testified that he used to be teacher in the area, though his homestead was elsewhere and was utilizing the suit land through farming hence the reason he sought and obtained interim orders of both inhibition and injunction following, which contempt proceedings were brought against the defendant for the disobedience of the interim orders. Reports were also made to the police.
13. In re-examination, the plaintiff reiterated that the defendant was selling her share of parcel No 624 which she co-owned with Ntiba and eventually became Parcel No 783, after the subdivision.
14. PW 2 adopted her witness statement dated January 18, 2014 as her evidence in chief. She confirmed that it was the plaintiff's casual labourer on the suit land. PW 2 confirmed knowing about the sale



- though she did not witness the same. Further PW 2 stated the defendant had allegedly cut down the plaintiffs' trees resulting to being summons by the police.
15. As a neighbour PW2 reiterated that though the defendant inherited the land from her father but sold it to the plaintiff who planted gravellia and mango trees currently at maturity stage.
 16. PW 3, adopted her witness statement dated June 18, 2014. As a neighbor to the plaintiff, PW 3 confirmed that it was the plaintiff who had planted fruit trees and was in occupation of the land until the defendant allegedly started claiming the land in 2014. She confirmed that the land was served with water installed by the plaintiff. PW 3 stated he was a casual labourer of the plaintiff prior to 2014.
 17. DW 1 adopted her replying affidavit sworn on July 23, 2018 and a witness statement dated 23 as her evidence in chief. She produced a plaint in Nkubu PMCC No 68/14, as D Exh (1), affidavits of service D Exh (2), summons to enter appearance, D Exh (3), amended plaint D Exh (4) and a copy of the order as D Exh (5) respectively.
 18. She denied signing the sale agreement produced as P. Exh No (1) or receiving the alleged purchase price. She further clarified that she came to own the land in 1990, was by then living in Kiamakoro area and could not therefore recall the plaintiff being on her land prior to the lodging of the Nkubu case after she found out that the plaintiff had registered a caution against her land, based on a purchaser's right.
 19. Further DW 1 admitted she was taken to the police on account of cutting down trees. She said she was not charged after the police established that the trees belonged to her. DW 1 disputed that the plaintiff has been on her land openly, uninterruptedly and notoriously for over 12 years. Even though P. Exh (1) bore her names and ID card No DW 1 denied giving the said details to the plaintiff but suspected he may have collected the same from her uncle.
 20. DW 1 confirmed that she left the suit land while she was young but acquired the land through succession. DW 1 also confirmed knowing the plaintiff since 1987. As regards the photos produced by the plaintiff, DW 1 said the same reflected her developments on the suit land which she was entitled to despite being married and living in Kiamakoro area.
 21. DW 2 adopted his witness statement dated July 23, 2018 as his evidence in chief. DW 2 said he was the caretaker of the defendant's land but would not confirm the items appearing in the photos produced by PW. 1. He however confirmed that the suit land had piped water. He confirmed DW 1 had cut down some trees. He could not however tell for which land the photos had been taken.

C. Written submissions

22. The plaintiff submitted that based on the sale agreement, entry into the land was permissive but after the last instalment was paid, adverse possession set in going by the holding in Public Trustee v Wanduru Ndegwa (1984) eKLR, Hosea v Njiru & others (1974) EA 526 and Stephen Mwangi Gatunge v Edwin Onesmus Wanjau ELC No 7 of 2021 (OS).
23. The plaintiff submitted his evidence has been corroborated by PW 2 as being an active user and developer of the land since 1990 in an open, continuous, in an exclusive manner, and with the intention to dispossess the defendant. Further, the plaintiff submitted his occupation was evident given his efforts to repulse the alleged trespass into the suit land by the defendant together with the police report of malicious damage to his property.
24. Reliance was placed on Meru Central Farmers' Cooperative Union v Ruth Igoki Rintari & others (2019) eKLR on the proposition that title to land extinguishes by operation of the law after a seller fails to obtain a land control board consent to facilitate a transfer of his land.



D. Issues for determination

25. The court has carefully gone through pleadings, list of documents filed, evidence tendered and the written submissions. The issues commending themselves for determination are;
- i. Whether the entry into the suit premises by the plaintiff was out of a valid sale agreement.
 - ii. If the plaintiff has proved the ingredients of adverse possession.
 - iii. If there was interruption with the filing of the suit in Nkubu laws courts and the issuance of a temporary injunction.
 - iv. What is the order as to costs?

