



**Manyara v Bwe (Environment and Land Case Civil Suit  
232 of 2013) [2022] KEELC 2641 (KLR) (13 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2641 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND CASE CIVIL SUIT 232 OF 2013**

**CK NZILI, J**

**JULY 13, 2022**

**BETWEEN**

**HONESTY KANYUA MANYARA ..... PLAINTIFF**

**AND**

**SILAS MURIGE BWE ..... DEFENDANT**

**JUDGMENT**

**A. Pleadings**

1. The plaintiff by a plaint dated 21.8.2013 sued the defendant for trespass over her registered parcel L.R No. Nkuene/Mitunguu-Kithino/138 by grazing livestock and putting up cattle shed. He sought for eviction and an order of injunction barring and restraining the defendant from further trespass into the suit land.
2. Through an amended defence and counterclaim dated 25.10.2014, the defendant averred he had all his life lived on the suit land together with his deceased parents and children and that the plaintiff only bought the suit land from the original owner one Zablon Nthamburi after the latter failed to eject him from the suit land in Meru HCCC No. 96/2006. He denied that the said seller or the plaintiff ever having possessed or cultivated on the suit land. He denied that orders of eviction or trespass could arise due to his long occupation and accrued rights by virtue of adverse possession.
3. By way of counter claim the defendant urged the court to determine whether he had acquired the suit land through open, continuous and exclusive possession for 12 years. He prayed for an injunction, declaration that he had become entitled to the land by virtue of adverse possession and for an order that he be registered as the owner thereof.
4. The plaintiff filed a reply to the amended statement and defence to the counterclaim dated 17.11.2018 denying the contents thereof and averring that the defendant remained a trespasser to the land.



5. As regards the originating summons the plaintiff swore a replying affidavit on 17.11.2018 disputing the alleged open, continuous and exclusively possession of the suit land. She insisted that the defendant remained a trespasser and that the counterclaim was aimed at delaying the expeditious disposal of the suit.
6. In compliance with Order 11 Civil Procedure Rules parties filed a paginated bundle dated 4.3.2019 and 28.2.2019 respectively. Additionally, and with leave of court the plaintiff also filed a further list of documents dated 4.11.2020 introducing a power of attorney registered on 25.9.2020.

## **B. Evidence**

7. The plaintiff adopted both his written statement filed on 6.11.2020 and that of his mother written on 21.8.2013. He produced a copy of his title deed, notice dated 7.7.2013 and a power of attorney as P. exh 1, 2 & 3 respectively. He testified that he did not know the defendant personally but had been warned against visiting the suit land due to the threats he had issued to him.
8. He stated that after purchasing the suit land in 2008 it was fenced with barbed wires and planted with eucalyptus trees. He admitted there were temporary structures on the land. According to him the 1<sup>st</sup> registered owner was one Zablon John on 13.8.1970 who was also the plaintiff against the defendant in High court Meru ELC No. 96 of 2006.
9. PW 1 testified the said Zablon John was the one who had sold the land to the plaintiff. He however confirmed that he was not aware of the pending suit since at the time he bought the land, the same was vacant, measuring about 33 acres hence the reason it was fenced off and planted with eucalyptus trees which are currently mature trees.
10. In re-examination the plaintiff admitted that he was only utilizing only a portion of the land, the rest being occupied by the defendant who was always armed and violent hence the need for eviction orders.
11. DW 1 adopted his written statement dated 28.2.2019 and stated he acquired the suit land through gathering having occupied the same since 1971. He admitted he came to know someone had been allegedly demarcated the land when he was sued but prior to that nobody had attempted to evict him from the suit land. He testified he had three built houses in number on the land where he was living with his two wives and thirteen children all born and brought up on the suitland. DW 1 produced a copy of the green card and pleadings in the Meru HC case No. 96 of 2006 as D. exh 1 & 2 respectively. He denied that the registered owner had ever occupied the land.
12. As regards ownership by Honesty Manyara, DW1 disputed the ownership, transfer or possession for he was the one who had planted bananas, mango, gravelia, eucalyptus and other assorted trees over thirty years ago which he has been harvesting its farm produce. DW 1 stated the suit land was vast but could not estimate the acreage though between him and the plaintiff there existed an access road. He denied any existence of a barbed wire fence as alleged by the plaintiff. He clarified however that whenever there was a fence the land was elsewhere from the land he was utilizing.
13. As concerns the prayers in his counterclaim the defendant said he had developed the suit land and the court could go there and ascertain who owned the land which land according to him bordered a Mr. Kimathi, Silas Ntombathi and Mitunguu – Tharaka -Marimanti road.
14. In cross examination the defendant insisted he acquired the land in 1971 and did not know the original registered owner. In his view the land was hilly, in which the plaintiff was using one side while he was utilizing the other side. He denied that the police visited the scene after one person was allegedly injured out of his violent character. He admitted that he did not know that the land was surveyed as part of



