



Njeru (appointed recognized agent of Faith Tirindi the legal representative of Abednego Golden Njeru – Deceased) v Nkabu (Environment & Land Case 24 of 2019) [2022] KEELC 15266 (KLR) (7 December 2022) (Judgment)

Neutral citation: [2022] KEELC 15266 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 24 OF 2019
CK NZILI, J
DECEMBER 7, 2022**

BETWEEN

KENNETH GITORA NJERU PLAINTIFF

APPOINTED RECOGNIZED AGENT OF FAITH TIRINDI THE LEGAL REPRESENTATIVE OF ABEDNEGO GOLDEN NJERU – DECEASED

AND

M'MWORIA NKABU DEFENDANT

(FORMELY NKUBU ELC CASE NO. 45 OF 2017)

JUDGMENT

1. Faith Tirindi Njeru, the plaintiff suing as a legal representative of the estate of the late Abednego Golden Njeru seeks to be declared as entitled to LR No Nkuene/Mitungu/723 a subdivision of the initial LR No Nkuene/Mitunguu/465, registered in the name of the defendant by virtue of adverse possession following an aborted sale and transfer.
2. The originating summons is supported by sworn affidavits witness statements dated May 4, 2017 case summary agreed issues and list of documents as per the paginated bundle index dated May 4, 2022.
3. The defendant opposed the originating summons by a replying affidavit sworn on March 16, 2006, notice of preliminary objection dated March 15, 2006 witness statements dated 9.5.2017 and list of documents dated January 13, 2020.
4. The plaintiff evidence is that her late husband Abednego Njeru bought some land from the defendant, then parcel No Nkuene/Mitunguu/465 and took vacant possession, erected a homestead and started farming activities therein. She relied on her witness statement filed on May 4, 2017 and produced a copy of the sale agreement as P Exh No (1) dated November 1, 1988 acknowledgement note for the



- land as P Exh No (2), consent letter dated August 20, 1990 as P Exh No (3), from the land control board transfer form as P Exh No (4), copy of the register as P Exh No (5), official search as P Exh No(6) and plan for the building as PMFI No (7).
5. In cross examination, the plaintiff told the court that two portions of land had been bought but only one was transferred to her but the one she had developed was yet to be transferred.
 6. PW 1 admitted there was a Nkubu case though was not sure of the outcome. On the sale agreement, PW 1 admitted attending the meeting leading to the sale though she could not recall the purchase price or the reason why her signature was missing in the sale agreement. She was however certain the entire purchase price was cleared by her late husband.
 7. PW 2 adopted his witness statement dated February 21, 2020 and explained that he was contracted to erect a commercial building on the suitland by the deceased as per PMFI (7) which he produced as P Exh No 7. He stated that he erected at the front four rooms and at the back of the plot 3 rooms based on the said map PW 3 and 4 adopted their witness statements dated February 21, 2020 respectively clarifying on the existence of a commercial building and some dispute over trees allegedly felled by PW 4 on the instruction of the defendant and which the deceased complained about.
 8. DW1 adopted his two witnesses' statements dated May 9, 2017 and January 13, 2020 respectively as his evidence in chief.
 9. He produced a copy of the official search as D Exh No (1) copy of plaint in Nkubu RMCC No 7 of 2013 as D Exh No (2) copy of the defence and counterclaim as D Exh No (3) copy of register for LR No Nkubu/Mitunguu/723 as D Exh No (4). He maintained that he had been cutting trees out of the suitland with no objection from the plaintiff till the filing of the suit.
 10. DW 1 admitted selling a portion of his land to the deceased measuring 3 acres and later on two more acres in 1988 which was under dispute.
 11. DW 1 told the court that the deceased gave him Kshs 14,000 but he did not transfer the land, even though he subdivided the land. He denied that the plaintiff ever took vacant possession or erected a commercial building on the transferred as well as disputed portion. The defendant told the court he had not refunded the purchase price nor was he intending to do so due to the pending cases since 1988.
 12. Even after the deceased passed on a date he could not remember, DW1 said that he had not approached the plaintiff for a refund since they were not in talking terms.
 13. DW 1 clarified that he had not used the police to evict them from his land since they had never occupied his land. He admitted that though he received Kshs 14,000/= the balance pending had not been cleared hence the rift.
 14. DW 2 adopted his witness statement dated January 13, 2020 as his testimony in chief and confirmed that the plaintiff was occupying the suitland but as a farm work of DW 1, he could not tell under what circumstances she was utilizing the land.
 15. DW 3 on the other hand told the court he used a map which he did not produce to erect a house for the defendant.
 16. He clarified that the said map had no approval from the county council offices in 2000. He denied that the plaintiff was occupying the plot at the time.
 17. At the close of evidence, parties consented to file written submissions dated August 16, 2022 and September 12, 2022 respectively. The plaintiff has submitted that her oral and affidavit testimony



