



**Muiruri & 4 others (Suing on behalf of 850 others) v Murang’a County Government
& another; Delmonte Kenya Limited (Interested Party) (Environment &
Land Case 47 of 2020) [2023] KEELC 18706 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18706 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 47 OF 2020**

LN GACHERU, J

JULY 6, 2023

BETWEEN

**SAMUEL IRUNGU MUIRURI 1ST APPLICANT
JOHN NJOROGE GACHO 2ND APPLICANT
FRANCIS KINUTHIA KIBE 3RD APPLICANT
JULIUS KANYIRI WAMBUI 4TH APPLICANT
MERCY MUGECCI MBURU 5TH APPLICANT
SUING ON BEHALF OF 850 OTHERS**

AND

**MURANG’A COUNTY GOVERNMENT 1ST RESPONDENT
LAND REGISTRAR MURANG’A 2ND RESPONDENT**

AND

DELMONTE KENYA LIMITED INTERESTED PARTY

JUDGMENT

1. By Amended Originating Summons dated **2nd June 2022**, and filed on **3rd June 2022**, the Applicants sought for orders against the Respondents that;
 1. THAT the Respondents’ interest in all that public piece of Land in Murang’a County along Kabuku River adjacent to Kenyatta Farm, Mitubiri Ward, Murang’a County being L.R No. 9213/ 1 & 2 (Formely known as Sassa Estate) measuring approximately 975 Acres hereinafter referred to as “the suit property” has been extinguished.



2. THAT the 2nd Respondent to delete entries in favour of the 1st Respondent in the record of the land described in paragraph 2 above or register appropriate discharge in respect thereof without gazettelement.
3. THAT the Plaintiffs herein be registered forthwith as the owners of the “the suit property” in place of the 1st Respondent by reason of the facts that the Applicants have become entitled to the said parcel of land by virtue of adverse possession.
4. THAT the 2nd Respondent do issue Certificate of Title for “the suit property” in the names of the Applicants without gazettelement.
5. THAT the 2nd Respondent be and is hereby ordered to reconstruct the file/ records for “the suit property” without gazettelement and create an entry and register the Applicants as the registered owners.
6. THAT the Orders referred to in paragraphs 2,3,4,5 and 6 above be registered against the title to “the suit property” in terms of Section 50(2) of The *Limitation of Actions Act*, Chapter 22, Laws of Kenya.
7. THAT the costs of this Originating Summons be provided for
 2. The Originating Summons is anchored on the Grounds stated thereon and the joint Supporting Affidavit sworn by the Applicants.
 3. The Applicants’ case is that they have been in uninterrupted and exclusive physical occupation of the suit property for a continuous period of over 15 years. They deponed that they have developed and built thereon and the 1st Respondent has not claimed ownership or interfered with their possession and occupation of the suit land. It is their disposition that the suit property is a public property, whose management fall under the 1st Respondent, but their ownership is now extinguished by virtue of adverse possession.
 4. The 1st Respondent filed a response to the Originating Summons averred that the summons cannot be sustained as no claim for adverse possession can issue against a public land. It averred that the suit land is reserved for light industrial works, but not to be given to individuals; and added that the suit land is utilized by squatters whose interests have been registered and the Applicants’ herein are not part of them.
 5. The 2nd Respondent entered appearance and in opposing the summons and filed a Notice of Preliminary Objection. The Preliminary Objection is premised on the ground; that the suit is bad in law for want of compliance with Sections 38 and 41 of the *Limitation of Actions Act*, as well as it offends Article 62 of the Constitution.
 6. The Interested Party filed a Replying Affidavit through its Legal Officer, Harry Odoni and opposed the Summons for non-compliance with the provisions of Order 37 Rule 7(2) of the Civil Procedure Rules. He deponed that the Originating Summons cannot be issued against a government entity and that the suit property is in possession of the Interested Party and not the Applicants. He further deponed that there have been other matters between the Applicants, the Respondents and the Interested Party, which have since been heard and determined. The Interested Party opposed the Applicants’ claim of ownership of the quarry and averred that there is no evidence of any relationship between the Applicants and the quarry in respect of the claim for adverse possession.
 7. On 8th February 2023, when the matter came up for directions parties expressed intentions to canvass the matter by way written submissions. This Court allowed the said application.



