



REPUBLIC OF KENYA



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**Ntinyari v Rauga (Being a trustee of Judy Rauga Gichu, Edward Mbaya Rauga, Ronald Murithi Rauga and Nicholas Mutwiri Rauga) (Environment & Land Case 3 of 2019) [2023] KEELC 18500 (KLR) (5 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18500 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MERU**  
**ENVIRONMENT & LAND CASE 3 OF 2019**

**CK YANO, J**

**JULY 5, 2023**

**BETWEEN**

**ELIZABETH NTINYARI ..... PLAINTIFF**

**AND**

**JOYCE KABURO RAUGA (BEING A TRUSTEE OF JUDY RAUGA GICHU, EDWARD MBAYA RAUGA, RONALD MURITHI RAUGA AND NICHOLAS MUTWIRI RAUGA) ..... DEFENDANT**

**JUDGMENT**

**Plaintiff's Case**

1. By the originating summons dated 21<sup>st</sup> December, 2018 and filed in court on 18<sup>th</sup> January, 2019, the plaintiff is seeking for determination of the following questions:-
  - a. Whether the plaintiff has acquired title to land parcel number Nyaki/Giaki/Kiburine/12 measuring 8.2 Ha by way of adverse possession.
  - b. Whether an order for transfer of land parcel number Nyaki/Giaki/Kiburine/12 in favour of the plaintiff should issue.
  - c. Ought the defendant be compelled to execute documents for transfer of title to the parcel number Nyaki/giaki/kiburine/12 to the plaintiff and in default the executive Officer of this Honourable court be authorized to do so.?
  - d. What is the order as to costs.?
2. The summons is supported by the evidence and facts set out in the supporting affidavit of Elizabeth Ntinyari, the plaintiff herein sworn on 21<sup>st</sup> December, 2018.



3. The plaintiff averred that she is in possession of land parcel Number Nyaki/Giaki/Kiburine/12 measuring 8.2 ha that is now registered in the name of the defendant in her capacity as a trustee of her children named in the originating summons herein and has annexed a copy of the register.
4. The plaintiff further averred that she has been in continuous and peaceful possession for a period of more than 12 years and that she has established her home on the said land and that her entire family lives on the said land.
5. The plaintiff averred that she has extensively developed the said land and has both permanent and semi-permanent buildings thereon and that she believes that she has acquired title to the said land by dint of her uninterrupted and peaceful occupation thereof since the time of land adjudication in the area where the land is situated and prayed that the orders sought in the originating summons be granted.

### **Plaintiff's Evidence**

6. At the hearing the plaintiff testified as P.W 1. She was cross examined and re-examined. She stated that she lives in Kiburine and that she is a farmer aged 75 years. She adopted the contents of her affidavit in support of the summons.
7. The plaintiff produced a copy of certificate of search as P exhibit 1 and testified that she has lived on the land since 1971 and that even her children were born on the land. She further averred that she has a lot of trees, a permanent house and variety of fruit trees.
8. The plaintiff stated that she has 6 children who are all adults and are with their families and have their own land and there is no portion of the suit land that she is not utilizing.
9. It is the plaintiff's case that the defendant has never been to the land despite knowing that the plaintiff lives thereon and has taken no action to evict the plaintiff from the land. Her prayer is to be given title to the suit land.
10. When cross examined by Mr. Mutuma learned counsel for the defendant, the plaintiff stated that the suit land is 24 acres and that she has lived there since 1971. She stated that she was not asked to bring a letter from the chief to confirm that she stays on the land.
11. The plaintiff further stated that she did not have any witness but she could bring even 10 witnesses. The plaintiff stated that she has birth certificates for her children but they were at home.
12. It was the plaintiff's case that she has evidence to show that she stays on the land, but stated she was not asked to bring it to court. The plaintiff stated that she has sued Joyce Kaburo as a trustee of her children Judy, Edward, Ronald and Nicholas. The plaintiff testified that at the commencement of the case, the defendant did not have children and stated that they started the case earlier with the husband of Joyce Kaburo. The plaintiff admitted that there was a case with Henry Rauga husband to Joyce Kaburo Rauga (deceased) which she could not remember, but that it may be case No. 56 of 1994.
13. The plaintiff stated that it was not true that the elders in the tribunal award gave the land to Henry Rauga and further denied that the tribunal award was brought to a magistrate for adoption.
14. The plaintiff admitted that Joyce Kaburo Rauga (now deceased) and wife of Henry Rauga filed case No. 274 of 2014 but denied that there was a court order signed by Hon. S.R Rotich, C.M on 5<sup>th</sup> September, 2014.
15. The plaintiff stated that she did not know that when Henry Rauga passed on Joyce Rauga filed succession cause No. 2379 of 1997 and assumed that Joyce Rauga sued over a different parcel of land and not the one she was staying in.



