



Naipita v Representatives of Moseka Damec Ngátun (Environment and Land Case Civil Suit 28 of 2021) [2022] KEELC 4791 (KLR) (19 September 2022) (Judgment)

Neutral citation: [2022] KEELC 4791 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND CASE CIVIL SUIT 28 OF 2021
EM WASHE, J
SEPTEMBER 19, 2022
(FORMERLY NAROK ELC CASE NO. 333 OF 2017)
IN THE MATTER OF: LIMITATION OF ACTIONS ACT, CAP 22 LAWS OF KENYA
AND
IN THE MATTER OF LAND PARCEL NO. TRANSMARA/MOITA/295
BETWEEN
JOSEPH OLOINYENYE NAIPITA PLAINTIFF
AND
REPRESENTATIVES OF MOSEKA DAMEC NGÁTUN DEFENDANT

JUDGMENT

1. The Plaintiff herein filed an Originating Summons dated October 28, 2015 seeking for a declaration that he was entitled to a claim of adverse possession to all the parcel of land known as Transmara/Moita/295 measuring approximately 11.99 Hectares (hereinafter referred to as “the suit property”)
2. Subsequently thereafter, the Plaintiff filed an amended Originating Summons on the dated November 23, 2020 (hereinafter referred to as “the present Originating Summons.”)
3. In support of the present Originating Summons, the Plaintiff filed a Supporting Affidavit dated November 19, 2020, annexed a Sketch Map of the Location of the suit property, a certified Copy of the Certificate of Official Search for the suit property and a letter dated March 25, 1997.
4. The Plaintiff also filed a List of Witnesses namely Wilson Kayioni Nakuro and Oloishuro Nantei together with their statements both dated November 23, 2020.
5. Similarly, the Plaintiff filed a List of Documents dated November 23, 2020 attaching a copy of the adjudication map, a copy of the Certificate of Search of the suit property dated September 25, 2015,



- copy of the adjudication overlap notice dated March 25, 1997 and the Copy of the letter dated September 30, 2004.
6. On the other hand, the Defendant filed a Replying Affidavit through the Moseka Daniel Nga'tuny on the December 9, 2015.
 7. The Late Moseka Daniel Nga'tuny also filed a Statement dated December 8, 2015.
 8. On the June 7, 2016, the Defendants filed a List of Documents which entailed the a copy of the Title Deed of the suit property, the respective Green Card of the suit property, a copy of the Declaration of the Adjudication and Demarcation process of Moita Adjudication Section dated May 27, 1985, the Copy of the Declaration of the adjudication and demarcation process of Masurura Adjudication Section dated 14th June 1996, the Area Index Map in respect of the suit property, an official search of the property known as Transmara/Ololchani/297 and lastly the pleadings, affidavits and documents filed in Kisii ELC Case No. 495 of 2015.
 9. The Defendant further filed a List of Witnesses namely Moseka Daniel Ngatuny, Jeremiah Saoli Ole Megh, Area Chief Masurura Location and the Sub-county Land Registrar, Transmara West & East.
 10. A List of issues as perceived by the Defendant was filed on the June 7, 2016 while the Plaintiff filed his list of issues on the June 13, 2016.
 11. Upon close of pleadings but before hearing of the suit, the original Defendant Moseka Daniel Ngatuny passed away and was substituted with present Defendant pursuant to the Letters of Administration Ad Litem issued thereafter.
 12. A supplementary List of Witnesses as well as Statement by the present Defendant was filed on the November 24, 2020.
 13. The hearing of this suit commenced on the 25/6/2021.
 14. The 1st Witness was the Plaintiff who adopted his statement dated 28/10/2015 in the form of an affidavit as his evidence in chief.
 15. During the hearing, the Plaintiff produced the Map of the Moita Adjudication Section as Exhibit No. 1, the Certificate of Official Search of the suit property as Exhibit No. 2, a Complainant Letter dated 26/3/1997 as Exhibit 3, a Letter from the District Commissioner on the dispute and resolution dated 30/11/2004 as Exhibit 4.
 16. The Plaintiff testified that he had occupied the suit property since 1984 and his occupation had never been disputed by anyone including the Defendant.
 17. The Plaintiff further testified that even upon the death of the original Defendant, the burial was conducted in a different place and not the suit property.
 18. The Plaintiff's prayer therefore was that the Court do grant his prayer and further direct the registrar to issue another title deed in his name.
 19. On cross-examination, the Plaintiff indicated that Exhibits 2, 3 and 4 did not make any reference to the suit property but the challenges between the Moita Adjudication Section and Masurura Adjudication Section.
 20. Secondly, the Plaintiff indicated that he had not produced any evidence to show his occupation on the suit property and/or when the entry into the suit property occurred.



