



**Kibunji & 2 others v Lucy Mugure (Legal Representative Of The Estate
Of Charles Muthaura Mutua – Deceased & 5 others (Environment & Land
Case 29 of 2015) [2022] KEELC 2410 (KLR) (4 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2410 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE 29 OF 2015**

**CK NZILI, J
MAY 4, 2022**

BETWEEN

**PILCIRA MPWII KIBUNJI 1ST PLAINTIFF
FRANCIS MUTHUKU KIBUNJI 2ND PLAINTIFF
JOSEPH MUTWIRI KIBUNJI 3RD PLAINTIFF**

AND

**LUCY MUGURE (LEGAL REPRESENTATIVE OF THE ESTATE OF CHARLES
MUTHAURA MUTUA – DECEASED 1ST DEFENDANT
JAMES MUTHURI NGEERA 2ND DEFENDANT
SAMWEL NJOROGE 3RD DEFENDANT
MATHEW MUUYA 4TH DEFENDANT
PHILIP KIRAI NGERA 5TH DEFENDANT
LETZIA NTINYARI 6TH DEFENDANT**

JUDGMENT

A. Pleadings

1. By an amended originating summons taken out on April 13, 2018 the plaintiffs sought to be declared to be entitled to the defendant's L.R No. Kiamuri "A"696 by way of adverse possession. The amended originating summons was supported by a sworn affidavit of Pilcira Mpwii Kibunji on the even date, list of documents dated May 4, 2015 and witness statements as contained in the paginated bundle filed on April 25, 2018.



2. The application was opposed by the 2nd respondents replying affidavit sworn on July 26, 2019, attaching annexures thereto and list of witness statements as contained in the paginated bundle dated July 26, 2019 and filed on July 26, 2019.
3. The basis of the 2nd defendant's defence was that the plaintiffs had entered the suit land with permission but upon revocation of the same the plaintiffs had refused to vacate following which suits were filed and determined against the plaintiffs hence the suit herein was both res judicata and sub-judice.
4. On the part of the 3rd defendant the originating summons was opposed through witness statements and list of documents dated 1.3.2019, and filed on March 4, 2019. Regarding the 6th defendant, the application was opposed by a replying affidavit sworn on July 18, 2019 by Letzia Ntinyari as well as her witness statements filed on April 23, 2019 on the basis that there had been four other previous court cases already determined against the plaintiff which they had failed to disclose.
5. Similarly the 3rd and 6th defendants relied on a supplementary list of witnesses and documents filed on July 16, 2017.

B. Testimony

6. The plaintiff adopted his affidavit attached to the amended originating summons dated 13.4.2018, witness statement and produced a limited grant dated April 18, 2012, a letter dated 15.7.2000, a certificate of official search for L.R No. Kiamuri "A" 1 696, receipts dated November 1, 2013, a map for the suit premises photographs demonstrating his homestead together with developments on the suit land and a copy of green card for L.R No. Kiamuri "A" 960 as P. exhibit 1 – 6 respectively.
7. In cross examination PW 1 admitted that her husband Julius Kubinji Matemi who had a case with one Mbae regarding the suit land before the Minister for land but denied that he had lost the case. Further, PW 1 stated that there had been a scene visit as ordered by the court whose report showed some developments on the land belonging to the defendant after she was removed her from the land and purported to subdivide the original parcel no. 960. PW 1 acknowledged that the defendant had erected a fence effectively blocking her access to the land.
8. PW 2 confirmed that PW 1 was his neighbor since 1961 until she was ordered out of the land by the defendants following her husband's death who was also buried on the suit land. He acknowledged that there had been previous cases between PW 1's husband and one Gibson Nyaga.
9. PW 3 adopted his witness statement on page 31 of the plaintiff's paginated bundle of documents and confirmed that the suit land was being utilized by the 2nd and 5th defendant even though as at 1972, PW 1 was the one occupying the land.
10. DW 1 Letzia Ntinyari adopted her witness statement dated 16.7.2019 and her replying affidavit sworn on 18.6.2016. She produced an application for leave to file judicial review in Meru HCC. Misc Application No. 57 of 1996, a statement of verification of facts by Julius Kibunji Mutemi, affidavit thereto, proceedings and pleadings in Meru High Court Misc civil case no. 150 of 1999, a plaint in Meru CMCC No. 671 of 1996 and a copy of records for L.R No. Kiamuri A1 960 as D. exhibit 1-6 respectively.
11. In cross examination DW 1 insisted the suit land had been bought from Macharia Njoroge and Lucy Wanyiri though they did not live on the land. As concerns P. exhibit 2, DW 1 admitted the house belonged to some people that they had found on the land while buying it in 2016 but could not tell the outcome of the previous suits. Regarding the house, DW 1 said the alleged houses were on parcel No. 696 and not parcel no. 960. She insisted that she was the one utilizing parcel No. 696 since 2016.



