

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
EMBU

ELC CASE NO. E039 OF 2021

EMILIO NJERUH.....
PLAINTIFF

VERSUS

BONIFACE NJUKI RUNJI.....1ST
DEFENDANT

ANDRIANO NYAGA KIGONDU.....2ND
DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit vide the Originating Summons dated 9/11/2021 seeking a declaration that he had become entitled to 12 acres out of the land known as Embu/Mavuria/1647 (the suit land) registered in the Defendant's name through adverse possession. He sought to have the Land Registrar, Kiritiri register him as proprietor of the suit land and for the Deputy Registrar of the court to sign all the necessary documents on behalf of the 1st Defendant to transfer the suit land to him and for the production of attendant documents to be dispensed with.
2. The Plaintiff swore the supporting affidavit where he deponed that the suit land measures 7.6 hectares (approximately 19

acres) and that he had lived on a portion measuring approximately 12 acres for over 50 years since 1968. He stated that he had extensively developed the land where he raised his children. Further, that his occupation has been open and within the knowledge of the 2nd Defendant who has now transferred the land to the 1st Defendant. He stated that the Defendants have never interrupted or interfered with his peaceful possession and occupation save that the 1st Defendant lodged a complaint with the police and he was charged with the offence of forcible detainer in Embu CMC Criminal Case No. 879 of 2017 where he was sentenced to pay a fine of Kshs. 20,000/= or serve 2 years in prison.

3. The Plaintiff elaborated that he had extensively developed the suit land by constructing a three bedroom permanent house, planted miraa, trees, mangoes, bananas and that he rears cows, goats and sheep on the land. He averred that his mother, father, child and one of his sister's children were buried on the suit land without the Defendant's objection. He was not issued a title deed for the land during land demarcation and was surprised to learn that the 2nd Defendant had been registered as the proprietor of the suit land.
4. The 1st Defendant opposed the Plaintiff's claim through the replying affidavit in which he deponed that he is the registered proprietor of the suit land, having purchased it from the 2nd Defendant sometime in 2012. A title deed was issued to him on 30/1/2013. He averred that before he purchased the land, he did

due diligence and visited the land and found no one occupying the land and that it was vacant. He stated that the Plaintiff and his family encroached and trespassed onto part of the land sometime in 2012 after the 2nd Defendant had sold and transferred the land to him. He reported the Plaintiff's illegal encroachment and the Plaintiff was charged and convicted. The conviction was upheld on appeal to the High Court.

5. He contended that the Plaintiff's claim for adverse possession is yet to crystallize as the Plaintiff has occupied and utilised the land for over 12 years since he was registered as proprietor. He denied that the Plaintiff's occupation had been quiet or that he had extensively developed the land. He stated that the only structures on the land were semi-permanent houses and that none of the Plaintiff's relatives were buried on the land. He urged the court to dismiss the Plaintiff's claim with costs.
6. At the hearing, the Plaintiff reiterated the averments in his supporting affidavit. On cross examination, he stated that he started living on the suit land in 1968 with his family when he was four years old. He claimed that his father gave him the land in 1987 and that his brothers had different parcels of land. He maintained that he has built on the suit land and that his parents' graves are on the land. He stated that he knew the boundaries of the land because they put stones and cacti which act as boundaries. On re-examination, he denied that he entered the land between 2012 and 2017 and reiterated that he had been on the land since 1968.

7. The Plaintiff produced an official search for the suit land and photographs showing developments he had made on the suit land.
8. The 1st Defendant gave evidence and stated that he purchased the suit land from the 2nd Defendant on 14/7/2012. When he bought the land, it was vacant. He discovered that between 2012 and 2017, the Plaintiff trespassed onto a portion measuring about half an acre. On cross examination, he stated that when the 2nd Defendant sold the suit land to him, it was bushy and that the 2nd Defendant was grazing and cultivating the land. He learnt in August 2012 that there were people on the suit land. He reported the matter to the police and they were charged in court.
9. He stated that he did not file a case for eviction because he was waiting for this case to end. Further, that he ploughs the suit land, plants maize and *miraa* and that he has developed it even though he did not bring photographs to prove it. He has a shed on the suit land that houses his goats. He confirmed that the Plaintiff has built a house on the land and that he found the trees on the land when he bought it. He did not know whether the Plaintiff lived on the suit land. On re-examination, he stated that the Plaintiff uses about half an acre of the land and that the trees and *miraa* on the land were his. He maintained that he keeps goats and cows on the land on which he also farms.
10. The 1st Defendant produced copies of the sale agreement, title deed for the suit land, proceedings and judgment in Embu Chief

Magistrate's Criminal Case No. 879 of 2017 and the judgement in High Court Criminal Appeal Case No. 8 of 2019.

