



Konde (Suing as the Administrator of the Estate of Konde Mulai alias Konde Nzingila) v Maithya (Environment & Land Case E025 of 2021) [2024] KEELC 1306 (KLR) (6 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1306 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E025 OF 2021**

**TW MURIGI, J
MARCH 6, 2024**

BETWEEN

**FRANCIS KINGOO KONDE (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF KONDE MULAI ALIAS KONDE NZINGILA) PLAINTIFF**

AND

MUEKE MAITHYA DEFENDANT

JUDGMENT

1. By a Plaint dated 1st September 2021, the Plaintiff prays for judgment against the Defendant for:-
 1. An order of permanent injunction restraining the Defendant herein from trespassing on the disputed portion of 2 acres comprised in land parcel number Nzai/Mumbuni/307.
 2. An order of eviction be issued requiring the Defendant to evict and remove all structures constructed in the disputed 2 acres of land comprised in land parcel number Nzai/Mumbuni/307.
 3. Costs of this suit plus interest thereon.
 4. Any other or further relief as this Honourable court may deem fit and just to grant.
2. The Defendant filed a statement of Defence and counterclaim dated 22nd September 2022 denying the Plaintiff's claim. She urged the court to dismiss the Plaintiff's suit with costs
3. In the counterclaim, the Defendant prays for judgment against the Plaintiff for:-
 - i. A declaration that the Defendant is the beneficial owner of a portion of land measuring 6 acres comprised in Nzai/Mumbuni/307.



- ii. In the alternative, an order do issue that the Defendant has acquired prescriptive rights over a portion of land measuring 6 acres comprised in Nzai/Mumbuni/307 by virtue of adverse possession and a title deed do issue in her name.
 - iii. An order do issue compelling the Plaintiff to excise the Defendant's portion of land measuring 6 acres from Nzai/Mumbuni/307, obtain Land Control Board consent and execute Land Transfer Forms in favour of the defendant and in default the Deputy Registrar execute the same on his behalf.
 - iv. Costs of the suit.
4. The Plaintiff filed a reply to the defence and defence to the counterclaim dated 3rd November 2022 in which he reiterated the contents in the Plaintiff and denied the Defendant's claim. She urged the court to dismiss the same with costs.

The Plaintiff's Case

5. At the trial, the Plaintiff called two witnesses in support of his case.
6. The Plaintiff Francis King'oo Konde testified as PW1. He adopted his witness statement dated 1st September 2021 as his evidence in chief. He also produced the documents in the list of documents as PEX 1-4 and the document in the supplementary list as PEX5 in support of his case.
7. The Plaintiff testified that the suit property is the registered in the name of his late father Konde Muunga Malai alias Konde Nzingila. That after the demise of his father, his late mother Kasiva Konde sold five acres to the Defendant on 13/10/2000. That the purchase price for one acre was Kshs 15,000/=, while the total purchase price for five acres was Kshs.75, 000/=.
8. He informed the court that the Defendant paid Kshs 60,000/= being the purchase price for four acres and that the balance of Kshs 15,000 was to be utilised to cater for transfer expenses which the Defendant refused to pay.
9. He went on to state that later on, the Defendant purported to purchase one acre which he has never paid for. He testified that the Defendant hived off an acre from the Estate of the deceased where she has been grazing animals and putting up structures thereon. He urged the court to grant the orders sought as they had exhausted the remedies in trying to settle the matter out of court.
10. On cross examination by Counsel for the Defendant, he reiterated that the suit property is registered in the name of his deceased father. He testified that he was present when the agreement for the sale of 4 acres comprised in the suit property was reduced in writing. He testified that after a survey was carried out in the year 2019, the Surveyor confirmed that the Defendant was in occupation of six acres comprised in the suit property. He testified that they did not receive the purchase price for the two acres. He asserted that he was issued with limited letters of administration in respect of the estate of his deceased father.
11. PW2 Josephat Mutua Mbithi adopted his witness statement dated 3rd November 2022 as his evidence in chief. He informed the court that the suit property is registered in the name of the Plaintiff's deceased father. It was his testimony that he witnessed the sale agreement between Kasiva Konde and the Defendant herein. It was his testimony that the agreement was for the sale of five acres comprised in the suit property. That the total purchase price was Kshs 75,000/= while the cost of one acre was Kshs 15,000/=. He testified that the Defendant paid Kshs 60000/= being the purchase price for 4 acres. He stated that the purchase price for the fifth acre was to be utilised to cater for transfer expenses which the Defendant refused to pay.



