



**Ngiti v M’Mwereria (Environment & Land Case 64 of 2012)
[2022] KEELC 15196 (KLR) (7 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15196 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 64 OF 2012**

CK YANO, J

DECEMBER 7, 2022

BETWEEN

PETER KIRIMI J NGITI PLAINTIFF

AND

JOHN IKUNDA M’MWERERIA DEFENDANT

JUDGMENT

1. The plaintiff filed an originating summons dated August 6, 2012 and filed on August 7, 2012 seeking for orders that:
 1. The plaintiff/applicant has become entitled by adverse possession to 0.25 acres out of parcel of land reference No Nkuene/kithunguri/712 measuring 1.20 acres pursuant to the Limitation of Actions Act.
 2. The said plaintiff/applicant be registered as the sole proprietor of the said 0.25 acres of parcel of land reference number Nkuene/kithunguri/1584, which area was originally excised from the main land Nkuene/kithunguri/712, under section 38 of the Limitation of Actions Act.
 3. Such other or further orders as may meet ends of justice in this case.
 4. Costs be provided for
2. The originating summons is supported by the affidavit of Peter Kirimi J. Ngiti the plaintiff sworn on August 6, 2012 and a supplementary affidavit sworn on August 19, 2013.
3. The plaintiff’s case is that he entered into an agreement for sale of land with the defendant on February 6, 1997 in which the defendant sold 0.25 acres to the plaintiff out of the defendant’s land parcel title number Nkuene/kithunguri/712 measuring 1.20 acres. The plaintiff states that after execution of the agreement for sale, he took possession of the said land, fenced it on clearly marked boundaries and developed the same extensively by planting bananas and other crops. That from then the plaintiff



together with his family have used the land continuously and uninterruptedly notwithstanding the fact that the land control board consent was not obtained. The said land was therefore not officially transferred to the plaintiff. It is the plaintiff's case that the said 0.25 acres of land has clear marked boundaries, but the defendant has started interfering with the plaintiff's rights by sub dividing the original parcel of land Nkuene/kithunguri/712 into three sub-divisions, one of which is No Nkuene/Kithunguri/1584 which falls on the plaintiff's land. The plaintiff has annexed copies of the said agreement marked "PKNI" and copies of the title of the subdivisions marked "PKN 2" "PKN 3" and "PKN 4".

4. In response to the originating summons, the defendant filed grounds of opposition and a replying affidavit both dated July 3, 2013. It is the defendant's contention that the entire summons as drawn and filed is frivolous fatally defective, an abuse of the court process and untenable in law for reasons that the same is premised on fraudulent, deceitful and misleading averments and depositions on the part of the plaintiff, that the summons raises no reasonable cause of action and that the prayers sought by the plaintiff are unsustainable and unavailable as the pleadings presented in court by the plaintiff are irreconcilable and incompatible with the accompanying pieces of evidence.
5. The defendant averred that the entire suit is deftly crafted masterpiece designed to defraud him of his land through the judicial process. The defendant has deponed that whereas it is true that he entered into an agreement with the plaintiff to sell him 0.25 acres to be excised from LR No Nkuene/kithunguri/712, the plaintiff has never taken actual possession, fenced the same or effected any developments thereon. The defendant denied that the subdivisions LR No Nkuene/kithunguri/1583, 1584, and 1585 exhibited by the plaintiff in his supporting affidavit are subdivisions of LR Nos Nkuene/Kithunguri/721 and not the land in question, LR No Nkuene/kithunguri 712 as claimed by the plaintiff. The defendant avers that both parcels are completely distinct and separate and that at no time did he contemplate selling a portion from LR No Nkuene/kithunguri/721 to the plaintiff. That in the circumstance, the issue of being entitled to a portion measuring 0.25 acres in LR No Nkuene/kithunguri/1584 by adverse possession is farfetched and baseless. The defendant prayed for the orders of caution and inhibition to be lifted and for the entire suit to be struck out with costs.
6. In his supplementary affidavit, the plaintiff deponed that he stands by the averments in his affidavit dated and sworn on August 6, 2012 except to correct the number which reads 712 to 721. He averred that the defendant has not shown that Land Reference No Nkuene/kithunguri/712 exists and that the agreement does not contain a typing error. The plaintiff maintained that he bought 0.25 acres from the defendant and paid the full purchase price, adding that the land had been identified to him on the ground and that as agreed in the agreement the plaintiff took possession of the land and has been using it since then. That despite the error in the agreement, the position is that the plaintiff has been living on LR No Nkuene/Kithunguri/1584, adding that the technicalities raised by the defendant cannot stand in view of the provisions of the *Constitution* and the *Civil Procedure Act*.
7. At the hearing, Peter Kirimi Ngiti the plaintiff testified as PW 1 and did not call any witness. He was cross examined and re-examined. He testified that he bought the suit land from the defendant who has since subdivided it. That they signed the sale agreement dated February 6, 1997 and that he first paid the sum of Kes 23,000/= leaving a balance of Kes 2,000/= which he paid later.
8. The plaintiff stated that he took possession of the land and developed it by planting coffee, bananas, nappier grass and grevillea trees and that he is still in possession of the land.
9. His evidence is that no one has disturbed his possession and occupation though he has not been issued with a title deed. The plaintiff testified that the defendant is now deceased, and that his widow agreed to give him title but the children complained. He stated that at the time he purchased the land,



