



**Muhamudo & another v Juma (The Administrator of The Estate of The Late Juma Yussuf)
(Environment & Land Case 35 of 2019) [2022] KEELC 2642 (KLR) (13 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2642 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 35 OF 2019**

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

BETWEEN

FATUMA GATITU MUHAMUDO 1ST PLAINTIFF

ZUBERI ABDALLA HASSAN 2ND PLAINTIFF

AND

**YUSSUF JUMA (THE ADMINISTRATOR OF THE ESTATE OF THE LATE
JUMA YUSSUF) DEFENDANT**

JUDGMENT

1. The plaintiffs took out an originating summons dated July 8, 2019 seeking the court to answer nine questions whose bottom line is whether the plaintiffs' occupation of L.R No. Ntima Igoki/610 originally owned by their grandmother the late Waliwaza Gatitu has been continuous, open, unhindered and notorious for a period of 12 years. They sought for orders that; they are entitled to a portion of the land measuring 0.06 ha by virtue of adverse possession which ought to be registered in their favour and order compelling the defendant as the administrator of the estate of the late Juma Yusuf who was a brother to their mother the late Mwanaisha Yusuf to execute all the relevant transfer instruments in default the deputy registrar of this court to do so.
2. In response the defendant averred that through a decree in Isiolo Kadhi's court Succession 8 of 2015 the suit land was distributed to the children of the late Juma Yusuf after which the 2nd plaintiff appealed in Meru High Court Civil Appeal No. 48 of 2017 whereas the 1st plaintiff filed Meru Misc. Succession No. 138 of 2015 both which were dismissed on May 31, 2017 and 5th June 2019 respectively.
3. The defendant therefore took the view that the issue raised in the originating summons were res-judicata, a delaying or an attempted to defeat the implementation of the decree of the Kadhi court and the court's ruling made on October 4, 2018.



4. Further the defendant averred the plaintiffs were giving a totally different story from what they stated in the previous suits hence the originating summons had been overtaken by events, was an afterthought, contradictory, self-defeating and ought to be dismissed. The respondent also filed a notice of preliminary objection dated September 17, 2019 that the suit was res judicata, the plaintiffs lacked standing to sue, the suit was bad in law, totally defective and an abuse of the court process.
5. By a supplementary affidavit sworn on October 2, 2019 the plaintiff stated the succession cause was different from their claim for adverse possession hence the causes of action were different. Additionally, the plaintiffs filed affidavits sworn by Francis Gikundi M’Inoti and Naomi K. Mwita on March 3, 2020 in support of the originating summons.
6. On the other hand, the defendant filed a defence dated December 9, 2020 on similar averments as in the replying affidavit and the notice of preliminary objection accompanied by a case summary, issues for determination, list of witnesses, written witness statement of Yusuf Juma, list of documents and the documents thereof all dated December 9, 2020 respectively.

Testimony

7. PW 1 adopted the affidavit sworn on July 8, 2019 and produced annexures thereto namely a search for L.R NO. Ntima/Igoki/610 in the name of Juma Yusuf and photos showing the developments as P. exh 1 & 2 respectively. He explained the two families had occupied their respective portions all long but recently they have not been living in harmony. PW 1 also admitted his mother the 1st plaintiff was elderly and they had sworn the affidavit jointly seeking to be given half share of the defendant’s land which the two families had been sharing throughout their long occupation. PW 1 insisted the suit land was ancestral initially belonging to their parent Mwaliwaza Kakeita, the great grandmother which they had all along occupied as of right and that thereafter the suit land registered in the name of the late Mzee Juma in 1971.
8. Further PW 1 admitted to have appealed appeal following the Isiolo Kadhi court’s though it was filed by mistake of counsel hence this suit. He further stated his late grandmother Mwanaisha Yusuf had lodged a caution seeking for her share as indicated in the search certificate, since the defendant was disputing of the time that the suit land belonged to the family.
9. As to whether the case lacked merits and was field to forestall the impending eviction, the PW 1 denied that he had been served with any eviction order of after they lost the appeals given there was nothing stopping them from filing this suit.
10. PW 2 as a neighbor of the plaintiffs confirmed that the two families had co-existed on the same piece of land as relatives for close to six decades as contained in his affidavit sworn on 3.2.2020. Pw 3 as a former area assistant chief confirmed knowing the two families who were in occupation of the suit land, each with permanent buildings therein as stated in his affidavit sworn on March 3, 2020. He could not however tell the exact measurement to each of the respective portions though it could be about half of the land.
11. DW1 adopted his witness statement dated December 9, 2020, the contents of his defence and a replying affidavit, he also produced a succession cause, pleadings, the ruling, official search and his submissions as P. exh 1-4 respectively.
12. DW 1 admitted that the suit land was approximately 0.12 ha, was occupied by the two families since 1980; the plaintiffs had another plot No. 162 in Muranga in the name of Fatuma Gatitu Mwanaisha. He therefore denied that the plaintiffs had been in sole, and exclusive occupation of the suit land. As regards the photos, DW 1 claimed that the buildings therein were put up by his late father.



