



**Muigai v Wandabwa (Environment and Land Case E001 of 2021)
[2024] KEELC 145 (KLR) (24 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 145 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND CASE E001 OF 2021
FO NYAGAKA, J
JANUARY 24, 2024**

BETWEEN

STANLEY MBURU MUIGAI PLAINTIFF

AND

MARTHA NASIMIYU WANDABWA DEFENDANT

JUDGMENT

1. Stanley Mburu Muigai, the Plaintiff herein instituted the Originating Summons Application dated 20/07/2020. It was supported by his Affidavit deposed to on a similar date. He sought to have this Court find him the proprietor of Bungoma/Ndalu/562 (hereinafter the suit land) measuring 5 acres, through adverse possession, as against Martha Nasimiyu Wandabwa, the Defendant herein.
2. In the Supporting Affidavit, he deposed that by a sale agreement dated 2nd November 2001, he bought the suit land at a consideration of kshs. 510,000/- and immediately took possession of the land to date. He stated that prior to entering into the sale agreement, he conducted due diligence where he ascertained that the suit land belonged to one Erastus Simiyu Butala (hereinafter 'The Vendor'). His evidence was that the suit land was eventually subdivided into three portions and the 5 acres that was registered in his favour was Bungoma/ Ndalu/562 and a title deed issued in his name.
3. He pleaded that since the purchase, he had since developed the land and the Defendant had neither visited the land nor interfered with his quiet possession. He pleaded that the Vendor had originally caused the suit land to be allocated to Julius Wandabwa (deceased) who was the husband of the Defendant.
4. It was his case that Julius Wandabwa, without the consent of the Vendor, sold the suit land to one Dismas Namiti. He claimed that the said sale resulted in Kitale Resident Magistrates Court *Miscellaneous Application No. 4 of 1981* where Erastus Simiyu Butala and Martha Nasimiyu Butala



- redeemed the suit land by refunding the Applicant thereon the sum of kshs. 48,810/=. He therefore claimed that he was an innocent purchaser without notice of any other person's interest in the land.
5. In another twist of events, the Plaintiff pleaded that in the year 2015, he conducted an official search, with a view to securing a loan for agricultural activities. The search results indicated that the land title number Bungoma/Ndalu/562 did not exist. He established that by a Court order obtained without his notice or of any other interested party, the entry No. 9 on green card of parcel No. Bungoma/Ndalu/150 was purportedly cancelled and title given to the Defendant herein for the same land.
 6. He pleaded that by dint of Section 25(2) of the Registered Land Act (now repealed) entry No. 9 and the register for Bungoma/Ndalu/150 was closed on 16th November, 2001 after subdivision of the same into three portions and new registers opened for Bungoma/Ndalu/561/562/563 which were registered in the names, John Soita Sinokho, Stanley Mburu Muigai and Jacob Wasike Wamachech respectively. He pleaded that he was not made party to any court proceedings pertaining to the said dubious cancellation nor is he aware of other two parties being so involved.
 7. He asserted further that by operation of Section 4(4) of the Limitation of Actions Act, the Judgment of 2002/2003 became time barred in or around the year 2014/15, after expiry of 12 years and hence is entitled to be registered as proprietor of the land measuring 5 acres.

The Evidence

8. The Plaintiff testified as PW1. He was the sole witness. He adopted his affidavit deposed on 20th July, 2020 as his evidence. He testified that he was 81 years of age and did not know Martha Nasimiyu. He claimed that he only saw her when she was claiming that the land is hers.
9. He stated that he knew John Soita Sinokho and Jacob Wamatete for having bought land from Erastus Simiyu Butala. He produced the Sale Agreement as P.Exhibit 4. He stated he bought 5 acres in the year 2001 from Erastus Simiyu for kshs. 510,000/-. He stated that the land he bought was to be excised from Bungoma/ Ndalu/150.
10. He stated that he conducted official search, whose results he produced as P.Exhibit 5, by which he confirmed that the land was registered in the name of Erastus Simiyu. He was categorical that he was issued with a title deed on 16th January, 2001. He produced it as P.Exhibit 10.
11. He stated that since he entered the land and had never moved from it. He stated that he learned of cancellation of their title in the year 2012 through John. He confirmed that through the registry that the cancellation had indeed been done and decided to sue. He did not know when the cancellation took place and was neither informed of the case in Kitale Magistrates Court that order cancellation. His further evidence was that he had been in his portion of the land, had never been evicted and had planted trees and was rearing farm animals on it. To that end, he produced photographs as P.Exhibit 8(a) & (b).
12. He stated that when survey was done, parcel No. 50 was subdivided and was issued with title to parcel No. 562. In a bid to demonstrate that the proprietor of the suit land was originally Erastus Simiyu, he produced the proceedings in *Webuye Miscellaneous Application No. 4 of 1981* as P.Exhibit 9 where the Court ordered Dismas Namiti to vacate the land.
13. In conclusion, it was his evidence that he has never seen Martha Wandabwa since he took possession of his land, it was his case that since taking over the land, he has never been given notice from the Court to vacate it and that he has resided on the suit land peacefully for a period of 22 years. He urged the Court to declare him the proprietor and to have the title deed back in his name by way of adverse possession.



The Defendant's Case

14. Martha Nasimiyu Wandabwa did not respond to the Case. Despite being properly served with the hearing notices, she failed to file her trial documents. The Affidavits of Service of 25th July 2023, 8th August 2023 and 23rd October 2023 indicate proper service of the Defendant.
15. That being the case, the suit herein is undefended and I will proceed to consider it as such.

