



Mahiri v Mbusiro (Sued as personal representative of the Estate of Daniel Mbusiro Mwita - Deceased); Ngoina (Interested Party) (Environment & Land Case 356 of 2017) [2023] KEELC 862 (KLR) (7 February 2023) (Judgment)

Neutral citation: [2023] KEELC 862 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 356 OF 2017
MN KULLOW, J
FEBRUARY 7, 2023**

BETWEEN

MAGABE NYOHERO MAHIRI PLAINTIFF

AND

CHARLES MWITA MBUSIRO DEFENDANT

**SUED AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DANIEL
MBUSIRO MWITA - DECEASED**

AND

SAMWEL MWITA NGOINA INTERESTED PARTY

JUDGMENT

1. The Plaintiff herein commenced this suit by way of an Originating Summons dated October 12, 2012 against the Defendant Orders: -
 - i. Spent.
 - ii. Spent.
 - iii. THAT this Honourable Court do declare that the Applicant has acquired Adverse Possession of part of LR No BUKIRA/ BWISABOKA/ 1217 registered now in the name of CHARLES MBUSIRO who has subdivided the same to LR NO BUKIRA BWISABOKA/2207, 2208 and 2209 of which the Applicant now is in occupation of the said land for Fourteen (14) years since 1998.



- iv. THAT this Honourable Court be further pleased to order LR No BUKIRA/ BWISABOKA/ 2208 be subdivided and that a portion measuring 4 ½ Acres be delineated and given a number and be registered in the name of the Applicant.
 - v. THAT this Honourable Court do issue an injunction restraining the Respondent from interfering with the Applicant's enjoyment of the said 4 ½ Acres of LR No BUKIRA/ BWISABOKA/ 2208.
 - vi. THAT this Court be pleased to order for any other relief deemed fit and just to grant in the circumstances.
2. The Originating Summons is premised on the 6 grounds thereon and on the Plaintiff's Supporting Affidavit sworn on even date. The Plaintiff avers that sometimes around November 22, 1998 he moved into and started residing on a portion of the suit parcel LR No BUKIRA/ BWISABOKA/ 2208 formerly No 1217, measuring approx. 4 ½ Acres.
 3. It is his contention that his occupation thereon has been definite, open, continuous and uninterrupted occupation and use of the said land for a period of more than 12 years since 1998; thus conferring him the right of adverse possession. That he has since intensively developed the suit land and has planted maize, potatoes, cassava, bananas, coffee and trees over the years.
 4. He further avers that no eviction case has ever been filed against him over the said period since he took occupation. That the Respondent has since subdivided the said original land No 1217 into 3 portions; 2207, 2208 and 2209 but has refused to apply for the Land Control Board Consent in order to transfer the portion occupied by the Plaintiff, No 2208. He therefore urged the court to grant the orders sought.
 5. The Respondent entered Appearance through the firm of M/S Nyagesoa & Co Advocates and filed a Replying Affidavit sworn on November 22, 2012. He denied all the allegations made against him and stated that at all material times the suit parcel was registered in the name of Daniel Mbusiro Mwita who is since deceased.
 6. It was his contention that the Applicant's claim is defective, bad in law, frivolous, misconceived and an abuse of the court process for the reason that; the Plaintiff bought the suit land from one Penina Mbusiro Mwita (now deceased); who did not have the requisite capacity to sell the deceased land parcel.
 7. He further deponed that the Plaintiff is not a beneficiary of the estate of the deceased and therefore has no right to intermeddle with the estate which is rightfully entitled to the beneficiaries of the estate and who solely depend on the same.
 8. He also denied that the Plaintiff has never occupied any part of the suit parcel and in case of any occupation then the same was unlawful and thus his claim on adverse possession cannot stand. He maintained that the Plaintiff had not disclosed any reasonable and sufficient grounds to warrant the grant of the orders sought and thus urged the court to dismiss his claim with costs.

TRIAL

9. The matter proceeded for hearing of the Plaintiff's case on December 18, 2018. The Plaintiff testified as PW1; he adopted his witness statement dated September 18, 2012 as his evidence in chief. He further stated that he bought a portion of the suit parcel No 1217 measuring 4 ½ Acres from one James Ngwena Mbusiro for a consideration price of Kshs 90,000/=.



