



REPUBLIC OF KENYA



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**M'Igweta v Gikundi (Environment & Land Case 59 of 2019)
[2022] KEELC 14952 (KLR) (23 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14952 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 59 OF 2019**

CK YANO, J

NOVEMBER 23, 2022

BETWEEN

JULIUS KATHURIMA M'IGWETA PLAINTIFF

AND

CHARLES GIKUNDI DEFENDANT

JUDGMENT

The Plaintiff's Case

1. The plaintiff vide an originating summons dated 14th October, 2019 and filed on 31st October, 2019 seeks for determination of the following questions;
 - i. Whether the plaintiff has been in actual possession and exclusive occupation of a portion of land measuring Zero decimal two four (0.24) Hectares in land parcel No. Nyaki/mulathankari/635 for a period exceeding twelve (12) years without interruption.
 - ii. Whether the occupation by the plaintiff of a portion of land measuring 0.24 Ha in L.R NO. Nyaki/mulathankari/635 for more than three decades has been exclusive, open and notorious.
 - iii. And for a declaration that the plaintiff is entitled to a portion of land measuring 0.24 Ha of land parcel No. Nyaki/mulathankari/635 by adverse possession.
2. The originating summons is supported by the affidavit of Julius Kathurima M'Igweta, the plaintiff sworn on 14th October, 2019 in which the plaintiff has deponed that in the year 1973, his brother, Justus Manyara M'Igweta, purchased land parcel No. Nyaki/Mulathankari/612 from Geoffrey Kirigu M'Nkoroi and that the said parcel of land borders land parcel No. 635 and has clear boundaries defined by a live hedge of gravellia.
3. The plaintiff avers that in about the year 1990, with express authority from his brother, he constructed a permanent house on parcel No. 612 next to the hedge demarcating parcel No. 635 and in which



he has been in exclusive occupation upto the date of filing suit. It is the plaintiff's contention that he constructed the said house knowing that he was occupying parcel No. 612 belonging to his said brother, but a survey map revealed that in fact a portion of land measuring 0.24 Ha where the plaintiff's house stands falls on parcel No. 635.

4. The plaintiff states that he has been in exclusive possession and occupation of the said land measuring 0.24 Ha. falling under parcel No. 635 openly, notoriously and exclusively for almost three decades, and that the defendant herein has never taken any steps to dispossess the plaintiff of the said land at any time. The plaintiff avers that he has acquired a right of ownership over the said portion of land measuring 0.24 Ha in land Parcel No. Nyaki/mulathankari/635 by adverse possession, and therefore seek for a declaration that he is the rightful owner of the said portion by virtue of prescription.
5. At the hearing Julius Kathurima M'igweta, the plaintiff testified as P.w 1 and was cross examined and re-examined. P.w 1 testified that he lives in Kaaga in land parcel no. Nyaki/Mulathankari/612 registered under the name of his brother Justus Manyara M'Igweta. The plaintiff stated that the land was registered in his brother's name in 1973 and that he came there in 1974 but developed it in 1996.
6. The plaintiff stated that he has constructed a three roomed permanent house where he lives to date and that he is bordering with parcel No. 635 belonging to Nicholas M'Mwania who sold it to the defendant herein in 1988. P.W 1 stated that the boundary is marked by a barbed wire.
7. The plaintiff stated that in the year 2009, he realized that his house was in parcel No. 635 following an advertisement by Barclays Bank Limited to sell the land. P.w 1 testified that when he saw the said advertisement, his brother and him filed HCC No. 152 of 2009 (OS) which case he stated did not determine the issue of occupation. The plaintiff stated that there was a survey report indicating the area his house occupied as 0.37 acres. It is his contention that neighbours and everyone else knew that the land was his adding that he had lived there from 1996 upto 2009 when it was slated for sale.
8. The plaintiff prayed that that portion be excised and registered in his name. The plaintiff adopted his witness statement filed on 26/1/2022 as his evidence in chief and produced the survey report and judgment in High Court civil case no. 152 of 2009 as P exhibits 1 and 2.
9. On being cross examined by Mr. Mutunga learned counsel for the defendant, P.w 1 stated that he lives on parcel No. 612 which is registered in the name of his brother, Justus Manyara Igweta and which land borders parcel No. 635. He stated that he did not know that he had encroached on parcel No. 635 until the year 2009 when the land was advertised for sale by the bank.
10. He was referred to the judgment in High court civil case no. 152 of 2009 (OS) in which he confirmed that they wanted the court to decide that they had occupied the land openly and peacefully for over 35 years. That he now seeks to be declared the owner of the portion that he has encroached.
11. 1 stated that he did not know that civil Case No. 152 of 2009 (OS) was dismissed, though he stated that there was an appeal filed. He further stated that he was not aware of case No. 109 of 2021 (O.S) but knew about Cmcc No. 204 of 2018 and was not aware whether judgment in it was delivered. He stated that he was not aware if there was an appeal No. 104 of 2021 that is pending. He however confirmed that in case No. 204 of 2018, he wanted the court to find that he had acquired the land by prescription.
12. The plaintiff maintained that he constructed his house in the year 1996, though he did not have the photograph of it, adding that he entered the land in 1973 when he was still a child. He stated that there is a boundary fence and trees which he planted.
13. 1 confirmed that case No. 152 of 2009 (O.S) was decided on 23/5/2018, and that from then they have been fighting over the suit land. He further stated that he was aware of the decree in case No. 204 of



