



**Mucheke v Macharia & another (Environmental and Land Originating
Summons 478 of 2014) [2024] KEELC 5043 (KLR) (3 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5043 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 478 OF 2014**

JO OLOLA, J

JULY 3, 2024

BETWEEN

MWANGI MUCHEKE PLAINTIFF

AND

FLORA WAMBUI MACHARIA 1ST DEFENDANT

JANE NJERI 2ND DEFENDANT

JUDGMENT

1. This suit was initially instituted in the High Court as Nyeri HCCC No. 99 of 2011 before being transferred to this court in the year 2014.
2. By an Originating Summons dated 28th July 2011, Mwangi Mucheke (herein after “the Plaintiff”) claimed to have acquired ownership of LR No. Githi/Muthambi/695 by way of adverse possession and sought for a declaration that:-
 - 1). Mwangi Mucheke be registered as proprietor of 3.0 acres of Land Parcel Number Githi/Muthambi/695 by way of adverse possession under the provisions on the *Limitation of Actions Act*;
 - 2). The Executive Officer of this Honourable Court do execute all relevant documents for the transfer of the said parcel of land to the applicants, and
 - 3). Costs of this application be provided for.
3. In his Supporting Affidavit sworn on 28th July 2011, the Plaintiff avers that they purchased the suit property together with his now deceased brother Ngatia Mucheke in the year 1966 from the Defendant’s husband Macharia Wainaina. It is further the Plaintiff’s case that upon payment of the purchase price, they took possession of the 3.0 acres of the suit land and have since the year 1966 been in continuous, open, exclusive and uninterrupted possession and use thereof.



4. The Plaintiff avers that the Defendant's husband died in 1977 before transferring the suit property to them and that in the year 1991, the Plaintiff and his deceased brother's wife, Njeri Ngatia Mucheke did discover that the Defendant had caused the land to be transferred to her name and that of her son David Mutahi (now deceased). It is the Plaintiff's case that they filed a suit which was later transferred to the Land Dispute Tribunal but the Tribunal ruled that it had no jurisdiction to deal with the same.
5. Flora Wambui Macharia, sued by the Plaintiff as the Sole Defendant did not file a response to the application. Instead, her daughter in law Jane Njeri having joined the suit as the 2nd Defendant did file a Replying Affidavit sworn on 10th April 2014 denying the Plaintiff's claim.
6. It was the 2nd Defendant's case that she was the widow of David Mutahi Macharia and that her mother in-law originally sued as the sole Defendant was elderly. The Defendant avers that the suit property is registered in the joint names of her husband and her mother in-law.
7. It was further the 2nd Defendant's case that the Plaintiff is a vexatious litigant having previously instituted another suit in the year 1995 claiming the same parcel of land together with one Njeri Ngatia Mucheke. The 2nd Defendant avers that the said suit was referred to the Land Disputes Tribunal which Tribunal determined that the claim by the Plaintiff and the said Njeri Ngatia Mucheke had no basis. The Defendant further asserts that the decision of the Tribunal was adopted as an order of the court on 22nd March 2011 and that when orders to have the Plaintiff evicted from the land were sought, the Plaintiff filed this suit to stop his eviction.

The Plaintiff's Case.

8. In support of his case, the Plaintiff called two witnesses at the trial.
9. PW1- Mwangi Mucheke is the Plaintiff. He testified that he had lived on the suit property since 1962 and that the land previously belonged to his uncle one Macharia Wainaina who was the husband to the 1st Defendant. PW1 told the court they had purchased 3 acres of the land together with his brother and that they had planted coffee trees, bananas, cassava and other trees on the land.
10. PW2 – Macharia Muturi is a neighbor of the Plaintiff. He told the court the Plaintiff had lived on the suit land since 1962 and that he had planted coffee trees, bananas and cassava on the land. He further told the court he was present when the Plaintiff and his brother Ngatia Mucheke had purchased the land.

The Defence Case.

