



Munyua v Esther Njiru (Sued as the Administratrix and Legal Representative of the Estate of Mbeneti Mukangu Alias Mbenenti Makangu (Environment & Land Case 51 of 2018) [2022] KEELC 3725 (KLR) (4 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3725 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 51 OF 2018**

CK NZILI, J

MAY 4, 2022

BETWEEN

PAUL GITUMA MUNYUA PLAINTIFF

AND

ESTHER NJIRU (SUED AS THE ADMINISTRATRIX AND LEGAL REPRESENTATIVE OF THE ESTATE OF MBENETI MUKANGU ALIAS MBENENTI MAKANGU DEFENDANT

JUDGMENT

1. By an originating summons taken out on November 22, 2018 the plaintiff asked the court to determine six key questions namely:- declare he owned a portion of land registration No. Abothuguchi/ Kariene/1549 measuring 12 ft by 45 ft by virtue of purchase and long on occupation; declare that any purported sale and or transfer of the suit land to third parties was null, void and contrary to his adverse possession and prescriptive rights since 1995; an order that the defendant should transfer the portion to him and an injunction restraining the defendant her agents, servants or employees from interfering, entering, evicting or in any way whatsoever interfering with his quiet enjoyment and possession of the suit premises.
2. The application was supported by grounds on its face that he had bought the portion from deceased Mboneti Mukangu on August 30, 1995 for Kshs 90,000 which he cleared and took possession on 2017, the defendant purported to evict him in an illegal manner; any purported sale of transfer to third parties was wrongful, fraudulent and illegal given his consent or notification was not sought or obtained; he had been in actual occupation for long; there was no justification for the purported sale except collusion with third the parties. The plaintiff swore a supporting affidavit on November 22, 2018 essentially repeating the grounds aforestated save to attach letters of succession in favour of the defendant issued in Githongo law courts succession court no 78 of 2017, copy of title extract, minutes



from the county council of Meru converting the plot to own land and approval of the sale and transfer, copy of the sale agreement, area chief's letter all marked as annexures PGM "1-6" respectively.

3. The defendant opposed the originating summons through her replying affidavit sworn on February 7, 2019 denying any alleged sale agreement between the plaintiff and her deceased husband; she stated her late husband was previously an absolute owner of the parcel initially Land Registration No 1549 jointly owned with Justus Kirigia Kiambati and which they subdivided to two portions in 1985 and his brother sold his half share to Mbaya Mbui who teamed up with him and developed the plots; that later on her husband sold to Mbaya Mbui a quarter share from his half share of land registration no 1549 which Mbaya Mbui requested the suit share to be directly transferred to his brother one Geoffrey Kinyua after seeking and obtaining all the requisite consents, transfers and approvals; she denied the plaintiff had ever taken possession of any part of the deceased husband's share of $\frac{1}{4}$ of the suit plot; that all what had existed was a lease to one Mark Kiria Mutwiri is a tenant with effect from 2003 who allegedly continued the lease after the deceased passed on by paying her rent following the sale; Mbaya Mbui erected a permanent stone wall separating the balance left for her husband; after the lease expired with Ford Kenya, the premises remained vacant for a period of two years and in the year 2016, the said tenant purported to sublet the premises without her consent or knowledge whereof she resisted and closed the premises following which she was reported to the DCI Kariene by the tenant and one Muthuri, charged but acquitted in Githongo law courts criminal case no 687 of 2017. She denied that the deceased allegedly made any application for approval, any transfer to the county council as alleged or at all.
4. Further the defendant insisted the suit property was governed by Cap 300 Laws of Kenya and that transfer could only occur through the land Control Board. She averred that the deceased was a close friend of the co-owner Mbaya Mbai and would have disclosed to him of any alleged purported sale and transfer to the plaintiff. Lastly she denied that the plaintiff had ever occupied, the developed, utilization and or was removed from the plot by her.
5. The defendant also relied on a further replying affidavit sworn by Mbaya Mbui on February 7, 2019 in which he essentially confirmed the truthfulness of the affidavit by the defendant and more so that the property was jointly owned by himself, the deceased and Geoffrey Kinyua at $\frac{1}{2}$, $\frac{1}{4}$ and $\frac{1}{4}$ shares respectively. Further he averred that any transfer to the plaintiff could not have been possible without the co-owners consents and or approvable at the land control board.

