



Makuyu v M'muketha & another (Sued as the Legal Representatives of the Estate of the Late Gladys Ruguru – Deceased) (Environmental and Land Originating Summons E009 of 2022) [2024] KEELC 102 (KLR) (17 January 2024) (Judgment)

Neutral citation: [2024] KEELC 102 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E009 OF 2022
CK NZILI, J
JANUARY 17, 2024

BETWEEN

JENNIFFER KARIMI MAKUYU PLAINTIFF

AND

JOHN MWENDIA M'MUKETHA 1ST DEFENDANT

STEPHEN KAREMU M'MUKETHA 2ND DEFENDANT

**SUED AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE
GLADYS RUGURU – DECEASED**

JUDGMENT

1. The plaintiff took out an originating summons dated 27.6.2022 seeking this court to declare her as entitled to LR No. Nyaki/Kithoka/520 on account of adverse possession.
2. The originating summons was accompanied by a supporting affidavit witness statement and a list of documents.
3. At the trial the plaintiff testified as PW 1 and adopted the supporting affidavit and witness statement dated 27.6.2022 as her evidence in chief. Her testimony was that her late husband Benjamin Makuyu had purchased the suit land from the late Gladys Ruguru through a sale agreement dated 26.5.1978 then the registered owner who passed on before the transfer could be effected.
4. PW 1 told the court her family took possession of the land in August 1978 and have since been in open, continuous peaceful and quiet possession and use of the land where they have fenced the entire portion planted trees, subsistence crops and fodder for their livestock.
5. In support of her evidence, PW 1 produced a copy of the sale agreement, photographs, official search, green card and court order dated 1.7.2022 as P. Exh No. 1 (a) & (b), 2 (a) – (j), 3, 4 & 5 respectively.



6. In cross-examination PW 1 admitted her late husband had initially filed a Civil Suit No. 75 of 2005 which was dismissed with costs on 28.9.2017. The plaintiff after his evidence closed his case. The claim was opposed by the defendant through a replying affidavit of Stephen Karemu M'Muketha sworn on 18.1.2023 and a witness statement and list of documents all dated 18.1.2023. The gist of the defence was that the suit land belongs to the defendants out of transmission following a confirmation of grant dated 2.11.2021.
7. In support of the defence Stephen Karemu Muketha testified as DW 1 and adopted his replying affidavit and witness statement dated 18.1.2023 as his evidence in chief. He told the court his late mother was gifted the suit land by her late father in 1970 took vacant possession and embarked on cultivating it, erecting a fence over it and planted trees.
8. DW 1 said after his mother passed on, the defendants successfully filed a succession cause and were issued letters of grant on 2.8.2019, which were later confirmed on 2.11.2021. Subsequently, DW 1 obtained a certificate of title in 2022 as administrator of the land in trust for other beneficiaries of the estate.
9. Similarly, DW 1 told the court the late Benjamin Makuyu husband to the plaintiff had filed Meru HCC No. 75 of 2005 seeking the land on account of purchase which his late mother opposed by a replying affidavit dated 2.2.2006.
10. DW 1 also stated that the suit was heard and determined in their late mother's favour, paving way for the removal of a caution against the title.
11. DW 1 said it was surprising for the plaintiff to resuscitate the same suit 16 years down the line. He denied the alleged entry into occupation and developments on the land as alleged by the plaintiff to sustain his defence, DW 1 produced an authority to depone and appear as D. Exh No. (1) certificate of official search for LR No. Nyaki/Kithoka/520 as D. Exh No. (2), copy of grant as D. Exh No. (3) (a) rectified certificate of confirmation of grant as D. Exh No. 3 (b), bundle of photographs as D. Exh No. 4 9a) & (b) replying affidavit in Meru HCC no. 75 of 2005 as D. Exh No. (5), Originating summons in Meru HCC No. 75 of 2005 as P. exh No. (6) copy of court register as D. Exh No. (7), copy of the order in the succession cause as D. Exh No. (8).
12. In cross-examination DW 1 told the court his late mother acquired the land from his grandfather and continued tilling the land until late 1990's though in her affidavit she had mentioned up to 1980's. His view was after she became unwell, she handed over the use of the land to his two brothers who have continued utilizing it and maintaining its fence after she passed on in 2010. DW 1 told the court though he was not a party to the previous suit, he was the one who had hired the lawyer defending his late mother. Further, DW 1 admitted that the claim in the previous suit was for and on behalf of the deceased since it was alleged that they had bought the land jointly.
13. DW 1 maintained D. Exh No. (1) and the thumb print imposed therein was fake. Further, DW 1 said the confirmed grant had already been implemented. He said he did not take over the dismissed suit. With this evidence, the defence closed its case following directions parties filed written submissions dated 14.11.2023 and 21.11.2023 respectively.
14. The plaintiff isolated four issues for the court's determination. On possession, the plaintiff submitted an entry into the land that occurred after the sale agreement was executed in 1978 and has continued to date. As to evidence of developments the plaintiff submitted settlement occurred followed by the fencing, water connection, planting of trees now in maturity, fodder and subsistence crop farming as per photographs produced before court. On alleged developments by the defendants the plaintiff submitted no supporting evidence was produced by DW 1 who said that he resided in Nairobi and his



