



**Kirimi & another v M’Twerandu (Environment & Land Case
31 of 2020) [2022] KEELC 2648 (KLR) (13 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2648 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 31 OF 2020**

**CK NZILI, J
JULY 13, 2022**

BETWEEN

EUNICE MWARONJA KIRIMI 1ST PLAINTIFF

JACOB KIRIMI PHILIP 2ND PLAINTIFF

AND

NKUNJA M’TWERANDU DEFENDANT

JUDGMENT

Pleadings

1. The plaintiffs took out an originating summons dated August 10, 2020 seeking under Section 38 of the *Limitation of Actions Act* and Order 37 Rule 7 *Civil Procedure Rules* for the court to determine if they have been in open, quiet, peaceful and notorious occupation/possession of one acre out of L.R No. Kiirua/Naari/Maitai/1083 for a period of 12 years which property is registered in the name of the defendant and if so an order do issue that the same be excised and registered in their favour.
2. The originating summons is supported by a joint affidavit sworn on the even date by Eunice Mwaronja Kirimi and Jacob Kirimi Philip. The application is supported by annexures to the supporting affidavit, list of witnesses, witnesses’ statements and a list of documents all dated August 10, 2020.
3. By a replying affidavit sworn on February 18, 2021 the defendant denied ever selling any part of his land to the plaintiffs as alleged or at all and averred the plaintiffs only licensed to the plaintiff a portion of his land for cultivation purposes with any developments thereon being temporary in nature. He averred that any subdivision of the suit land was made for his sons and that the plaintiffs took advantage of his illiteracy and or ignorance of his rights. Further he said that any alleged evidence in their possession was procured fraudulently and through misrepresentation of facts since there can be no land transaction without a written and or executed sale agreement otherwise the plaintiffs were abusing the court process to unlawfully take away his land. He urged the court to order that the plaintiffs do vacate his



land since he is now convinced he should terminate the licence for the plaintiff's intention are laced with *mala fides*.

B. Evidence

4. PW 1 told the court the defendant as a neighbor sold to them half an acre each. She produced a search certificate, witness statement of the defendant in the Succession Cause No. 480 of 2011 dated March 18, 2016, consent from the land control board dated February 23, 2016 for parcel no. 1083, demand letter to the defendant and photographs showing the developments as P. exh 1-5 respectively.
5. She insisted she had been on the suit land for 23 years since 2007 which fact was also admitted by the defendant in his witness statement.
6. As regards the payment the PW 1 admitted he cleared his pay in 2014 but there was a balance of 20,000 to be cleared after a title deed was issued under her name. Further pw 1 admitted he acquired the land from her brother and cousin who had bought the land from the initial owner. PW 1 said there was a sale agreement and a chief's letter and after a breach of the agreement a meeting was convened at the chief's office on March 3, 2015 in which the seller was ordered to repay the money by December, 2015.
7. PW 2 a husband to the PW 1 confirmed signing the joint affidavit in support of the originating summons. He stated Parcel No. 1083 arose from the subdivision of L.R No. 695. He averred that even though there existed a sale agreement between James Mworia and his cousin he did not produce it in court because the chief's letter and the proceedings were clear over the existence of the sale agreement. Even though there was a pending balance of KShs.20,000 PW 2 told the court the defendant had allowed them to take up vacant possession pending the completion date. He also admitted that the agreement had been repudiated in 2015 but the refund did not take place after James Mworia failed to comply on time as agreed.
8. PW 2 testified that they had been on the land for 14 years, the purchase price was Kshs.200,000 in 2007 and that the defendant was the one who had helped them construct a house and develop the land for he knew the land belonged to them.
9. PW 3 told the court the defendant sold to him the land and produced a sale agreement. He averred his two uncles namely Mworia and Kirimi had initially bought the land and he gave the money to Andrew and Henry. He confirmed later on in 2007 he sold the land to the plaintiffs though he had no sale agreement, who have since occupied the land for the last 12 years. He said the said Henry and Andrew had bought the land from the defendant and after selling to the plaintiffs they had no claim over the same.
10. The defendant's testimony was that the plaintiffs were known to him as well as Henry and Jeremiah Mwiti who were his neighbors. As to the land, DW 1 admitted that the said Jeremiah and his brother wanted to buy land from him but a disagreement arose for they were taking him in circles following which the land control board and the area chief declined to allow the transaction. He denied entering into an agreement with the plaintiffs who according to him were illegally on his land for close to 10 years where they had erected permanent buildings which is connected with water and electricity. DW 1 acknowledged he signed the wayleaves form for and on behalf of the plaintiffs. As regards the succession cause DW 1 denied Otieno C. advocates were ever his advocates on record. He however admitted his testimony in the succession cause was correct as a witness for PW 1 as his neighbor. He further stated that the land control board consent was disallowed since the consideration was too low.



Written submissions.

