



**Muremera v Stephine & another (Environmental and Land Originating
Summons 1 of 2021) [2024] KEELC 6438 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6438 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 1 OF 2021**

CK YANO, J

OCTOBER 3, 2024

BETWEEN

JULIUS MBAE MUREMERA PLAINTIFF

AND

NAZARIANO BUNDI STEPHINE 1ST DEFENDANT

CATHERINE KAIMURI MUGUONGO 2ND DEFENDANT

JUDGMENT

Introduction

1. The plaintiff instituted the suit vide an originating summons dated 6th June 2018 and filed in court on 8th June 2018 claiming to have acquired title to land parcel No. Abogeta/U-Kiungone/1084 by way of adverse possession. The summons is supported by the evidence and facts set out in the affidavit of Julius Mbae Muremera, the plaintiff herein.
2. In opposing the originating summons, the defendants filed a replying affidavit sworn by Nazarino Bundi Stephen on 7th March, 2023.

Plaintiff's Case

3. The plaintiff avers that on 5th June, 1997, he entered into an agreement for the sale of title No. Abogeta/U-Kiungone/1084 with M'Muguongo Magambo (deceased). That as a consideration the plaintiff was to handover his title No. Abogeta/U-Kiringa/409 plus a payment of Kshs. 115,000/= . The plaintiff states that he paid the said amount and took possession of title No. Abogeta/U-Kiungone/1084 on 5th June 1997 and have enjoyed uninterrupted possession since then while the defendant took possession of title No. Abogeta/U-Kiringa/409.



4. The plaintiff states that M'Muguongo Magambo (deceased) died on 7th December, 2000 before the transfer and exchange of the title to the properties had been completed. That consequently, a meeting was held on 2nd September, 2009 between the defendant's family/beneficiaries and the plaintiff wherein it was agreed that all parties would effect the transfer and exchange as per the agreement of 5th June 1997.
5. The plaintiff avers that sometime in 2010 or thereabouts, the defendants discretely initiated succession process over the estate of M'Muguongo Magambo without informing the plaintiff contrary to what was agreed upon. The plaintiff states that on 21st February, 2013, he registered a caution over the suit property claiming purchaser's interest. That the said caution was removed on 12th July, 2015 by a court order arising from Meru High Court Succession cause No. 360 of 2012, Estate of M'Muguongo Magambo (deceased). That the defendants obtained a certificate of confirmation of Grant dated 17th February, 2014 wherein title No. Abogeta/U-Kiungone/1084 was granted to Willy S.N Muguongo, Nazarino Bundi Stephen and Zachary Marangu Muguongo.
6. The plaintiff avers that together with his family they have enjoyed uninterrupted, continued possession of title No. Abogeta/U-Kiungone/1084 while the defendant's family has enjoyed title No. Abogeta/U-Kiringa/409 since 5th June 1997. That in addition to building his house and installing piped water, the plaintiff and his family have developed the property by planting tea, coffee, bananas, maize and trees whose value now stands at over Kshs. 5,000,000/=.
7. It is the plaintiff's contention that the defendant's discretely conducted succession proceedings with intent to dispossess him of the property. Relying on advice from his advocates, the plaintiff believes that he has acquired the suit property by way of adverse possession by virtue of his uninterrupted, continuous and exclusive possession of the same for more than 12 years. He prays to the court to declare him the legal owner of the land. That he is willing and undertakes to transfer Abogeta/U-Kiringa/409 to the defendants.
8. In his supporting affidavit, the plaintiff annexed a copy of the agreement for sale dated 5th June, 1997, a copy of search dated 4th May, 2018 for title No. Abogeta/U-Kiungone/1084, a copy of search dated 28th May 2018 for title No. Abogeta/U-Kiringa/409, copy of minutes dated 2nd September, 2009 a copy of green card dated 4th May, 2018 for title No. Abogeta/U- Kiungone/1084, a copy of the certificate of Grant dated 17th February, 2014 and photographs of the development in title No. Abogeta/U-Kiungone/1084.
9. The plaintiff testified as P.w 1 and adopted the averments in his affidavit in support of the originating summons as his evidence in chief and produced the documents as P exhibits 1-7 respectively and was cross-examined and re-examined. P.W 1 testified that he entered the land in 1972 when he exchanged it with the defendant's land No. Abogeta/U-Kiringa/409 and paid Kshs. 115,000=.
10. 1 stated that in 1972, parcel No. Abogeta/U-Kiringa/409 was still in the name of his father. He further stated that he had no evidence to show that he entered the land in 1972. That the exchange agreement was entered in the presence of their family members. That the defendants' father died in the year 2000, and that before he died, they had not effected transfers to each other because of the outstanding balance which was paid in the year 2009.
11. 2 was Gregory Mutegi, a brother to the plaintiff, who adopted his statement dated 24th August 2022 as his evidence in chief, and was cross-examined. His evidence was that on 5th June 1997, the parties who are known to him entered into a sale agreement wherein they agreed to exchange the parcels of land and that the plaintiff was to also pay Kshs. 115,000/= to the deceased because his land was smaller than