12. He testified that the Defendant hived off an additional acre which she was using to graze her animals and had developed structures thereon.
13. To buttress his submissions, Counsel relied on the case of *Joseph Kipchirchir Koech V Philip Cheriyo Sang*(2018)eKLR

The Defendant's Case

14. The Defendant called two witnesses in support of her case
15. The Defendant Mueke Maithya testified as DW1. She adopted her witness statement as her evidence in chief. She also produced the documents in the list of documents as DEX 1-5 in support of her case.
16. She informed the court that on 13/10/2000 she purchased land measuring 5.03 acres from the Estate of Konde Muunga Mulai at an agreed purchase price of Kshs 75000/=. That she paid a deposit of Kshs 60,000/= leaving a balance of Kshs 15,000/= which was to be utilised to cater for transfer expenses. She stated that the area Assistant Chief demarcated her portion with sisal plants.
17. She further testified that a joint survey carried out on 21/11/2019 established that she was in occupation of 6 acres comprised in the suit property. She testified that she has been in continuous, uninterrupted and exclusive possession of six acres comprised in the suit property for more than 21 years and has therefore acquired the same by virtue of adverse possession. She urged the court to dismiss the suit and allow her counterclaim as prayed.
18. On cross examination by Counsel for the Plaintiff, she testified that the sale agreement was in respect of five acres comprised in the suit property and admitted that she had only paid for 4 acres. She reiterated that the purchase price for the fifth acre was to be utilised to cater for transfer expenses. She testified that she paid the outstanding balance of the purchase price but lost the book where she had recorded the agreement to that effect. She confirmed that she did not purchase 0.97 acres
19. In re-examination, she reiterated that the Surveyor established that she was in occupation of six acres.
20. DW2 David Kithuka testified that on 13/10/2000, he witnessed the sale agreement between the Defendant and Kasiva Konde in respect of 5.03 acres. He stated that on 22/08/2008 the late Kasiva Konde requested the Defendant to pay the remaining balance of Kshs 15,000/= while promising that she would pay the same. That he relayed the information to the Defendant and later learnt that the Defendant paid the outstanding balance of the purchase price.
21. On cross examination by Counsel for the Plaintiff, he reiterated that he witnessed the sale agreement between the Defendant and Kasiva Konde. He testified that he was not present when the late Kasiva Konde received the balance of Kshs 15,000/= in the year 2008. He testified that the Defendant was in occupation of 6 acres though she had only paid for 4 acres.
22. In re-examination he testified that he saw the book which confirmed that the Defendant had paid the balance of Kshs 15,000/=.
23. After the close of their respective cases, the parties agreed to file and exchange their submissions.

The Plaintiff's Submissions

24. The Plaintiff's submissions were filed on 4th October 2023. Counsel submitted that the suit herein is anchored on a contract of sale between Kasiva Konde deceased and the Defendant herein. Counsel submitted that the law governing the validity of a contract for sale of land is premised on Section 3(3) of the *Law of Contract Act*. Counsel submitted that the sale agreement dated 30/10/2000 was not



- disputed in any way. According to Counsel, the Defendant did not tender any evidence to show that she had paid the outstanding balance of the purchase price.
25. Counsel submitted that the Surveyor's report clearly demonstrates that the Defendant was in occupation of 6 acres yet she had only paid for 4 acres.
 26. According to Counsel, the court cannot re write contracts for parties neither can it imply terms that were not part of the contract.
 27. Counsel submitted that the Defendant cannot claim ownership over the land by virtue of adverse possession since she occupied the same on the strength of the sale agreement.
 28. Concluding his submission, Counsel submitted that the Plaintiff has proved his case on a balance of probabilities against the Defendant and urged the court to grant the orders sought in the Plaintiff.

The Defendant's Submissions

29. The Defendant's submissions were filed on 7th November 2021.
30. On her behalf, Counsel identified the following issues for the court's determination:-
 - 1). Whether the Plaintiff is entitled to the prayers sought in the Plaintiff?
 - 2). Whether the Defendant is entitled to the orders sought in the counterclaim?
31. On the first issue, Counsel submitted that the Plaintiff was inviting the Court to interpret the sale agreement that was made more than 23 years ago. Counsel submitted that the instant suit ought to have been instituted within 6 years from the date the cause of action arose in accordance with Section 4(1) of the Limitation of Actions Act since it is based on a breach of contract. Counsel submitted that the court cannot give life to the sale agreement dated 30/10/2000 as the suit herein was filed out of time.
32. Counsel argued that the sale agreement is statute barred hence the court lacks jurisdiction to entertain the suit herein. That the Plaintiff is not entitled to the orders sought since there was no valid agreement between the purchaser and the vendor.
33. On the second issue, Counsel submitted that the Defendant took possession of the suit property immediately after she had paid the purchase price and has since acquired the same by virtue of adverse possession. Counsel submitted that though the Defendant's possession was initially consensual pursuant to the sale agreement, the permission ended when the Defendant paid the last instalment of the purchase price. Counsel argued that the period of limitation began to run from August 2008 so that by the time the suit herein was filed, the Defendant had been in adverse possession of the land.
34. None of the authorities cited by Counsel were availed for the Court's perusal.

