



Kariuki & 2 others (As Personal Representatives of the Estate of Stephen Mungai alias Stephen Mungai S. Kamau alias Stephen Mungai Samwel Kamau - Deceased) v Libey Njoki Munene And James Chege Munene (As Personal Representatives of the Estate of James Flavian Chege Munene) & 7 others (Environment & Land Case 43 of 2019) [2023] KEELC 21469 (KLR) (9 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21469 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 43 OF 2019
OA ANGOTE, J
NOVEMBER 9, 2023**

BETWEEN

**ELIZABETH NJOKI KARIUKI 1ST PLAINTIFF
GEORGE MACHEMO MUNGAI 2ND PLAINTIFF
ELIZABETH NJOKI MUNGAI 3RD PLAINTIFF
AS PERSONAL REPRESENTATIVES OF THE ESTATE OF STEPHEN MUNGAI
ALIAS STEPHEN MUNGAI S. KAMAU ALIAS STEPHEN MUNGAI SAMWEL
KAMAU - DECEASED**

AND

**LIBEY NJOKI MUNENE AND JAMES CHEGE MUNENE (AS PERSONAL
REPRESENTATIVES OF THE ESTATE OF JAMES FLAVIAN CHEGE
MUNENE) 1ST DEFENDANT
ROSEMARY NYAMBURA KARANJA, FRANCIS MUHIA KARANJA AND
JOSEPH KIMAANI KARANJA (AS PERSONAL REPRESENTATIVES OF THE
ESTATE OF TIRAS TIRUS KARANJA MUHIA) 2ND DEFENDANT
PERSONAL REPRESENTATIVES OF THE ESTATE OF TIRAU
MUIRANG'A 3RD DEFENDANT
PERSONAL REPRESENTATIVES OF THE ESTATE OF TIRUS KIBUTHIAI
MUCHERU 4TH DEFENDANT
PERSONAL REPRESENTATIVES OF THE ESTATE OF JAMES MUNGAI
WARUHIU 5TH DEFENDANT**



**PERSONAL REPRESENTATIVES OF THE ESTATE OF PETER
ITATE 6TH DEFENDANT**
**PERSONAL REPRESENTATIVES OF THE ESTATE OF PETER
NJOROGE 7TH DEFENDANT**
**PERSONAL REPRESENTATIVES OF THE ESTATE OF CHARLES
MUGANE 8TH DEFENDANT**

JUDGMENT

1. Before the Court for determination is the Plaintiffs' Originating Summons dated 5th February 2019 and brought under Section 38 of the [Limitation of Actions Act](#), Order 37 Rule 7 of the [Civil Procedure Rules](#) and Section 7 (d) of the [Land Act](#). The Plaintiffs are seeking orders that:
 - a. Elizabeth Njoki Kariuki, George Machelo Mungai and Elizabeth Njoki Mungai (Personal Representatives of the Estate of Stephen Mungai S. Kamau) have been in adverse possession of the approximately 0.1006 of an acre of land known as LR 36/1/892 situated in Eastleigh in the City of Nairobi (hereinafter 'the suit property') since 1978 to the present and consequently they be declared the absolute owners thereof and the same be registered in their names on behalf of the Estate of Stephen Mungai S. Kamau.
 - b. The Deputy Registrar of this Honourable Court be authorized to sign all the requisite transfer documents/papers/consents in place of the Defendants herein to facilitate the transfer of the suit property to the Plaintiffs.
 - c. Costs of the suit be provided for.
2. The Originating Summons is supported by an affidavit sworn by the Plaintiffs who deponed that they are the Personal Representatives of the Estate of Stephen Mungai S. Kamau (hereinafter the late Stephen Mungai) who was in a business partnership known as Kibibana Farm with James Flavian Chege Munene, Tiras Karanja Muhia, Tirau Muirang'a, Tirus Kibuthiai Mucheru, James Mungai Waruhiu, Peter Itate, Peter Njoroge, Charles Mugane and John Githi Kigunda (hereinafter the deceased partners).
3. The Plaintiffs deponed that the partnership which was initially unregistered had LR 36/1/891 and the suit property registered in the names of the Late Stephen Mungai and the deceased partners in 1967.
4. According to the Plaintiffs, the two parcels of land had commercial buildings erected thereon; that in 1975, the deceased partners sold the two parcels to the Late Stephen Mungai; that the same land was transferred to Mary Muthoni Mungai (the second wife to the Late Stephen Mungai) for a consideration of Kshs. 90,000 and that there was registration in her favour on 15th September 1975.
5. It is the Plaintiffs' case that the late Stephen Mungai and Mary Muthoni Mungai took possession of the two parcels of land and the buildings thereon without any objection from the deceased partners and that it later came to the attention of the deceased that the registration had only been done for one parcel of land and not for the suit property despite having purchased both parcels from the deceased partners.



