



Mburugu (Suing through Samwel Mwenda Mburugu as her guardian ad Litem) v Rutere & another (Environment & Land Case 12 of 2018) [2023] KEELC 420 (KLR) (1 February 2023) (Judgment)

Neutral citation: [2023] KEELC 420 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 12 OF 2018
CK NZILI, J
FEBRUARY 1, 2023**

BETWEEN

MARGARET MWARI MBURUGU (SUING THROUGH SAMWEL MWENDA MBURUGU AS HER GUARDIAN AD LITEM) PLAINTIFF

AND

REBECCA KINYA RUTERE 1ST DEFENDANT

JACOB MUNGATIA 2ND DEFENDANT

JUDGMENT

1. By an amended originating summons dated 21.2.2019 the plaintiff through her guardian and next friend Samuel Mwenda Mburugu has asked the court to answer the question whether she has acquired LR No. Ntirimiti Settlement Scheme/173 which is registered in the name of defendant by virtue of adverse possession.
2. The originating summons was accompanied by a supporting affidavit by Samuel Mwenda Mburugu sworn on the even date. Annexed thereto was a copy of the register, an extract showing a subsequent transfer and on developments photographs marked as SMM 1, 2, 3(a) (b) (c) (d). The plaintiff also filed a list of witness statements and list of documents dated 21.2.2019.
3. The plaintiff averred that the suit land was initially registered in the name of Joshua Micheni Mbaabu and upon his death, the 1st defendant took over and fraudulently transferred it to the 2nd defendant in 2017. The plaintiff stated that he has been on the land openly, continuously and peacefully and has undertaken extensive developments as shown by by erecting houses, rearing livestock, installing water and electricity.
4. The 1st defendant by a replying affidavit dated 22.5.2018 stated that she was co- legal representative of the late Joshua Mbaabu Micheni who passed on 17.1.2005 alongside the 2nd defendant, her son to



whom she transferred all her rights over the suit land, which was initially owned by the Government of Kenya through the Settlement Fund Trustees.

5. The 1st defendant averred that the 1st allottee was her father in-law, the late M'Mugambi M'Mbogori who in 1987 caused it to be registered under the name of his son who unfortunately defaulted into pay the requisite registration fees. Eventually, his late father in-law paid the money so that a restriction registered on 15.4.1993 could be removed and later took over occupation of the land, build a farm house and cattle sheds. The 1st defendant therefore denied that the plaintiff ever paid any money to the Settlement Fund Trustees so as to be allocated the land. The 1st defendant averred that the plaintiff as their relative was only allowed to continue cultivating and taking care of the father in -law's cattle after his husband, the late Joshua Mbaabu Micheni passed on in 1984.
6. The 1st defendant denied that the plaintiff made any new developments as alleged since at the time she was permitted to enter in 2003/04, the land was already developed by her late father in law. The replying affidavit was accompanied by a list of witness statements and documents dated 7.11.2018.
7. Samuel Mwenda Mburugu, the plaintiff testified as PW 1. He adopted his affidavit sworn on 21.2.2019 as his evidence in chief. As the guardian of the initial plaintiff, following court's leave on 3.12.2018, PW 1 said that Margaret Mwari had occupied the suit land since 1994 but was chased from it by the defendants in 2015. He produced a copy of the register and photographs showing development by the plaintiff, a copy of consent to act as guardian ad litem, a medical report dated 16.11.2018 and bundle of receipts among them one for the restoration of water supply to the land as P. Exh No's 1, 2(a) – (g), 3, 4, 5(a) – (d) respectively. He denied that the late Joshua Micheni ever lived in the land as well as the defendants. Further, PW1 said that all the neighbours knew that the land belonged to Margaret Mwari and not the defendants who did not know and could not tell where they lived.
8. In cross examination, PW 1 said that all the developments on the land were undertaken by Margaret Mwari who lived on the land until 2015 when she moved out due to sickness leaving all her belongings, including cattle and fruit trees therein, which the defendants have interfered with. PW 1 however admitted that Margaret Mwari had another homestead in Kithoka village. He denied that Margaret Mwari and the late Joshua Mbaabu were either partners or relatives who used to undertake farming activities on the suitland. Similarly, PW1 denied that Margaret Mwari used to offset school fees for the defendant's children out of the farm produce following the death of Joshua Micheni.
9. PW 1 told the court that Margaret Mwari together with him had also acquired some land from Settlement Fund Trustees but could not trace the documents since she had fallen sick with dementia. PW 1 testified that the defendant's entry into the land was by force and that they purported to evict them from the suit premises, after which he made a report to Subuiga police station only to establish that the defendants had already acquired a title deed for the land. They were therefore forced to start paying rent.
10. PW 2 was Geoffrey Mworira Mugambi, a neighbor of PW1. Relying on his witness statement dated 30.8.2018, he told the court that he knew the owner of the land as Margaret Mwari who had built, fenced and had been undertaking various developments on the land until 2017. He denied that the defendants were the owners of the land who he said were his sister in law and a nephew. PW 2 could not tell how Margaret entered into the land.
11. David Kiminya testified as PW 3. He associated his evidence with that of PW 1 & PW 2 save to add that Margaret left the land on her own volition. In his view, Margaret was an allottee of the land and was surprised that her name was not appearing in the copy of the register. PW 4 was Arthur Ndege Manyara, an elder brother to Margaret Mwari. He told the court that his sister acquired the suit land in 1984 and embarked on various permanent developments on the land.



