



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kaaria & another v Kobia (Environment & Land Case 15 of 2020)  
[2022] KEELC 13764 (KLR) (26 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13764 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 15 OF 2020**

**CK NZILI, J**

**OCTOBER 26, 2022**

**BETWEEN**

**DAVID MUTHAMIA KAARIA ..... 1<sup>ST</sup> PLAINTIFF**

**DAVID MAOORE KAARIA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**PETER KOBIA ..... DEFENDANT**

**JUDGMENT**

1. The plaintiffs took out an originating summons dated June 3, 2020 seeking to have acquired LR No Nyambene/Kirindine "A"/3594 which is registered in the name of the defendant by virtue of adverse possession. The originating summons was supported by an application sworn by Daniel Muthamia Kaaria in which he attached a copy of the register, ruling in Maua Chief Magistrates civil case No 443 B/2013 and a chief's letter as annexures DMK 1-3 respectively.
2. The defendant filed a replying affidavit sworn on July 13, 2020 stating that he lawfully purchased land bordering the plaintiffs land with effect from 1987 and planted coffee, bananas, miraa, tea, pineapples and other trees. He admitted that they have been in constant dispute over the boundary. He attached a copy of the title deed, green card, sketch map, summons by the land registrar, crop damage report, assistant chief's letter, judgment in Maua ELC No 29 of 2018, copy of the order, photos, valuation report, occurrence book report, chief's letter, copy of judgment in Meru ELC No 157 of 2013 (OS), proceedings and findings before the adjudication committee as annexures marked PKM 1-8 respectively.
3. The plaintiff adopted his supporting affidavit sworn on June 3, 2020 and a witness statement dated June 22, 2020 as his evidence in chief. He produced copies of the register, ruling in Ministers Appeal No 41 of 2001, chiefs letter dated February 20, 2017, proceedings before the minister, ruling in the criminal case, chief's letter dated March 12, 2020 as P Exh's 1-6 respectively.



4. PW 1 said he inherited the suitland from his father since 1990 and no one had interfered with his occupation except in 2013 when he was arraigned before alleged court for malicious damage claim and a civil case No 29/18 both which were dismissed. He admitted the existence of High Court ELC No 159 of 2013 (OS) where he was the 2<sup>nd</sup> defendant which awarded him the land. According to him parcel LR No 3120 was consolidated into parcel LR No 3594 in 2016. PW 1 confirmed that the land registrar came to the land to fix the boundary.
5. PW 2 adopted his witness statement dated June 22, 2021. He confirmed that he was a neighbour to the 1<sup>st</sup> plaintiff and admitted that the defendant had bought land from him.
6. PW 3 adopted his witness statement dated June 22, 2021. He confirmed the parties herein were his neighbors who had been having several disputes after the defendant allegedly merged his land with that of the plaintiffs.
7. The defendant adopted his replying affidavit and witness statement as his evidence in chief. He produced a copy of his title deed and green card as Dexh (1), sketch map as D exh (2), copy of summons by the land registrar as D exh (3), crop damage assessment report as D exh (4), copy of judgment and decree in Meru CMCC No 29 of 2018 as D exh. (5), copy of OB No. and the chiefs' letter as D exh 6 (a- 8), copy of the proceedings and findings before the land adjudication committee as D exh (7) and a copy of judgment together with a notice of motion in Meru ELC No 157 of 2013 and the originating summons as D exh No 8.
8. The defendant confirmed that in the Maua Law Courts Case, He was the one occupying the land as confirmed in D exh 5, hence the plaintiff had sued him for vacant possession of the land where he had stayed since adjudication stage. This was the reason the plaintiff had been charged with malicious damage of the property. DW 1 testified that he brought 4.7 acres of land which traversed the main road. He confirmed the malicious damage charges were made in 2013 while in D exh (5) he was an interested party over LR No 4353. DW 1 confirmed that he had been on the land since 1987.
9. DW 2 and DW 3 told the court that the defendant was their neighbor who bought the land in 1987 which cuts across a road. They said the defendant had been occupying the land since then until the plaintiff invaded it in 2020.
10. By written submissions dated July 15, 2022 the plaintiff listed out the issues for determination as: -
  - a. if the defendant is the registered owner of the suitland
  - b. If he has established the ingredients of adverse possession
11. It was submitted that the plaintiff's testimony had confirmed that the land was registered under the name of the defendant which borders their land. Further, it was submitted the plaintiff's testimony was clear on possession of the land for over 12 years as confirmed by the chief's letter dated March 12, 2020, the ruling in Maua Law Courts and the corroboration by DW 2 and DW testimony.
12. Reliance was placed on *Maweu v Liu Ranching & Farming Cooperative Society* (1985) KLR 430 and *Chevron (K) Ltd v Harrison Charo wa Shutu* (2016) eKLR.
13. As to whether the Maua Chief Magistrate's Court ELC No 29 of 2018 extinguished the claim, the plaintiffs submitted that time did not stop running for this case was not an action for the recovery of the land or an attempt to retake the land. Reliance was placed on *James Maina Kinya v Gerald Kwendaka* (2018) eKLR.



