



Marete v Kimathi (Sued as the Legal Representative of the Estate of Edward Kimathi – Deceased) (Environment & Land Case E031 of 2021) [2023] KEELC 21368 (KLR) (9 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21368 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E031 OF 2021
CK YANO, J
NOVEMBER 9, 2023**

BETWEEN

NAOMI KAGWIRIA MARETE PLAINTIFF

AND

ROSE HELLEN K. KIMATHI (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF EDWARD KIMATHI – DECEASED) DEFENDANT

JUDGMENT

1. By an originating summons dated 15th December, 2021 the plaintiff is seeking for the following reliefs;-
 - a) A declaration that the plaintiff is and has been occupying an area measuring $\frac{1}{2}$ of an acre from land parcel No. Nyaki/Mulathankari/451 which is currently registered in the names of Edward Kimathi (deceased) and that her occupation has been open, public, exclusive, continuous and without interruption since 1988.
 - b) A declaration that the plaintiff has acquired by way of adverse possession ownership of a portion of land measuring $\frac{1}{2}$ an acre from Land parcel Number Nyaki/Mulathankari/451 measuring 3 acres.
 - c) Alternatively, and without prejudice to the foregoing, that Edward Kiamthi (deceased) held $\frac{1}{2}$ of an acre of land parcel no. NyakI/Mulathankari/451 in trust for the plaintiff.
 - d) An order that the defendant do execute a valid transfer instrument of $\frac{1}{2}$ of an acre from land parcel No. Nyaki/Mulathankari/451 in favour of the plaintiff and in default the court administrator of this Honourable court be empowered to execute such transfer instruments.
 - e) Costs of this suit and any other relief that the court may deem fit and expedient.



2. The summons is supported by the plaintiff's affidavit sworn on 15th December, 2023 wherein she has annexed a copy of the green card of the suit land showing that Edward Kimathi (deceased) was registered as proprietor of the land in the year 1967.
3. The plaintiff averred that she got married to her late husband Joseph Kaimenyi (deceased) in the year 1980 and they set up their matrimonial home in the suit land. That the plaintiff and her family have been living and utilizing ½ an acre of the suit land since 1967 and that the occupation was open, exclusive, continuous and uninterrupted and have built permanent and semi-permanent houses in the said portion where they also engage in farming. The photographs showing the alleged developments have been exhibited.
4. The plaintiff stated that when her husband died on 26th May 2012, his remains were interred in the said portion. That the defendant and her family have been aware of the plaintiff's open, continuous and exclusive occupation of the suit land with the claimed portion having clear boundaries which have been maintained and her neighbours are aware of and do not interrupt or trespass thereon.
5. It is the plaintiff's case that on 17th March, 2017, the defendant applied for letters of administration of the estate of Edward Kimathi and the grant was confirmed on 31st May 2018 whereby the suit land was wholly distributed to the defendant without caring the plaintiff's interests. That the plaintiff protested against the said distribution but her protest was dismissed. A copy of the judgment has been exhibited. The plaintiff believes that she has a genuine claim against the estate of the deceased owner of the land thus the filing of this suit.
6. During the hearing, the plaintiff testified as P.w 1 and called three witnesses. The plaintiff adopted her witness statement dated 15th December, 2021 as her evidence – in chief which basically reiterated the contents in the supporting affidavit. The plaintiff produced the green card, a copy of the judgment in Meru Cmc succession cause No. 115 of 2017 and the photographs as P exhibits 1,2 and 3 (1) to (iv) respectively.
7. When cross examined by Mr. Mokuu, learned counsel for the defendant, the plaintiff stated that the defendant is her sister in law and confirmed that they have been to the succession court in succession cause No. 115 of 2017. That she did not appeal against the judgment in the said succession cause.
8. The plaintiff testified that when she got married to her late husband in 1988 she lived in a house on parcel No. 451 which she found her husband staying in and which she later learnt belonged to her father in law whom she did not however meet. That she met her mother in law who was using the land but had moved out of the house. The plaintiff confirmed that other than the house she found when she first got married, her late husband put up another house for their children. She also confirmed that the suit land is an ancestral land and that her father in law, Silas M'Muchui (deceased) had a large family who are settled in different parcels belonging to the deceased.
9. The plaintiff further confirmed that there was succession cause No. 564 of 2012 over the estate of her deceased father in law which shared out the estate to the beneficiaries out of which the plaintiff got a share of 5 acres from estate as the legal representative of her deceased husband.
10. 2 was Titus Mwitii, a brother in law to both the plaintiff and the defendant. He admitted that their father inherited the suit land from their grandfather. That he and his other brothers are settled on other parcels belonging to their late father but the late Joseph and late Edward were left on the suit land, where they lived and stayed with their families until their demise and are buried thereon. He was cross-examined and re-examined.



