



Kantai v Aburi & another (Enviromental and Land Originating Summons E002 of 2023) [2024] KEELC 317 (KLR) (22 January 2024) (Judgment)

Neutral citation: [2024] KEELC 317 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2023
EM WASHE, J
JANUARY 22, 2024
IN THE MATTER OF LIMITATION OF ACTIONS ACT, CAP 22
AND
IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION
PURSUANT TO SECTION 38 OF THE LIMITATION OF
ACTIONS ACT, CAP 22
BETWEEN

BETWEEN
OLCHUMARI OLE KANTAI PLAINTIFF

AND
ASHFORD MBAE ABURI 1ST DEFENDANT
ABSA BANK KENYA LIMITED 2ND DEFENDANT

JUDGMENT

1. The Plaintiff herein filed an Originating Summons dated 06.02.2023 seeking for the following Orders against the 1st and 2nd Respondent herein; -
 - a. A declaration that the Defendants' right to recover the entire parcel of land otherwise known as LR No.Transmara/Moita/506 measuring approximately 11.42 Hectares be barred under the *Limitation of Actions Act*, Cap 22 Laws of Kenya and his title over the said parcel of land in occupation/use of the Plaintiff thereto extinguished on the grounds that the Plaintiff herein has openly, peacefully and continuously been in occupation/use and possession of the aforesaid parcel of land measuring 11.42 Hectares for a period exceeding 40 years.



- b. That there be an order that the Land Registrar (Transmara West/East Sub-County) do register the Plaintiff as the proprietor of the entire land measuring 11.42 Hectares of LR No.Transmara/Moita/506 in place of the Defendant and/or the register thereof be rectified to reflect the Plaintiff's ownership of the aforesaid 11.42 Hectares under his use and current continued occupation.
 - c. That the charge registered over the suit land in favour of the 2nd Defendant for "uncertain amount" be vacated and/or deregistered from encumbrance section of the suit land that is LR No.Transmara/Moita/506.
 - d. That the Defendants herein be ordered to execute all the requisite papers necessary to have the Plaintiff be registered as the owner of the entire parcel measuring 11.42 Hectares of LR No.Transmara/Moita/506 decreed by the Court, in default, the Deputy Registrar and/or Court Executive Officer be at liberty to execute all such necessary documents to give effect to the judgement and/or decree of the Court.
 - e. That this Honourable Court be pleased to issue an permanent order of injunction against the Defendants, their agents, servants and/or employees from whatsoever manner interfering with the Plaintiff's occupation and/or use over parcel of land otherwise known as LR No.Transmara/Moita/506 measuring 11.42 Hectares under the Plaintiff's occupation.
 - f. Costs of this Originating Summons be borne by the Defendants.
 - g. Such further and/or other orders be made as the Court may deem fit and expedient in the circumstances of this case.
2. The prayers outlined hereinabove are premised on the grounds contained in the body of the Originating Summons as well as the Supporting Affidavit sworn on 06.02.2023 and can be summarised as follows; -
- a. The Plaintiff herein has been and is still in occupation of the property known as LR No.Transmara/Moita/506 since the year 1980 which is over 40 years now.
 - b. The Plaintiff's occupation on the property known as LR No.Transmara/Moita/506 has been open, continuous and without interruption for over a period of 40 years.
 - c. The Plaintiff's occupation over the property known as LR No.Transmara/Moita/506 has been adverse to the ownership of the 1st Defendant.
 - d. Unfortunately, the 1st Defendant has of recently threatened the Plaintiff with eviction over the property known as LR No.Transmara/Moita/506 thereby necessitating the present proceedings.
 - e. In essence therefore, the Plaintiff herein is seeking for an order to extinguish the 1st Defendant's ownership over the property known as LR No.Transmara/Moita/506 and his name recorded as the legal owner of the said property.
3. The Plaintiff upon filing the Originating Summons herein sought for leave to serve the same by way of substituted service.
4. The Honourable Court upon considering the Plaintiff's Application for substituted service granted the same on the 08.03.2023 only in relation to the 1st Defendant.



