



**Kiura v Kariuki & another (Environment & Land Case 17 of 2020)
[2022] KEELC 14570 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14570 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 17 OF 2020
EC CHERONO, J
OCTOBER 27, 2022**

BETWEEN

CYRUS MURIITHI KIURA PLAINTIFF

AND

PIUS NJAGI KARIUKI 1ST DEFENDANT

DISTRICT LAND REGISTRAR KIRINYAGA COUNTY 2ND DEFENDANT

JUDGMENT

Introduction

1. The plaintiff instituted this suit against the defendants vide an Originating Summons dated May 16, 2020 seeking the following orders;
 1. Declaration that the plaintiff herein is entitled to be registered as proprietor of land parcel No. Ngariama/Nyangemi/1928 by way of adverse possession having occupied and used the said land uninterrupted, adversely to the title and ownership of the previous registered proprietor Richard Mugo Muna, and openly as his own for a period exceeding the statutory period of limitation of 12 years i.e from April 2002
 2. Declaration that the title of Richard Mugo Muna the previous registered proprietor for Land Parcel No. Ngariama/Nyangemi/1928 was extinguished for all purposes as at April 2014 by reason of effluxion of time and that the transfer of title or conveyance and any other ownership documents, and derivative title thereto purportedly made or issued to the defendant in July, 2017 or any date the said Richard Mugo Muna lacked the power to transfer.
 3. Declaration that the first defendant holds the title of Land Parcel No. Ngariama/Nyangemi/1928 for and in trust for the plaintiff



4. An Orderbe issued by this Honourable court directing the 2nd defendant District Land Registrar, Kirinyaga County to cancel the title issued to the 1st Defendant in respect of land parcel No. Ngariama/Nyangemi/1928 and instead thereof to register the plaintiff herein as Registered Proprietor of the said parcel of land
 5. An Urgent Orderbe issued permanently restraining all the defendants, his servants or agents or anybody claiming through or by him or acting for or on his behalf from entering into or remaining into the said Land Parcel No. Ngariama/Nyangemi/1928 or any part thereof and from interfering in any manner with the use and occupation of the said land by the plaintiff thereof and from charging, conveying, transferring or in any manner alienating the said land.
 6. The defendant named herein be condemned to pay the costs of this suit.
2. The suit is supported by grounds shown on the face of the {{abbr{title riginating Summons} O.S }}and the affidavit of the plaintiff/applicant as well as annexures to the supporting affidavit.
 3. By way of defence, the 1st respondent swore a replying affidavit on June 26, 2020 and filed on October 21, 2021. The hearing was heard November 16, 2021 and January 20, 2022.

Plaintiff's Case

4. The plaintiff testified on oath and called two witnesses in support of his claim. In his testimony, the plaintiff/applicant stated that in the year 2002 or thereabouts, he entered into a sale agreement with one Richard Mugo Muna for half an acre out of land parcel No. Ngariama/Nyangemi/1928 at the purchase price of Kshs. 130,000/-. He further stated that the seller Richard Mugo Muna was only a beneficiary of the Estate of his deceased father, Muna Mwara since he had not taken letters of Administration. Upon executing the sale agreement, the plaintiff was put into possession until the year 2017 when he was evicted. He said that on 2/8/2017, he was called by his brother who told him that there was a person cutting down trees from his land. He said that by then he had planted tea bushes in the suit land totaling Kshs. 450,000/= He went to Kianyaga Police Station and reported the incident. He also contacted the seller who assured him that he had not sold the land to any other person. He conducted a search and found out that the land had been transferred by the seller Richard Mugo Muna to Pius Njagi Kariuki
5. The first witness called by the plaintiff was Symon M Mwaniki who adopted his witness statement dated May 6, 2021. According to him, Richard Mugo Muna sold his land to the plaintiff/applicant herein who took possession and planted tea bushes. However, he later came to learn that one Muchira Muna who is a brother to Richard Mugo Muna sold the same portion of land to a different person without the knowledge of the owner.
6. The second witness was Mungai Kamuti who also adopted his witness statement dated May 6, 2021. On his part, the witness stated that he worked for Cyrus Muriithi Kiura, the plaintiff/applicant herein as a casual labourer planting tea and other casual work as may be assigned from time to time. He further stated that during his engagement as a labourer, Cyrus Muriithi Kiura bought a parcel of land from Richard Mugo Muna and Joseph Mbogo Muna who are the rightful owners.
7. The third and last witness called by the plaintiff was Joseph Mbogo Muna. He too adopted his witness statement recorded on May 6, 2021. In his testimony, the witness who is also a brother to Richard Mugo Muna stated that at the time of the death of their father, he was the registered owner of land parcel No. Ngariama/Nyangemi/444. He stated that after his demise, they filed succession proceedings



being No. 348/2002. After the case was concluded, the land was subdivided amongst the beneficiaries as follows;

