



**Kosgei v Meghji (Environment & Land Case E015 of 2022)
[2023] KEELC 20535 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20535 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE E015 OF 2022
MN MWANYALE, J
OCTOBER 5, 2023**

BETWEEN

JOSEPH KOSGEI PLAINTIFF

AND

VELJI MEGHJI DEFENDANT

JUDGMENT

1. Vide the Originating Summons dated 19/5/2022 the Applicant, now Plaintiff, Joseph Kosgei, sought determination on the following issues;
 - i) Whether the Applicant has acquired title of LR 7830/22 Nandi Hills by adverse possession
 - ii) Whether the Respondent her heirs, agents, assigns and/or successors hold the title of the said Land in Trust for the Applicant
 - iii) Whether the title by the Respondent in respect of the parcel of land got extinguished by the expiry of 12 years after the Applicants took possession thereof.
2. The said Originating Summons was based on the grounds, inter alia, that the Applicants has been in occupation of the suit land, continuously, openly peacefully and uninterrupted since 1978 which is in excess of 12 years.
3. That the Applicant has always occupied and/or utilized the said parcel of land since the stated duration without force, without permission and without secrecy.
4. That the Applicant has continued to openly utilize the suit land without any objection from the Respondent.
5. The Applicant on the basis of the above grounds thus sought orders that;



- a) A declaration that the Applicant have acquired the suit property LR No 7830/22 Nandi Hills, by adverse possession and a vesting order in favour of the Applicants do issue forthwith.
 - b) An order that the Chief Land Registrar Nandi County Land Registrar do register the Applicant as proprietor of the suit land being LR as proprietor of the suit land being LR No 7830/22 Nandi Hills and do issue the Applicant with Certificate of Lease forthwith.
 - c) That the Deputy Registrar to execute transfer documents vesting the land upon Joseph Kosgei the Applicant herein.
 - d) That the Chief Land Registrar to use a copy of the order herein and the lease issued to Velji Meghji for purpose of construction of the register.
 - e) Costs of the suit.
6. The Originating Summons is supported by the Supporting Affidavit of the Applicant who depones inter alia that sometimes in 1978 he assumed and/or took possession of all that parcel of land known as LR No 7830/22 Nandi Hills, and he applied for allocation of the same to the Commissioner of Land and the then District plot allocation committee.
 7. That he thereafter assumed possession of the land parcel of land openly, continuously, without force, without secret and without permissions.
 8. That sometimes in 1995, he was allocated the parcel of only to realize that the same could not be allocated to him in view of the existence of a lease issued to the Respondent on 1st May 1959, and upon investigation of the registration, the Applicant learnt that the property had been registered in the name of the Respondent.
 9. The Plaintiff testified as the sole witness in the matter. The Defendant/Respondent did not enter appearance and interlocutory judgment was entered by the Honourable Deputy Registrar on 2/6/2023 and the matter proceed as undefended on 23/9/2023.
 10. It was the Plaintiff's case while adopting his witness statement that he had bought the suit property from Velji Meghji and he produced a copy of the Agreement for Sale as P Exhibit 1. At the time of the sale, he was given a copy of the title, which he produced as P Exhibit 2, and that he had built houses on the property and he produced photographs of the same as P Exhibit 3.
 11. The Plaintiff did not call any other witness and closed his case the defence case was equally closed and the Court directed oral submissions to be made on the same day.

Plaintiffs Submissions:-

12. In the oral submissions before Court the Plaintiff Advocates, urged the Court to consider the Originating Summons, supporting affidavit and the testimony of the Plaintiff and be guided by Sections 37 and 38 of the Limitation of Actions Act as well as the Order 37 Rules 7 and note that the Plaintiff has been in occupation for more than 12 years and allow the Plaintiff's case.
13. As observed earlier in this judgment, the matter is undefended but as was observed by the Court of Appeal in the decision in the case of Karugi and others v Kabiya & 3 others 1983 (eKLR) where the Court held "the burden on a Plaintiff to prove his case remains the same throughout the case even though the burden may become easier to discharge where the matter is not validly defended, the burden of proof is not way lessened because this is heard by way of formal proof."



14. The Court shall now examine the matter in light of the above holding of the Court of Appeal with regard to an undefended suit.

Issues For Determination:-

- 15.
- i) whether or not the Plaintiff has tendered evidence to support the Originating Summons?
 - ii) whether or not the Plaintiff has proven his case and
 - iii) what reliefs ought to issue?

