



**Kiambi v Miriti (Environment & Land Case 18 of 2020)
[2022] KEELC 13299 (KLR) (5 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13299 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 18 OF 2020**

CK NZILI, J

OCTOBER 5, 2022

BETWEEN

MOFFAT MURIITHI KIAMBI PLAINTIFF

AND

ALICE MIRITI DEFENDANT

JUDGMENT

A. Pleadings

1. The plaintiff by an originating summons dated June 22, 2020 prayed for the court to find him entitled to ownership of ½ share of the defendant's LR No Abogeta/L- Kithangari/1277 (hereinafter the suitland) by virtue of adverse possession. The originating summons was supported by an affidavit where he attached copies of the green card, a sale agreement dated May 26, 2008 acknowledgement receipts, land control board consent and photographs showing developments thereon marked as annexures MMK – 01 – 04 respectively. Alongside the originating summons, the plaintiff also sought for and obtained orders of inhibition and for the maintenance of status quo over the suit property.
2. Through a replying affidavit sworn on August 21, 2020, the defendant admitted to selling 0.012 ha of her land to the plaintiff which was vacant at the time of sale. She said she had no objection to the plaintiff's portion being hived off from her land so long as that portion did not include her house which was not part of the sale. In compliance with Order 11 of the *Civil Procedure Rules* the plaintiff filed a paginated bundle of documents dated November 15, 2021.

B. Testimony

3. The plaintiff testified that on May 26, 2008 he bought ½ share of the suit land from the defendant. He adopted his supporting affidavit sworn on June 22, 2020 as his evidence in chief and produced a copy of the green card, sale agreement dated May 26, 2008, receipts dated May 28, 2008 and July 30, 2008, land control board consent and photographs showing developments thereon as P. exhibits 1-4 respectively.



4. PW 1 insisted that a transfer for the land was not effected for unknown reasons though he has been occupying and developing the land for the last 13 years as acknowledged by the defendant at paragraph 4 of her reply. He urged the court to find him worthy the orders sought more so there has been no notice to vacate given by the defendant.
5. In cross examination, PW 1 admitted that he was occupying more land than was sold to him and as agreed at the land control board meeting which they both attended together with the defendant. Further PW 1 admitted that the defendant has been bringing third parties to purchase the land so that he could be refunded his money. PW 1 acknowledged admitted receipt of a second letter dated October 22, 2014 from Kaimenyi advocate as well as having been allowed to occupy the defendant's house while he developed his homestead. He denied the allegations that he was occupying more land than was sold to him.
6. Additionally, PW 1 admitted that a portion of the defendant's land had developed rental houses occupied by some tenants. The plaintiff also admitted that together with the defendant, they visited a land surveyor's office and after his land surveyor's death, another one came to fix a disputed boundary. PW 1 was categorical that the differences between the parties arose on the basis that what was on paper did not tally with what was on the ground.
7. Further, PW 1 testified that after the land control board meeting he started developing his vacant portion which the defendant did not object to or attempt to stop or evict him from the said portion.
8. The defendant told the court that the plaintiff was her nephew. Relying on her replying affidavit dated August 21, 2020 as a defence and a demand letter from the public health department which she produced as D Exh No 1 DW 1 said the house and the toilets on the larger portion of the suit land belonged to her and hence the reason she declined to transfer the sold portion was because the plaintiff was demanding more land to wit 1.12 acres as opposed to 0.012 acres she had sold to him.
9. In cross examination, DW 1 said that the plaintiff was demanding half an acre. DW 1 disagreed with the contents of the land control board consent and likewise P Exh (4) and which to her did not reflect the suit land since the developments thereon were on her land. DW 1 admitted signing P Exh 2 (a) and owned up its contents. DW 1 also said that she did not threaten to evict the plaintiff from the illegally occupied portion where he had allegedly put up some structures for reasons that blood was thicker than water.

C. Written Submissions

10. The plaintiff has submitted that both his oral and documentary evidence were clear that he has occupied half share of the suit land for over 12 years which are the ingredients of adverse possession. Reliance was placed on *Nancy Wangithi Munui v Gichubi Githumbi Nyamu* [2016] eKLR, *Maweu v Liu Ranching & Farming Coop Society Ltd* [1985] KLR 430, *Kim Pavey & 2 others v Loise Wambui Njoroge & another* [2011] eKLR, *Munyaka Kuna Co Ltd v Bernado Vicezo De Masi* [2018] eKLR.
11. Further the plaintiff submitted that his claim at was admitted at paragraph 4 of the replying affidavit. Therefore, he has been in possession with respect to adverse possession with effect from July 10, 2008; which land he developed and that there has been occupation without complaint or notice to vacate from the defendant.