11. The 2nd Defendant – Jane Njeri Mutahi (DW1) testified as the sole witness in the defence case. DW1 told the court that the 1st Defendant was the mother to her husband and that both her husband and the 1st Defendant had passed away. She told the court that the two deceased persons were the registered proprietors of the suit property. She testified that the Plaintiff occupies a small portion of the suit property where he has built a home and planted some coffee trees.

Analysis and Determination.

12. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses as well as the evidence adduced before the court. I have similarly perused and considered the submissions placed before the court by the Learned Advocates representing the parties herein.
13. By the Originating Summons instituted under Order 37 Rule 7 of the *Civil Procedure Rules*, 2010 and Section 38 of the *Limitation of Actions Act*, the Plaintiff herein claims to have acquired ownership of



the suit property described as LR No. Githi/Muthambi/695 said to be measuring some 3.9 acres by way of adverse possession.

14. As a consequence thereof the Plaintiff prays for orders that he be registered as the proprietor of some 3.0 acres of the said parcel of land and urges this court to direct the Executive Officer of the court to execute all relevant documents for the transfer of the said parcel of land to himself.
15. In support of his case, the Plaintiff avers that sometime in 1966, he and his brother Ngatia Muccheke (now deceased) entered into a sale agreement with the 1st Defendant's husband one Macharia Wainaina wherein the 1st Defendant's husband agreed to sell to them some 3.0 acres of the suit property.
16. It was the Plaintiff's case that they had agreed with the 1st Defendant's husband that he would sell to them the land at a cost of Kshs. 300/- per acre. It was further his case that they did agree that instead of paying the consideration in cash, the Plaintiff and his brother would pay the purchase price in different forms. Accordingly, the Plaintiff asserted that he did give 5 lambs, 1 gourd of honey and 1 gourd of beer to the 1st Defendant's husband. On the other hand, his brother Ngatia Muccheke paid a sum of Kshs. 400/= in cash and 4 goats as the balance of the consideration.
17. It was further the Plaintiff's case that the 1st Defendant's husband had gifted unto them some 0.9 acres of the suit property in consideration of their undertaking to follow up on the sub-division of a parcel of land belonging to the 1st Defendant's husband, which parcel was situated in Mukurweini.
18. The Plaintiff told the court that upon payment of the agreed consideration, they had immediately taken possession of the suit property and have since been in continuous, open, exclusive and uninterrupted possession thereof. It was however, his case that the 1st Defendant's husband passed away sometime in 1977 before transferring the suit property and that sometime in the year 1991, they did discover that the 1st Defendant had caused the suit property to be transferred into her name and the name of her son who was the 2nd defendant's husband.
19. The Plaintiff asserts that the Defendants were aware that the suit property had been sold to himself and his brother and that the transfer of the property to the Defendants' names was hence fraudulent and aimed at depriving them of their property.
20. As it turned out, Flora Wambui Macharia who was initially sued as the Sole Defendant herein did not file a response to the Originating Summons. It would appear from the material placed before the court that she was prevented from doing so due to the fact that she was aged and was ailing. As fate would have it, she passed away before the conclusion of the trial herein.
21. In the meantime, her daughter-in-law Jane Njeri had been enjoined as a 2nd Defendant in these proceedings. In her Replying Affidavit sworn and filed herein on 10th April 2014, the 2nd Defendant does not deny that the Plaintiff was residing on the suit property. It was the 2nd Defendant's case that she became aware of this suit sometime in the year 2012 when the Plaintiff sought to bury his wife Damaris Wanjiru on the suit land.
22. From the material placed before the court, it was apparent that when the 2nd Defendant and her now deceased mother-in-law learnt of the planned burial, they did institute Nyeri CMCC No. 325 of 2012 wherein on 19th July 2012, they were issued with a temporary order of injunction restraining the Plaintiff from burying the remains of his said wife on the suit property.
23. Testifying at the trial herein, the 2nd Defendant conceded that the Plaintiff has a home and some coffee trees on a portion of the suit land which is registered jointly in the name of her husband and her mother



in-law. It was further her testimony that she got married in the year 1988 and that she found the Plaintiff and a person she described as the Plaintiff's mother on the land when she got married.

