



Charles (Suing as the legal representative of the Estate of the Late Charles Gichoga (Deceased)) v M'Mbijiwe (Sued as the legal representative of the Estate of Rosalia Andea (Deceased)) (Environment & Land Case 63 of 2015) [2022] KEELC 15115 (KLR) (30 November 2022) (Judgment)

Neutral citation: [2022] KEELC 15115 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 63 OF 2015**

**CK NZILI, J
NOVEMBER 30, 2022**

BETWEEN

**GLADYS GATWIRI CHARLES PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE
CHARLES GICHOGA (DECEASED)**

AND

**ROMANO MUNYUGI M'MBIJIWE DEFENDANT
SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ROSALIA
ANDEA (DECEASED)**

JUDGMENT

1. The plaintiff took out an originating summons dated July 23, 2015 seeking the court to declare him entitled to LR No Nkuene/Kithunguri/340 which is registered in favor of the defendants by virtue of adverse possession. The application was supported by an affidavit sworn by Charles Gichoga on the even date, further affidavits sworn on May 11, 2016 and bundle of documents dated January 30, 2020.
2. The defendant opposed the originating summons by a replying affidavit of Romano Munyugi M'Mbijiwe sworn on March 30, 2016 and witnesses' statements dated October 26, 2016.
3. Gladys Gatwiri Charles the widow of the late Charles Gichoga testified as PW 1 and adopted her witness statement dated January 30, 2020, the supporting affidavit dated July 22, 2015 and the annexures thereto as her evidence in chief and produced a copy of the records for land date as P. exh No 1. Her testimony was that together with her late husband and children, they entered into the suit land in 1983 after paying Kshs 5,000 for 0.39 acres to the owner. Thereafter, they constructed a homestead



- thereto and started farming activities. The owner then failed to transfer the land to them but never ordered them out of the land.
4. She produced photographs for the said developments including those of her elderly children as P. Exh No (2), and a supporting affidavit in the succession cause as P. Exh No (3). PW1 denied that her occupation was out of a license. Further, the plaintiff told the court the defendants had never entered into the land nor made any developments thereto, since their homestead was far away from the suit land.
 5. PW 1 said that prior to her husband's demise, the 2nd defendant's mother had intended to transfer the land. In cross examination, PW 1 said the seller one Rosalia signed a written agreement at the chiefs office but none of them kept a copy. She said that she filed citation No 293/2013 since she did not know about the succession because which was only brought to her attention after she bought the green card, hence the reason a protest was never lodged. PW 1 denied any threats, assault claims or notice of eviction in 1994 as alleged by the defendants.
 6. She insisted that after the death of Rosalia, the 1st defendant purported to sell the land to third parties which she resisted. PW1 denied ever attending any meetings at the area manager's office.
 7. DW 1 adopted his replying affidavit dated March 30, 2016 and a witness statement dated October 28, 2015 as his evidence in chief. He testified that in 1983 he was aged 15 years and that he never knew that her late mother had an arrangement with the late Charles Gachoga, husband to the plaintiff, over a portion of their land to occupy. DW 1 stated that the deceased Charles Gachora erected a thatched hut on the land which structure he eventually improved. Further, DW 1 admitted that the deceased brought forth his wife and children while on the land and upon his death, he was buried on the suit land.
 8. DW 1 admitted that the deceased was also tending a coffee farm on the suit land. Similarly, DW 1 acknowledged that the plaintiff together with her children were in occupation of the suit land to date which was approximately 0.48 acres.
 9. Even though the plaintiff was ordered to vacate the land by her late mother, DW 1 said that the plaintiff became adamant and her children allegedly started issuing threats to them. He said that efforts to seek the area chief's intervention were all futile. Nevertheless, DW1 admitted that no eviction orders against the plaintiff and her children were sought or obtained.
 10. DW 1 testified that at the time they sought and obtained the letters of administration, they did not disclose to the court that there were intruders on the suit land nor did they involve the plaintiff in the process or indicate the same in the chief's letter accompanying the application for the letters of administration.
 11. Further, DW 1 told the court that after obtaining letters of administration, he told the area chief to notify the plaintiff to vacate his land but she declined to do so and insisted that prior to the plaintiff's entry to the land, there was in existence a temporary structure which they would utilize while working on the land. The defendant insisted that prior to filing the succession cause, PW 1 was summoned to the chief's office but failed to either vacate the land or file a letter of protest before the court. He denied service upon him of the alleged citation in 2013 by which time a title deed was already out under the 1st defendants name of as evidenced by P. Exh No 3 and eventually came under his name on April 3, 2014.
 12. Additionally, DW 1 said that the plaintiff never filed for any inhibition orders over the title. He admitted that the plaintiff's chased away her late mother from the land in 1991/92 but she never came back to reclaim the land. DW 1 said that the plaintiff has been defying a court order in place by connecting the suit land with electricity and building more houses for her children.



