



**Murunga v Mwangi t/a Lawrence Commercial Links (Environment & Land
Case E008 of 2021) [2023] KEELC 18024 (KLR) (8 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18024 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E008 OF 2021**

LA OMOLLO, J

JUNE 8, 2023

BETWEEN

OMUSUNGU REUBEN MURUNGA PLAINTIFF

AND

**LAWRENCE MAINA MWANGI T/A LAWRENCE COMMERCIAL
LINKS DEFENDANT**

JUDGMENT

Introduction

1. The Plaintiff instituted this suit vide an Originating Summons dated 12th February, 2021 which were subsequently amended on 25th January, 2022.
2. He claims ownership of all that parcel of land known as Dundori/Lanet Block 2/129 (Tabuga) Plot No. 3 measuring 0.0450 Ha (Herein after referred to as the suit property) and seeks the following orders:-
 - a. That there be a declaration that the Plaintiff has acquired by adverse possession an absolute title to all that parcel of land known as Dundori/Lanet Block 2/129 (Tabuga) Plot No. 3 measuring 0.0450 Ha
 - b. That the court issues an order that the Plaintiff be registered as the registered proprietor of all that parcel of land known as Dundori/Lanet Block 2/129 (tabuga) Plot No. 3 measuring 0.0450 Ha in place of the Defendant
 - c. That costs of this suit be paid by the Defendant.
3. The Defendant filed his Replying Affidavit sworn on 8th November, 2021 in response to the amended originating summons. He deposes that the Plaintiff's claim is incompetent and unmerited and ought to be dismissed with costs.



4. He further states that he is the registered owner of parcel of land known as Dundori/Lanet Block 2/1823 (Tabuga) by virtue of a title deed issued to him on 17th September, 2018.
5. He states that Dundori/Lanet Block 2/1823 (Tabuga) forms one of the subdivisions of the suit land i.e. Dundori/Lanet Block 2/129 (Tabuga) Plot No. 3, measuring 1.18 Ha (Parent Parcel).
6. He states that he purchased the parent parcel and procured its registration in the year 2007 adding that he obtained the necessary approvals and subdivided the parent parcel into 26 plots one of which is the suit property.
7. He also states that he has been in possession of the property since 2018 until when he sold it the same year but that the transfer process was yet to be finalized.
8. He states that he surrendered the original title deed and other transfer documents to the purchaser.
9. The Defendant further states that up until the time of sale, he used to lease the suit property and its subdivisions to local farmers.
10. He states that the Plaintiff's allegation of being an adverse possessor cannot hold since the only persons who have in possession of the suit property have been himself, his licensees and the purchaser.
11. He states that the suit property was registered in his name on 17th September, 2018 and that for a claim of adverse possession by the Defendant to be sustained, the Plaintiff must prove that he has been in possession for an uninterrupted period of 12 years from the said date.
12. In conclusion, he states that the Plaintiff failed to satisfy the basic criteria for one to be declared to have acquired interest in land by way of adverse possession.

Plaintiff's Evidence.

13. At the hearing, Omusungu Reuben Murunga testified as PW1.
14. He stated that he is a retiree of the Kenya Defence Forces and that he bought land parcel Dundori/Lanet Block 2/129 (Tabuga) plot No. 3 (the suit land) in September, 1999 from the Defendant herein.
15. It is his testimony that in the course of looking for land to buy, he met the agent being the Defendant and the owner of the suit property being on Samuel Kimani Mungai.
16. He further testified that he agreed with the Defendant that the purchase price would be Kshs. 65,000 and he made an initial deposit of Kshs. 30,000.
17. It is his testimony that the agreement was drafted by Wambui Ndungu Advocate and he paid Kshs. 2,000 for drafting of the said agreement. He produced a copy of the sale agreement dated 3rd September, 1999 which was marked as Exhibit P1.
18. He went on to testify that he paid the purchase price in two installments. He produced a copy of the said receipts which was marked as Exhibit P2 (a) & 2 (b).
19. It is also his evidence that he paid Kshs. 2,000 for the sale agreement. He produced a copy of the receipt dated 3rd September, 1999 which was marked as Exhibit P2 (c).
20. He further testified that he made a payment of Kshs. 5,000 for the title deed and produced a copy of the receipt dated 20th November, 1999 which was marked as Exhibit P2 (d).