8. The Applicants filed their written submissions on the 9th March 2023, through the Law Firm of Orina & Co. Advocates and raised four issues for determination by this Court. The Applicants submitted on the law on adverse possession and submitted that they have become adverse to the 1st Respondent's title. It is the Applicants' submissions that they acquired possession of the suit land without permission from the Respondents and that the Interested Party has been aware of their occupation. They relied on a litany of cases to demonstrate that their occupation on the suit land extinguished the 1st Respondent's title.
9. It is the Applicants' further submissions that they have established the tenets for the grant of order of adverse possession as was established in the cases of *Mtana Lewa vs Kahindi Ngala Mwangandi* {2005} eKLR and *Samuel Kihamaba vs Mary Mbaisi* {2015} eKLR. The Applicants went ahead to submit on each of the principles of adverse possession as set out in the case of *Virginia Wanjiku Mwangi vs David Mwangi Kamau* {2013} eKLR to wit; open, continuous, exclusive use of the property, actual possession of the property and non-permissive, hostile or adverse use of the property. They relied on a number of other cases to buttress their claim for the prayers sought.
10. The Applicants further submitted that they are entitled to the reliefs sought having demonstrated their satisfaction of the principles of adverse possession. In the end they urged this Court to exercise its discretion and award them costs.
11. The 1st Respondent filed its submissions through the Law Firm of Miller & Co. Advocates and Kimwere Josphat & Co. Advocates. It is the 1st Respondent's case that a claim for adverse possession cannot issue against the Respondents as per the provisions of Section 41 of the Limitations of Actions Act. That the Applicants acknowledged that the suit land is a public land and as such the orders sought cannot issue as per the provisions of Article 62(1) of the Constitution. It relied on the case of *Ravji Karsan Sanghani vs Peter Gakunu* {2019} eKLR, where the Court observed that adverse possession cannot issue on public or trust land or land owned by the Government.
12. Further, it was submitted that the Originating Summons was defective and incurably defective for want of compliance with Order 37 Rules (1) and (2) of the Civil Procedure Rules. Reliance was placed on the case of *John Wambura & Another vs Anakletus Wambura* {2017} eKLR, where the Court observed failure to attach a title extract made the Originating Summons incompetent. It was also submitted that a claim for adverse possession is attached on a person and as such the suit ought not to have been representative suit.
13. The Interested Party filed its submissions through the Law Firm of Njoroge Regeru & Co. Advocates, and raised five issues for determination. It reiterated the 1st Respondent's submissions that adverse possession cannot issue against the Government or in respect of any public land. It further submitted that the non-compliance with Order 37 Rules 1 and 2 of the Civil Procedure Rules, was fatal as the ownership of the suit property was not certain for this Court. It was its further submissions that the orders sought cannot issue against the 2nd Respondent in light of its position as to the custody of the records which it submitted are held in Nairobi.
14. The Interested Party also submitted that there was no compliance by the Applicants on the provisions of Order 1 Rule 8 of the Civil Procedure Rules. Reliance was placed on the case of *Rose Florence Wanjiru vs Standard Chartered Bank of Kenya Limited & 2 Others* {2014} eKLR. It also submitted that the Applicants had failed to establish that they are in occupation of the suit property and in a larger front failed to establish the principles for adverse possession.



15. The Interested Party filed further submissions where it reiterated that the Applicants had not proven their claim for adverse possession. Further that persons who were engaging in mining had been evicted and there was therefore no occupation on the suit land as alleged.

16. The Court considered the pleadings, annexures thereto and all the submissions, filed herein and the relevant provisions of the law and finds as follows;

The claim in this suit is for adverse possession over L.R No. 9213/ 1 & 2. Unfortunately, this Court has not had the privilege of perusing a copy of the title to the suit property to decipher ownership thereof. However, from the Applicants' pleadings, this Court has been informed that the suit property belongs to the 1st Respondent and has been referenced as public land. Incidentally, the Applicants in prayer (2) has sought for orders "the Respondents' interests in all that public piece of land..... being L.R No. 9213/ 1 & 2" The 1st Respondent in its submissions maintained that the suit property is a public property which belongs to the 1st Respondent.

17. As per the letter dated 27th September 2018, attached to the Applicants' bundle of documents, the 1st Respondent referred to the property referenced therein as a public property. Paragraph 7 of the Supporting Affidavit in support of the Originating Summons informs this Court that the parcel of land, the subject matter of the letter highlighted, is the suit property. The Deponent thereof maintains throughout the Affidavit and Summons that the suit property is a public land.

18. The Respondents on the other hand are opposed to the Originating Summons majorly for the reason that orders for adverse possession cannot issue against public land. The 2nd Respondent raised a Preliminary Objection, and even though the same was never prosecuted, the grounds raised therein formed part of the 1st Respondent and Interested Party's responses. The Respondents and the Interested Party conceded that the suit land is a public land and therefore no claim for adverse possession can issue.