5. A newspaper advertisement was subsequently published on the 22.03.2023 in the Daily Nation and an Affidavit of Service filed on the 13.04.2023 to confirm the same.
6. On the other hand, the Plaintiff served the 2nd Defendants physically and on the 17.07.2023, the firm of Owiti, Otieno & Ragot, Advocates entered appearance on their behalf.
7. However, on the 20.09.2023, the 2nd Defendant applied to be struck out of this suit because the 1st Defendant had fully paid his facility and therefore the bank did not have any interest over the property known as LR No.Transmara/Moita/506.
8. The Plaintiff herein did not oppose the 2nd Defendant's application to be struck out and consequently, this Honourable Court struck out the name of the 2nd Defendant in this suit on the 20.09.2023.
9. Thereafter, the hearing proceeded on the 26.09.2023 in the absence of the 1st Defendant who had failed to enter appearance and/or defend the suit.
10. The Plaintiff's case began with the testimony of the Plaintiff who was witness PW 1.
11. PW 1 introduced himself as a farmer and a resident of Oldanyati area.
12. PW 1 confirmed to the Honourable Court that the land he has been in occupation is the property known as LR No.Transmara/Moita/506.
13. PW 1 informed the Honourable Court that he had been in occupation of the property known as LR No.Transmara/Moita/506 since the beginning of 1980 which is now over 40 years.
14. During this occupation, PW 1 stated that he has developed a homestead, cattle pen and planted sugar cane for commercial purposes on the property known as LR No.Transmara/Moita/506.
15. Unfortunately, after adjudication of Moita Section, the property known as LR No.Transmara/Moita/506 was registered in the name of the 1st Defendant who is not in occupation thereof.
16. PW 1 testified that the developments on the property known as LR No.Transmara/Moita/506 are open to the public eye and the 1st Respondent has knowledge of the same.
17. However, the 1st Defendant has never interrupted the Plaintiff's occupation over the property known as LR No.Transmara/Moita/506 for over 12 years and therefore his ownership should be extinguished by operation of law and the name of the Plaintiff registered as the new legal owner thereof.
18. The Plaintiff then produced two exhibits namely the Green Card of the property known as LR No.Transmara/Moita/506 and a bundle of photographs confirming the occupation and use by the Plaintiff over the said property.
19. The Plaintiff further called one witness namely Intoiga Olebele Kantai (PW2).
20. PW 2 introduced himself as a farmer and resident of Oldanyati area.
21. PW 2 informed the Honourable Court that the Plaintiff was his cousin who had started occupying the property known as LR No.Transmara/Moita/506 since 1980.
22. Unfortunately, PW 2 informed the Honourable Court that the said property known as LR No.Transmara/Moita/506 had been registered in the name of the 1st Defendant who had never occupied the same.
23. The discovery of the 1st Defendant being registered as the owner of the property known as LR No.Transmara/Moita/506 was done in the year 1997 when the title deeds were issued.



24. PW 2 stated that the Plaintiff's occupation on the property known as LR No.Transmara/Moita/506 was open, continuous without interruption and without consent of the 1st Defendant.
25. In conclusion thereof, PW 2 relied on his witness statement dated 17/04/2023 fully.
26. After the testimony of PW 2, the Plaintiff closed his case and thereafter filed his submissions on 16.10.2023.
27. The Honourable Court has indeed perused the pleadings, the witness statements, the evidence adduced and the exhibits produced in Court as well as the submissions filed by the Plaintiff.
28. The issues for determination can be identified as follows; -

Issue no.1- has the plaintiff provided sufficient proof of adverse possession against the 1st Respondent?

Issue no.2- is the Plaintiff entitled to the reliefs sought in the originating summons?

Issue No.3- Who bears the costs of this suit?

29. The issues thereof having been duly outlined hereinabove, the same can now be discussed below.
Issue No.1- Has the plaintiff provided sufficient proof of adverse possession against the 1st Respondent?
30. The first issue for determination is whether or not the Plaintiff has provided sufficient evidence to establish a claim of adverse possession.
31. In the case of *Mtana Lewa v Kabindi Ngala Mwangandi* (2015) eKLR, the Honourable Court outlined the following ingredients to prove adverse possession; -

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 nor 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.

32. In another case of *Mbira v Gachuhi* (2002) 1 EALR 137, the Honourable made the following finding; -

“... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption...”

33. Based on the above cited authorities, there are four main ingredients in considering a claim of adverse possession which will now be discussed individually and independently as hereinbelow.

a. Possession.

34. The first ingredient that a Court must satisfy itself in a claim of adverse possession is whether or not the Plaintiff is in actual occupation.