21. PW1's testimony is that after the above process, he was unable to have the suit property transferred in his name since he could not locate the Defendant. He testified that he has been in occupation of the property since the year 1999.
22. He further testified that on 15th February, 2021 he obtained a green card which shows that the suit property was in the Defendant's name. He produced a copy of the green card which was marked as Exhibit P3.
23. It was his testimony that paragraph 6 of the agreement provides that the vendor undertakes to do all that is required to have the said property transferred to him after completion of payment.
24. PW1 urged this court to order the Land Registrar transfer the suit property from the Defendant to himself. He added that since the year 1999 no one had questioned or disturbed his occupation of the suit land.
25. It was PW1's testimony that he had since sold the suit property to Francis Mbugua Kamau who is in occupation and added that he did not have copy of the said agreement.
26. In conclusion he produced a copy of his ID which was marked as Exhibit P4.
27. On cross-examination, PW1 confirmed that he purchased the suit property from the Defendant and took possession. He further confirmed that his authority to take possession arose from the sale agreement adding that he had permission from the Defendant to take possession.
28. It was his testimony that according to the agreement he was purchasing Plot No. 3 measuring 0.0445 Ha. He confirmed that at the time of purchase he did not see the title deed for Plot No. 3.
29. He also confirmed that at the time of purchase, he had not seen a title deed for the suit property and admitted that the suit property was excised from a block whose title he had not seen. When referred to Exhibit P3, he confirmed that the size of the suit parcel is 0.036 Ha and that the land is described as Dundori/Lanet Block 2/1823 (Tabuga).0
30. PW1 urged this court to grant him an order in respect of plot No. 3 measuring 0.0450 Ha. He also admits to not having a copy of the green card for the said plot. He also confirmed that he did not see a title in the name of the Defendant or Samuel Mwangi whom, he stated, he had sued erroneously.
31. He confirmed that he took possession after completion of payment after which he cultivated from the year 1999 to 2012. He admits that he did not have any proof of cultivation neither did he fence the suit land. He confirms that it was instead fenced by his neighbor.
32. PW1 also confirmed that at the time of purchase, the entire block had been fenced but Plot No. 3 was not fenced. He also stated that he could not remember if plot No. 3 had beacons.
33. He added that in 2012 he sold the suit property to Francis Mbugua Kamau and that he is yet to transfer the said plot to him. He further confirms that Francis is now in possession and has beneficial interest.
34. He confirmed that both himself and Francis have agreements but no titles for the suit property. He further confirmed that his parcel is no longer plot 3 and confirms that his pleadings are in respect of plot 3.
35. He also confirmed that plot No. 3 is now plot No. 1823 and that he had this information before instituting the instant suit. He added that plot no. 3 is currently owned by him and that he is yet to effect transfer to Francis.



36. On re examination, he stated that he had gone with the Defendant to the suit property and that the Defendant showed him the demarcation and boundaries to the suit parcel.
37. That marked the close of the Plaintiff's case.
38. The Defendant opted not to call any witness and closed his case.

Issues for Determination.

39. The Plaintiff filed his submissions dated 30th November, 2022.
40. In his submissions, he gives a brief background of the case and submits that his case is not rebutted and the court ought to grant him the orders as prayed.
41. The Plaintiff relies on the judicial decision in *Leonard Ketere v Kipkoech arap Talaam and Kibuchii Talaam* and asks that this court pays attention to paragraph 15 of the said decision.
42. The Plaintiff also relies on the decision in *Stephen Mwangi Gatunge v Edwin Onesmus Wanjau (Suing in her capacity as the administrator of the Estate of Kamingi Wariera (Deceased) and of Mwangi Kimmingi (deceased))*.
43. The Plaintiff also relies on Section 107 of the *Evidence Act*.
44. The Defendant filed his submissions on 20th January, 2023. He gave a brief summary of the case and identified the following issues for determination:
 - a. Whether the suit herein is fatally defective.
 - b. Whether all the necessary ingredients of a successful claim for adverse possession have been proved.
 - c. Who should bear the costs of the suit?
45. On the first issue, the Defendant relies on Order 37 Rule 7 of the *Civil Procedure Rules* and the decision in *Joseph Ruboni Njoka v Registrar of Titles & 3 Others* [2008] eKLR. He submits that the Plaintiff failed to file an affidavit in support of his originating summons as required by law. He submits that the same renders the originating summons fatally defective. He urges this court to find that the suit is null and void and dismiss it with costs.
46. He also submits that the Plaintiff referred to different names and acreage of the properties confirming that the two properties are different and distinct.
47. The Defendant relies on the decision in *Independent Electoral and Boundaries Commission & Another V Stephen Mutinda Mule & 3 Others* [2014] eKLR. He submits that the Plaintiff is bound by his pleadings and that despite his testimony, without proof that the suit parcel is no longer Plot No.3 he insists that he wanted orders in respect to Plot No. 3.
48. He further urges the court to find that the Plaintiff's failure to annex or produce a certified copy of the title to the suit land is fatal to his case and dismiss it with costs.
49. On the second issue for determination, the Defendant relies on the Court of Appeal decision in *Samuel Kihamba V Mary Mbaisi* [2015] eKLR on the ingredients of a successful claim for adverse possession and Section 107 (1) of the *Evidence Act*. He submits that from the plaintiff's cross examination, the plaintiff confirmed that he did not have evidence of cultivation of the suit land from 1999 to 2012 and also confirmed that he was not in possession of the property.



