Mwangangi (Suing as the legal representative of the Estate of William Mwangangi Kirima) v M'Mutua (Environment & Land Case E006 of 2020) [2023] KEELC 18499 (KLR) (5 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18499 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT & LAND CASE E006 OF 2020

CK YANO, J

JULY 5, 2023

BETWEEN

JULIA NGUGI MWANGANGI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF WILLIAM MWANGANGI KIRIMA) ..... PLAINTIFF

AND

PAUL MBAE M'MUTUA ..... DEFENDANT

JUDGMENT

1. The plaintiff filed originating summons dated December 21, 2020 which was amended on the March 28, 2022 and brought under Section 38 of the *Limitation of Actions* Cap 22 and Order 37 Rules 7 of the *Civil Procedure Rules* 2010 and Section 3 and 3A of the *Civil Procedure Act* and all enabling provisions of law and invited the court to make a determination of the following questions.

    I. Whether the applicant/plaintiff has occupied land reference No Abothuguchi/Ruiga/1724 (referred to a suit land) for more than 12 years.

    II. Whether the applicant's/plaintiff's occupation has been open unhindered, notorious, undisturbed and uninterrupted for more than 12 years.

    III. Whether the plaintiff /applicant has been on the suit land since 1999 to date respectively?

    IV. Whether the plaintiff has become entitled to the suit land by way of adverse possession?

    V. Whether the defendants have ever occupied the suit land.

2. The plaintiff is seeking for issuance of the orders that-;

    I. Declaration that the defendant's right to recover the whole of occupied land parcel No Abothuguchi/Ruiga/1724 are barred under the *Limitation of Actions Act* Chapter 22 Laws of

Kenya and his title thereto extinguished on the grounds that the plaintiff herein have openly peacefully, and continuously been in occupation and possession of the aforesaid parcel of land for a period exceeding 21 years.

II. That there be an order that the applicant plaintiff be registered as the sole proprietor of the whole of occupied land Parcel No Abothuguchi/Ruiga/1724 in place of the defendant.

III. That the Deputy Registrar and or the executive officer of the Honourable court be directed and or ordered to execute the transfer instruments and all attendant documents to facilitate the transfer and registration of the said parcel of land that is occupied parcel No Abothuguchi/Ruiga/1724 in favour of the applicant/plaintiff in event of default by the respondent defendant.

IV. That there be an order of permanent injunction restraining the defendant either by himself, agents, servants and or employees from interfering with plaintiff's peaceful possession and occupation of the land parcel that is Abothuguchi/Ruiga/1724 in any manner whatsoever, and or however.

V. That costs of this originating summons be borne by the defendant.

3. The application is supported by the affidavit of Julia Ngugi Mwangangi and is premised on the grounds that the plaintiff has been in exclusive, open and uninterrupted occupation of the suit land wherein she has made substantial developments and planted various trees and fruits and generally developed the land since the year 1999, running to about 21 years.

4. In the supporting affidavit, the plaintiff avers that her late husband purchased the suit land in 1993 from the defendant and had also purchased two other parcels being LR No 1638 and 1589 from the defendant. The plaintiff has annexed copies of the titles and agreement. It is the plaintiff's contention that her deceased husband and the defendant went to the Land Control Board for subdivision and the land was subdivided and mutation prepared. That unfortunately the original title got lost in the course of the transaction and the loss was reported at Meru Lands Registry and subsequently gazetted vide gazette notice of June 19, 1998, a copy of which has been exhibited. That subsequently, a new title deed in respect of the suit land was issued, a copy of which is also annexed.

5. The plaintiff states that transfer form was prepared and signed by both parties, but the same got misplaced before the transaction could be completed. That the deceased also went abroad and upon his return, and with the defendant's blessings, the plaintiff and her husband built a house and other developments on the suit land and are still there to-date. It is the plaintiff's contention that their stay on the suit land has been peaceful, continuous and uninterrupted, adding that the defendant who has been aware of the possession and occupation was staying on a different parcel of land but has not effected a transfer of the suit land to the plaintiff.

6. Julia Ngugi Mwangangi Kirimi testified as P.w 1 and adopted the contents of her supporting affidavit and the witness statement as her evidence in chief and produced the limited grant of letters of administration, title deeds, Gazzette notice, agreement, mutation form and receipt as P exhibits 1 to 8 respectively.