- i. Dorcas Muringo Muna (Wife) ----1 acre
- ii. Joseph Mbogo (son) -----3/4 acre
- iii. Richard Mugo (son)-----3/4 acre
- iv. Paul Muturi (son) -----3/4 acre
- v. Muchira Muna (son)-----3/4 acre
- vi. John Mugo (son) -----3/4 acre

8. He further stated that he was the custodian of the land documents in respect of the suit land which were stolen by his sister Teressiah Mwaura who gave to some brokers who sold to some people without his knowledge. He said that he reported to- the police and the area Chief but no steps were taken.

Defence Case

9. The original 1st defendant died and was substituted by his wife Cecily Muthoni Njagi who referred to her witness statement on August 18, 2021 which she adopted in her evidence. The witness also adopted the replying affidavit of her deceased husband sworn on June 26, 2020. She also produced the documents attached to the said replying affidavit in her evidence. In her evidence, the defendant stated that her late husband bought the suit land from Richard Mugo Muna on July 7, 2017. She produced a copy of the Sale Agreement as d-exhibit 4. She said that the suit land is a resultant portion after succession and subdivision of the original land parcel No. Ngariama/Nyangemi/444 in the name of Muna Mwara(deceased). She said that one of the beneficiaries to the estate was one Richard Mugo Muna who was awarded 0.32 ha. Out of the Estate, which, upon distribution, became land parcel No. Ngariama/Nyangeni/1928, the subject matter of the suit herein. The defendant also stated that the said Richard Mugo Muna obtained his title deed on 9/6/2017 and on 7/7/2017, he sold the said parcel of land to her husband at a consideration of Kshs. 1,200,000/= which her husband (deceased) paid in full. After the land was transferred, they immediately took vacant possession. She said that at the time they bought the suit land and took possession, there was nobody either living on or working on the said land and that they have lived on the suit land since July, 2017 to the exclusion of any other person including the plaintiff herein.

Plaintiff's Submissions

10. The plaintiff through his advocates framed the following three questions for determination
 - a. Whether the evidence shows that the plaintiff lawfully purchased the suit property
 - b. Whether the plaintiff has been in constant possession and use of the suit property without force, without secrecy, without permission and without interruption for a period of more than 12 years
 - c. Whether the plaintiff is entitled to the- orders sought for in the Originating Summons.
11. On the first question, the plaintiff answered in the affirmative. He submitted that the plaintiff has produced a duly executed Sale agreement dated April 16, 2002 between himself and the vendor, Richard Mugo Muna who was a beneficiary of land parcel No. Ngariama/Nyangemi/444 which was registered in the name of Muna Mwara, the father of the vendor (deceased). That the purchase price



was indicated as Kshs 130,000/=which sum was duly paid in full at the time of execution of the Sale agreement.

12. On the second issue, the plaintiff submitted that he has demonstrated that he has been in continuous occupation of the land parcel No. Ngariama/Nyangemi/1928 from April 2002 to July 2017 when the 1st defendant came into the suit land without his consent and unlawfully evicted his workers/uprooted the tea bushes and demolished the workers house
13. With regard to the third issue, the plaintiff submitted that he has demonstrated that he has been in continuous, constant, uninterrupted possession of the suit property for over 12 years and is therefore entitled to the orders sought. He cited the following cases;
 1. *Public Trustee v Wanduru* (1984) KLR 314
 2. *Peter Mbiri Michuki v Samuel Mugo Michuki* (2014) eKLR
 3. *Mwangi & Anor v Mwangi* (1986) KLR 328
 4. *Wambugu v Njuguna* (1983) KLR172
 5. *Mtana Lewa v Kabindi Ngala Mwangandi* (2015) eKLR

