



Mungai & another v Muiruri & another (Sued as the Legal Representatives of Muiruri Homba) & 5 others (Environment & Land Case 512 of 2016) [2024] KEELC 474 (KLR) (2 February 2024) (Judgment)

Neutral citation: [2024] KEELC 474 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 512 OF 2016
A OMBWAYO, J
FEBRUARY 2, 2024**

BETWEEN

STEPHEN CHEGE MUNGAI 1ST PLAINTIFF

PATRICK WAINAINA MUNGAI 2ND PLAINTIFF

AND

AUGUSTINE NJUNGE MUIRURI & JOSEPH KIBIRA MUIRURI (SUED AS THE LEGAL REPRESENTATIVES OF MWIRURI HOMBA) ... 1ST DEFENDANT

PENINAH WANJIRU 2ND DEFENDANT

NAOMI NJERI MUTHIORA 3RD DEFENDANT

PETER NJOROGE KARANJA (SUED IN HIS CAPACITY AS HEIR OF JAMES GICHUNGUMWA) 4TH DEFENDANT

MBURU KAHURA (SUED AS THE LEGAL REPRESENTATIVE OF KAHURA GIKONYO) 5TH DEFENDANT

PETER GACHEGE 6TH DEFENDANT

JUDGMENT

1. Stephen Chege Mungai and Patrick Wainaina Mungai herein referred to as the plaintiffs are seeking that;
 - a. The applicants are entitled by adverse possession to a portion of land currently occupied by the applicants and measuring nought decimal seven five (0.75) acre or thereabouts previously known as Plot No’s 14 and 26 being portions of Nakuru Municipality Block 22/40 formerly registered in the name of Muguga Co-operative Co. Ltd which was subsequently re-surveyed



with the result that the new parcels registered in the names of the respondents wholly or partially encroached on the portion occupied and claimed by the applicants.

- b. The applicants have been in occupation of the said portion measuring 0.75 acres or thereabouts without permission though with the knowledge of the respondents, for an uninterrupted period of twelve (12) years.
 - c. The applicants are entitled under Section 38(1) and (2) of the *Limitation of Actions Act* (Cap. 22) Laws of Kenya to be registered as the absolute proprietors of the said parcel situated in an area currently sitting partially on Muguga/Mun. Block 22/511, 512, 514, 516 and 518 and wholly on Muguga/Mun. Block 22/517.
 - d. The respondents should transfer the said parcel to the applicants.
 - e. The respondents do pay costs of the suit.
2. The plaintiffs claim that their deceased father John Mungai Karua purchased two parcels of land aggregating 0.75 acres situated in Muguga Nakuru County from Peter Gakaria and Nahashon Gikonyo. That the two parcels of land were portions of Nakuru Municipality Block 22/40 (formerly LR 4730/72) that was the property of a land buying company known as Muguga Co-operative Society Ltd. That Peter Gakaria and Nahashon Gikonyo were allocated the suit properties by the said company. That their father John Mugai Karua immediately took possession and has extensively developed the property. That the applicants have lived on the suit property since 1979. That between the years 1995 and 1996 the suit land was irregularly parcelled out and portions of it fell under the re-numbered Nakuru Municipality Block 511, 512, 514, 516, 517 and 518 with titles issued to the respondents. That the applicants are now seeking to have acquired the said portion by way of adverse possession.
 3. Stephen Chege Mungai in his supporting affidavit reiterated the grounds set out in the originating summons and stated that he had beneficial interest in the suit property as the heir of John Mungai Karua and claimed ownership of the portion measuring 0.75 acres.
 4. He also stated that the suit property was the subject of litigation in ELC 205 of 2012. That the said suit was dismissed for non-joinder of parties. That the dismissed suit does not prevent them from asserting their rights and he sought that the court cancels the titles issued to the respondents and the County Surveyor be ordered to amend the Registry Index Map to reflect the true status on the ground.
 5. In the Further affidavit of Loice Wairimu Kagucia the plaintiffs produced the green card for land parcel No's. Nakuru Municipality/Block 22/511, 512, 514, 516 and 517. That the green cards for Nakuru Municipality Block 22/518 could not be traced.
 6. Peninah Wanjiru filed a replying affidavit stating that she purchased land parcel No. Nakuru Municipality Block 22/514 from James Gichungumwa who is deceased. She also stated that she purchased land parcel No. Nakuru Municipality Block 22/512 from Naomi Njeri Muthiora. She also stated that she purchased land parcel No. Nakuru Municipality Block 22/511 from Mwiruri Homba the 1st defendant who is also deceased.
 7. Before purchasing the same she conducted her due diligence from Muguga Farmers Cooperative Society Limited and no irregularity was established. By the time of purchase there were no titles but allotment letters. The titles were issued in 1995 and 1996. Before the vendors could transfer the titles to the 2nd defendant's name, the plaintiff's father registered cautions and so the titles are still in the names of the original owners. The plaintiffs have not demonstrated the portions that they are claiming. Acceding to the plaintiffs' claim Peninah Wanjiru stated that the plaintiffs are occupying land parcel No's Nakuru Municipality Block 22/514, 517, 512 and 511 instead of 515. Their occupation of this



parcels of land have never been peaceful. The 2nd defendant stated that the plaintiffs have developed semi-permanent structures which they have rented out to third parties.