12. PW 5, told the court that he was an assistant manager in the settlement scheme in 1973 in charge of plot allocations. In his view, Margaret Mwari was allocated plot no. 173, exclusively took vacant possession, erected a fence, made constructions of various buildings and eventually embarked on undertaking farming activities. PW 5 said that his role during the plot allocations entailed showing the allottees their plots on the ground as so long as one came with a chief's letter who was the chairman of the plot's allocation committee. PW 5 admitted that he was not the one who used to be in charge of entering details to the register or keeping records on ownership.
13. DW 1 adopted her witness statement and the replying affidavits as her evidence in chief. She explaining that her late husband Joshua Micheni through his father in law acquired the land from the settling committee and embarked on various development and at one time allowed the plaintiff to undertake some farming on a portion of it. Additionally, DW1 said that after her husband died, she took out letters of administration together with the 2nd defendant, her son for the estate of the deceased DW 1 produced a copy of a green card for Parcel No173, a death certificate, a certificate of confirmation of grant and a title deed as D. Exh No's 1-4 respectively.
14. Similarly, DW 1 admitted that the plaintiff was only allowed to utilize 2 acres of her land in 1987 for a fruit and cereals farm and was not allowed to erect any permanent structures. She clarified that all the old buildings and structures on the land belonged to her late father in law and not the plaintiff. DW1 denied ever licensing the plaintiff to utilize the land between 1984 – 2018. She testified that she reported the plaintiff to the area chief over three times to vacate the land but all in vain.
15. Further to that, DW 1 said that at the time her husband passed on he was the registered owner. She clarified that the plaintiff never made a protest during the succession proceedings, since she knew that she was a mere licensee of her late husband.
16. Lastly, DW 1 said that the plaintiff as a licensee, continued to pay her licensee fees after her husband's death to cater for the children's school fees. She also said that after the land was transferred to her after the succession proceedings, she took over the land following a notice to vacate it given to the plaintiff.
17. DW 2 was Charles Gikunda Mugambi, a brother in law to the 1st defendant. His evidence was that the land was initially being utilized by his late brother Joshua Micheni between 2003 and 2005 and thereafter, he eventually took over the land. In his view Margaret Mwari had only been authorized to use one acre or so of the land between 1990 – 2015 when she was ordered to vacate the land.
18. DW 2 said their late father summoned them in 2005 and gave him firm instructions that he takes over the use land but to allow Margaret to utilize one acre of it until the children of the late Joshua Micheni came of age. He said that he eventually added her an extra one acre of land to Margaret. DW 2 confirmed that he was the caretaker of the land for and on behalf of his late brother until his children came of age. DW 2 said that he knew PW 5. He denied that PW5 owned any land in the neighborhood as he alleged in his testimony. He clarified that all the old trees and buildings on the suit land belonged to his late brother and not the plaintiff. Further, DW 2 said that the plaintiff was only permitted to undertake farming activities and not to erect any permanent structures thereon. Additionally, DW2 said that he was the one occupying the land from 2015 after the plaintiff vacated it. DW 2 faulted the scene visit report to the extent that it indicated the developments on the land belonged to the plaintiff.
19. At the close of the case, parties filed written submissions dated 30.11.2022 and 13.12. 2022. The plaintiff submitted that she has been in continuous possession of the suit land with the full knowledge of the defendants from 1984 to 2018 and as confirmed by her witnesses and the scene visit report.
20. The plaintiff also submitted that her evidence had not been challenged especially given the 1st defendant disowned her own statements and affidavit leaving her evidence with no probative value. Further, the



