



**M'Muchai v Nkuene (Being sued as the legal representative of  
Parcasio Nkumbu M'Ikamati) (Environment & Land Case 69 of 2019)  
[2022] KEELC 13650 (KLR) (19 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13650 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 69 OF 2019  
CK NZILI, J  
OCTOBER 19, 2022**

**BETWEEN**

**M'IKIUGU M'MUCHAI ..... PLAINTIFF**

**AND**

**SOPHIA NKUENE (BEING SUED AS THE LEGAL REPRESENTATIVE OF  
PARCASIO NKUMBU M'IKAMATI) ..... DEFENDANT**

**JUDGMENT**

**A. Pleadings**

1. The plaintiff took out an originating summons dated November 21, 2019 seeking that the court makes a finding that he is entitled to three acres out of the defendant's LR No. Nyaki/Giaki 1919 (hereinafter the suitland) by virtue of adverse possession. The originating summons is supported by an affidavit sworn on the even date by M'Ikiugu M'Muchai, witness statement and a list of documents.
2. The defendant opposed the originating summons through an affidavit sworn by Sophia Nkuene on November 25, 2020 in which she denied the alleged purchase or occupation of the suitland by the plaintiff. On the contrary, the defendant averred the plaintiff was a mere licensee for one year authorized by her deceased husband which licence expired upon his death. The replying affidavit was also supported by defendant's witness statements and list of documents filed on December 6, 2020.

**B. Testimony**

3. Pw1 adopted his supporting affidavit and witness statement dated November 21, 2019 as his evidence in chief. He produced a search certificate for L.R No. Nyaki/Giaki/1919, sale agreement and a translation as P.exh 1, MFi (2) and 3 respectively. He testified that she bought the land from the deceased in 1978, took vacant possession, put in boundaries and paid all the entire purchase price.



4. PW 1 testified that he lived on the land without any dispute until the seller passed on in 1994. He denied that he had been a licensee of the deceased and or ever paying any rates or rent for leasing the land.
5. PW 1 further said he sought his share of the estate during the succession cause and an order was issued that six acres be surveyed but the remainder which was three acres was to be determined by this court.
6. The plaintiff insisted it was the deceased who allowed him to possess and occupy the suitland until 1994. He said they never attended any land control board for the subdivision and or on transfer or sign any transfer forms though he kept asking the vendor for the same until he passed on. In his view the reason for the delay was out of a prolonged sickness on the part of the deceased.
7. PW 1 testified that he erected permanent buildings on the suitland with effect 1978. He admitted that he did not take the deceased to the area, Njuri Ncheke or write him a letter after the delay in affecting the transfer. PW1 denied that the defendant ordered him to vacate the land after her husband passed on, though she had been quarreling her. The plaintiff testified that after the filing of the probate cause, an order was made for the maintenance of the status quo. PW 1 said the only issue the parties had at the chief's office concerned some trees allegedly belonging to him. The plaintiff testified that there were four timber structures and a stone building as reflected during the scene visit occupied, within the 3 acres he was claiming.
8. As regards the visit by the land surveyor, PW1 said this occurred after the scene visit. The plaintiff denied that the defendant was occupying an adjacent land or developing it, given that she sold it and vacated the area hence the land had no – visible buildings belonging to her. PW 1 admitted that the defendant had a criminal case lodged against his wife. As concerns the sale agreement, PW 1 admitted it was written before a panel of elders in 1978, though neither the deceased vendor nor his children signed the same at the time.
9. PW 1 denied that he had threatened the defendant or was occupying the land by force. Shown the photographs, PW 1 admitted that the images appearing thereon were reflective of the defendant's land and not the one he was claiming. Concerning the visit to the chief's office, PW 1 admitted that there were at least three such visits but denied the alleged threats to kill the defendant as evidenced by the letter dated July 11, 2008 which he was not aware of.
10. PW2 adopted his witness statement dated October 18, 2021 and confirmed that he was aware that the plaintiff had bought 3 acres of land from the late Parcasio Nkumbu in 1978. He testified the dispute was handled by the clan elders in the presence of the defendant and her children regarding a claim of Kshs.665 alleged to have been an outstanding balance out of the sale PW 2 confirmed that the area chief had handled several disputes regarding the parties herein including a boundary dispute but could not confirm if the police were also involved.
11. PW 2 said that the clan elders were unable to resolve the dispute but could not confirm if the defendant had ordered the plaintiff to vacate the land though he was certain that the boundaries to the land had been fixed prior to the death of the defendant's husband.
12. PW 3 as the first-born son of the plaintiff confirmed that he was privy to the sale agreement and the dispute before which arose after the defendant refused to transfer the land to PW 1. He confirmed that the plaintiff has been in peaceful occupation of the suit land until the deceased passed on. However, PW 3 said there was no formal notice given to his late father by the defendant to vacate the land given he was even circumcised on the said land.