6. Consequently, it was deponed, on 30th June 2003, the surviving partners of the partnership which had by then been incorporated as Kibibana Limited wrote an acknowledgement to confirm that the partnership had sold the suit property to the Late Stephen Mungai.
7. The Plaintiffs averred that although Mary Muthoni Mungai died on 12th June 2004, the family of the late Stephen Mungai has been in uninterrupted and continuous possession of the two parcels of land, including the suit property since 1975 when they were purchased the land from the partnership. The possession, it was deponed, has been without opposition from the deceased partners or from their families.
8. In view of the foregoing, the Plaintiffs averred that they have acquired title to the suit property by adverse possession. In conclusion, they stated that the Estate of the late Stephen Mungai is being distributed and a title to the suit property is needed to bequeath the same to the family of Mary Muthoni Mungai who is also deceased.
9. The 1st Defendant was served with the Originating Summons and the hearing notice. The 2nd to 9th Defendants were served by substituted service in the Standard Newspaper. None of the Defendants entered appearance, nor filed a response to the Originating Summons.
10. During the hearing, George Macheho Mungai, one of the Plaintiffs, testified as PW1. He adopted the supporting affidavit on record as part of his evidence-in-chief and the annexures thereon as exhibits. He further stated that he is a co-administrator of his late father's estate alongside his sisters.
11. While asking that the Originating Summons should be allowed, the witness stated that the suit property belonged to his late father who bought it in 1975 from the Kibibana Farm partnership for his second wife, Mary Muthoni Mungai.
12. PW1 informed the court that although the land was never registered in her name, she took possession of the suit property and has been in occupation since then. Additionally, it was stated, when the partnership was registered as a limited liability company, the surviving directors agreed that the suit property belonged to their late father.

Submissions

13. The Plaintiffs filed their submissions on 11th June 2023. Relying on the cases of *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR, *Chevron (K) Ltd v Harrison Charo Wa Shutu* [2016] eKLR and *James Maina Kinya v Gerald Kwendaka* [2018] eKLR, the Plaintiffs submitted that it is the inaction of the title holder that gives rise to the adverse possessor's rights.
14. It was submitted by the Plaintiffs that in the instant case, there was no fraud or wrongdoing on the part of the late Stephen Mungai in the acquisition of the suit property and that the late Stephen Mungai and his family have been in open, exclusive and continuous possession of the suit property in a manner that was detrimental to the interests of the deceased partners as the registered owners of the suit property.

Analysis and Determination

15. Based on the foregoing, the following one issue arises for determination:

Whether the Plaintiffs have acquired title to the suit property by way of Adverse Possession.

16. The Plaintiffs have averred that the suit property was one of the two plots that the late Stephen Mungai purchased from Kibibana Farm partners in 1975. The other plot was successfully registered in the name of Mary Muthoni Mungai, and not the other portion (the suit property).