12. DW 2 adopted his witness statement dated 1.3.2019 and stated that there existed no clear boundary between the two parcels of land. He clarified that PW 1's house was on the land belonging to one Mbogo but had refused to vacate the land after the land was given to him by one Macharia. Further PW 2 said PW 1 was on the land belonging to one Mbogo where her house stood but the rest of the land belonged to the owner.
13. DW 3 adopted his replying affidavit and a witness statement dated 22.7.2019 and 26.7.2019 respectively. He produced a Minister's ruling in no. 27 of 1992, letter to the land registrar dated April 28, 1995, a plaint in Githongo CMC No. 17 of 1995, a copy of title deed in L.R Kiamuri/A1 696, a copy of green card thereof and a copy of grant in succession cause no. 288 of 2011 as D. exh 7-12 respectively. He admitted to have settled on the suit land in 2015 though he was told PW 1 used to occupy the land on permission prior to the adjudication process.
14. DW 3 testified that the person who sold to him the suit land had sought for and obtained eviction orders against the PW 1 through a series of cases between 1992 and 1999 though he was not a party to the said cases. He however admitted that they had been a pending case. As regard P. exhi 2, DW 3 admitted that the houses in the photos were there as at 2015, as well as the mango trees but could not tell who had planted them since PW 1 was on and off the land and that at the time he bought the suit land the said houses were in a dilapidated state, only existing there for speculation purposes.
15. In re-examination DW 3 admitted the suit land was 2.3 ha Pw 1 occupied one acre of the suit land and while he was occupying the rest of the suit land.
16. DW 4 adopted her witness statement dated July 26, 2019. She testified that her late father had sued the father to the 2nd and 3rd defendants over the suit land after he refused to vacate the suit land. She admitted that she sold the land to DW 2 after she finalized the succession though she had not evicted the plaintiffs before transferring the same to DW 2.
17. DW 5 testified that L.R No. 696 was approximately five acres initially belonging to one Mbogo but was bought by James Muthuuri. He said one Kibunji had allegedly trespassed into it before the adjudication section and erected a temporary structure. DW 5 confirmed that the suit land was sold to one Muthuuri who acquired a title deed. DW 5 was emphatic that one Kibunji was ordered to vacate the land but appealed against the said order. DW 5 said that eventually PW 1 vacated the suit land and had no justification to claim the same since it was now occupied by DW 2.

C. Written submissions

18. The plaintiff's submit they are still in actual possession of the suit land since the inception of the minister's appeal no. 27/92 which was decided in 1994 as confirmed by the letter dated July 15, 2020.
19. It is the plaintiff's submissions that even if the appeal was in favour of the defendants the latter had slept on the judgment for over 12 years hence was not applicable and could not defeat their claim since they had not been evicted or disposed of the suit land.
20. Reliance was placed on *M'Ikiara M'Kaunyang Sebastian Nyamu v Gilbert Kabeere M'Mbijiwe* Nyeri Civil Appeal no. 124 of 2003.
21. As regards the requirements and the ingredients of adverse possession the plaintiffs relied on *Mbiira v Gachubi* (2002) IEA since they had been on the land with effect from 1976, the 1st plaintiffs husband acquired the land only for the defendant to fraudulently transfer the same to themselves on May 3, 1996 which transfer could not affect the plaintiff's adverse possession. Reliance was placed on *Githu v Ndeete* (9184) KLR since the affidavit of James Muthuri Ngeera dated April 29, 2016 had admitted



the continued and utilization of the suit land and the affidavit dated October 12, 2016 conceding that the respondents had not tried to evict the plaintiffs.