11. 3 was Julius Kathurima M'Itwamwari, a cousin to both the plaintiff's and defendant's late husbands. He confirmed that the plaintiff is using about ½ an acre of the suit land and that the plaintiff's late husband was buried on the said land. He too was cross examined. He confirmed that other than the suit land, the plaintiff has another parcel of land which was given to her late husband by his father.
12. Martha Karambu Kiogora testified as P.w 4. She is a sister in law to both the plaintiff and the defendant. She adopted her witness statement dated 3rd February, 2022 as her evidence in chief.
13. The defendant filed a statement of defence dated 10th January, 2022 wherein she denied the plaintiff's claim. It was the defendant's case that Silas Mucee (deceased), her father in law had a family of four boys and six daughters. That all of them were settled on their respective parcels, the plaintiff included. That when the plaintiff got married, they moved into the parent's old house where she has remained to-date.
14. It is the defendant's contention that the suit land has been the subject of litigation in Meru CM Succession cause No. 115 of 2017 where it was determined that the plaintiff was wrongly in occupation of the suit land. The defendant stated that the plaintiff's late husband was buried on the land out of love and because they had not set up a home at the parcel of land given to him.
15. The defendant testified as D.w 1 and called two witnesses. The defendant testified that her late husband was given the suit land by her father in law Silas Mucee (deceased) in 1967 who also gave his other children land where they are settled. That the plaintiff's late husband was only buried on the suit land because he had not settled on the land that he was given. She denied that the plaintiff has carried out any developments on the suit land but that she stays in a house that belonged to her father in law. The defendant produced the judgment in the succession cause and the confirmation of grant as D exhibits 1 and 2 respectively. The defendant was also cross-examined and re-examined.
16. D.W 2 was Eliud Munyua while D.w 3 was Johnson Mwitia. They both adopted their witness statements and were cross examined and re-examined. At the close of the plaintiff's case and the defendant's case, the parties through their advocates on record filed written submissions. The plaintiff filed submissions dated 18th July, 2023 through Mr. Ashford Gerald Riungu Advocate of the firm of M/s A.G Riungu & Co. Advocates while the defendant's submissions dated 4th September, 2023 were filed by the firm of Mokua Obiria & Associates Advocates. The court has read and considered the said submissions.

Analysis and Determination

17. The court has carefully considered the pleadings, the evidence and the submissions filed by the parties to buttress their assertions. I have also taken into account the legal authorities proffered by the parties. The court identifies the following issues for determination-;
 - i. Whether the plaintiff has acquired ½ an acre from Land Reference No. Nyaki/Mulathnakari/451 through adverse possession.
 - ii. Whether the applicant is entitled to the reliefs sought.
18. In deciding whether or not the plaintiff has proved her claim for adverse possession to the required standard in Civil cases, the plaintiff must prove that she has been in occupation of the suit land 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.



19. In *Wambugu v Njuguna* [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.”

20. In the case of *Mtana Lewa v Kabindi Mwangandi* [2015] eKLR, the Court of appeal (Makhandi 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.”

21. 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”

22. Further in Section 13 it is provided that-:

“(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 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 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 possession of the land.
- (3) For the purpose 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.”

23. Section 16 provides as follows-;

“For the purpose of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration.”

24. Section 17 goes on to state-;

“Subject to Section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action) the title of that person to the land is extinguished.”

25. Finally, Section 38 (1) and (2) states-;

“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.

- (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”

26. The combined effect of these sections is to extinguish the title of the proprietor of the land in favour of the adverse possessor at the expiry of 12 years of occupation of the adverse possession on the suit land.

27. Section 28(h) of the *Land Registration Act*, 2012 recognizes overriding interests on land, some of which are rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription. Under section 7 of the *Land Act*, 2012 prescription is one of the ways of acquisition of land.

28. In *Kasuve v Mwaani Investments Limited & 4 others* 1 KLR 184, the Court of Appeal restated that a plaintiff in a claim for adverse possession has to prove-;

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.”



29. In the case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, Kuloba J in a persuasive decision stated-;

“(3) 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. It has been held many times that acts done under licence or permitted by or with love of, the owner do not amount to adverse possession and do not give the licensee or permitted entrant any title under the limitation statute. If one is in possession as a result of permission given him by the owner, or if he is in possession of the land as a licensee from the owner, he is not in adverse possession. Permissive occupation is inconsistent with adverse possession. The stranger must show how and when his possession ceased to be permissive and became adverse...”