Analysis And Determination

35. Having considered the pleadings, the evidence on record and the respective submissions, the following issues fall for determination:-
 1. Whether the Defendant has trespassed on the disputed portion of 2 acres comprised in the suit property?
 2. Whether the Defendant is entitled to the orders sought in the counterclaim?
36. From the evidence on record, the following facts are not disputed:-



1. That the Defendant executed a sale agreement dated 13/10/2000 with the late Kasiva Konde for the sale of five acres comprised in the suit property.
2. That the Defendant paid Kshs 60,000/= out of the total purchase price of Kshs 75000/=.
3. That the outstanding balance of the purchase price for the fifth acre was to be utilised to cater for transfer expenses.
4. That the Defendant is in occupation of six acres comprised in the suit property.

Whether The Defendant Has Trespaced On The Disputed Portion Of 2 Acres Comprised In The Suit Property.

37. The Plaintiff's claim against the Defendant is based on trespass. The Plaintiff is seeking for a permanent injunction to restrain the Defendant from trespassing on the disputed portion of 2 acres comprised in the suit property.
38. Black's Law Dictionary 10th Edition defines trespass to land as follows;

“A person's unlawful entry on another's land that is visibly enclosed.”
39. The Court of Appeal in the case of M'Mukanya v M'Mbijiwe (1984) KLR 761 set out the ingredients of the tort of trespass as follows;

“Trespass is the violation of the right to possession and a Plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership.”
40. The Plaintiff instituted this suit as the legal Administrator of the Estate of his deceased father Konde Muunga Mulai alias Konde Nzingila. He produced a grant of limited letters of administration issued in the matter of the Estate of the late Konde Muunga Malai alias Konde Nzingila as (PEX1). He also produced a certificate of official search (PEX2) to show that the suit property is registered in the name of his deceased father.
41. The Plaintiff asserted that the Defendant had trespassed on an extra acre in the suit property which she was utilising to graze her animals in addition to putting up structures. It is not in dispute that the late Kasiva Konde sold 5 acres comprised in the suit property to the Defendant.
42. According to the sale agreement dated 13/10/2000, the Defendant paid Kshs 60,000/= for 4 acres. The balance of Kshs 15,000/= for the fifth acre was to be utilised to cater for transfer expenses.
43. The evidence on record shows that the Chief Surveyor, Peter M Ndonye from the Department of Lands, Environment, Urban Development and Climate Change carried out a joint survey and established that the Defendant was in occupation of 6 acres comprised in the suit property. The Plaintiff and the Defendant produced the Chief Surveyor's report dated 22nd November 2019 in support of their respective cases. In his findings, the Chief Surveyor stated as follows in part:- “The area of 6 acres was more than what the seller had sold to the buyer The seller and the buyer are requested to agree on what is their suggestion on 0.97 acres. They all agree that 0.97 acres should be separated from the six acres and give back the rest to the seller....”
44. The Defendant admitted that she purchased 5.03 acres comprised in the suit property. The Defendant testified that she paid the outstanding balance of the purchase price in the year 2008. As regards the issue of the outstanding balance, the sale agreement stipulated as follows:- “The balance of Kshs 15,000/= for the fifth acre shall remain for transfer transaction”. The Defendant did not tender any



evidence to show how and when she paid the outstanding balance of Kshs 15,000/=. Moreover, the outstanding balance of Kshs 15,000/= was to be utilised to cater for transfer expenses. No evidence was adduced to show that the process of transfer had commenced. Furthermore, the Defendant did not produce the book that allegedly contained the agreement confirming payment of Kshs.15,000/=. The evidence of DW2 was of no probative value since he did not witness the Defendant making payment for the fifth acre. The Defendant having entered onto 0.97 acres comprised in the suit property without any lawful or justifiable cause is therefore a trespasser and should be evicted.

