



**Muthui v Ringera (Environment and Land Case Civil Suit 166 of 2017)
[2022] KEELC 13463 (KLR) (12 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13463 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND CASE CIVIL SUIT 166 OF 2017**

CK NZILI, J

OCTOBER 12, 2022

BETWEEN

JAMES KIMATHI MUTHUI PLAINTIFF

AND

MERCY KARAMANA RINGERA DEFENDANT

JUDGMENT

A. Pleadings

1. The plaintiff as a legal representative of the estate of the late Eutyclus Muthui took out an originating summons dated November 22, 2016 seeking to be declared as entitled to one acre of LR No Nyaki/ Kithoka/4023 (herein the suit land) owned by the defendant by virtue of adverse possession. The originating summons was supported by an affidavit sworn by James Kimathi Muthui on the even date in which he attached a copy of the letters of grant, a witness statement, list of documents dated November 22, 2016, further statements and list documents dated August 3, 2020.
2. The defendant opposed the claim by a replying affidavit sworn on July 10, 2017. She stated that she was the one in occupation of the suit land until 2014 when she became sick. The defendant denied the alleged sale agreement, consent to transfer her land and the purported developments on the suit land. She insisted the alleged claim if any was time barred, lacked facts in support and was unsustainable in law. The defendant filed a witness statement dated July 10, 2017.

B. Testimony.

3. The plaintiff adopted his witness statement dated November 22, 2018 and the affidavit in support of the originating summons as his evidence in chief. He produced a sale agreement dated October 11, 1990 as P Exh No (1), search certificate dated May 11, 2010 P Exh (2), application for consent as P Exh (3), letter of consent dated December 6, 2011 as P Exh No (4), mutation form dated March 12, 2012, a P Exh No (5) grant of letters of administration dated October 3, 2012 as P Exh No (6), map for the



area as P Exh No (7), proceeding before the elders as P Exh No (8) and proceedings before the land registrar as P Exh No (9), application for consent to transfer as P Exh No (10), form for the transfer as P Exh No (11), a search certificate dated 30.10.2012 as P Exh No (12), a letter dated January 8, 2013 as P Exh No (13) letter to the land registrar as P Exh No (14) receipt dated January 18, 2013 as P Exh (15), letter dated February 21, 2012 as P Exh No (16) and the demand letter dated April 29, 2013 as P Exh No (17) respectively.

4. Cross-examined, PW 1 admitted that he did not attend the signing of the sale agreement and said his father used to be a money lender, a distributor with Eveready Co. Ltd an owner of several buildings in Meru town, which he took over after his late father was threatened with an auction due to rent arrears.
5. PW 1 told the court his late father also owned over hundred acres of land with coffee farms and factories in Kithoka area, some of which he sold to Kenya Methodist University. Concerning the suit land, PW 1 said it was not under any coffee plantation or other developments even though he could not tell if the defendant was utilizing it since she was the owner of parcel No 4022.
6. As regards the caution, PW1 testified that he lodged it as per P Exh No (9) and eventually received a letter from the land registrar. He could not, however, tell why his late father did not file the claim during his lifetime but clarified that his father used to have dealings with the defendant. He could not tell if the said transaction led to him lending some money to the defendant's mother.
7. PW 1 testified that his efforts on behalf of the family to reach out to the defendant through the Njuri Ncheke were unsuccessful hence the reason he placed the caution on the suit land.
8. PW 2 adopted his witness statement dated August 3, 2020 as his evidence in chief. Confirming that he was a neighbor of the plaintiff, he said PW1 was the one utilizing the suit land after it was sold to her late mother which was approximately three acres in size. He clarified that prior to the sale the defendant was the one tilling the land.
9. DW 1 adopted her replying affidavit and witness statement dated July 10, 2017 as her evidence in chief. She testified that she acquired three acres of the suit land from her late father and subdivided, sold and transferred two acres of it to a Dr Ndege and was left tiling the rest of the portion until 2012 when she was taken ill.
10. DW 1 admitted that the plaintiff was her immediate neighbor who had previously bought over 15 acres from her brother which he eventually transferred to the Methodist University. She denied selling one-acre of her land to him. She denied that the plaintiff was tiling the suit land as alleged given that it had been invaded by elephants. She stated that at the time she sold her two acres to Dr Ndege, she had initially approached the plaintiff who declined to buy due to some financial challenges. DW1 admitted that initially the plaintiff used to support her family.
11. In cross examination, DW1 confirmed that the details and signatures appearing on P Exh No (3) were hers. In her view, the alleged sale agreement did not materialize. She also admitted that she never reported an alleged forgery of the two exhibits to the police. DW 1 clarified that she never gave the plaintiff any notice to vacate her land nor had she been receiving any rent or rates for the occupation since 1990. DW1 however confirmed that she last used that land up to 2012 though a neighbor had planted some maize and beans for the last two seasons prior to her testimony before court.
12. Further, DW1 maintained that the sale agreement was frustrated given that she was not paid any consideration and maintained that her mother had merely given the land as security after borrowing some money from Mr Muthui which she eventually refunded.



