



**Michael v Kiara (Environment & Land Case 1 of 2019)  
[2022] KEELC 14762 (KLR) (16 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14762 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 1 OF 2019  
CK NZILI, J  
NOVEMBER 16, 2022**

**BETWEEN**

**JENNIFFER MICHAEL ..... PLAINTIFF**

**AND**

**HUMPHREY K. KIARA ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff took out an originating summons dated 11.1.2019, seeking that the court to determine if he has acquired 0.725 ha out of the defendant's L.R No. Nkuene/Kithunguri/396 by virtue of adverse possession.
2. The originating summons was supported by an affidavit of Jennifer Michael sworn on 11.1.2019 where she attached a copy of the green card for the suit land. The summons was also supported by her witness statements filed on 3.7.2019.
3. The originating summons was opposed through a replying affidavit by Humphrey K. Kiara sworn on 20.2.2019, witnesses' statements filed on 14.8.2013, and a list of documents dated 23.9.2019.
4. At the trial, the plaintiff called two witnesses. PW 1 adopted her witness statement and told the court that she did to know the defendant. That she entered the suit land in 1972, erected a permanent house and has been tilling the land which has mature coffee, bananas trees and nappier grass. She testified that her late husband passed on and was buried on the suit land. She said that the defendant has never occupied or developed the land or attempted to evict her. She produced the green card as P. Exh No. 1. She did not however produce any photographs or a surveyor's report to support her evidence.
5. Regarding Civil Case No. 60 of 1983, the plaintiff admitted that an order was issued in 1997 against one Silas Kinoti to transfer to her the land but instead, he sold it to the defendant. She confirmed that she lived on P/No. 396. She also denied the dispute was about a boundary or that she had trespassed into



- the defendant's parcel of land. PW 1 also said that she bought her land from one Kanampiu Muthige through her father in law. She said she was not aware of P/No. 645.
6. Further, PW 2 a neighbour of the plaintiff confirmed that the defendant had never occupied the suit land unlike the plaintiff who had erected a permanent homestead since 1972. Further, PW2 said that the suit land was initially part of P/No. 370 prior to subdivision. PW 2 also said that the plaintiff was a witness when the plaintiff's father in law was buying the land. She admitted that there was a tribunal case which determined ownership in favour of the purchaser.
  7. PW 3 told the court that as a chairman of the land disputes tribunal, members visited the suitland and established that there was a permanent homestead, coffee trees belonging to the plaintiff as well as a graveyard. He said that the lands tribunal determined the case which was between the father in law of the plaintiff and one M'Mungania over the suit land. He said the determination was in favor of the purchaser.
  8. In addition, PW 3 testified that the defendant attended the lands tribunal and gave his testimony. He confirmed that the suit land has all along been under occupation by the plaintiff.
  9. The defendant as DW1 adopted his witness statement and replying affidavit as his evidence in chief. He produced a copy of the green card, official search and sheet map as P. Exh (1), (2) & (3) respectively DW1 said that the map showed the plaintiff's Parcel No. 645 bordered his land Parcel No. 396. He denied that the plaintiff was occupying his land or that he had allegedly abandoned the same for her use as alleged or at all.
  10. Similarly, DW 1 admitted that Kanampiu Muthige was the initial owner of the suit land but later on was transferred out of transmission DW1 said that he bought the suitland from Silas Kinoti and someone else who showed him the land which was vacant. He clarified that the plaintiff was occupying P/No. 645. DW1 denied that the plaintiff had constructed any permanent development on his land as pleaded or at all. He admitted that he did not live on the suit land though he would occasionally visit the place.
  11. Additionally, DW 2 told the court that together with his late father Kanampiu Muthige, they sold their land to the defendant but not the plaintiff as alleged, who was a neighbor. He however clarified that when he took the defendant to view the land, the plaintiff's relatives chased them away and fearing for his life, he never stepped back to the land nor could he confirm if the defendant ever took vacant possession 2 however clarified it was the plaintiff who was still on the land.
  12. The plaintiff has submitted that her testimony has met the ingredients of adverse possession as set out under the Limitations of Actions Act, the *Land Act* 2012 and the case law of *Wilson Njoroge Kamau vs Nganga Muceru Kamau* (2020) eKLR & *Kasuve vs Mwaani Investments Ltd & 4 others* (2004) 1 KLR 184.
  13. On the other hand, the defendant has submitted that going by the plaintiff's documentary evidence and in particular the map, she was occupying land Parcel No. 645 while at the same time mobilizing her people to allegedly and forcefully purport to take away his land which attempts he has always resisted.
  14. Relying on *Mati Gitahi vs Jane Kaburu Muga & 3 others* Nyeri C. A 43 of 2015, the defendant submitted that the use of violence disqualified the plaintiff from alleging adverse possession. Further, based on the caselaw of *Gabriel Mbui vs Mukindia Manyara* (1993) eKLR, the defendant submitted that occupation per se cannot make an intruder the owner of the land and that the plaintiff had merely interfered with the common boundary. Therefore, at the very least, the plaintiff was a mere trespasser and not an adverse possessor, who had failed to tender any evidence to prove her claim.



