



REPUBLIC OF KENYA



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Njenga & another v Nganga (Environmental and Land Originating Summons E036 of 2021) [2022] KEELC 13679 (KLR) (19 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13679 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E036 OF 2021**

JG KEMEI, J

OCTOBER 19, 2022

BETWEEN

GEOFFREY KAMAU NJENGA 1ST PLAINTIFF

DAVID MBARI NJENGA 2ND PLAINTIFF

AND

KAHUUH WA NGANGA DEFENDANT

JUDGMENT

1. The Plaintiffs filed their Originating Summons on the November 19, 2021 against the Defendant seeking the following orders:-
 - a. Spent.
 - b. That the Caution registered by Kahuhu Wa Ng'ang'a on November 29, 1983 against Title Number Kiambaa/kihara/776 be lifted and discharged unconditionally forthwith.
 - c. THAT a declaration do issue that in view of the provisions of Section 4(4) of the *Limitation of Actions Act* Cap. 22 of the Laws of Kenya, the Judgment entered on 9/1/1984 by the Honourable Justice D. K. S. Aganyanya in Nairobi HCCC Number 4237 of 1983 is no longer capable of being executed by the Defendant against the Plaintiffs herein or their father's Estate, because a period of more than 12 years has lapsed since the delivery of the said Judgment and the same remains unexecuted to date.
 - d. That a declaration do issue that the Plaintiffs herein, Geoffrey Kamau Njenga and David Mbari Njenga having been in continuous and uninterrupted use, possession and/or occupation of the entire parcel of land known as Kiambaa/kihara/776 for a period of more than 12 years after delivery of the Judgment by the Honourable Justice D. K. S. Aganyanya on 9/1/1984 in Nairobi HCCC Number 4237 of 1983 be declared as the legitimate and sole owners of the



suit property Kiambaa/kihara/776 and any right that the Defendant may have asserted and/or claimed in respect thereof be extinguished forthwith.

- e. That a declaration do issue forthwith that the Plaintiffs Geoffrey Kamau Njenga and David Mbari Njenga have acquired rights of inheritance and adverse possession over all that Parcel of land known as Kiambaa/kihara/776 and such rights override any other interest that the Defendant may have attempted to assert, claim and/or acquire.
 - f. Costs of this application be costs in the cause.
2. The Summons are premised on the grounds cited in the application and particularly in the Supporting Affidavit of the 1st Applicant sworn on the November 11, 2021.
 3. The Applicant deponed that he is acting on his own behalf and that of the 2nd Plaintiff, who is his brother. Both brothers are the administrators of both the estates of their grandfather Daniel Mbari Mahoru alias Mbari Mahoru and their own father Reuben Njenga Mbari who passed away on 13/10/93 and 5/1/2005 respectively.
 4. He stated that they petitioned for Grant of Letters of Administration in the estate of their father Reuben Njenga Mbari in 2018 and have annexed the said grant issued on the 25/5/2018. Upon the demise of their grandfather in 1993, their father Reuben Njenga was appointed the administrator of his estate in 2002 but he died in 2005 before the Grant of Administration was confirmed. The administration of the two estates were later consolidated on the 31/7/2019 and the two brothers issued with a grant on the 13/3/2018 and confirmed on the 31/7/2019. In the said Confirmation of Grant the suit land devolved to the Plaintiffs to hold in trust for the beneficiaries. He further deposed that the suit land is registered in the name of the grandfather Mahoru Mbari and that they and their families have been in open continuous and uninterrupted quiet use and exclusive occupation of the suit land since the demarcation of the lands in 1950s.
 5. In addition, he stated that the Defendant sued Mahoru in HCCC No 4237 of 1982 in the case of Kuhuhu Wa Nganga –Vs- Mbari Mahoru & Anor seeking cancellation and transfer of the title to the suit land to the Defendant. On the 9/1/1984 Judgment was entered in favor of the Defendant by Justice Aganyanya (as he then was) against Mbari Mahoru. That prior to the issuance of the Judgment the current Defendant had lodged a caution on the suit land on the November 29, 1983. He deponed that 37 years later the Judgment remains unexecuted and urged the Court to grant orders as they have obtained a right in the land by way of adverse possession.
 6. Despite service of the summons to enter appearance having been served the Defendant did not file any response to the Plaintiff's claim.
 7. The Plaintiffs filed written submissions through the law firm of Gatheru Gathemia & Co Advocates on the 18/5/2021 while the Defendant failed to so file.
 8. It was submitted on behalf of the Plaintiffs that a Judgment for possession of land should be enforced before the expiry of 12 years otherwise its enforcement shall stand barred under Section 7 of the *Limitation of Actions Act*. Counsel relied on the case of *M'Ikiara M'Rinkanya & Anor Vs Gilbert Kabeere M'Mbijiwe* (2007) eKLR support of the above proposition that failure to execute the Judgment within the stipulated period of 12 years, the rights of the decree holder are extinguished under Section 17 of the *Act* and the Judgment debtor acquires possessory rights by adverse possession which he can enforce in appropriate proceedings. That in this case, the counsel contended, the judgment of 1984 expired in 1996 before the decree holder executed the same.