11. The plaintiffs submitted their testimony was clear since they entered the suit land in 2007 after purchasing the land from the brother to the 1st plaintiff, one Henry Mworira and Jeremiah Mwiti Ismael who had initially bought ½ an acre each from the defendant herein for Kshs.180,000 and Kshs.80,000 respectively as a subdivision of L.R No. Kiirua/Naari-Maitei/693. The plaintiffs submitted their occupation has been adverse to the right of the defendant. Given the uninterrupted long occupation and permanent developments thereto as evidenced by the photographs produced, the plaintiffs submitted they were entitled for an order to vest and register the subject matter in their favour.
12. As regards the denial of the sale, the plaintiffs submitted it could not be possible for the defendant to apply for and obtain land control board forms for consent to subdivide the land to the two purchasers if at all there was no valid sale agreement, either orally or in writing.
13. As regards section 38 (1) of the *Limitation of Actions Act*, the plaintiffs submitted they had met the conditions as held in *Virginia Wanjiku Mwangi v David Mwangi Jotham Kamau* (2011) eKLR.

C. Issues for Determination

14. The issues calling for my determination are:
 - i. If there was a valid sale agreement between the plaintiffs and the defendant.
 - ii. If the plaintiffs have proved the ingredients of adverse possession.
 - iii. If the plaintiffs are entitled to the prayers sought.
15. It is trite law that a party seeking adverse possession has the burden to prove non-permissive entry, non-permissive occupation, exclusive and open, as of right without interruption for a period of 12 years, hostile possession without challenge or permission from the lawful owner.
16. In this suit the plaintiffs aver they initially gained entry as purchasers for value from the initial owners of the land from the defendant. In his replying affidavit the defendant denies ever selling his land to Henry Mworira or Jeremiah Mwiti the alleged sellers to the plaintiffs. At paragraph 6 of the reply the defendant however admits the entry into the land by the plaintiffs but terms them as licencees for cultivation purposes only and insists that any of their developments thereon were temporary and made with his express licence. DW 1 averred any alleged evidence given by him in the probate court was procured through fraudulent means and was a misrepresentation of facts. At paragraph 10 of the replying affidavit the defendant stated he would terminate the licence to occupy the land since the plaintiffs were acting malafides.
17. While testifying the defendant admitted there was an attempt to enter into a sale agreement with Henry Mworira and Jeremiah Mwiti though the sale did not materialize after the land control board and the chiefs failed to approve it. He however admitted that the plaintiffs had been on his land for over 12 years and made permanent development thereon. He made further admission that the land was under his name.
18. Further, DW 1 admitted he even signed the way leave forms for the plaintiffs to be connected with water and electricity services to their permanent houses erected by them in the suit land.
19. Similarly, DW 1 admitted testifying in the succession cause proceedings in favour of the 1st plaintiff. Even though the defendant had pleaded that the plaintiffs were mere licencees to his property, that



he was going to terminate the licence and stop their occupation nothing of that sort came out of his testimony before the court.

20. The defendant has admitted the entry into the suit land by the plaintiff. He however says the entry was not out of a sale agreement but through permission to cultivate the land; the defendant has not stated the terms and conditions of the licence and for how long. The plaintiffs evidence shows that they continuously lived therein for over twelve years which occupation has been visible, apparent, open and known by the legal owner. The plaintiffs have testified that they have fenced the portion that they occupy the same is identifiable and distinct. Further the plaintiffs have erected permanent buildings and connected the said building with both water and electricity with full facilitation of the defendant.
21. All these activities have been done with the full knowledge of the registered owner and to his exclusion from the portion occupied. The plaintiffs have testified and which has been confirmed by the defendant that they have been clearing, painting, keeping cattle, doing construction works and making other developments on the land without seeking any express permission from the defendant. All these are activities which are inconsistent with the defendant's rights as to ownership.
22. The defendant has not pleaded and testified that he ever complained about the plaintiffs' entry, occupation, and or developments thereon. Further the defendant did not plead or testify that he ever stopped or gave a notice to the plaintiff to vacate the suit premises during the period they have been occupying and or developing his land.
23. In *Francis Gicharu Kariri vs Peter Njoroge Mairu* C.A Nairobi No. 293 of 2002, the court citing with approval *Kimani Ruchire vs Swift Rutherford and Co. Ltd* (1980) KLR 10 held the plaintiffs had a duty to prove that they had used the land which they claimed as of right, with no force, no secrecy and no permission (nec vi nec clam, nec precario).
24. In this suit the plaintiffs have proved the entry was not out of permission as the sale agreement has been denied. The entry appears to have been of right, without force, in no secrecy and or permission to develop. The defendant has admitted he initially intended to enter into a sale agreement with the plaintiff's cousin but the same aborted. The plaintiffs on the other hand trace their entry to the alleged initial purchasers. If the defendant now denies the sale agreement including what he purports to have been fraudulent land control board consent and transfers then the inferred is that there could not have been any permission or licence from him to gain entry. Again, if the defendant's alleged fraud or misrepresentation, the onus was on him to plead and prove the same. See *Arithi High Way Developers vs West End Butchery* (2015) eKLR.
25. In the premises I find the claim proved on a balance of probabilities. The same is allowed in terms of an order that the plaintiffs are declared to have acquired one acre out of L.R No. Kiirua/Naari/Maitei/1083 by virtue of adverse possession the same be excised and they be registered as proprietors thereof in default by the defendant signing the subdivision and transfer forms, the Deputy Registrar of the court to execute them. Costs to the plaintiffs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 13TH DAY OF JULY, 2022

In presence of:

Gikunda Anampiu for plaintiff

Kaumbi for (Kaunyangi) for defendant

HON. C.K. NZILI



ELC JUDGE