- remained uncontroverted on the issue of entry into and stay in the suitland since 1988 to present day, without interruption, notice to vacate or eviction from the land by the defendant.
18. The plaintiff submitted that the evidence of PW 2, 3 & 4 was clear that a building was erected on the land and that farming activities continue on the suit land to present day with the knowledge of the defendant.
 19. Therefore, the plaintiff urged the court to find the occupation and dispossession unbroken, an interrupted and cumulative to 12 years hence the claim of adverse possession proved. Reliance was placed on *Mate Gitabi vs Jane Kaburu Muga & 3 others (2017) eKLR*.
 20. The defendant submitted that the plaintiff never took possession and occupation of the suit land at all save for the other pieces her deceased husband had been transferred. Further the defendant submitted that the plaintiff admitted the existence of Nkubu SRMCC No 7 of 2003 for specific performance and which was defended by the defendant through a counterclaim.
 21. Further, the defendant submitted that the plaintiff was unable to confirm if her late husband had cleared the entire purchase price. As regards entry into the land, the defendant submitted that the evidence of PW 4 was clear, the felling of trees was at the instance of the defendant who has testified that he continues to utilize the land to present day.
 22. Additionally, the defendant submitted the scene visit report confirmed the defence testimony on who was on the land hence PW 2 was an untruthful witness.
 23. The defendant submitted if the mode of entry was out of a sale agreement without prove of the payment of the last instalment, the claim for adverse possession would not be sustained for time did not start running, since as per P Exh 2 dated April 19, 1990, a balance of Kshs 1,010/= remained unpaid.
 24. Similarly, as per P Exh No (1), the instalment ought to have been cleared by August 30, 1989 for vacant possession to be handed over. The defendant submitted since there was no evidence of the final payment no adverse possession was proved.
 25. Reliance was placed on *Mbira vs Gachuhi (2003) 1 EARL 137 Hosea vs Njiru & others (1974) 2 ALL ER 577* and *Public Trustee vs Wanduru Ndegwa (1984) eKLR*. The singular issue for the court's determination is if the plaintiff has proved adverse possession.
 26. Adverse possession is a concept of land where a registered owner is disposed or discontinued from possession by an intruder, who enters into the land without the permission of the true owner and undertakes acts inconsistent with those of the said owner, uninterruptedly, exclusively, openly, notoriously and with the knowledge of the true owner, and with the intention of owning the land for a period of 12 years. See *Mbira vs Gachuhi (supra)*, *Githu vs Ndete (1984) KLR 776* *Wambugu vs Njuguna (1982) KLR 173*, *Kasuve vs Mwaani Investment Ltd & 4 other (2004) KLR 184*.
 27. In *Mate Gitabi vs Jane Kaburu & others (supra)*, the court held that the evidence was clear that the appellant had occupied the land openly, without secrecy, without violence, without permission and in a manner inconsistent with and wholly adverse to the rights of the estate of the deceased and the successors in title. The court citing with approval *Githu vs Ndete (supra)* held that a mere change of ownership did not interrupt the adverse possession.
 28. Further, the court held that the evidence of the respondent not giving the appellant peace demanding he vacates the land, reporting the trespass to the local administration went to show that the respondent had notice of the alleged occupation that was inconsistent and adverse to his title.



