



**Gakuya v Mathenge (Environmental and Land Originating Summons
31 of 2023) [2024] KEELC 5238 (KLR) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5238 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 31 OF 2023**

YM ANGIMA, J

JULY 11, 2024

BETWEEN

ELIZABETH WANJIRU GAKUYA PLAINTIFF

AND

GERALD MWANGI MATHENGE DEFENDANT

RULING

A. Introduction

1. By an originating summons dated 13.10.2020 filed pursuant to Section 38 of the *Limitation of Actions Act* (Cap.22) and Order 37 rule 7 of the *Civil Procedure Rules* 2010 and all enabling provisions of the law, the Plaintiff sought adverse possession of Title No. Mutara/Mutara Block II/1544 (Uruku) against the Defendant who was the registered proprietor thereof.
2. Vide a judgment dated 05.10.2023 the court dismissed the Plaintiff's suit on the basis that she has failed to prove her claim for adverse possession. In particular, the court found that the Plaintiff had failed to prove that she had been in open, continuous and uninterrupted possession of the suit property for at least 12 years since the Settlement Fund Trust was the registered owner thereof until 10.04.2018.

B. Defendant's Application

3. Vide a notice of motion dated 05.01.2024 filed pursuant to Section 152A, 152B, 152E & 152F of the *Land Act* 2012, Sections 1A & 3A of the *Civil Procedure Act* (Cap.21) and all other enabling provisions of the law, the Defendant sought the following orders:
 - a. That the Respondent be evicted from L.R. No. Mutara/Mutara Block II/1154 (Uruku) at her own costs and for vacant possession of the suit plot to be delivered to the Plaintiff/Applicant.
 - b. That the Officer In-Charge Subego Police Post does supervise the eviction.



- c. That the costs of this application and eviction be borne by the Defendant/Respondent.
4. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Defendant, Gerald Mwangi Mathenge, on 15.01.2024. The Defendant stated that in spite of having lost her claim for adverse possession, the Plaintiff had refused to vacate the suit property despite being asked to do so.
5. It was the Defendant's case that as the current registered owner of the suit property he was entitled to immediate possession thereof. It was also his contention that the interim orders the Plaintiff obtained 22.07.2021 had lapsed since they were intended to prevent her eviction pending the hearing and determination of the suit. It was thus the Defendant's case that the interim orders lapsed automatically upon delivery of judgment.

C. Plaintiff's Response

6. The Plaintiff filed a replying affidavit sworn on 27.05.2024 in opposition to the application on three grounds. First, that she was the one in possession and occupation of the suit property. Second, that the judgement dated 05.10.2023 did not address the issue of ownership of the suit property and that no eviction order was issued against her. Third, that the application was misconceived hence it should be dismissed with costs.

D. Directions on Submissions

7. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Defendant filed submissions dated 22.05.2024 but the Plaintiff had not filed any submissions by the time of preparation of the ruling.

E. Issues for Determination

8. The court has considered the Defendant's notice of motion dated 15.01.2024, the replying affidavit in opposition thereto as well as the material on record. The court is of the view that the following are the main issues for determination herein:
 - a. Whether the Defendant has made out a case for an eviction order against the Plaintiff.
 - b. Who shall bear costs of the application.

F. Analysis and Determination

- a. Whether the Defendant has made out a case for an eviction order against the Plaintiff
9. The court has considered the material and submissions on record on this record. It is evident that the Plaintiff's suit for adverse possession against the Defendant was dismissed with costs to the Defendant on 05.10.2023. There is no indication on record to show that the Plaintiff appealed the judgment. There is also no indication of the Plaintiff having obtained interim orders from either this court or the Court of Appeal to prevent her eviction.
10. The material on record shows that the Plaintiff obtained interim orders to prevent her eviction from the suit property on 22.07.2021 pending the hearing and determination of the suit. There is no contest that the suit was ultimately heard and determined on 05.10.2023 whereupon the interim injunction lapsed automatically.



11. The court does not agree with the Plaintiff's contention that the issue of ownership of the suit property was not determined vide the judgment dated 05.10.2023. The court is of the opinion that by filing the originating summons dated 13.10.2020 the Plaintiff implicitly acknowledged the Defendant's ownership of the suit property coupled with a plea that he had lost his right to sue for recovery on account of limitation of time. It is on the basis of that plea that the court found and held that the Plaintiff had not acquired adverse possession of the suit property because she had not been in possession for the statutory minimum period of 12 years.
12. It must be remembered that 12 years is the limitation period for recovery of land prescribed under Section 7 of the *Limitation of Actions Act* (Cap.22). By dismissing the Plaintiff's claim for adverse possession, the court was in effect saying that the Defendant was not caught up by the limitation period hence he was entitled to recover the suit property. In a nutshell, the judgment dated 05.10.2023 simply affirmed the Defendant's ownership of the suit property hence the question of ownership was settled in that judgment subject, of course, to the decision being overturned on appeal.
13. The Defendant may as well have chosen to lodge a counterclaim for an eviction order but he did not do so. The court is, however, of the view that such a counterclaim is not mandatory since a claim for adverse possession by a trespasser and a counterclaim for eviction by the registered owner are mutually exclusive. If one of them were to succeed, then the other would automatically fail. Even if the Defendant had counter-claimed for eviction his claim would have been successful because the Plaintiff's claim for adverse possession was dismissed.
14. The court is further of the view that it would not be necessary for the Defendant to institute fresh proceedings for an eviction order since that would run counter to the overriding objective of the *Civil Procedure Act* (Cap.21) as stipulated in Sections 1A and 1B of the Act. Another hearing among the parties would not be necessary just for the purpose of handing possession of the suit property to the registered owner. As a result, the court finds that the Defendant is entitled to the eviction order sought and that the Plaintiff has no legal or legitimate basis for her continued occupation of the suit property. It cannot be the law in this country that winning or losing a case would have no legal effect and no legal consequences.
 - b. Who shall bear costs of the application
15. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the Defendant shall be awarded costs of the application.

G. Conclusion and Disposal Order

16. The upshot of the foregoing is that the court finds merit in the Defendant's notice of motion dated 15.01.2024. As a consequence, the court makes the following orders for disposal thereof:
 - a. An order be and is hereby granted for the eviction of the Plaintiff, Elizabeth Wanjiru Mathenge, from Title No. Mutara/Mutara Block II/1154 (Uruku) at her own cost and for the Defendant to be given vacant possession thereof.
 - b. The OCS – Subego Police Post shall provide security to court bailiffs who shall undertake the eviction.



c. The Plaintiff shall bear the costs of the application and costs of the eviction.

Orders accordingly.

RULING DATED AND SIGNED AT NYANDARUA THIS 11TH DAY OF JULY, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

N/A for the Plaintiff

N/A for the Defendant

C/A - Carol

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Y. M. ANGIMA

JUDGE