21. On the Map produced as Exhibit 1, the Plaintiff confirmed that Transmara/Moita/295, Transmara/Moita/296 and Transmara/Moita/297 were adjacent to one another.
22. Similarly, the Plaintiff confirmed that he has another case with the owner of Transmara/Moita/296 regarding adverse possession while the Plaintiff owned Transmara/Moita/297.
23. The Plaintiff indicated that the property known as Transmara/Moita/296 measured approximately 10.98 Hectares while Transmara/Moita/297 measured approximately 15.66 Hectares.
24. The Plaintiff indicated that he does not reside on the property known as Transmara/Moita/297 but grazes cattle on the same.
25. Lastly, the Plaintiff indicated that he is not the one who had dug a trench on the property known as suit property.
26. In conclusion, the Plaintiff indicated that his entire homestead had been fenced and its transcends on the two parcels of land.
27. On re-examination, the Plaintiff denied knowledge of the trench made on the suit property.
28. The Plaintiff further indicated that he took possession of the suit property before filling of this suit.
29. The Plaintiff's Second witness known as Wilson Kayony Nakuro testified on the 13/10/2021.
30. The Plaintiff's Second witness adopted the Statement dated November 23, 2020 and fully relied on the same as his evidence in chief.
31. The Plaintiff's Second Witness indicated that he also owns the property known as Transmara/Moita/559 which is about 4 Kilometres from the suit property.
32. The Plaintiff's Second witness testified that it is the Plaintiff who occupies the suit property and has built his home, does farming and keeps cattle on the same.
33. The Plaintiff's Second Witness concluded his testimony by stating that he does not know the Defendant and has never seen her in occupation of the suit property.
34. In cross-examination, the Plaintiff's Second witness indicated that the Plaintiff had two wives who live with him on the same parcel of land.
35. According to the Plaintiff's Second witness, the Plaintiff only had one parcel of land which he admitted to not knowing the number or the acreage.
36. The Plaintiff's Second witness however stated that according to his knowledge, the parcel occupied by the Plaintiff was the suit property.
37. On being referred to the Certificate of Official Postal Search dated June 6, 2016 appertaining to Transmara/Moita/297, the Plaintiff's Second Witness indicated the same was registered in the name of the Plaintiff.
38. Similarly, the Plaintiff's Second Witness was again referred to the Certificate of Official Postal Search dated September 25, 2015 appertaining to the suit property and the witness confirmed the same to belong to the Defendant.
39. The Plaintiff's Second Witness reiterated that he does not know the specific parcel number which is occupied by the Plaintiff but according to him, the Plaintiff resides on the suit property.



40. On Re-examination, the Plaintiff's Second witness stated Transmara/Moita/295, Transmara/Moita/296 and Transmara/Moita/297 are neighbouring each other.
41. It was therefore possible for the Plaintiff to have occupied more than one parcel of land.
42. The Plaintiff's Third Witness was one Oloishuro Nantei.
43. The Plaintiff's Third witness was a resident of Masusrura and knew the Plaintiff very well.
44. The Plaintiff's Third witness adopted his statement dated November 23, 2020 and fully relied on the same as his evidence in chief.
45. Further, the Plaintiff's Third Witness indicated that he is one of the village elders of Embitir Village and therefore knew most of the residents therein.
46. In his testimony, the Plaintiff's Third Witness confirmed personally knowing the Plaintiff but denied having met the Defendant.
47. The Plaintiff's Third Witness indicated that the Plaintiff's neighbours are Ngetesh, Ole Senki and Charles.
48. The Plaintiff's Third Plaintiff's Witness in his closing remarks indicated that the Plaintiff does farming and cattle rearing on the suit property.
49. On Cross-examination, the Plaintiff's Third Witness indicated that he owns a property known as Transmara/Moita/287.
50. According to the Plaintiff's Third Witness, the distance between where the Plaintiff resides and his residence is not so far away.
51. The Plaintiff's Third witness further testified that in the Plaintiff's compound, there are about 5 houses spread within a 1 kilometre radius.
52. The Plaintiff's Third Witness confirmed that according to the registration documents from the Land's Department, the Plaintiff was the registered owner of Transmara/Moita/297.
53. On the same front, the Plaintiff's Third Witness denied being familiar with the Defendant who is the registered owner of the suit property.
54. In the closing remarks, the Plaintiff's Third Witness indicated that he has no evidence that the Plaintiff occupies the suit property but he believes that it is the parcel that he occupies.
55. On Re-examination, the Plaintiff's Third witness reiterated that the Plaintiff resides on suit property and does not know who lives on Transmara/Moita/297.
56. On completion of the testimony by the Plaintiff's Third Witness, the Plaintiff closed his case.
57. The Defence hearing commenced on the 3/3/2022 with the Defendant as the first witness.
58. The Defendant indicated that she resides in Enemase Village within Moita Location.
59. Thereafter, she informed that Court that she would like to adopt her witness statement dated 20/11/2020 as her evidence in chief.
60. Thereafter, the Defendant produced the following documents as Exhibits in support of her case.
61. Defence Exhibit 1 was the Title Deed Certificate of the suit property, Defence Exhibit 2 was a certified copy of the Green Card to the suit property, Exhibit 3 was a Declaration of the Adjudication