brothers were working on the land. Reliance was placed on *Munyaka Kuna Co. Ltd Nancy Wangari Munui and Wilson Njoroge Kamau vs Nganga Muceru Kamau* (2020) eKLR.

15. On whether the defendant's title to the land had been extinguished, the plaintiff submitted the registration of the suit land in the names of the defendants as per P. Exh no. 4 was subject to the accrued rights whose time began to run with effect from 1979 and extinguished the title by 1991. The plaintiff submitted the original title holder did not assert her right from the time of entry in 1978, through effective repossession of the land or through taking out legal proceedings against the plaintiff for the recovery of the land. Reliance was placed on *Joseph Gachumi Kiritu vs Lawrence Munyambu Kabura* C.A No. 20 of 1993.
16. On the reliefs sought the plaintiff submitted that based on *Wilson Njoroge Kamau vs Njenga Muceru Kamau* (supra), in deciding the issue of adverse possession the primary functions of a court is to draw inferences from proved facts as a matter of law and draw legal conclusion from the facts on whether or not the possession is adverse. In this instance the plaintiff submitted that having ascertained the title to the land was extinguished in 1991 in his favour, it follows therefore the action of the defendants in trying to subdivide and share the land was unlawful and untenable and the transmission of the land from the deceased to the defendants did very little if anything to interrupt time form running. Reliance was placed on *Mbaabu vs M'Ikiugu* (2022) KEELC 14654 (KLR) 9 November (2022) (Judgment).
17. The defendant on the other hand isolated two issues for the court's determination on adverse possession, the defendant submitted there are two concepts to prove dispossession and discontinuance of possession as held in *Wambugu vs Njuguna* (1983) KLR 173.
18. Further, the defendants submitted that the ingredients of adverse possession as to date of possession nature of possession, knowledge of possession, lengths of possession, if possession was open and undisturbed have to be established by the plaintiffs as held in *Songoi vs Songoi* (2020) eKLR and *Samuel Kihamba vs Mary Mbaisi* (2015) eKLR.
19. To this end the defendants going by P. Exh No. (1) submitted the entry by the plaintiff was permissive out of a sale agreement and since the two cannot coexist as held in *Wambugu vs Njuguna* (supra) her claim fails.
20. On when time for adversity stated to run the defendant submitted based on *Samuel Miki Waweru vs Jane Njeri Richu* E.A No. 122 of 2001 that the plaintiff did not produce any letter to show repudiation or termination of the sale agreement. Reliance was also placed on *M'Mbaoni M'Ithara vs James Mbaka* (2017) eKLR.
21. As to interruption the defendant submitted the filing of the former suit in 2005 which was dismissed on 28.9.2017 interrupted the claimed occupation.
22. Further, the defendant submitted there was no evidence of possession or dispossession tendered. Additionally the defendant submitted that since they have been in possession of the land, there was no need for eviction orders or an effective entry to retake ownership.
23. Concerning stay in WRB the defendants submitted that did not take away their right to own the land as held in *Songoi vs Songoi* (supra).
24. On the previous suit the defendant submitted the issues and the subject matter in the previous suit was similar to the instant one though the plaintiff was not a party and which were determined.
25. Therefore, there being no appeal preferred against the dismissal order, the defendants urged the court to dismiss this suit.