- plaintiff submitted that DW 2 was evasive and his evidence should not be taken as credible. Reliance was placed on *Githu vs Ndeete (1984)* eKLR on the proposition that the change of ownership to the 2nd defendant did not affect the rights accrued by the plaintiff under Section 7, 13 & 38 of the Limitations of Action Act.
21. It was submitted that the plaintiff's evidence was consistent on occupation since 1984, as an active user and developer thereof to the exclusion of the defendants going by the photographs produced. Reliance was placed on *Stephen Mwangi Gatunge vs Edwin Onesmus Wanjau Muranga ELC No. 7 of 2021 (OS)*, *Meru Central Farmers' Cooperative Union vs Ruth Igoki Rintari & others (2019)* eKLR *Mark Muriuki Kirima vs Isabella Kathuni M'Mungania Meru HC ELC NO. 95 of (2014) OS*.
 22. On the other hand, the defendants submitted that the plaintiff failed to prove any alleged fraud, payment of settlement fund trustee fees or allotment letter and the basis of her ownership rights given that their evidence was clear that her entry into the land was permissive on condition that she would support the owner's family, which she continued to do by paying license fees. Reliance was placed on *Titus Kigoro Munyi vs Peter Mburu Kimani (2015)* eKLR on the ingredients of adverse possession.
 23. The defendants submitted it was not in contention that the plaintiff has been utilizing the land. However, what was in contest was under what terms, conditions, the acreage and the purpose of the utilization of the land. The defendants relying on *Halsbury's Laws of England 3rd Edition Vol. 24 page 252*, stated that the plaintiff had to demonstrate evidence of exclusive use of the five acres of the suit land. However, the evidence tendered showed that any farming activities undertaken by the plaintiff were together with the late Mbogori Micheni, his late son Joshua Micheni and thereafter, she continued doing so while supporting the defendant as a licensee.
 24. Therefore, the defendants submitted that the circumstances obtaining clearly showed that there was no intention to possess (*animus possidendi*) and corpus possessions (*effective exclusive control*) on the part of the plaintiff. Reliance was placed in *Mutuku Kasuve vs Mwaani Investment Ltd & 4 others (2004)* eKLR. Given the evidence tendered, the defendants urged the court to find that there was no dispossession of the suit land at any given point and neither was there discontinued possession since they continued utilizing the land hence there could be no adverse possession due to the permissible entry.
 25. Having gone through the pleadings, evidence tendered, written submissions and the law, the issues for the court's determination are:
 - i. If the plaintiff has proved the ingredients of adverse possession and fraud.
 - ii. If the plaintiff is entitled to the reliefs sought.
 - iii. What is the order as to costs?
 26. The plaintiff brought the suit suing through Samuel Mwenda Mburugu as guardian pursuant to the order issued on 31.1.2019 claiming the suit land by virtue of adverse possession. In the case of *Watuko vs Busolo & 3 others (Civil Appeal 129 of 2017) (2022) KECA 171 (KLR) 18th February (2022) (Judgment)* the court discussed the statutory underpinnings of adverse possession as Sections 7, 13 and 38 of the Limitations of Action Act. The court said that adverse possession occurs where an intruder in wrongful occupation makes a claim of ownership against a right of the true owner by alleging that due to clear and unequivocal evidence he has been in possession which is not permissible, open with the knowledge of the true owner and has excluded the true owner from the enjoyment of his property. The court went on to state that the onus was on the person claiming adverse possession to prove it as held in *Kimani Ruchine & others vs Swift Rutherford & Co. Ltd (1980) KLR 10* that he has used



the land as of right, with no force no secrecy, no permission, with no evasion in a continuous and in a non-interrupted manner.