22. On the other hand the defendant submitted that they gave candid sequence of events that it was the defendant who have been in occupation of suit land and made numerous developments thereon. As regards the pleading in Meru HCC No. 150 of 1999 and Meru CMCC No. 67 of 1996 even though the same was not disputed the defendants submitted that they could not trace the court files and confirm the outcomes.
23. That notwithstanding the defendants submitted the plaintiffs had not proved occupation of the entire land other than about ¼ acre of L.R No. Kiamuri "A"/696 and that time stopped running due to the filing of the previous numerous court cases.
24. Reliance was placed on *Maweu vs Hiu Ranching & Farming society* (1985) KLR 430 on the proposition that a party must prove that possession was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner(s).
25. Reliance was also placed on *Andrew Kariuki Boro v David Kinuthia Kimani* (2019) eKLR on interruption once suits are filed, when assertion occurs by legal proceedings or a registered owner make an effective entry into the land.
26. The defendant submitted the plaintiffs had the burden to tell the court what became of Meru CMCC No. 671 of 1996 because time stopped running the moment the suit was filed as well as the Meru High court misc. Civil Case No. 150 of 1999.
27. In sum the defendants urged the court to find that the plaintiffs had failed to discharge the burden of proof that they were entitled to adverse possession.

D. Issues for determination

26. The issues for commending themselves for my determination are:-
 - i. If the plaintiffs have met the conditions for a claim based on adverse possession.
 - ii. If time was interrupted by the filing of numerous suits.
 - iii. If the plaintiffs failure to bring the outcomes in the named suits impacted on the claim for adverse possession.
 - iv. What is the order as to costs.

E. Determination

28. For a party to be entitled to adverse possession he must bring evidence that the entry into the suit land was without permission, was an uninterrupted for 12 years, open and to the detriment of the registered owner. See *Maweu supra*, *Andrew Kariuki Bor (supra) Gitbu v Ndete (supra)*.
29. In this suit the 1st plaintiff pleaded she was bringing the suit as the legal representative of the estate of Julius Kibunji Mutemi her late husband and that L.R No. Kimaru A 696 and 960 was family land which they had occupied for 20 years and the defendants had never showed any interest or stepped therein. She pleaded their dwelling houses and mature trees were in place prior to the adjudication of the land and had even won a ministers appeal as per the letter dated July 15, 2010 but the defendants had through fraud and misrepresentation illegally obtained a title deed without her knowledge yet they had obtained the land by adverse possession which were overriding rights.