10. It was his testimony that upon completion of the transaction in 1998, he moved into the suit land and has remained in possession, occupation and use to date. No steps have ever been taken by the Defendant or his family to vacate him from the said land.
11. He also produced the documents on his list of Documents dated September 18, 2012 to be marked as PExhibits 1 – 8 (a) – (c) in support of his claim.
12. On cross-examination; he reiterated that he bought the suit land from James Ngwena in the year 1998 and he paid Kshs 90,000/= as per Pexh 5 to Penina Mbusiro. He however conceded that Pexh 7 showed that the land was registered in the name of the late Daniel Mbusiro Mwita and that he was still live at the time of the alleged transaction. On re-examination he clarified that James Ngwena is the son of the late Daniel Mbusiro and that he bought the land when the said Daniel was still alive. He has remained in occupation of the suit land and has done extensive development thereon.
13. Jackson Giyabe testified as PW2; he adopted his witness statement dated September 18, 2012 as his evidence in chief. He further confirmed that the Plaintiff lives on and uses a portion of the suit parcel and is his neighbour. He added that the Plaintiff moved into the suit parcel sometimes in the year 1998, having purchased the suit land as per Pexh 5 and has never left the said land. He maintained that no effort has ever been made to evict the Plaintiff from the suit parcel.
14. Mahiri Matiko testified as PW3; he adopted his witness statement dated September 18, 2012 as his evidence in chief. He further stated that the Plaintiff is in occupation and cultivates a portion of the suit land No 2208 measuring approx. 4 ½ Acres; the said land is a subdivision of the original parcel No 1217. He maintained that the Plaintiff's occupation and use has been from the year 1998 to date. The Plaintiff thereafter closed his case.
15. Vide a Ruling dated June 13, 2022; the Defendant and the Interested Party herein were given an opportunity to file their respective pleadings and the documents they wished to rely on and thereafter fix the matter for defence hearing. However, on the scheduled date for the defence hearing on December 7, 2022 neither the Defendant and the Interested Party nor their advocate on record attended court for the hearing of their case despite being aware of the said date. Owing to the age of the matter, the same having been filed in the year 2012; I directed that the Defence case be closed.

Analysis And Determination

16. It is this court's considered opinion that the following issues arise for determination: -
 - a. Whether the Plaintiff has proved his claim on adverse possession.
 - b. Whether the Applicants are entitled to the reliefs sought.

A. Whether the Plaintiff has proved his claim on adverse possession

17. The legal framework for adverse possession is provided for in various statutory provisions to wit; Sections 7,13, 17 and 38 (1) and (2) of the [Limitation of Actions Act](#) and Section 28 (h) of the [Land Registration Act](#).
18. The Plaintiff contends that he entered the suit parcel sometimes in the year 1998; having purchased a portion of the suit parcel measuring approx. 4 ½ Acres from one James Ngwena, who is the son of the late Daniel Mwita. That upon the said purchase, he took possession of the said portion and has remained in occupation and use of the same to date. He maintained that the Defendant has never taken any steps to evict him from the said land. He now contends that as a result of the said possession and



occupation which has been for over the 12 years' statutory period, he has acquired rights and overriding interests over the said portion which are adverse to those of the registered owner and his estate.

19. The Defendant on the other hand maintained that the alleged sale transaction relied on by the Plaintiff is null and void for the reason that the said Penina Mbusiro did not have the requisite capacity to deal and/or sell the property of the deceased as alleged. It was his contention that the said property belongs to the beneficiaries of the deceased Daniel Mwita who are rightfully entitled to the same and solely depend on it. He further denied that the Plaintiff has ever been in occupation of the said land.
20. The Court of Appeal in *Chandrakant Devraj Shah v Alibhai Haji & another [2018] eKLR* in outlining the principles of adverse possession stated as follows: -

' In order for the appellant to succeed in his claim against the respondents, he was obligated to demonstrate that the acts relied upon to establish adverse possession were actual, visible, exclusive, hostile, open and notorious; that the respondents lost their right to the suit property through either dispossession, or discontinuation, of their possession of the same by virtue of proven acts or activities carried out on the suit property by the appellant which were inconsistent with the purpose for which the respondents intended to use the suit property for; that on the facts on the record, the appellant had used the suit property as of right *Nec VI Nec clam, nec Precario* (no force, no secrecy, no persuasion);