Evidence

6. The plaintiff adopted her witness statement dated November 22, 2018 as evidence in chief and produced a sale agreement dated August 30, 2015, certificate of death of Mbeneti Mukangu, copy of record for L R No Abothuguchi/Kariene/1549, grant of letters in succession cause no 98 of 2017 Githongo law courts, Traders and markets by-laws transfer by the defunct Meru county council, chiefs letter Kariene location dated June 30, 2017 and photos all produced as P. exhibit 1-7 respectively. He confirmed he had moved out of the suit premises after he filed the case. In cross examination the plaintiff admitted that his P. exh no 1 did not mention the plot no, he had only produced the application for transfer and not the approved council minutes despite the contents of clause (6) of the sale agreement.
7. As regards the balance, the plaintiff admitted it was to be done after the transfer was approved by the council. As to the date of the agreement and the Traders and Markets form differing, the plaintiff testified they had agreed to transfer to occur before the sale agreement was written hence the reasons it predates the sale agreement during which time he had not paid any deposit.



8. Regarding the signatory to the sale agreement, the plaintiff stated it was signed by Cypriano Murungi and the name of Mbeneti Mukangu was missing.
9. Similarly the plaintiff admitted the plot Parcel No was also missing in the County Council application for transfer and neither was it signed by the required administrative officers and the chairman of the local market. As regards possession the plaintiff said he had been on the plot since 1995 running a retail shop but produced no permits or licenses for the business he used to run. On the issue of the land registration the plaintiff admitted the plot fell under Cap 300 and was not public plot, hence there was need to appear before the land control board for the requisite consents to transfer which he blamed on the deceased.
10. Concerning Mark Kiria Mutwiri, the plaintiff admitted that he was his witness to the suit and that the plot he had stated to have rented out on 2005 was the same one he was claiming to have bought from the then landlord. The plaintiff testified he was aware of the criminal case at Githongo law courts where he was a complainant. He told the court he rented the premises between 1995 and 2003 but the owner undertook to sell to him though there was no written agreement. He insisted he was the one who had rented out the plot to Mark Mutwiri but did not avail the rental agreement nor the rental receipts. As at 2018 the plaintiff told the court he was running a macadamia business alongside Mutwiri Nyamu who he had rented out the premises to with effect from 2010 to 2018 when he was alleged evicted by the defendant. He however produced no permits, rent receipts or licences to back such claims. PW1 admitted at the time of the sale he was aware that the property was jointly owned by 3 people hence he contacted Kinyua, informed him but not Charles Mbaya since the seller was only disposing his share.
11. In re-examination the plaintiff told the court Mbeneti Mukangu was also known as Cypriano Murungi, the title deed indicated his share as $\frac{1}{4}$ as well as those of the other co-owners.
12. PW 2 told the court the deceased had informed him about the sale agreement with the plaintiff though the plot was jointly owned with two persons with defined shares. He told the court the plaintiff took possession in 1995 though P. e3 & 4 stated he could only do so after the approval of the transfer by the then county council of Meru. He could not however tell if the approval occurred. He told the court the plaintiff became the landlord in 2015 with the consent of the deceased but was not privy to such tenancy agreement. He however admitted that Ford Kenya party were one time tenant and that the plot had also remained vacant for some time while his brother was still alive.
13. In re-examination PW 2 told the court the delay in transferring the land to the plaintiff had occurred no subdivisions had been undertaken so that each of the co-owners could have individual title deed. PW 3 told the court he used to be a tenant of the plaintiff between 2003 and 2016 but was not a party to the sale agreement though he had been verbally told about it. He admitted in 2003, he was a tenant of the deceased who used to collect the rent. He further told the court the defendant was not present during the sale agreement and that he possessed no written tenancy, agreement with the plaintiff nor was he issuing him with any rental receipt.
14. Similarly Pw 3 admitted he did not produced any trade licences or permits to show that he was not only a tenant but was also running a business at the premises.
15. PW 3 admitted being a witness against the defendant in the criminal trial at Githongo law courts. Further he told the court it was the plaintiff who gave him a notice to vacate the premises in 2016 and was replaced by new tenant Muthuri.
16. DW 1 adopted her witness statement dated February 7, 2019. She testified that her husband passed on 18 years after the alleged sale agreement with the plaintiff and could not remember the plaintiff asking for any transfer of the plot from him during his lifetime.