30. Further the plaintiffs averred that in succession cause no 288 of 2011 the 1st defendant purported to distribute LR No Kiamuri/'A'/696 to the 2nd defendant when they had obtained the land by adverse possession hence the ownership titles by 3rd, 4th and 5th defendants were fraudulent and obtained through misrepresentation and contrary to the plaintiffs adverse rights.
31. In support of this claim the plaintiffs produced p. exh 2 a certificate of an official search issued on October 28, 2013. It is not worth noting that the said search showed the registered owner of L.R 696 as Charles Muthaura Mutua and that Julius Kibunji Mutemi had placed a caution claiming a licensee's interest. In P. exh 6, the record shows the register for L.R no. Kiamuri/1/696 was opened on November 12, 1992 measuring 1.27 ha in favour of the defendants and a title deed issued on January 14, 2016.
32. In their response the defendants denied the claim, insisted there were previous suits namely Meru HCC Misc civil case no. 150 of 1999, Meru CMCC NO. 671 of 1996 (D. Exh 9) Meru H.C Misc No. 57 of 1995 and that the suit land had been transmitted to them out of Meru HCCC No. Succession Cause 288 of 2011.
33. It is trite law parties are bound by their pleadings and issues flow from pleadings see *IEBC v Stephen Mutinda Mule*. In this suit the plaintiffs pleaded that there was fraud and misrepresentation in the manner the defendants acquired and were registered the suit premises under their names. It is not in dispute that L.R No. Kiamuri/'A'/960 was opened on November 12, 1992 and title deed(s) issued on January 14, 2016 in favour of the defendants. Similarly L.R No. Kiamuri 'A'/696 was opened on November 12, 1992. The 1st entries indicate the title was initially registered in the name of Gerishon Mbogo and a restriction was placed on April 28, 1995 due to a minister's appeal. A caution was also placed by Julius Kibunji Mutemi for a licensee's interest on 6.6.1997 but later was removed. On May 24, 2015 under section 73(3) of the *Land Registration Act* 2012. Eventually the land was registered in favour of Lucy Mugure Mwaura on March 30, 2015 as per D. Exh (II) and a title deed issued on March 30, 2015 in favour of James Muthuri Ngeera which was produced as a defence exhibit.
34. There was no evidence led by the plaintiffs on any alleged fraud or misrepresentation by the defendants regarding the manner in which the registration and issuance of the title deeds under their names. It was not enough to plead fraud and misrepresentation and fail to substantiate it. There was no single letter produced indicating that the plaintiffs ever complained and or reported to the police for investigation over the transfers and or the entries there on. There was no evidence lead that any investigations were undertaken and a report compiled showing or pointing out any fraud or misrepresentation on the part of the defendants either individually or jointly. In absence of that my finding is that the plaintiffs have failed to prove fraud or misrepresentation in terms of section 25 & 26 of the *Land Registration Act* 2012.
35. The plaintiffs pleaded that they had won the ministers appeal and had cautioned the land to await the legal process. The D. exhibit 2 indicates that the caution was removed by the land registrar on May 24, 2015. However the plaintiffs avers it was fraudulently done. On the other hand the defendant aver that the plaintiffs lost the ministers appeal and the plaintiff's deceased husband filed Meru HCC Misc. No. 150 of 1999.
36. In D. Exhibit NO. 4 the plaintiff's deceased husband was seeking to quash the registration of L.R No. 696 in the name of Gerishon Mbogo John and for order for the cancellation of the transfer of the land to Charles Muthaura on May 3, 1996. He sought and the land to revert to him. Similarly the deceased husband was seeking to have the ministers proceedings and judgment declared defective and the court to find there had been fraud and or collusion between the minister and the land adjudication officer to deprive him the land.



