



Inoti v M'MutungI (Also as legal representatives of David M'Marete (Deceased) (Environment & Land Case 37 of 2020) [2022] KEELC 13721 (KLR) (26 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13721 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 37 OF 2020
CK NZILI, J
OCTOBER 26, 2022**

BETWEEN

MARY KITHINU INOTI PLAINTIFF

AND

**SALOME KARUGA M'MUTUNGI (ALSO AS LEGAL REPRESENTATIVES OF
DAVID M'MARETE (DECEASED) DEFENDANT**

JUDGMENT

1. The plaintiff took out an originating summons dated 4.9.2020 seeking the court to declare that she has acquired L.R No. Nyaki/Mulathankari/4201 which is a subdivision of LR No. Nyaki/Mulathankari/2352, measuring approximately 0.07 ha by virtue of adverse possession.
2. The originating summons was supported by an affidavit sworn by Mary Kithinu Inoti on the even date. The plaintiff averred that she bought the portion in 1996 from the defendant, took vacant possession and developed the same. She annexed a copy of the register, photos showing developments thereon, citation to the defendant to take out letters of administration, letters of administration and a copy of the register showing the subdivisions marked as MK 1-7 respectively.
3. Alongside the originating summons, the plaintiff sought for temporary orders of injunction and inhibition against the defendant following which the court granted orders for maintenance of status quo.
4. The plaintiff filed a list of witness's statements dated 19.1.2021 while the defendant filed a replying affidavit sworn by Salome Karuga M'Itunga on 6.11.2020.
5. In the said response, the defendant acknowledgment knowing the plaintiff for a long time as a tenant in her house who was allegedly selling illicit brew after her late husband allowed her to graze cows on the suitland. She stated she left for Isiolo town leaving her husband on the land where after she learned that he was sick, came and took him to hospital in Isiolo where he stayed for three years and



passed on. She averred it was during this time, the land when the land was left vacant that the plaintiff took advantage, sneaked in, visited her late husband in Isiolo General Hospital and purported to have him execute an agreement without involving his family. That he took his identification card, a chief's letter and visited the Land Registrar's office. That upon pressure from the area D.O, she eventually surrendered the original ID card. That she averred she demolished the house her husband used to stay in but the plaintiff extended a mabati structure after which a report was made to the area chief who summoned her to show cause but she declined to attend. Eventually, the area chief gave the plaintiff a warning not to set foot on the land but she adamantly refused following which she made a report to the Njuri Ncheke panel of elders after the plaintiff extended her structures.

6. That after lodging for letters of administration, the defendant stated she learned about the caution. That summons was issued by the land registrar to the plaintiff to explain why the caution should not be lifted but she declined to attend. The defendant attached the chief's letter to the land registrar, complaint letter, chief's response, demand letter, letter from Njuri Ncheke, letter to land registrar and summons over the caution by land registrar as annexure SKM 1-7 respectively.
7. In compliance with Order 11 of the Civil Procedure Rules parties filed a paginated bundle of documents dated 15.11.2021 and 17.11.2021 respectively.
8. The plaintiff adopted his supporting affidavit sworn on 4.9.2020 and a witness statement dated 6.1.2021 as her evidence in chief. She also produced her documents in the list dated 21.1.2021 namely a copy of the green card, photographs showing her developments and a reply to the citation as P. exh 1-3 respectively.
9. She insisted that she bought the suitland in 1996. She produced no sale agreement to that effect. She said that even though P. exh 1 showed the registered owner was one Kireria M'Lintari, she did not seek for his signature or that of the deceased's wife, the defendant, since he had told her that he had no wife. PW 1 said she was the one taking the deceased to the hospital and that her late husband was the one who bought the land together with her three children.
10. PW 1 said her late husband was buried in Nakuru and that the defendant was the one who took away the deceased to Isiolo. She said she sought for the letters of administration only to establish that the defendant had secretly lodged the papers and obtained a title deed without her knowledge. She eventually complained to the area chief and Njuri Ncheke panel of elders before she filed the current suit.
11. PW 1 said the defendant's late husband had told the defendant to give her the suit land but she became adamant and ignored all the summons from the area chief and Njuri Ncheke elders.
12. PW1 said she constructed some houses on the land and denied never receiving any notice to stop or vacate the land from the defendant. She said she bought the land for Kshs.65,000/= but could not tell if the balance was ever cleared. PW 1 said she used to assist the defendant's deceased husband as he was a person of no fixed abode, was sickly and needy. PW 1 said the deceased subdivided the land and sold to her a portion so that he could go to the hospital. PW 1 said it was the deceased who subdivided the land and gave her Parcel No. 2352.
13. PW 2 adopted his witness statement 6.1. 2021. As a retired assistant chief of the area, he told the court that in 2005, the plaintiff came to his offices alleging that he had bought land from the late David Marete for Kshs.65,000/= and upon perusal of the sale agreement, he noted Kshs.45,000/= had already been paid. He could not however confirm if the balance was ever cleared. Regarding the dispute, he said he was aware of several complaints between the parties which were handled both at the chief's office and before the Njuri Ncheke clan elders. Further, PW 2 confirmed that the plaintiff had been