26. On the reliefs sought the defendants submitted there being no proof of adverse possession, this suit should fail. The court has carefully gone through the pleadings, evidence tendered and the written submissions. The issues for determination are:
- i. If the suit is *res-judicata*.
 - ii. If the plaintiff has proved adverse possession.
 - iii. If the plaintiff is entitled to the reliefs sought.
 - iv. What is the order as to costs.
27. A plea of *res-judicata* is properly taken and upheld where the following elements are satisfied:
- i. The suit or issue was directly and substantially in issue in the former suit.
 - ii. The former suit was between the same parties or parties under whom they or any of them claim.
 - iii. Those parties were litigating under the same title.
 - iv. The issue was heard and finally determined in the former suit.
 - v. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised. See [IEBC vs Maina Kiai & others](#) (2017) eKLR, [CCK vs Royal Media Services](#) (2014) eKLR.
28. In the defence, the defendant pleaded that the plaintiff's husband had filed Meru HCC No. 75 of 2007 against the deceased mother who filed a replying affidavit on 2.2.2006 and which suit was heard and determined by a competent court over the same issues and title. To prove the plea of *res-judicata* the defendant produced a copy of the pleadings and a copy of the court register for the outcome as D. Exh No. "5" & "6".
29. D. Exh No. "6" indicates that the former suit was dismissed with costs on 28.9.2017. In [Benjamin Makuyu vs Gladys Ruguru w/o Thanduku](#) (2016) eKLR, the court after being told the defendant had passed on and substitution of the deceased was on course declined to dismiss the suit under Order 17 of the [Civil Procedure Rules](#) on 12.4.2016.
30. DW 1 told the court he did not participate in the previous suit nor did he join it. D. Exh No. 3 (a) was issued on 2.8.2019 so as of 28.9.2017 the substitution alluded to by the court in Benjamin Makuyu vs Gladys Ruguru (supra) had not occurred. Gladys Ruguru from D. Exh No. 3 (a) passed on 18.12.2010.
31. The defendants have not pleaded that they testified in the previous suit and offered a similar defence as in the instant suit. The defendant have not tendered evidence before this court that the issues pleaded in the earlier suit over the same title and similar parties were determined on merits to finality. A decree of the previous court has not been produced as an exhibit.
32. It is not enough to plead *res judicata* without proof. *Res judicata* is defined in [Black Laws Dictionary](#) 10th Edition as an issue definitely settled by judicial decision on merits over the same parties or parties in privity with the original parties.
33. Finality must be proved through evidence of the decision which conclusively determined the issues. See [Keya Commercial Bank vs Muiri Coffee Estate Ltd & another](#) (2016) eKLR. Dismissal for non-prosecution is not a final determination on merits. See [Njue Ngai vs Ephantus Njiira Ngai & another](#) (2016) eKLR. [David Mwangi Mburu vs Hotel Intercontinental Nairobi Ltd](#) (2018) eKLR, [Kimemia Mukono vs Equity Bank Ltd & another](#) (2015) eKLR.



34. Based on the material before the court I find the plea of *res-judicata* lacking merits. See *Songoi vs Songoi supra*.
35. Coming to adverse possession, the plaintiff has pleaded that she, alongside her late husband purchased the suit land in 1978 and paid full consideration for it. She produced a copy of the sale agreement and an acknowledgment note for the purchase price as P. Exh No. 1 (a) & (b).
36. Vacant possession was to be granted forthwith as per clauses No. 2 & 3 of P. Exh No. 1 (a) P. Exh No. 1 (b) shows that the plaintiff paid the final installment which was acknowledged by the seller on 24.12.1979. In the replying affidavit sworn by the seller on 24.2.2006 she did not denounce the sale agreement or plead forgery, illegality and misrepresentation of her thumbprint. She did not denounce that she did not sign and receive the purchase price before the said law firm. The defendant in this suit did not term the sale agreement as fraudulent based on forgery, misrepresentation or illegality. The sale agreement was in line with the Law of Contract Act. To that end, I find no reason to doubt the existence of a binding sale agreement between the parties. See *Jacob Wekesa Bokoko Balongo vs Kiucho Oloki Adeya and another* (2020) eKLR, *Peter Mbiri Michuki vs Samuel Mugo Michuki* (2014) eKLR, *Macharia Mwangi Maina & 81 others vs Davidson Mwangi Kagiri* (2014) eKLR, *Cheruiyot vs Bartiony* (1988) eKLR.
37. Coming to the issue of adverse possession, adverse possession occurs where the true owner fails, neglects or omits to take action for a period of twelve years to eject an intruder to his land who dispossesses or discontinues possession of the land by the true owner on circumstances that he assumes or intends to own the land as if it belongs to him. See *Mtana Lewa vs Kabindi Ngala Mwangandi* (2015) eKLR.
38. The ingredients of adverse possession include continuous exclusive, hostile, open and notorious occupation for a period of 12 years. See Sections 7 and 38 of the *Limitation of Actions Act*, Order 37, Rule 7, 16, 17 & 18 of the *Civil Procedure Rules*, *Abad vs CJE* (2019) eKLR, *Kimani Ruchine vs Swift Rutherford and Co. Ltd* (1980) KLR, *Wambugu vs Njuguna (supra)* *Samuel Miki Waweru vs Jane Njeri Richu (supra)*, *Kasuve vs Mwaani Investments Ltd & others*, *Munyaka Kuna Co. (supra)*.
39. *Wilson Njoroge Kamau vs Nganga Muceru Kamau (supra)* the said evidence of planting, tending tea bushes, growing trees and practicing subsistence farming as though it was of right since entry into the land in 1971, openly without interruption least of all by the respondent while aware of it was a clear manifestation of *animus possidendi*.
40. In *Joseph Macharia Kairu vs Kenneth Kimani Muiruri* (2021) eKLR the court cited with approval *Songoi vs Songoi (supra)* and *Samuel Kihamba vs Mary Mbaisi (supra)* that a party must prove dispossession without license or permission of the land owner.
41. Further, in *Songoi vs Songoi (supra)* the court observed that building a house and living and ploughing the land without the intention to dispossess the true owner even if the possession was for over 12 years did not amount to adverse possession.
42. In *M'Mbaoni M'Thara vs James Mbaka (supra)*, the court said the very character of adverse possession must be proved by facts and where entry into the land is out of a sale a party must adduce evidence about the sale agreement and in particular when the agreement collapsed. The court cited with approval *Wambugu vs Njuguna (supra)* that possession out of a sale agreement becomes adverse and time begins to run when the license is determined.
43. Further the court cited with approval *Samuel Miki Waweru vs Jane Njeri Richu (supra)*, that a sale agreement must be repudiated or terminated first for adverse possession to set in.



