



**Mogusu v Mbogo & another (Environment & Land Case
99 of 2020) [2023] KEELC 18786 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18786 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 99 OF 2020
EK WABWOTO, J
JULY 6, 2023**

BETWEEN

NEHEMIAH OCHIENG MOGUSU PLAINTIFF

AND

MWIHAKI MBOGO 1ST DEFENDANT

SEVENTHDAY ADVENTIST CHURCH (EA) LIMITED 2ND DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit vide a plaint dated 31st May 2020 seeking the following reliefs:
 - a. A declaration do issue that the Defendant is not entitled to enter and/or use all that land premises known as Title No. Dagoretti/Riruta/S. 954, he suit property herein.
 - b. An injunction to restrain the Defendant by herself, her servants and/or agents or otherwise howsoever from entering, remaining, leasing, hiring, pledging, selling and/or dealing with and/or interfering with the Plaintiff's quiet possession of all that land known as Title No. Dagoretti/Riruta/S. 954; the suit property herein.
 - c. Damages or mesne profits from the date of wrongful entry pleaded hereinabove until vacant possession is delivered up, such mesne profits to be assessed by the court.
 - d. An order for vacant possession of the suit premises to the Plaintiff in default whereof an order for eviction of the Defendant shall issue.
 - e. Costs of the suit.



- f. Interest on (e) above.
 - g. Any other relief that the Honourable Court may deem just and expedient in the circumstances.
2. The 1st Defendant contested the suit and filed a Statement of defence and Counter Claim dated 22nd April 2021. She prayed for dismissal of the Plaintiff's suit and in the counterclaim sought several orders against Nehemiah Mogusu as the 1st Defendant and the Seventh Day Adventist Church (EA) Limited as the 2nd Defendant. The following orders were sought in her counterclaim dated 22nd April 2021;
 - a. A declaration that the Plaintiff (Mwihaki Mbogo) has acquired title to land parcel Dagoretti/Riruta/S. 954 by way of adverse possession and she is entitled to be registered as proprietor and a title to be issued to the Plaintiff.
 - b. An order of injunction permanently restraining the 1st Defendant, or his agents from interfering with the Plaintiff's quiet possession of the suit premises.
 - c. An order for rectification of the Land Register.
 - d. Cost of the suit and counterclaim.
 - e. Any other or further relief.
3. The second Defendant was joined to these proceedings by way of the Counter Claim dated 22nd April 2021 and upon service filed its Statement of Defence dated 30th July 2021 seeking for dismissal of the 1st Defendant's counterclaim and supporting the Plaintiff's case in the main suit.

The Plaintiff's case in the main suit.

4. The Plaintiff's case in the main suit is contained in his plaint dated 31st May 2020. The Plaintiff averred that he is the registered owner of the title No. Dagoretti/Riruta/S. 954 measuring approximately 0.032 Hectares situate at Satellite Estate, Nairobi County. He also averred that the 1st Defendant on diverse dates of 2014 wrongfully entered into her property and has been collecting rent from persons residing thereon. The Plaintiff also pleaded that due to the said actions by the 1st Defendant he has been deprived of the use and enjoyment of the suit property and has thereby suffered loss and damage. Particulars of the loss and damage were particularized at paragraph 7 of the plaint as follows:
 - a. Loss of use of the suit property since 2014 to date.
 - b. Expenses and time taken in resolving this dispute since the year 2015.
 - c. Restraint on the access to the suit property.
 - d. Mental anguish and stress.
5. During trial the Plaintiff Nehemiah Ochieng Mogusu testified as PW1 and the sole Plaintiff's witness. He adopted and relied on his witness statement dated 31st May 2020 together with list and bundle of documents on record as his evidence in chief.
6. It was his testimony that he purchased the suit property from the 2nd defendant in 2014 for a consideration of KShs 1,800,000/- after a valuation of the property and payment of stamp duty and was issued with a certificate of lease on 28th May 2014. He also told the court that the 1st Defendant wrongfully entered the suit property in 2014 and started to collect rent from persons residing in the said



property denying the Plaintiff peaceful occupation and enjoyment of the same. He further stated that he lodged several complaints to police officers including the DCIO and area chief but the 1st Defendant never showed up when summoned thus frustrating his efforts in amicably resolving the dispute.