15. For a party to found a claim on adverse possession, he must adduce some credible and believable evidence that his possession of the land has been as of right, in a manner inconsistent with the rights of the registered owner, that is to say in open, actual, continuous, uninterrupted, peaceful, exclusive and with the knowledge, but without the consent or permission for a period of 12 years. See *Kimani Ruchure vs Swift Rutherford and Co. Ltd* (1980) eKLR 10, *Mati Gitahi vs Jane Kaburu Muga & 3 others supra*, *Gabriel Mbui vs Mukindia Manyara* (1993) eKLR, *Wilson Njoroge Kamau vs Nganga Muceru Kamau* (supra).
16. In *Mtana Lewa vs Kabindi Ngala Mwangandi* (2015) eKLR, the Court of Appeal held that adverse possession occurs when a person takes possession of land, without force or permission, asserts rights over it and the true owner omits or neglects to act against the intruder for 12 years. The court said it must be adequate, in continuity, in publicity and in extent.
17. In *Wilfred Kegonye Babu vs Henry Mose Onuko* (2019) eKLR, the Court of Appeal cited with approval *Wambugu vs Njuguna* (1953) KLR 172 where it was held that possession only becomes adverse for a purchaser of land under a contract once the contract is repudiated or after the last instalment has been paid but the seller fails to complete the land sale process. See also *Public Trustee vs Wanduru* (1984) KLR 314.
18. In *Gatimu Kinguru vs Muga Gathangi* (1976) KLR 253 the court observed that the land or portion of the land allegedly adversely possessed must be definitely identified, defined or at the very least, be an identifiable portion with a clear boundary.
19. As regards the computation of time for adverse possession, the court in *Githu vs Ndeete* (1994) KLR cited with approval *KCB vs Sarah Njeri Muchene* (2016) eKLR, where it was held that time ceases to run either when the owner takes or asserts his rights or when his rights to land are admitted by the adverse possessor. Further, the court held that an assertion includes the taking of legal proceedings or making an entry to the land but not through the mere giving of a notice to vacate the land.
20. Applying the foregoing case law, the plaintiff has pleaded that she has been in occupation of 0.725 ha of the defendant's parcel of land since 1972 where she has constructed permanent houses and has been tending a coffee farm. In her supporting affidavit, witness statement and testimony, the plaintiff told the court that the land was bought by her late father in law M'Mungania M'Kiriamunya from one Kanampiu Mutige, who put her family into possession. Thereafter, she said that her late husband together with his family continued to live therein when the original owner transferred the land to his son and later on to the defendant as per P. Exh (1). The plaintiff had maintained that the defendant has never set foot on the land or developed it. The plaintiff's evidence was corroborated by PW 2 & PW 3.
21. The defendant denies that the plaintiff was occupying his land and insists that she is on her Parcel No. 645. He insisted that the plaintiff has only interfered with the common boundary and allegedly trespassed into his land which acts of trespass he has always resisted.
22. As regards the plaintiff's assertion that she was a purchaser for the suit land, the defendant disputes this and insists that there has been no sale agreement availed before court and that any alleged claim over ownership by the plaintiff's late father in law against the previous owner was not only resisted but also defeated in court.
23. DW 2 in his testimony denied the alleged sale by his later father to the plaintiff's late father in law. He however admitted that when defendant went to take vacant possession the plaintiffs relatives chased them away. He said it was the plaintiff in occupation of the land.