27. The court held that the key test is that the owner of the land has been disposed or discontinued possession of the property. The court restated the case law of *Maweu vs Lin Ranching & Farming Coop Society Ltd* (1985) KLR 430 inter alia, that possession is a matter of fact depending on all the circumstances obtaining. In other words, the court underscored the principle that adverse possession kicks in where an intruder has stayed in the property publicly, but without permission of the registered owner.
28. Applying the foregoing law and principles both sides in this suit agree that the plaintiff has been occupying a portion of the suit land with effect from 1990 or thereabout until 2015. What is in contention is the nature, status, acreage and manner of occupation. In her pleadings the plaintiff indicated the entry into the suit land was in 1984 until the filing of the suit and where after she started developments therein which subsist to date on the suit land as per P. Exh No's 2 (a) – (g). At paragraph 14 of the supporting affidavit, the plaintiff denied that the defendants ever utilized the entire suit premises for the period she has been in possession. She also termed the transfer and registration of the land from the initial deceased party to the 2nd defendant as fraudulent and lacking basis in law.
29. The plaintiff in support of her claim produced P. Exh No.1, a copy of the register. The register shows that it was opened on 3.6.1986 in the name of Ntirimiti Settlement Scheme Settlement Fund Trustees. The 2nd entry indicates that the land became registered in the name of the late Joshua Mbaabu Micheni on 25.9.1987. Entry No. 3 is a caution by M'Mugambi M'Mbogori while entry No. 4 was made on 15.4.1993 which was a restriction by the Director of Land Adjudication. Thereafter entry No. 5 was the removal of the caution in 2017 and subsequently in entry No. 6, the property came into the name of the 1st defendant who eventually transferred the land to the 2nd defendant who acquired a title deed on 14.12.2017 as entry No. 8.
30. The plaintiff has termed the entries relating to the 1st & 2nd defendants as fraudulent, illegal and unprocedural since she was all along the occupier and bonafide owner of the land.
31. PW 5, testified to have been a onetime area manager under the superintendence of the chief, the then chairman for the plot's allocation committee. His evidence was that the plaintiff was the original allottee and not the defendants or their relatives. He was however unable to produce any minutes or register for the allottees. He said that his role did not include the entry of the details of the allottees or the keeping of the records thereof.
32. No evidence was called from the settlement fund trustees to lead credence to the plaintiff's witnesses' testimonies that the land was allocated to her in 1984 and hence she was an allottee in the first instance and secondly as an adverse possessor. Further, the plaintiff did not plead any specific particulars of fraud or lead tangible and credible evidence to that effect as held in *Arthi Highway Developers Ltd vs West End Butchery Limited & 6 others* (2015) eKLR to found fraud. The plaintiff never called any forensic examiner to produce any report to the effect that the entries in P. Exh No. (1) were forgeries, fraudulent, illegal and were perpetuated by the defendants. Additionally, the plaintiff did not call the land registrar who is the custodian of the land documents to back her claim that the entries should have reflected her name as the allottee and not the defendants.
33. The 1st defendant on the other hand in her replying affidavit gave vivid details on how the land was acquired initially by her late father in law together with her late husband and how the caution or restrictions appearing in the plaintiff's own exhibit number (1) came about.



34. DW 1 swore on oath and later testified in court the circumstances under which her late father in-law came to undertake the various buildings, establish a farm and started rearing cows in the suit land including allowing the plaintiff as a licensee on the land to manage his farm after his son passed on. The defendants in the replying affidavit and witness statements explained that the plaintiff was allowed to use only 2 acres since she had no means of subsistence and that later from 2003, she was permitted utilize the land on condition that she pays school fees through DW2 for the deceased children until they matured. The plaintiff did not file a supplementary affidavit to counter that evidence. No material was brought or pleaded to explain when and what cost the plaintiff incurred in undertaking all the developments on the suit land.
35. DW 2's evidence appeared more consistent, credible and believable unlike PW 1, PW 2, PW 3, PW 4 and PW 5 as to the nature and the circumstances in which the plaintiff came into the land. The plaintiff never challenged the assertion that she was a mere licensee with the understanding that she would be remitting the proceeds from the farm produce to the defendants through DW 2.
36. The plaintiff was unable to explain why until the filing of the suit, there was no complaint lodged with the Settlement Scheme Trustees that her name should have been indicated as the allottee and not the defendants. Similarly, there was no document produced by the plaintiff to the effect that she ever paid any monies to the allocating agency which is a condition precedent to the issuance of an allotment letter. There was also nothing produced to show that P. Exh 6 (a) – (d) were paid by the plaintiff not as a licensee but the true owner of the land.
37. It was not enough for the plaintiff to allege either adverse possession or ownership of the land without bringing tangible and cogent evidence in support of the two positions. The plaintiff could not have been an adverse possessor on public land in 1984 since at the time, the land was the public land. The plaintiff had to prove when time start running against the registered owner on account of adverse possession. None of the plaintiff's witnesses was able to state any other date apart from 1984.
38. Contrary to that assertion, the evidence from the defence is that the plaintiff and the deceased Joshua Micheni and his late father in-law used to co-exist on the land. So therefore, the concept of exclusive use and control against the true owner has not been proved by the plaintiff to the required standard in view of the evidence of DW 2 who unlike the PW 1, PW 2 and PW 3 was the one dealing with Margaret Mwari and the two deceased parties. His version on the permissive entry and occupation of the plaintiff appears more credible, consistent and reliable.
39. The plaintiff has denied any relationship with the defendants. PW 1 went to an extent of stating that he did not know the defendants. On the other hand, the DW 1 stated in her affidavits that the plaintiff was a distant cousin who if at all she had any claim, would have lodged a protest during the succession proceedings. In *Watuko* (supra) the court took note of some customary social obligations where Africans allow distant relatives to merely come to join them and live on their lands on permissible terms. In the case of *Samuel Kihamba vs Mary Mbaisi* (2015) eKLR the court had occasion to discuss a claim on adverse possession based on a permissive entry by a relative. The court cited with approval *Eunice Karimi Kibunja vs Mwirigi M'Ringer Kibunja* (2013) eKLR where the court adopted a limited or strict interpretation of the provisions of the *Limitation of Actions Act*. The court held that whether or not parties were related or that the land was ancestral or family, the prerequisites of adverse possession had to apply. Further, the court held that the occupation of land by consent or license did not accrue any rights of adverse possession on a claimant. Additionally, the court cited *Mwinyi Hamisi Ali vs AG & Philemon Mwaisaka Wanaka Civil Appeal No. 125 of 1997* where it was held that adverse possession could not apply where possession was by consent of a true owner and that in a court of law, sympathy took a second stand as the court was governed by statutes.