13. DW 2 adopted his witness statement dated October 26, 2015 as his evidence in chief. He said that he knew the late Rosalia and confirmed that the plaintiff was living on the suit land though he could not explain under what terms. He admitted that the late Charles Gichoga had erected a house on the suit land apart from the initial temporary structure and brought on board the plaintiff where they started rearing cattle and planting fruit trees. He confirmed that the deceased was buried on the said land and that the developments as captured in the photographs before court belonged to the plaintiff. DW 2 also said that efforts by the late Rosalia to have the plaintiff vacate the land through local provincial administration were futile.
14. DW 3 adopted his witness statement dated October 26, 2015 as his evidence in chief. As the area manager in the locality, DW 3 confirmed that the suit land was occupied by the plaintiff's late husband but could not ascertain under what terms and conditions he was developing the land, which he confirmed that it was vacant before the entry. DW 3 said that a dispute over the land was brought to him by DW 1 over some attempts to evict the plaintiff through the area chief but in vain.
15. With leave of court, parties filed written submissions dated July 21, 2022 and August 18, 2022.
16. The plaintiff submitted that the entry into the suit land occurred in 1983, then registered in the name of Chamaru Kathuri which entry was hostile to the then title holder and the successors up to the filing of the suit. The plaintiff submitted that given the testimony tendered, she had proved that she had been in open, uninterrupted, exclusive and in notorious occupation of the land to the exclusion of the defendants herein.
17. The plaintiff urged the court to find the title to the land held by the defendants extinguished. Reliance was placed on *Jospeh Kamau Gichuki v James Gatheru Mukora & another* (2019) eKLR and *Regina Wanjiru; Mwagoa & another v Lucy Wairimu Gichuki & 2 others* (2019) eKLR.
18. On his part, the defendant submitted that the plaintiff did not comply with order 37 rule 7 *Civil Procedure Rules* and section 38 of the *Limitation of Action Act*, by attaching a certified extract of the title to the suit land.
19. The defendants urged the court to find that the entry into the land was permissive for lack of an alternative land and that the same had not been peaceful due to the cases of threats, assault and hostility towards the defendant. Further, as to the alleged purchase in 1983 for Kshs 5,000/= it was submitted that no evidence was tendered to that effect especially on whether the alleged seller Rosalia Andea was ever the owner of the suit land.
20. As regards the failure to file a protest to the succession cause, the defendants submitted that the plaintiff knew she was on the land out of African generosity by permission and hence lacked any stake on it, more so, given the area chief had summoned them before the issuance of the chief's letter to accompany the application for the succession cause.
21. Reliance was placed on *Mbui v Maranya* (1993) KLR 726, *Samuel Kihamba v Mbaisi* (2015) eKLR, *Mwinyi Hamis Ali v AG and another* (1997) eKLR & *Tabitha Ciomboroki M'Thiruane v Twamwari Mamiira* (2020) eKLR.
22. The issues commending themselves for the court's determination are: -
 - a. Whether the plaintiff has proved adverse possession.
 - b. If the plaintiff is entitled to the prayers sought.



23. Adverse possession is a concept through which an intruder to the land for a period of 12 years dispossesses the true owner and or discontinues possession of the registered owner through open, exclusive, uninterrupted, notorious and without force or permission of the said owner.
24. In *Loise Nduta Itotia v Aziza Said Hamisi* (2020) eKLR, the court held that the tenets of adverse possession include the plaintiff proving that he has used the claimed land as of right, without force, in no secrecy and or persuasion for a period of twelve years. Further, the court held that the plaintiff must show that the defendant had knowledge or means of knowing, actual or constructive, of the possession or occupation and that the possession must be continuous, unbroken for any temporary purposes or any endeavors to interrupt it or by way of recurrent consideration.
25. In *Kasuve v Mwaani Investments Ltd & 4 others* 1KLR 184, the Court of Appeal held that there must be proof of stay on the land for 12 years after dispossessing the owner or by discontinuation of possession by the owner on his own volition. Exclusive possession was defined in *Gabriel Mbui v Mukindia Maranya* (1993) eKLR as the exercise of dominion over land which must not be shared with the dispossessed owner of the land, being in actual possession with the intent to hold it solely for the possessor to the exclusion of others.
26. As to what dispossession is, the court in *Wambugu v Njuguna* (1983) KLR 172 held that it refers to acts which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it. In *Gerishon Muindi Baruthi v Willys Mukobwa & another* civil appeal No 98 of 1998 the court held that there must be exclusive possession of a land which is identifiable and definite. The court in *Ravji Karsam Sangani v Pamar Investments Ltd* (2021) eKLR held that there was no evidence of knowledge by the true owner over the appellant's illegal occupation. As to where the possession is permissive out of a sale agreement or void transfer, in *Public Trustee v Wanduru Ndegwa* (1984) eKLR the court held that the limitation of action begins to run from the date of the final payment.
27. Applying the foregoing caselaw to the instant case the plaintiff has pleaded that she entered in to the suit land in 1983 where she has lived, established a permanent home and exclusively discontinued the possession of the defendants who despite the clearance of the purchase price, failed to transfer the land to her. The plaintiff averred and called evidence to corroborate her testimony that she has all along occupied the land as if it was hers and has openly asserted her rights up to and including the filing of citation No 292 of 2013 when the initial owner of the land passed on. The plaintiff also produced photographs indicating the nature of developments on the land which the defendants have not challenged.
28. The defendants while admitting that the plaintiff has been in occupation of the suit land, they stated that the possession has not been quiet, open and exclusive since there have been several claims, complaints and disputes which were reported to the area chief, the police and the area manager to enforce a notice to vacate the land which the plaintiff has all along resisted. They also denied the alleged developments on the land belonging to the plaintiffs.
29. At paragraph 5 of the replying affidavit sworn by the 2nd defendant, he admitted that the entry into the suit land in 1983 was allowed by his late mother to occupy part of the land, then registered in the name of Chamaru Kathuri, on the understanding that as soon as the plaintiff's late husband had acquired his own land he would vacate the land. The 2nd defendant testified that disputes arose in 1993 on the refusal to vacate the land until his late mother applied for letters of administration in 2009 and transmitted the land to him and acquired a title deed on April 3, 2014.
30. PW 1 has insisted that the entry into the land was out of a sale agreement in which the then owner was given KShs 5,000/= as consideration hence the reason that they immediately took vacant possession