17. It is the Plaintiff's case that the late Stephen Mungai and Mary Muthoni Mungai (and later on their family) took possession of the suit property and have been thereon since 1975 without interruption from the deceased partners, or their families. They therefore claim that they have acquired ownership of the same by adverse possession.
18. Section 38 (1) of the *Limitations of Actions Act* provides as follows:
- “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.”
19. In *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, the court stated that a person claiming land by adverse possession must establish on a balance of probabilities the following elements:
- a. The person claiming land by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period.
 - b. The entry and occupation must be with, or maintained under, some claim or colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.
 - c. The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied.
 - d. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with the evinced unmistakable animus possidendi, that is to say occupation with clear intention of excluding the owner as well as other people.
 - e. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter, unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.
 - f. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community of the exercise of dominion over the land.
 - g. The possession must be continuous uninterrupted, unbroken for the necessary statutory period.
 - h. The rightful owner or paper title holder against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period.
 - i. The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.



- j. The land, or portion of the land adversely possessed must be definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. The absence of a plot or title number need not present any difficulty, nor should it be a bar to establishing a claim of adverse possession.

20. In *Wambugu v Njuguna* [1983] KLR 172 the court stated as follows:

“First in order to acquire by the Statute of Limitations 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 entails acts which are inconsistent with his enjoyment of the soil and for the purpose for which he intended to use it. The *Limitation of Actions Act* (Chapter 22) on adverse possession contemplated 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.”

21. In *Kimani Ruchine & another v Swift, Rutherford Co. Ltd. & another* [1977] KLR 10 Kneller J. stated as follows at page 16:

“The Plaintiffs have to prove that they have used this land which they claim as of right, necvi, nec clam, necplecario (no force, no secrecy, no evasion)The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”

22. It is not disputed that the late Stephen Mungai bought the two parcels of land from the deceased partners. Although he took possession of the two parcels of land, it is only one portion that was transferred to one of his wives, Mary Muthoni Mungai.

23. The Plaintiffs have identified the land that was never transferred, but which they have always occupied since 1975 as LR 36/1/892. A copy of the Certificate of Title certified by the Registrar of Lands has been attached in support of the existence of the suit property.

24. The same shows that it was originally registered in the name of the late Stephen Mungai and the deceased partners. The document also shows that LR 36/1/891 was transferred to Mary Muthoni Mungai for a consideration of Kshs. 90,000. The suit property was not transferred as per the title document.

25. Photographs of the suit property and the commercial buildings thereon were produced in support of this assertion. The Plaintiffs have averred that the occupation has been open, continuous and with the knowledge of the deceased partners and their families and without any interruption.

26. Indeed, a document dated 30th June 2003 by the surviving directors of Kibibana Limited (formerly Kibibana Farm) stated as follows:

“We Directors of Kibibana Ltd confirmed as Stephen Mungai S. Kamau is the owner of Plot 36/1/892. He bought it when we were Kibibana Farm and it has been difficulty to transfer to him.”



27. This is evidence to show that the rightful owners of the suit property knew they were ousted from the suit property and did part with possession of the same.
28. In view of the foregoing I find that the Plaintiffs have proven on a balance of probabilities that they are entitled to the suit property which is registered in the name of the late Stephen Mungai and the deceased partners by way of adverse possession. The Plaintiffs are therefore entitled to the orders sought.
29. For those reasons, the Originating Summons dated 5th February, 2019 is allowed as follows:
 - a. Elizabeth Njoki Kariuki, George Machelo Mungai and Elizabeth Njoki Mungai (Personal Representatives of the Estate of Stephen Mungai S. Kamau) have been in adverse possession of the approximately 0.1006 of an acre of land known as LR 36/1/892 situated in Eastleigh in the City of Nairobi since 1978 to the present and consequently they are the absolute owners thereof and the same be registered in their names on behalf of the Estate of Stephen Mungai S. Kamau.
 - b. The Chief Land Registrar to comply with the above order by issuing to the Plaintiffs with the title document in respect of LR 36/1/892.
 - c. Each party to bear his/her own costs.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 9TH DAY OF NOVEMBER, 2023.

O. A. ANGOTE

JUDGE

