



Marubu & another v Munyora & 3 others (Sued on their own behalf and on behalf of all other Occupants of the Suit Premises) (Environment & Land Case 988 of 2014) [2022] KEELC 14484 (KLR) (27 October 2022) (Judgment)

Neutral citation: [2022] KEELC 14484 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 988 OF 2014
LN MBUGUA, J
OCTOBER 27, 2022**

BETWEEN

ROBERT NG'ANG'A MARUBU 1ST PLAINTIFF

CAROLINE MURUGI 2ND PLAINTIFF

AND

JULIUS MBOYA MUNYORA ALIAS WAMUNYORA 1ST DEFENDANT

GICHUKI MATHENGE ALIAS WAMOTHER 2ND DEFENDANT

SAMUEL NJUGUNA MWANGI 3RD DEFENDANT

IRUNGU MUCHANGI 4TH DEFENDANT

**SUED ON THEIR OWN BEHALF AND ON BEHALF OF ALL OTHER
OCCUPANTS OF THE SUIT PREMISES**

JUDGMENT

1. The Plaintiffs through the Plaint dated July 18, 2013 (the suit was formerly NBI HCCC e No 280 of 2013) claim to be the lawful owners of properties LR No 209/4401/384, 209/4401/385 and 209/4401/390 located in Hamza Estate, Makadara, whereby the defendants have been illegally occupying the suit premises despite being issued with eviction notices. The plaintiffs therefore seek the following orders:
 - i. A declaration that the Defendants are illegally in the suit premises namely LR No 209/4401/384, 209/4401/385 and 209/4401/390 Hamza Estate Makadara, Nairobi.
 - ii. A mandatory order requiring the Defendants, their agents, servants, tenants and / or employees and all other occupants of the suit premises namely LR No 209/4401/384, 209/4401/385 and



209/4401/390 Hamza Estate Makadara, Nairobi to surrender and handover vacant possession of the suit premises to the Plaintiffs within such reasonable period as the Honourable Court deems fit.

- iii. An eviction order against all the Defendants, their agents, servants, tenant and / or employees and all other occupants of the suit premises namely LR No 209/4401/384, 209/4401/385 and 209/4401/390 Hamza Estate Makadara, Nairobi.
 - iv. An order that in default of the voluntary surrender of vacant possession of the suit premises by the Defendants, the Plaintiffs be at liberty to forcefully evict the defendants from the suit premises namely LR No 209/4401/384, 209/4401/385 and 209/4401/390 Hamza Estate Makadara, Nairobi at the Defendants' expense.
 - v. A perpetual injunction restraining the Defendants, all other occupants, their agents, employees, servants and/or tenants from interfering with the Plaintiffs' quiet enjoyment of the suit premises after the Defendants vacate the same.
 - vi. Costs of the suit.
 - vii. Any other or further relief that this Honourable court may deem fit to grant.
2. The Defendants in their statement of Defence and Counterclaim dated August 27, 2013 contested the Plaintiffs claim stating that the suit properties belonged to one Singh whom the Defendants used to pay rent to, but he left the country, leaving the properties to the Defendants. Thus the attempt to evict them was malicious pointing out that they were neither trespassers nor illegal occupants of the suit properties.
3. The defendants seek the following orders in their Counter-Claim:
- i. Dismissal of the Plaintiff's cause with costs.
 - ii. An order of this court declaring the Defendants the adverse owners of LR No 209/4401/384, LR No 209/4401/385 and LR No 209/4401/390.
 - iii. Such other and further orders as this court shall deem just to give.
4. The Plaintiffs in their reply to the Defence and Defence to Counter-Claim dated January 6, 2014 reiterated that they were the bonafide owners of the suit properties and contested that the Defendants had been in quiet possession of the suit properties, stating that the Defendants had acknowledged to have been issued with eviction notices hence the claim of adverse possession was not sustainable.
5. The Plaintiff Caroline Murugi, (PW1) testified and adopted her witness statement filed on March 8, 2019 as her evidence. She also produced the nine documents in her bundle of March 8, 2019 as Plaintiff Exhibit 1 to 9. She identified the 1st plaintiff as her husband averring that both are the registered owners of the suit properties.
6. On how they acquired the land, Pw1 stated that they visited the suit properties in year 2007 as prospective investors and found condemned residential units which were occupied by the defendants. They also established that the leases for the said premises were redundant as the previous owners had not applied for their extension.
7. The plaintiffs thus successfully applied for allocation of the suit land from the City Council of Nairobi and they were issued with leases on October 24, 2008 and deed plans on June 7, 2011, Since then, they have been paying rates in respect of the suit premises.