21. Possession and occupation are some of the key elements that must be demonstrated in a claim for adverse possession. The same must '*nec vi, nec clam, nec precario*' that is, the same must be peaceful, open, continuous and uninterrupted for a period of 12 years.
22. The Plaintiff testified that he has been in occupation and has extensively developed the portion of the suit parcel, this was further confirmed by the testimony of PW2 and PW3 who testified that the Plaintiff is their neighbour and has been living on the suit land since 1998. It was therefore his position that as a result of the said occupation and use of the suit parcel; he has acquired rights and overriding interests over the suit property which are adverse to the rights of the Defendant or the estate of the deceased Daniel Mwita. The said Daniel Mwita is the registered proprietor of the suit land herein and the same is evidence by Pexh 7. The Plaintiff also produced Pexh 8 (a) to (c) to prove his occupation claims. Despite the Defendant being given an opportunity to ventilate his case, he neither appeared for hearing nor produced any exhibits in support of his case.
23. From the pleadings and evidence in court; it is evident that the Plaintiff has been in open and exclusive possession and occupation of the suit land as supported by Pexh 1 – 8(c), which occupation has been in excess of the statutory period of 12 years, since the year 1998. The said possession and occupation has been adverse to the rights of the registered owner and his successors and its effect is to dispossess the owner thereof. Section 25(b) and 28(h) of the *Land Registration Act*, provides that ownership of a registered land is subject to among other claims, adverse possession.
24. In the case of *Wambugu vs Njuguna [1983] KLR 172* This Court cited with approval the case of *Wallis Cayton Bay Holiday Camp Ltd vs Shell Mex and BP Ltd [1975] QB 94* where it was held as follows: -

' The next question, therefore is what constitutes dispossession of the proprietor. Bramwell LJ in *Leigh vs Jack* (1879) 5 Ex D 264) said at 273, that to defeat a title by dispossessing the former owner 'acts must be done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.'
25. It is important to note that while the Defendant stated in his Replying Affidavit that the Plaintiff has never been in occupation of the suit land; he did not adduce any evidence in support of his



averments that he has been in actual possession and occupation of the suit land. Further, there was no demonstration of any efforts made or steps taken to evict the Plaintiff from the suit land or discontinue his possession and occupation.

26. In the absence of any proof by the Defendant; I find that the evidence and the testimony of PW1, PW2 and PW3 are a true reflection of the actual position on the ground and I hereby find that the Plaintiff has been in open, continuous and uninterrupted possession and occupation of the suit land. Thus, guided by the above decision, it is apparent that the Plaintiff's occupation and actions over the years have been inconsistent with the Defendant's and Interested Party's title and intended use over the suit land. consequently, the said actions have dispossessed the Defendant and Interested Party of the suit land and their rights thereto.
27. In view of the foregoing; I find that the Plaintiff has satisfactorily proved his claim on adverse possession to the required threshold. Having held that he has proved his claim on adverse possession; I find that there is need to restrain the Defendant, by way of permanent injunction from interfering with the Plaintiff's occupation, use and enjoyment of the suit land.

B. Whether the Applicants are entitled to the reliefs sought

28. From the foregoing, having held that the Plaintiff has proved his claim on adverse possession against the Defendant and the Interested Party on a balance of probabilities, I find that he is entitled to the reliefs sought in his Originating Summons dated September 18, 2012.

Conclusion

29. The upshot of the above is the Plaintiff has proved his claim on adverse possession to the required standard and I accordingly allow the Originating Summons dated September 18, 2012 as follows;
- I. A Declaration be and is hereby made that the Plaintiff has acquired by virtue of Adverse Possession a portion of LR No BUKIRA/ BWISABOKA/ 1217 measuring approx 4 ½ Acres, registered now in the name of CHARLES MBUSIRO who has since subdivided the same to LR NO BUKIRA BWISABOKA/2207, 2208 and 2209, having been in occupation of the said land since 1998.
 - II. Further, the said portion measuring approximately 4 ½ Acres be carved out from the suit property LR No BUKIRA/ BWISABOKA/ 2208 and the same be registered in the name of the Plaintiff. The Defendant is hereby directed to execute all the necessary documents for purposes of the said subdivision, transfer and registration in favor of the Plaintiff within 45 days from the date of this Judgment. In default, the Deputy Registrar is hereby directed to execute the said documents for purposes of the transfer and registration in favor of the Plaintiff.
 - III. An Order of Permanent Injunction be and is hereby issued restraining the Defendant and/ or the Interested Party from interfering with the Plaintiff's enjoyment of a portion measuring approximately 4 ½ Acres of LR No BUKIRA/ BWISABOKA/ 2208.
 - IV. Costs of the suit to be borne by the Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 7TH DAY OF FEBRUARY, 2023.

MOHAMED N. KULLOW

JUDGE

In presence of; -



Mr. Abisai for the Plaintiff
Nonappearance for the Defendant
Court Assistant - Tom Maurice/ Victor