24. As it were, the principles that undergird the concept of adverse possession are well settled under the Limitation of Action Act, Cap 22 of the Laws of Kenya. Section 7 of the said Act places a bar on actions to recover land after 12 years from the date on which the right accrued. Further Section 13 of the said Act provides as follows:-

- “ 1). A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under Section 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 the purposes of this section, receipt of rent under a lease by a person wrongly claiming in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.”

25. Additionally, section 38 of the Act provides:

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 of the Act, 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.”

26. As was long stated in the case of Wambugu -vs- Njuguna 91983) KLR,172:

“In order to acquire by the statute of limitation title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.”

And that:

“The proper way of assessing proof of adverse possession would then 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 has been in possession for the requisite number of years.”

27. In the matter before me, it was the Plaintiff's case that he and his brother one Ngatia Mucheke had been on the suit property from the 1960s having purchased the land from the 1st Defendant's husband. It was his case that the 1st Defendant's husband had passed away in 1977 without transferring the land to the two brothers.



28. From the material placed before the court, it was apparent that sometime in the year 1990 the 1st Defendant and the 2nd Defendant's husband filed succession proceedings in regard to the estate of the late Macharia Wainaina who was the husband to the 1st Defendant. It is through those proceedings that the title to the suit property was transferred to their joint names.
29. Given the testimony of the 2nd Defendant that as early as 1988 when she got married, the Plaintiff had built a home on the suit land and was growing coffee and bananas thereon, it was apparent to me that those succession proceedings were done, as stated by the Plaintiff, without his involvement and/or knowledge. It was also clear to me that even if it could be taken that the Plaintiff had only been on the land since 1988, some 23 years had passed by the time the Plaintiff instituted this suit in the year 2011.
30. And given the 2nd Defendant's testimony that the Plaintiff had built a home on the suit land and was growing coffee and bananas thereon, it was evident to me that the Plaintiff had clearly dispossessed the registered owner of the land of the portion that he was occupying and had acquired the same by way of adverse possession.
31. However, while the Plaintiff by his Originating Summons herein claims 3.0 acres of the suit property, it was apparent that he was not in occupation of the 3.0 acres. For a start, the 3.0 acres were according to himself to be shared equally with his brother Ngatia Mucheke. It was also apparent from his own testimony that even after his brother's death, he did not occupy the whole portion as his brother's wife Njeri Ngatia took charge of the other portion.
32. Indeed in his own testimony before the court, the Plaintiff asserted that even though he was claiming the 3 acres he had purchased jointly with his brother, he had only cultivated and was occupying ½ acre of the suit land. Asked about the land in cross-examination, the Plaintiff responded as follows:-

“I confirm that I currently cultivate about ½ acre although I am entitled to 3 acres.

It is true that Jane Njeri (the 2nd Defendant) was born on the same land and lives there currently with her children occupying almost the entire land.

I cannot remember when I was evicted from the 2 ½ acres I was previously occupying but I can confirm that the defendants were still occupying the 2 ½ acres in 1995.”

33. Arising from the foregoing, it was evident to me that the Plaintiff was only entitled to 0.5 acres of the suit land and not the 3 acres he claims. Accordingly I hereby enter Judgment for the Plaintiff and make the following orders:-
 1. Mwangi Mucheke be registered as proprietor of the portion of land measuring 0.5 acres comprised in the parcel of land known as Githi/Muthambi/695 having acquired the same by way of adverse possession.
 2. The Deputy Registrar of this court is hereby directed to execute all relevant documents for the transfer of the said parcel of land to the Plaintiff.
 3. Each party shall bear their own costs.

Dated, signed and delivered at Nyeri this Wednesday 3rd day of July, 2024.

In the presence of:

Ms. Muthoni holding brief for Mr. Mwaura for the Plaintiff.

Mr. Kiminda for the Defendant.



Court Assistant: Michael

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J. O. OLOLA

JUDGE

3 NYERI ELC CASE NO. 478 OF 2014 (OS) JUDGMENT