- 2018 in which he gave evidence, and that there is a judgment delivered on 9/9/2021 and a decree issued on 10/11/2021.
14. 1 stated that in appeal No. 109 of 2021, he was appealing against the judgment in case No. 204 of 2018. He further stated that he was aware that surveyor has been on the land and the surveyor's report produced as P exhibit 1 is dated 4/9/2019.
 15. 1 stated that the portion he has encroached is on the tarmac and that from the year 2009, they have been having cases to date. He stated that he stays on the land at the invitation of his brother, though he did not know that he had encroached on the defendant's land which had been charged to Barclays bank. That his brother did not survey the portion he gave the plaintiff to live in.
 16. When the plaintiff was re-examined by Mr. Kaumbi, learned counsel for the plaintiff, he stated that there is a preliminary objection dated 15/1/2020 seeking to have the present suit struck out for being res judicata, and that a ruling was given on 19/11/2020. The plaintiff stated that the report that he has produced in this case was out of case No. 204 of 2018. That the judgment in CMCC No. 204 of 2018 was in his favour, and that the court also ruled that he was entitled to the portion that he is living on.
 17. 2 was Justus Manyara M'Igweta, the elder brother to the plaintiff. He produced copies of search certificates dated 19/7/2022 in respect to parcel No. Nyaki/Mulathankari/635 and 612 a copy of title deed for Parcel No. Nyaki/Mulathankari/612 and a copy of judgment in Meru Cmcc ELC No. 204 of 2018 as P exhibit 3, 4, 5 and 6 respectively.
 18. When cross examined by Mr. Mutunga, P.w 2 confirmed that the plaintiff was his brother and that the defendant's land parcel 635 abuts his parcel No. 612 though he had never seen the defendant there. He was shown the report produced as P exhibit 1 which shows that the two parcels border each other.
 19. 2 confirmed that he became the registered owner of parcel No. 612 in 1973 while entry No. 4 in the Green card for parcel No. 635 indicates that the land was given to the defendant in the year 1988. He also read entry No. 6 dated 15/7/1991 which was a charge No. 1 containing an agreement in terms of section 70, entry No. 7 dated 3/2/1998 which states charge entry No. 10 contains an agreement in terms of section 70.
 20. 2 stated that the plaintiff came into his land when he was a small child and constructed a house thereon in 1996 in parcel No. 612. He stated that in the year 2009 an auctioneer wanted to sell the plaintiff's house together with parcel No. 635 alleging that the house was parcel No. 635. That a case No. 152 of 2009 (OS) was filed and was decided on 23/5/2018 in his presence. That there was an appeal that he filed against that judgment.
 21. 2 stated that in the year 2009, they realized that their neighbor had taken a loan with Barclays Bank and the Bank wanted to realize the loan and instructed an auctioneer to sell the land and the house. That there was case No. 204 of 2019 filed by the defendant seeking eviction orders against the plaintiff and P.w 2. That they filed a defence and counterclaim for adverse possession. That they were not satisfied with the decision in ELC No. 204 of 2018 and filed ELC appeal No. 104 of 2021. He confirmed that he was a party in all those cases together with the plaintiff and the defendant. He stated that it is the defendant who has encroached on his land, not P.w 1 and P.w 2 encroaching on the defendant's land.