that of the deceased. That he was a witness to the said agreement. That the plaintiff took possession of land parcel No. Abogeta/U-Kiungone/1084 and developed it and has been living therein together with his family since then to date. That the family of the deceased on the other hand took possession of land Parcel No. Abogeta/U-Kiungone/409 where they live. It was his evidence that the plaintiff has enjoyed uninterrupted use and occupation of the land since 1997.

Defendants' Case

12. The defendants filed a replying affidavit sworn by Nazarino Bundi Stephen on 7th March 2023. He stated that the plaintiff was a cousin to the deceased in that their fathers were brothers. It is the defendants' contention that the plaintiff's suit should fail because it is incurably defective and incompetent for the reason inter alia, that the deceased is not the current registered owner of the suit land LR NO. Abogeta/U-Kiungone/1084. That the suit is brought in bad faith since the plaintiff never honoured his part of the bargain and/or terms and conditions of the agreement dated 5th June 1997 for exchange of land. That the suit is frivolous, vexatious and an abuse of the process of court. That the said agreement was entered into discretely as the family members were neither informed nor involved, yet the land was customary trust land. That there was no evidence of payment of the sum of Kshs. 115,000/= . It was also denied that the plaintiff had taken possession of title No. Abogeta/U-Kiungone/1084 or that the defendant took possession of title No. Abogeta/U-Kiringa/409. That the plaintiff has not explained why the transfer of the exchanged parcels of land were never completed between 5th June 1997 and 7th December, 2000 when the deceased died and even before the filing of suit. The defendants denied initiating succession proceedings over the estate of the deceased discretely and pointed out that the same was publicly gazetted and that due process was followed over the distribution of the deceased's estate which was done without any protest.
13. It was pointed out by the defendants that a caution was registered on the suit land by the plaintiff who was claiming the land as a purchaser. That the claim for adverse possession is untenable and unenforceable primarily because the suit land is not registered in the name of the deceased, but is currently registered in the name of Nazarino Bundi Stephen having got so registered on 18th September, 2016 in trust for the family of the deceased. That the plaintiff has land where he lives that is neighboring the suit land which he occasionally trespasses on to among others cut grass and other shrubs for his use, which actions the defendants have asked him to desist from doing. That the defendants are not interested in the plaintiff's land No. Abogeta/U-Kiringa/409 and wondered why the plaintiff never transferred the same to the deceased when he was alive.
14. Nazarino Bundi Stephine, the sole defendant's witness, testified as D.W 1. He adopted the averments contained in his replying affidavit and was cross examined and re-examined. He denied knowledge of the agreement allegedly made in 1997. He denied that they were using parcel No. Abogeta/U-Kiringa/409.

Analysis and Determination

15. This court has carefully considered the pleadings and the evidence adduced. The issues for determination are whether a suit for adverse possession can lie against the defendant who is admittedly not the registered proprietor of the land subject of title claimed by the plaintiff, when did the plaintiff enter the land and under what circumstances and whether the plaintiff is entitled to the reliefs sought.
16. For the plaintiff to succeed in a claim for adverse possession, he must prove that he has been in peaceful, open and uninterrupted possession of the land in question for a period of twelve years or above. That is to say that the plaintiff's occupation must be "nec vi, nec clam, nec precario."



