



**Wachira v Wagura (Environment & Land Case 1 of 2020)
[2022] KEELC 13529 (KLR) (6 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13529 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 1 OF 2020
YM ANGIMA, J
OCTOBER 6, 2022**

BETWEEN

HANNAH WANJIKU WACHIRA APPLICANT

AND

MONICA WANJIRU WAGURA RESPONDENT

JUDGMENT

A. The plaintiff's claim

1. By an originating summons dated July 15, 2019 brought under sections 7 & 38 of the *Limitation of Actions Act* (cap 22), order 37 rule 7 (1) & (c), of the *Civil Procedure Rules* and all other enabling provisions of the law the applicant sought the following orders:
 - (a) A declaration that the applicant is entitled by virtue of the doctrine of adverse possession to be registered as the sole and absolute proprietor of LR Laikipia/Kinamba Mwenje Block 1/1809 & 1810 measuring 2.014 and 1.995 hectares or thereabouts.
 - (b) An order that the deputy registrar of this honourable court be authorized to execute all the necessary documents to facilitate the registration of the applicant as the sole and absolute proprietor of LR Laikipia/Kinamba Mwenje Block 1/1809 & 1810.
 - (c) The respondent be restrained permanently from remaining, using, possessing, occupying the said LR Laikipia/Kinamba Mwenje Bloc 1/1809 & 1810 or any portion thereof.
 - (d) The costs of the suit be awarded to the applicant.
2. The originating summons was based upon the grounds set out on the face of the summons and the contents of the supporting affidavit sworn by the applicant on July 15, 2019 together with the exhibits thereto. The applicant contended that she took possession of the suit properties in 1977 and that since then she had been in actual, open, continuous and exclusive possession thereof without any



interference from the respondent who was the registered proprietor thereof. It was contended that the applicant and her family members had undertaken massive developments on the suit properties over the years and that the respondent had never occupied them or taken legal action for recovery thereof. She further contended that as a result of the foregoing, she had acquired adverse possession of the suit properties.

3. The applicant contended that in 1977 she entered in a woman to woman marriage with one, Wachinga Wagura (Wagura) and it is on that basis that she was put into possession of the suit properties which then belonged to Wagura who was deceased by the time of filing suit. That was her pleading on how she came into possession of the suit properties.

B. The respondent's response

4. The respondent filed a replying affidavit sworn on February 3, 2020 in opposition to the originating summons. She dismissed the summons as a fraudulent suit. It was her case that she was the one who had entered into a woman to woman marriage with Wagura and that at all material times, the applicant was merely a servant or employee of Wagura.
5. The respondent further pleaded that she was the legitimate owner of the suit properties by virtue of two (2) shares she had bought in a company known as Laikipia West Farmers Co Ltd (the Company) in 1970. She further stated that the suit properties were officially allocated to her in 1997 even though she had built a wooden house on Parcel 1810 for Wagura in 1977 after which the applicant was employed as Wagura's servant.
6. It was the respondent's case that upon employment the applicant bore additional children whom she named after Wagura's relatives in a bid to create a false impression that she was in a woman to woman marriage with her. The respondent further pleaded that during her twilight years Wagura fell out with the applicant and chased her out of the Parcel 1810.
7. The respondent further pleaded that she had pity upon the applicant after being thrown out and allowed her to build a house and settle on Parcel 1809 whereas she leased out Parcel 1810 to a tenant. It was her case that all along the applicant and her family members have been residing on Parcel 1809 with her permission as licencees. She therefore contended that the doctrine of adverse possession was not applicable to the suit properties hence the suit should be dismissed with costs.

C. The issues for determination

8. The court has noted that the parties did not file an agreed statement of issues. The applicant filed a list of 3 issues for determination whereas the respondent filed a statement of 7 issues for determination. In the premises, the court shall frame the issues for determination as required by law.
9. Under Order 15 rule 2 of the *Civil Procedure Rules*, the court may frame issues from any of the following:
 - (a) The allegations contained in the pleadings.
 - (b) The contents of documents produced by the parties.
 - (c) Statements made on oath by or on behalf of the parties.



10. The court has considered the pleadings, affidavits, documents and the evidence on record in this suit. The court is of the opinion that the key issues arising for determination are the following:
- a. Whether the applicant has proved her claim for adverse possession of the suit properties.
 - b. Whether the applicant is entitled to the reliefs sought in the suit.
 - c. Who shall bear costs of the suit.

D. Directions on submissions

11. Upon conclusion of the trial, the parties were accorded an opportunity to file and exchange their respective written submissions. The applicant was granted 30 days to file and serve her submissions whereas the respondent was granted 30 days upon the lapse of the applicant's period to file and serve hers. The record shows that the applicant's submissions were filed on May 10, 2022 whereas the respondent's were filed on June 16, 2022.

E. Analysis and determination

(a) Whether the applicant has proved her claim for adverse possession of the suit properties

12. The court has considered the material and submissions on record on this issue. Whereas the applicant submitted that she had demonstrated her claim for adverse possession to the required standard, the respondent contended otherwise. The elements of adverse possession were summarized in the case of *Kasuve v Mwaani Investments Ltd & 4 Others* [2004] I KLR 184 as follows:

“....and in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, *Wanja v Sakwa No 2* [1984] KLR 254...”

13. Similarly, in the case of *Chevron (K) Ltd v Harrison Charo Wa shutu* [2010] eKLR the Court of Appeal held as follows on adverse possession:

“At the expiration of the twelve-year period the proprietor's title will be extinguished by operation of the law and Section 38 of the Act permits the adverse possessor to apply to the High Court for an order that he be registered as the proprietor of the land. Therefore, the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it. See *Littledale v Liverpool College* [1900] 1 Ch 19, 21.”

