



**Otwali v Waweru & another (Enviromental and Land Originating Summons E199 of 2021) [2024] KEMC 171 (KLR) (19 March 2024) (Judgment)**

Neutral citation: [2024] KEMC 171 (KLR)

**REPUBLIC OF KENYA  
IN THE NAKURU LAW COURTS  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E199 OF 2021**

**PA NDEGE, SPM**

**MARCH 19, 2024**

**IN THE MATTER OF THE LIMITATIONS OF ACTIONS ACT CAP 22 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE PARCEL OF LAND KNOWN  
AS NAKURU MUNICIPALITY BLOCK 15/573**

**BETWEEN**

**NICHOLAS MIYA OTWALI ..... PLAINTIFF**

**AND**

**BARNICE NJAMBI WAWERU ..... 1<sup>ST</sup> DEFENDANT**

**FRANCIS WAWERU MACHARIA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff commenced these proceedings vide the Originating Summons dated 12<sup>th</sup> November, 2021 and filed on the 24<sup>th</sup> of November, 2021, against the Defendants. The Plaintiff's case is that he has acquired by way of adverse possession and rights over all that parcel of land comprised in Nakuru Municipality Block 15/573 hereinafter called the suit land.
2. The Plaintiff seeks the following orders:
  - a) That the Plaintiff be declared to have become the legal owner entitled by adverse possession having occupied, cultivated and developed the said Parcel of Land continuously and uninterrupted for over 16 year since 27/08/2007 and as the sole proprietor of all that parcel of land comprised in Nakuru Municipality Block 15/573 situated in Nakuru;
  - b) That the Honorable Court do direct that Nakuru County Land Registrar rectify the Land Register accordingly and the Plaintiff be registered as the sole proprietor of the said parcel of



land namely Nakuru Municipality Block 15/573 in place of the above-named Defendants in whose favor the land is currently registered;

- c) That the original Title Deed is respect of Nakuru Municipality Block 15/573 which is with the Defendants be dispensed with.
  - d) Costs of this application be provided for.
3. The Originating Summons was supported by the Plaintiffs' affidavit dated 12<sup>th</sup> November, 2021 and annexed was a copy of the Certificate of Lease of the suit land, and pictures of the developments in the suit land. Despite being served of the said summons by way of advertisement, the Defendants herein did not enter appearance and or file any documents to defend the claim. This suit therefore proceeded for hearing ex parte.
  4. The hearing commenced on the 29<sup>th</sup> of August, 2023 with the Plaintiff being the only witness. Testifying as PW1, the Plaintiff stated that he got the farm in 2007 when it was bush and filled with grass. That he slashed it and commenced cultivation thereon. That after around one year, he commenced construction therein. That it was towards the end of 2007, when he erected a house therein. That he has stayed in the parcel without paying any rent to anyone. That no one has also approached him to leave the land parcel. That he did a search and confirmed that the title was in the names of the defendants herein.
  5. The Plaintiff filed his submissions on the 21<sup>st</sup> of September, 2023. He submitted that he has lived continuously and uninterrupted in possession of the suit land for more than 12 years without the consent of the Defendants and as such is entitled to the orders sought herein. He referred the court to the minimum 4 basic conditions to be met to perfect the title of the adverse party as set out in the case of *Tabitha Waitherero Kimani Vrs Joshua Ng'ang'a* [2017] e KLR i.e. open and notorious use of the property, continuous use of the property, exclusive use of the property, and actual possession of the property. He therefore submitted that all the conditions have been met herein.
  6. I have considered the pleadings, submissions and the applicable law. The issues which in my opinion arise for determination are as follows:
    - a) Whether the Applicant's occupation of the Suit Land is adverse to that of the Defendants; and
    - b) Who bears the costs of this suit?
  7. The doctrine of adverse possession in Kenya is embodied in Section 7 of the *Limitation of Actions Act*, CAP 22 Laws of Kenya, which provides that: - "An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."
  8. A claimant for the land by adverse possession must demonstrate that he has been in peaceful, continuous and uninterrupted occupation of the claimed land period of excess of twelve (12) years. The evidence of the Plaintiff on this is unchallenged. He stated that he took possession of the suit land herein in 2007. That he immediately commenced cultivation in it. That towards the end of the same year, he constructed a house that he has been occupying since with his family. The photographs or pictures of the house was produced herein as exhibit. He has thus been in a continuous and interrupted possession of the land herein. The fact that he built a house herein and has been living in the house since, shows the open and notoriousness of his use of the property. He was in actual possession of the property for his exclusive use for all these years.
  9. For the claim to succeed, the possession and use must be continuous, open and uninterrupted for a period of not less than 12 years and the adverse possessor must over the period engage in acts in regard



to the property which are inconsistent with the rights of the true owner. The acts have to be hostile to the rights and interests of the real owner. The Plaintiff has sufficiently proved that his possession of the suit land has been adverse and hostile to that of the true proprietor. His occupation and use has not been challenged by the defendants or any other evidence herein.

10. The Court of Appeal in the case of Ruth Wangari Kanyagia Vrs Josephine Muthoni Kinyanjui [2017] eKLR while acknowledging adverse possession is a common law doctrine restated the same by citing the India Supreme Court decision in the case of Kamataka Board Of Wakf Vrs Government Of India & Others [2004] 10 SCC 779 where the court stated thus: -

In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continues. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.

11. From the plaintiff's accounts, he is using the entire land and he has disclosed that his use and occupation is adverse to the Defendant's ownership and I do hereby allow the suit herein as prayed. Consequently, judgment is entered for the Plaintiff in the following terms: -
- a) The Plaintiff be and is hereby declared to have become the legal owner entitled by adverse possession having occupied, cultivated and developed the said Parcel of Land continuously and uninterrupted for over 16 year since 27/08/2007 and as the sole proprietor of All That parcel of land comprised in Nakuru Municipality Block 15/573 situated in Nakuru;
  - b) The Nakuru County Land Registrar be and is hereby directed to rectify the Land Register accordingly and the Plaintiff be registered as the sole proprietor of the said parcel of land namely Nakuru Municipality Block 15/573 in place of the above-named Defendants in whose favor the land is currently registered;
  - c) The original Title Deed in respect of Nakuru Municipality Block 15/573 which is with the Defendants be and is hereby dispensed with.
  - d) Costs of this application be and is hereby provided for.

**DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT THIS 19<sup>TH</sup> DAY OF MARCH , 2024**

**ALOYCE-PETER-NDEGE**

**SENIOR PRINCIPAL MAGISTRATE**

In the presence of;

Plaintiff's counsel: n/a

Plaintiff: n/a