Whether The Defendant Is Entitled To The Orders Sought

45. The Defendant is claiming ownership over two acres comprised in the suit property by virtue of adverse possession. She testified that she has been in continuous, uninterrupted and exclusive possession for more than 21 years. She stated that initially her possession was consensual pursuant to the sale agreement but upon payment of the last instalment in August 2008 she acquired the land by virtue of adverse possession.
46. The doctrine of adverse possession is enshrined under Section 7 of the *Limitation of Actions Act* which provides that;
- “An action may not be brought by any person to recover land after 12 years from the date on which the right of action accrued to him or if it first accrued to some other person through whom he claims to that person.”
47. Section 38 of the *Limitation of Actions Act* gives authority to the claimant for orders of adverse possession.
48. In the case of *Mtana Lewa v Kabindi Ngala Mwangadi* (2015) eKLR the Court held that: -
- “Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it, and the person having title to it omits or neglects to take action against such person having title to it for a certain period. In Kenya it 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 nor under the licence of the owner. It must be adequate, in continuity, in public and in extent to show that possession is adverse to the title owner.”
49. To determine whether the Defendant’s right of adverse possession has accrued the Court will seek to determine the following issues:-
- i. How did the Defendant take possession of the suit property.
 - ii. What was the nature of her possession and occupation.
50. The Defendant testified that she purchased five acres from the Estate of the late Konde Muunga Mulai. That immediately after the purchase, the chief demarcated her portion and she took possession thereof where she has been in continuous and uninterrupted possession thereof.
51. For a claim of adverse possession to succeed, the Defendant must demonstrate that her entry into the suit property was non-permissive and non-consensual and without licence.



52. In the case of *Mombasa Teacher Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 Others* (2018) eKLR the Court stated as follows;
- “Likewise, it is settled that a person seeking to acquire title to land by adverse possession must prove non-permissive or non-consensual, actual, open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the latin maxim *nec vi nec clam nec precario*.”
53. In the present case, the Defendant’s entry into the suit property was pursuant to the sale agreement dated 13/10/2000. The entry of the Defendant into the suit property was with the permission of the Plaintiff. It therefore follows that the possession was permissive and consensual.
54. The Defendant must also satisfy this court that she is in actual and continuous occupation. In the case of *Jandu v Kirpal & Another* (1975) EA 225 the Court held that;
- “...to prove title by adverse possession, it is not sufficient to show that some acts of adverse possession must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner. It must be actual, visible exclusive, open and notorious.”
55. The Defendant testified she has been in possession of the suit property for more than 20 years. The Defendant produced a letter dated 8/12/2009 from the District Surveyor (DEX1), agreement reached at the Chief’s office dated 5/05/2019 (DEX4) and a letter from the Assistant County Commissioner dated 2/10/2020(DEX5). The said letters confirm that the parties were disputing over the land occupied by the Defendant. It is therefore clear that Defendant’s possession of the suit property was interrupted by the disputes relating to the same.
56. The Defendant is also required to demonstrate the nature of possession and the occupation which must be continuous open, honest, with the proprietor’s knowledge.
57. In the case of *Samuel Kibamba v Mary Mbaisi* (2015) eKLR the Court held that;
- “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 licence 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.”
58. In the matter at hand, the disputes amount to interruption of possession for the purpose of adverse possession. Having found that the Defendant’s occupation and possession was interrupted by the disputes over the same, I find that the Defendant has not acquired t2 acres by virtue of adverse possession.
59. From the foregoing, I find that the Plaintiff has proved his case against the Defendant on a balance of probabilities as required. I also find that the Defendant has not has not met the threshold for the grant of the orders of the ownership of the suit property by virtue of adverse possession. The counter claim is hereby dismissed with costs to the Plaintiff.
60. Consequently, I enter judgment for the Plaintiff against the Defendant as follows:-



1. An order of permanent injunction be and is hereby issued restraining the Defendant from trespassing on the disputed portion of 2 acres comprised in land parcel number Nzai/ Mumbuni/307.
2. An order of eviction be and is hereby issued requiring the Defendant to evict and remove all structures constructed in the disputed 2 acres of land comprised in land parcel No. Nzai/ Mumbuni/307.
3. The Plaintiff is awarded cost of the suit and the counterclaim with interest.

HON. T. MURIGI

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAM THIS 6TH DAY OF MARCH, 2024.

In The Presence Of:

Court assistant Kwemboi.

Munyasya for the Plaintiff

Kioko for the Defendant