14. This being a claim for adverse possession, the court shall not consider or determine the other peripheral matters which were raised by the parties. For instance, it shall not be necessary to determine whether or not there was a valid woman to woman marriage between the applicant and Wagura. It shall not also be necessary to determine whether or not the applicant was a servant or employee of Wagura since the latter was not the registered proprietor of the suit properties at any given time.



15. There are no pending succession proceedings for the estate of the late Wagura and the suit before me is not one of distribution of her assets amongst her “wives”. The court shall consequently consider the only claim which was presented in the applicant’s originating summons and that is the claim for adverse possession.
16. The court has considered the evidence on record with respect to Parcel 1809. There was no doubt from the evidence tendered at the trial that the applicant and her family members have been in possession and occupation of the said parcel for a very long period of time. The only issue in dispute was whether the occupation was with or without the respondent’s permission.
17. The material on record shows that respondent became registered as proprietor in 1991 whereas the applicant had been in possession thereof from 1977 or thereabouts. In the circumstances, the court is unable to accept the respondent’s contention that she is the one who had authorized the applicant to take possession of the said parcel. The court accepts the evidence of the applicant and her witnesses that it was Wagura who put her into possession. The court is thus of the opinion that applicant’s possession of the suit properties was adverse to the interest of the respondent with effect from 1991 when she obtained registration of the suit properties as proprietor.
18. The court is further satisfied on the basis of the evidence on record that by constructing houses on Parcel 1809 and continuously undertaking farming activities thereon the applicant demonstrated animus possidendi necessary to crystalize her claim for adverse possession. She was simply utilizing the suit properties as if it were her own.
19. The court accepts the applicant’s evidence that the respondent has never occupied, utilized or developed the said properties since she was resident in Gituamba in Muhotetu and that the applicant’s possession has been continuous, exclusive and without interruption in the legal sense. Accordingly, the court is satisfied that the applicant has proved her claim for adverse possession with respect to parcel 1809.
20. The court has also considered the evidence on record with respect to Parcel 1810. Although the applicant contended that she was also in possession of this parcel as well, the respondent claimed to have leased it out to a tenant who testified as DW2. The court has considered the evidence of the daughter of Wagura (who testified as PW2) and that of the area Assistant Chief (who testified as PW3). They both testified that the applicant was the one in occupation of Parcel 1810. They stated that the respondent had never occupied, utilized or developed the said parcel. PW3 swore that he moved to Mwenje area in 1986 as a young boy and that he was appointed an Assistant Chief in 2004. It was his evidence that it was the applicant who was utilizing Parcel 1810 over the years. The court considers his evidence as credible and accepts it as such.
21. In the opinion of the court, the evidence of DW2 who was alleged to be the respondent’s tenant was not satisfactory or credible. He claimed to have leased Parcel 1810 for over 9 years but he did not produce any lease agreement to demonstrate the existence of the alleged agreement with the respondent. When he was asked during cross examination whether he had paid the leasing fee for the current year he answered in the negative. When asked whether he had paid the fee for the previous year he answered in the negative too. In the absence of a lease agreement and evidence of payment of the applicable fee the court is unable to believe that DW2 was the lessee and user of Parcel 1810. It is really incredible that he could be leasing and utilizing Parcel 1810 without the knowledge of the local Assistant Chief for 9 years.
22. The court is thus of the opinion that the applicant has demonstrated that she has been in occupation of Parcel 180 as well. The court is satisfied that she was in possession thereof without the consent or



permission of the respondent at least with effect from 1993 when the respondent was registered as proprietor thereof. The court is satisfied that she has been utilizing it as her own and without reference to the respondent. In the premises, the court is satisfied that the applicant had demonstrated her claim for adverse possession to the required standard.

(b) Whether the applicant is entitled to the reliefs sought in the suit

23. The court has found and held that the applicant has demonstrated her claim for adverse possession of Parcel 1809. The court has also found that the applicant has demonstrated her claim for adverse possession of Parcel 1810. In the premises, the court is satisfied that the applicant is entitled to the reliefs sought in the suit to facilitate her registration as proprietor of the suit properties. However, the court is not satisfied that a legal basis has been laid for the grant of a permanent injunction against the respondent. In the event, the court is not inclined to grant the injunction sought.

(c) Who shall bear costs of the suit

24. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co Ltd* [1967] EA 287. The court finds no good reason why the successful litigant should be deprived of costs of the action. Accordingly, the applicant shall be awarded costs of the suit to be paid by the respondent.

F. Conclusion and disposal

25. The upshot of the foregoing is that the court is finds and holds that the applicant has proved her claim for adverse possession of the suit properties to the required standard. Accordingly, judgment be and is hereby entered for the applicant against the respondent in the following terms:

- (a) A declaration be and is hereby made that the applicant has become entitled to be registered as proprietor of Title Nos Laikipia/Kinamba Mwenje Block 1/1809 and 1810 on account of the doctrine of adverse possession.
- (b) The Deputy Registrar of the court is hereby authorized to execute all necessary documents and instruments to facilitate the registration of the applicant as the proprietor of Title Nos. Laikipia/Kinamba Mwenje Block 1/1809 & 1810.
- (c) The applicant's prayer for a permanent injunction is hereby declined.
- (d) The applicant is hereby awarded costs of the suit to be borne by the respondent.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 6TH DAY OF OCTOBER, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. Nderitu Komu for the applicant

Ms. Nduta Kamau holding brief for Dr. Kamau Kuria for the respondent

C/A - Carol

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Y. M. ANGIMA



JUDGE