D. Determination

12. The court has carefully gone through the pleadings, documents tendered in evidence, the oral testimony and written submissions. The issues for the court's determination are:
 - i. If the plaintiff has proved the ingredients of adverse possession concerning half share of LR No Abogeta/L-Kithangari/1277 against the defendant
 - ii. If the plaintiff is entitled to the prayers sought.
13. To found a claim based on adverse possession a party must plead and prove two key concepts; dispossession and discontinuance to the required standards. In *Kasuve v Mwaani Investments Ltd & 4 others* [2004] 1KLR 184 the Court of Appeal held that a party must prove exclusive possession of land openly, as of right, without interruption for a period of 12 years either after dispossessing the registered owner or by discontinuance of possession by the registered owner of his own volition.
14. In *Maweu v Lih Ranching* (supra), the court held that to prove ownership by way of adverse possession, it was not sufficient to show some acts of adverse possession had been committed, but there is a necessity to prove that the possession claimed was adequate, in continuity, in publicity, in extent and that it was adverse to the registered owner.
15. In *Nancy Wangari Munui* (supra) the court set out some evidence of possession as including developing the land and living on it with a family.
16. In *Munyaka Kuna Co* (supra) the court held that a litigant must also prove that he has both the factual possession of the land and the requisite intention to possess the land otherwise known as *animus possidendi*. Further, the court stated that there must be evidence of use of the land without force, without secrecy, without persuasion with the knowledge of the registered owner and in a continuous manner up to 12 years.
17. As regards a claim of adverse possession out of an aborted sale and a transfer of land in *Wanyoike v Kabiri [1979] KLR and Public Trustee v Wanduru* [1979] eKLR, the court held that the period of limitation starts to run after the last instalment has been paid and from that last day the true owner stands dispossessed of the possession.
18. In *Macharia Mwangi Maina and 811 others v Davidson Mwangi Kagiri* [2014] eKLR the court of Appeal held that the appellants who were purchasers of portions of the suit land and who had been put in possession of the said portions by the respondents, were protected under the doctrine of constructive trust.
19. Applying the above principles and case law in this suit the plaintiff pleaded that he had a sale agreement which he produced as P Exh (2) (a) with the defendant for 0.012 ha which was to be excised from her the suit land. The plaintiff testified that he paid Kshs 100,000/= as per P Exh 2 (b) & 2 (c) and eventually obtained a letter of land control board consent for subdivisions dated July 27, 2008.
20. The plaintiff testified that the property sold to him was vacant and possession was to take place from 26.5.2008 P Exh No (1) is a copy of the records. It indicates that the suit land measures 0.046 ha and is in the name of the defendant.
21. The plaintiff in cross examination, admitted that the defendant allowed him to occupy her house within her parcel of land as he developed his homestead on the portion sold to him. PW 1 also admitted that a land surveyor visited the land at the request of the defendant in order to excise the sold portion and proceeded to erect beacons so as to establish a clear boundary between the parties. Similarly, PW