37. The burden of proof was on the plaintiffs to bring before the court the outcome of the aforesaid suit or proceedings which appears to have raised similar claim essentially touching on the same facts and seeking similar prayers as in the instant suit.
38. It cannot be true that the plaintiffs would not be aware of the outcome since the case was theirs and or belonged to her late husband. The caution must have been removed by the land registrar for a reason. If the plaintiffs now allege the caution was placed in order to await for the outcome of the legal process one would have expected a complaint from the plaintiffs to the land registrar as the one who allegedly removed the caution if at all the proceedings were pending and or determined in favour of the plaintiffs by the High Court.
39. As regards the succession cause at paragraph 14 of the supporting affidavit to the amended originating summons the plaintiffs allege the 1st defendant filed succession cause no. 288 of 2011 and purported to distribute L.R No. 696 to the 2nd defendant despite the existence of their adverse right of possession. D. Exh 12 was the certificate of confirmation of grant issued by the court on September 18, 2013 regarding L.R No. Kiamuri "A" 696 in favour of the 2nd defendant.
40. The plaintiffs did not produced any evidence that they filed any protest and or revocation against the confirmed grant on account of adverse possession or for a beneficial interest soon after the grant was issued. Further there is no evidence that the plaintiffs sought for the stay or isolation of parcel no. 696 in line with Rule 41 of the *Probate and Administration Rules* on account of any pending claims over the suit properties. Similarly there was no evidence tendered that there was any pending appeal or review proceedings against the said certificate of confirmation of grant brought by the plaintiffs.
41. Following the aforesaid confirmed grant and the issuance of tile deed for L.R No. 696 in favour of the 2nd defendant, the defendant produced D. exhibit 9, the CMCC No. 7 of 2018 in which the 2nd defendant had sued the plaintiffs for vacant possession, permanent injunction and mesne profits.
42. The P & A 47 "A" produced by the plaintiffs indicate it was issued on April 18, 2012 to the 1st plaintiff as a legal representative the estate of Julius Kibunji Mutemi said to have died on December 3, 2011. the plaintiff have not told the court if at all upon issuance of the letters of administration ad litem took over the Meru CMCC case No. 7 of 2018 yet it was seeking orders to evict the husband from the suit land.
43. Looking at the foregoing the deceased husband filed a caution on account of licensee's interest. The defendants averred that the plaintiffs had permission to stay but had refused to vacate once asked to do so. Defence witnesses said as much. It is trite law adverse possession cannot succeed if the person asserting the claims was in possession with the permission of the owner. See *Samuel Muriuki Waweru v Jane Njeru Richu* Civil appeal NO. 122 of 2001.
44. The plaintiffs have not denied that there was such a suit filed against them. The question is whether before the said suit, the plaintiffs had been in possession of the suit premises for the requisite 12 years. It is not clear if the plaintiffs in that suit for eviction had raised the defence of adverse possession given in Meru High court Misc. No. 150 of 1999 the plaintiffs deceased husband was basing his claim on ownership by virtue of purchase from one M'Ikunyua Nguari prior to the adjudication, alleging that land adjudication committee had ignored his interests but instead demarcated it in favour of Gerishon Mbogo John.
45. As at April 14, 2015 when the suit in Githongo was filed the registered owner was stating that various notices to vacate the land had been issued. The judicial review proceedings was brought against the first registered owner Gerishon Mbogo John as the 1st respondent. The 1st plaintiff's husband in 1995



knew the registered owner was Gerishon Mbogo John and was not asserting adverse possession but a purchaser's rights from the interested party in one M'Ikunyua Nguari.

46. Given these clear facts from the pleadings by the parties the plaintiff were not clear as to when time started running on their claim for adverse possession. As at October 30, 1995 the plaintiff's deceased husband knew who recorded owner was. Again the caution registered was alleging a licensee's interest and not adverse possession. The deceased husband passed on in 2011. Between 2011 and 2015 it is not clear why the plaintiffs had to wait for close to four years to lodge this claim. Similarly it is not clear which of the two suits was filed earlier, namely the suit for vacant possession in Githongo law courts and the instant suit. Be that as it may in the application dated April 12, 2016 the plaintiffs attached annexure marked PM "2", a ruling delivered on June 19, 2015 in which the plaintiffs herein had applied in Githongo PMCC No. 17 of 2015 seeking for the transfer of the said suit and joinder of the same with this suit.
47. Consequently, it is apparent that the defendants had as at 2015 continued to assert their ownership rights which they alleged had been resisted by the plaintiffs hence the formal suit for vacant possession. From the pleadings it is quite clear that the plaintiffs' alleged occupation was always under constant question and attack from the recorded registered owners before and after the suit parcels were registered under the Land Registration Act.
48. The question whether possession is adverse or not is a matter of legal conclusion to be drawn from the findings of facts. See Kweyu v Omuto C.A appeal 8 of 1990.
49. Given the facts and evidence tendered herein it is doubtful that the plaintiffs have been in exclusive control of the suit land. The evidence tendered does not have therefore demonstrate any animus possidendi on the part of the plaintiffs as regard the suit premises.
50. In the premises I have come to the conclusion that the plaintiffs have failed to prove the ingredients for a claim on adverse possession. The suit is therefore dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 4TH DAY OF MAY, 2022

In presence of:

Anampiu for plaintiff

Mutuma for defendants

HON. C.K. NZILI

ELC JUDGE