13. Similarly, DW 1 stated P Exh No (3) was merely meant for subdivision and not for a transfer. She denied ever accompanying the plaintiff to a land control board meeting. She stated she was only allowed to subdivide two acres from her land which she sold to Dr Ndege. DW1 was of the view that she could not have given a notice to the plaintiff to vacate or request for any rent since the plaintiff had never been in occupation of her land.

C. Written Submissions

14. The plaintiff has submitted the issues for the court's determination are on whether there was a valid sale agreement and if adverse possession has been proved.
15. On the 1st issue the plaintiff submitted the sale agreement was duly executed and vacant possession granted in 1990 for one acre of land. He submitted there are genuine signatures and details belonging to the defendant both in the sale agreement, the applications for transfer as contained in P Exh Nos 10 and 11 which made him register a caution on October 30, 2012.
16. The plaintiff submitted his claim did not become time barred for lack of a land control board consent but was based on adverse possession which cannot be not bound by the rules of contract as held in *Public Trustees v Wanduru Ndegwa* [1984] eKLR.
17. As regards adverse possession, the plaintiff submitted that he had satisfied the key ingredients to found such a claim as held in *Gabriel Mbui v Mukindia Maranya* [1993] eKLR and *Felicity Mutete Mutula v James Ndambuki* [2020] eKLR.
18. The plaintiff took the view that as per the case of the *Public Trustee (supra)*, time began to run after paying the final instalment.
19. On the issue of the alleged fraud by the defendant, the plaintiff submitted that none was pleaded and or proved as held in *Virjay Morjaria v Nansingh Madhunsingh Darbar & another* [2015] eKLR.
20. The defendant has submitted that she has never ceased to be in possession of the suit land for a claim for adverse possession to accrue in favour of the plaintiff as per section 38 of the *Limitation of Actions Act*.
21. Guided by the holding in *Virginia Wanjiku Mwangi v David Mwangi Joham Kamau* [2011] eKLR, the defendant submitted that five basic conditions must be met namely: open and notorious use, continuous use, exclusive use, actual possession, non-permissive, hostile or adverse use of the land.
22. Further, the defendant submitted an adverse possessor must change the face of the land through several overt acts such as; - by clearing, mowing, planting, harvesting fruits, cutting timber, mining, fencing or through other improvements of the land none of been pleaded which were and or proved by the defendant.
23. Similarly, looking at the sale agreement possession was to be handled over after the official transfer and since none was affected due to the demise of the plaintiff's father, the defendant submitted there could not possibly have been any exclusive possession without the transfer since parties were bound by the terms of the contract.
24. Additionally, the defendant submitted that the purported land control board consent was a forgery, allegedly procured many years after the date of the sale agreement and outside beyond the six months statutory requirement.
25. Therefore, the defendant submitted the plaintiffs claim was time barred under section 4 of the *Limitation of Actions Act* and could only be filed within 6 years if it was for the recovery of land.



26. Moreover, the defendant submitted that a cardinal element was not proved that the use of the land was inconsistent with the owner's intention. Reliance was placed on *Jane Elizabeth Barasa v George Wesonga Ogwang and another* [2020] eKLR.

D. Issues for Determination

27. The court has gone through the pleadings, documents filed, evidence tendered and the written submissions. The issues for determination are:-
- i. If there was a valid sale agreement, duly executed transfer forms and land control board consents between the plaintiff's deceased father and the defendant over the suit land.
 - ii. If there was permissive possession of the suit land out of a sale agreement which later on translated into adverse possession.
 - iii. If the plaintiff has proved the ingredients of adverse possession.
 - iv. If the claim is time barred.

D. Determination

28. The plaintiff's claim and the evidence tendered was that there was a validly signed agreement dated 11.10.1990 for a sale of one acre of the defendant LR No Nyaki/Kithoka/1549 which was later subdivided into LR No Nyaki/Kithoka/4023 and registered in favour of the defendant and despite the issuance of a LCB consent to transfer, the same was not effected due to the death of his father and the defendant declined to reapply for another land control board consent, hence frustrating the sale agreement.
29. The plaintiff testified he took vacant possession of the one acre in 1990 and has since been on the land hence prayed to be declared an adverse possessor.
30. The defendant denied the alleged occupation for 12 years or ever transacting with the plaintiff as alleged or at all under the terms of the alleged sale agreement. She termed the sale agreement as invalid and the transfer as forgeries.
31. In support, the plaintiff produced her exhibits P Exh Nos 1-17 without any objection from the defendant. In cross examination the defendant admitted that the signature and the details contained in the sale agreement and the transfer forms as belonging to her. Further, the defendant admitted knowledge of the sale agreement but termed it as having been frustrated and or abandoned. Additionally, the defendant said her late mother only used the sale agreement and the transfers as security for monies allegedly lend to her by the plaintiff's late father as a known money lender. DW1 was however unable to state how much money it was when and where it was refunded and the sale agreement was ever withdrawn or marked as spent by the parties.
32. Additionally, the defendant failed to tender any documentary evidence of the alleged forgery, mistake, misrepresentation or fraud in support of her defence.
33. The issues for determination and the case summary dated June 5, 2018, the defendant raised the issues of the limitation of action under sections 4 of the *Limitation of Actions Act*, voidability of the sale agreement due to lack of a land control board consent.
34. In *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, which cited with approval the cases of *Public Trustee v Wanduru* (*supra*), the Court of Appeal held that, where a sale agreement becomes null and



