



Muhika v Muriuki (Sued through his appointed attorney Margaret Wangari) (Environment & Land Case 14 of 2020) [2022] KEELC 15714 (KLR) (4 May 2022) (Judgment)

Neutral citation: [2022] KEELC 15714 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 14 OF 2020**

YM ANGIMA, J

MAY 4, 2022

BETWEEN

FRANCIS MUTHOGA MUHIKA PLAINTIFF

AND

SAMUEL KARONJO MURIUKI DEFENDANT

SUED THROUGH HIS APPOINTED ATTORNEY MARGARET WANGARI

JUDGMENT

A. The Applicants' Claim

1. By an originating summons dated July 22, 2020 brought under section 38 of the *Limitation of Actions Act* (cap 22) and order 37 rule 7 of the *Civil Procedure Rules*, 2010, the plaintiff sought determination of the following questions:
 - a. Whether the plaintiff has acquired title deed by adverse possession over 2 acres of land which he occupies to be excised from L.R. No. Nyandarua/Ol Aragwai/994.
 - b. Whether 2 acres of land to be excised from L.R. No. Nyandarua/Ol Aragwai/994 should forthwith be registered in the name of the Plaintiff and whether the Defendant should be ordered to sign all the necessary transfer documents in favour of the Plaintiff and in default the Executive Officer of the Court to do the same.
 - c. Whether the District Land Registrar Nyandarua should dispense with the production of the original title deed for L.R. No. Nyandarua/Ol Aragwai/994 while transferring the two (2) acre of land to the Plaintiff.
 - d. Who shall bear the costs of the suit.
2. Upon determination of the said questions the Plaintiff sought the following reliefs:



- a. An order that the Plaintiff has acquired 2 acres of land in his occupation to be excised from Nyandarua/Ol Aragwai/994 on account of adverse possession.
 - b. That the Defendant be ordered to transfer the said portion of 2 acres to the Plaintiff and in default the Deputy Registrar of the court be authorized to do so on his behalf.
 - c. That the costs of the suit be borne by the Defendant.
3. The originating summons was supported by the supporting affidavit sworn by the Plaintiff, Francis Muthoga Muhika on 22.06.2020 and the exhibits thereto. The Plaintiff stated that in 1994 he bought a portion of 2 acres to be excised from Nyandarua/Ol Aragwai/305 (old number) from Joseph Muna who had purchased it from the then registered owner, Joseph Kariuki Kuria (the deceased).
 4. The Plaintiff further stated that upon taking possession of the said portion of land in 1994 he started developing the same by constructing a semi-permanent house, putting up a perimeter fence, planting crops, and rearing poultry thereon. It was his contention that at the material time the deceased who was alive until 1998 did not object to his occupation and did not take any steps to evict him from the said land. The Plaintiff stated that he later on discovered that the Defendant had taken out letters of administration for the estate of the deceased and obtained registration of the entire land originally comprised in Nyandarua/Ol Aragwai/305 which was assigned Title No. Nyandarua/Ol Aragwai/994.
 5. The Plaintiff contended that since he had been in open, continuous and uninterrupted occupation of the portion of 2 acres out of the suit property, he had acquired the same under the doctrine of adverse possession under the provisions of the *Limitation of Actions Act* (Cap. 22).

B. The Defendant's Response

6. The material on record shows that the Defendant appointed the firm of Naomi Muriithi & Co. Advocates which filed a notice of appointment dated 22.07.2020 on 14.08.2020. The said firm did not enter any appearance to the originating summons and neither did it file any replying affidavit in answer thereto.
7. The record, however, shows that the said advocates filed grounds of opposition dated 17.07.2020 raising the following grounds against the originating summons:
 - a. The application is frivolous, vexatious and an abuse of the process of the Honourable Court.
 - b. The application is meant to deny the Respondent from enjoying the fruits of her parcel of land.
 - c. The applicant is guilty of laches.
 - d. The application has been overtaken by events.
 - e. The application lacks merit both in fact and law.
 - f. The application is full of malafides and lacks merit both in fact and in law.

C. Hearing and Directions on Submissions

8. At the hearing hereof the Plaintiff testified on his own behalf as the sole witness. He adopted the contents of his supporting affidavit sworn on 22.06.2020 as his evidence in chief. It was his evidence that had been in open, continuous, exclusive and interrupted occupation of the 2 acres the subject of the suit since 1994. He further testified that the deceased who was aware of his occupation never took steps to evict him during his lifetime. He consequently prayed for the reliefs sought in the originating summons.