7. The defendant was duly served but never entered appearance nor defended the suit.

8. After the close of the plaintiff's case, the plaintiff's advocates filed written submissions on March 21, 2023.

Analysis And Determination

9. Having considered the plaintiff's case and submissions on record and having taken into consideration that the defendant has neither entered appearance nor has he filed a defence, I find that the following issues are for determination.

   i. Whether the plaintiff has proved that her occupation of the suit land is adverse to the title of the defendant for the requisite period hence to be entitled to be declared the owner of the suit premises as prayed in the originating summons

   ii. Who should pay costs of the suit.

10. Adverse possession is a common law doctrine under which a person in possession of land owned by someone else may acquire valid title to it. In Kenya this doctrine is alive in Section 7 of the *Limitation of Actions Act* that states.

> " 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."

11. In *Alfred Welimo Vs Mulaa Sumba Barasa* CA No 186 of 2011 the Court of Appeal expressed itself thus:

> " It is trite that adverse possession is not established merely because the owner has abandoned possession of his land and ceased to use it, for as Robert Megarry aptly observed in his Megarry's Manual of the Law of property, 5th edition page 490, the owner may have little present use for the land and that land may be used by others, without the users demonstrating a possession inconsistent with the title of the owner. So the mere fact that the appellant abandoned possession of the suit property and went to live at Ndalu Scheme by and of itself does not established adverse possession. The abandonment of possession must be complied with animus possidendi (the intention to possess)and asserting thereon rights that are inconsistent with those of the appellant as the owner of the land..."

12. The court further held that, for a claim founded on adverse possession to succeed, the person in possession must have a peaceful and uninterrupted user of the land. Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are important factors in a claim for adverse possession.

13. In *Wambugu Vs Njuguna* (1983) KLR 173 the court of appeal held that adverse possession contemplates two concepts: Possession and discontinuance of possession. It was further held that the proper way of assessing proof of adverse possession is whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.

14. The ingredients were recently discussed by the Court of Appeal in the case of *Mutana Lewa Vs Kahindi Ngala Mwangandi* [2015] eKLR where it was stated -:

> " Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya is twelve (12) years. The process springs into action essentially by default or inaction of the owner..."

15. The plaintiff has to prove that she has used the suit premises as of right *nec vi, nec clam, nec precario*. It must be shown that the registered owner of the land had knowledge (or means of knowing, actual or constructive) of the possession or occupation. Further, the possession must be continuous.

16. In the instant case, the plaintiff has stated that they have been in exclusive open and continuous possession and occupation of the suit land since 1999 which is a period in excess of 12 years. The registered owner did not take any step to evict the plaintiff from the suit premises for over twelve years. The plaintiff has tendered evidence that has not been challenged or controverted by the defendant. The plaintiff's evidence is that they have been using the suit property together with their family as if it were their own and do not share control of the property with the defendant or anyone else. The plaintiff uses the land at the exclusion of everyone else as if they are the actual owners.

17. Presented before this court is undisputed and undefended evidence by the plaintiff. I find that the plaintiff has on a balance of probability proved that she has a claim over the title Abothuguchi/Ruiga/1724 registered in the defendant's name by way of adverse possession. From the material presented before this court, I find that the plaintiff has on a balance of probabilities proved that she has adversely remained in possession and occupation of the suit property for a period in excess of 12 years to the exclusion of the defendant who is the registered owner. The defendant as registered owner has certainly lost his right over the property and the plaintiff has now acquired prescriptive rights over the property by way of adverse possession. I find that all the questions for determination in the originating summons dated March 28, 2021 are in the affirmative. I enter judgment as follows-;

    a) The plaintiff is hereby declared to have become entitled to LR. Abothuguchi/Ruiga/1724 by virtue of adverse possession and the plaintiff is entitled to be duly registered as proprietor thereof.

    b) The defendant's right over the suit land had been extinguished

    c) Since the suit is undefended, I make no order as to costs.

DATED, SIGNED AND DELIVERED AT MERU THIS 5TH DAY JULY, 2023

In The Presence Of

Court Assistant - V. Kiragu

Ondari for plaintiff

No appearance for defendant

C.K YANO

JUDGE