void on account of non-compliance with the [Land Control Act](#), the period of the limitation and the conferring of adverse possession time starts to run from the date of the signing of the sale agreement.

35. In this suit the plaintiffs' claim is based on adverse possession as per sections 7 and 38 of the [Limitation of Actions Act](#) and not section 4 thereof.
36. The elements to be proved to found a claim on adverse possession include physical entry, actual possession or occupancy for the statutory period; appropriation to his use, sufficient degree of occupation; entry must be with or maintained under some claim or right or title made in good faith, by the stranger seeking to invoke the doctrine of adverse possession as against everyone else. It must be non-permissive use of the land. The stranger must show how and when his possession ceased being permissive and became adverse.
37. In *Gabriel Mutava (supra)*, court held that where possession was consensual or contractual in its inception, adverse possession starts only when such a contract, licence or permission expires or when occupation becomes hostile with *animus possidendi*. The court went on and defined exclusive possession as the exercise of dominion over the land not shared with the registered owner.
38. Flowing from the case law above, a party seeking to be declared an adverse possessor must therefore prove two key concepts, discontinuance of possession and dispossession ie entry into and driving the registered owner from the land against his will. As regard discontinuance, there must be the owner giving up or ceasing to use and the abandonment of the land or the cessation of occupation.
39. The court in *Gerald Mbuvi (supra)* went on to state that the fact that nothing was done to improve or work on a piece of land was not evidence that a person has abandoned the possession or that he had otherwise been eliminated from the land.
40. In this suit the plaintiff has pleaded and testified that there was a contractual arrangement in 1990 and he took vacant possession expecting there would be a transfer of the land to his name, which never took place after his father passed on. He has produced exhibits to support his claim which are genuinely executed by the defendant but the agreement became null and void for lack of a land control board consent within 6 months of its execution. The plaintiff said he took over vacant possession in 1990 while the defendant denied this and said the vacant possession was to take place after the transfer.
41. The plaintiff testified and confirmed through witnesses his occupation of the land, the undertaking of some works and improvements on the land.
42. There is no evidence that the defendant retook and regained possession and or evicted the purchaser from the suit land.
43. The defendant stated the sale agreements or transfer were security for the money lend to her mother by the plaintiff which was refunded. In the alternative she said the sale or transfer was frustrated, invalidated and or overtaken by events if at all they were executed.
44. The plaintiff has testified and given instances where the defendant had allowed him to exclusively use the land between 1990 to 2016 when she became the registered owner.
45. There is no evidence tendered to suggest that the defendant upon becoming a registered owner, disowned both the sale agreement and the transfer forms or sought for their cancellation and or withdrawal from being bound by the two documents.
46. The defendant knew of the implications of the two key documents but did nothing to stop the process. The only inference is that she abandoned her rights including seeking for the recovery of the land under section 4 of the [Limitation of Actions Act](#). The use and control of the land remained in the hands of



the plaintiff. His claim on account of adverse possession matured by 2002 and as against the previous registered owner and as against the defendant in 2016 when she became the registered owner. There was no evidence of assertion of the defendant's rights on recovery of the land.

47. In my considered view the plaintiff openly, without force, uninterruptedly, notoriously, exclusive and for over twelve years occupied the suit land with full knowledge of the defendant.

48. Therefore, I find the plaintiff has proved adverse possession hence is entitled to the prayers sought.

49. I grant the following prayers:

1. An order be and is hereby issued that the estate of Eutyclus Muthui represented by the plaintiff herein has become entitled by adverse possession to land parcel No Nyaki/Kithoka/4023 to the extent of one acre registered in the name of the defendant.
2. An order that the plaintiff/applicant be registered as the proprietor of one acre of land of parcel No Nyaki/Kithoka/4023.
3. The defendant to subdivide, excise and transfer one acre of land out of her land parcel No Nyaki/Kithoka/4023 to the plaintiff within two months from the date hereof and in default the Deputy Registrar the subdivision and transfer forms.
4. Costs to the plaintiff.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 12TH DAY OF OCTOBER, 2022

In presence of:

Karanja for plaintiff.

Gikunda Anampiu for defendant.

Court Assistant: Kananu.

HON CK NZILI

ELC JUDGE