40. Moreover, the court said that a consent could be oral or written or by way of a license whether implied or written or through a valid tenancy.
41. The court held thus;

“the question of whether one is a licensee to water down a claimant’s case is a question of fact that need to be determined by the court. The claimant’s case would only be watered down if the license had not terminated or had terminated and the licensor interrupted the possession upon the determination of the license”.
42. The court went on to cite with approval John Baraza Ojiambo vs Veronica Auma Ojiambo & 3 others (2013) eKLR and Rodgers Mwambonje vs Douglas Mwambonje (2014) eKLR on whether a relative could claim adverse possession and held that given African customs, the issue of consent in such a situation was a rebuttable presumption on the claimant given under Africans customs, accommodating of their kin on long period was normal. In Mbui vs Maranya (1993) KLR 726, the court took judicial notice that people were so caring in the countryside and mindful of one another’s welfare through African milk of generosity and kindness for mutual survival including having a gentlemen’s agreement.
43. In this suit, the 1st defendant at paragraph 13 of the replying affidavit averred that the plaintiff was a daughter of Micheni, a great cousin and a close clansman who was allowed to take care of the livestock in 2003/2004 after the demise of her husband. At paragraph 19 thereof, the 1st defendant averred that the plaintiff was graciously allowed to cultivate the land but was now seeking to deprive the orphans of the deceased the land.
44. DW 1 in her witness statement dated 7.11.2018 vividly stated the manner in which the timber structure was put up by her husband in 1990 for the farm employees and how after 2003 she allowed the plaintiff to utilize the entire land as long as she continued paying a licensee fee to cater for her children’s school fees. This averments on oath were not specifically challenged or denied by PW 1 when he swore the supporting affidavit to the amended originating summons on 21.2.2019.
45. PW 1 in the said affidavit and before this court did not lay a basis of how long he had known the plaintiff and on what basis he would say that the plaintiff was not a relative of the defendants yet DW1 in her earlier affidavit had gone to an extent of demonstrating there was a family relationship.
46. Exh. No. 3 (a) was executed by Patrick Gitobu Mburugu and Mwirigi Alexander Mburugu two male adults described as the only sons of the plaintiff though they allowed the PW 1 to act as a guardian for their mother in this suit. Strangely they were never listed and or called as witnesses to this suit by the plaintiff, yet they would have been the key witnesses to attest to not only the relationship with the defendants but also give out the life history of their mother in relation to the suit land.
47. In cross examination, PW 1 said that he had no documents on the allocation of the land to the plaintiff. He also said that the defendants were taking advantage of her sickness to disentitle her of the land.
48. In my considered view, the most appropriate witnesses would have been the children of the plaintiff unlike PW 1, 2, 3 & 4 to shed light on the circumstance the plaintiff came into the suit land. See *Bukenya & others vs Uganda* (1972) E. A 549. The failure to call the said children makes this court draw an inference that they would have given adverse evidence against the plaintiff’s claim as regards family ties and or consensual or permissive entry to the suit premises by the plaintiff. See *Teresia Kamene Kingoo vs Edward Mwangi* (2019) eKLR.



49. Looking at the totality of evidence before me I come to the irresistible conclusion that the plaintiff has failed to prove the ingredients of adverse possession and ownership. The upshot is the suit is dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 1ST DAY OF FEBRUARY, 2023

In presence of:

C/A: Kananu

Mukaburu for plaintiff

Kaumbi for defendant

HON. C.K. NZILI

ELC JUDGE