Defendants' Submissions

14. The 1st defendant also framed the following three issues;
 - i. Whether the plaintiff has proved that he has dispossessed Land Parcel No. Ngariama/Nyangemi/1928 from the previous registered proprietor Richard Mugo Muna for a period of 12 years?
 - ii. Whether the plaintiff has been in actual, visible, exclusive, hostile and continued possession for over 12 years?
 - iii. Whether the plaintiff is entitled to the orders sought?
15. As to whether the plaintiff has proved that he has dispossessed the previous proprietor Richard Mugo Muna, the 1st defendant submitted that the law is clear that the property of a deceased person shall not be sold before confirmation of the grant. She submitted that the plaintiff in his own admission proved that he bought the suit property after the death of the original registered proprietor and before the confirmation of grant over the deceased's estate. The 1st defendant further submitted that the plaintiff never bought the suit property lawfully and was in fact an intermeddler. In the absence of a legal and binding Sale agreement, the plaintiff did not take possession of the suit property and as such, the adverse possession did not commence in his favour upon payment of the purchase price as alleged.
16. The 1st defendant also submitted that the plaintiff has not proved that he dispossessed the previous registered owner namely, Richard Mugo Muna for a period of 12 years when he got registered as the proprietor of the suit land. She averred that Richard Mugo Muna was registered as proprietor of the suit land on June 7, 2017 and for the purposes of adverse possession, if any, time started to run from the aforementioned date making it only 3 years prior to the filing of this suit thus making the present suit premature.
17. She cited the following cases;
 1. *Estate of Paul M'Maria (deceased)* 2017 eKLR
 2. *John Ndungu kipsoi v Samuel Chepkulul & Anor* (2018) eKLR



18. The 1st defendant referred to the second issue and submitted in the negative. First, She submitted that the plaintiff contradicted himself on cross-examination on the following factual issues;
1. That he planted tea bushes without a license from Kenya Tea Development Authority
 2. The plaintiff failed to remember how many tea bushes he planted on his farm and gave two conflicting numbers i.e 955 and 450
 3. The plaintiff bought the said land before the confirmation of grant
 4. The plaintiff confirmed that the 1st defendant bought the said land from Richard Mugo Muna
 5. The plaintiff testified that Pius Kamunyi Njagi was the one who destroyed the tea bushes despite not witnessing the said destruction.
 6. The plaintiff also testified that he reported the alleged destruction of tea bushes to Kianyaga Police Station but did not produce the O.B extract
 7. The plaintiff confirmed that together with vendor they instituted a suit against the 1st defendant in 2018 and they never appealed against the judgment which was entered in favour of the 1st defendant and another party.
 8. The plaintiff did not produce any documents and/or records to demonstrate that he planted tea bushes, built a house and/or the alleged destruction of the tea bushes.
 9. The plaintiff has never lived on the land and actually lives near the suit property.
19. She cited the following cases;
1. *Kimai Ruchine & Anor v Swift Rutherford & co. Ltd and Another* (1980) KLR 10
 2. *William Kipnyor Rotich v Paul Kiprop Karoney* (2020) eKLR
20. On the third and last issue, the 1st defendant submitted that the plaintiff has not proved that he has acquired the suit land by way of adverse possession and that he is actually clutching on straws to try his luck with the claim of adverse possession and sale at the same time.

Legal Analysis and Decision

21. I have considered the pleadings the evidentiary documents, the testimony by the parties and the witnesses and the applicable law. Flowing from the pleadings and the evidence, the issues that comment for determination are as follows;
1. Whether the plaintiff has proved that he dispossessed the previous registered proprietor, one Richard Mugo Muna of land parcel No. Ngariama/Nyangeni/1928 for a period of 12 years
 2. Whether the plaintiff has been in actual, visible, exclusive, hostile and continued possession for over 12 years and
 3. Whether the plaintiff is entitled to the orders sought.

Whether the plaintiff has proved that he dispossessed the previous registered proprietor, one Richard Mugo Muna from land parcel No. Ngariama/nyangeni/1928 for a period of 12 years

22. From his own evidence, the plaintiff admitted that he bought the suit land parcel No. Ngariama/Nyangeni/1928 in April, 2002. From the Sale agreement produced, it indicates that he bought an un-



subdivided portion of land parcel No. Ngariama/Nyangeni/444. The registered proprietor of the said parcel of land was Muna Mwara (deceased) who was father to, among others, Richard Mugo Muna. At the time of the purported Sale, no grant of Letters of administration had been issued as Succession proceedings had not been taken out.