8. The plaintiffs duly informed the defendants of the change of ownership and accordingly issued them with notices to vacate the suit premises, but the latter declined to vacate. The plaintiffs consider the defendants as trespassers or illegal occupants of the suit premises who should give vacant possession.
9. On cross examination, PW1 reiterated that in year 2007, they were looking for an investment venture and they contacted their advocate on the matter. They proceeded to purchase the suit property but there were people living on that land. She confirmed that the lease was dated October 24, 2008 and that they had paid over Kshs 3,000,000 to the City Council of Nairobi before they got the leases.
10. She further stated that Mr Singh was the previous owner of the suit properties and that even after the registration of the leases, they continued to pay rates in the name of Central Timber Company. She does not know when the defendants started occupying the suit land.
11. On re-examination, PW1 stated that no objection was ever raised regarding the lease which was registered on November 11, 2011. She further restated that the rates were paid in the name of Central Timber Company as advised by the City Council until the records were changed into their names in the year 2013.
12. PW2 Abwao Eric Odhiambo introduced himself as an advocate of the High Court of Kenya and the Acting County Solicitor General, Nairobi City County. He adopted his witness statement dated May 27, 2015 as his evidence. His duties entailed: preparing leases, advising the County on legal matters, following up on County debts, attending court on behalf of the County, liaising with external advocates, representing the County and verification of external advocates' fee notes amongst other duties.
13. He testified that his predecessor is the one who prepared the leases dated October 24, 2008 for properties Bahati LR No 209/4401/385, LR No 209/4401/384 and LR No 209/4401/390. This was done after the previous lease of 40 years came to an end in the year 2000, and the owner thereof Central Timber Limited had not applied for an extension. The procedure was that the person with the lease would apply for extension of the lease but if the application was not made, then the land would revert to the County.
14. In this case, the lease expired and the property automatically reverted to the County until the Plaintiffs applied for issuance of the lease. The said leases were then duly forwarded to the ministry of lands (Central Registry), adding that the documents that accompany a lease are: Deed Plan and Passport size photos of the leasees.
15. The leases were registered on November 11, 2011 after the Deed Plan was available. He clarified that the Leases could not be finalized without the Deed Plan and the date of October 24, 2008 on the first page of the lease is the date when the lease was prepared.
16. PW2 went on to state that the suit properties being reversionary leases meant that the leasees ought to have paid the accrued land rates for Central Timber which was about Kshs 58,080 for each of the plots (Plot 384, 385 and 390). This money was however paid by the Plaintiffs including clearance certificates and other administrative charges as per the documents in plaintiff's bundle, but the payments were made in the name of Central Timber Ltd as the leases had not been fully registered and submitted.
17. Pw2 further stated that after registration, the leases are supposed to be submitted to the County for preparation of a new rate account. He confirmed that all the arrears were paid on July 25, 2011 as per the receipt on page 51 of plaintiff's bundle which was the last receipt issued in the name of Central Timber Ltd.
18. Pw2 was not aware if the Plaintiffs ever got actual possession of the suit land.