13. PW 4 told the court that the purchase price for the suitland was Kshs.5350 which was fully paid and was unaware of the alleged outstanding balance. In his view the sale agreement was oral for the three acres of land but eventually, the plaintiff took vacant possession.
14. DW 1 adopted his replying affidavit and the witness statement as her evidence in chief dated 28.11.2020. She produced the proceedings in 1990 between the parties as D. Exh (1), letters dated July 10, 2009, July 10, 2008, August 29, 2007, February 13, 2017, chiefs letter dated June 20, 2017, advocates letters dated June 18, 2019, September 30, 2017 as D. exh 2-8 respectively; land registrar's letter dated 6.11.2020 as D. exh (9) and two OB reports dated April 26, 2020 and October 25, 2020 as D. exhibit 10 & 11, letters from Giaki Police Station as D. exh (12), letter dated 27.4.2009 as D. exh (13), application to court dated March 30, 2009 as D. exh (14) and a letter dated 15.10.2020 as D. exh (15).
15. DW 1 admitted the existing dispute with the plaintiff as evidenced by D. Exh (1) in 1999 over the suitland since it was only Kshs.800/= which had been paid for one acre and that the plaintiff was asked to vacate the land but declined to date.
16. The defendant testified that the correspondence she had produced before court indicated that the plaintiff had been having a dispute with her and had declined to vacate the land.
17. DW 1 said that both the defendant and his wife have been threatening, assaulting, destroying her trees and stopping her from accessing the land, hence the reason she complained severally to the area chief and the police as evidenced by P. exh (15). She testified that interventions by the area chief, the police and the assistant area chief and the county commissioner had been in vain.
18. DW 1 testified that she complained about the threats during the succession cause and the plaintiff was warned. However, she has been unable to access the land despite the court order. She denied the existence of the alleged sale agreement since the deceased was a mere licensee for three years which expired but declined to hand over vacant possession. DW 1 said that during the funeral of her late husband a village elder gave verbal notice to any complainant over any debt to raise it with the family as per Kimeru customary traditions but the deceased through present did not come forward.
19. DW 1 said before the court order was issued, the plaintiff was only occupying one acre of her land but in total disregard of the order, he fenced off 2 more acres of her land and continued with more developments even during the pendency of this suit despite her objections. She confirmed that her relationship with the plaintiff has been chaotic and the occupation has not been peaceful at all.
20. DW 1 confirmed that she sold 2 acres of her land and left the area. She denied that her husband mentioned to her about the alleged sale. In her view, D. exh 1 showed that the plaintiff was given an option of paying Kshs.25,000/= or in the alternative to vacate the land.
21. DW 2, a neighbor to the defendant confirmed that the plaintiff was the one in occupation of the suit land and that the dispute had been handled severally by the area chief as well as the panel of elders where he participated. He confirmed further that the plaintiff used to utilize the land but from 2018 he moved in and erected permanent buildings despite protests by the defendant and notices to vacate the land.
22. DW 3 told the court he was aware of the lease for three years which expired before the defendant's husband passed on in 1994 but the plaintiff refused to vacate the land claiming he had bought it. He testified that the plaintiff was unable to produce before the elders in 1994, any sale agreement and therefore was ordered that he vacates the land. Instead the plaintiff started erecting permanent structures on the land after destroying some house belonging to the defendant.