- 1 admitted receiving a demand letter from M/s Kaimenyi Advocates as well as D Exh (1), the public health officer's letter over the house he was alleging occupying and belonging to the defendant which was in dire need of repairs. PW 1 also admitted that some rental houses with tenants existed in the defendant's land where she was the one collecting rental income.
22. Again PW 1 admitted that their differences were over the boundary since what was in the sale agreement and the transfer forms P Exh No 2 (a) (b) & (c) and P Exh No 3 were differing with the situation on the ground.
 23. DW 1 on her part testified that the plaintiff was occupying more land on the ground as opposed to what she sold to him or he was entitled to which was the reason the transfer was never effected.
 24. Further, DW 1 in cross examination was categorical that the plaintiff bought 0.012 acre and not 0.12 ha of her land. Asked why she had not evicted the plaintiff from the suit land DW 1 said the plaintiff was her close relative and since blood was thicker than water she could not evict him from the land.
 25. In *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR, the court found that adverse possession was a constitutional claim where a registered owner loses his land and title out of his default or inaction in failing to take action against a trespasser for a period of 12 years without interruption while knowing it and without licence or authority to possess or occupy, the land.
 26. The plaintiff has admitted that he was given a house to occupy by the defendant while he developed the portion sold to him. He also admitted receiving D Exh (1) which is dated July 4, 2020. It was addressed to the defendant regarding her residential houses on Parcel No 1277 Kanyakine market.
 27. The public health officer were calling upon the defendant to improve her residential houses and all its amenities to the required standard under the *Public Health Act*.
 28. PW 1 admitted that he received the notice from the defendant to vacate her house(s) so that she could work on the requested repairs by the Public Health Department.
 29. The plaintiff in his pleadings averred he became an adverse possessor from the date he obtained a land control board consent on July 10, 2008. The plaintiff has however failed to produce any consent letter for the transfer of the portion he bought from the defendant.
 30. exh 3 does not refer to the plaintiff as the sole beneficiary to the subdivision(s). The sale agreement was clear on the portion sold to the plaintiff as the one neighboring Obed Gitonga. In his evidence, the plaintiff failed to produce anything to specify the exact portion he currently occupies which was beyond the portion sold to him and which he now pleads is half share of the defendant's entire land.
 31. The plaintiff failed to plead and prove the dimension(s) of the land he has claimed to have acquired through adverse possession over and above the portion sold to him which was clearly defined on the sale agreement as the one next to Obed Gitonga.
 32. In her evidence, the defendant was consistent that she had no claim whatsoever over the portion measuring 0.012 acre she sold and which according to her belongs to the plaintiff as of right.
 33. From the case law above, adverse possession has been said as proved as a matter of fact based on the circumstances of each particular case See *Gabirel Mbui v Mukindia Maranya* [[1997] eKLR.
 34. The plaintiff has admitted that the defendant has rental houses on her larger parcel of land where she continues to collect rental income and which house she has been ordered to make repairs and make the residential houses to be in tenantable condition. The plaintiff has not offered any testimony by way of receipts for the rates and rents from the tenants. He has produced no evidence that he has dispossessed



- the defendant of ownership, made repairs or maintained or improved the houses so that he can be the one collecting rent and or dealing with the tenants as if he was the true owner.
35. Upon getting the notice to vacate the rental houses the plaintiff rushed to court to claim adverse possession. Given that the plaintiff has admitted that his occupation of the rental house of the defendant was conditional as he developed the portion sold to him and a notice to vacate was lawfully issued, I find the plaintiff's occupation was permissive in nature.
 36. The defendant has all along been asserting her rights and the entitlement to the suit land save for what she had sold to the plaintiff. PW 1 has admitted that the defendant went to an extent of bringing two land surveyors to the land in order to effect the boundary between them. This means that the defendant has not neglected or omitted to take care of her land to the exclusive control and possession by the plaintiff. The plaintiff has failed to bring and/or tender tangible and cogent evidence of the nature of his developments on the suitland in the nature of approved building plans by the County Government given the suit land is situated in a market. The plaintiff has not demonstrated before this court that any of his developments over and above the portion sold to him and which is equivalent to half an acre of the defendant's total land.
 37. Above all, the plaintiff failed to call an independent witness to substantiate and or corroborate his claim on both the discontinuance and dispossession.
 38. The sold portion of land is described in the sale agreement as vacant at the time of sale. The plaintiff obviously could not expect the defendant to transfer to him what was not included in the sale agreement. The plaintiff did not call any of his neighbours and the witnesses to the sale agreement.
 39. Incidentally the lawyer who witnessed the sale agreement a Mr Elija Ogoti was also the one who acted for the defendant initially and prepared the replying affidavit to the application for an injunction, the one for the review of the interim orders and the replying affidavit to the originating summons.
 40. Taking into totality all, the foregoing evidence, the court finds that the plaintiff has failed to prove entitlement of half share of the defendant's parcel of land on account of adverse possession.
 41. The plaintiff failed to in the alternative, plead any constructive trust or tender evidence to that effect as was the case in *Munyaka Kuna Co Ltd (supra)*. The plaintiff was not even sure of the exact portion of the defendant's parcel of land he was occupying beyond what was sold to him as against the other neighbours allegedly sold some land by the defendant.
 42. The defendant was clear that the plaintiff was her blood relative hence the reason she had not evicted him from her land.
 43. Given the foregoing and in absence of an alternative claim to enforce the sale agreement, the suit is dismissed with costs. Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 5TH DAY OF OCTOBER, 2022

In presence of:

C/A: Kananu

Muthomi for plaintiff

Alice Miriti for defendant

HON. C.K. NZILI



ELC JUDGE