and started construction thereon as the seller had promised to transfer the land but in vain until she passed on.

31. In support of this, PW 1 produced P. Exh No (1), (2) and (3). She denied any alleged license to occupy the land or any alleged meetings at the chief's office or area manager's office where she allegedly agreed to vacate the land.
32. DW 1 acknowledged that the husband to the plaintiff was the one who entered into an arrangement with his late mother to move into the suit land and erected buildings therein. Later on, DW 1 admitted that the plaintiff joined her husband on the suit land and were able over the years to bear children while utilizing the land.
33. Further, DW 1 said that even though they knew that the plaintiff were intruders in the land, they neither involved them in the succession proceedings nor did they apply for vacant possession or eviction against the plaintiff until after he obtained the grant and notified the area chief who gave the plaintiff a notice to vacate the land.
34. Similarly, DW 1 testified that as at 1965, the copy of records showed the suit land was in the name of Chamaru Kathuri but on October 1, 2013, it came under the name of the 1st defendant and later under his name on April 3, 2014. DW 1 denied that the plaintiff had been given a blanket authority to use the land as it pleased her. However, DW 1 acknowledged that the plaintiff had connected the land with both electricity and water DW 2 & DW 3 confirmed that the land belonged to the defendants but has been under occupation by the plaintiff for many years who has undertaken various developments therein DW 3 added that he was involved in a land dispute between the parties herein in 1993 when the area sub-chief served the plaintiffs with a letter to vacate the land. DW3 confirmed that the whole land was under the occupation by the plaintiff.
35. Looking at the totality of this evidence there is no doubt that the occupation of the land by the plaintiff has been on since 1983 till the filing of the suit. The defendants have admitted that they were dispossessed of the occupation of the land and discontinued the defendants from putting the land into any purpose for which they intended to use the soil.
36. Further, the defendants have not refuted the claim that the land was acquired for a consideration and the plaintiff took vacant possession as a purchaser for value. Similarly, there is no evidence that the defendant's predecessor in title ever made an effective entry into the land and perhaps applied for eviction orders the moment the land came into their ownership in 2009 and 2014 respectively.
37. In PCEA (Uthiru Church) & another v Kihoro & 3 others(civil appeal No 303 of 2018) (2022) KECA 49 (KLR) (February 4, 2022) (Judgment), the court cited with approval Alfred Welimo v Mukaa Sumba Barasa CA No 186 of 2011 where the court held that adverse possession is not established merely because the owner has abandoned possession of his land and ceased to use it, but must include animus possidendi or acts inconsistent with those of the true owner.
38. In this suit, the intention of the plaintiff to possess and assert her rights and exclusive control of the land have been consistent since 1983. That evidence has not been challenged or weakened by the defence testimony.
39. Consequently, I find the suit proved to the required standards and proceed to grant the prayer declaring the plaintiff as entitled to the suit land by virtue of adverse possession. The defendants shall sign the transfer forms in favor of the plaintiff within 2 months from the date hereof in default the Deputy Registrar of this court to execute the same.

Costs to the plaintiff.



**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 30TH DAY OF
NOVEMBER, 2022**

In presence of:

C/A: Kananu

Mukamburu for defendant

HON. C.K. NZILI

ELC JUDGE