16. The plaintiff testified that she left all documents with her advocate and that she could bring a letter from the chief, tax payment receipts etc. The plaintiff testified further that she could be given time to bring other documents including a sub division of the land from Lands Office.
17. When re-examined by Mr. Ringera, the plaintiff admitted they had cases with Henry Rauga and Joyce Rauga previously, and that it was true that Henry Rauga brought her an order to vacate from the land but she could not remember when that was. She further reiterated that she was still on the land and that in all the previous cases, it was admitted that she is on the land.

### **Defendant's Case**

18. The defendant filed a replying affidavit sworn by herself on 27<sup>th</sup> June 2022 in which she averred that she is the daughter and administrator of the estate of the late Joyce Kaburo Rauga and annexed a copy of the Grant of Letters of Administration Ad Litem issued in chief magistrate's court Meru Succession Cause No. E 009 of 2022. The defendant averred that the late Joyce Kaburo Rauga held the suit land in trust for the defendant and her siblings and denied that the plaintiff was ever in possession of the entire land, but admitted that she had occupied a small portion thereof. The defendant further pointed out that the plaintiff has not indicated when she got into the suit land and has also not demonstrated that she was in possession of the land for a continuous period of more than twelve years with no action being taken by the deceased.
19. The defendant pointed out that her late mother had filed Meru MC ELC NO. 274 OF 2014 against the plaintiff who filed an application to stay it pending the hearing and determination of HCC No. 138 of 2009, and has annexed copies of the pleadings. The defendant stated that the plaintiff got into the suit land in the early 19990s and the defendant's father filed a suit against her being Meru Civil suit No. 56 of 1994. Copies of the proceedings have been annexed. It is the defendant's contention that the plaintiff and the defendant's parents have been fighting over the suit land from as far back as the year 1994. That the plaintiff has on numerous occasions been evicted from the suit land and therefore it is wrong for the plaintiff to claim that she has had continuous and peaceful occupation of the land. The defendant accused the plaintiff for being guilty of material non-disclosure by failing to disclose the suits filed in the year 2014 and 2009 and urged the court to dismiss the plaintiff's suit with costs.
20. At the hearing, the defendant reiterated the contents of her affidavit and produced the Limited Grant, consent from her siblings, a copy of chief's letter, pleadings and orders in Meru CM C No. 274 of 2014, official copy of search, green card, proceedings in case no. 56 of 1994, pleadings in succession cause No. 2379 of 1997, copy of title, medical documents, a schedule of their working places, and extract of OB report as D exhibits 1 to 15. The defendant was also cross examined and re-examined.

### **Submissions**

21. The parties through their advocates on record filed written submissions. The plaintiff's submissions are dated 27<sup>th</sup> February, 2023 while the defendant's submissions are dated 9<sup>th</sup> March 2023.

### **Analysis And Determination**

22. The court has carefully considered the pleadings, the evidence and the submissions filed by the parties to support their respective positions. I have also taken into account the legal authorities cited by the parties. The issues for determination are whether the plaintiff has proved her claim for adverse possession to the required standards and whether the plaintiff is entitled to the reliefs sought.
23. In deciding whether or not the plaintiff has proved her claim for adverse possession, the plaintiff must prove that she has been in occupation for a period of over twelve (12) years, that such occupation



was open, peaceful and continuous without interruption from the registered owner and that such occupation was adverse i.e inconsistent with the right of the registered owner.

