



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muriuki v Muriuki & another (Environment and Land Case Civil Suit  
35 of 2018) [2022] KEELC 15013 (KLR) (21 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15013 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 35 OF 2018  
EK WABWOTO, J  
NOVEMBER 21, 2022**

**BETWEEN**

**WILSON NDIRANGU MURIUKI ..... APPLICANT**

**AND**

**MARY MUTHONI MURIUKI ..... 1<sup>ST</sup> RESPONDENT**

**SUSAN NYAMBURA MURIUKI ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Applicant filed this suit by way of an originating summons dated January 29, 2018 brought under Order 37 Rule 7 of the *Civil Procedure Rules, 2010* and Section 38 of the *Limitation of Actions Act* (cap 22) seeking a determination on the following questions;
  - a. Whether the Applicant should be registered as the proprietor of all the parcel of land situated within the Nairobi County known as LR No 14225/48 by adverse possession.
  - b. Whether the Respondents' title to the suit property has been extinguished by the Applicant's adverse possession thereof.
  - c. Whether the Applicant's should be registered as proprietors of the suit property in the place of the Respondents.
  - d. Whether a permanent injunction should issue restraining the Respondent's by themselves, their agents, their servants and/or employees from trespassing, entering, breaking into, or in any way interfering with the Applicant's quiet possession and enjoyment of all that parcel of land situated within the Nairobi County known as LR 14225/48.



- e. In alternative to (a) – (c) above, whether the Respondents should be ordered to pay the Applicants the market value of the property and developments he has effected thereon.
  - f. Further that the Respondents being registered proprietors of all that parcel of land situated in Nairobi and known as LR No 14225/48 be declared and registered as trustees for the Applicant and other family members.
  - g. That the cost of this application be borne by the Respondent.
2. The originating summons was supported by an affidavit sworn by Wilson Ndirangu Muriuki the Applicant herein on January 28, 2018.
  3. The originating summons was opposed by the Respondents through a Replying Affidavit sworn on February 25, 2021 by the 1<sup>st</sup> Respondent on her own behalf and on behalf of the 2<sup>nd</sup> Respondent and herself where they are siblings and children to the late Duncan Muriuki Weru and his wife Nancy Wanjiku Muriuki.

**The applicant's case.**

4. The Applicant testified on February 9, 2022. He called two other witness to support his case. During the hearing, he adopted his witness statement dated January 29, 2018 and the further affidavit sworn on July 6, 2021 as his evidence in chief. He stated that he had been on the suit property since 1980s. It was also his testimony that the Respondents are the registered owners of the suit property.
5. The Applicant averred that he had set up his matrimonial home and currently resides in the suit property with his family including his children who have been brought up there including those that have moved out. The Applicant also stated that he has never been evicted from the land which he has invested heavily and currently does livestock and poultry farming.
6. On cross-examination, he stated that he has never at any point in time been asked to vacate the suit property neither has there been any attempts to evict him. He also stated that he became aware in 2016 that the property had been transferred to the names of the Respondents. He also stated that the property had initially been registered in his late father's name Duncan Muriuki Weru. He further stated that after obtaining a copy of the title from the Land's Office he saw that the property had been transferred to the Respondents in the year 2011.
7. Robert Mbugua testified as PW2. He adopted his witness statement dated January 29, 2018 as his evidence in chief. He stated that he knew the Applicant since their childhood days and that he has been staying in the suit property since then.
8. Upon cross-examination, he stated that he does not know the number of the property and neither does he know its current registered owner but he is aware that the Applicant has been staying in that property for a long time.
9. Samuel Wainaina Ndungu testified as PW3. During the hearing, he adopted his witness statement dated January 29, 2018 as his evidence in chief. He testified that he has known the Applicant since 1974 and he has also undertaken some construction work of his house at the suit property. He further stated that he has seen the Applicant living on the suit property since he knew him.
10. On cross-examination, he stated that he had been notified that the property had been registered in the names of the Respondents.



### **The Respondents case.**

11. The Respondents filed a Replying Affidavit sworn by 1<sup>st</sup> Respondent on May 25, 2021. The 1<sup>st</sup> Respondent deposed that the suit property was acquired by their parents and registered in the names of their father on May 3, 1991 for which a certificate of title was issued to him.
12. It was also averred that the Applicant's occupation to the suit property is not adverse since he has been living there with the approval and consent of the Respondents.
13. During the hearing, the 1<sup>st</sup> Respondent Mary Muthoni Muriuki testified as the sole Respondents' witness. She adopted her witness statement dated February 25, 2021 as part of her evidence in chief. She further stated that the suit property was transferred to them in the year 2004. He also testified that the Applicant has never stayed in the property as alleged and neither has he stayed there with his family.
14. It was also her testimony that the Applicant was only given permission to stay on the property by her father and that he has continued staying there with their consent. She also stated that she has no problem with the Applicant staying in the property.
15. On cross-examination, she stated that they had not informed the Applicant that he was a licensee. She also conceded that she did not have any sale agreement in respect to the suit property. She further stated that she still resides in Germany but regularly visits the property whenever she comes Kenya.