44. Having set the contours and the legal hurdles or principles to surmount for one to be declared an adverse possessor; the plaintiff produced a sale agreement dated 26.5.1978 and acknowledgment receipts showing the last payment was cleared on 24.1.1979. There is no evidence that the plaintiff applied for the transfer of the land to her name or that of the late husband before the true owner passed on in 18.12.2010. P. Exh No. 4 shows the L.R no. Nyaki/Kithoka/520 came under the name of the late Gladys Ruguru w/o Thanduku on 20.5.1967 and she obtained the title deed on 5.3.1977.
45. Further in O.S No. 75 of 2005 (D. Exh No. 6) the late Benjamin Makuyu averred he had paid the entire purchase price by 1979, took vacant possession but the deceased refused to transfer the land rendering the sale agreement null and void for lack of a land control board consent. In her replying affidavit other than denying the existence of the sale agreement the seller did not deny that the sale agreement has become null and void for lack of a land control board under Section 6 (1) of the Land Control Act after six months.
46. In Public Trustee vs Wanduru Ndegwa (1984) eKLR the court said the discontinuance of possession occurred when the person in possession went out and another person took possession. Further, the court said a purchaser in possession of the land after having paid the purchase price was a person in whose favour, a time for adverse possession would run.
47. The court said the Land Control Act makes extension on only on agreements for the sale of agricultural land without consent. Further, the court held the right to adverse possession accrues on the date of acknowledgment of the last or final installments.
48. To this end, the defendants have submitted that the entry was permissive and there was no adversity since the sale agreement was not repudiated or terminated.
49. As indicated above the defendant has not sought to impeach the sale agreement.
50. The deceased did not deny or allege fraud nullity, illegality and or misrepresentation by the plaintiff. The sale agreement became void by operation of law. In Mbui vs Maranya (1993) eKLR, the court said where adverse possession arose out of a sale agreement and the agreement fails the period of limitation starts after the last and final payment has been made. The court said the land must be identified, defined or at least be identifiable.
51. The court observed that when the agreement becomes null and void a purchaser retains possession under some other color of right independent of the sale agreement. Therefore, where the agreement becomes inoperative null, void or unenforced the court said the onus was on the claimant as a matter of fact to prove affirmatively that he was in physical possession in adversity.
52. Flowing from the case law cited there is evidence the sale agreement became null and void after the consent from the land control board was not obtained within the statutory period. The last payment occurred in 1979. So, 12 years elapsed in 1991. This was against the predecessors in title. As at the time Meru HCC No. 75 of 2005 was over 12 filed years had elapsed and so was by the time the defendant sought and obtained letters of administration and became the registered owner on 19.4.2022. Adverse possession goes with the land and therefore operates against both predecessors and successors in title to land.
53. In Peter Gichuki Wanjobi vs Juliab Mumbi Muturi (2021) eKLR the court cited with approval Peter Thuo Kairu vs Kuria Gacheru (1988) 2 KAR 111, that adverse possession subsists not only against the present holders but also their predecessors in title.
54. Therefore, time was running in this suit in favour of the plaintiff against the deceased Gladys Ruguru up to 18.12.2010, when she passed on. The change of ownership of land already occupied by the