9. On adverse possession counsel for the Plaintiffs submitted and relied on the decision of the Court in Maweu Liu Ranching and Farming Cooperative Society (1985) KLR 430 where the Court stated as follows;

“...Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances...”

10. Similarly he quoted the case of Samuel Miki Waweru –Vs- Jane Njeru Richu (2001) where the Appellate Court stated ;

“... It is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in Jandu v Kirpal [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted.”

11. Whilst quoting the above cases counsel submitted that the Plaintiffs have been in open continuous and uninterrupted quiet use and exclusive occupation of the suit land since demarcation and that adverse possession has accrued in their favour.

Analysis and determination

12. The key issue for determination is whether the Plaintiffs are entitled to the orders sought in the Originating Summons.
13. It is evident that the suit is not contested given that the Defendant failed to file a defence even with demonstrated service of summons.
14. It is trite that notwithstanding that the suit is not controverted the Plaintiffs retain the onus to prove their case to the standard of proof required. It is not automatic that their plea shall be granted as unopposed. The Court is required to interrogate the Plaintiffs suit on its merit in arriving at the appropriate decision.
15. According to the copy of the search dated the 11/9/2013 the suit land became registered in the name of Mbari Mahoru on the 10/6/1958 and a certificate of title issued on the 29/9/1982. There are two cautions lodged on the title on the 20/12/82 and November 29, 1983 by Njenga Mbari and the current Defendant respectively. Affidavit evidence shows that the Defendant sued Mahoru in 1982 in the case of HCCC No 4237 of 1982 in the case of Kuhuhu Wa Nganga –Vs- Mbari Mahoru & Anor seeking the cancellation and transfer of the suit land to the current Defendant. According to the proceedings in the said suit annexed by the Plaintiffs the suit was compromised by entering a consent on the 9/1/1984 before the Hon Mr Justice Anganyanya (as he then was) in favour of the Defendant. The Plaintiffs failed to annex the extracted consent but suffice to state that the same is contained in the proceedings.
16. It is the Plaintiffs case that they and their families before them occupied the land since 1950s. That their grandfather, Mahoru, their father Njenga and themselves have been in occupation of the land quietly, openly, exclusively and uninterrupted.
17. That the Judgment issued by the Court in 1984 has never been executed and by dint of Section 4(4) of the Limitation of Actions Act, the same is now expired.



18. Section 4(4) of *Limitation of Actions Act* which states as follows;

“An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent Order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.” [emphasis mine].

19. Consequently I find that the Judgment having been issued in 1984 and the same having not been executed within the stipulated period of 12 years, expired in 1996 and is of no legal consequence.

20. In the case of *M'ikiara M'rinkanya & Another V Gilbert Kabeere M'mbijiwe*, Civil Appeal 124 of 2003 [2007] eKLR, the Court held that

“... From the above analysis, it is clear that a judgment for possession of land should be enforced before the expiry of the 12 years limitation period stipulated in section 7 of the Act. If the judgment is not enforced within the stipulated period, the rights of the decree holder are extinguished as stipulated in section 17 of the Act and the judgment debtor acquires possessory title by adverse possession which he can enforce in appropriate proceedings. So, quite apart from the authority of *Lougher v Donovan* [1948] 2 All ER 11, which we consider as still good law in this country, and the previous decisions of this Court, there is a statutory bar in section 7 of the Act for recovery of land including the recovery of possession of land after expiration of 12 years. It follows, therefore, that, to hold that execution proceedings to recover land are excluded from the definition of “action” in Section 4 (4) of the *Act* would be inconsistent with the law of adverse possession...