14. The defendant by written submissions dated July 8, 2022 submitted that the plaintiffs had failed to establish the ingredients of adverse possession as required under sections 7 & 17 of the law of *Limitation of Actions Act* and as set out in the case law of *Kasuve vs Mwaani Investment Ltd & 4 others* (2004) 1KLR 184, *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* (2020) eKLR, *Samuel Kihamba v Mary Mbaisi* (2015) eKLR, *Wambugu v Njuguna* (1983) KLR 173.
15. It was the defendant's submissions that the plaintiffs have never been in occupation of the suit premises given the criminal charges at Maua Law Courts for malicious damage where he was been asserting his rights of ownership through the complaint and secondly, in the Maua ELC No 29/2018 where the plaintiffs were seeking for vacant possession which was dismissed for lack of merits. Lastly it was submitted that any alleged occupation had been with the resistance from the defendant hence has not been peaceful at all as ownership was confirmed in the Maua suit and Meru ELC No 157 of 2013.
16. As to computation of time under sections 37 and 38 of the *Limitation of Actions Act*, the defendant submitted that whereas the plaintiffs alleged the year of possession as 1987, the doctrine of adverse possession could not be invoked since the land was only registered in 2017 and while filing the suit in 2020, only three years had elapsed. Reliance was placed on *Benson Mukuwa Wachira v Assumptions sisters of Nairobi Registered Trustees* (2016) eKLR and Meru ELC No 38 of 2020 *Stanley Kaume v Stephen Kinanchui Lichoro*.
17. The issues for determination are whether the plaintiffs have met the ingredients of adverse possession and if the defendant's defense has merits.
18. For a party to succeed in a claim based on adverse possession, there must be proof that the possession claimed is adequate, in continuity, in publicity and in extend and it adverse to the registered owner. Possession is a matter of fact depending on all the circumstances obtaining in a given case. See *Maweu v Liu* (supra).
19. Adverse possession cannot arise if a party is in possession with the permission of the owner or, through an agreement of sale, lease or otherwise until the end of the period under which the permission was granted. See *Abdirashid Adan Hassan v Estate of WHE Edgley* (2022) eKLR citing with approval *Janda v Kirpal* (1975) EA 225.
20. In *Chevron (K) Ltd* (supra), the court held an adverse possessor has to prove both the discontinuance and dispossession by doing acts inconsistent with the owners' enjoyment of the soil for purpose of which he intended to use the land. The court also said there must be manifestation of animus possidendi by the applicant, a clear mind and intention of dealing with the suit premises as if it was exclusively his and in a manner that was in clear conflict with the registered owner's rights.
21. Applying the above principles and caselaw to this case, the plaintiffs have not pleaded the date of entry into the suit premises both in the originating summons, the supporting affidavit and the witness statements.
22. In his testimony, PW 1 stated that he inherited the suitland from his father in 1990. He said it was only in 2013 when he was taken to court. He also admitted there had been numerous disputes in court and before the land registrar over a boundary. Further, PW 1 and his witness admitted there was a claim of malicious damage to property and some litigation before the Maua law courts.
23. The copy of records produced by the plaintiffs indicated that the register for LR No Namkeen/ Kirindine/3594 was opened on March 1, 2004 and defendant became the registered owner on November 23, 2016 as per D exh 1(b).