13. Further DW 1 testified that the previous suits were determined in his favour hence the plaintiffs could not have been living on the suit land peacefully. Concerning the caution, DW 1 admitted that there was a dispute between his late father and Zuberi previously.
14. In cross examination DW 1 admitted that the plaintiffs were his relatives, the 1st plaintiff being his cousin but was not aware of any eviction order or proceedings brought against them by his late father. Further DW 1 admitted that the previous suits were over inheritance and not eviction. Additionally, DW 1 admitted that they had lived on the suit land with no formal boundary and that without a site visit or surveyor's report it was impossible for the court to know the status of the suit land.
15. By written submissions dated 20.1.2022 the plaintiffs stated their claim was based on Section 38 of the *Limitation of Actions Act* Cap 22 and Order 37 Rule 7 *Civil Procedure Rules*, being an O.S though the defendant opted to file a defence. On facts and law, the plaintiffs submitted that they were in occupation of half share of the suit land exclusively and due to lack of a replying affidavit the O.S technically stood unopposed.
16. The plaintiffs submitted from 1980 to 2019 the occupation of 39 years was a clear indication that adverse rights had accrued.
17. Further, the plaintiffs submitted that the previous suits were over inheritance rights and not adverse possession. Additionally, it was submitted the plaintiffs claim was over half share and not the whole land. Reliance was placed on ELC case No. 184 of 2014 consolidated with ELC No. 6 of 2015 Bungoma *Wilson Bara Wankhila & 13 others vs John Kisero Zebedayo & 6 others*, on the proposition that a party could succeed in a claim for a portion of land on account of occupation.
18. The defendant by written submissions dated January 25, 2022 stated the burden of proof rested with the plaintiffs to meet the threshold for the establishment of adverse possession.
19. Reliance was placed on *Gabriel Mbui vs Mukindia Manyara* (1993) eKLR on the proposition that occupation perse did not make an intruder the owner of land.
20. Counsel for the defendant urged the court to find there must be a clear and intentional exclusion of the owner or successors in title, with clear boundary which is distinct, identifiable and the occupation should not be with the permission of the owner. The defendant submitted that the plaintiffs had failed to meet the condition. As regards the previous proceedings, the defendant held the view that the court determined similar issues which the plaintiffs had failed to disclose and or appeal against.
21. Concerning time, the defendant submitted it could only have started running in 2015 so by 2019 12 years were not over. As to alleged portion, counsel for the defendant submitted no survey maps were produced to show the alleged specific acreage of occupation. Likewise, counsel submitted that there was no site visit and that without the two, the plaintiffs had failed to establish occupation and particulars thereto as well as the alleged developments hence the claim was now hypothetical, unidentifiable, unproved and to grant such others would be a recipe for chaos.
22. As regards the non-filing of a replying affidavit, the defendant submitted that was a mere technicality curable by Article 159 of *the Constitution*, hence urged the court to invoke Order 2 Rule 12 *Civil Procedure Rules*.
23. Further as regards the preliminary objection, given the court had gone through the evidence, on res judicata, it was not order for the court at this stage also to relook at the preliminary objection based on evidence, pleadings and the law more for bearing in mind the Kadhi court's case constituted an interruption, there was no suit brought against the deceased during his lifetime hence the instant suit



was a mere afterthought and a fishing expedition following the determination of the issues in the previous suits. Counsel relied on *Richard W. Songoi vs Songoi* (2020) eKLR.