the defendant's children were still in school and the consideration was used to pay their fees. The plaintiff produced the sale agreement dated February 6, 1997 and copies of register on LR No Nkuene/Kithunguri/1583, 1584, and 1585 as P exhibit 1 to 4 respectively.

10. When cross examined by Mr. Muriithi, learned counsel for the defendant, PW 1 stated that he has not put up a house on the suit land as he lives on another parcel of land which is next to the suit land. He agreed that in the sale agreement produced as P exhibit 1, he was buying 0.25 acres out of parcel no Nkuene/Kithunguri/712, adding that he filed a supplementary affidavit on August 20, 2013 in which he deponed that parcel no 712 was not owned by the defendant as it belonged to one M'Mutwambari. He stated that parcel no 1584 is a subdivision of parcel Number 712.
11. The plaintiff stated that he was buying 0.25 acres and that after executing the sale agreement, they went and subdivided the land. He confirmed that the green card for parcel no 1584 (P exhibit 3) the land is measuring 0.18 ha (which is about 0.44 acres).
12. The plaintiff testified that he placed cautions in all the parcels of land because he had bought one, LR No 1584 which he said he had developed. He stated that he was using the entire parcel no 1584, and that if it is more than 0.25 acres, then that was not his mistake. The plaintiff confirmed that in the originating summons, he is claiming 0.25 acres out of parcel LR No 1584. That if the land was more than 0.25 acres, the defendant should bring a surveyor to give the plaintiff 0.25 acres. He stated that he has a receipt for Kes 2,000/= which he was given by the defendant but did not have it before court.
13. When re-examined by Ms Rimita learned counsel for the plaintiff, the plaintiff stated that the parcel no 1584 which he is claiming is out of parcel no 721. He further stated that all the parcels came from parcel no 712, that is 721, 1583, 1584 and 1585. That the surveyor came and gave him parcel no 1584 and asked the court to assist him get title because he is in possession and occupation of the land.
14. John Ikunda M'Mwereria (now deceased) the original defendant died on August 6, 2015 and his widow Alice Karambu Mwendwa was substituted in place of the deceased. The defence did not adduce any evidence for the reason that the defendant's legal representative was not privy to any dealings or transactions that might have occurred in relation to the suit.

SUBMISSIONS

15. The plaintiff filed his submissions dated August 23, 2022 and filed in court on August 29, 2022. He submitted that he took possession of the suit property in performance of the sale agreement between the plaintiff and the defendant who was the registered owner of the suit property in 1997.
16. The plaintiff cited section 3 (3) of the *Law of Contract Act* which provides that
 - a. The contract upon which the suit is founded
 - i. Is in writing
 - ii. Is signed by all the parties thereto and
 - b. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party”
17. The plaintiff's submissions is that the proviso to section 3 (3) of the *Law of Contract Act* applies in this case and therefore the sale agreement between the plaintiff and the deceased defendant did not violate or offend the provisions of the *Law of Contract Act*.