24. The plaintiffs filed this originating summons on June 5, 2020 whereas as per D exh 5 (a) the defendant filed Maua Chief Magistrates ELC No 29 of 2018 on February 20, 2018 where he sought for vacant possession and eviction of the plaintiffs from the suit land on account of fraud, encroachment and return of the suitland to LR No Nyambene/Kirindine/2680 and 2681 "A".
25. In that case, the trial court made some definite findings that the defendant was the legal owner of LR No 3594 "A"; that no fraud or illegality on acquisition of the land had been proved and that the defendant as the lawful occupier of the land was protected in law. The suit was therefore dismissed on July 19, 2019. See *Jason Masai v Masai* (1996) eKLR.
26. Looking at the said judgment the defendant's evidence was that he bought the land in 1987, took vacant possession and eventually became a registered proprietor. See *Githu v Ndeete* (1984).
27. In D Exh 8(a) at page 40 of the bundle the 1<sup>st</sup> defendant in that suit sought to join the defendant as a party *vide* an application dated May 23, 2016 as an interested party regarding LR No 3594. The court made a finding that parcel No3594 was different from parcel No. 3448 from which parcel No 4353 was derived from, hence no cause of action existed with the interested party, the defendant herein.
28. In view of this evidence it is quite obvious that the plaintiffs have not pleaded and proved the alleged entry into the suitland. In the suit which was dismissed seeking for vacant possession the plaintiffs were seeking the land based on a limited grant for the estate of their deceased father.
29. In this suit and which was filed close to one year after the lower court suit was dismissed, the plaintiffs are not claiming the land for and on behalf of the estate of the deceased father. The plaintiffs have ingeniously and deliberately left out and failed to mention the existence of the previous suit over the suitland
30. In my considered view therefore, even if the plaintiffs had been on the land prior to 2016 when the property was registered in favour of the defendant, twelve years had not elapsed by the time they filed this suit. Again, even if time was running in their favor, the same stopped running the moment the defendant asserted his ownership rights and his rights were confirmed by the judgment and in D exh 5 (b), a decree issued by the lower court on July 2019.
31. Again, looking at the D exh (3) (4), 6(a), (b), (e) there is no doubt in my mind that the defendant had been making persistent moves to resist any alleged occupation of his land by the plaintiffs as early as 2013.
32. It cannot therefore be true that the plaintiffs have been occupying the suitland openly, without force, without secrecy, and with the intention to exclusively have the land. See *Samuel Kihambo v Mary Mbaisi* (2015) eKLR. The resistance and assertion of title by the defendant has been consistent and to the point that he retook ownership hence the reason the plaintiffs were seeking for vacant possession and eviction in the lower court. Sese *Githu v Ndeete* (supra).
33. Over and above this, the plaintiffs would not have been seeking for vacant possession and eviction orders before coming to this court if at all they were in possession.
34. The claim for adverse possession was not included in the former suit and only came about close to a year afterwards.
35. The lower judgment confirmed the rights of the defendant which he asserted and hence if at all any time was running in favor of the plaintiffs, the same was interrupted and could only have started to run afresh only if at all the plaintiffs regained entry after their suit was dismissed in 2019 for them to file this suit in 2020. This can only mean that they had hardly been on the suit land less than a year from 2019.



36. The plaintiffs however have not led any evidence to show the nature of possession by way of buildings, erection of a fence or other visible foot prints to show that the dispossession and discontinuance of the rights of the registered owner had occurred.
37. It is quite apparent that the plaintiffs having lost in a previous suit relating on the same suitland came back this time round through an originating summons to assert adverse possession.
38. The lower court made definite findings on ownership rights of the defendant which have not been impeached under section 24, 25 and 26 and 80 of the Land Registration Act. However, the plaintiffs now are trying to assert adverse possession, without appealing against the lower court decree.
39. A party cannot use the process of court so as to have a second bite of the cherry after losing in a previous suit. In *Richard Wefwafwa* (supra), the court held for the doctrine of res-judicata to apply, the suit must have been determined by a competent court as held in *CCK v Royal Media Services Ltd and 5 others* (2014) eKLR.
40. The plaintiffs herein allege that they inherited the land from their late father. There is no evidence which has been tendered that the said father had any proprietary interest on the suit land by the time he passed on in 2015. D exh No 8 (a) related to parcel No 4353 and not parcel No 3594. Attempts also to bring on board the defendant in the previous suit were thwarted by the trial court. In similar circumstances the court in *Wefwafwa* (supra) held without any evidence to show any proprietary interest, a deceased parent could not gift the appellant in that case the land so as to assert adverse possession. Similarly, in that suit like in the instant case, the deceased parent was alive by the time the property was registered.
41. Citing with approval *Alfred Welimo v Mulaa Sumba Barasa* CA No 186 of 2011 the court said adverse possession is not established merely because a party has abandoned possession of his land and ceased to use it.
42. In this suit, the mere fact that part of the suitland is across the road and near the plaintiff's land does not Ipso facto mean that the defendant had abandoned his land. Nevertheless, there is enough evidence that the defendant has been asserting his rights and demanding that the plaintiffs vacate or cease any acts of trespass.
43. The plaintiffs had the burden to prove not merely the possession, but possession that is *nec vi nec clam, nec precario*.
44. Given the exhibits by the defendant, it is quite evident that there has been no hostile take over and to the exclusion of the defendant from the suitland by the plaintiff.
45. All the efforts by the defendant to complain to the chief, police and the courts are clear that he has been asserting his rights and resisting any attempts of entry, re-entry and trespass to his land by the plaintiffs.
46. In the premises the plaintiffs have failed to prove the case to the required standards
47. The suit is dismissed with costs.

Orders accordingly.

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

**In presence of:**

C/A: Kananu

Miss Kinyanjui for defendant



Miss Mutegi for plaintiffs

**HON. C.K. NZILI**

**ELC JUDGE**

