



**Muhindi v Githiaka (Environment & Land Case 115 of 2016)
[2022] KEELC 13637 (KLR) (19 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13637 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 115 OF 2016
YM ANGIMA, J
OCTOBER 19, 2022**

BETWEEN

MICHAEL MURIUKI MUHINDI PLAINTIFF

AND

CHARLES MAIMBA GITHIAKA DEFENDANT

JUDGMENT

A. The Plaintiff's Claim

1. By a plaint dated 30.05.2016 the Plaintiff sought the following reliefs against the Defendant:
 - a. A declaration that the award of the Kieni East Land Disputes Tribunal dated 2.4.2002 with reference No.29 of 1998 pending reading and adoption as judgment of court Vide Nyeri C.M. Award Case No.21 of 2002 is null and void and of no legal effect.
 - b. An order of forcible eviction do issue against the Defendant by himself, his servants, agents or anyone claiming under him and same be effected by the court bailiffs of this Honourable court at his own costs from Plaintiff's L.R. Narumoru/Block 2/7.
 - c. An order of permanent injunction do issue restraining the Defendant by himself, his servants, agents or anyone claiming under him from trespassing and or illegally interfering with the Plaintiff's proprietary rights over his L.R.Narumoru/Block.2/7.
 - d. Costs of the suit and interest thereon at court rates.
2. The Plaintiff pleaded that he was the registered proprietor of Title No. Narumoru/Block 2/7 (the suit property) which he bought in 1997 for valuable consideration from one, Onesmus Murage Karoki (Murage) who was the registered proprietor at the time. The Plaintiff further pleaded that upon purchase he took possession and developed the suit property until 2003 when he was transferred to a place outside Nyeri.



3. It was the Plaintiff's case that sometime in 1998 the Defendant started laying a claim upon the suit property in consequence whereof he (the defendant) filed a claim before the defunct Land Disputes Tribunal (the Tribunal) in Tribunal Case No.29 of 1998 which purported to award him the suit property vide an award dated 2.04.2002. It was the Plaintiff's contention that on the basis of the said award the Defendant had unlawfully trespassed into the suit property and occupied the same together with all developments thereon.
4. The Plaintiff further pleaded that the Defendant had further filed the same award in Nyeri C.M.'s Award Case No.21 of 2002 for adoption but the same was not adopted as a judgment by the magistrate's court. The Plaintiff contended that the said award was illegal and void for want of jurisdiction on the part of the Tribunal hence the same ought to be set aside.

B. The Defendant's Defence And Counter-claim

5. By a statement of defence and counter-claim dated 5.07.2016 the Defendant denied liability for the Plaintiff's claim. By his defence, the Defendant denied that the Plaintiff was the legitimate owner of the suit property and put him to strict proof thereof. He, however, conceded the existence of the award by the Tribunal but contended that it was valid and lawful since it was never challenged through an appeal as stipulated by law.
6. By his counter-claim the Defendant contended that he was the legitimate owner of the suit property by virtue of having acquired it in 1974 from Weruini Lands Limited (the company) which was a land buying company. He further pleaded that upon making all the necessary payments to the company he was issued with a clearance certificate and other registration documents to facilitate his registration as proprietor. It was his case that when he lodged his documents for registration they were rejected by the Land Registrar because Murage had already been registered as proprietor and then transferred the suit property to the Plaintiff.
7. The Defendant contended that Murage and the Plaintiff had illegally or fraudulently acquired the suit property which rightfully belonged to him. He enumerated five (5) particulars of fraud against the Plaintiff in paragraph 11 of his counter-claim.
8. In the alternative and without prejudice to the foregoing, the Defendant pleaded that he took possession of the suit property in 2001, constructed his residence thereon and continued developing and farming thereon without any interruption from the Plaintiff. It was his further pleading that he had been in open, continuous and exclusive possession of the suit property for a period exceeding 12 years hence he had acquired adverse possession thereof under the law. He consequently sought the following reliefs in his counterclaim:
 - a. A declaration that the Defendant is the lawful owner of the suit land L.R.No.Narumoru/Block 2/7, the same having been fraudulently and unlawfully transferred to the Plaintiff.
 - b. In the alternative, a declaration that the Defendant has acquired title to the suit land, L.R.No.Narumoru/Block 2/7 by adverse possession.
 - c. An order for verification of the register to the suit land L.R.No.Narumoru/Block 2/7 by cancellation of the Plaintiff's name as the proprietor thereof and the Defendant be registered as the absolute proprietor.
 - d. Costs and interest.