17. As regards the tenancy DW 1 told the court all the tenants prior to 2016 when she locked up the premises belonged to her deceased husband hence it was not true the plaintiff ever became a landlord over the plot. She insisted that the plaintiff exhibits P. exh 1 and all other exhibits had missing details, gaps and inconsistencies. Further she denied that her late husband was also known as Cypriano Murungi as indicated in paragraph 10 of P. exh 5 DW 1 insisted a transfer had to be effected before a land control board and not at the court council since this was own land.
18. DW 2 adopted his affidavit sworn on February 7, 2019 largely re-stating the evidence of DW 1. He denied that the plaintiff had ever occupied the premises and confirmed all the developments on the plot belonged to the deceased who was a co-owner of the plot. He further told the court that there was no transfer or land board consent sought and obtained which in any event had to involve all the co-owners in favour of the plaintiff. Similarly he told the court a change of user had not been effected at all.

Written Submissions

19. The plaintiff submitted his claim was found on adverse possession in line with section 7, 13 & 38 of the Limitation of Actions Act under which a party must prove a non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him of the land for 12 years without interruption.
20. It was submitted there was permissive entry to the land given the sale agreement. However, the plaintiff took the view that once the final payment was made, the occupation ceased being consensual and becomes adverse henceforth against the registered owner, the defendant.
21. Reliance was placed on Public Trustee vs Wanduru Ndegwa (1984) eKLR. Given that the final payment of Kshs 250,000 was done on July 27, 1995 and thereafter the transfer by the county council Meru offices, it was submitted time began running as held in Hosea vs Njiru & others (1974) EA 526 quoted with approval in Stephen Mwangi Murunga Gatunge vs Edwin Onesmus Wanjau Muranga OS No. 7 of 2021 and Meru Central Farmers Cooperative Union vs Ruth Igoki Rintari and others (2019) eKLR.
22. On the other hand defendant submitted the substantive issue was whether the plaintiff has pleaded and proved adverse possession.
23. It was submitted the settled ingredients of adverse possession going by decision of James Mwangi & others vs Mukiyu Enterprises Ltd (1986) KLR were a clear possession, lack of consent of the owner and occupation for more than 12 years before the suit is filed.
24. The defendant submitted that the plaintiff had totally failed to meet the above threshold since the alleged sale agreement was invalid, there were no valid transfer forms executed by the seller; there was no evidence for taking up actual possession in 1995 to the detainment of the deceased; the sale agreement had contradictory clauses; no evidence was availed if the county council Meru ever approved its minutes so as to enable the plaintiff take vacant possession as per clause 6 of the sale agreement and lastly that given PW 3 admitted he had been rented out the premises by the deceased, there was a clear indication that between 2003 and 2005 the deceased possessed the plot and leased it out until 2016.
25. The defendant submitted the plaintiff's evidence failed to demonstrate a continuous and uninterrupted occupation by the plaintiff more so when he failed to produce any rent receipts, tenancy agreement and permits or licences in favour of his alleged tenants indicating him as the bonafide landlord. Similarly it was submitted the plaintiff failed to tender any evidence of payment of land rates to the county council of Meru for the alleged period he was in occupation as a bonafide owner.
26. The defendant submitted he who alleges had to prove in line with section 107 (1) and 108 of the Evidence Act the factual and legal aspects to his claim including inaction up to 2013 before and after



the deceased passed over the non-transfer of the suit land during the lifetime of the deceased and lack assertion of his alleged purchasers or adverse possessory rights during the same period.