- plaintiff to the names of the defendants in 2022 did not interrupt the accrued rights of the plaintiff as held in *Githu vs Ndeete* (1974) KLR 776.
55. Concerning whether there was interruptions or assertion of title in *Kilimo Shutu & others vs Godfrey Karume* (2017) eKLR the court said failure to take any steps to recover the suit land within 12 years and filling the suit after expiration of the 12 years was time-barred on the part of the respondent since it was contrary to Sections 7 & 17 of the *Limitation of Actions Act*.
 56. In this suit there is no evidence that the deceased sought to refund the purchase price, repudiate the sale agreement, recover the land, make an effective entry and or to issue a notice of eviction or apply for vacant possession before she passed on in December 2010. Similarly, between 2010 and 2019 when the defendant sought and obtained letters of administration and eventually became registered owners in 2022, there is no evidence that he gave a notice to the plaintiff to cease and desist utilizing the land.
 57. Further, there is no evidence that the plaintiff acknowledged the title held by the current or previous holders of the title. All these shows that the plaintiff had animus possidendi to occupy the land as a matter of right.
 58. The defendant knew that the plaintiff's late husband was asserting a superior ownership going by an affidavit sworn on 17.8.2005. While aware of such DW 1 admitted in cross-examination was the one who procured legal services for his late mother, and took no action at all until the suit was filed 16 years later to either assert title or evict the plaintiff from the suit land. See *Chevron K. Ltd vs Harrison Charo Wa Shutu* (2016) eKLR.
 59. As to elements of possession the plaintiff has produced photographs to show her developments on the suit land. Similarly, DW 1 alleged the developments on the suit land were theirs as opposed to the plaintiffs.
 60. In *Mweu vs Lin Ranching & Farming Cooperative Society Ltd* (1985) KLR 430, the court said an adverse possessor was a fact to be observed upon the land. The court said building structures on the suit land without obtaining permission from the true owner manifested animus possidendi, a clear mind and intention of dealing with the land as if it was exclusively his and in a manner in conflict with the appellant's rights.
 61. The sale agreement was clear that the plaintiff would take vacant possession forthwith and with no interference whatsoever. The balance was to be paid upon formal transfer of the land to the purchasers.
 62. Given there was no repudiation, termination or offer for the refund of the purchase price, other than the agreement being void by operation of law, the evidence by DW 1 that the defendant has been on the land up to 1990 or that they have developments on the land is unbelievable.
 63. DW 1 in his evidence admitted that her late mother used the land up to 1990, when she became ill. He said it was his two brothers whom he was assisting who fenced or maintained the fence, planted trees and cultivated the land. The two brothers and the co-administrator were not called to testify, corroborate or dislodge the plaintiff's evidence on actual and constructive possession.
 64. Even though interruption of possession by the defendant was alleged no evidence was produced to that effect proved other than by mere word. See *Nyaga Rungu vs Stanley Nyaga Kuvuta* (2020) eKLR. There was no evidence produced to show that the defendants or his late mother had filed a suit to assert ownership rights by suing for the recovery of the land.
 65. Nothing has been shown that they interrupted possession through an assertion of superior title or through an effective entry to drive out the plaintiff from the land. The apparent dispossession of the



defendants from the suit land is evident. DW 1 was unable to state when he was last at the suit land. See *Kibamba vs Mary Mbaisi* (*supra*).

66. Assertion of title as held in *Gitbu vs Ndeete* (*supra*) occurs when the owner takes legal proceedings or makes an effective entry into the land. The filing of a succession cause did not amount to an assertion of right that could stop time from running. See *Benson Mukuwa Wachira vs A.S.N Registered Trustees* (2016) eKLR. In *Amos Weru Murigu vs Maralu Wangari Kambi & another* (2009) eKLR the court said a demand letter or a chief summons was not enough assertion of title and or interruption of time from running and that interruptions only occur where there is eviction or ejection of the trespasser by the proprietor to land or institution of suit against the trespasser.
67. On interdivision of the land, the sale agreement was clear on what parcel of land and its locality the plaintiff was to take possession of. See *Wilson Kazungu Katana & others vs Salim Abdalla Baksbwein & another* (2015) eKLR. The upshot is I find the plaintiff has proved her claim on the balance of probability.
68. I find her entitled to L.R No. Nyaki/Kithoka/520 by adverse possession. The defendant shall execute a transfer form in her favour within 2 months from the date hereof in default of which the same shall be executed by the Deputy Registrar of this court.
69. Costs to the plaintiff.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 17TH DAY OF JANUARY 2024

In presence of

C.A Kananu/Mukami

Kiogora for the Plaintiff

Amati for Defendant

