



Kioko v Katelembo Athiani Muputi Farming & Ranching Co-operative Society Ltd (Environment & Land Case E002 of 2020) [2024] KEELC 634 (KLR) (13 February 2024) (Judgment)

Neutral citation: [2024] KEELC 634 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E002 OF 2020
CA OCHIENG, J
FEBRUARY 13, 2024**

BETWEEN

JOSEPHINE NDUNGWA KIOKO PLAINTIFF

AND

**KATELEMBO ATHIANI MUPUTI FARMING & RANCHING CO-OPERATIVE
SOCIETY LTD DEFENDANT**

JUDGMENT

1. Through an Originating Summons dated the 30th September, 2020, the Plaintiff seeks the following Orders against the Defendant:-
 1. A declaration that the Plaintiff is entitled through the Doctrine of Adverse possession to ownership of all that land known as Katelembo Plot No. 2883 measuring 2.04 acres by virtue of actual possession and continuous use of the said parcel of land for a period exceeding twenty four (24) years.
 2. A declaration that the Defendant's right to recover the parcel of land known as Katelembo Plot No. 2883 is barred under the *Limitation of Actions Act*, Cap 22 and its/ownership thereto is extinguished on the ground that the Plaintiff has openly, peacefully, exclusively and continuously been in occupation of the aforesaid parcel of land for a period exceeding twenty four (24) years.
 3. An order to issue in terms that the Plaintiff be registered as the proprietor and/or owner of all that land known as Katelembo Plot No. 2883 measuring 2.04 acres.
 4. An order compelling the Defendant's officials sign all relevant documents to facilitate transfer of all that land known as Katelembo Plot No. 2883 to the Plaintiff and in default thereof the Executive officer of this Honourable Court do sign the same.



5. An order of permanent injunction restraining the Defendant's officials, agents, servants, third parties claiming under the Defendant and or employees from interfering with the Plaintiff's peaceful possession and occupation of land known as Katelembo Plot No. 2883 in any manner whatsoever.
 6. An order compelling the Defendant to pay the costs of this suit.
 7. Any other Orders that this Honourable Court may deem just and appropriate.
2. The Originating Summons is supported by the Affidavit of the Plaintiff. The Defendant opposed the Originating Summons by filing a Replying Affidavit sworn by Wilson Masila Muema, its Chairman. He deposes that the said Application lacks merit and should be dismissed with costs. He explains that the Defendant was established in 1971 with an aim of acquiring the land then known as Katelembo Ranch. Further, that the Defendant had a membership of 3525. He contends that upon acquiring the land, part of it was subdivided into plots of 2.04 acres in 1988 with Plot No. 2883 being one of the plots. He avers that members' were allocated one plot measuring 2.04 acres in 1989 upon participating in a balloting exercise. He confirms that upon each member being allocated one (1) plot each, some plots remained with the Defendant. He states that the Defendant sold some plots among those which were not allocated and those which remained are still in its name. He contends that Plot No. 558 was allocated to No. 3057 Francisah M. Mutunga. Further, that Plot No. 2883 still belongs to the Defendant. He argues that although the Plaintiff alleges her husband had bought Plot No. 558 which was exchanged with Plot No. 2883 hereinafter referred to as 'the suit land', she has not exhibited the transfer forms which were lodged with the Defendant or a confirmation letter to that effect. He reiterates that the Defendant is in the process of aligning her register to enable title deeds to be issued to the members and those who have acquired plots for value and in the process the committee realized that there are many fraudulent transactions which were carried out to enable people to unlawfully get plots from it. He further argues that the Plaintiff cannot be claiming to have bought the suit land and at the same time pray for adverse possession. He disputes the process the suit land was acquired and insists it still belongs to the Defendant. He reaffirms that the Plaintiff's claim for adverse possession is misplaced and does not meet the threshold set out by law.
3. The Originating Summons was canvassed through viva voce evidence where the Plaintiff called three witnesses while the Defendant had one witness.

Evidence of the Plaintiff

4. The Plaintiff claims her late husband Gideon Katungwa Mukeli bought Plot No. 558 in the year 1989 from one Mulinge Kathwake who is also deceased. She explains that the late Mulinge Kathwake was the Defendant's member No. 3507. She contends that her husband swapped Plot No. 558 with Plot No. 2883 measuring 2.04 acres. She explains that she entered Plot No. 2883 in October, 1996 and commenced cultivating the said land as well as grazing livestock thereon. She reiterates that she had been in open and peaceful occupation of the said land from 1996 upto 14th September, 2020 when she received a letter from the Defendant's officials directing her to stop interfering with the said land. She hence sought to be registered as the proprietor of the said land through adverse possession. The Plaintiff produced the following documents as exhibits: Sale Agreement dated the 11th October, 1989, Certificate of Translation, Translated Copy of the Sale Agreement, Plot Allocation Slip dated 26th March, 1990, Photographs of the Suit land, Letter dated 14th September, 2020 and Membership Card No. 1764.