9. The Defendant did not attend court to tender evidence during the trial. The Defendant's advocate did not attend court at any given time during mention or hearing despite service of court process on various dates.
10. Upon conclusion of the hearing the Plaintiff was granted an opportunity to file written submissions and the suit slated for judgment on 04.05.2023. By the time of preparation of the judgment, however, the Plaintiff's submissions were not on record.

D. The Issues for Determination

11. The court has perused the originating summons, the evidence and documents on record in this matter. The court has noted that the Defendant's grounds of opposition were not prosecuted since no submissions were filed in support thereof. The court is of the opinion that the following issues arise for determination herein:
 - a. Whether the Plaintiff has proved his claim for adverse possession.
 - b. Who shall bear costs of the suit.

E. Analysis and Determination

a. Whether the Plaintiff has proved his claim for adverse possession

12. The court has considered the pleadings and evidence on record on this issue. The Plaintiff claimed to have been in open, continuous, exclusive and uninterrupted occupation and possession of a portion of 2 acres out of Title No. Nyandarua/Ol Aragwai/994 for a period exceeding 12 years prior to the filing of the suit. He claimed to have developed the said land for over 28 years by fencing it, constructing a dwelling house, and undertaking farming activities thereon without any interruption.
13. The elements of adverse possession were summarized in the case of *Kasuve v Mwaani Investments Ltd & 4 others* [2004] 1KLR 184.

“...and 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 and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, *Wanja v Sakwa* No.2 [1984] KLR 284. A title by adverse possession can be acquired under the *Limitation of Actions Act* for part of the land...”
14. It is evident from the material on record that the Plaintiff's evidence was not challenged at the trial through cross-examination. It was also not controverted by contrary evidence since the Defendant did not tender any evidence at the trial. Consequently, the court finds the Plaintiff's evidence unchallenged and uncontroverted hence accepts the same as true. The court accepts that the Plaintiff has been in open, continuous and exclusive possession and occupation of the portion of 2 acres out of the suit property for a period exceeding 12 years. The court accepts that Plaintiff's occupation and user has been inconsistent with the title of the true owner and the purpose for which he intended to use it. The court accepts that such occupation was without the consent of the owner and that it was hostile in nature.
15. Although it is evident from the material on record that the Defendant had filed a suit for recovery of the suit property in Nyahururu CM ELC No. 340 of 2018, the said suit was filed about 24 years after the Plaintiff took possession of the land and long after his claim of adverse possession had crystallized. In other words, the Defendant's claim for recovery of the suit property in 2018 was already statute-



barred under Section 7 of the Limitation of Actions Act hence it could neither constitute interruption of possession nor stop the running of time for purposes of a claim for adverse possession. (See Gitbu v Ndeete [1984] KLR 776).

16. The court is further of the opinion that the change of ownership of the suit property from the deceased to the Defendant had no effect on the Plaintiff's claim for adverse possession. As was held by the Court of Appeal in Gitbu v Ndeete (*supra*):

“The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession.”

17. In the circumstances, the court is satisfied that the Plaintiff has satisfied all the legal requirements for adverse possession. As such, the court is inclined to grant him the orders sought to facilitate his registration as owner of the 2 acres sought out of Title No. Nyandarua/Ol Aragwai/994.

b. Who shall bear costs of the suit

18. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287. The court has noted that the suit was not defended as the Defendant neither filed a replying affidavit nor attended court for trial. In the circumstances, the court is of the opinion that each party should bear his own costs.

F. Conclusion and Disposal

19. The upshot of the foregoing is that the court finds and holds that the Plaintiff has proved his claim for adverse possession to the required standard. Accordingly, the court hereby enters judgment in favour of the Plaintiff in the following terms:

- a. A declaration be and is hereby made that the Plaintiff is entitled to be registered as proprietor of 2 acres in his possession out of Title No. Nyandarua/Ol Aragwai/994 on account of adverse possession under Section 38 of the Limitation of Actions Act, (Cap. 22).
- b. The Defendant shall transfer the said portion of 2 acres out of Title No. Nyandarua/Ol Aragwai/994 to the Plaintiff within 30 days from the date hereof in default of which the Deputy Registrar of the court shall sign all necessary forms, documents and instruments to facilitate transfer thereof to the Plaintiff.
- c. The Land Registrar – Nyandarua County shall dispense with the production of the original title deed, photographs, copies of the Defendant's National Identity Card, PIN Certificate and all documents in his possession, custody or control while transferring the said portion of land to the Plaintiff.
- d. Each party shall bear his own costs of the suit.

- 20 It is so decided.

JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 4TH DAY OF MAY, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Ms. Wanjiru Muriithi for the Plaintiff



N/A for the Defendant

C/A - Carol

Y. M. ANGIMA

JUDGE