The Defendant's Case

22. On December 2, 2021, the defendant filed a replying affidavit sworn on December 1, 2021. The defendant also filed a preliminary objection dated January 15, 2020 on ground that the instant suit was res judicata by dint of civil Case No. 152 of 2009 (OS) and determined vide a ruling dated November 18, 2020.



23. In his response, the defendant avers that the instant suit is an afterthought upon the defendant filing ELC No. 204 of 2018 which culminated in ELC appeal No. 104 of 2021 against the plaintiff and P.W 2. Copies of order in ELC No. 204 of 2018 and memorandum of appeal are annexed. The defendant states that similar orders were sought by the plaintiff in 2009 which was dismissed in 2012. A copy of the judgment has also been annexed.
24. It is the defendant's contention that the plaintiff has been shopping for a favourable judgment in various courts. The defendant avers that he is the legal owner of L.R No. 635 Nyaki/mulathankari and has annexed a copy of the search. That his land borders land parcel No. Nyaki/mulathankari/612 belonging to P.w 2 and denied that the plaintiff has been in possession of 0.24 of parcel No. 635 for 12 years, adding that in previous suits, the plaintiff has been claiming that he resides on land parcel 612 with the consent of his brother. It is the defendant's contention that they have been having boundary issue with the plaintiff and his brother until when the court gave the order in ELC No. 204 of 2019. The order and survey report are annexed. That the instant suit is pegged on similar prayers sought by the plaintiff in the lower court in case No. 204 of 2019. A copy of the defence is annexed.
25. The defendant avers that the plaintiff is not candid by claiming that he realized in 2009 that he had encroached on the defendant's land as he rushed to court vide case No. 159 of 2009 (OS) which was dismissed in 2012 and no appeal or review filed. That for the doctrine of adverse possession to succeed, one must prove to have been in possession of the land peacefully, continuously and exclusively without resistance from the owner. That in 2009, the plaintiff believed that he had built on his brother's parcel No. 612 and not the defendant's parcel No. 635. The defendant contends that time for adverse possession started in 2009 when the plaintiff sued the defendant and which case was decided in 2018. That the defendant filed ELC No. 204 of 2019 seeking for the eviction of the plaintiff which triggered this suit. The defendant further believes that the claim of adverse possession is not only riddled with numerous suits but that the charge to the bank protected the land since it is reserved under the law.
26. At the hearing, only the defendant testified as D.W 1 and did not call any witness. He was cross examined and re-examined. He adopted the averments in his replying affidavit as his evidence in chief and produced the annexures thereto as D exhibits 1-8. These are, an order in ELC NO. 204 of 2018, a memorandum of appeal in ELC appeal No. 104 of 2021, judgment in Civil suit No. 152 of 2009 (OS), certificate of official search, an order dated 12/7/2019 in ELC No. 204 of 2018 a surveyor's report, joint statement of defence and counterclaim, and a copy of the green card.
27. The defendant stated that the plaintiff herein was a party in those cases as well as the defendant himself. The defendant testified that he got judgment in his favour in the lower court, adding that the plaintiff also was given an option to curb a portion similar to the size in which the house is in. The defendant stated that he has been using his parcel of land since 1988 as collateral and referred to the entries in the green card. That currently, the title is held by the Bank and has never been dormant.
28. The defendant stated that he has known the plaintiff since the year 2009. That he bought his land in 1988 and charged it to various Banks. That in 2009, P.w 2 came to his office in Nairobi and suspected that the house built on his land was constructed shortly before the year 2007. That when he bought his land, there was no house and even when the title was charged.
29. The defendant stated that he has had conflicts with the plaintiff from before the year 2009 as the plaintiff used to chase away the workers the defendant sent to fence his land. He further stated that the boundary dispute has now become a priority issue more than before. That he advised his workers who were being chased away to report to the local authorities but they advised him to come down himself. He stated that he did not involve the Njuri Ncheke.