Evidence of the Defendant

5. The Defendant's witness who was its Chairman confirmed the Plaintiff was occupying Plot No. 2883 without their permission. He explained that from the extract from the Defendant's Records, Plot No. 558 was allocated to Francisca M. Mutunga. Further, that their plots do not have title deeds. He stated that in their records there was no exchange between Plot No. 558 and 2883.

Submissions

Plaintiff's Submissions

6. The Plaintiff in her submissions contends that she has proved the ingredients on adverse possession as she has occupied the suit land which is owned by the Defendant, from 1996. She reiterates that she has openly, interruptedly and without force occupied the suit land without permission from the Defendant. Further, that the Defendant has never attempted to evict her therefrom. To support her averments, she has relied on Sections 7, 13 and 38 of the *Limitation of Actions Act* as well as the following decisions: *Wambugu v Njuguna* (1983) KLR 172; *Mtana Lewa v Kabindi Ngala Mwangadi* (2015) eKLR; *Kasuve v Mwaani Investments Limited & 4 others* 1 KLR 184; *Samuel Kihamba v Mary Mbaisi* (2015) eKLR; *Kim Pavey & 2 others v Loise Wambui Njoroge & another* (2011) eKLR and *Maweu v Liu Ranching & Farming Cooperative Society* (1985) KLR.

Defendant's Submissions

7. The Defendant in its submissions contends that it does not hold a title to the suit land that the Plaintiff can claim orders of adverse possession. It argues that since the Plaintiff failed to annex an extract of title to her claim, the said claim should fail. It further submits that since the Plaintiff occupied Plot No. 2883 assigned to her husband, her claim cannot be separated from her late husband. Further, she has failed to pursue the claim by the deceased husband by procuring Letters of Administration for his estate. It reiterates that the Plaintiff failed to avail records from the Defendant that had allowed her to occupy the suit land. To support its averments, it relied on Sections 37 and 38 of the *Limitation of Actions Act* as well as Order 37 rule 7 (1) and (2) of the *Civil Procedure Rules* including the following decisions: *Moses Chepkonga Cheronu v Margaret Njoki Kinyanjui* (2017) eKLR; *Titus Mutuku Kasuve v Mwaani Investments Limited & 4 others* (2004) eKLR; *Damaris Wanjiru Mungai & Another v Mucua Igogo & 3 others* (2020) eKLR; *Samuel Kihamba v Mary Mbaisi* (2015) eKLR; *Joseph Macharia Kairu v Kenneth Kimani Muiruri* (2021) eKLR and *Wilson Kazungu Katana & Salim Abdalla Bakshwein & Another* (2015) eKLR.

Analysis and Determination

8. Upon consideration of the Originating Summons, respective Affidavits, testimony of the witnesses, exhibits and rivaling submissions, the only issue for determination is whether the Plaintiff is entitled to orders of adverse possession in respect to Plot No. 2883 (suit land).
9. On institution of a suit to claim for land through adverse possession, Order 37 Rule 7 of the *Civil Procedure Rules* provides inter alia:
 - (1) An application under Section 38 of the *Limitation of Actions Act* shall be made by originating summons.
 - (2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed. (Emphasis added)



- (3) The court shall direct on whom and in what manner the summons shall be served.”
10. On adverse possession, Section 37(a) of the [Limitation of Actions Act](#) stipulates that:-
- “This Act applies to land registered under the [Government Lands Act](#) (Cap. 280), the [Registration of Titles Act](#) (Cap. 281), the [Land Titles Act](#) (Cap. 282) or the [Registered Land Act](#) (Cap. 300), in the same manner and to the same extent as it applies to land not so registered, except that (emphasis added)
- a. where, if the land were not so registered, the title of the person registered as proprietor would be extinguished, such title is not extinguished but is held by the person registered as proprietor for the time being in trust for the person who, by virtue of this Act, has acquired title against any person registered as proprietor, but without prejudice to the estate or interest of any other person interested in the land whose estate or interest is not extinguished by this Act;”
11. While Section 38(1) and (2) of the [Limitation of the Actions Act](#) provides inter alia:-
- “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.”
12. From a perusal of the Originating Summons filed herein, I note the Plaintiff did not annex an extract of title for the land in question, a certificate of official search nor did she produce the same during the hearing of this suit. In the case of [Mtana Lewa vs Kabindi Ngala Mwangandi](#) (2015) eKLR, Ouko JA while dealing with the importance of annexing an extract of title or certificate of official search to an Originating Summons where a party claims land through adverse possession held that:-
- “In [Teresa Wachuka Gachira vs Joseph Mwangi Gachira](#) Civil Appeal No. 325 of 2003, the court emphasized the importance of following the prescribed procedure in adverse possession claims. Because a claim based on adverse possession is anchored on the fact that the suit property belongs to a registered owner, that evidence in form of a copy of document of title must be exhibited. Failure to do this has been found in a long line of cases to be fatal because it is only through such exhibit that the existence and ownership of the suit property can be ascertained by the court. See [Kyeyu v Omuto](#), Civil Appeal No.8 of 1990. See also the present position in [Johnson Kinyua v Simon Gitura](#) Civil Appeal No.285 of 2005, where this court found that existence and proprietorship of land can be proved by either an extract copy of title or certificate of official search.” Emphasis Mine
13. While in the case of [Titus Mutuku Kasuve v. Mwaani Investments Ltd & 4 others](#) Civil Appeal No.35 of 2002 the Court of Appeal held that:-
- ... in order to be entitled to the land by adverse possession the claimant must prove that he has been in exclusive possession of the 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- [Wanje v. Saikwa \(No.2\)](#) (1984)KLR 284...The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. Indeed, rule 3 D(2) of Order XXXVI [Civil Procedure Rules](#) requires that a certified extract of the title to the land in question should