Nkuene/Mitunguu-Kithino adjudication section at the boarder of Imenti/Tharaka though at the time he came into the land, the same was barren with no occupants. He denied he tried to evict someone from the land. DW 1 said he was born in Kibiru village which was not far away from the suits land.

### Written Submissions

15. By written submissions dated 22.2.2022 the plaintiff submitted she had proved ownership of the suit land and held a title deed which was indefeasible with no overriding interests registered on it and that the defendant was served with a notice to vacate the land and declined to do so for no apparent reason.
16. The plaintiff submitted her rights were protectable under Sections 24, 25 & 26 of the Land Registration Act since there was no pleading or prove to impeach her title on account of fraud, misrepresentation or illegality by the defendant. She urged the court under Article 40 of the Constitution to protect her rights from the alleged trespasser, the defendant by issuing the prayers sought. Reliance was placed on Signon Cooperative Savings & Credit Society Ltd vs Kiriga & 3 others (2019) eKLR.
17. As to whether the defendant's counter claim was merited, the plaintiff submitted that the onus was on the defendant to prove and establish non-permissiveness, non-consensual, actual, open, notorious, exclusive and adverse use by him for 12 years without interruption as held in Mbira vs Gachubi (2002) 1 EALR 137, Jandu vs Kierplal & another (1975) E.A 225. The plaintiff took the view that the evidence tendered by the defendant showed the alleged possession was non-consensual and was not open due to the existing litigation.
18. Further the plaintiff submitted the title deed was acquired in December 2008 while the suit was filed on 2013 hence by the statutory period of 12 years was not over to found a claim of adverse possession.
19. As to computation of time the plaintiff submitted time starts to run when there is actual or constructive knowledge by the registered owner that a third party is in possession of the land and that if the plaintiff did not know or have knowledge of the defendant's possession before December 2008 then the defendant had failed to establish adverse possession against her as held in Titus Kigoro Munyi vs Peter Mburu Kimani (2015) eKLR Samuel Kihamba vs Mary Mbaisi (2015) eKLR.
20. Concerning the prayer for eviction, the plaintiff submitted the same was merited and urged the court to be persuaded by the holding in Josephat Kuria Gathoni vs James Maina Njoroge & 3 others (2019) eKLR.
21. On his part, the defendant by written submissions dated 10.2.2022 he had pleaded that he has been on the land his entire life which entry was without permission, open and notorious.
22. As regards the alleged entry in 2012 the defendant submitted the suit with the initial owner shows his entry was earlier than 2012 and going by his evidence over 40 years had elapsed with no eviction by any party from the suit land.
23. The defendant submitted that the plaintiff knew before purchase of the land that he was in occupation hence was not an innocent purchaser without notice making the purchase subject to all the existing appurtenant encumbrances.
24. Further the defendant submitted that the mere fact that the plaintiff was seeking eviction orders shows he has been in occupation of the suit land and which occupation he has proved to the requirements on adverse possession.