7. It was his further testimony that the 1st Defendant is still trespassing on the property despite several requests and demands to vacate the same. In response to the 1st Defendant's counterclaim he stated that he was not aware of any adverse interest by the 1st Defendant in respect to the suit property and that her claim of an adverse possession does not lie. He also added that he is a bonafide purchaser for value without notice of any adverse interest.
8. On cross-examination by Counsel for 1st Defendant, he stated that together with his wife they separately visited the property before purchase and found that the property had some mabati structures. He also stated that the church had informed him that they were not the owners of the mabati structures put up on the suit property. He also stated that he complained to the church but the church did not demolish the said structures.
9. He also stated on cross-examination that he had written letters to the tenants informing them that they to pay rent to him. He also stated that he remembers meeting Mwiwaki, the 1st Defendant at the Chief's Office.
10. On cross-examination by Counsel for 2nd Defendant he stated that he bought the land from Riruta SDA Church and he had no issue whatsoever with the 2nd Defendant in the suit.
11. When re-examined he stated that the church had informed him that the property was vacant at the time of purchase. He also reiterated that he has the documents of ownership in relation to the suit property.

The case of the 1st Defendant.

12. The case of the 1st Defendant is contained in her statement of defence and counter-claim dated 22nd April 2021. It was the 1st Defendant's case that she has been the beneficial/ registered owner of the suit property and has always been in possession since 1970's and that she was allocated an allotment letter sometimes in 1999.
13. It was also her case that she initially put up structures initially in the 1970's and in later in the 1990's for the purpose of collecting rent over the years and nobody had laid claim to the said property until when the Plaintiff did so in 2014.
14. During trial, three witnesses testified in support of the 1st Defendant's case. The 1st Defendant testified as DW1. She adopted her witness statement dated 19th February 2022 and also bundle of documents dated 19th February 2022 as her evidence in chief. She stated that she built the mabati structures on the land and nobody has ever laid claim to the same. She also added that there are tenants in the said structures who have been paying rent to her for over 40 years. She further added that she has never seen SDA church on the said property and that she first met the Plaintiff at the Chief's Office. It was also her testimony that she has been staying in the property since 1975. She urged the court to allow her counter-claim and dismiss the Plaintiff's suit.
15. Upon cross-examination by Counsel for the 2nd Defendant, she stated that she has been in the property since 1975. When asked about if she had any photos of the structures or receipts of any rent received from the tenants she said that she did not have any in court neither did she have any receipts for the construction of the said mabati structures. She also conceded that she had not filed in court any approvals obtained in respect to the construction of the said houses.



16. When asked about her specific claim against the 2nd Defendant, she stated that she had sued the church because they claimed to have sold the property to the Plaintiff yet she had been on the property since 1975.
17. On cross-examination by 1st Defendant, she stated that she stays next to the suit property. She also stated that personally she has never resided in the said mabati structures. When asked whether she has any evidence to confirm that she had been in the suit property, she stated that she had no evidence to demonstrate the same.
18. On further cross-examination, she also stated that she had been in the suit property in 1975 but was issued with an allotment letter in 1999, though she did not have the said allotment letter in court. When asked about whether she had paid any stand premium upon being issued with an allotment letter, she stated that the same was paid but did not have any evidence of its payment in court.
19. When re-examined, she stated that her house is next to the suit property. She also stated that she was never aware that the title was registered in the names of the Plaintiff. She also stated that her allotment letter was not a forgery.
20. Fridah Nduta Kamau testified as DW2. She relied on her witness statement dated 19th February 2022 as her evidence in chief. She further added that the 1st Defendant is known to her and she has been in the suit property since 1970's. She also stated that the 1st Defendant started constructing the mabati structures in early 1980s and that she has been collecting rent ever since. She also stated that she has never seen any member of the 2nd Defendant in the property.
21. When cross-examined by the Counsel for the 1st Defendant, she stated that her statement had not indicated the exact place when she used to visit the 1st Defendant. She also stated that she did not know that a title deed in respect to the property had been obtained by the Plaintiff.
22. Upon cross-examination by Counsel for 2nd Defendant she stated that she did not know the title number of the suit property and that the 1st Defendant does not stay in said property.
23. When re-examined, she stated that the houses in the suit property are adjacent to where the 1st Defendant resides.
24. Francis Kungu Kamundu testified as DW3 on behalf of the Plaintiff. She also relied on her witness statement dated 19th February 2022 as her evidence in chief. He added that he knew about the suit property in 1980s and that nobody including the church has ever laid claim to the same.
25. On cross-examination by Counsel for the 1st Defendant, he stated that he used to assist the 1st Defendant in getting the workers to construct the houses in the suit property though he did not have any evidence to support the same. He also stated that he did not know the exact number of houses on the property. He further stated that he is not sure of the title number of the said property.
26. On cross-examination by Counsel for the Plaintiff, he stated that he was 10 years old in 1990 and he did not know the workers who constructed the houses. He also stated that he does not know the land reference of the suit property and neither has he ever stayed in the same.
27. When re-examined, he clarified that the 1st Defendant had only requested him to do some maintenance works of the houses but not its initial construction.