11. Parties filed and exchanged written submissions, which the court has considered. The Plaintiff relied on the doctrine of adverse possession embodied in Sections 7, 13, and 38 of the Limitation of Actions Act. He cited various authorities and submitted that at the time the 1st Defendant bought the suit land from the 2nd Defendant, the 2nd Defendant's title to the land had become extinguished in his favour by operation of law and there was no title that the 2nd Defendant would pass to the 1st Defendant. He submitted that the 1st Defendant confirmed that he did not initiate any action to have him removed from the suit land.
12. Further, he emphasised that his occupation was open, continuous and uninterrupted since 1968 and that time did not stop running after the filing of the criminal proceedings. He submitted that not only had he planted miraa on the suit land, but that he had constructed a house where he lives with his family. He expressed the view that the houses on the land cannot have been constructed when this suit was still going on as the Defendants contend. In any case, that nothing was done to stop the construction if they were done during the pendency of the case. He submitted that he had proved his case on a balance of probabilities and urged the court to enter judgment in his favour.
13. The 1st Defendant submitted that the Plaintiff is not entitled to the suit land by way of adverse possession as his claim does not

meet the conditions for the orders he is seeking. He maintained that at the time of purchasing the suit land, the Plaintiff was not on the land. He submitted that for purposes of adverse possession, time stopped running when he took steps to assert his rights over the suit land by reporting the matter to the police and when the Plaintiff was charged and convicted. He asserted that there is no basis for the Plaintiff to claim 12 acres of the suit land which measures about 19 acres when the Plaintiff only occupies about half an acre. He urged that the Plaintiff had not proved his case on a balance of probabilities and that the suit should be dismissed.

14. The issue for determination is whether the Plaintiff has proved that he has become entitled to land parcel Embu/Mavuria/1647 by way of adverse possession. In **Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR**, the Court of Appeal described adverse possession a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for twelve (12) years. That the process springs into action essentially by default or inaction of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”
15. Similarly in **Samuel Kihamba v Mary Mbaisi [2015] KECA 853 (KLR)** the court stated that for one to

succeed in a claim for adverse possession, one must prove that he has occupied the land openly without force, without secrecy, and without the permission of the landowner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner.

16. In this case, it is not disputed that the 1st Defendant is the registered proprietor of the suit land, having purchased it from the 2nd Defendant pursuant to a sale agreement dated 14/7/2012. The Plaintiff contends that he has been in occupation of approximately 12 acres out of the 19 acre parcel since 1968, where he has built a permanent three-bedroom house, planted miraa, mangoes, bananas, and trees, and buried his family members.
17. His occupation, he states, has been open, peaceful, and within the knowledge of the 2nd Defendant, the previous owner, who never took any steps to evict him. The Plaintiff relied on photographs of developments which he claimed to have carried out on the suit land. The 1st Defendant, while denying the Plaintiff's claim, admitted that the Plaintiff has built a house on the land and occupies about half an acre. The Plaintiff maintained that he occupies about 12 acres. The 1st Defendant claimed that the Plaintiff's occupation began in 2012 after he purchased the land from the 2nd Defendant.
18. The Plaintiff's occupation or possession of the suit land is not in dispute. What is in contention is the time and manner of the Plaintiff's entry onto the land. The Plaintiff asserts that he had

been on the land since 1968 and that his father gave it to him in 1987, while the 1st Defendant argued that the Plaintiff entered the land between 2012 and 2017 after the land was transferred to him. This issue is crucial, as the success of the Plaintiff's claim for adverse possession hinges upon proof of continuous and uninterrupted occupation for at least twelve years prior to filing suit. The Plaintiff merely stated that he began residing on the land in 1968 but did not call any witnesses to corroborate that assertion. He relied on photographs showing certain developments he claimed to have made on the suit land.

19. The photographs show a semi-permanent and permanent house, a mature tree and what appears to be *miraa*. On their own, these do not establish when the developments were undertaken or when the Plaintiff's possession began. Another photograph shows a cross placed on the land, which presumably marks a grave for his family members. However, it is not clear that there is an actual grave or graves on the land. Given the Plaintiff's claim that several relatives including his parents, one of his children and one of his sister's children were buried on the suit land, the court expected more cogent evidence, such as testimonies of persons who attended the burials and evidence of the graves.
20. The 1st Defendant claimed that he found the suit land vacant and bushy when he purchased it and that the *miraa* and trees presently on the land belong to him. In light of these conflicting accounts, the burden lay on the Plaintiff to disprove the

Defendant's claim and to demonstrate, on a balance of probabilities, that his occupation preceded the 1st Defendant's acquisition of the suit land. The Plaintiff failed to discharge that burden.

21. The Plaintiff failed to prove that he has been in actual, open, and continuous occupation of the suit land since 1968. The only period of occupation established is from 2012, which was admitted by the 1st Defendant. This suit was instituted on 9/11/2021, if the Plaintiff entered the suit land in 201, only 9 years had lapsed by the time he filed suit. This duration falls short of the statutory 12 years required to ground a claim for adverse possession under the law.
22. The court finds no merit in the Plaintiff's suit and dismisses it with costs to the 1st Defendant.

Delivered virtually at Bungoma this 10th day of February 2026.

**K. BOR
JUDGE**

In the presence of: -

Ms. Irene Waweru for the Plaintiff

Ms. Pamela Kimathi for the 1st Defendant

No appearance for the Respondents 2nd Defendant