### C. Issues for Determination

25. The issues commending themselves for the court's determination are:



- i. If the plaintiff has proved entitlement to the prayers for injunction and eviction as an absolute owner of the suit land.
  - ii. If the defendant has proved his claim for adverse possession.
  - iii. What is the order as to costs.
26. The plaintiff pleaded and testified that he acquired the suit land from the initial registered owner measuring 12.2 ha and became the registered owner on 22.12.2008. He testified upon acquiring the land he put up a perimeter barbed wire fence and planted some assorted trees therein until June 2012 when the defendant allegedly trespassed into her land prompting a demand letter dated 7.7.2012 to be issued ordering him to cease and desist his illegal acts and remove any structures therein. In support of the claim the plaintiff produced a copy of the title deed, demand letter and a power of attorney as p. exh 1, 2 & 3 respectively.
  27. In efforts to impeach the plaintiff's title to land the defendant relied on a copy of record for L.R No. Nkuene Mitunguu – Kithino/138 showing that the land became registered in the name of Zablun John on 13.8.1970 and a title deed issued on 4.1.1971 which land measured 12.2. ha and D. exh 2 a plaint in Meru High Court Civil Suit No. 96 of 2006 in which the said Zablun John had sued him for illegal entry and encroachment of his two acres out of 35 acres without his consent or approval seeking for an injunction, eviction and mesne profits.
  28. A title deed in law can be challenged under the parameters set in Section 24, 25 and 26 of the [Land Registration Act](#).
  29. In *Dr. Joseph Arap Ngok vs Justice Moiwo Ole Keiwa & 5 others* Nairobi Civil Appeal No. 60 of 1997 the court held Section 23 (1) of the then Registration of Titles Act (now reproduced substantially as Section 25 & 26 of the [Land Registration Act](#)) gives an absolute and indefeasible title to the owner of the property which can only be challenged on the grounds of fraud, illegality and or misrepresented in which the owner is proved to be a party to. The court held that the law takes precedence over all other alleged equitable rights of title.
  30. In [Alice Chemutai Too vs Nickson Kipkurui Korir & 2 others](#) (2015) eKLR the court held a title deed's protection can only be removed or challenged if it is proved to have been procured illegally or misrepresentation or through a corrupt scheme in which the title holder is a party to.
  31. Guided by the principles alluded to in the cited caselaw, the plaintiff has stated the manner he acquired the property and a title deed issued in his favour in December 2008. The defendant has not challenged that title at all on the basis aforesaid. I therefore find the plaintiff lawfully, procedurally and legally bought and got transferred the suit land and has a title deed which is a prima facie evidence of ownership.
  32. In *Mrao Ltd vs First American Bank of Kenya Ltd & 3 others* (2003) KLR 125, the court held a party to entitled to an injunction must establish a prima facie case. A prima facie case is established where based on the material before the tribunal, a right, is established which has been infringed to call for a rebuttal by the opposite party. In the *Nguruman Ltd vs Jan Bonde Neilsen & 2 others* (2014) eKLR the court held the parameters in *Giella vs Cassman Brown & Co. Ltd* (1933) E.A 358 are distinct and must be established sequentially.
  33. In this suit the plaintiff holds an absolute title to the 12.2 has. She has produced a title deed for the entire 12 ha. On the other hand, the defendant has pleaded that at the time the plaintiff allegedly acquired the land he was on the land having acquired it at the gathering stage hence he has acquired rights on account of adverse possession.