- occupying the suit land together with her tenants on the structures she had erected on the suit land since 2000. He also confirmed that the plaintiff sought for and obtained a letter from him to go and place a caution on the land.
14. PW 3 adopted his witness statement dated 18.1. 2021. He confirmed the sale between the plaintiff and the deceased David Mwilaria after which the plaintiff took vacant possession close to over twenty years ago.
 15. DW 1 adopted her replying affidavit sworn on 6.11.2020 as her evidence in chief and produced the chief's letter dated 7.2.2007, another one to the Njuri Ncheke elders, a demand letter, letter of the land registrar dated 8.6.2017 and another one dated 10.8.2016 as D. exh 1-7 respectively. She confirmed that there had been long ranging dispute between her and the plaintiff over attempts by the latter to take her land by force, falsely claiming to have bought the land.
 16. DW 1 said she sought and obtained letters of administration and later on obtained a title deed to the land, which she later on sold to Cyrus Gikundi. She denied that the plaintiff was the one occupying the land.
 17. DW1 said that any agreement in a possession of the plaintiff was fraudulent since she visited her late husband in hospital and falsely took away his ID card. Even though the plaintiff had a makeshift structure on the land, DW 1 said it was erected in 2020 during the pendency of the suit. She accused PW 3 as being the one exacerbating the dispute. DW 1 said she made complaints about the illegal structures to both the area chief and the Njuri Ncheke elders. DW 1 said the caution was registered over L.R No. 5223 in 20.5.2016 before she applied for the letters of administration and that initially the land was registered between her late husband and her late brother in law and that after summons were issued to the plaintiff to attend the meeting, and upon failing to do so, the land registrar had no option but to vacate the caution.
 18. DW 1 however admitted that the plaintiff had let out the suitland to illicit brew traders. Though she had given her a notice to vacate through her advocates, DW 1 admitted she took no efforts to evict the plaintiff from the land.
 19. DW 2 adopted his witness statement dated 9.2.2021. As the chairman of Njuri Ncheke Kariene house, DW 2 confirmed that on 3.5.2016 the defendant filed a complaint with the elders against an illegal occupation of her land by the plaintiff which they were unable to resolve since the plaintiff declined to attend the meeting after being summoned twice.
 20. After the close of the case, parties were ordered to put in written submissions by 11.7.2022.
 21. The plaintiff submitted that her entry to the suit premises was on account of sale in March 1996 and has stayed therein openly, uninterruptedly, continuously and notoriously for over 26 years making extensive development's therein, which evidence has been corroborated by PW 2, 3 and documentary evidence of the green card.
 22. In her view, the balance of Kshs.19,500 was to be paid upon subdivision and transfers, but there was reluctance in transferring the land until the seller passed on. Eventually, she lodged a caution to protect her interests only to establish that the land had been subdivided into L.R No. 4201 and 4202 on 6.7.2020 and title deeds issued on 16.7.2020.
 23. The plaintiff relied in *Gerald Murithi vs Wamugunda Muriuki & another* (2020) eKLR, *Mweu vs Kiu Ranching & Farming Cooperative society Ltd* (1985) eKLR, *Kasuve vs Mwaani Investment Ltd & 4 others* (2004), 1KLR 184, *Celina Muthoni Kitbinji vs Safiya Binti Swaleh & 8 others* (2018) eKLR,



Jacob Mugambi M'Mugwika vs Ester Mwendwa (2022) eKLR, *Stanley Gitonga M'Mwithimbu vs Stephen M'Kiambati & another* (2021) eKLR.