50. He also submits that by the Plaintiff's admitting that he has not been in possession of the suit land since 2012 but that it is in the hands of a third party, his claim of adverse possession fails. He relied on Section 13(1) as read with section 7 of the *Limitation of Actions Act*.
51. The Defendant also relied on the Court of Appeal decision of *Wilfred Kegonye Babu v Henry Mose Onuko* [2019] eKLR and submits that the Plaintiff did not plead adverse possession as an alternative to purchaser's interest. Instead, he pleaded adverse possession on the strength of and arising out of purchaser's interest. He adds that the Plaintiff did not plead or allege that the agreement was repudiated or terminated but relied on it.
52. On the final issue, the Defendant relied on Section 27 of the *Civil Procedure Act* and submits that the court dismisses the instant suit with costs to the Defendants.

Analysis And Determination.

53. In making my determination, I have taken into consideration the pleadings in this matter, the testimony of the plaintiff, the documents produced as evidence in this suit, the rival submissions filed by both parties and the judicial decisions cited.
54. It is my considered view that the issues that arise for determination are:
 - a. Whether the Originating Summons are fatally defective.
 - b. Whether the plaintiff has proved his case on a balance of probabilities.
 - c. Which party should bear the costs of the suit?

A. Whether the Originating Summons are fatally defective.

55. Order 37 Rule 7 of the Civil Procedure Rules provides as follows: -
 1. An application under section 38 of the *Limitation of Actions Act* shall be made by originating summons.
 2. The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.
 3. The court shall direct on whom and in what manner the summons shall be served.
56. Order 37 Rule 18 provides as follows:

“At the time of directions, if the parties do not agree to the correctness and sufficiency of the facts set forth in the summons and affidavit, the judge may order the summons to be supported by such further evidence as he may deem necessary, and may give such directions as he may think just for the trial of any issues arising thereupon, and may make any amendments necessary to make the summons accord with existing facts, and to raise the matters in issue between the parties.”
57. My view is that the court has discretion under order 37 Rule 18 to remedy non-compliance with order 37 Rule 7 (2). To that extent, failure to comply with 37 Rule 7 (2) is not fatal. Further Article 159 (2) (d) of the *Constitution* of Kenya, 2010 and Section 19 of the *Environment and Land Court Act* reminds us of the requirement to dispense substantive justice.



58. Directions were taken that this matter proceeds by way of viva voce evidence and further that the originating summons would be deemed as the plaint and the replying affidavit deemed as the statement of defence.
59. Under Order Rule 19 thereof the court has power to order that the proceedings do continue as if the case had been begun by Plaintiff. It provides as follows;
- “if it appears to the court at any stage of the proceeding that the proceedings should for any reason be continued as if the cause had been begun by filing a Plaintiff.”
60. In view of the foregoing I find that failure, in this instance, not to have filed a supporting affidavit was not fatal.