19. In regard to the Gazette Notice dated April 3, 2009 on page 72 of the Plaintiffs bundle, PW2 stated that this was to notify the previous owner of the arrears and anyone with an objection could lodge a claim within the stipulated time.
20. Pw2 also stated that the suit property which belonged to the Council could not be claimed under adverse possession.
21. On cross examination, PW2 restated that the previous lease had been issued in 1960 for a period of 40 years. He pointed out that when a property reverts back to the County, no document is prepared to that effect and the general public is usually not informed of the same. He rehashed that the previous owner ought to have sought an extension for the leases on December 31, 1999.
22. On how the Plaintiffs got to know about availability of the land, PW2 explained that people apply for allocation of land, the Office of the Town Clerk and Director of Physical Planning then identify a suitable allottee. He stated that the County does not change the name of the person appearing on the Lease until a new lease is prepared and the rate account opened. In this case, the lease was prepared on October 24, 2008 and the Plaintiffs account was opened and they were billed their rates on April 10, 2013.
23. PW2 also stated that after reversion, an account is blocked only allowing the rateable owner to make payments. He further stated that the office does not advertise for expired leases and it was the mandate of the Physical Planner and the Town Clerk to allocate such land. After expiry of the lease, the property reverts back to the council.
24. On re-examination, PW2 restated that the previous lease expired in the year 2000, that is when reversion occurred. The new lease was issued in the year 2011 therefore the issue of adverse possession was inapplicable adding that the Defendants were clear in their statement of defence that they were paying rent.
25. He also restated that as per the information in their records, the suit properties belonged to the Plaintiffs, and he was aware that one of the Directors had issued a vacation notice to the people residing in the suit properties.
26. DW1, Julius Mboya Munyora gave testimony for and on behalf of the other defendants. He adopted his witness statement dated August 27, 2013 as his evidence, and he also produced 3 items in their bundle of documents as Defendant's Exhibit 1 to 3. He avers that him and his co-defendants were tenants of Mr Singh in the early 70s, but Singh left the country in late 70s. The defendants continued to occupy the suit premises without interruption to date hence the claim of adverse possession.
27. On Cross examination DW1 stated that he owned three plots on the suit property and they have booklets which contain the particulars of ownership thereof. He stated that they used to pay rent to the Indian person known as Starpa-Singh Garesh and they have receipts to that effect of which the amount of Ksh 50 was the initial figure. The Indian gentleman passed away and they started dealing with his son, but they were not aware that the lease of the owner had expired. They stopped paying the rent because Singh went to Canada.
28. He denies there having been a meeting where they were informed that the suit properties had new owners and accused the Plaintiffs of fraud. But they did receive an eviction notice from the plaintiffs which they declined to adhere to because they had been on that land for a long time. He also confirmed that they had not been paying rent to the Plaintiffs and also stated that they had not been paying rent to the Indian since he left for Canada. He is not aware if the Indian continued to pay land rates to the City Council.



29. Dw1 affirmed that everyone on the suit properties had a copy of the lease held by the plaintiffs, but they still refused to pay rent. He was neither aware of reversion nor whether the previous owner had applied for renewal of the lease.
30. On re-examination, he stated that they last paid rent to Singh in the year 1972.
31. In their submissions dated June 30, 2022, the plaintiffs highlighted the following as the issues for determination: who are the current registered owners of the suit properties; whether the Defendants had acquired the suit properties under the doctrine of adverse possession; whether the Plaintiffs are entitled to the orders sought; who should bear costs of the suit.
32. On the issue of ownership, it was submitted that Plaintiffs were the legal registered owners of the suit properties, having been issued with leases to that effect by the Nairobi City County, following the expiry of the previous leases. On this point, the plaintiffs made reference to the case of *Rakesh Kumar Anand v Dipak Kumar Anand [2016] eKLR* where the court held: 'Once the 99 years lease between the Government and the defendant expired and he did not apply for extension which must be granted and executed by the lessee and lessor and registered before the expiry of the then current term, the interest of the lessee ceases and the land becomes available for allocation by the Commissioner of Land who is at liberty to allocate the same to any deserving applicant following the laid down procedures'.
33. On the claim of adverse possession by the defendants, it was submitted that a person claiming adverse possession had to apply to court to be registered as the proprietor as per Section 38(1) of the [Limitation of Actions Act](#). However, Defendants had not made such an application.
34. Further, the suit properties belonged to the Nairobi City County and an order for adverse possession was inapplicable as per Section 41 of the [Limitation of Actions Act](#) and Article 62(1) of the [Constitution](#) because the land had reverted back to the Government after lapse of the previous lease.
35. On whether the Plaintiffs were entitled to the orders sought, it was submitted that the Plaintiffs being the legal owners of the suit land are entitled to the said orders plus costs. Reference was made to the case of *Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review Application no 6 of 2014*.
36. The submissions of the Defendants are dated July 26, 2022 where it is averred that the defendants had lived on the suit property uninterrupted for a period of over forty years, since the previous owner (Singh) had left the country in the 70s, hence they had met the criteria of continuous uninterrupted occupation for a period of 12 years. To this end, reference was made to the cases of *Kimani Tuchenji vs Shift Rother Ford Ltd 1980 KLR 10*, *Kasuve vs Mwaani Investments Limited & 4 others 1 KLR 184* and *Diocese of Ngong Trustee vs Loise Nongai Kindi case no 1562 of 1995*.
37. It was further submitted that Plaintiffs acquired their Leasees through collusion because there was a charge registered against the suit property at the time the Plaintiffs claims to have purchased it. This was in regard to the Gazette notice dated April 3, 2009 on the intention to discharge the charge while the sale agreement was dated October 24, 2008. He added that there was neither advertisement or a Gazette notice indicating that the lease had expired and was supposed to be renewed nor evidence of how the Plaintiffs came to learn of the expired leases.