24. In *Wambugu – vs- Njugune* ( 1983) KLR 173, the Court of Appeal restated the principles of adverse possession and held as follows-;

- “(1) the general principle is that until the contrary is proved, possession in law follows the right to possess.
- 2). In order to acquire by the statute of Limitation 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. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The Respondent could and did not prove that the appellant had either been dispossessed or had discontinued possession of the suit land for a continuous statutory period of twelve years to enable him, the respondent to title to that land by adverse possession.
- 3). The *Limitation of Actions Act*, on adverse possession contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be 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 has been in possession for the requisite number of years.”

25. In the case of *Mtana Lewa Vs Kabindi Mwangandi* [2015] eKLR the Court of Appeal ( Makhandia JA) stated as follows:

“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. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

26. The doctrine of adverse possession is embodied in Section 7 of the *Limitation of Actions Act* which 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.”

27. Section 13 of the same *Act* further makes provisions for adverse possession as follows-;

- “(1) A right of action to recover land does not accrue unless the land is in 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 “Section 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 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.”

28. Section 38 ( 1) of the [Limitation of Actions Act](#) provides that-;

- “ 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 or lease in place of the person then registered as proprietor of the land.”

29. Order 37 Rule 7 of the [Civil Procedure Rules](#) states that-:

- “(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.”

30. In the instant case, the court has noted that the plaintiff is claiming the land through the doctrine of adverse possession. The plaintiff annexed a copy of certificate of search which she produced as her exhibit 1 and she stated that she has lived on the land since 1971 and that even her children were born on the land. She further stated that she has a lot of trees, a permanent house and many varieties of fruit trees on the land.

31. On the other hand the defendant is claiming ownership of the land as beneficiaries of the estate of their father who was the original owner and who left it to the defendant’s mother to hold the land in trust for the defendant and the other siblings.

32. The ingredients of adverse possession include that the possession must be open, notorious, and peaceful. By virtue of the cases that were ongoing between the plaintiff and the father to the defendant and also with the mother both of whom are now deceased, it is clear that the possession of the plaintiff was not quiet. The defendant produced evidence to show disputes dating back to the year 2009 between the plaintiff and the defendant’s deceased parents.

33. The plaintiff also admitted that she had a case with Henry Rauga and further admitted that Joyce Kaburo Rauga (now deceased) filed case No. 274 of 2014 although she denied there was a court order signed by Hon. S.R Rotich C.M on 5<sup>th</sup> September, 2014. Based on the threshold set out for adverse possession, and especially the prerequisite for quiet possession, I am not convinced that on a balance of probabilities the plaintiff has proved her case for adverse possession.

34. In my considered view, the plaintiff cannot purport to have been in quiet occupation and possession adverse to the defendant for the reason that there were continuous land disputes that were filed in court. It is clear that there were various suits before court and as such the plaintiff cannot claim that there was quiet possession.



35. It is a well settled principle that a party claiming adverse possession ought to prove that his or her possession was “*nec vi, nec clam, nec precario*,” that is peaceful, open and continuous. From the material on record, it is clear that in this case, the plaintiff and the defendant have had several disputes in court. Therefore, the plaintiff’s claim of quiet possession, cannot stand. Based on the evidence on record, the claim of adverse possession cannot succeed since the plaintiff has not been in peaceful and quiet possession of the suit land for the statutory period of twelve (12) years.
36. The defendant has elaborately explained the several cases pitting her parents and the plaintiff. I am of the view that the plaintiff has failed to demonstrate how she is entitled to the land by virtue of adverse possession.
37. Considering the totality of the evidence availed in this case, and applying the legal principles as outlined above, I am not satisfied that the plaintiff has proved her case on a balance of probabilities. It is my finding that the plaintiff has failed to bring herself within the limits of the doctrine of adverse possession.
38. Consequently, the plaintiff’s claim is without merit and must fail. The same is dismissed. The costs of the suit shall be in favour of the defendant against the plaintiff.
39. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MERU THIS 5<sup>TH</sup> DAY OF JULY, 2023**

**C.K YANO**

**JUDGE**