34. A party basing his claim on adverse possession must establish he gained entry without permission, the same has been uninterrupted, there has been exclusive possession, the occupation is adverse to the rights of the registered owners and that the registered owner had knowledge that the adverse possessor was in possession of his land but did nothing to eject him or complain.
35. In this suit the plaintiff has pleaded and testified that the defendant was not in possession of the suit land at the time she bought the land and only came in 2012. On the other hand the defendant pleads he was on the land by prior to 1996 going by the pleadings in the suit filed against him by the initial owner in 1996.
36. In *Maweu vs Liu Ranching & Farming Cooperative Society Ltd* (1985) KLR 430 the court held a man who buys land without knowing who is in possession of it risks his title, just as he does, if he fails to inspect his land for twelve years after he had acquired it.
37. In *Kimani Ruchire vs Swift Rutherford & co. Ltd* (1980) KLR the court held a plaintiff must show that the defendant had knowledge (or means of knowing actual or constructive) of the possession or occupation.
38. In this suit the plaintiff has stated she viewed the property before the purchase, soon thereafter he erected a perimeter fence and planted assorted trees on it which are now mature trees. At that time, the plaintiff averred there was no one in possession or occupation.
39. Other than producing the plaint in the former suit, the defendant has not produced his defence to that suit or the outcome thereof. Similarly, in his defence, the defendant was evasive and unwilling to answer questions as put by his advocate during the examination in chief on exactly when he gained entry into the suit land and the nature of his occupation, therein.
40. The defendant was also unable to tell the court both in his pleadings and evidence the exact acreage of the entire land as claimed by the plaintiff in general and in particular the area he claims to be entitled by way of adverse possession. Further the defendant has said he allegedly acquired the suit land through gathering.
41. If that be so the defendant was unable to explain why he was unaware of the demarcation process. Additionally if the defendant was on occupation throughout he would have participated in the adjudication process to ensure that his interest were recorded, under Section 5 of the [Land Adjudication Act](#).
42. The defendant did not state when he came to know the 1<sup>st</sup> recording of interests had been effected and the action he took either during the demarcation process or so soon thereafter when the initial owner acquired first registration in 1970.
43. No evidence was tendered that the defendant raised any complaints, claims and or defence to the ownership by the initial owner before 2008 if at all he was in possession or occupation of the land as an adverse possessor or in any other capacity for that matter.
44. Again, a party seeking adverse possession must show the possession was exclusive, open, notorious and adverse to the right of the registered owner for a period of 12 years.
45. The date and manner of occupation by the defendant has not been established. In *Wellis Cayton Bay Holding Camp Ltd vs Shell Max & B.P Ltd* (1975) QB 54 quoted with approval Titus Kigoro Munyi (supra) the court held when the owner intends to use his land for a particular purpose in the future and so leaves it unoccupied he does not lose his title simply because some other person enters into it and uses the land.



46. In his pleadings and evidence the defendant says he had not seen the initial owner and that the said owner had never used or occupied the suit land. That alone does not entitle the defendant to enter into the land and claim it as unoccupied and so to justify its utilization. Be that as it may, the initial owner took action by filing a suit in which he interrupted any alleged possession. This was two years before the transfer of the suit land to the plaintiff. In the said plaint at paragraph 4 the initial owner put the date of the alleged trespass as 2006 and specifically regarding two acres of his 35 acres.
47. In his evidence the defendant has not produced anything to counter those clear allegations on the date of the alleged trespass and perhaps a defence to that claim.
48. Similarly, and given my finding that the defendant has failed to show any prior evidence of occupation before 2006, by the time the suit was filed for eviction in 2013 the period of the alleged occupation was less than the statutory period of twelve years. The defendant has not produced any documentary evidence of any developments on the suit land. He has also not produced any material identifying and or estimating the exact acreage he seeks this court to find him entitled to by way of adverse possession.
49. The onus was on the defendant to produce evidence show his occupation at the time the plaintiff acquired a title to the land and perhaps that the plaintiff knew or ought to have known he was in possession then. The duty was on the defendant to prove the plaintiff knew of his occupation at the time, such that his rights were binding on the plaintiff. If the defendant says he had never seen the initial owner since 1970 up to 2008 and subsequently the plaintiff it means the two had no actual knowledge that he was in possession prior to 2006 and 2012 respectively. See Kimani Richure (supra). My finding is that the plaintiff has proved her claim and the defendant has failed to justify his possession or occupation of the suit land on account of adverse possession.
50. In the premises the plaintiff's suit is allowed and the defendant's defence and counter claim is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT**

**THIS 13TH DAY OF JULY, 2022**

**In presence of:**

Defendant

Nelius holding brief for Mokuu for defendant

Mrs. Mutegi for plaintiff

**HON. C.K. NZILI**

**ELC JUDGE**