24. The issues for the court determination are: -
 - i. If there was a valid sale agreement between the parties.
 - ii. If the plaintiff has proved the ingredients of adverse possession
 - iii. What is the order as to costs?
25. Adverse possession is a situation where an intruder who is in wrongful occupation makes a claim of ownership against a right of a true owner by alleging that due to clear and unequivocal evidence, he has been in possession which is not permissible, is open, with the knowledge of the true owner for the enjoyment of the property for a period of 12 years. See *Maweu vs Kiu Ranching* (supra), *Gerald Muriithi vs Wamugunda* (supra), *Kasuve vs Mwaani* (supra), *Celina Muthini Kithinji* (supra), *Stanley Gitonga M'Mwithambu* (supra) & *John Mugambi M'Mugwika* (supra).
26. Ordinarily the onus to prove adverse possession as held in *Kimani Ruchine vs Swifts Rutherford & Co Ltd* (1980) KLR 10 is on the intruder to demonstrate that the true owner knew or had the means, actual or constructive, to know of the possession or occupation; that the possession has not been broken for any temporary purpose or by any temporary purpose or by any endeavors to interrupt it or by any recurrent consideration.
27. In *Mweu* (supra) the court held that the key concepts and or tests are that the true owner has been dispossessed or has discontinued possession of his property.
28. As regards computation of time, the Court of Appeal in *Watuko vs Rusole & 3 others* (civil appeal) Nof. 129 of 2017) KLR (18 February 2022) (Judgement) held a period of twelve years begins to run as soon as the true owner is dispossessed of the land or has discontinued possession unless of course the true owner files a suit to recover the disputed parcel of land.
29. In *Kasongo & another vs Ochieng & 2 others* (Civil Appeal 123 of 2017) (2022) KECA 145 (KLR) 11th February 2022) (Judgement) the court held that consensual possession cannot be adverse otherwise even a lease or license to use land could potentially give rise to a claim for adverse possession, which consent could either be expressed or non-verbalized. The court cited with approval *John Baraza Ojiambo vs Veronica Auma Ojiambo and 3 others* (2013) eKLR where the court dismissed a non-verbalized consent in the context of family relations.
30. The court cited with approval *Titus Kigoro Munyi vs Peter Mburu Kimani* (2015) eKLR, that time for adversity cannot run against a person who has no interest in the property and said prescription affects not only present holders of title to land but also their predecessors hence a mere change of ownership of land occupied by the intruder does not interrupt such adverse possession as held in *Githu vs Ndeete* (1984) KLR.
31. As regards permissive possession out of a sale agreement, courts have held that time does not start running until the last instalment is cleared or a license determinate. See *Public Trustee vs Wanduru Ndegwa* (1984), eKLR *Hosea vs Njiru & others* (1974) EA 526, *Wambugu vs Njuguna* (1983) KLR 172.
32. Further, an adverse possessor must also demonstrate that he intended to take up the land as of right. In *Chevron (K) Ltd vs Harrison Charo Wa Shutu* (2016) eKLR, the court held by building structures on the suit premises, without obtaining permission from the appellant, the defendant had manifested