and Demarcation of Moita Section dated 27/5/1985, Defence Exhibit 4 was a Declaration of the Adjudication and Demarcation of Masurura Section dated 14/6/19, Defence Exhibit 5 was the Area Index Map in respect of the parcel of land known as Transmara/Ololchani/295, Defence Exhibit 6 is a copy of the official search of Transmara/Olochani/297 and lastly, Defence Exhibit 7 was a copy of the Certificate of Official Postal Search relating to Transmara/Moita/295.

62. In her testimony in chief, the Defendant indicated that the suit property is not occupied by anyone.
63. The Defendant testified that she uses the suit property for cultivation every year.
64. However, the Plaintiff herein is a neighbour being the registered owner of Transmara/Moita/297.
65. However, in the year 2019, the Plaintiff herein trespassed into the suit property and dug a trench without authority of the Defendant.
66. The Defendant's main prayer therefore is that the Amended Originating Summons filed by the Plaintiff be dismissed with costs.
67. On cross-examination, the Defendant denied knowledge of a person known as Jeremiah Saudi Nengesh.
68. The Defendant confirmed that Moseka Daniel Ngatuni (now deceased) was her husband.
69. Upon the demise of Moseka Daniel Ngatuni, the Defendant obtained Letters of Administration Ad Litem and was substituted as the Defendant in place of her husband.
70. The Defendant reiterated that the Title Deed of the suit property is currently registered in the name of her late husband Moseka Daniel Ngatuni.
71. However, the Defendant and her family reside about 30 Kilometres from the location of the suit property.
72. The Defendant indicated that she cultivates the suit property every year and the Plaintiff has never occupied and/or cultivated the suit property.
73. In conclusion, the Defendant indicated that she does not know the chief of Masurura although she is the legal owner of the suit property.
74. Upon the Defendant closing her testimony, the Defence closed its case.
75. Parties were directed to file their respective submissions with the Plaintiff filing his submissions on the May 17, 2022 and the Defendant filing her submissions on the May 16, 2022.
76. The Court has gone through the pleadings filed by the parties herein, both the oral and documentary evidence therein, the submissions of both parties and the supporting authorities therein.
77. The main issue in this suit is whether or not the Plaintiff has satisfied the ingredients of a claim relating to adverse possession.
78. Section 7 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya provides as follows; -

“An action may not be brought by any person to recover land after the end of Twelve (12) years from the date on which the right of action accrued to him or, if its first accrued to some person through whom he claims, to that person.”



79. The Courts in Kenya have also endeavoured to discuss the issue of adverse possession extensively and generally, a number of principles and/or ingredients have been developed to assist in claims of adverse possession.
80. As cited by the Defendant in their submissions, the ingredients of adverse possession were clearly highlighted in the case of *Kenya Tea Development Authority-versus- Jackson Gachubi*(2006) eKLR as follows; -
- a) There must be an adverse act (by the applicant) and nothing that would lead the owner (Respondent) to suppose that his rights remain intact.
 - b) The assertion of possession must be open, peaceful and as of right.
 - c) The party claiming to hold adversely must go to prove that his possession was in denial of the other's title, and that he excluded that other from enjoyment of the property.
 - d) The registered owner must have knowledge of his ouster by the adverse possessor.
81. In the celebrated case of *Mtana Lewa-versus- Kabindi Ngala Mwagandi*(2015) eKLR, the Court reiterated these principles in the following manner; -
- “For one to succeed in a claim of adverse possession, one must prove and demonstrate that he has occupied the land openly, that is without secrecy, without force, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the latin maxim nec vi,nec cla,nec precario.”
82. The Court having established the guiding principles applicable in the determination of the Plaintiff's issue, then the evaluation of the testimony and documentary evidence must be undertaken to arrive at a just decision.
83. In this matter, the Plaintiff testified that he has been in occupation of the suit property from way back in the year 1984.
84. The Plaintiff indicated that he has construed his home on the suit property where he resides and does other farming activities for subsistence and income.
85. According to the Plaintiff's testimony, his occupation on the suit property was way before the declaration of the Moita Adjudication Section in the year 1985 and the subsequent declaration of Masurura Adjudication Section in the year 1996.
86. According to the testimony of the Plaintiff in Statement contained in the Amended Originating Summons dated November 23, 2020, the Plaintiff indicated that the reason why the suit property was registered in the name of the Defendant was as a result of an overlap of Moita Adjudication Section into Masurura Adjudication Section.
87. The Plaintiff produced two letters dated 26/03/1997 and the other one dated 30/11/2004.
88. The significance of both letters was the dissatisfaction and registration of a dispute by the Masurura residents appertaining to issuance of various titles as part of the Moita Adjudication Section.
89. The Plaintiff's other two witness also testified that the suit property has been occupied by the Plaintiff who has built homes for his family members and does agricultural activities therein.
90. In essence therefore, the Plaintiff was the lawful person to be issued with a title to the suit property.