8. Alexander Njonge Gachege guardian of Peter Gachege relied on his affidavit sworn on 25th March 2022 that was filed on 14th September 2022. He stated that the plaintiff's suit was misconceived and denied that the parcel of land encroached on the plaintiff's parcel of land. He also denied ever seeing the plaintiffs.
9. When the matter came up for hearing, the plaintiffs testified that their deceased father had purchased plot number 26 in Muguga Farmers Co-operative Society Limited situated at Lanet measuring 0.25 acres or thereabout from Peter Gakaria on 24th October, 1977. He also purchased plot No. 14 from Nahashon Gikonyo measuring 0.5 acres on 8th August 1984 and they were both members of Muguga Farmers Co-operative Society. Upon purchasing the properties, their father put up developments on the land that included a sawmill, a timber yard, offices, sheds, stores and residential houses. That they have been in occupation of the said parcels from the year 1979 to 1984. The portions of land were part of Nakuru Municipality Block 22/40 formerly LR 4730/72 that was registered in the name of Muguga Farmers Co-operative Society Limited. That they occupy the property to date and that their father died in the year 2014. Those portions were re-surveyed and subdivided in 1995 and 1996 and the original parcels became Nakuru Municipality Block 22/511, 512, 514, 516, 517 and 518. They had taken possession of the said plots since 1979 and 1984.
10. DW1 Alexander Njonge Gachege testified that his father had not encroached onto the plaintiffs land. That they do not possess their father's land. That there are no structures on land parcel No. Nakuru Municipality/ Block 22/518 and that they are not neighbours.
11. DW2 Peninah Wanjiru testified that she lives in her land which she has constructed. That the plaintiffs are using all the plots including plot 514 and part of 511. That she has never filed a suit. That her home was in Nakuru Municipality Block 22/511 where she has stayed since the year 1983. That Nakuru Municipality Block 22/512 had a posho mill which was not operational. That the plaintiffs have taken over a quarter of Nakuru Municipality Block 22/512.
12. Naomi Njeri Muthiora testified that she sold land parcel No. Nakuru Municipality Block 22/512 to Peninah Wanjiku. That when she sold the land it was vacant. That she has never owned 513 and that the plaintiffs entered the 2nd defendant's land by force.
13. The plaintiffs submit that it is clear that the problem began when subdivision was done that was occasioned by the company known as Muguga farmers. The applicant argues that there has been boundary issues that led to the encroachment of the properties of the late John Karua whose sons are the applicants. That it is the encroachment that led them to claim adverse possession. The applicants argue that they have satisfied the requirement to be declared to be in adverse possession. The 6th defendant gave a summary of the pleadings and evidence and submitted on whether the plaintiffs had the requisite locus standi to bring the suit and whether they are entitled to the orders sought.
14. On the first issue, the 6th defendant relied on the cases of Joseph Macharia Kairu vs Kenneth Kimani Muiruri [2021] eKLR, Samuel Kihamba vs Mary Mbaisi [2015] among other cases, Order 37 Rule 7 of the Civil Procedure Rules and submitted that a claim for adverse possession has to be brought against a registered proprietor and in this case the court cannot give orders against a non-existent and unknown title.
15. On the issue of locus standi, the 6th defendant relied on the case of Julian Adoyo Ongunga vs Francis Kiberenge Abano Civil Appeal no. 119 of 2015 submitted that one cannot make a claim against the



estate of a deceased person without making an application for grant. The 6th defendant then sought that the plaintiffs suit be dismissed with costs.

Analysis and Determination

16. After considering the pleadings in this matter, it is my view that the issue that arises for determination is whether the plaintiffs are entitled to be registered as the proprietors of a portion of land measuring 0.75 acres of plots previously known as Plot No's 14 and 15 that were initially part of Nakuru Municipality Block 22/40.

17. The Limitations of Actions Act provides for the statutory provisions that govern the doctrine of Adverse Possession. Section 7 of the said act states as follows;

“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.”

18. Section 13 of the *Limitation of Actions Act* provides as follows;

“(1) A right of action to recover land does not accrue unless the land is in the possession of some persons in whose favour the period of limitation can run (which possession is in this Act referred to as Adverse Possession), and, where under Sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in Adverse Possession on that date, a right of action does not accrue unless and until some person takes Adverse 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.