The issues for determination

27. The issues calling for this court's determination are:-
 - i. If the plaintiff has pleaded and proved he had any valid sale agreement with the deceased.
 - ii. If the plaintiff has pleaded and proved the ingredients for adverse possession as provided under the law.
 - iii. If the plaintiff is entitled to the reliefs sought.
28. The plaintiff case is brought under section 7 (2) the Land Act Section 28 (2) of the Land Registration Act, Section 38 of the Limitation of Action Act. Order 37 rule 7 (1) & (2) Civil Procedure Rules and Section 3A of Civil Procedure Act seeking to have acquired 12 ft by 45 ft, a portion of Land Registration no. Acothuguchi/Kariene/1549 on account of purchase and occupation since 1995. He sought to enforce the said rights against the defendant sued as the administratrix and legal representative of the estate of Mbeneti Mukangu pursuant to grant of administration issued on March 12, 2018 at Githongo SRC succession cause no 78 of 2017.
29. Order 37 Rule 7 Civil Procedure Rules requires an Originating Summons under Section 38 of the Limitation of Actions Act to be supported by an affidavit attaching a certified extract of the title to the land in question.
30. The plaintiff herein in attempted compliance with the law attached PMG "2" a certified copy of the record and not a title to the land as at June 2, 2016.
31. Similarly he attached a sale agreement which does not describe the parcel of land at all and the registration regime applicable.
32. The defendant pleaded originally that the deceased owned Land Registration no 425 which was subdivided into 1549 in the joint names of the deceased, Justus Kiringia Kiambati, Mbaya Mbui and Geoffrey Kinyua. In the further affidavit sworn by Mbaya Mbui on 7.2.2019 the plaintiff attached a copy of the official search dated 19.7.2017 which clearly showed the parcel no. 1549 was jointly owned with effect from 31.1.1985 by Mbaya Mbui ½ share Geoffrey Kinyua Mbui ¼ share and Mbeneti Mukangu share at ¼ share.
33. Coming to the issue of the sale agreement dated August 30, 1995 and having established the property was jointly owned the sale agreement did not indicate the nature of ownership of the plot by the deceased. It did not indicate the manner and the timelines of the subdivisions and the transfers. It did not indicate if the co-owner had been notified of and or approved the sale of the deceased share since the property was jointly owned.
34. Section 103 (3) of Registered Land Act cap 300 outlawed such a sale in the absence of a consent from the other owner. Section 60 of the Land Registration Act provides if a joint tenant dies, upon proof the name of the deceased tenant shall be deleted upon proof, by way of death certificate Section 61 thereof provides that when a proprietor's in common dies the proprietor's personal representative shall on application to the registrar on the production of grant enter the name and upon confirmation of grant register any transmission.



35. Section 62 thereof provide that the administrator holds the land subject to other rights including overriding rights which the deceased proprietor held the land and that such registration relate back to and take effect from the date of the death of the proprietor.
36. In this suit the shares of the proprietors are clearly indicated and defined. They therefore held the property as tenants in common in divided shares. The sale agreement by the deceased did not contain that crucial and vital reality.
37. In *Kursbed Begun Mirza vs Jackson Kaibunga* (2017) eKLR the court held a tenancy in common was a tenancy to equal or unequal undivided shares with each person having the right to possess the whole property but not the right of survivorship. The court held such parties quite separate interests but in a single property, each size duly fixed once and for all but not effected by the death of one of the tenants in common and that once a tenant in common dies his interest passes under his will or intestacy for his undivided share is his to dispose of as he wishes. See Bryan A Garner *Black Laws Dictionary* 11th Edition. Thomson Renter page 176 g *Parkoyiet Mokare & 4 others* (2021) eKLR.
38. In this suit the group and location of the shares was indicated. The manner of subdividing and or partitioning the share is not clear hence the reason that if the plaintiff had any sale agreement with the deceased it was crucial to formally notify and or involve the co-tenants in line with Section 104 of the Retired Registered Land Act Cap 300 which was the applicable law in 1995 as regards the partition and consent to do so. See *Godfrey Njogu Mungai vs Francis Kagiya & 3 others* (2021) eKLR.
39. The validity of a land sale agreement is governed by section 3 (3) *law of contract act* and Section 38 of the *Land Act*. It must be in writing and signed by the parties an attester to the signatures.
40. Issues were raised by the defendants as to the missing details including whether the sale agreement referred to the suit land and its enforceability. The plaintiff did not see it fit to call the maker of the documents, a law firm and the witness to the sale agreement. The attestor would have shed light on the glaring omissions, inconsistencies and whether actually the transfer would have been effected at the county council of Meru offices or at the land registrar's office and through the land control board. See *Isaac Ngatia Kihagi vs Paul Kaiga Gitbui* (2017) eKLR.
41. In this suit, the attester would have shed light as to whether the deceased who had brought to the attention of the plaintiff as administered in his evidence that the land was held in joint shares the law was complied with in so far as seeking the consent of the co-tenants as provided by the then section 103 (2) of the Registered Land Act. See *Peter Wanderi Mwangi and 3 others vs Kenya Bus Services Ltd and another* 2013 eKLR. *Agnes Wambui Kihara vs Bajila Chonya Bashora* (2014) eKLR. My finding therefore is the sale agreement was void and unenforceable for land of the foregoing.
42. In *Ravindaranath Dabybbai Bhagat vs Hamisi Harod and 5 others* (2014) eKLR the court held one cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land was the true owner of the said land.
43. Further the evidence tendered indicates the suit property was still registered in the names of the deceased and other two persons at the time of the hearing. The defendant was yet to be registered as a co-owner. In *Mwingi Hamisi Ali vs A.G & Phlemon Mwaisaka Wanaka* Civil Appeal No. 127 of 1997, the court held adverse possession could only be granted against the owner or legal representatives.
44. As indicated in the copy of the official search produced by the defendant as well as copy of record, the land was registered in the name of three tenants in common and was yet to be partitioned. The plaintiff failed to all plead and prove he had adverse rights against the registered owners generally and is particularly against the defined share belonging to the deceased co-owner.