C. The Plaintiff's Reply And Defence To Counter-claim

9. The Plaintiff filed a reply to defence and defence to counter-claim dated 15.7.2016. The Plaintiff joined issue upon the Defendant on his defence. He denied any fraud in his acquisition of the suit property from Murage. The Plaintiff further pleaded that he was an innocent purchaser for value of the suit property without notice of any fraud or irregularity in Murage's acquisition thereof. The Plaintiff consequently denied all the particulars of fraud and illegality pleaded in the counter-claim.
10. The Plaintiff further denied that the Defendant had been in occupation of the suit property since 2001 and stated that he discontinued occupation of the suit property in 2003 upon being transferred but continued keeping watch over it and that he only discovered the Defendant's encroachment in 2010.
11. The Plaintiff further contended that the Defendant could not lawfully claim adverse possession of the suit property since the parties were engaged in litigation before the Tribunal and the Defendant's occupation was based upon the Tribunal's award. It was the Plaintiff's contention that the counter-claim was untenable in law hence the same sought to be dismissed with costs.

D. Summary of Evidence at the Trial

a.I The Plaintiff's Evidence

12. The Plaintiff testified on his own behalf as the sole witness at the trial hereof. He adopted the contents of his witness statement dated 30.05.2016 as his evidence in-chief and produced the documents listed in his list of documents dated 30.05.2016 as exhibits P1 – P5 respectively. The gist of the Plaintiff's case was that he was the registered proprietor of the suit property and that the Defendant had trespassed and settled thereon without lawful justification or excuse. The Plaintiff's further evidence was to the effect that even though the Tribunal had awarded the suit property to the Defendant in 2002, the Tribunal had no jurisdiction to do so hence the resultant award was null and void. He further testified that the Defendant could not legitimately claim adverse possession of the suit property since he had always reported his encroachment to the police service.

b. The Defendant's Evidence

13. The Defendant testified on his own behalf as the sole witness. He adopted his witness statement dated 05.07.2016 as his evidence in-chief. The gist of the Defendant's evidence was that he was the legitimate owner of the suit property having acquired it from the company way back in 1974 by virtue of being a shareholder. He testified that Murage and the Plaintiff must have acquired the suit property illegally or fraudulently since the company had confirmed that he was the legitimate allottee thereof. It was his further evidence that upon lodging his claim with the Tribunal against the Plaintiff it was determined that he was the legitimate owner of the suit property.
14. The Defendant also pursued his alternative claim for adverse possession. It was his evidence that despite the Plaintiff's registration as proprietor, he had been in open, exclusive and uninterrupted possession of the suit property since 2001 hence he had acquired adverse possession thereof. He testified that he had constructed a house, undertaken farming and connected water and electricity to the suit property and developed it as his own without any interference from the Plaintiff for a period exceeding 12 years hence the Plaintiff had lost his right of recovery.



E. Directions on Submissions

15. Upon conclusion of the trial, the parties were granted timelines within which to file and exchange their respective submissions. The Plaintiff was granted 21 days within which to file and serve his submissions whereas the Defendant was given 21 days upon the lapse of the Plaintiff's period to do likewise. The record shows that the Plaintiff's submissions were filed on 23.07.2021 whereas the Defendant's submissions were not on record by the time of preparation of the judgment.