Analysis and determination

38. There is no controversy that the defendants are the ones in occupation of the suit land and that the plaintiffs found them in such occupation by the time they were acquiring the land in year 2008. The parties also seem to be in agreement that the initial lease for the suit properties was in the name of a Mr



Singh and that currently the leases registered on November 11, 2011 are in the names of the plaintiffs. The issues falling for determination are:

- i. Whether the Defendants can claim to be rightful owners of properties LR No 209/4401/385, LR No 209/4401/384 and LR No 209/4401/390 through the doctrine of adverse possession.
 - ii. Whether the Plaintiffs are the lawful owners of properties LR No 209/4401/385, LR No 209/4401/384 and LR No 209/4401/390.
 - iii. What relief is available to the parties.
39. The defendants claim that they have been on the suit parcels for many years. They were tenants of Mr. Singh but he left for Canada in the 1970's. They used to pay rent to the owner of that land, Ksh 50 per month but the last time they paid rent was in 1972.
40. The plaintiffs on the other hand contend that Mr Singh held the leases for 40 years while trading as Central Timber Limited and the same ended in year 2000 as there was no renewal. The land thus reverted back to the City Council of Nairobi and other leases were issued to the plaintiffs in 2008. The plaintiffs suit was filed on July 19, 2013 and therefore, the requisite 12 years period had not lapsed by the time the suit was filed as from 2008, thus adverse possession cannot be claimed.
41. In the case of *Celina Mutboni Kitbinji v Safiya Binti Swaleh & 8 others [2018] eKLR*, the Court explained the conditions to be met for one to prove an entitlement in adverse possession as follows;
- ' The requirements for Adverse Possession in Kenya has also been set out in the case of Mbira –v- Gachuhi (2002) IEALR 137 in which the court held that:
- 'A person who seeks to acquire title to land by the method of Adverse Possession for the applicable statutory period must prove non-permissive or non-consensual, actual, open, notorious, exclusive and Adverse use by him or those under whom he claims for the statutory prescribed period without interruption'
42. And in *Mtana Lewa –v- Kabindi Ngala Mwangandi- Malindi (2015) eKLR* it was held that:
- ' 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 his title for a certain period, in Kenya 12 years.'
43. It is quite clear that the defendants must have entered the suit land with the permission of the owner since they claimed to have been paying rent. However the owner of the land simply left the country/ died and the defendants stopped paying rent in 1972. To this end, I find that the occupation of the land by the defendants after 1972 was not with the permission of the owner.
44. Dw1 contends that he has 3 plots of which one is number 547. He also asserts that when they were informed that plaintiffs were the new owners of the land and were given notices to leave, the defendants not only declined to leave but they also declined to pay rent to the new owners (plaintiffs).
45. It is quite clear that the actions of the defendants are a manifestation of Animus possidendi, the intention to possess to the exclusion of everyone else including the rightful owner of the land. It is not necessary that the owner should have been driven out of possession. If the owner abandons possession or if he dies and the next of kin does not assert his rights of possession over the land, time will begin to ran for purposes of adverse possession from the time of abandonment.