30. The defendant was not sure if the plaintiff has been on his land since 1988. He stated that he has been testifying in the previous cases over the same subject matter but could not remember the case numbers.
31. The defendant reiterated that when he bought the land and even when the bank sent valuers for purposes of the charge, there was no house on his land. That the plaintiff moved to court and the defendant instructed an advocate who advised him not to testify. He stated that the case was dismissed but could not tell if there was an appeal on it. He confirmed that his land borders that of the plaintiff's brother. That he knew that there was a structure on his land in 2009 when P.w 2 went to see him in Nairobi and when the dispute was taken to court when the bank wanted to sell the land and the houses.
32. In his submissions filed on September 14, 2022, the defendant gave a brief history of the matter and submitted inter alia, that the plaintiff has never appealed against the decision in case No. 152 of 2009 (OS) where they sought similar orders as those in this suit.
33. The defendant further submitted that the green card produced indicated that he because the owner of land parcel No. Nyaki/mulathankari/635 in 1988 and by 1990 the land was charged to various banks up to date. That it is evident that the defendant land reserved other third parties rights such as the banks by way of charge since 1990 to-date.
34. It is the defendant's submissions that for a party to succeed on a cause of action founded on adverse possession, he must prove that he has been in possession of the land peacefully, continuously, and exclusively without resistance from the owner and for a period of 12 years. That in this case, the plaintiff jointly sued the defendant with his brother vide case No. 152 of 2009 (O.S) and a judgment given on 23/5/2018. That the suit was actuated by the fact that they had encroached the defendant's land. The defendant submitted that in case No. 152 of 2009 (O.S) the plaintiff sought adverse possession over the defendant's land occupied by the plaintiff, and that one of the issues that was determined in that case was ownership of the land and time stopped running for any party in the suit who may wish to find a cause of action of adverse possession in a subsequent suit. The defendant submitted that in the instant case, time stopped running between the year 2009 and May 23, 2018 since the matter was active in court.
35. The defendant further submitted that a claim of adverse possession cannot arise upon a court pronouncing itself over the same issue, adding that it is not in dispute that the plaintiff had knowledge of his existence in the defendant's land in 2009 and not 1990. That from 1990's the plaintiff was not aware that he was encroaching on the defendant's land and thus such time cannot be calculated. That in a claim for adverse possession the possessor must be aware that he is in possession of someone else's land without the permission of that person and to the detriment and adverse interest of the owner. That in this case from 1990s to the year 2009, P.w 1 and P.w 2 had no clue and idea that the plaintiff was occupying the defendant's land, and instead believed innocently that he had built on P.w 2's parcel No. 612. It is therefore the defendant's submissions that the plaintiff's claim is an afterthought and unmerited on account of being a neighbor to the defendant, and never possessed the defendant's land because he reasonably believed to be living on his brother's land and not on the defendant's land.

Analysis and Determination

36. Having carefully considered the pleadings, the evidence and the submissions filed by the parties to buttress their assertions and having also taken into account the legal authorities cited, this court finds that the following issues are for determination;
 - i. Whether the plaintiff has acquired a portion of land measuring 0.24 hectares in land parcel No. Nyaki/mulathankari/635 through adverse possession.



- ii. Whether the plaintiff is entitled to the reliefs sought.
37. Adverse possession is a common law doctrine under which a person in possession of land owned by someone may acquire valid title to it. In Kenya, this doctrine is alive in section 7 of the *Limitation of Actions Act* cap 22 Laws of Kenya that states:
- “An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or if it first accrued to some person through whom he claims, to that person”
38. Section 17 of the *Limitation of Actions Act* provides as follows-;
- “Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action, to recover land (including a redemption action) the title of that person to the land is extinguished.”
39. In *Wambugu Vs Njuguna* (1983 KLR 173, the court of appeal restated the principles for adverse possession and held as follows;
- “1. The general principle is that until the contrary is proved, possession in law follows the right to possession.
 2. In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed or had discontinued possession of the suit land for a continuous statutory period of twelve years to enable him, the respondent, to title to that land by adverse possession.
 3. The *Limitation of Actions Act*, on adverse possession contemplates two concepts, dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not 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 has been in possession for the requisite number of years.”
40. In *Alfred Welimo vs Mulaa Sumba Baras* C.a No. 186 of 2011, the court of appeal expressed itself thus;
- “It is trite that adverse possession is not established merely because the owner has abandoned possession of his land and ceased to use it, for as Robert Megarry aptly observed in his Megarry’s Manual of the Law of Property, 5th edition at page 490, the owner may have little present use for the land and that land may be used by others, without the users demonstrating a possession inconsistent with the title of the owner. So the mere fact that the appellant abandoned possession of the suit property and went to live at Ndalulungu scheme by and of itself does not establish adverse possession. The abandonment of possession must be complied with animus possidendi (the intention to possess) and asserting thereon rights that are inconsistent with those of the appellant as the owner of the land...”