35. In this instant case, the Plaintiff has testified on oath that he has been in occupation of the property known as LR No.Transmara/Moita/506 since the early 1980.
36. However, it was only in the year 1997 that he discovered the said property known as LR No.Transmara/Moita/506 had been registered in the name of the 1st Defendant.
37. The Plaintiff produced various photographs to confirm his occupation on the property known a LR No.Transmara/Moita/506 which included houses, sugar cane plantation and other developments.
38. So far, the developments in the photographs provided by the Plaintiff have not been challenged and this Honourable Court has no reason to doubt that these developments belong to the Plaintiff and are on the property known as LR No.Transmara/Moita/506.
39. The Plaintiff has also called one witness (PW2) who reconfirmed that indeed the Plaintiff is in occupation of the property known as LR No.Transmara/Moita/506 as envisaged in the photographs produced in Court.
40. In essence therefore, this Honourable Court is of the considered view that the Plaintiff is in actual possession of the property known as LR No.Transmara/Moita/506.

B. Date of entry and/or taking possession.

41. The second ingredient in proving a claim of adverse possession is the establishment of when such an entry and/or taking possession happened.
42. In this particular case, the Plaintiff states that he entered and took possession of the property known as LR No.Transmara/Moita/506 way back in the early 1980.
43. However at this particular time, the land was still under adjudication until in the year 1997 when the titles were issued.
44. Unfortunately, the portion he occupied was titled as LR No.Transmara/Moita/506 and registered in favour of the 1st Defendant.
45. Consequently therefore, the entry into the 1st Defendant's property known as LR No.Transmara/Moita/506 legally commenced in the year 1997 when the title was issued.

C. Nature of the possession and/or occupation.

46. The third ingredient for consideration is the nature of possession and/or occupation that has been asserted by the Plaintiff.
47. The possession and/or occupation must be one which is open to the owner of the land to the effect that it shows a dispossession of his access and/or occupation of the same land.
48. The Claimant must be in actual possession and use of the said property to make it impossible for the owner of the same land to utilise and/or occupy the same.
49. In this particular case, the Plaintiff has demonstrated by way of photographs the actual use and occupation on the property known as LR No.Transmara/Moita/506.
50. According to the photographs produced at the hearing, the Plaintiff herein has developed homes and other facilities within the homestead.



51. Further to that, the Plaintiff has planted various crops for his own use and/or commercial purposes including sugar cane.
52. This type of occupation by the Plaintiff is one which is open to the general public including the 1st Defendant and further affects the 1st Defendant's ability to occupy and/or utilise the said property known as LR No.Transmara/Moita/506.

D. Period of occupation.

53. The last ingredient for consideration is the period within which the Plaintiff has been in the said property.
54. According to the Plaintiff, his occupation on the property known as LR No.Transmara/Moita/506 began way back in the early 1980.
55. However in the year 1997, a title deed was issued in favour of the 1st Respondent who was not in occupation and/or possession.
56. Despite the 1st Defendant being registered as the proprietor of the property known as LR No.Transmara/Moita/506 in the year 1997, the Plaintiff continued to occupy the same property up to date.
57. Consequently therefore, for purposes of this proceedings, the Plaintiff has been in occupation of the property known as LR No.Transmara/Moita/506 since 1997 when the same was registered in the name of the 1st Defendant up to now, which is over 12 years.

Conclusion.

58. In conclusion therefore, this Honourable Court is satisfied that the Plaintiff has proved the ingredients in a claim for adverse possession and therefore hereby makes the following Orders in determination of the Originating Summons dated 12.10.2023; -
 - a. The originating summons dated 12.10.2023 is merited.
 - b. A declaration be and is hereby made extinguishing the 1st defendant's ownership over the property known as LR no.transmara/moita/506 by way of adverse possession forthwith in favour of the plaintiff herein.
 - c. The sub-county land registrar, transmara east, west & south be and is hereby ordered to discharge the charge registered over the property known as LR no.transmara/moita/506 in entry no.3 and restriction no.4 of the green card within fourteen (14) days from the date of this judgement.
 - d. An order be and is hereby issued to the sub-county land registrar, transmara west, east and south to cancel the name of the 1st defendant on the register of the property known as LR no.transmara/moita/506 and instead register the name of the plaintiff herein as the owner of the same within the next thirty (30) days from the date of this judgement.
 - e. The sub-county land registrar, transmara west, east and south is further directed to prepare and issue a new title deed of the property known as LR no.transmara/moita/506 in the name of the plaintiff within fourteen (14) days from the date of compliance with order c hereinabove.
 - f. There will be no orders as costs in relation to this originating summons.



DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 22ND JANUARY 2024.

EMMANUEL.M.WASHE

JUDGE

In the presence of:

Court Assistant: Mr. Ngeno

Advocate for the Appellant: Ms. Wakiaga

Advocate for the Respondent: N/a