46. In the case of *Chevron K Ltd v Harrison Chano wa Shatu [2016] eKLR*, the court stated that;
- ' With respect, we agree with the learned Judge that the appellant ought to have exercised diligence at the time it purchased the suit premises by inspecting it. The manner it dealt with the acquisition was evidently contrary to its own policy not to purchase land occupied by squatters or one with a dispute. As this court stated in *Mweu v Kiu Ranching & Farming Co-operative Society Ltd [1985] eKLR 430*: 'Adverse possession is a fact to be observed upon the land. It is not to be seen in the title even under Cap 300. A man who buys land without knowing who is in occupation of it risks his title just as he does if he fails to inspect his land for 12 years after he had acquired it, emphasize added.'
47. What emerges from the foregoing analysis is that the defendants had long been entitled to the suit land by way of adverse possession by mid 1980's if time was to be computed from 1972 when they stopped paying rent and the owner abandoned the land. The only action that the defendants did not take is to apply to be registered as the owners of the land which is not fatal to their claim.
48. I must point out that there is no tangible evidence on how the suit land allegedly reverted back to the City Council by 2000. Firstly, Pw2 had stated that there was no document issued to indicate that the land had reverted back, there was no advertisement either. However, the last document in plaintiff's bundle is a gazette Notice No 3186 of April 3, 2009 indicating that the city council had executed an instrument of discharge in favour of Singh and others trading as Central Timber Company. That discharge of 2009 is inconsistent with a claim where the land had reverted back to the City Council and had even been allocated to the plaintiffs a year earlier in 2008.
49. This court also takes cognizance of the explanation given by Pw2 as to why the gazette notice was issued that the previous owner was being notified of the arrears and anyone with an objection could lodge a claim.
50. It is also not lost to this court that the rating account in the name of Central Timber company (the firm associated with Singh) had not been closed as at July 25, 2011 (see plaintiff's document at page 51 of their bundle).
51. What resonates from the foregoing analysis derived from the evidence of Pw2 is that the City Council was blowing hot and cold in matters reversion or issuance of new leases. They were actively flaunting the previous holder of the lease as the owner of the suit land by year 2009 and 2011, but at the same time, they were preparing leases for the alleged new owners in year 2008!
52. The City Council appeared to have operated under stealth in matters reversion of the leases, and their attempts to illuminate the process has come rather late in the day.
53. I find that the rights of the defendants as adverse possessors had crystallized long before the plaintiffs acquired their leases and that there is no plausible evidence to show that the leases had reverted back to the City Council. It therefore follows that the City Council of Nairobi had nothing tangible to offer to the plaintiffs.
54. It is not lost to this court that the plaintiffs have never occupied the suit property and even when they were buying the same, they were aware that the land was occupied. The occupants happen to be the defendants who had no intention of relinquishing that land.
55. In the final analysis, I find that plaintiff's claim is unmerited while defendant's counter-claim is allowed in the following terms:



1. It is hereby declared that the defendants are entitled to land parcels LR 209/4401/384, LR NO 209/4401/385 and LR 209/4401/390 by way of adverse possession.
2. An order is hereby given for the defendants to be registered as the owners of the suit parcels LR 209/4401/384, LR NO 209/4401/385 and LR 209/4401/390.
3. The leases issued to the plaintiffs for the land parcels No's LR 209/4401/384, 209/4401/385 and 209/4401/390 are hereby cancelled.
4. Each party is to bear their own costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

M/s Wambua for Plaintiffs

M/s Irungu holding brief for Mr. J.I Mwangi for all Defendants

Court assistant: Eddel