Issues for Determination

16. From the foregoing, the only issue that arises for determination is whether the Plaintiff's case for adverse possession is merited.

Analysis and Determination

17. The resolution of the instant dispute resides in the assessment of the principle of Adverse Possession and the legal requirements one must satisfy in order to successfully claim proprietorship of land through it.
18. The *Black's Law dictionary* 11th Edition defines Adverse Possession at page 67 as follows;
 1. The enjoyment of real property with a claim of right when that enjoyment is opposed to another person's claim and is continuous, exclusive, hostile, open, and notorious.
 2. The doctrine by which title to real property is acquired as a result of use or enjoyment over a specific period of time
19. In Civil Appeal 56 of 2014, *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR, the Court of Appeal in Malindi referred to the Supreme Court of India and discussed the ingredients of Adverse Possession in the following terms:

The Supreme Court of India discussed the essentials of adverse possession in *Karnataka Board Of Wakf V. Government Of India & Others* (2004) 10 SCC 779 and stated as follows:

"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 of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile 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 continuous. 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."

20. In *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR, the Court of Appeal described adverse possession as follows:

"Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The



process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act*, which is in these terms:-

“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.”

21. As is evident, the instant claim for was instituted through Originating Summons, a procedure reserved for simple and uncomplicated matters (see Court of Appeal decision in *AHAD v CJE* [2019] eKLR).
22. That said the question that immediately arises is whether the circumstance of the instance suit fit the parameters that entitle one to claim entitlement to land through Adverse Possession.
23. I have keenly gone through testimony of the plaintiff.
24. The chain of documents, namely, the Land Sale Agreement, the Title Deed, the Certificate of Official Search and the Mutation Form indicate that interest in the suit land was acquired through a voluntary contract between Erastus Butala and the Plaintiff herein. The quest for Adverse Possession is validated by evidence that the title of the land in question is in another person’s name. An Applicant must demonstrate that the title of the land he is seeking to adversely possess is in the name of its original owner. That is an essential requirement.
25. Contrary to the foregoing, the evidence presented before this Court show that land parcel No. Bungoma/Ndalu/150 was a large portion of land disposed of by Erastus Butala. It was bought by the plaintiff herein, one Jacob Wasike Wamacheche and John Soita Sinokho.
26. According the Mutation forms, subdivision of the Land Parcel No. Bungoma/Ndalu/150 yielded Bungoma/ Ndalu/561, Bungoma/Ndalu/562 and Bungoma/Ndalu/563. Bungoma/Ndalu/562 was registered in the name of the Plaintiff herein and to that end, a title deed issued in his name.
27. Essentially, therefore, the Plaintiff seeks to have this Court declare him to have adversely possessed a land that is in his own name, an untenable legal invitation.
28. I find so because there is no evidence that the plaintiff’s 5 acre parcel of land, known as Bungoma/ Ndalu/562 is in the name of the Defendant as an ‘original true owner’ as to validate the proceedings herein. Thus, since the title is in the Plaintiff’s name, if there was any error he needed the court to order for correction in the register, that is what he should have sought, and in the interest of justice I grant him that relief. I also grant him the other relief of injunction against the Defendant.
29. My finding is fortified by the Court of Appeal decision in Civil Appeal 56 of 2014, *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR where the validity of adverse possession proceedings was discussed as follows;

“...a claim based on adverse possession is anchored on the fact that the suit property belongs to a registered owner, that evidence, in the form of a copy of the document of title must be exhibited. Failure to do this has been found in a long line of cases to be fatal because it is only through such exhibit that the existence and ownership of the suit property can be ascertained by the court. See *Kyeyu v Omutu*, Civil Appeal No. 8 of 1990. See also the present position in *Johnson Kinyua v Simon Gitura* Civil Appeal No.265 of 2005, where this Court found that the existence and proprietorship of land can be proved either by an extract copy



of title or certificate of official search. The registered owner of any person who may have an interest in the property the subject of the summons must be served with it”.

30. From the foregoing, this Court need not make one more step in respect of the claim of adverse possession.
31. The overwhelming uncontroverted evidence show that Stanley Mburu Muigai, the Plaintiff herein is the legal proprietor of the land parcel No. Bungoma/Ndalu/562.
32. In the premises the following final Orders hereby issue:
 - i. Pursuant to the Sale Agreement dated 2nd November 2001, Stanley Mburu Muigai, the Plaintiff herein, lawfully acquired proprietorship of land parcel No. Bungoma/Ndalu/562 from Erastus Simiyu Butala.
 - ii. The County Land Registrar Bungoma is hereby directed to reinstate the ownership of Bungoma/Ndalu/562 derived from the Mutation in Bungoma/Ndalu/150 to the name of Stanley Mburu Muigai as the legal proprietor.
 - iii. Martha Nasimiyu Wandabwa, the Defendant herein, is hereby permanently restrained, by herself, her agents, representatives or assigns from interfering in any way whatsoever with the quiet and peaceful enjoyment and or use of land parcel No. Bungoma/Ndalu/562 by the Plaintiff.
 - iv. Each party to bear its own costs.
33. It is so Ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 24TH DAY OF JANUARY, 2024.



HON. DR. *IUR* FRED NYAGAKA
JUDGE, ELC, KITALE