23. DW 4 and DW 5 told the court the plaintiff was initially a lessee of one acre of land which was to expire after three years but upon expiry, he refused to vacate the land. They told the court there has never been any peaceful occupation by the plaintiff since several disputes, quarrels and altercations have happened leading to the intervention by the police, the area chief, a panel of elders and the probate court whose directives the plaintiff has disobeyed and instead continued to forcefully occupy the land and erect illegal buildings.

### C. Written Submissions

24. The plaintiff submitted that pursuant to an oral agreement made in 1978, he entered into the suitland, cleared the entire purchase price and has since extensively developed it, his occupation has been peaceful and within the knowledge of the defendant, only for the dispute to arise after the vendor passed on.
25. In his view the plaintiff submits he has occupied the land for over 41 years uninterruptedly and peacefully not as a licensee or lease but as an adverse owner.
26. As to the issue of the sale, the plaintiff submits he paid through PW 4 Kshs.5,335/= to the defendant's late husband which fact was confirmed by PW 2 and eventually cleared the balance of Kshs.665/-
27. The plaintiff submitted that an oral agreement of sale was valid at the time by dint of Section 3 of the Law of Contract Act as held in Peter Mbiri Michuki vs Samuel Mugo Michuki (2014) eKLR.
28. The plaintiff submits he has met the ingredients of adverse possession as held in Gabriel Mbui vs Mukindia Maranya [1993] eKLR, Felicity Mutete Mutula v James Ndambuki (2020) eKLR and Public Trustee vs Wanduru Ndegwaa [1984] eKLR.
29. As to the burden of proof, the plaintiff submitted that under Section 107 of the Evidence Act, he has discharged the burden as regards entry into the land out of a sale agreement which occupation from 1978 to the death of the vendor in 1994 was 16 years and thereafter up to present.
30. Further, the plaintiff submitted that the defendant acquiesced to his occupation, allowed it to progress hence the equitable principle applies since the conduct of the defendant reflects her assent or accord to the entry and occupation and would therefore not be heard to complain otherwise. The plaintiff further submitted the defendant was estopped from denying the said facts as held in Willy Kimutai Kitilit vs Michael Kibet (2018) eKLR.
31. Regarding the doctrine of *lis pendens* and *status quo* orders, the plaintiff submitted that the definition of *status quo* as per Shimmers Plaza Ltd v NBK Ltd [2015] eKLR, is that the way things stand at the time the order is made or the existing state of things.
32. Therefore, if the deceased sold the land to other parties and went ahead and processed their titles, it means the land he sold to him was valid with effect from 1978. Additionally, the plaintiff submitted the scene visit orders were given by the Probate Court on December 5, 2018, that three acres be set aside until this suit was heard and determined. The plaintiff urged the court to find the suit proved to the required standard.
33. The defendant submits that her five witnesses' evidence was collaborative and unchallenged that the entry to the suitland by the plaintiff was consensual for a license of three years and not based on a sale. Further, the defendant submitted the documentary evidence tendered was clear that after the death of the defendant's husband, the plaintiff refused to vacate and therefore his occupation thereafter has not been peaceful and was interrupted all through.



34. Regarding the alleged sale the defendant submitted that the makers of P. exh (2) were not called to testify, PW 2 could not explain why the defendant and her children were not called as witnesses to the sale agreement, the fixing of the boundaries and that the evidence of PW 3 & 4 were unable to confirm if the entire purchase price was cleared. Thus, the defendant urged the court to find the evidence over the alleged sale suspect, unconvincing and the alleged agreement as invalid in law since it was not reduced into writing. In any event, it was submitted that such a claim became time barred after 12 years.
35. On the issue of peaceful, continuous and uninterrupted occupation, the defendant submitted the plaintiff did not tender such evidence though they admitted the entry was consented or permitted by the defendant's late husband for a license of 3 years whose expiry, the occupation became forceful.
36. Reliance was placed on *Daudi Ledama Morintat vs Mary Christine Kiarie & 2 others* (2017) eKLR and *Charles Barongo Momanyi v Hezron Kebati Mokuia & another* [2021] eKLR.