24. The issues falling for my determination are:
 - i. Whether the parties have filed proper pleadings before this court.
 - ii. If the plaintiffs have met the threshold of adverse possession.
 - iii. Whether the plaintiffs are entitled to the prayers sought.
 - iv. What is the order as to costs.
25. The plaintiffs took an Originating Summons dated July 8, 2019 alongside a notice of motion for interim orders of injunction on inhibition. The defendant entered appearance on 13.8.2019 and filed a replying affidavit on September 18, 2019. At paragraph 1 thereof the defendant stated that he was responding to the application dated July 8, 2019. He was however not specific to which application he was responding to since there was both the O.S and the notice of motion though the issues raised were intertwined.
26. Alongside the replying affidavit the defendant also filed grounds of opposition and a preliminary objection dated September 12, 2019 and September 17, 2019 respectively in which he addressed both the notice of motion and the entire suit. The said responses led to the plaintiffs to filing a supplementary affidavit on October 3, 2019 addressing the issues raised therein.
27. Further the plaintiffs filed without leave of court additional affidavits on 3.3.2020. The defendant filed a defence, case summary and witness statements. Pretrial directions were eventually given for each of the parties to exchange their responses and file paginated bundles. Looking at the record at no time did any of the parties before the matter was fixed for hearing object to the particular pleading(s).
28. The above notwithstanding, courts have held that a claim for adverse possession can be brought by way of plaint see *Marba vs Marba* Civil Appeal No. 188 of 2002 and *Wabala vs Okuma* (1997) L.L.R 609 CAK quoted with approval in *Chervon (K) Ltd vs Harrison Charo wa Shutu* (2016) eKLR.
29. Order 37 Rule 7 *Civil Procedure Rules* and Section 38 Cap 22 does not specifically state the manner in which a defendant must approach the court. Under Section 2 of the *Civil Procedure Act* as pleading is defined to include a statement in writing by either the plaintiff or the defendant.
30. That this court has a wider power to do substantive justice to the parties is not in dispute. My finding is therefore the Originating Summons is properly defended by the defendant. I see no harm in the parties relying on whatever response(s) for or against this suit more so when no prejudice has been said to have been occasioned to any party by non-compliance with any particular procedure.
31. Further Order 37 Rule 19 *Civil Procedure Rules* gives the court discretion to continue the proceedings as if the same were begun by way of a plaint and that the court may order affidavits filed thereof to stand as pleadings with or without liberty to any party to add to or apply for particulars of those affidavits.
32. In this matter the plaintiffs did not object to the defence, the witness statements and the list of documents during pretrial conference. Directions were given for the matter to be heard viva voce based on the pleadings filed herein.
33. For a party to establish adverse possession, there must be prove that the entry was without permission, uninterrupted for 12 years and to the detriment of the registered owner.



34. Adverse possession contemplates two concepts – possession and discontinuation of possession of the registered owner.
35. In *Mbira vs Qachuli* (2002) 1EARL 131 the court held that an applicant must prove non-permissive or non – consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory period without interruptions.
36. In this matter the plaintiffs have pleaded and testified that the suit land was ancestral land initially registered in the name of their great grandmother.
37. Further the plaintiffs have alleged that they are co-owner(s) having been allowed in 1980 to construct and occupy the land till the filing of this suit to the extent of half share of the registered land.
38. Court have held that possession is a question of fact and degree. In *Wilson Kazungu Katana and 10 others vs Salim Abdalla Bakshwein & another* (2015) eKLR, the Court of Appeal held the parcel of land must be registered in the name of a person other than an applicant, the applicant must be in open and exclusive possession in an adverse manner to the title of the owner for a period of 12 years, having disposed the owner.
39. The plaintiff's evidence is that they have been occupying a portion of the suit land which possession has been inconsistent with the rights of the previous owner, there was no consent to occupy the suit land, they believed the land was theirs and that the former owner did not ever assert his ownership to their detriment during his lifetime if at all he is the one who had consented to their occupation and or possession in 1980.
40. In their evidence the plaintiffs testified that they had occupied and developed their side of the suit land exclusively whereas the defendant was on the other side of the land.
41. In *Karnataka Board of Wakf vs Government of India & others* (2004) 10 SCC 779 the court held in the eye of the law an owner would be deemed to be in possession of a property so long as there was no intrusion and that in adverse possession the possession must be adequate, in continuity, in publicity and in extent to show the possession was adverse to the true owner(s).
42. In *Peter Thuo Kairu vs Kuria Gicheru* (1988) 2 KLR the Court of Appeal held adverse possession subsists not only against the present holders but also their predecessors in title.
43. The evidence before this court shows the plaintiffs settled on the land in 1980 while the defendant's father was alive and subsisted until he died in 2015. The deceased never asserted his rights even after a caution was lodged on March 30, 1997 by one Mwanaisha Kairu Yusuf.
44. Due to this long possession and occupation the plaintiffs have pleaded and testified as a matter of right are entitled to the land by virtue of prescription. The defendant's late father became the registered owner on January 8, 1970 while the plaintiffs' entered the land and began occupying it in 1980. This fact is admitted by the defendant. It is however not clear from the defendant on what basis the plaintiffs were allowed and have been occupying the suit land and why there has been no notice for them to vacate the land. There is also no evidence of the occupation being interrupted and or disrupted. Similarly, there is no evidence that the defendant or their predecessor in title ever gave a notice to vacate the land.
45. In his evidence the PW 1 slated the portions occupied by the two families are known, identified, ascertained or at least have a clear visible boundary which is definite, known and unchallenged by the defendant as plotted on the ground.