be annexed to the affidavit supporting the originating summons...The burden was on the appellant to produce the certified extracts of title in respect of the suit properties. In the absence of extracts of title the affidavit evidence of George Matata Ndolo that the suit lands are encumbered and therefore not free for alienation has not been refuted...” (Emphasis supplied)

14. Based on the facts as presented noting that the Plaintiff failed to annex an extract of title nor produce one during the hearing, while relying on the legal provisions I have cited as well as associating myself with the aforementioned decisions, I find that the annexed Plot Allocation the Plaintiff has attached to the Originating Summons cannot be deemed to be an extract of title as envisaged within the Limitation of Actions Act that indicates a claim for adverse possession only arises where land is registered. Further, it is only through an extract of title that the true owner of the land sought to be possessed can be identified. In the circumstances, I find that the Plaintiff’s claim for adverse possession over the suit plot is incompetent *ab initio*.
15. As to whether the Plaintiff has acquired the suit land through adverse possession.
16. The Plaintiff as PW1 claimed she entered the suit land in 1996 and continued to be thereon to date. She testified that she has been cultivating the said land as well as grazing animals thereon. She contended that her late husband exchanged the suit land with another person. Further, that the Defendant allowed her to occupy the said land wherein she has openly and uninterruptedly done so. She was categorical that the husband had a Sale Agreement with one Mulinge Kathwake who is also deceased. DW1 in his testimony stated that as per their records there was no exchange between Plot No. 558 and 2883. From the testimony of PW1 and the produced Sale Agreement, it indicates Plot No. 558 was derived from Share Number 3057 to Mulinge Kathwake. However, DW1 insists Plot No. 558 was allocated to Francisca M. Mutunga. Further, from the exhibit on plot allocation, it is not clear if it emanated from the Defendant. I note the Plaintiff failed to avail a representative of the family of the person she claims exchanged plot 2288 with 558. The Plaintiff produced certain photographs of the suit land to prove her claim. From a perusal of the said photographs I note there is no structure on the said land nor crops being cultivated thereon but the land is vacant except for a few young trees, one cow and a barbed wire fence.
17. In Daniel Kimani Ruchine & others versus Swift Lotherford & Co. Ltd and Anor (1977) eKLR the court held that:-

“The Plaintiffs have to prove that they used the land as of right, nec vi, nec clam, nec precario (no force, no secrecy, no evasion).”
18. While in the case of Wambugu v Njuguna (1983) KLR 173, the Court of Appeal articulated the requirements a party is expected to fulfill in a claim for adverse possession and held thus:-

“Adverse possession contemplates two concepts: Possession and discontinuance of Possession. It further held that the proper way of assessing proof of Adverse Possession would 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 or she has been in possession for the requisite number of years.”

See also the case of Public Trustee v Wanduru, (1984) KLR 314 at 319.
19. From the evidence presented herein, the Plaintiff claims the late husband purchased the suit land but had not availed a representative from the seller’s family to confirm this averment. She claims the late husband exchanged the plot but never availed a witness from the previous owner of the plot she now



occupies to confirm this position. PW2 and PW3 claimed the Plaintiff has been openly occupying the suit land for long, but what is not clear is, if indeed the Plaintiff had been cultivating the suit land, then how come there were no photographs of the crops thereon. DW1 who was a representative of the Defendant confirmed that the Plaintiff was on the suit land but insisted that they had no records of the exchange of the two parcels of land and they had told her to stop interfering with the said land. Further, he confirmed the parcels of land had no titles. To my mind, the burden of proof was upon the Plaintiff to demonstrate actual, open and uninterrupted possession of the suit land but from the evidence tendered, I am reluctant to believe that the suit land as it looks, has been utilized for over twenty four (24) years as claimed.

20. Based on the evidence presented in court while associating myself with the decisions cited above, I find that the Plaintiff has not fulfilled all the tenets of adverse possession to enable her claim the suit land.
21. It is against the foregoing that I find that the Plaintiff has not proved her case on a balance of probability and will dismiss it, with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 13TH DAY OF FEBRUARY, 2024

CHRISTINE OCHIENG

JUDGE

