



**Kananu v Arujah & 4 others (Environment & Land Case
16 of 2018) [2023] KEELC 17363 (KLR) (10 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17363 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 16 OF 2018**

CK NZILI, J

MAY 10, 2023

BETWEEN

JANET KANANU PLAINTIFF

AND

JOHN THURANIRA ARUJAH 1ST DEFENDANT

SHEILA GACHERI THURANIRA 2ND DEFENDANT

DUNCAN KITHINJI THURANIRA 3RD DEFENDANT

MUREITHI ARUJAH 4TH DEFENDANT

MARTIN KINOTI ARUJAH 5TH DEFENDANT

JUDGMENT

1. The plaintiff took out an originating summons dated 8.5.2018 claiming to be entitled to a portion measuring about $\frac{1}{4}$ an acre of L.R. No Nyaki/Mulathankari/216 registered in the names of the defendants. She sought for an order that the same be excised and transferred to her. The originating summons was supported by an affidavit sworn by Janet Kananu dated 8.5.2018, she annexed thereto a certificate of official search, death certificate for her husband and photographs showing the extent of her development on the suit land.
2. By a replying affidavit sworn on 24.7.2018 the 1st defendant on behalf of the 2nd and 4th respondents opposed the originating summons denying that the plaintiff was in occupation of the alleged portion; stating that she was on LR No. Nyaki/Mulathankari/71 which shares a boundary with the suit land where her developments are situated. That before 2015, a wrong occupation on LR No. Nyaki/Mulathankari/96, 216 and 71 occurred when the plaintiff unknowingly extended her cultivation into the suit land. That the 1st defendant had also unknowingly extended his cultivation into LR No. Nyaki/Mulathankari No.76. That a joint survey exercise was undertaken to determine the exact boundaries



- of the three respective parcels of land in the presence of the area local provincial administrators and relatives.
3. That following the exercises, parties restricted their occupation to their respective parcels of land. However, the plaintiff still lives on L.R No. 71 and cultivates on L.R No. 796 belonging to her sister and father-in-law respectively but has with effect from May 2018 staked a claim on it despite the resolution and warning from the Assistant County Commissioner. The defence was accompanied by unfiled witnesses' statements and document dated 24.7.2018. Following pre-trial, parties filed their paginated bundle dated 16.3.2022 and 4.4.2022.
 4. At the trial, the plaintiff testified as PW 1. She adopted her supporting affidavit sworn on 8.5.2018 as her evidence in chief PW 1 went on to produce an official search for LR No. Nyaki/Mulathankari/216 as P. Exh No. (1), a death certificate for the late Phineas Maingi as P. Exh No. (2) and photographs showing her developments as P. Exh No. (3). Regarding the replying affidavit, she said that the allegations therein were not true. She asked the court to allow her to retain the land where her husband and a child were buried.
 5. Cross-examined by the defendants, PW 1 told the court that she has been on the land since her marriage in 1986 where her house is situated and which parcel of land has no visible marked boundaries with LR No's 71 and 96. She said that her husband used to live on the land before they got married and erected a permanent home with the knowledge, approval and consent of their parents.
 6. PW 1 told the court that the 1st defendant was out to throw her out of her land since she has a grudge with her. She admitted that a land surveyor visited the land in 2015 and established the encroachment on the suit land and was told to vacate the land but declined.
 7. The 1st defendant testified as DW 1. He adopted his replying affidavit sworn on 24.7.2018 and witness statement dated 4.4.2022 as his evidence-in-chief.
 8. Further DW 1 produced a cadastral map as D. Exh No. (1), his evidence was that the plaintiff has not been on the land for 12 years as alleged but lives on LR No. 71 which are separate but adjacent parcels of land.
 9. At the close of the defence, parties were directed to file and exchange written submissions by 14.3.2023. None were filed by the plaintiff. In their submissions dated 9.5.2023, the 1st-4th defendants submitted that the ingredients of adverse possession have not been met since the land she was actually occupying is not L.R No. 216 but L.R No. 71 and 96. Reliance was placed on *Gabriel Mbui vs Mukindia Maranya* (1993) eKLR on the proposition that the character of the adverse possession has to be established since mere possession does not amount to adverse possession without a clear intention to hold adversely.
 10. The 1st-4th defendants further submitted that the burden to prove where the occupation was on the plaintiff and that other than the photographs whose authenticity and the date they were taken were absent.
 11. Additionally, the 1st – 4th defendants submitted that the plaintiff frustrated efforts to undertake a joint scene visit and furnish a report before the court and who later on 11.11.2021 expressly stated that she was not interested in the scene visit. Further, the 1st – 4th defendants submitted that other chances to conduct the scene visit were curtailed by the plaintiff.
 12. As to the evidence produced to oppose the originating summons, the 1st – 4th defendants submitted that D. Exh No (1) was produced and a joint survey was conducted in the presence of each of the parties showing the mix-up.