91. The Defendant on the other had denied the Plaintiff's entry on the suit property.
92. According to the Defendant's testimony, the suit property has only been used by the Defendant's family every year by planting various crops and grazing cattle thereof.
93. The Defendant produced the legal documents of ownership which included the Title Deed and the Green Card of the suit property.
94. The Defendant further testified that the Plaintiff owns a different parcel of land namely Transmara/ Moita/297 which he has developed his home and currently resides.
95. The Defendant indicated to the Court that it is only in the year 2019 when the Plaintiff tried to enter the suit property and dug a trench signifying the boundary of his parcel of land.
96. Section 107 (1) and (2) of the Evidence Act, Cap 80 Laws of Kenya states as follows; -
 - (1) "Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he/she asserts must prove that those facts exist."
 - (2) "When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person"
97. The Question therefore that arise at this juncture is whether or not the Plaintiff has proved the ingredients of adverse possession as required by law.
98. Looking at the testimony and documentary evidence adduced by the Plaintiff, the line of evidence is to the effect that occupation of the suit property by the Plaintiff from the time of his birth.
99. The Plaintiff's evidence is to the effect that at no time did the Defendant occupy the suit property.
100. The only reason the Defendant was given a title to the suit property was due to the illegal allocation of land within Masurura Adjudication Section by the Moita Adjudication Section officials.
101. Whether this allegation is true or not, this Court does not have jurisdiction in this suit to venture into the legality and/or processes undertaken in the titling of both the Moita Adjudication Section and the Masurura Adjudication Section.
102. What this Court is tasked in this suit is to confirm whether or not the Plaintiff has satisfied the ingredients of adverse possession.
103. So far, there has been no evidence tabled before the Court by the Plaintiff indicating any act of entry and occupation of the suit property.
104. The Plaintiff has not provided any pictures of the homestead on the suit property or the agricultural activities that it undertakes therein to proof entry and occupation.
105. The Plaintiff's testimony on cross-examination disclosed an interesting fact that actually the Plaintiff resides on another parcel of land.
106. The suit property is therefore not developed with any houses by the Plaintiff as alleged in his evidence in chief and the evidence of the Plaintiff's witnesses.
107. Similarly, there is an issue as whether or not the time lines provided in Section 7 of the Limitation of Actions Act, Cap 22 have been complied with?
108. According to the Title Deed of the suit property and the Certificate of Official Search produced in Court, the suit property first vested in the Defendant on the 19.3.2014.



109. The registration of the Defendant on the 19.3.2014 was a first registration emanating from an adjudication process of the Moita Adjudication Section which had been declared in the year 1985.
110. In other words, prior to registration of the Defendant as the registered owner of the suit property on the 19.3.2014, the suit property was Government Land and thereafter administered through the provisions of the Land Adjudication Act, Cap 284, Laws of Kenya on the basis of the Declaration Notice issued in the year 1985.
111. Consequently therefore, the time frame of Twelve (12) years provided under Section 7 of the Limitation of Actions Act, Cap 22 can only commence running from the 19.3.2014 when the suit property was alienated to the Defendant.
112. Clearly therefore, at the time of instituting this claim for adverse possession on the 29th October 2015, the envisaged time of Twelve (12) years under Section 7 of the Limitations of Actions Act, Cap 22 had not lapsed and therefore such a claim could not arise against the Defendant thereof.
113. In conclusion therefore, the Court do hereby make the following Orders thereof; -
 - i. The Amended Originating Summons dated 2November 3, 2020 be and is hereby dismissed with costs.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON DAY OF 19TH SEPT 2022.

EMMANUEL.M.WASHE

JUDGE

In the presence of:

Court Assistant: Elisha/lekakeny

Advocates for the applicant: Mr. Begi

Advocates for the respondent: Ms. Opondo