41. The court further held that, for a claim founded on adverse possession to succeed, the person in possession must have a peaceful and uninterrupted user of the land. Physical fact of exclusive possession and the animus Possidendi to hold as owner in exclusion to the actual owner are important factors in a claim for adverse possession.
42. The ingredients were recently discussed by the court of appeal in the case of *Mtana Lewa Vs Kabindi Ngala Mwangandi* [2015] eKLR where Makhandia J.A stated as follows-;
- “Adverse possession is essentially a situation where a person takes possession of land and 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 certain period, in Kenya is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner”.
43. Section 13 of the *Limitation of Actions* further makes provisions for adverse possession as follows-:
- “(1) (1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of Limitation can run (which possession is in this Act referred to as adverse possession) and where under sections 9, 10, 11 and 12 of this act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date a right of action does not accrue unless and until some person takes possession of the land.
- (2) where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land”
44. In the instant case, there is no dispute that land Parcel L.R Nyaki/mulathankari/635 is registered in the name of the defendant. A copy of the title deed, the green card and certificate of official search of the said property were produced as exhibits and indicated that the land was first registered in the defendant’s name in 1988 and title deed issued to him.
45. The plaintiff’s case is that he has been in possession and exclusive possession of a portion of the land measuring 0.24 hectares for a period exceeding twelve (12) years without interruption. The issue that arise is whether the plaintiff has proved that he has used the said portion of land as of right: nec vi, nec clam nec precario. The plaintiff must show that the defendant as the registered owner of the land had knowledge (or means of knowing, actual or constructive) of the possession or occupation. Further the possession must be continuous for the statutory period of twelve years.
46. In his own evidence, the plaintiff admits that there has been disputes with the defendant that resulted in filing of suit in High Court civil suit No. 152 of 2009 (O.S) and ELC NO. 204 of 2018. The defendant also gave evidence that show that he has been utilizing his entire land by using the title to obtain loans from the banks. The defendant further testified that he used to send workers to the land to fence it, but were always chased away by the plaintiff. It is therefore apparent that the plaintiff’s possession of the suit land was by force and one of the pre-requisites for adverse possession is that the possession of the adverse possessor should not be by force.



47. I have also perused the evidence on record. There is no dispute that in Meru ELC case No. 204 of 2018, the plaintiff herein had raised a counter claim of adverse possession. In addition, the parties, reliefs and subject matter in HCCC NO. 152 of 2009 (O.S) were similar. Therefore there is no dispute that there have been several conflicts over the land and the plaintiff cannot claim to have had exclusive and quiet possession. What has emerged from the material on record is that the parties herein have had a long standing dispute over boundaries of their respective parcels which border each other.
48. Based on the matter on record, the claim of adverse possession by the plaintiff has certainly not been proved to the required standard. The plaintiff's possession on the suit land if at all, was not nec vi nec clam, nec precario, that is without force, without permission. Further the possession and occupation was not continuous since it was interrupted by the previous suits between the parties. It is therefore my finding that the plaintiff has not met the threshold to warrant this court to grant an order of adverse possession. The plaintiff's claim is therefore without merit and the same must fail.
49. Consequently, the plaintiff's suit is hereby dismissed. The costs of the suit shall be in favour of the defendant against the plaintiff.
50. Orders accordingly.

DATED SIGNED AND DELIVERED AT MERU THIS 23RD DAY OF NOVEMBER, 2022

In the presence of

C.A Mwenda

Kaumbi for plaintiff

Mutungu for defendant

C.K YANO

ELC JUDGE