#### **D. Issues for Determination\*\*** \_\_\_

37. Having gone through the pleadings, evidence tendered and the written submissions, the issues for determination are:-
  - (i) Whether the plaintiff has pleaded and proved the ingredients of adverse possession.
  - (ii) If the plaintiff pleaded and proved the existence of a sale agreement.
  - (iii) If the plaintiff pleaded and proved the doctrine of acquiescence, lis pendens and the maintenance of status quo.
  - (iv) If the plaintiff is entitled to the prayers sought.

#### **E. Determination**

38. The law relating to adverse possession is set out under Sections 7a, 10, 12 (3), 13, 17, 38(1) & (2) of the *Limitations of Actions Act* Cap 22 whose combined effect is to extinguish the title of the proprietor of the land in favour of an adverse possessor at the expiry of 12 years of occupation by the adverse possessor on the suit land.
39. Under Section 28 (h) of the *Land Registration Act* 2012, overriding rights or interests are recognized *inter alia*, rights which are acquired or are in the process of acquisition by virtue of any written law relating to Limitations of Actions or by prescription. Section 7 of the *Land Act* 2012 also provides prescription as one of the ways of acquisition of land.
40. In interpreting the above provisions, courts have settled the essential requirements that one has to meet in order to succeed in a claim for adverse possession.
41. In *Wambugu v Njuguna* [1983] KLR 173 the court held that adverse possession contemplates two concepts; possession and discontinuance of possession. Further, the court held that the proper way of assessing proof of adverse possession would be whether the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he or she has been in possession for the requisite number of the statutory period of 12 years.
42. In *Mbiru v Gachuhi* [2002] 1 EALR 137, the court stated that an adverse possessor has to 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 12 years without interruption.



43. Likewise, in *Jandu v Kirpal & another* [1975] E.A 225, the court held that to prove adverse possession it was not sufficient to show that some acts of adverse possession, which must be adequate, in continuity, in publicity and in extent to show that it is adverse to the owner, but must be actual, visible, exclusive, open and notorious.
44. Similarly, in *Mtana Lewa vs Kabindi Ngala Mwangandi* (2015) eKLR, the court said that adverse possession is essentially 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 statutory period of 12 years.
45. In *Sisto Wambugu v Kamau Njuguna* [1983] eKLR the claimant had given two versions; some on a sale agreement and another on adverse possession. Hancox J.A said .... “A person.... Must have an effective right to make entry and to recover possession of the land in order that the statute may begin to run. He cannot have that effective right if the person in occupation is there under a contract or other valid permission or license which has not been determined”. Citing with approval *Jandal vs Kirpal (supra)*: “The rule on permission possession is that possession does not become adverse before the end of the period during which the possessor is permitted to occupy the land”.
46. In *Peter Okoth v Peter Ochido* [2021] eKLR, the court observed that a claim for adverse possession cannot accrue on a sale agreement but only after the payment of the final instalment. This was also the position adopted by the court in *Public Trustee vs Wanduru Ndegwa (supra)* that time begins to run from the date of the final payment.
47. In this suit the plaintiff stated that he made entry into the suit land in 1978 after the defendant’s late husband received Kshs.5355/= and later on cleared the balance of Kshs. 665/= That evidence was confirmed by PW 2 & 3.
48. On her part the defendant and her witnesses while agreeing there was a permissive entry into the land by the plaintiff, deny there was an alleged sale and assert the latter was a licensee to use the land only, which license was to expire in three years and terminated with the death of the deceased.
49. The defendant pleaded and testified that at the time her late husband passed on in 1994, the license had expired but the plaintiff failed to hand back vacant possession of the one acre, initially he was tilling the land and instead moved in, forcefully settled his family therein, occupied two more acres of land and started making permanent developments which she continued to resist and protest going by D. exhs 1-15. She denied the occupation has been peaceful, open, uninterrupted and or adverse to her rights to the land.
50. In *Peter Mbiru Michuki v Samuel Mobgo Michuki* [2014] eKLR, the Court of Appeal held that:
 