13. Therefore the 1st – 4th defendants submitted that the evidence tendered did not sustain the plaintiff's suit be dismissed and they are enabled to enjoy their proprietary rights as provided under article 40 of *the Constitution*.
14. The court has considered the pleadings, evidence tendered the written submissions and the law. The single issue for determination in this matter is whether the plaintiff has proved that she holds ¼ of an acre of LR No. 216 by virtue of adverse possession.
15. In *Gabriel Mbuvi vs Maranya* (supra), the court held that adverse possession was the non-permissive physical control over the land coupled with the intention of doing so by a stranger having actual occupation solely on his own or on behalf of some other person and to the exclusion of all others including the true owner out of possession of the land. The court said that possession must not be clandestine, must ripen into a prescriptive title only if it was juridical and must not be by stealth, violence or supplication.
16. Further, the court said that it must be open, peaceful as of right and uninterrupted either through physical entry institution of legal proceedings and by acknowledgment by the person in possession to the rightful owner. The court further said that the true owner must be aware that he has been ousted.
17. Lastly the court held that adverse character must be proved with clear facts and cannot be assumed since mere exclusive possession no matter how long did not count as adverse possess.
18. In regard adverse possession by close relatives, in the case of *Rodgers Mwamboje vs Douglas Mwamboje* (2014) eKLR, the issue was whether a person staying on his brother's land for more than 12 years could claim adversity. The court determined that given African customs, the issue of consent in such a situation was a rebuttable presumption on the claimant. Citing *Mbui vs Maranya* (supra) the court said it could not overlook African customs where relatives allow each other to stay on the land of the other as long as it was necessary and that the burden of proving that the consent or permission was not given will be on the person claiming the land of a relative.
19. In *Samuel Kihamba vs Mary Mbaisi* (2015) eKLR, where applying the foregoing principles can a sister-in-law who is the plaintiff herein establish that what she occupies qualifies for adversity against her brother-in-law and nephews who are the sons of the 1st defendant.
20. There is no dispute that the plaintiff entered into the land by virtue of marriage to the late Phineas Maingi who had been shown where to erect and to cultivate by his late father-in-law. There is no evidence that the initial owner of the land was the said father-in-law.
21. According to her, entry was in 1990 upon marriage and was adverse not permissive D. Exh No. (1) shows that the land came under the registration of the 1st defendant on 18.6.2013.
22. Before this, there is no evidence that the father-in-law was the previous owner or who else was the true owner for the time to start running against him in 1990 for there to be tacking.
23. No evidence was tendered that the 1st defendant and by extension was aware that the land occupied by the plaintiff with effect from 1990 was his or theirs. The plaintiff did not state if and when time for adversity started to run with a clear intention to own to the exclusion of others including her relatives among them the defendants,
24. No manifestation of adverse possession was demonstrated before this court except the photographs whose date of processing, a certificate of processing and for the exact parcel of land are missing. If the plaintiff is also advancing adversity out of the time her husband also lived on the land and settled them therein, the plaintiff was not suing as a legal representative of the estate of her deceased husband.



Even if it were so, again, other ingredients of adverse possession will come into play such as open, uninterrupted, notorious and to the exclusion of the true owner.

25. The 1st defendant is said to have transferred the land to the 2nd – 5th defendants on 18.6.2013. Again, there are no copies of the record or search. If then there was adverse to be possession against them by the time the suit was filed in 2018, 12 years had also not lapsed.
26. In paragraph 7 of the supporting affidavit, the plaintiff averred that strangers came to her land seeking to ascertain the boundaries. The 1st defendant admits that it was out of this report neither party which now has produced that the encroachment was established and each of the parties told to stay within their parcels of land.
27. To my mind, the inference is that the plaintiff was not aware that she was occupying someone's else land. Without that knowledge, one cannot allege adverse possession since there was no clear intention to displace and or dispossess the true owner. The true owner has also said that both the plaintiff and himself had unknowingly extended their cultivation to other parcels of the land. An adverse possessor must also establish the exact locality, size and nature of the land occupied.
28. In this suit, the plaintiff was unable to bring a land surveyor report with a registry index map report to show the details, extent and nature of her encroachment to LR. No.216.
29. In the case of *Chigamba and 2 others vs Noormohamed and 8 others* Civil Appeal No. 126 of 2019 (2022) KECA 535 (KLR) 6th May 2022 Judgment, the court said that the nature of complete and physical possession has to be demonstrated without the consent of the true owner through a verifiable physical survey of the land. The court emphasized that the portions must be identifiable in terms of location, size and the exclusivity of the land claimed by an applicant. As to subdivisions, the court cited with approval *Mwangi Gitbu vs Livingstone Ndeete* (1980) KLR, that the newly registered owners held the land in trust for the party having an overriding interest over the suit land,
30. In *Josinter Atieno Ouma & another vs Joshua O. Omiti & another* (2018) eKLR, the plaintiffs were sisters-in-law whereas the defendants were registered as owners upon the death of their father. The plaintiffs failed to prove adverse possession of one of the parcels. They had merely stated that their homes were on Plot No.906 and cultivated on land Parcel No.844 with no buildings thereon. The court cited with approval *Wambugu vs Njuguna* (1998) KLR 173 that the inconsistent with the enjoyment of soil by the true owner has to be demonstrated and at the best way to assess proof of adverse possession would be whether the title holder has been dispossessed or has discontinued his possession for 12 years and not whether or not the claimant had proved that he has been in possession for the 12 years. Looking at the plaintiff's sole evidence, I take the view that she has fallen short of proving any of the ingredients of adverse possession as laid out in the cited case law and sections 7 & 38 of the *Limitation of Actions Act* cap 22.
31. The upshot is that the suit fails but in order for the end of justice to be met for the parties I direct that the land registrar visits the suit parcels of land to establish the nature of encroachment and to fix the boundaries in line with the *Land Registration Act*.
32. There will be no orders as to costs this being a family dispute.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

THIS 10TH DAY OF MAY 2023

In presence of



C.A John Paul

Muthomi for plaintiff

Kariuki for defendant

HON. C.K. NZILI

ELC JUDGE