The case of the 2nd Defendant.

28. The 2nd Defendant filed its statement of defence dated 30th July 2021. It was the 2nd Defendant's case that sometimes in 1995, members and the leadership of Riruta Satellite Seventh-day Adventist Church resolved to acquire additional land for purposes of constructing a house for accommodation of their Church Pastor. Through its members and leaders, the Church agreed to purchase the land from Mr. Simon T. Ongwacho (now deceased) and Mr. Joel Gwako Atuti. The leaders of the SDA church viewed the premises and established that it was vacant without any structures, houses or development.
29. In the organized administrative structure of the SDA Church, all assets of the Church are registered in the name of the Seventh-day Adventist Church East Africa Limited, the 2nd Defendant. The members of Riruta Satellite Seventh-day Adventist Church negotiated and agreed on the terms and conditions of sale between the Church and Elders Simon T. Ongwach(deceased) and Joel G. Atuti. The agreement for sale and all other documents were therefore prepared in the name of the 2nd Defendant as the purchaser.
30. An agreement for sale dated 16th May 1995 was executed between the parties in which the 2nd Defendant purchased the suit property for a valuable consideration in the sum of Kenya Shillings Five Hundred Thousand (Kshs 500,000/-). The 2nd Defendant had the documents proceeded and the certificate of lease dated 16th June 1995 issued in its name.
31. It was averred that the 2nd Defendant was a purchaser for value without any notice of any adverse interest of a third party including the Plaintiff and the 2nd Defendant had no notice of the Plaintiff's interest in the suit property in 1995 when it purchased the same.
32. It was also averred that in 2014, members and the leadership of Riruta Satellite SDA Church realized that the membership of the church had increased in large numbers and the church building could not accommodate everyone. A resolution was made to sell the suit premises in order to raise funds for expansion and completion of the church building, this was when an agreement was entered into with the Plaintiff in the main suit and the property was sold to him at a consideration of Kshs 1, 800,000/ which sum was paid and property transferred to the Plaintiff.
33. At the time when the 2nd Defendant was acquiring the property in 1995 there were no houses/ structures or any person living on the suit premises and even the Plaintiff in the counterclaim was not in occupation or possession of the property.
34. The 2nd Defendant contends that having purchased the suit premises, and having been issued with a title, the concept of indefeasibility of registration as a first registered owner defeats the Plaintiff's claim under adverse possession.
35. The 2nd Defendant admits receiving a demand which simply asked it to clarify how it acquired the property and nothing more, similarly, no cause of action has been disclosed against the 2nd Defendant in the end and prays for the dismissal of the suit against it with costs.
36. During trial, Joel Atuti testified as the only witness on behalf of 2nd Defendant. He relied on his witness statement dated 18th March 2022 and bundle of documents filed on behalf of 2nd Defendant as his evidence in chief.
37. On cross-examination by Counsel for the Plaintiff he stated that he was initially the owner of the land having been given an allotment letter about 27 years ago. He stated that he acquired the land in 1995 and sold it to the 2nd Defendant and that the 2nd Defendant was issued with a title deed. He also stated that there was no structure on the property when he sold it to the Plaintiff.