(3) For purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with Section 12(3) of this Act, the land in reversion is taken to be Adverse Possession of the land.”

19. Section 17 provides as follows;

“Subject to Section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”

20. Section 37 further provides as follows-

“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, to land or easement or land comprised in a lease registered under any of those Acts, 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.”

21. Section 38(1) and (2) provide 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 these 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.
 - (2) An order made under sub-section (1) of this Section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”
22. The plaintiffs in the present matter allege that they have been in occupation of a portion of land measuring 0.75 acres that was previously known as Plot No’s 14 and 26. The plaintiffs also allege that the said plots were portions of land parcel No. Nakuru Municipality Block 22/40. The plaintiffs further allege that they took possession of the said properties after their father purchased them from Peter Gakaria and Nahashon Gikonyo. The plaintiffs state that between the years 1995 and 1996, the suit land was allegedly parcelled out and parts of it fell under Nakuru Municipality Block 22/511, 512, 514, 516, 517 and 518. The plaintiffs now seek to be declared to have acquired the said portions by way of adverse possession.
 23. In support of their case the plaintiffs produced a sale agreement dated 24th October 1979 as PEX 1 which showed that John Mungai had purchased plot No. 26 from Peter Gakaria for kshs 5,000/=. PEX 2 was an agreement for transfer of shares that indicated that John Mungai Karua had purchased one share of 0.59 acres from Nahashon Mburu Gikonyo for a consideration of kshs. 17,000/=. The plaintiffs also produced search certificates for land parcel No’s Nakuru Municipality Block 22/512, 514, 515, 516 and 517 as PEX. 4 to 8 respectively.
 24. The 2nd defendant’s case on the other hand was that she was in occupation of land parcel No. Nakuru Municipality Block 22/511 where she had constructed her home. She also alleged that she was in occupation of a portion of land parcel No. Nakuru Municipality Block 22/512. She indicated that the portions of land that the plaintiffs are currently in occupation of belong to her and other third parties.
 25. The 3rd defendant testified that she was the initial owner of land parcel No. Nakuru/Municipality/Block 22/512 that she had sold to the 2nd defendant.
 26. The 6th defendant claimed ownership of land parcel No. Nakuru Municipality Block 22 /518 and denied that the plaintiffs were in occupation of the said property. The 6th defendant stated that he did not know the plaintiffs and neither were they neighbours.
 27. The Court of Appeal in the case of Kasuve Vs Mwaani Investments Limited & 4 others 1 KLR 184, stated as follows on what an applicant in a claim of adverse possession has to prove:

“In order to be entitled to land by Adverse Possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right 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”.
 28. The Court also in the case of Kisumu Civil Appeal No. 27 of 2013 Samuel Kihamba v Mary Mbaisi [2015] eKLR stated as follows:

“Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained



in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land”

29. As aforementioned, the plaintiffs are seeking to be declared to have acquired a portion of land measuring 0.75 acres by way of adverse possession. The said portion of land was previously known as Plot No’s 14 and 26 and was part of land parcel No. Nakuru Municipality Block 22/40. The plaintiffs alleged that the parcel they are claiming ownership to was irregularly parcelled out and it now falls under Land parcel No’s Nakuru Municipality Block 22/511, 512, 514, 516, 517 and 518.
30. The 2nd defendant in her replying affidavit admitted that land parcel No. Nakuru Municipality Block 22/40 had been subdivided into land parcel No’s Nakuru Municipality Block 22/510, 511, 512, 513, 514, 515, 516, 517, 518, 519 and 520.
31. The court in *Gabriel Mbui v Mukindia Maranya* [1993] eKLR held as follows;

“The land, or portion of the land, adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. For this purpose, that which can be ascertained is certain; that which is definitive is positive. It must at least be so plotted that if not certain it can be made certain. The absence of a plot or title number need not present any difficulty; nor should it be a bar to establishing a claim of adverse possession (*Madan, J* (as he then was) in *Kinguru v Gathangi* op cit, at p 260)”
32. In the present matter, the plaintiffs allege that the portion of land they are claiming forms part of Nakuru Municipality Block 22/511, 512, 514, 516, 517 and 518. No evidence was tendered on the measurement of the said portion that forms part of each of the said parcels of land. For example, it is not clear what portion of the 0.75 acres that the plaintiffs are claiming forms of part of land parcel No. Nakuru Municipality Block 22/511. It is my view therefore that the portion of land measuring 0.75 acres that the plaintiffs are claiming to have acquired by way of adverse possession is not identifiable.
33. Consequently, the plaintiffs have failed to prove their claim for adverse possession and their suit is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAKURU THIS 2ND DAY OF FEBRUARY 2024.

A.O.OMBWAYO

JUDGE