18. The plaintiff further submitted that in regard to the consent by the land control board, the plaintiff correctly pleaded that the defendant failed to obtain the same so that transfer in favour of the plaintiff's name would be effected.
19. The plaintiff relied on case of *Kimani Ruchire v Swift Rutherford & Co. Ltd* (1980) K10 in which Kneller J held that-;

“The plaintiff has to prove that they used his land which they claim as of right: *nec vi, nec clam, nec precario* (no force no secrecy no persuasion). So the plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavors to interrupt it by way of recurrent consideration”
20. The plaintiff submitted that he entered the suit property in 1997 and occupied the same by claim of right, that his occupation was not only actual and physical but open and uninterrupted, further that he has developed the suit property by planting trees, building houses and farming seasonal crops.
21. The plaintiff further submitted that time began to run for purposes of his claim for adverse possession in the year 1997 the year of the sale agreement between the said parties and that in that year the plaintiff took legal possession of the suit property.
22. The plaintiff also relied on *Wambugu v Njuguna* (1983) KLR where the Court of Appeal held;

“Where the claimant is in exclusive possession of the land with leave and license of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined.”
23. The plaintiff contends that entry to the suit property was pursuant to a sale agreement in 1997 with the plaintiff as a bona fide purchaser for value and that the entry was with the permission of the defendant (registered proprietor then) qua vendor
24. The plaintiff relied on the case of *Public Trustee v Wandura* (1984) KLR 314 where at 319 Madam J.A stated “that adverse possession should be calculated from the date of payment of the purchase price to the full span of 12 years if the purchaser takes possession of the property because for that date the true owner is disposed off possession. A purchaser in possession of the land purchased, after having paid the purchase price is a person in whose favour the period of Limitation can run.”
25. The plaintiff further relied on the case of *Mwangi & another v Mwangi* (1986) KLR 2328 in which it was held that rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights.
26. The plaintiff also cited the case of *Public Trustee v Wandura* (1984) KLR 314 at 321 in which it is stated that a purchaser in possession has an overriding interest under the provisions of the *Registered Land Act* (now repealed).
27. The plaintiff referred to the dicta in the case of *Mwangi (supra)* that establishes the principle that the right of a person in possession or occupation of land are equitable rights which are binding on the land.
28. The plaintiff submitted that his occupation was therefore possessory right and are not only equitable rights but an overriding interest binding on the land.



29. The plaintiff cited section 7 of the *Limitation of Action Act* that provides that:
- “An action may not brought by any person to recover land after the end of twelve years from the date on which the right of actions accrued to him or, if it first accrued to some person through whom he claims to that person”
30. The plaintiff prayed that his summons be allowed in terms of the prayers sought therein.
31. In her submissions filed on September 28, 2022, the defendant submitted that the plaintiff’s contention is that he has acquired ownership of a portion measuring 0.25 acres in LR No Nkuene/Kithunguri/1584 as excised from LR Nkuene Kithunguri/712. The defendant submitted that it is clear that LR No Nkuene/Kithunguri/1584 is not a subdivision of LR No Nkuene/Kithunguri/712 as evidenced from the green card availed by the plaintiff.
32. The defendant further submitted that, be that as it may a claimant under the doctrine of adverse possession must in his evidence demonstrate that they have been in occupation of the suit land for a period exceeding twelve (12) years without the true owner’s permission, that the owner was dispossessed or discontinued his possession of the land and that the adverse possessor has done acts on the land, which are inconsistent with the owner’s enjoyment of the soil for the purposes for which he intended to use it as seen in *John Ndung’u Kipsoi v Samuel Chepkulul & another* (2018) eKLR
33. The defendant submits that in the instant case the entry of the plaintiff is claimed to have been with the permission of the registered owner on the strength of a sale agreement. The defendant further contends that in the circumstances of this suit it is pertinent for them to address their mind on the legal implications of entry into a parcel of land with the permission of the registered owner and the subsequent lapse of the statutory period of twelve (12) years.
34. The defendant relied on *Christopher Kioi & another v Winnie Mukolwe & 4 others* (2018) eKLR in which the Court of Appeal held-;
- “But even if it were accepted that Kioi took possession of the suit property pursuant to the alleged agreement for sale, in itself would negate a claim based on adverse possession because the possession would have been with the consent of Kituri”
35. The defendant further relied on a passage quoted by the Court of Appeal in *Samuel Miki v Jane Njeri Richu* CA No 122 of 2001 that:
- “It is trite law that a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of or in pursuance to an agreement of sale or lease or otherwise.”
36. The defendant further relied in the case of *Mbaoni M’Itbara v James Mbaka* (2018) eKLR in which the court of appeal cited with approval the following passage made in *Wambugu v Njuguna* 1983 KLR 172
- “Where the claimant is in exclusive possession of the land with leave and license of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence the occupation is not adverse but with permission. The occupation can only be either with permission or adverse the two concepts cannot co-exist.”