38. When re-examined, he stated that the 1st Defendant has not filed a suit to challenge the title herein. He also stated that the land was vacant when he sold it. He was only informed of some structures being on the land between 2013-2014.

The Plaintiff's submissions.

39. The Plaintiffs filed written submissions dated 31st January 2023 through the firm of Nyandieka & Associates Advocates. Counsel submitted on the following three issues; -
- a. Whether the Plaintiff has proved his case on a balance of probability.
 - b. Whether the 1st Defendant is entitled to any of the reliefs she seeks in the counter-claim.
 - c. Who is to pay costs.
40. On whether Plaintiff has proved its case, reliance was made to the cases of D.T. Dobie & Co. Limited –Vs- Wanyonyi Wafula Chebukati (2014) eKLR, Charles Karathe Kiarie & 2 others –Vs- Administrators of Estate of John Wallance Muthare (deceased) & 5 others 2013 eKLR, David Peterson Kiengo & 2 others –Vs- Kariuki Tho (2012) eKLR, Lilian Waithera Gachuhi –Vs- David Shikuku Mzee (2005) eKLR, Shadrack Kuria Kimani –Vs- Stephen Gitau Nganga & Another (2017) eKLR. Reference was also made to section 26(1) of the [Land Registration Act](#). It was submitted that the Plaintiff's title in this case can only be impeached on grounds of fraud or misrepresentation which grounds have neither been pleaded nor proved by the 1st Defendant in this suit. Counsel submitted that indeed the Plaintiff had proved his case beyond a balance of probability and was entitled to the reliefs sought.
41. On the 1st Defendant's claim for adverse possession, it was submitted that the 1st Defendant has not proved elements of adverse possession. It was also submitted that the 1st Defendant has not proved the fact that she acquired the suit property in 1970 thereby dispossessing the initial registered owners. It was further submitted that the 2nd defendant had been utilizing the property for its weekly activities as well as daily accommodation for the church pastor since it acquired the property in 1995.
42. It was also submitted that the 1st Defendant has not if at all enjoyed open, continuous, uninterrupted occupation of the suit premises for 12 years in order to qualify to claim title through adverse possession. The Plaintiff took possession of the suit property in 2014 upon purchase of the same from 2nd Defendant and hence there has been clear breaks of the purported possession.
43. On whether the Plaintiff is entitled to the reliefs sought, Counsel submitted that the prayer for injunction was merited and reliance was made to the cases of Mohammed Ndoge –Vs- Mohamed Golo Ndogo & 3 others (2015) eKLR, Kenya Power & Lightning Co. Ltd –Vs- Sheriff Molan Habib (2018) eKLR, Nguruman Limited –Vs- John Bonde Nielson & 2 others CA No. 77 of 2012 (2014) eKLR, Mrao Ltd –Vs- East American Bank of Kenya & 2 others (2003) KLR 125 and Giella –Vs- Cassman Brown (1973) EA 358.
44. On trespass, it was submitted that the Plaintiff has proved its case on trespass to his property and the damages for trespass ought to be granted. Counsel also submitted and urged the court to grant costs of the suit to the Plaintiff.



1st Defendant's submissions.

45. The 1st Defendant filed written submissions dated 6th April 2023. The same was filed by Sheila Mugo & Co. Advocates. Counsel outlined the following three issues for consideration by this court:
 - a. Whether the Plaintiff is entitled to the reliefs claimed in his plaint.
 - b. Whether the 1st Defendant is entitled to the prayers sought in the counterclaim.
 - c. Who pays costs of the suit.
46. It was submitted that the 1st Defendant is squarely in the suit premises having entered many years ago. It was also submitted that the Plaintiff is also not entitled to a claim of mesne profits since the 1st Defendant is at a trespasser having acquired the suit property by way of adverse possession and she has been collecting rent on the houses build by her. Counsel also submitted that the prayer for eviction could not issue since the Plaintiff ought to have asked the 2nd Defendant to grant him vacant possession before purchasing the suit property.
47. The 1st Defendant made reference to the case of *Chevon (K) Ltd –Vs- Harrison Charo Wa Shutu (2016) eKLR* and sections 7 (1), 28 and 38(1) of the *Limitation of Actions Act* in support of her case.
48. The 1st Defendant concluded her submissions by urging the court to dismiss the suit and grant her the prayers sought in her counterclaim.