F. The Issues For Determination

16. The court has noted that the parties did not file an agreed statement of issues for determination as provided for under the law. Under Order 15 rule 2 of the [Civil Procedure Rules](#) the court may frame issues from any of the following:
- a. The allegations contained in the pleadings.
 - b. The contents of documents produced by the parties.
 - c. The statements made on oath by or on behalf of the parties.
17. The court has considered the pleadings, evidence and documents on record and is of the opinion that the following issues arise for determination herein:
- a. Who between the Plaintiff and the Defendant is the owner of the suit property.
 - b. Whether the Defendant has proved his counter-claim for adverse possession.
 - c. Whether the Plaintiff is entitled to the reliefs sought in the plaint.
 - d. Whether the Defendant is entitled to the reliefs sought in the counter-claim.

G. Analysis and Determination

a. Who between the Plaintiff and the Defendant is the owner of the suit property

18. The court has considered the evidence and submissions on record on this issue. It is evident from the record that the Plaintiff claims ownership on the basis of his registration as the current proprietor of the suit property. He produced a copy of his title deed and a copy of the land register as evidence of ownership. There is evidence on record to demonstrate that he acquired the property by purchasing it for valuable consideration in 1997 from Murage who was the registered proprietor at the material time. The Defendant's claim was based upon his membership of the company which was to transfer the suit property to him by virtue of the 2 shares he held in the company.
19. It is evident from the material on record that the company's intention and attempt to transfer the suit property to the Defendant did not materialize for no fault of the Defendant. The Defendant, therefore, remained with his ballot paper, share certificate, clearance certificate and other documents from the company. Although the Defendant pleaded that the Plaintiff and Murage had obtained registration of the suit property illegally or fraudulently, the court is not satisfied that any fraud or illegality was proved against the Plaintiff at the trial. The evidence at the trial simply showed that the Plaintiff was a purchaser for value of the suit property from Murage. There was no evidence to demonstrate that the Plaintiff was privy to any fraud or illegality in his acquisition of the suit property. It was not even demonstrated that he was aware of the alleged fraud or illegality on the part of Mr. Murage. The court is further of the opinion that no fraud or illegality could be proved against Murage since he was not joined as a party to the counter-claim to enable him respond to the serious allegations against him.



20. The court is thus satisfied on the basis of the evidence on record that the Plaintiff is the legitimate owner of the suit property which he bought for valuable consideration from Murage in 1997. The court is further of the opinion that the award of the Tribunal in Land Dispute Tribunal Case No.29 of 1998 was ultra vires the Land Disputes Tribunals Act 1990 hence null and void. The court agrees with the Plaintiff's submission that the Tribunal had no jurisdiction to entertain the Defendant's claim and to make the award in view of the provisions of Section 3 of the establishing Act. Accordingly, the resultant award was a nullity.

b. Whether the Defendant has proved his counter-claim for adverse possession

21. The elements of adverse possession were summarized in the case of Kasuve -vs- Mwaani Investments Ltd & 4 Others [2004] 1KLR 184 as follows:

“....and in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, Wanja vs Sakwa No.2 [1984] KLR 284. A title by adverse possession can be acquired under the Limitation of Actions Act for part of the land....”

22. The court has considered the material and submissions on record. The Defendant contended that he had enjoyed open, exclusive and uninterrupted possession of the suit property since 2001 and that he had developed the same by constructing a house and undertaking farming thereon. The Plaintiff, on the other hand, contended that he was in occupation of the suit property until 2003 when he was transferred out of Nyeri County but he kept checking on this property from time to time. He did not, however, demonstrate that he undertook any activities on the suit property after his departure in 2003.
23. During cross-examination by the Defendant's advocate, the Plaintiff stated that he did not know when the Defendant entered the suit property and that he only discovered his occupation in 2010. The court has noted that in paragraph 10 of the plaint the Plaintiff pleaded that the Defendant took possession of the suit property on the basis of the Tribunal's award dated 02.04.2002 and occupied the land together with all developments thereon. The court is of the opinion that if the Plaintiff discontinued his possession in 2003, then the Defendant could only have taken possession after his departure. The Plaintiff himself conceded that he did not know in which year the Defendant took possession of the suit property. It was his duty to inspect his property at reasonable intervals to ensure that trespassers are kept at bay. The Plaintiff can only have himself to blame for failing to discover the Defendant's possession until 2010 whereas he had the opportunity to do so earlier.
24. The court is satisfied that the Defendant has been in occupation of the suit property at least with effect from 2003. The court is further satisfied on the basis of the material on record that the Defendant's possession was without the consent or permission of the Plaintiff and that it was exclusive. There is no evidence on record to demonstrate that the Plaintiff was in possession of any part of the suit property or that he undertook any activities on the suit property between 2003 and 2016 when he filed the instant suit.
25. The court does not agree with the Plaintiff's contention that the Defendant's possession was interrupted by reason of the Tribunal case which the Defendant had filed. The court does not also agree with the Plaintiff's contention that his act of reporting the land dispute to the police service had the effect of interrupting the Defendant's possession or stopping time from running under the Limitation of Actions Act. (Cap.22).