The learned judges further stated

“The appellant had a duty to establish indeed he occupied the suit lands by virtue of a contract of sale, which means he entered through a licence and when the validity of the contract ceased to give way for a claim of occupation without permission (*nec vi nec clam, nec precario*) without force, without secrecy and without permission.”

37. The defendant contends that in the instant case the plaintiff did not lead evidence on the particulars of the contract and that a perusal of the agreement indicates that the balance of Kes 2,000/= was to be paid on an unspecified date in future and that the plaintiff did not prove that such payments was even made.

38. The defendant quoted the decision made in *Joseph Ngareh Kanyeria v Sarah Wandia Njogu (sued in the capacity of the legal representative of the estate of Njogu Kibaka (deceased))* 2020 eKLR in which the court quoted the following passage made in the court of appeal case of *Wambugu v Kamau Njuguna* Civil appeal No 10 of 1982;-

“...if a purchaser has not paid the full purchase price, time for adverse possession does not begin to run and that it will only be deemed to start running after the full purchase price is paid”

While applying the same principle the High court held:-

I agree with the position of the law as re-stated in the above decision. The plaintiff has not proved to the satisfaction of the Honourable court that he has paid the last instalment of Kes 6,000/=. The only conclusion that can logically be drawn from the evidence by the parties is that the plaintiff was occupying the suit property as a purchaser.”

39. It is the defendant’s submissions that the plaintiff has failed to prove his claim to the required standard and prayed that the suit be dismissed with costs.

ANALYSIS AND DETERMINATION

40. This court has carefully considered the pleadings, the evidence and the submissions filed by the parties to buttress their assertions. I have also taken into account the legal authorities proffered by the parties. The court identifies the following issues for determination.

- i. Whether the plaintiff has proved that he has acquired 0.25 acres in LR No Nkuene/Kithangari/1584 through the legal doctrine of adverse possession.
- ii. Whether the plaintiff is entitled to the reliefs sought.

41. In deciding whether or not the plaintiff has proved his claim for adverse possession to the required standard in civil cases, the plaintiff must prove that he has been in occupation of the suit land measuring 0.25 acres for a period of over twelve (12) years, that such occupation was open, peaceful and continuous without interruption from the registered owner and that such occupation was adverse i.e inconsistent with the right of the registered owner.

42. In *Wambugu v 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 possess.”



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 purpose 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 as to entitle 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.”
43. In the case of *Mtana Lewa v Kabindi Mangandi* [2015] eKLR, the Court of Appeal (Makhandia) JA stated as follows;
- “Adverse possession is essentially a situation where a person takes possession of land and asserts right 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 adverse 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.”
44. The doctrine of adverse possession is embodied in section 7 of the *Limitation of Actions Act* which provides:
- “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”.
45. Section 13 of the same act further makes provisions for adverse possession as follows-;
- (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 section 9, 10, 11 and 12 of this Act a right of action to recover possession on the 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”.



46. Section 38 (1) of the *Limitation of Action Act* provides that;

“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

47. In this case, the plaintiff testified that he entered into a sale agreement with the defendant on February 6, 1997 for the purchase of a portion of land measuring 0.25 acres in LR No Nkuene/Kithunguri/721 at a consideration of Kes 25,000/= out of which he paid Kes 23,000/= on the day of executing the agreement and the balance on a subsequent date. It was the plaintiff’s testimony that he immediately took possession of the land in February, 1997 and has been in occupation since then until the time the suit was filed in the year 2012. The plaintiff further testified that there was an error in the agreement for sale in which the land was referred to as LR No Nkuene/Kithunguri/712 instead of Nkuene/Kithunguri/721. Indeed in his supplementary affidavit in support of the originating summons the plaintiff sought to correct the number to read 721 instead of 712.