24. It is trite law that he who asserts must prove. The plaintiff has pleaded and testified that the entry into the subject land was out of a purchase done by her late father in law. She has not produced the sale agreement, stated the terms and conditions of the same and the consideration thereof. PW 1 failed to produce any evidence to show when the last installment to the sale agreement was made for the court to be able to compute the time of 12 years from the date of payment of the last installment.
25. The plaintiff averred and testified that the late father in law purchaser's rights were litigated upon with Silas Kinoti both at the land disputes tribunal, at the district officer's level and later confirmed through the courts. PW 3 testified that he was the chairman of the defunct land disputes tribunal which handled the dispute, visited the land and eventually awarded the same to the purchaser. No such proceedings, the award or a decree to that effect were tendered before court. Similarly, there was no photographic evidence tendered to show any of the plaintiff's developments on the suit land.
26. In *Loise Nduta Itotia vs Aziza Said Hamisi* (2020) eKLR the court held that the oral testimony of the respondent was credible since it was supported by a surveyor's report capturing all the developments in the suit land, which were not claimed by the opposite party.
27. In this suit, whereas the plaintiff claims the area under her occupation is 0.725 ha, a copy of the official search indicates that the defendant's land is estimated at 0.725 acres. The defendant on the other hand averred that the plaintiff's encroachment on his land has only been haphazard, infrequent and did not amount to adverse possession. Further, the defendant testified that what the plaintiff has done was to violently interfere with the common boundary but has always been resisted hence the alleged occupation has not been peaceful, open and or notorious.
28. DW 2 has denied that there was any sale of land by his late father to the plaintiff's late father in law. A copy of the records shows that the land was registered in the name of Kacapi Muthige on 6.9.1966, became registered in the name of the DW 2 on 4.5.1981 and later in the name of the defendant on 19.11.1991. D. Exh 3 indicates that the two parcels namely No. 645 and 396 are distinct and separate.
29. The law is that the area under the adverse possessor must be identifiable and with a clear boundary. The plaintiff did not say if what was bought by her late father in law was the whole of the suit land. She admitted that the land was subdivided and transferred to third parties from the name of the initial owner. There is evidence that the second owner subdivided the land, later sold and transferred the same to the defendant.
30. Both parties agree that there have been disputes over ownership up to court prior to this suit. All these acts taken into totality establishes that the defendant and the predecessors in title have been asserting ownership rights.
31. There is evidence that the plaintiff all along has been aware of the defendant's claim. Similarly, there is evidence that the predecessors to title have been resisting any attempts by the plaintiff to enter the land.
32. The court's finding is that the plaintiff has not been under peaceful, quiet and open occupation of the land without resistance by the defendant or the predecessors in title. The burden of proof was on the plaintiff to prove each and every ingredient of adverse possession on the two key concepts of dispossession and discontinuance of possession of the true owner.
33. The plaintiff has failed to bring tangible and cogent evidence to the satisfaction of the court that she has asserted her intruder's rights, openly, continuously, notoriously, uninterruptedly with the animus possidendi and lastly, g that the defendant or his predecessor in title ignored or neglected to assert his rights.
34. The upshot is the suit is dismissed with costs.



Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 16<sup>TH</sup> DAY  
OF NOVEMBER, 2022**

**In presence of:**

C/A: Kananu

Miss Rimita for Kimathi Kiara for plaintiff

Gichunge for defendant

**HON. C.K. NZILI**

**ELC JUDGE**