19. Having perused the pleadings and the responses thereto, and having considered the rival submissions by parties and guided by the authorities cited, the Court finds the issues for determination are:

- i. Whether the orders for adverse possession can issue over public land
- ii. Whether the orders sought by the Applicants' can issue
- iii. Who should bear the costs for the application

I. Whether the orders for adverse possession can issue over public land.

20. Article 61 of *the Constitution* classifies land into three categories being public, community and private land. Article 62 defines Public Land as:

- (1) Public land is—
 - a. Land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;
 - b. Land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;
 - c. Land transferred to the State by way of sale, reversion or surrender;



- d. Land in respect of which no individual or community ownership can be established by any legal process;
21. *The Constitution* further vests this land on either the County or the National Government, as contemplated in Article 62(2) & (3) which provides;
- (2) Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, if it is classified under—
- (a). clause (1) (a), (c), (d) or (e); and
- (b). clause (1) (b), other than land held, used or occupied by a national State organ.
- (3) Public land classified under clause (1) (f) to (m) shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.”
22. The 1st Respondent is a County Government within the provisions of Article 176 of *the Constitution*, and as created under Article 6(1) and enumerated in Schedule 1 of *the Constitution*. The suit land has been defined as public land and this Court has already established hereinabove that the parties to the suit have agreed by dint of their pleadings that the land is a public land. It is not clear to this Court who is in occupation of the suit land, but borrowing from the pleadings the land may be occupied by “squatters” and or a party to a lease. Even so, it remains that this is a public land within the provisions of Article 62 elaborated above.
23. Adverse possession is recognized under Section 7(1) of the *Land Act* as one of the methods of land acquisition. Additionally, Section 28(h) of the *Land Registration Act* recognizes rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription as interest that may take away the indefeasibility of titles.
24. Adverse possession is a right that attaches on land and it matters not in whose name the title is in. This position was stated in the case of *Maweu vs Liu Ranching & Farming Cooperative Society* [1985] eKLR, as quoted in *Civil Appeal No 164 of 2011: - Gachuma Gacheru VS Maina Kabuchwa* [2016] eKLR, where the Court held that:
- “Adverse possession is a fact to be observed upon the land. It is not to be seen in a title”
25. The Law on adverse possession is set out under the Limitation of Actions Act. Section 7 of the Act provides:
- “An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.
- Section 13 on the other hand provides;
- (1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land



- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
- (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land”.
26. Section 17 extinguishes the rights of a registered owner where there is a successful claim for adverse possession. Section 38 on the other hand provides;
- (1) Where a person claims to have become entitled by adverse possession to land registered under any of the acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land.”
27. The Applicants have a duty as set out above to establish their claim for adverse possession. However, Section 41 of the same Act excludes application of the *Limitation of Actions Act* on public land. Section 41(a)(i) of the Act provides:
- This Act does not—
- (a) enable a person to acquire any title to, or any easement over—
- (i) Government land or land otherwise enjoyed by the Government;
28. In this case, the suit land has been said to be public land. The Applicants are seeking to acquire title that belongs to the 1st Respondent. The 1st Respondent is a County Government. The Court in the case of *Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees* [2016] eKLR, held:
- "If the land is registered in favour of the Government of a County Government, the doctrine of adverse possession would not apply to it and the claim would fail."
29. This Court has not had the benefit of perusing any title deed to confirm in whose name the land is registered. But as per the Interested Party’s submissions, the details of the suit land are not held in the offices of the 2nd Respondent, but in Nairobi. This corroborates the Applicants’ averments in paragraph 7 of the Supporting Affidavit that the records of the suit property cannot be traced in the 2nd Respondent’s office. It would be safe for this Court to conclude that the suit property is a property belonging to the County Government of Murang’a within the provisions of Article 62(2) of *the Constitution*.
30. It is already a statutory provision that no claim for adverse possession can issue on a public land. This has also been held by a number of Courts in their decisions and this Court cannot reiterate. It is noteworthy that the Applicants opted not to submit or respond to the foregoing. The Court in the case of *Sammy Mwangangi & 10 others v Commissioner of Lands & 3 others* [2018] eKLR held:
- It is a well settled principle that a claim for adverse possession can only be maintained against a registered owner; nor can one claim adverse possession against public land” (emphasis added)
31. Therefore, the Court will not belabour on this well settled principle and it matters not that there are defects in the Originating Summons as highlighted by the 1st Respondent and the Interested Party,



as this Originating Summons is ripe for dismissal for want of compliance with Section 41 of the Limitation of Actions Act. Having found as above, this Court finds and holds that the Applicants have failed to prove their case on the required standard and are thus not entitled to the prayers sought.

II. Who should bear the costs for the suit?

32. It is trite law that costs shall follow the events. It is no doubt that the Respondents are the successful litigants and are entitled to costs. However, this Court has the discretion to award costs by operation of **Section 27** of the Civil Procedure Act. Therefore, the Court will exercise its discretion and directs that each party shall bear its own costs.
33. The upshot of the foregoing is that the Applicants' amended Originating Summons dated 2nd June 2022, and filed on 3rd June 2022, is found not merited and the same is dismissed entirely with each party directed to bear their own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 6TH DAY OF JULY, 2023.

L. GACHERU

JUDGE

Delivered online in the presence of; -

Applicants - Absent

M/s Taank H/B M/s Kwamboka for the 1st Respondent

N/A - 2nd Respondent

M/s Awiti H/B for Mr Thuo for the Interested Party

Joel Njonjo – Court Assistant

L. GACHERU

JUDGE

6/7/2023.