23. It is trite law that no immoveable property of a deceased person shall be sold before confirmation of the grant. That was the holding in the case of the *Estate of Paul M'Maria (deceased)* 2017 eKLR where it was observed;

“The restriction provided by law that no immovable property shall be sold or distributed before confirmation of grant is not merely directory or an embellishment. It is a statutory command with fatal consequences on any transaction done in contravention of the said law. Accordingly, acquisition of immovable property of the Estate in contravention of the law of succession is tainted with killer poison; and is unlawful acquisition-----”

24. I agree with the 1st defendant that by his own admission that he purported to buy an immovable property of an- estate before confirmation of a grant, the plaintiff's actions are not only unlawful but are tantamount to intermeddling which is a criminal offence punishable in law.

25. Even considering the evidence on merit, it is my opinion that the plaintiff has not proved his claim for adverse possession on a balance of probabilities. The doctrine of adverse possession was defined in the case of *Mtana Lewa- v- Kabindi Ngala Mwamgandi* (2005) eKLR where the Court of Appeal held;

“Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of the title for a certain period, in Kenya 12 years. The process springs into action essentially by default or inaction of the owner. The essential pre-requisites being that the possession of the adverse possessor is neither by force or stealth or 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. This doctrine in Kenya is embodied in section 7 of the *Limitation of Actions Act*, which is in these terms-----”

26. Again in the case of *Samuel Miki Waweru- v- Jane Njeri Richu*, Civil Appeal No.122 2001 (UR),*the Court of Appeal held

“---it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in accordance with provisions of an agreement of Sale or lease or otherwise.”

27. The plaintiff in his testimony stated that he took possession of the suit property in accordance with a Sale agreement entered in April, 2002 between Him and the seller Richard Mugo Muna. Since his possession was by consent and not hostile, his claim on adverse possession cannot therefore succeed.

Whether the plaintiff has been in actual visible, exclusive, hostile and continued possession for over 12 years

28. The ingredients to be satisfied in a claim for adverse possession was discussed in the case of *Tabitha Waittherero Kimani v Joshua Ng'ang'a* (2017) eKLR where Ombwayo j held;

“(A) Open And Notorious use of the Property.For this condition to be met the adverse party's use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim. The occupation and use of the property by the adverse party



must be of such character that would give notice to a reasonable person that someone would claim. If a legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings or animals that a diligent owner could be expected to know about.

- B) Continuous use of the Property- The adverse party must, for statute of limitations purposes, hold that property continuously for the entire limitations period, and use it as a true owner would for that time. This element focuses on adverse possessor's time- on the land, not how long the true owner has been dispossessed of it. Occasional activity on the land with long gaps in activity fail the test of continuous possession. If the true owner ejects the adverse party from the land, verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitations starts over from the time of the adverse party return. He cannot count the time between his ejection by the true property owner and the date on which he returned.
- (C) Exclusive use of the Property- The adverse party holds the land to the exclusion of the true owner. If, for example, the adverse party builds a barn on the owner's property, and the owner then uses the barn, the adverse party cannot claim exclusive use. There may be more than one adverse possessor, taking as tenants (i.e owners) in common, so long as the other elements are met.
- (D) Actual Possession of the Property-The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not constitute actual possession."

29. The plaintiff in his evidence stated that in the month of July 2017, the 1st defendant came into the suit land and evicted him and thereafter demolished his house. He further stated that the 1st defendant cut down his tea bushes and chased away his farm workers. At paragraph 7 of his supporting affidavit, the plaintiff/applicant referred to photographs but the same were neither attached nor produced during the hearing. The plaintiff also alleged that he made a report to Kianyaga Police Station. However, an extract of the Police Occurrence Book was not also produced during the hearing. In the absence of any empirical evidence that the title owner was dispossessed or his possession discontinued for the statutory period of twelve (12) years, the plaintiff's claim for adverse possession falls by the way side.

Whether the plaintiff is entitled to the orders sought

30. Having failed to prove his claim to the required standard, it is my considered opinion that the plaintiff's claim fails.
31. Having considered the pleadings, the evidence, submissions and the relevant authorities, I find that the plaintiff has not proved his claim for adverse possession to the required standard. This suit is therefore dismissed with costs to the 1st defendant.

Orders accordingly.

READ, SIGNED AND DELIVERED VIA E-MAIL THIS 27TH OCTOBER, 2022.

HON. E.C CHERONO

ELC JUDGE