45. The pleadings and evidence were not specific. Material evidence was not produced to confirm if indeed the shop allegedly the share of the deceased measures 12 ft by 45 ft.
46. As much as the plaintiff called. PW 2 a co-owner of the suit land I found his evidence shaky, incoherent, inconsistent and economical with the truth as regard the manner of giving a consent to transfer the land without the involvement of all owners.
47. In *Kipketer Arap Manson vs Paul Kipkuri Kurgat* (2005) eKLR the court held the plaintiff must establish that he had been in continuous possession of the land for a period of 12 years openly and without the registered owner making a claim over it.
48. The plaintiff pleaded and testified he got into the land both as a tenant a purchaser and later on with effect from 1995 to 2016 as an adverse possessor to the land.
49. Even assuming the sale agreement was valid, there is no evidence that the plaintiff asserted his legal rights as a purchaser by ensuring vital consents approvals and transfers were made during the lifetime of the deceased at the land registration offices. After the deceased passed on in 2013 the plaintiff waited until 2018 to file the instant suit trying to enforce a sale agreement and or acquire the land through adverse possession.
50. The plaintiff made no arrangements to ensure the transfer at the County Council Meru was approved and effected on time so as to gain vacant possession in line with clause (6) of the sale agreement.
51. At the filing of the suit, the plaintiff had not procured such approvals. Further the suitland being agricultural land, the plaintiff took no action to secure a land control board consent within six months as provided under *Land Control Act* Cap 302 so as to effect the transfer in his favour.
52. A claim for recovery of land has to be filed in line with Section 7 of the *Limitation of Actions Act*. The plaintiff perhaps to escape the trap pleaded fraud. Fraud must be proved as held in *Arthi Highway Developers Ltd vs West End Butchery Ltd & 6 others* (2015) eKLR. In my view the plaintiff should have sought to recover his land from the deceased on account of a sale agreement before the expiry of 12 years with effect from 1995. He did not do so hence his claim became time barred by July 27, 2007 if at all he had cleared his final payment on July 27, 1995.
53. On the issue of adverse possession evidence has been tendered that there were tenants belonging to the deceased and by extension the defendant between 2003 and 2016.
54. The plaintiff however avered he became a land lord the moment he cleared the balance of Kshs.25,000. As indicated above, if at all the plaintiff was a valid owner by virtue of purchase he should have tendered evidence that he was in the exclusive use, possession and control of the suit land to the detriment of the deceased and by extension the defendant.
55. The defence testimony was consistent, clear, cogent and direct in so far as who asserting the rights of the registered owner. The plaintiff failed to bring any rent receipts, or tenancy agreement to prove that indeed between 1995 and 2018 he had dispossessed the deceased as well as the defendant to be entitled to adverse possession. The fact that the defendant made entry to the land and evicted the tenants has not been challenged. See *Githu vs Ndate* (1984) KLR 776. This amounted to dispossession as held in *Kasuve vs Mwaai Investments Ltd and 4 others* (2004) 1 KLR 184.
56. Given the foregoing reasons my finding and conclusion is that the plaintiff has failed to prove his claim to the required standards. He is not entitled to any reliefs as prayed.
57. Consequently the suit is dismissed with costs.



**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 4TH DAY
OF MAY, 2022**

In presence of:

No appearances

HON C K NZILI

ELC JUDGE