The 2nd Defendant's submissions.

49. The 2nd Defendant filed its submissions dated 18th April 2023 through Rachuonyo & Rachuonyo Advocates. They began by outlining brief background of the 2nd Defendant's case and proceeded to agree with the submissions filed by the Plaintiff.
50. The 2nd Defendant also submitted that they had been wrongly joined in the suit since no claim was sought against them by the 1st Defendant. They made reference to the cases of *Joseph Njau –Vs- Robert Maina Chege Eldoret HCCC No. 136 of 2000* and *Gladys Nduku Nthuki –vs- Letshego Kenya Limited & Another Machakos HCCC No. E007 of 2021* in support of its submissions.
51. The 2nd Defendant concluded its submissions by urging the court to dismiss the Plaintiff's counterclaim with costs to them.

Analysis and Determination.

52. I have considered the pleadings, submissions filed by the parties and also the oral testimony tendered by the witnesses herein and the court is of the view that the following are the appropriate issues for determination herein.
 - i. Whether the Plaintiff has proved his case to the required standard.
 - ii. Whether the 1st Defendant has proved her claim of adverse possession herein.
 - iii. What are the appropriate reliefs that this court should issue.
 - iv. What orders shall apply as to costs.



Whether the Plaintiff has proved his case to the required standard.

53. The Plaintiff submitted that he is the bonafide registered owner and entitled to the possession of the suit property known as Title No. Dagoretti/Riruta/S.945 measuring approximately 0.032 Hectares situated at Satellite Estate, Nairobi County. During trial the Plaintiff tendered evidence to support the same. The Plaintiff produced in evidence copies of Certificate of Lease in his favour, duly registered transfers and copy of lease that was issued to the 2nd Defendant on 2nd June 1995. The Plaintiff also produced a certificate of lease for the suit property issued in his name dated 28th May 2014.
54. It is trite law that whoever alleges must prove. This is set out under Section 107(1)(2) of the Evidence Act, which provides as follows:
- “(1) 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.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
55. In the instant case, the 1st Defendant did not controvert evidence tendered to the effect that the Plaintiff has title to the suit property.
56. The 1st Defendant stated that she had been issued with an allotment letter in respect to the suit property in 1999 even though she did not produce it as evidence during the hearing of this suit. I wish to state that in respect to allotment letters, the law is settled to the effect that only once a letter of allotment is issued and the terms thereon accepted, that title comes into existence. This was the holding by the Court of Appeal in the case of Wreck Motor Enterprises vs Commissioner of Lands & 3 others [1997] eKLR, who held as follows:
- “Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of a title document pursuant to the provisions held.”
57. A similar decision was made in the case of Joseph Arap Ngok vs Justice Moyo Ole Keiwa, Nairobi HCCA, APPL. No. 60 OF 1997 where it was observed as follows:
- “It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held.”
58. The 1st Defendant failed to adduce any evidence that despite being issued with an allotment letter in respect to the suit property as alleged, failed to comply with its conditions and also failed to even produce a copy of the said allotment letter before court. In the circumstances the 1st Defendant cannot lay any claim to the suit property.
59. The Plaintiff is currently the registered owner of the suit property. In addition and is entitled to partake of and benefit from the statutory privileges espoused by Sections 24 and 25 of the Land Registration Act, 2012.
60. Having considered the above, it is therefore the finding of this court that indeed the Plaintiff has proved his case to the required standard.



Whether the Defendant is entitled to any claim to the property by way of adverse possession.