30. In the above case, the learned Judge went on to state as follows-;

“4. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with an evinced unmistakable animus possessidendi, that is to say occupation with the clear intention of excluding the owner as well as other people. Exclusive possession means that the exercise of dominion over the land must not be shared with the disused owner, the land being in actual possession with intent to hold solely for the possessor to the exclusion of others. A person in possession of land is not entitled to the protection of the statute of limitations as against the owner of the paper title where the latter and his predecessors in title have not been kept dispossessed or have not abandoned possession of the land for the statutory period and the person claiming the protection of the statute has been in possession with an animus possessidendi for the requisite time. It must be shown that the owner has ceased to be in occupation and that the claimant is and has continuously been in occupation...” ... the person relying on the statute must prove that he is in exclusive possession. It is not sufficient to prove that he enjoyed the use of the land in common with the true owner. It is a fallacy to assume that it is a presumption of law or fact that when two people live on the same land the whole or any part of the land is in view of the law of limitation of actions, in the possession of the person who happens to be using the land for cultivation, building, grazing or howsoever. There is no foundation for such a doctrine either in law or in fact. It is not an extraordinary phenomenon in this country for one person to let another man who has no land of his own, to live on his land for as long as possible, on the clear understanding express or by customary law, that as soon as the landless is able to get land of his own, he shall vacate the owner’s land. That arrangement may be between clansmen, relatives, or vendor and purchaser under a failed contract. The arrangement does not result in ouster or discontinuance and hence, exclusive possession by the squatter ...”

31. Kuloba J. went on to state further that “if the true owner can make no immediate use of the land, as the years go by it cannot be accepted that he would lose his rights as owner merely by reason of act of trespass or user which in no way would interfere with contemplated subsequent user by the owner...”



32. In the instant case, it is not in dispute that the plaintiff and the defendant are sisters in law having been married by men who were brothers. Their deceased husbands used to live together in their father's land. From the evidence on record, their father who is the patriarch had 4 sons and 6 daughters. During his lifetime he had several land parcels which he gave to his sons. Both the patriarch and his wife vacated the suit land and went to live elsewhere. All the children of the patriarch left the suit land leaving behind Edward and Joseph who were husband to the defendant and the plaintiff respectively who continued occupying the suit land.
33. The plaintiff and her late husband were bequeathed 5 acres on behalf of her deceased husband being LR. No. 1340 while Edward Kimathi was given the suit land by his father upon which he was registered owner of the land measuring three (3) acres. Edward out of love, accommodated his brother and his family since they had not settled on the land given to him by their father. He even allowed him to be interred on the land upon his demise since he hadn't developed his.
34. The plaintiff has now filed originating summons where she claims ½ an acre of land Parcel Nyaki/Mulathankari/451. The issue for determination is whether the plaintiff has acquired the suit land by adverse possession. It is the plaintiff's evidence that she has lived on the land since 1988 when she got married which is also admitted by the defendant. The same is therefore not contested. The question however is whether such occupation and possession was adverse to the rightful owner.
35. Looking at the evidence as presented, the plaintiff has been living on the defendant's land with the permission of the defendant and her late husband. They all lived on the land and the owner cannot be said to have been dispossessed of the land. In the evidence of the attached judgment marked P exhibit 2 of succession cause No. 115 of 2017 the succession court stated-;
- “ 1 could be allowed to have a second bite at the cherry. She cannot have the whole of 5 acres out of L.P no. 1340 and rightfully claim a portion however small out of the suit land which measures 3 acres. In fact P.w 1 ought to have received the suit land like yesterday. The only reason why she continued living on the suit land after the death of Joseph in the year 2012 was that Edward and Joseph were in good terms and that is why Edward allowed his sister in law to continue living on the suit land after the death of (Edward's) brother Joseph. It was clear on evidence that Edward attempt to gently nudge P.w 1 to move to their land fell on deaf ears. Edward died in year 2015 and matters came to an on heard...”
36. In this case, all the parties are related and lived on the land as relatives. The original owner subdivided his parcels of land and gave each of his children their respective portions. The plaintiff's late husband had not developed his own land and, out of love, his brother allowed him to stay on his land with his family including the plaintiff as he organizes himself. To this end, the plaintiff has not brought herself within the confines of adverse possession since her stay was with the permission of the defendant's husband. In addition, the defendant as owner of the land had not been dispossessed of it as to amount to adverse possession.
37. In my view this is a pure case of greed, noting that the plaintiff has 5 acres elsewhere but still wants to have a share of a ½ of the defendant's portion of 3 acres. This is an issue that was adequately addressed in P Exh 2. However, since the issue at hand is a claim of adverse possession, it suffices to state that the same has not been proved since the plaintiff lived on the suit land with the permission of the defendant's husband. I am persuaded by the decision of Kuloba J. in *Gabriel Mbuvi v Mukindia Maranya* (*supra*).
38. In the result, it is my finding that the plaintiff has not proved her case on a balance of probabilities and the same is dismissed with costs to the defendant.



39. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 9TH DAY OF NOVEMBER, 2023.

IN THE PRESENCE OF

Court Assistant – V.Kiragu/Lena M.

Ms Riungu for plaintiff

Mokua for defendant

C.K YANO

JUDGE