### **The Applicant's submissions.**

16. The Applicant filed submissions dated September 9, 2022 through the firm of T.J. Michael & Co. Advocates. The Applicant submitted on the following four issues: -
  - a. Whether the Applicant should be registered as the proprietor of all that parcel of land situated within Nairobi County known as LR No 14225/48 acquired by adverse possession.
  - b. Whether the applicant should be registered as the proprietors of the suit property in place of the Respondents.
  - c. Whether a permanent injunction should be issued restraining the Respondents from trespassing, entering, breaking into, or in any way interfering with the applicant's quiet possession and enjoyment of all that parcel of land situated within Nairobi County known as LR No 14225/48.
  - d. Whether the Respondents should be ordered to pay the Applicant the market value of the property and the developments he has affected thereon.
17. On the first issue, Counsel submitted that the Applicant had acquired the suit land by adverse possession because of the following reasons: -
  - a. That the Applicant has been in occupation of the suit property since 1965.
  - b. The Applicant has never sought the Respondents permission to live on the suit property.
  - c. The Respondents have never been in actual possession of the suit land shall since registration as they live abroad.



- d. The Respondents have never asked the Applicant to vacate the suit land and he has had actual, open, exclusive and continuous occupation of the suit land for well over 13 years uninterrupted since such registration and therefore acquired title by prescription.
18. Counsel cited the cases of *Samuel Miki Waweru v Jane Njeri Richu* Civil Appeal No 122 of 2001 (UR) *Kasuve v Mwaari Investments Limited & 4 others* 1 KLR 184 and *Jandu v Kirpal & Another* (1975) EA 225 in support of this position.
19. The Applicant also submitted that the Respondents' right to the suit property having been extinguished, the property ought to be registered in his name as stipulated under Section 38(1) and (2) of the *Limitation of Actions Act*.
20. The Applicant also prayed and submitted for a permanent injunction to be granted against the Respondents from interfering with his quiet enjoyment of the land and reference was made to the cases of *Kenya Power & Lighting Co. Ltd v Sheriff Molana Habib* (2018) eKLR, *Giella v Cassman Brown* (1973) EA 358 and *Nguruman Limited v John Bonde Nielson & 2 others* CA No 77 of 2012 (2014) eKLR
21. Counsel for the Applicant also submitted that should the court fail to order that the Applicant be registered as the proprietor of the suit property, then the Respondents should pay him the market value of the developments he has effected on the said property.

#### **The Respondent's submissions.**

22. The Respondents filed their submissions dated October 19, 2022 through the firm of Theuri Wanjohi & Co. Advocates. Counsel submitted on the following issues:
  - i. Whether the Applicant has been in open and peaceful possession of the suit property for a period in excess of over 12 years.
  - ii. Whether the possession was exclusive.
  - iii. Whether the possession was adverse.
  - iv. Whether the Respondents discontinued possession or were disposed of the suit property.
23. Counsel referred to minutes of family meeting held on November 22, 2016 which showed that there was some wangling between the parties in respect to the property and hence the possession and stay by Applicant was not peaceful. In the circumstances, the criteria of adverse possession had not been satisfied.
24. It was also submitted that the Applicants possession to the property was not exclusive since other parties were also residing in the said land. Counsel submitted that a cousin to the parties called James Ngari stays in the said property with his family and also the 1<sup>st</sup> Respondent's son Dan Muriuki also stays in the said property. The case of *Bernard Ndungu v David Komu Mukumbu* (2021) eKLR was cited in support.
25. It was also argued that the possession and occupation of the land by the Applicant was by consent of the family and hence a claim for adverse possession cannot arise. Counsel made reference to several decided cases in support of this position.



26. Relying on the court of the Appeal case of *Titus Mutuku Kasuve v Mwaani Investment Ltd & 4 others* (2004) eKLR, Counsel submitted that even though the 1<sup>st</sup> Respondent was not present in Kenya most of the time, they allowed their parents and other family members to live on the suit property which in essence amounted to constructive possession and further reference was made to the case of [Peter Mbiri Michuki v Samuel Mugo Michuki](#) (2014) eKLR
27. Counsel concluded his submissions by urging the court to dismiss the suit with costs to the Respondents.