B. Whether the plaintiff has proved his case on a balance of probabilities.

61. Section 107 of the [evidence Act](#) provides as follows:
- i. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - ii. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
62. In civil cases, a Plaintiff has to prove his/her case on a balance of probabilities. In this particular case, the Plaintiff seeks a declaration that he has acquired the suit parcel by adverse possession and further that upon such declaration he be registered as the proprietor of the suit parcel.
63. The law is that where a person claims to have become entitled by adverse possession to land which has been registered, he is allowed by virtue of the provisions of section 38 of the [Limitation of Actions Act](#) to apply to the High Court (ELC) for an order that he be registered as the proprietor of that land.
64. Adverse possession is a method of gaining legal title to real property by actual, open, hostile and continuous possession of it to the exclusion of its true owner for the period prescribed by law- which is 12 years according to the [Limitation of Actions Act](#), Cap 22 of the Laws of Kenya.
65. [Halsbury's Laws of England](#), 4th Edition Volume 28, paragraph 768 defines adverse possession and states thus;
- “No right to recover land accrues unless the land is in the possession of some person in whose favour the period of limitation can run. What constitutes such possession is a question of fact and degree. Time begins to run when the true owner ceases to be in possession of his land.”
66. An analysis of the foregoing is that the following ingredients essential for a claim of adverse possession to succeed:
- i. Exclusive use and possession of the property.
 - ii. Open and notorious use of the property.
 - iii. Nonpermissive, hostile or adverse use of the property.
 - iv. Continuous/uninterrupted use of the property for a period of at least 12 years



67. The question that follows is whether the Plaintiff has tendered evidence that supports his claim of adverse possession.
68. The Plaintiff's evidence is that he bought Dundori/Lanet Block 2/129 (Tabuga) Plot No.3 in the year September 1999. It is his further evidence that he sold the parcel to Francis Mbugua Kamau in the year 2012. The Plaintiff confirms that he has no evidence of use of the suit parcel from the year 1999 to the year 2012 and also does not have evidence of sale to the said Francis Mbugua Kamau.
69. The evidence produce in support of the Plaintiff's claim are is a sale agreement for Dundori/Lanet Block 2/129 (Tabuga) Plot No.3 measuring 0.0450 Ha, receipts for payment for the said parcel, a copy of green card for a parcel of land described as Dundori/Lanet Block 2/129 (Tabuga) 1823 measuring 0.036 Ha. No explanation has been offered for this variation and/ or the nexus between these two parcels.
70. It is evident that there is a variance in the Plaintiff's pleadings, documents produced in evidence and his testimony. The variance relates to:
- a. Description of the suit parcel as contained in the sale agreement, pleadings and green card.
 - b. The size of the suit parcel.
71. Also important in this analysis is that the Plaintiff is not in possession of the suit parcel. He stated in his evidence in chief that he sold the suit parcel. Possession ranks extremely high in the list of ingredients essential for a claim of adverse possession.
72. The Plaintiff has also failed to annex a copy of the title document to the suit parcel. The green card produced is not certified and is for a parcel of land known as Dundori/Lanet Block 2/129 (Tabuga) 1823 which shows that a title to the said parcel was issued to one Lawrence Maina Mwangi on 17th September, 2018.
73. The Plaintiff has also failed to prove Open and notorious use of the property, Nonpermissive, hostile or adverse use of the property and Continuous/uninterrupted use of the property for a period of at least 12 years.
74. In *Peter Okoth v Ambrose Ochido andajo & Benedict Odhiambo Oketch* [2021] eKLR the Learned Judge cited with approval the Court of Appeal decisions of *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another* [2015] eKLR wherein the court sought to define what constitutes adverse possession. The court stated as follows: -

“From all these provisions, what amounts to adverse possession” First, the parcel of land must be registered in the name of a person other than the Applicant, the Applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.

This concept of adverse possession has been the subject of many discourses and decisions of this Court. Suffice to mention but two, *Kasuve v Mwaani Investments Limited & 4 others* [2004] 1KLR 184 and *Wanje v saikwa (2) (supra)*. In the first decision, the court was emphatic that in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of twelve years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition. In the Wanje case, the



Court went further and took the view that in order to acquire by statute of limitations a 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 and that what constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use. Further, the court opined that a person who occupies another's persons land with that person's consent, cannot be said to be in adverse possession as in reality he has not dispossessed the owner of the land and the possession is not illegal."

75. Ultimately, the plaintiff has failed to discharge his burden of proof and his claim for adverse possession cannot succeed.

C. Which party should bear the costs of the suit?

76. The general rule is that costs shall follow the event. This is in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

Disposition

77. The upshot of the foregoing is that the Plaintiff's suit is dismissed with costs to the Defendant.
78. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 8TH DAY OF JUNE, 2023.

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Bosire for the Plaintiff.

Mr. Gatonye for the Defendant.