17. In this case, the plaintiff's claim is predicated on his own evidence that he entered into an agreement on 5th June 1997 with the defendant herein, M'Muguongo Magambo (deceased) for exchange of land parcels L.R No. Abogeta/U-Kiungone/1084 and L.R No. Abogeta/U-Kiringa/409. His case is that he has since been in actual physical possession of LR No. Abogeta/U-Kiungone/1084 as a right and without interruption.
18. The defendants' case on the other hand appears to be rooted on three postulates. First, that the deceased defendant is not the registered proprietor of the suit land and therefore no claim for adverse possession can be maintained against him and that the plaintiff's prescriptive rights could only run against the current registered owner of the land.
19. As regards the first issue, it is my view that both the *Limitation of Actions Act* and the *Civil Procedure Rules* are pertinent. Section 38(1) of the *Limitation of Actions Act* provides that where a person claims to have become entitled by adverse possession to registered land, he may apply to the High Court for an order that he be registered as the proprietor of the land in place of the person then registered as proprietor of the land. And Order 37 Rule 7 of the *Civil Procedure Rules* provides that an application under Section 38 of the *Limitation of Actions Act* Cap (22) shall be made by originating summons which shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed. According to my understanding, these provisions mean that an order for relief by way of adverse possession can only be made in favour of an applicant against a respondent if the said respondent or defendant is the currently registered proprietor of the land which the applicant/plaintiff seeks to have registered in his name. In the instant matter, the registered proprietor of Abogeta/U-Kiungone/1084 as at 8th June 2018 when this suit was filed was Nazarino Bundi Stephen and not the defendant herein, M'Muguongo Magambo (deceased). Nazarino Bundi Stephen who is the current registered owner of the suit land has only been sued in a representative capacity as an administrator of the estate of M'Muguongo Magambo (deceased) and not in his personal capacity. Therefore, in my view, he is not amenable to the orders sought in the originating summons. For that reason alone, it is my opinion that the entire summons is misconceived and is for dismissal. This is because Section 38 (1) of the *Limitation of Actions Act* is clear that a claim for adverse possession ought to be against the person who is the registered owner of the land. In my view therefore, the failure to comply with this mandatory provision makes the suit incontestably bad in law. Moreover, a court of law cannot issue orders against a person who has not been rightly sued. As a rule, relief not founded on pleadings will not be given and a case must be decided on the issues on record.
20. The next issue to consider is the circumstances under which the plaintiff entered the land. From the evidence on record, it is clear that the plaintiff's claim is based on an alleged agreement dated 5th June 1997 for exchange of land parcels No. Abogeta/U-Kiungone/1084 and No. Abogeta/U-Kiringa/409 between the plaintiff and M'Muguongo Magambo (deceased). It is therefore not in dispute that the plaintiff's entry, if any must have been pursuant to the said agreement and with the permission of the deceased. Indeed, in paragraph 11 of his supporting affidavit, the plaintiff averred that on 21st February, 2013, he registered a caution over the suit property claiming purchaser's interest. Based on that, it is my finding that the plaintiff's entry and occupation, if any, was with the permission of the deceased. It is trite law that the occupation by a person who pleads adverse possession must be non-permissive use, that is without permission from the true owner of the land occupied. It has been held many times that acts done under licence or permitted by, or with the consent of the owner of the land do not amount to adverse possession and do not give the licensee or permitted entrant any title under the limitation statute (see *Gabriel Mbui v Mukindia Maranya* [1993] eKLR).



21. In the case of *Gabriel Mbui v Mukindia Maranya* (*supra*) Kuloba J held inter alia that for adverse possession to succeed, it “must be one nec vi, nec clam, nec precario. It must not be clandestine, and it ripens into prescriptive title only if it is juridical, and must have none of the vicia possession as clam, viant precario (by stealth, violence or supplication)”. It was also held that it is a well-known in our law, that the adverse character of the intruder’s possession of another’s land must be proved as a clear fact, and cannot be assumed as a matter of law from the mere exclusive possession, no matter how long it is continued. From the clearly proved facts, the court is to draw legal inferences as to whether there was or there was no adverse possession.”
22. From the material on record, it is clear that the plaintiff’s claim is based on an alleged agreement for exchange of parcels of land which was however not completed due to the demise of one of the parties. The plaintiff’s entry and occupation and possession if any, must have been pursuant to the said agreement and therefore was with the permission of the then registered proprietor of the land. Certainly, the plaintiff’s occupation and possession cannot qualify to be called “adverse possession.” In my view, the essential prerequisites in the doctrine of adverse possession being that the possession must be neither by force or stealth nor under the licence or permission of the owner have not been met. It must also be adequate in continuity, in publicity and in extent to show that the possession is adverse, to the title owner. In this case, it is clear that the plaintiff entered the land with the permission of the original registered owner by virtue of the alleged agreement for exchange of parcels of land and the plaintiff is trying to enforce the said agreement through the instant summons.
23. Considering the totality of the evidence availed in this case, and applying the legal principles outlined in law, I am not satisfied that the plaintiff has proved his case on a balance of probabilities. It is my finding that the plaintiff has failed to bring himself within the limits of the doctrine of adverse possession. Consequently, the plaintiff’s suit is dismissed with costs.
24. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 3RD DAY OF OCTOBER, 2024

C.K YANO

ELC JUDGE

IN THE PRESENCE OF-;

Court Assistant – Tupet

Atheru for plaintiff