46. The plaintiffs have testified that given the known and identifiable boundary at no time did the defendant prevent them from occupying the land or make any formal entry to assert any rights or file legal proceedings to evict them.
47. In *Chevron (K) Ltd vs Harrison Charo Wa Shutu* (2016) eKLR, the court held by building structures on the suit premises without obtaining permission from the registered owner, the respondent had manifested *animus possidendi*, a clear mind and intention of dealing with the land as if it was exclusively his and in a manner that was in clear conflict with the owners right.
48. Looking at the plaintiffs' evidence as tendered against that of the defendant, I am more convinced that the plaintiffs have been on the suit land under a claim of right and with intent to hold the land adversely or in hostility to the true owner and the world.
49. The plaintiffs seem to have exercised dominion over the suit land by building, and occupying it before the previous owner passed on and thereafter since 1980 to present. The defendant did not give any evidence that the deceased ever shared the portion occupied by the plaintiff's and or gained entry therein to purport to assert occupation or possession. What comes out from the evidence is that the deceased ceased to be in occupation and never went into and or attempted to drive out the plaintiffs from the portion they have been occupying if at all he knew they had another land in Murang'a.
50. It is apparent therefore the deceased since 1980 gave up, or ceased to use and or abandoned the portion to the plaintiffs. He never worked on it and or sought from the plaintiffs to hand over vacant possession with a view of utilizing the land.
51. Looking at the aggregate of all those acts, the defendant has not been free to utilize the portion occupied by the plaintiffs. He never asserted title after his late father passed on in 1980. He seems to have been eliminated from his own land and in place the plaintiffs took over ownership and possession.
52. As regards the acreage in *Gerrison Muindi Baruthi vs Willays Gatiuku Mukobwa and another* C.A NO. 98 of 1998 the court held that a party seeking adverse possession has a duty also to prove that the land he was claiming was definite and identifiable.
53. The plaintiffs have identified the parcel no. and stated in the pleadings and evidence the approximated area under their exclusive control as half share of 0.12 ha. Further both parties are in agreement that each of the two families occupy separate portions with a clear boundary though not a formal one.
54. In *Peter Njau Kairu vs Stephen Ndungu Njenga & another* C.A 57 of 1997 the court held a claimant must produce evidence which is stringent and straight forward that they have been in occupation of the suit land exclusively, openly, uninterrupted for an identifiable portion from 1980. The plaintiffs evidence is consistent and identifies the portion.
55. In this matter it is submitted the previous succession proceedings determined the issues and or interrupted the alleged adverse possession.
56. In *Priscilla Ndubi & Zipporah Mutiga vs Gerishon Gatobu Mbui* Meru Succession case No. 720 of 2013 the court held the primary duty of a Probate Court is to distribute the estate to the beneficiaries and where issues of ownership arise in a succession cause, they must be resolved before the property is distributed in line with rule 41 (3) of the *Probate rules*. The same was the position taken by the court in *Re-estate of Kinogu Mukiria (deceased)* 2022 eKLR.
57. In *Re-estate of Alice Mumbua Mutua (deceased)* 2017 eKLR, the issue of adverse possession was not before the probate court at all. I therefore find the objection by the defendant herein lacking merits.



58. Be that as it may in *Mati Gitabi vs Jane Kaburu Muga & 3 others* Nyeri Court of Appeal Civil Case No. 43 of 2015, the court held that the continued adverse occupation without secrecy, without violence and without permission may be adverse to the rights of the estate of the deceased his heirs and all those claiming under him. Applying the above principles, in *Peter Mbiri Michuki vs Samuel Mugo Michuki* Court of Appeal Nyeri Civil Appeal No. 22 of 2013, the court held the effect of letters administration means the administration of the estate dates back to the date of death. It matters not therefore in the instant case that the defendant has obtained letters of administration.
59. Given the foregoing reasons, I find the plaintiffs have on a balance of probability proved adverse possession. The claim is allowed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 13TH DAY OF JULY, 2022

In presence of:

2nd plaintiff

HON. C.K. NZILI

ELC JUDGE