E. Determination

26. The plaintiffs claim is based on an entry into the suit land on account of permissive possession based on a sale agreement dated August 27, 1990. The defendant denies the existence of such sale agreement since at the time she had no land to sell and or transfer; the agreement does not bear her signature and that she did not receive the alleged consideration from the plaintiff.
27. It is trite law that parties are bound by their pleadings and issues flow from pleadings. See *IEBC v Stephen Mutinda Mule* (2017) eKLR. As stated above the plaintiffs' claim is based on the originating summons dated June 18, 2014 backed by her paginated bundle of documents filed on August 3, 2018, while the defendant filed a replying affidavit sworn on July 23, 2018 and attached her paginated bundle filed on August 8, 2018 containing D Exh (1), (2), (3), (4), (5) respectively.
28. In her defence D Exh No 1, at paragraphs 5 & 6 defendants attacks the sale agreement solely on account of sections 6 & 8 of the [Land Control Act](#) and proceeds to seek for its nullification and for vacant possession. In her statement accompanying the plaint at Nkubu Law Courts, the defendant states and I quote: "On August 27, 1990 I entered into a sale agreement with the defendant and as per clause 6, the defendant was to foot all the costs of transferring the land but the defendant refused to do so and as such no consent from the land control board was applied for and obtained within six months from August 27, 1990. I am therefore suing the defendant for removal of the caution and for a declaration that the defendant has no agreement to enforce against me".
29. In the said suit the defendant also attached the sale agreement.
30. Looking at the said clear pleading, the defendant is estopped in law from stating otherwise subsequent to this by denying the obvious in her replying affidavit to the originating summons sworn on July 23, 2018 and written statements dated July 23, 2018, prepared by the same law firm as the previous one.
31. The defendant does not raise any forgery of the sale agreement, misrepresentation or complaint against the law firm or the lawyer who had prepared and witnessed the sale agreement in the first instance.
32. The law on the sale of land at the time did not require as a condition precedent an appended signature by a vendor. See Legal Notice No 189/2002 and sections 3 (7) of the [Law of Contract Act](#). All what was required was an acknowledgment note by the vendor or any of his representatives. See Legal Notice No 18 a of 2002 and section 3 (7) of the [Law of Contract Act](#).
33. Similarly, the law further required the taking of vacant possession by the purchaser as a sign of consummation of a land transaction.



34. Based on the foregoing, my finding therefore is that the plaintiff made entry into the suit premises based on a valid sale agreement. This was therefore permissive a possession of the suit land.
35. Coming to the 2nd issue, a party seeking orders of adverse possession must prove adequate possession, in continuity, in publicity and in extent that was adverse to the registered owner. See *Maweu v Lin Ranching & Farming Cooperative Society* (1985) eKLR 430.
36. The court in *Samuel Miki Waweru v Jane Njeri Richu* Civil Appeal No 122 of 2001 held adverse possession cannot succeed if possession was with the permission of the registered owner.
37. In this suit, though the court has found the initial possession was permissive, once the defendant failed to honour the sale agreement and or transfer the land, the plaintiff remained on the land without the defendant's permission between 1990 and 2014. The plaintiff has testified he made entry into the land and remained therein undertaking various farming activities to the exclusion of the defendant not as a licensee but with the animus possidendi of dispossessing the registered owner.
38. The acts of developing the suit property without the permission of the defendant between 1990 and 2014 is indicative that the defendant had been dispossessed of her ownership by acts inconsistent with her enjoyment of the suit for the purpose which she wishes to use it. See *Wambugu v Njuguna* (1983) KLR 172.
39. The plaintiff had paid the entire purchase price. He was on the land without force, with full knowledge of the defendant and without persuading her to undertake such acts. There is no evidence that the occupation was broken between 1990 and 2014 when the defendant allegedly filed the Nkubu suit and obtained restraining orders. As at the time the said orders were obtained, already 12 years had elapsed.
40. The caution was also in operation by the time the defendant was filing the suit. Similarly, there is no evidence that prior to 2012, the defendant had given the plaintiff a notice to vacate the suitland. See *Abednego Othudo Ayuku v Laban Masinjira* (2021) eKLR.
41. In *Ruth Wangari Kanyagia v Josephine Muthoni Kinyanjui* (2017) eKLR the court held that if there is evidence of consensual occupation, adverse possession is not proved even if a party asserting it has been on the land for 12 years.
42. In this suit even after the 12 years, the defendant's own admission in D Exh's 1-4 show she was not disputing the long occupation by the plaintiff but was basing her claim on the non-enforceability of the sale agreement. The plaintiff in this suit however has been categorical that he has been exclusively on the land, displaced and disposed the registered owner by asserting hostile title to her rights.
43. The plaintiff never sought the defendant's permission and or consent to occupy the suit land. This is evidenced by the report to the police over trespass when the defendant allegedly attempted to gain entry and cut down the plaintiffs' trees on the suit premises. See *Stephen Mwangi Gatunge v Edwin Onesmus Wanjau* (supra) and *Meru central* (supra).
44. In *Mtana Lewa v Kabindi Ngala Mwangandi* (2015) eKLR the court held adverse possession is established where a person takes possession of the land, asserts rights over it and the person having title to it omits or neglects to take an action against such person in assertion of his title for 12 years.
45. The defendant herein sought to reclaim the land after 12 years. Already the rights of adverse possession by the plaintiff had accrued and a title hostile to him came to existence as per sections 9, 10, 11, 12, 13 & 17 of the *Limitation of Actions Act*.