61. In the counterclaim dated 22nd April 2021, the 1st Defendant sought inter alia proprietorship of the suit property by way of adverse possession.
62. For one to succeed in a claim for adverse possession, one must prove that she has been in exclusive continuous occupation of the suit land for a period of at least 12 years, which occupation must be open and notorious and should be without permission of the owner; nec vi, nec clam, nec precario (no force, no secrecy, no persuasion), See- Nyeri Court of Appeal case No.22 of 2013, Peter Mbiri Michuki vs. Samuel Mugo Michuki.
63. In *Celina Muthoni Kithinji v Safiya Binti Swaleh & 8 others* [2018] eKLR, the Court explained the conditions to be met for one to prove an entitlement in adverse possession. The court proceeded to quote various authorities which explain the entitlement and I wish to borrow fully from the decision and capture it as hereunder;

“The requirements for Adverse Possession in Kenya has also been set out in the case of *Mbira –v- Gachuhi* (2002) I EALR 137 in which the court held that:

.....a person who seeks to acquire title to land by the method of Adverse Possession for the applicable statutory period must prove non-permissive or non-consensual, actual, open, notorious, exclusive and Adverse use by him or those under whom he claims for the statutory prescribed period without interruption....”

64. In the instant case, during trial the evidence tendered by the 1st Defendant was to the effect that she does not reside in the suit property save for only putting up the mabati structures. The 1st Defendant was unable to adduce any evidence as to the particulars of the land she was in possession of. She was also unable to adduce any photos or any other documentary evidence to confirm that indeed she had been in actual occupation of the suit property. The court has had the benefit of considering and evaluating the 1st Defendant’s evidence and it returns a finding to the effect that the 1st Defendant has failed to prove her case in the counterclaim to the required standard and her claim for adverse possession fails.

What relief should issue herein.

65. On what reliefs should issue herein, having found that the Plaintiff has been able to prove his case to the required standard, the court finds that he is entitled to the reliefs sought. On the issue of general damages for trespass, the Plaintiffs did not indicate any amount to guide the court in assessing the same. The court would have expected the Plaintiff to do so in his submissions but none was provided. In view of the foregoing, I will only proceed to award Kshs 100,000/- being nominal damages for trespass. In support of the foregoing proposition, the Court adopts and reiterates the holding in the case of *Davis Mwashau Jome v Damaris Karanja & Another* (2021) eKLR, where the court stated as hereunder;

“She cannot escape payment of general damages for trespass. In his submissions, Mr Mwakisha pitched for general damages in the sum of Kshs 2 million. Mr Oddiaga did not make any submissions on the quantum of general damages. I have seen the case of *Duncan Nderitu Ndegwa v Kenya Pipeline Company Limited & Another* (2013) eKLR referred to me by Mr Mwakisha. In that case, Nyamweya J, awarded general damages in the sum of Kshs 100,000/= for trespass. The quantification of such general damages is in the discretion of the court.”



66. On the issue of costs, although costs of an action or proceedings are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the provision to section 27 of the Civil Procedure Act (Cap 21). However, considering the general circumstances of this case, I will direct each party to bear own costs of the suit and counterclaim.

Final orders.

67. In conclusion, this court hereby issues the following final orders.

- i. The Counterclaim by the 1st Defendant is hereby dismissed.
- ii. An order of permanent injunction is hereby issued restraining the 1st Defendant by herself, her servants and or agents or otherwise from entering, leasing, hiring, pledging, selling and or interfering with the Plaintiff's quiet possession of all that known as title No Dagoretti/Riruta/ S. 954.
- iii. Nominal damages for trespass for Kshs 100,000/- payable by the 1st Defendant.
- iv. The 1st Defendant is hereby ordered to vacate the suit premises within 90 days from today failure of which an eviction order shall issue.
- v. Each party to bear own costs of the suit and counter- claim.

Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6TH DAY OF JULY 2023

E.K. WABWOTO

JUDGE

In the presence of:-

No appearance for Plaintiff.

No appearance for 1st Defendant.

Mr. Onyango for the 2nd Defendant.

Court Assistant – Caroline Nafuna.