..as regard recovery of judgment debts, the construction of Section 4 (4) of the Act by local Courts barring recovery after 12 years, is as shown in *Lowsley V Forbes* [1999] 1 AC 329 , consistent with construction given by English Courts to Section 2 (4) of the *Limitations Act* 1939 and its predecessors for over 100 years that a judgment debt becomes statute barred after 12 years.”

21. I do respectfully agree with the Plaintiffs on that proposition.

22. The said judgment of the Court having expired any rights that had accrued to the Defendant were extinguished and the land reverted to the original owner, the late Mahoru. The Plaintiffs led unchallenged evidence that they were appointed the legal administrators of the estate of Mahoru in 2019 and the suit land devolved to them vide the confirmation of grant dated the 28/1/2019 to hold the suit land in trust for all the beneficiaries. As it stands therefore the suit land is now in the hands of the Plaintiffs as owners of the land.

23. In the case of *Ruth Wangari Kanyagia Vs Josephine Muthoni Kinyanjui* (2017) eKLR while restating the common law doctrine of adverse possession the Court stated that;

“.... it is a well settled principle that a party claiming adverse possession must prove that his possession is nec vi, nec clam, nec precario that is peaceful open and continues. The possession must be adequate in continuity in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrong full dispossession of



the rightful owner and be actual visible exclusive hostile and continued over the statutory period.”

24. To be successful in a claim for adverse possession one must prove that he has been in exclusive possession of the land openly and as of right and without any interruption for a period of 12 years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition. Further the claimant must show that he is using the land as of right and that he has the necessary animus possidendi to use the land to the exclusion of the owner.
25. My reading of this case is that upon expiry of the Judgment of 1984, the land reverted back to the estate of Mahoru whose occupation and control was in the hands of the Plaintiffs. Upon confirmation of grant in 2019 the land devolved into the names of the Plaintiffs. The elements of adverse possession therefore are absent to favour the Plaintiffs who are already owners of the land. It is my finding that a beneficial owner of the land cannot bring a claim of adverse possession. It does not lie against the beneficial owner because in law the said beneficial owner is in all intents and purposes the owner of the suit land. The claim of adverse therefore in my humble view fails.
26. There is evidence that the land is encumbered by two cautions. Removal of caution is provided for in law. Sections 73 and 78 of the [Land Registration Act](#), 2012 which in the relevant parts provides as follows:-
- “73. A caution may be withdrawn by the cautioner or removed by order of the
- (1) Court or, subject to subsection (2), by order of the Registrar.
 - (2) The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.
 - (3) If the cautioner has not raised any objection at the expiry of the time stated, the Registrar may remove the caution.
 - (4) If the cautioner objects to the removal of the caution, the cautioner shall notify the Registrar, in writing, of the objection within the time specified in the notice, and the Registrar shall, after giving the parties an opportunity of being heard, make such order as the Registrar considers fit, and may in the order provide for payment of costs.
- “78(1) The Registrar may, at any time and on an application by any person interested or at the Registrar’s own motion, and after giving the parties affected by the restriction an opportunity of being heard, order the removal or variation of a restriction.
- (2) upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the Court may order a restriction to be removed, varied, or otherwise order as it deems fit, and may make an order as to costs.”
27. It is evident that these cautions have subsisted on the land for over two decades. In this case no evidence has been led by the Plaintiffs to show that they have made the application contemplated in Sections 73 and 78 of the [Land Registration Act](#) cited above for the purpose of removing the cautions.
28. Whilst this Court has power to order for removal of the caution/restriction herein, it cannot do that through a process where the cautioner has not been given an opportunity to participate. In the special



circumstances of this case, I am of the considered view that the Applicants should invoke the process provided in Section 73(2) (3) (4) of the Land Registration Act, 2012 as it is only through that process that it may be determined that there is no person with an interest in the maintenance of the caution.

29. In the circumstances, the prayer for removal of cautions therefore cannot be granted.
30. Having considered the Originating Summons, the affidavit evidence the written submissions and all the material before me I make the following orders:-
 - a. Prayer (b) is declined.
 - b. Prayer (c) is granted in terms of paragraph 19 of the Judgment.
 - c. Prayer (d) & (e) are declined.
 - d. I make no order as to costs.
31. Orders accordingly

DELIVERED, DATED AND SIGNED AT THIKA THIS 19TH DAY OF OCTOBER, 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Mc Ronald for 1st and 2nd Plaintiff

Defendant - Absent

Court Assistant – Phyllis Mwangi