48. The plaintiff further testified that the original land was subdivided by the defendant and the portion sold to him and which he is in possession and occupation is LR No Nkuene.Kithunguri/1584 which was excised from LR No Nkuene/Kithunguri/721. As already stated, the defence did not adduce any evidence for the reason that the defendant’s legal representative was not privy to any dealings or transactions that might have occurred in relation to the suit land. The evidence of the plaintiff therefore remains uncontroverted. Though the defendant never adduced any evidence to challenge the plaintiff’s evidence, the burden on the plaintiff to prove his case remains the same and that burden of proof is in no way lessened because the defendant did not adduce any evidence (see *Karugi & another v Kabiya & 3 others* (1987)KLR 347 and *Charter House Bank Limited (under statutory Management) v Frank N Kamau* [2016] eKLR)

49. From the material placed before me, there is no dispute that the defendant is the registered owner of the suit property. The plaintiff placed before the court the agreement for sale, copies of titles including for subdivision LR No Nkuene/Kithunguri/1584.

50. The plaintiff testified that he purchased a portion of the land measuring 0.25 acres on February 6, 1997, took possession and is still in possession and occupation, but has never gotten title. In my humble view, the mere change of the title number due to subdivision of the original title that was sold and which the plaintiff took possession of does not make the plaintiff’s claim to fail.

51. In the case of *Githu v Ndeete* 1984 (KLR) 766, the Court of Appeal held that “a title by adverse possession can be acquired under the *Limitation of Actions Act* to a part of the parcel of land which the owner holds title”. In *Kasure v Mwaani Investments Ltd & 4 others* (2004) KLR 184, at page 188, it was stated-;

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly and as of right and without interruption for a period of 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition. See *Wanje v Saikwa* (1984) KLR 284”.



52. In the case of *Public Trustee v Wanduru* (1984) KLR 314, the claimant who had entered into a written agreement with the registered owner for purchase of the land and took possession of the land just as in the present case, the court of appeal held *inter alia*, that-;

“the period of twelve years began to run the day the appellant and her husband took possession of the land as that was the day when the respondent’s possession was discontinued, and not on the last day by which an application for the consent of the land control board was required to have been made under the Land control Act as that Act did not apply to the appellants’ claim”

The Court of Appeal further stated-;

“A purchaser in possession of the land purchased, after having paid the purchase price is a person in whose favour the period of limitation can run under section 10(1) of the English Limitation Act, 1939 (closely a kin to our section 7) as against the vendor”.

53. In this case, the plaintiff testified that he took possession upon executing the agreement for sale and later cleared the balance of the purchase price. There was no evidence adduced to challenge these assertions as the defence never adduced any evidence. I am therefore satisfied that based on the uncontroverted evidence given by the plaintiff, the plaintiff has acquired a portion of the suit land measuring 0.25 acres.

54. Counsel for the defendant submitted that the plaintiff’s claim must fail because the entry of the plaintiff was with the permission of the defendant as the registered owner on the strength of the said agreement for sale. However, the plaintiff’s cause of action, in my view, arose not from the agreement of sale but from the claim of adverse possession under the Limitation of Actions Act, cap 22 Laws of Kenya. In this case, the plaintiff testified that he immediately entered the land upon the execution of the sale agreement on February 6, 1997 and that he was still in possession and occupation as at the time of filing suit on August 7, 2012. That was a period of about 15 years. There was no evidence tendered by the defence challenging the evidence adduced by the plaintiff. I am therefore convinced that on a balance of probabilities, the plaintiff has proved his case for adverse possession. The plaintiff proved that the defendant had either been dispossessed or had discontinued possession of the suit land measuring 0.25 acres for a continued statutory period of twelve (12) years.

55. Considering the totality of the evidence availed in this case, and applying the legal principles as outlined above, I am satisfied that the plaintiff has proved his case on a balance of probabilities. It is my finding that the plaintiff has brought himself within the limits of the doctrine of adverse possession. Presented before this court is undisputed and uncontroverted evidence by the plaintiff.

56. I find that the originating summons dated August 6, 2012 has merit and is hereby allowed. I enter judgment as follows:

- a. That the plaintiff is hereby declared to have become entitled by virtue of adverse possession of 0.25 acres of land reference No Nkuene/Kithunguri/1584
- b. The plaintiff is entitled to be duly registered as proprietor of the said portion measuring 0.25 acres out of LR No Nkuene/Kithunguri/1584.
- c. Costs of the suit are awarded to the plaintiff.

57. Orders accordingly.

DATED SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF DECEMBER, 2022



In the presence of:

Court Assistant – Kibagendi

Wambua for plaintiff

Muriithi for defendant

C.K YANO

JUDGE