### **Analysis and determination.**

28. The court has now carefully considered the originating summons, the evidence adduced by the parties and the written submissions filed together with the existing legal framework and the main issues for determination is: -
  - i. Whether the Applicant has met the criteria of an adverse possession in respect to 14225/48.
  - ii. What are the appropriate reliefs to issue herein?
29. For one to succeed in a claim for adverse possession, one must prove that he has been in exclusive continuous occupation of the suit land for a period of at least 12 years, which occupation must be open and notorious and should be without permission of the owner; nec vi, nec clam, nec precario (no force, no secrecy, no persuasion), See- Nyeri Court of Appeal case No22 of 2013, [Peter Mbiri Michuki vs. Samuel Mugo Michuki](#).
30. In [Celina Muthoni Kitbinji v Safiya Binti Swaleh & 8 others](#) [2018] eKLR, the Court explained the conditions to be met for one to prove an entitlement in adverse possession. The court proceeded to quote various authorities which explain the entitlement and I wish to borrow fully from the decision and capture it as hereunder;
 

“The requirements for Adverse Possession in Kenya has also been set out in the case of Mbira –v- Gachuhi (2002) I EALR 137 in which the court held that:

.....a person who seeks to acquire title to land by the method of Adverse Possession for the applicable statutory period must prove non-permissive or non-consensual, actual, open, notorious, exclusive and Adverse use by him or those under whom he claims for the statutory prescribed period without interruption....”
31. Given the nature of the Applicant’s claim, it is important to underscore that before a claim for adverse possession can be deemed to have been proven, it is incumbent upon the claimant to demonstrate that same has been in actual, visible, open and notorious occupation and possession of the portion of land which is the subject of Adverse possession.
32. Similarly, the claimant must also tender evidence that the occupation or possession has been non-permissive actual possession, which is hostile to the title of the current owner. In this regard, the actual possession must relate to a defined, definite and distinct portion and the impugned occupation must be exclusive. On the other hand, the other set of ingredients that must be demonstrated and proven relates to the fact that the possession must be continuous, uninterrupted and unbroken for the necessary statutory duration, same being the Twelve (12) year period. See Section 7, 12, 13 and 17 of the [Limitations of Actions Act](#), Chapter 22, Laws of Kenya.



33. It is not disputed that the Applicant has been on the suit land for over 12 years and is still currently in occupation of the same. This was also supported by the testimony of PW2 and PW3.
34. From the testimony that was adduced, the 1<sup>st</sup> Respondent equally did not dispute the fact that the Applicant is on the suit property and neither did they dispute whether he had been there for a period of over 12 years. The Respondents however argued that the Applicant have not met the necessary ingredients to succeed in a claim of adverse possession.
35. From the evidence that was tendered, it is clear that the parties are family members being siblings. The applicant is the elder brother to the Respondents. It was the 1<sup>st</sup> Respondent's testimony that they bought the land from their father who wanted to raise funds for medical purposes. It also emerged that while the 1<sup>st</sup> Respondent does not stay in the suit property, there are other family members apart from the Applicant who stay on the said property. These includes the mother of the Applicant and the Respondents, the cousin to the parties one James Ngari and his family. It was also the testimony of the 1<sup>st</sup> Respondent that the Applicant was given permission by their late father to live on the property.
36. In the instant case, it is therefore clear that the Applicant was not using the said property exclusively to his possession since there are other family members staying in the said property including the son of the 1<sup>st</sup> Respondent. The Court of Appeal in the case of *Harison Kaara v Gichobi Kaara & Another* (1997) eKLR, which case was cited by the Respondents held that: -

“In other words the adverse possessor must show that he is using the land as though it is solely his own before a right of action to recover it can be said to have occurred for the limitation period to start running”

37. On the basis of the evidence that was adduced by the parties, there was irrefutable evidence that several members of the parties family are currently staying in the property and even the Applicant was permitted to stay in the said property courtesy of his late father who later transferred the said property to the Respondents.
38. The Applicant in his testimony stated that the 1<sup>st</sup> Respondent does not stay in the property owing to the fact that she resides in Germany. The court has had the benefit of considering this testimony and the reasons advanced by the 1<sup>st</sup> Respondent and it is evident that there are other family members of both parties who still use and reside in the land. In fact, during the hearing, it was the 1<sup>st</sup> Respondent's testimony that her son who is about 35 years old also resides in the said property. The Court of Appeal in Nyeri Civil Appeal No 153 of 2017, *Chairman Board of Governors Muranga College of Technology Primary School v Julius Ngigi Munjuga* (2018) eKLR quoted with approval the case of *Alfred Welimo -vs- Mulaa Sumba Barasa* CA No 186 of 2011 and held:-

“It is trite that adverse possession is not established merely because the owner has abandoned possession of his land and ceased to use it...”

Based on the foregoing and the fact that the 1<sup>st</sup> Respondent stays in Germany does not necessary imply that she has given up her entitlements to the property.

39. It is therefore the finding of this court that after considering the evidence of the parties together with their written submissions, the Applicant has failed to prove his case to the required standard and his claim for adverse possession fails.



40. On what relief should issue, having found that the applicant has not satisfied the ingredients and or elements to succeed in a claim of adverse possession, he is not entitled to any of the reliefs sought since the same are not for granting.
41. In the end, the originating summons dated January 29, 2018 is not merited and the same is dismissed in its entirety. On the issue of costs, having considered the relationship of the parties who are siblings, I direct that each party bears own costs of the suit.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2022.**

**E.K. WABWOTO**

**JUDGE**

In the presence of:

Ms. Muraguri h/b for T.J. Michael for the Applicant.

Mr. Wanjohi for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

Court Assistant; Caroline Nafuna.

**E.K. WABWOTO**

**JUDGE**