“When the appellant entered into a sale agreement with the plaintiff in 1964 and received the purchase price the suit property the appellant became a trustee holding the suit property in favour of the plaintiff. The plaintiff having paid the purchase price and taken possession acquired an equitable beneficial interest in the suit property. Section 18 (4) of the *Law of Limitation Act* applies in the instant case and the right to recover the suit property was extinguished by death of the plaintiff. The plaintiff having been in possession of the suit property Section 13 (1) of the *Limitation of Actions Act* applies as it provides that a right to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run”



51. The defendant has attacked the oral sale agreement as unproved and not reduced into writing. The plaintiff on the other hand submitted that the oral sale agreement was valid under Section 3 of the Law of Contract Act and relied on Peter Mbiru Michuki (*supra*).
52. The law on land contracts was changed effective from 2003 to include the mandatory attestation of the written sale agreement by a witness to the signatures of both the vendor and the purchaser. Prior to this, all what was required was an acknowledgment note followed by the taking up of vacant possession. See Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & another [2014] eKLR.
53. In this matter the plaintiff has brought witnesses who were present at the time he gave out the purchase price and was handed over vacant possession by the defendant's deceased husband. His evidence has been consistent and corroborated by his witnesses.
54. On the other hand, the defendant protested and testified that the entry was on account of a license or lease. The particulars of the lease or license have not been given. If at all the license existed it was to last only 3 years, meaning that as at 1994 the plaintiff had stayed on the suit land for 13 years after its expiry. There was no evidence lead by the defendant as to whether the licence was renewed on expiry by her deceased husband and why he would then allow the plaintiff to stay on his land for more period than was contemplated in the license or lease.
55. The defendant admitted that there was a meeting before the panel of elders and the area chief in which the plaintiff was told to pay Kshs.25,000/= and in default to vacate the land. This confirms that after 1994 the plaintiff was on the land not with the permission of the deceased or the defendant.
56. The question is then in which capacity was the plaintiff on the suit land after 1987 till 1994 and thereafter, up to the time the defendant sought and obtained the letters of grant.
57. The plaintiff's testimony is that he paid the last instalment of Kshs.665/= prior to the death of the defendant's husband in 1994, hence the reason he kept on urging for the transfer the land to himself and also the reason he was not ordered to vacate the land for non- clearance of the purchase price.
58. The defendant on the other hand says the plaintiff remained there by force and which she has resisted all the years hence interrupting the alleged time, going by the correspondence produced and the order for status quo issued in 2018.
59. In Benson Mukuwa Wachira vs Assumption Sisters of Nairobi Registered Trustees (2016) eKLR, the court held that since equity looks on that as done which ought to be done, it was legally plausible to assert that where a trespassing claimant was in continuous and uninterrupted possession and control of a land belonging to a person with an allotment letter, such a trespassing claimant for all intents and purposes, must be deemed to have been in adverse possession to the title holder.
60. As at the time the deceased passed on, the plaintiff had been on the land for more than 12 years, openly, uninterrupted and in exclusive control of the one acre after he had cleared the purchase price.
61. In Wilfred Kegonye Babu v Henry Mose Onuko [2019] eKLR the Court of Appeal citing with approval Wambugu v Njuguna (*supra*) held:

“Where the claimant is a purchaser under a contract of sale of land, it would be unfair to allow time to run in favour of a purchaser pending completion when it is clear that he was only allowed to continue to stay because of the pending purchase had it not been for the pending purchase the vendors would have evicted him. The possession can therefore only become adverse once the contract is repudiated. Where the claimant plead the right to land under an agreement and in the alternative seeks an order based on subsequent adverse possession,



the rule is; the claimant's possession is deemed to have been adverse to that of the owner after the payment of the last instalment the purchase price. The claimant will succeed under adverse possession for at about 12 years after such payment”.