46. The combined effect of the above sections as read together with section 38 thereof is that the title of the proprietor of the land is extinguished in favour of the adverse possessor at the expiry of 12 years of occupation of the adverse possession of the suit land.
47. Under section 28 (b) of the [Land Registration Act](#), such rights are overriding interests on the land as recognized under section 7 thereof.
48. In [Kasuve v Mwaani Investment Ltd & 4 others](#) (2004) IKL 184, the court held a party to be entitled to adverse possession must prove two key elements dispossession of the owner and discontinuation of the possession by the owner on his own volition.
49. In this suit the plaintiff has proved the two elements. The defendant by filing the Nkubu suit admitted she had been disposed since 1990 and was trying to seek for the court to declare the initial consensual dispossession invalid in law. Unfortunately, the concept of adverse possession had taken effect.
50. The defendant alleged to have been in occupation of the suit land. However, her own pleadings in the Nkubu case appear inconsistent with this pleading. The effect of the injunctive order produced as D Exh No 5 is that it was the plaintiff who was in possession and not the defendant. The said order did not amount to eviction of the plaintiff from the suit land.
51. In [Gitbu v Ndeete](#) (1984) KLR 776, the court held time which has began to run is stopped when the owner asserts his right; when his right is admitted by the adverse possessor or when the owner takes legal proceedings or makes an effective entry into the land. Further, the court held a registered owner must either make a peaceful and effective entry or sue for recovery of the land.
52. In this suit, there is no evidence that the defendant either retook possession of the suit land or that he successfully removed or ousted the plaintiff from possession of the suit land.
53. My view therefore is that, the Nkubu suit filed in 2014 did very little to stop time from running nor did it dislodge the plaintiff from the suit land, since the title by way of adverse possession had already accrued and vested in favour of the plaintiff.
54. The evidence of the planting and tending fruit trees which as confirmed by DW 3 are mature trees aged over 10 years demonstrates animus possidendi, as though it was as of right which acts the defendant was all aware of.
55. In [Kweyu v Omutu](#) (1990) KLR 709 the Court of Appeal held possession is a matter of fact and whether or not possession is adverse is a matter of a legal conclusion. See [Wilson Njoroge Kamau v Ng'ang'a Muceru Kamau](#) (2020) eKLR.
56. The totality of the above evidence leads this court to make a finding that the plaintiff has proved his case to the required standards.
57. The upshot is that:
 - a. A declaration be and is hereby issued that the plaintiff is entitled to LR No Nkuene/Ngonyi/783 by virtue of adverse possession and should be registered as such.
 - b. An order is hereby issued directed at the defendant to transfer LR No Nkuene/Ngonyi/783 within 90 days from the date hereof in default the deputy registrar of the court to sign the transfer form.
 - c. Costs to the plaintiff.



**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 28TH DAY
OF SEPTEMBER, 2022**

In presence of:

C/A: Kananu

Mukaburu for plaintiff

Karanja for defendant

HON. C.K. NZILI

ELC JUDGE