26. In the case of *Githu -vs- Ndeete* [1984]KLR 776 the court considered the running of time for purposes of limitation of actions as follows:

“.....time ceases to run under the *Limitation of Actions Act* either when the owner takes or asserts his rights or when his right is admitted by the adverse possessor. Assertion occurs when the owner takes legal proceedings or makes an effective entry into the land. Giving notice to quit cannot be effective assertion of the right for the purpose of stopping the running of time under the *Limitation of Actions Act*.....”

27. It is evident from the material on record that the claim before the Tribunal was not filed by the Plaintiff. It was not a claim to assert the Plaintiff's rights over the suit property but a claim by the Defendant to recover the suit property from the Plaintiff. In any event, as the Plaintiff contended and the court has agreed with him on this, the proceedings before the Tribunal were a nullity for want of jurisdiction. The court is thus satisfied that the Defendant has proved his claim for adverse possession against the Plaintiff to the required standard.

c. Whether the Plaintiff is entitled to the reliefs sought in the plaint

28. The court has found that the Plaintiff is the legitimate owner of the suit property as the current registered proprietor thereof. The court has also found that the award of the Tribunal was null and void for want of jurisdiction. However, the court is not satisfied that the Plaintiff is entitled to all the reliefs sought in the plaint because the court has found that the Defendant has demonstrated his claim for adverse possession of the suit property. Accordingly, the court shall only grant the Plaintiff the declaration on the legality of the Tribunal's award.

d. Whether the Defendant is entitled to the reliefs sought in the counter-claim

29. The court has found that the Plaintiff is the legitimate owner of the suit property and that the Defendant has failed to demonstrate any fraud or illegality in his acquisition of the suit property. In the premises, the Defendant is not entitled to prayers (a) and (c) of the counter-claim. However, since the Defendant has demonstrated his claim for adverse possession of the suit property the court is inclined to grant him a declaration to that effect together with any consequential orders to facilitate his registration as proprietor.

H. Conclusion And Disposal

30. The upshot of the foregoing is that the court finds that each party has partially succeeded and partially failed in his respective claim and counter-claim. Accordingly, the court makes the following orders for disposal of the suit and counter-claim:

- a. A declaration be and is hereby made that the award of the Kieni East Land Dispute Tribunal Case No.29 of 1998 dated 02.04.2002 is null and void and of no legal effect.
- b. The rest of the Plaintiff's prayers in the plaint dated 30.05.2016 are hereby declined.
- c. A declaration be and is hereby made that the Defendant, Charles Maimba Githiaka, has acquired Title No. Narumoru/Block 2/7 on account of adverse possession and is consequently entitled to be registered as proprietor in place of the Plaintiff.
- d. The Plaintiff shall sign all forms, documents and instruments necessary to transfer the suit property to the Defendant within 21 days from the date hereof in default of which the Deputy Registrar of the court shall do so on his behalf.



e. Each party shall bear his own costs.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 20TH DAY OF SEPTEMBER, 2022.

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Y. M. ANGIMA

JUDGE

JUDGMENT DELIVERED AT NYERI THIS 19TH DAY OF OCTOBER, 2022

In the presence of:

Mr. Gitau Kahiga for the Plaintiff

N/A for the Defendant

Ms. Kendi - Court Assistant

.....

J.O. OLOLA

JUDGE