Analysis and Determination:-

16. In his Originating Summons and the Supporting Affidavit thereof, being the pleadings in the matter, the Plaintiff depones that he assumed and/or took possession of the suit property sometime in 1978. This is found on paragraph 2, 4, 5 and 6 of the supporting affidavits and it is replicated in the witness statement; dated 5/7/2023 that the Plaintiff adopted as part of his evidence in chief.
17. In his testimony before Court, the Plaintiff now alludes to having purchased the suit property from the Defendant and has produced as P Exhibit number 1, a copy of an Agreement for Sale prepared on 5th July 1977.
18. The issue of purchase of the property however was not pleaded in the Originating summons neither does it appear in the Supporting Affidavit as well as the witness statement. It is thus a new issue altogether that does not support the original claim, as pleaded.
19. The evidence and the pleadings are not only inconsistent but also at variance.
20. It is trite law that parties are bound by their pleadings. The Court of Appeal in its decision in the case of *IEBC and another v Stephen Mutinda Mule and 3 others* Civil Appeal No 219 of 2013 (2014 eKLR) reaffirmed this position and quoted the decision of the Nigerian Supreme Court in *Adetoun Oladeji (NIG) o ltd v Nigeria Breweries*
- “it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in other way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”
21. Having found that the evidence is inconsistent and at variance and noting the principles laid down in the above cited decision, the testimony of the Plaintiff and P Exhibit 1 with regard to purchase by the Plaintiff on LR No 7830/22 Nandi Hills must thus be disregarded and thus in answer to issue number 1 the Court finds that the Plaintiff has not tendered evidence to support the Originating Summons.
22. On the second issue as to whether the Plaintiff has proven the ingredients of adverse possession. The ingredients were stated in the case of *Daniel Kimani Rucine v Swift Tutterfood Company Ltd. & Another* (1977) eKLR where the Court stated “the Plaintiffs have to prove that they have used this land which they clam as of right; nec vo, nec clam nec plecario (no force, no secrecy, no ecaion). So, the Plaintiffs must show that the Defendant had knowledge (or the means of knowing, actual or constructive) of the possession of occupation. The possession must be continuous. I t must not be broken for any temporary purposes of by any evidence to interrupt it or by any recurrent consideration.”



23. From the said decision and applying the principles thereto to the current case, the Plaintiff has established, occupation for a period of more than 12 years, and the occupation is open and notorious. The Plaintiff is further required to show knowledge of his occupation by the Defendant. The Court of Appeal in the decision in the case of *Francis Gicharu Kariri v Peter Njoroge Mairu* Civil Appeal No 293 of 2002, as well as the decision in the case of *Titus Kigoro Munyi v Peter Mburu Kimani* Civil Appeal No 28/2014 confirmed that knowledge by the Defendant of the occupation is an ingredient of adverse possession. In *Francis Gicharu Kariri v Peter Njoroge Mairu* Civil Appeal No 293/2002 the Court approved the decision of the High Court in *Kimani Ruchire v Swift Rutherford Foods & Company Ltd*.
24. Similarly, in *Titus Kigoro Munyi v Peter Mburu Kimani* Civil Appeal No 28/2014 the Court held as follows

“Guided by the dicta as stated by Kneller J, herein above and as adopted by this Court in *Francis Gicharu Kariri v Peter Njoroge Mairu* we are of the considered view that a claim for adverse possession actual or constructive knowledge of adverse possession by a third party on the part of the registered owner must be proved.”
25. It follows from the above decisions that Plaintiff ought to prove knowledge of his occupation of the suit property by the Defendant as an ingredient of adverse possession.
26. Has the Plaintiff proved this? In the supporting affidavit to the Originating Summons as well as the witness statement, the Plaintiff narrated of assuming ownership and having conducted an investigation on the owner he found that the property to belong the Defendant.
27. There was no evidence adduced to suggest that the Defendant has knowledge of occupation by the Plaintiff. Additionally, the Plaintiff testified as the sole witness, he did bring a witness to corroborate the occupation of the property evidenced by the photographs and to that extent his evidence on occupation though not challenged was not corroborated.
28. In answer to issue number 2, the Court finds that the Plaintiff did not prove all the ingredient of adverse possession. Particularly did not prove knowledge by the registered owner of his occupation.
29. On issue number 3, having found the evidence and pleadings to be at variance leading to disregarding the Agreement for Sale (P Exhibit 1) and the testimony thereof and having found the Plaintiff's occupation was not corroborated and that the element of knowledge of occupation as an ingredient was not proven, it follows that the Plaintiff has not discharge his burden of proof and consequently did not proven his case.
30. The inevitable conclusion is that the Plaintiffs suit though undefended has not proven and the same is hereby dismissed.
31. There shall be no orders as to costs.

JUDGMENT, DATED AND DELIVERED AT KAPSABET THIS 5TH DAY OF OCTOBER, 2023.

HON. M. N. MWANYALE

JUDGE

In the presence of;

Mr. Korir for the Plaintiff.