29. The court further cited with approval *Githu vs Ndeete* (supra) that on the holding that time ceases to run upon the owner asserting his right or if his right as admitted by the intruder and that assertion may include taking legal proceedings or making an effective entry into the land.
30. As to the effect of subdivisions of land alleged to be adversely affected, the court held that such subdivision had no effect so long as the appellants had been in physical notorious occupation and user of identifiable land by building on it, cultivation, fencing and clearly demarcating it.
31. The court went on to further cite with approval Madan J in *Kunguru vs Muya Gathangi (1976) KAR 253* on the proposition that that which can be ascertained is certain that which is definitive is positive. It is so plotted that if not certain it can be made certain'.
32. Applying the foregoing legal paths and reasoning of able legal sages before me, the plaintiff pleaded that her late husband entered into a sale agreement dated November 1, 1988 with the defendant to purchase 2 acres of out of LR NO Nkuene/Mitunguu/465, which he paid Kshs 20,000/=.
33. She pleaded that a surveyor came into the land, surveyed it and boundaries were fixed for the 2 acres as it was being hived off from the initial land. The plaintiff has testified that on February 1, 1999, the land control board of South Imenti granted a consent for the transfer of the excised portion and the new portion given LR No Nkuene/Mitunguu/723.
34. The defendant pleaded and testified that afterwards she took vacant possession, started developments thereon, put up a building and that there were no interruptions from the defendant who however refused to sign transfer forms leading to her husband filing Nkubu RMCC No 7 of 2003 for specific performance whereof the defendant filed a statement of defence and a counterclaim on February 28, 2003 which suit was withdrawn on January 27, 2006 and came to this court on February 28, 2006.
35. Exh No (1) indicates vacant possession was to be granted on August 3, 1989. P Exh No (1) is the acknowledgment receipt signed and witnessed by an advocate. It states that the defendant received on April 19, 1990, Kshs 4,640/= from the deceased being part and final payment for the agreed purchase price for the suit land as per the agreement dated November 1, 1988.
36. Therefore, it cannot be true from the testimony of the defendant and submissions by his counsel on record that there was no final payment of the Kshs 6,000. there cannot be parole evidence introduced to counter a written agreement.
37. The defendant is therefore estopped in law from denying receiving the total purchase price on April 19, 1990 before his lawyers Mbae Mwarania and Co Advocates Meru who witnessed, P Exh No (2) subsequent to that, P Exh No (3) was issued dated February 1, 1991 and P Exh (4) duly signed by the defendant and witnessed before Mr Kithinji Rwito advocate as he then was.
38. The defendant in the Nkubu defence and counterclaim had claimed fraud and breach of the sale agreement. He had also admitted that the plaintiff was in occupation at paragraph 11 thereof. The prayers were for eviction and mesne profits from January 1, 1994 till eviction dated.
39. The court has looked at the original file from Nkubu which form part of this record and in which the deceased had testified before his demise and produced the original title deed for LR No Nkuene/Mitunguu/723, OB report, land control board consent and the defence to the counterclaim.
40. In the replying affidavit to this originating summons dated March 15, 2006 at paragraph 6, the defendant stated that time begun running from the date of acknowledgement being January 27, 2003 and slated that though the suit had been withdrawn in Nkubu, his counterclaim for eviction was still pending and urged that it be determined first.



41. Therefore, in this court the defendant did not seek to and or produce any evidence to invalidate the plaintiffs exhibits on account of illegality and or fraud. The defendant did not counterclaim for any alleged balance of the purchase price. The defendant did not produce any forensic document examiners record to counter his allegations of forgery or fraud and more particularly, deny P Exh (3).
42. In my view therefore, I find the entry to the suit land was initially permissive but after the last instalment was paid on April 19, 1990 the plaintiff's permissive entry became determinate as held in Public Trustee (supra).
43. Turning to the issue of the length of 12 and acts inconsistent with those of the true owner, the scene visit report sanctioned by this court dated January 10, 2020 indicate there was a construction of an old stone foundation with four rooms and two old timber toilets. The report states the suitland is 2 acres with clear boundaries and which was under cultivation.
44. The plaintiff testified that P Exh No (7) was a building plan imitated by her late husband and which PW 2, 3 & 4 confirmed were her developments on the land.
45. Given that the defendant in his own pleading in Nkubu Law courts were that the plaintiff was in occupation, hence the prayer for eviction, I find the plaintiff has proved entry into occupation and carrying out of activities on the suitland which are inconsistent with the use the defendant intended for the soil.
46. The defendant alleges he has been harvesting trees and farm produce form the suitland.
47. Having found that he voluntarily sold and signed transfer forms in favour of the plaintiff but reneged on it any attempts to enter the suitland have been illegal to say the least and could not amount to an effective entry or assertion of right. On the contrary, documents produced before the court the by the plaintiff are clear that the plaintiff has resisted any attempts to allow the defendant to occupy the land and or regain entry hence the reason the defendant was seeking for an eviction order.
48. Looking at the totality of the evidence, the plaintiff has proved the occupation of the suit land was open without force and with the knowledge of the defendant.
49. The filing of the suit for specific performance and the defence by the defendant did not interrupt the time from running since April 19, 1990.
50. At the time the defendant field a counterclaim, his rights to the land had been extinguished by the adverse rights of the plaintiff.
51. The upshot is that the plaintiff has proved the ingredients of adverse possession.
52. Therefore, a declaration be and is hereby issued that the plaintiff is entitled to LR No Nkuene/ Mitunguu/723 by virtue of adverse possession. The defendant shall sign the transfer forms in favour of the plaintiff within 2 months from the date hereof in default the deputy registrar to execute them.
53. Costs to the plaintiff.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 7TH DAY OF DECEMBER, 2022

In presence of:

C/A: Kananu

Mr. Riungu for plaintiff



HON. C.K. NZILI
ELC JUDGE