62. In my considered view as at 1994, twelve years in this matter had elapsed as against the land held at the time by the deceased.
63. On the nature of possession and occupation, the law is that it has to be *nec vi nec clam nec precario* going by the holding in *Gabriel Mbui vs Mukindia Maranya (supra)*.
64. The plaintiff has pleaded and testified that she was undertaking commercial cultivation prior to the demise of defendant's deceased husband in 1994 and eventually made extensive developments after 1994 to date. He testified he has been under continuous, open, notorious and uninterrupted occupation of the land since 1978 to present and guided by the holding in *Felicity Mutete Mutula (supra)*, he should be declared to have acquired adverse rights.
65. The law is that a claimant must undertake visible and tangible activities adverse to the true owner with the animus possidendi to dispossess him and exclusively discontinue his possession. In *Samuel Kihamba v Mary Mbuisi* [2015] eKLR the court held one must prove the intention to have the land without force, without secrecy and without license or permission of the land owner.
66. The defendant has not denied the plaintiff's said developments though she averred they were made during the pendency of this suit and against the order for the maintenance of status quo.
67. There is no evidence tendered that prior to 2019 or the filing of the succession cause, that the defendant had made an effective entry into the suit land to take over possession and assert her rights by driving out the plaintiff from occupation through an eviction order other than the mere demand letters or notices through the police or chiefs, which courts have held do not amount to interruption of time from running.
68. The defendant admitted the developments made by the plaintiff were without her permission. This is a clear manifestation of animus possidendi and was in clear conflict of the defendant's rights as held in *Chevron (K) Ltd v Harrison Charo wa Shutu* [2016] eKLR.
69. Even though it is trite law that the filing of a suit by a registered owner to assert her rights stops the time from running, the succession cause did not amount to a suit seeking for an eviction of the plaintiff from the land.
70. In any event, at the time the defendant sought for the letters of grant, already the plaintiff's adverse rights had accrued as against the registered owner and this act did not stop the time from running as against the successor in title.
71. In *Isaac Cypriano Shingore v Kipketer Togom* [2016] eKLR, the court held even by the time the appellant became registered as proprietor by transmission, the respondent had been in occupation of the property for 18 years and no attempts had been made to assert title and that objections proceedings before the probate court and complaints at the Land Disputes Tribunal had no effect of interrupting the possession.
72. In *Githu v Ndete* [1984] KLR, the court held that; “Assertions of right occurs when the owner takes legal proceedings or makes an effective entry into the land”.
73. Applying the above principles my finding is that D. exh 1-15 do not amount to legal proceedings for eviction or an effective entry into the suit premises.



74. As to the doctrine of lis pendens and acquiescence the same were not pleaded at all. It is trite law that parties are bound by their own pleadings and issues flow from pleadings. See *Mutinda Mule v IEBC* [2014] eKLR. The plaintiff did not plead or lead evidence on those two twin issues.
75. Submissions cannot replace pleadings or amount to evidence as held in *Daniel Toroitich Moi vs Mwangi Stephen Murithi* [2014] eKLR.
76. In the premises, I find the suit proved to the required standard and hereby declare that the plaintiff is entitled to 3 acres of land out of L.R No. Nyaki/Giaki/1919 by virtue of adverse possession. The defendant shall subdivide and sign the transfer forms in favour of the plaintiff within 2 months from the date hereof in default the Deputy Registrar of the court to sign the forms. Costs to the plaintiff.

Orders accordingly

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT**

**THIS 19TH DAY OF OCTOBER, 2022**

**In presence of:**

**C/A: Kananu**

**Mr. Kaume for defendant**

**Karanja for plaintiff**

**HON. C.K. NZILI**

**ELC JUDGE**