- animus possidendi, a clear mind and intention of dealing with the property as if it was exclusively his and in a manner that was in clear conflict with the appellant's right.
33. On what amounts to interruption, the Court of Appeal in *Peter Kamau Njau vs Emmanuel Charo Tinga* (2016), eKLR, said in order to stop time which has started running, it must be demonstrated that the owner of the land took positive steps to assert his rights by for instance taking out legal proceedings against the person on the land or by making an effective entry into the land.
 34. As to identification of the land sought, in *Wilson Kazungu Katana and 101 others vs Salim Abdalla Bakshwein & another* (2015) eKLR, the court said an adverse possessor must specifically identify or even describe the portion, size and location of the land from the larger suit premises he wants decreed to him.
 35. Applying the above binding principles and decisions the plaintiff has pleaded that she is entitled L.R No. Nyaki/Mulathankari/4201 a subdivision on LR No. Nyaaki/Mulathankari/2352 measuring 0.07 ha which she initially entered into by virtue of a valid sale but which the deceased failed to transfer before his death. She testified she has possessed, utilized, developed and dispossessed not only the present defendant but also her predecessor in title.
 36. The plaintiff testified and produced a copy of records as P.exh (1) showing an entry No. 1 made on 9.10.2007 in the name of Kireria M'Muthiora and entry No. 2 on 8.10.2008 in the name of David M'Marete, copies of photos showing developments thereon, citation to the defendant to take up letters of administration, response by the defendant admitting there was letters of grant and removal of a caution placed by the plaintiff on LR. 2352 and removed on 16.10.2019 as well as a copy of records for LR No. Nyaki/Mulathankari/4201 in the name of the defendant with effect from 16.7.2020 after LR No. 2352 was subdivided into L.R No's 420 land 4201, which the defendant transferred the later to Silai Gikundi as P. exh No's 1-3 respectively.
 37. The plaintiff also called PW 2 and 3 who confirmed her entry into the land, possession and developments there on.
 38. In her defence the defendant admitted knowing the plaintiff as a tenant to the suit land. She said she left her late husband on the land for Isiolo, who later on became sick and took him to hospital. Further, the defendant insisted that during his absence the plaintiff took advantage, visited him in hospital and fraudulently took his ID card, purported to have an agreement of sale and made illegal structures on the land which she has all along resisted. DW1 said the plaintiff put a caveat on her land which she eventually lifted, took up letters of grant and eventually registered the land under her names after selling a portion to a third party.
 39. She denied there was a valid sale agreement more so for lack of her signature or that of her relatives.
 40. In her testimony, the defendant produced a letter dated 4.1.2019 and 30.9.2019 from the chief confirming that the land was hers, protest letter dated 4.8.2019 over the illegal buildings, a demand letter to vacate dated 26.8.2011, Njuri Ncheke proceedings for 17.4.2016, letters dated 8.6.2017 to land registrar to remove the caution and a notice of intention to remove caution dated 16.8.2018 by the land registrar as D. exh 1-7 respectively. The defendant also called DW 2, a clan elder who said they did not succeed in arbitrating over the dispute since the plaintiff declined or refused to honor their summons.
 41. The plaintiff pleaded and testified the entry into the land was as a result of a sale agreement. It is trite law that he who asserts must prove and that anybody claiming a sale of land must produce an agreement duly signed and witnessed by an independent witness.



42. Section 3 (1) of the *Law of Contract Act* as read together with Section 38 of the *Land Act* 2012 provides that a contract of land to be valid must be in writing, signed by parties and witnessed or attested by a witness who was present when it was made unless it is out of an auction by operation of law or entered before the law became effective, provided that a verbal contract shall be reduced to writing within 2 years after the enactment of the Act.
43. The plaintiff averred and testified that the sale took place in 1996. This was before the Law of Contract was amended with effect from May 2003. At the time, all what the law required was a note of acknowledgement and taking up of vacant possession.
44. The plaintiff has not produced any evidence of a sale agreement though she said Kshs.45,000/= was paid and a balance of Kshs.19,500/= was to be paid after the subdivision and transfer. She was not certain if the balance was ever paid. PW 2 & 3 confirmed the existence of the sale agreement but were not certain of its terms, conditions and timelines.
45. On the other hand, the defendant insists the plaintiff was a mere tenant and if at all there was any sale agreement, the same had not been produced before court as well as evidence of compliance with its terms and conditions.
46. None of the plaintiff's witnesses was able to tell the terms and conditions of the payments and whether the plaintiff ever cleared the total purchase price. The law is that time starts running after the last instalment is cleared. In this suit the plaintiff has been unable to confirm when the balance was cleared. She has said it was to be done after the subdivision and the transfer. Evidence has been tendered that a subdivision done. The plaintiff has not said whether she offered to clear the balance to the deceased seller to the defendant even at the times he lodged the caution and was summoned to show cause why it should not be removed.
47. There is evidence that the defendant asserted her rights and resisted any attempts to the plaintiff's occupation on an alleged sale. Additionally, by the time the defendant became a registered owner on 6.7.2020, time could not have been running against her predecessor in title without the clearance of the balance.
48. In my view, the evidence by the plaintiff and the developments therein are not indicative of her mind and the intention to occupy the suitland as of right and to the exclusion of the defendant without first clearing the balance. For all intents and purposes, she remained a mere licensee but not an adverse possessor.
49. Therefore, and given the foregoing, it is my finding that the plaintiff has not proved all the ingredients of adverse possession hence is not entitled to the orders sought.
50. In the circumstances, I disallow the claim. Costs to the defendant in any event.
Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 26TH DAY OF OCTOBER, 2022.

In presence of:

C/A: Kananu

Wambua for plaintiffs

Otieno C. for defendant

HON. C.K. NZILI



ELC JUDGE

