



Kikwau & 30 others (Suing on their behalf and on behalf of all persons with structures and developments on LR NO 209/11388/1 (a sub division of LR NO 11388) v Mathari United Traders & Farmers Ltd (Environment & Land Case E194 of 2022) [2024] KEELC 1032 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEELC 1032 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E194 OF 2022

AA OMOLLO, J

FEBRUARY 29, 2024

IN THE MATTER OF L.R. NO. 209/11388/1 (A SUBDIVISION OF LR. NO. 11388)

AND

IN THE MATTER OF SECTION 37 & 38 OF THE LIMITATION OF ACTIONS ACT (CHAPTER 22 OF THE LAWS OF KENYA)

BETWEEN

DANIEL MAKAU KIKWAU & 30 OTHERS PLAINTIFF

SUING ON THEIR BEHALF AND ON BEHALF OF ALL PERSONS WITH STRUCTURES AND DEVELOPMENTS ON LR NO 209/11388/1 (A SUB DIVISION OF LR NO 11388

AND

MATHARI UNITED TRADERS & FARMERS LTD DEFENDANT

JUDGMENT

1. The Plaintiffs filed an originating summons dated which was amended on 18th September 2023 seeking for the following orders;
 1. A declaration that the plaintiffs are entitled to be registered forthwith as owners of LR No. 209/11388/1 (a subdivision of LR No. 11388) which the plaintiffs have been in adverse possession since 1978 to date for more than 12 (twelve) years immediately preceding the presentation of this suit and, on which they have lived openly and continuously as of right and in adverse possession and without any interruption from the Defendant or its predecessors in the above title and that the Defendant's title to parcel LR No. 209/11388/Ida subdivision of



LR No. 11388) has been extinguished in favour of the plaintiffs under section 37 and 38 of the *Limitation of Actions Act* Laws of Kenya.

2. An order for permanent injunction be issued restraining the defendant, its employees, servants, agents, or any person claiming through him from evicting the plaintiffs from the parcel of land known as LR No. 209/1138811 (a subdivision of LR No. 11388) (suit land) or from fencing the suit land or interfering with the plaintiffs possession of the same or alienating transferring, disposing and/or dealing with the suit land in any manner whatsoever.
 3. A declaration that the suit land LR No. 209/11388/1 (a subdivision of LR No. 11388) be and is hereby vested in the Plaintiffs.
 4. An order that the Defendant forthwith transfers land LR No. 209/11388/1 (a subdivision of LR No.11388) and in default the Deputy Registrar of this Court executes all relevant transfer/ vesting order documents.
 5. An order for costs and interest thereon of this Suit.
2. The Summons was supported by two affidavits sworn by Lucy Nyambura Thuita, the 2nd Plaintiff on 31st May 2022 and 18th September 2023 respectively. The Plaintiffs stated that in the year 1978, they occupied the suit land LR No. 209/11388/1(which was then part of a mother parcel LR No.209/11388) herein after referred to as “the suit property” and put up structures therein as the same was unoccupied at the time believing it to belong to the government or City Council of Nairobi. Ms Thuita narrated that their occupation continued and sometimes in 1998 a group of rough looking young men came to the suit land claiming to have been sent by the Defendant to give them an oral notice to vacate the suit land within seven (7) days or else face forceful eviction.
 3. The Plaintiffs averred that in or about 1980, it appears the Defendant effected a subdivision of the mother parcel LR No.209/11388 and the parcel they occupied was separated and given LR No.209/11388/1 and identified for surrender to the government which gave them hope that they would apply for the same.
 4. They stated when they threatened to call the area chief, the young men fled but reappeared again in the year 1999 demanding that the Plaintiffs move out of the private land but they stayed put. The Plaintiffs explained that they are poor people who do not own any land in which to move to and that in March 2010 they did their own research at the offices of the Survey of Kenya and established that the Defendant is not the registered owner but another company with all most a similar like the name of the defendant i.e Mathare United Traders Company Limited.
 5. They added that they have sired and brought up children within the land, connected their houses with amenities like water and electricity and also been paying for business licenses to City Council of Nairobi thus acquired prescriptive rights by way of adverse possession having been in occupation of the suit land for over 12 years.
 6. The Plaintiffs averred that subsequent to filing this suit, replying affidavits have been filed by persons claiming parcels LR No.209/11388/141 to 150 giving the impression that the suit property and what they claim is the same land. That they secured the services of a surveyor who provided a survey plans FR 219/9 showing the location of the land LR No.209/11388/141 to 150 to be scattered throughout the mother parcel thus not seeking the same land.
 7. The Defendant opposed the Plaintiffs’ claim for adverse possession vide replying affidavit sworn by Hottensiah Wanjiru Gaturu, a joint Administaror of the Estate of the Late John Karuma Mbiyu Deceased, together with Bernice Wangari Kairu, and Margaret Wanjiru Karuma, and Iri-Ingu Karuma



stating that the deceased who is their father, was the Legal Plot Owner of Plot Nos LR 209/ 11388/ 141,142 and 143. That the deceased had bought the said properties from Mathare United Traders & Farmers Co. Ltd and was allocated the said Plots long before ELC Case No. 614 of 1998 filed by Mathare United Traders & Farmers Co., Ltd to evict the people who had illegally occupied the Ten (10) Plots in Dispute, being Plot Nos. LR/209/ 11388/ 141,142, 143,144,145,151,147,148,149 and 150 and none of the Plaintiffs in this Case were Defendants thereon.

8. The Defendant contended that in a case for claiming for Adverse Possession of Land, the Plaintiffs must prove that they have been in exclusive possession of the claimed suit property which belongs to the Defendant for more than twelve (12) years Ten (10) Plots referred to above Including Plot Nos. LR 209/ 11388/ 141,142 and 143, and also prove that they have been in possession of identifiable boundaries to the same.
9. The Defendant denied that the Plaintiffs have been in occupation of the suit property to their exclusion for over Twelve (12) Years thus their claim should be dismissed.

Evidence

10. In support of their case, the Plaintiffs called one witness PW1 who adopted her witness statement dated 31.5.2022 and further statement dated 18.9.2022 as evidence in chief. She also produced the documents in the list dated 31.5.2022 and further list dated 18.9.2023 containing three documents as PExh 1-9.
11. The witness testified that she started living on the suit property in the year 1978 and at the time, the original title number was 11388. The land was later subdivided and the portion of subdivision they are occupying is comprised in the portion numbered LR 209/11388/1, which is opposite Huruma flats. The witness referred to PEx8 which is a map showing the location of their plot. It is their evidence that the plot claimed by the Defendant is different from the suit property as they are located on the lower side of the suit property. She affirmed that they had no interest in the Defendants plots numbered 141-150 and added that she has not seen any letters of allotment showing these plots belong to the Defendants.
12. It was the further testimony of Ms. Lucy that the Plaintiffs have lived on the suit property for over 40 years, and to prove their longevity of stay, they produced a receipt dated 10.9.1980 issued to the 6th Plaintiff by the City Council of Nairobi; and a school certificate (KCPE) for Muthoni Josphine, the 6th Plaintiff's daughter who attended Salama Primary School in Huruma.
13. The Plaintiffs emphasized that they are only claiming parcel no.11388/1 and not Plot LR Nos. 141-150. That after conducting an official search dated 2.10.2023 the same is yet to be registered with 135 plots having been carved out of the mother title. The Plaintiffs closed their case relying on the sole evidence of Ms Lucy Thuita.
14. The Defendants stated that they were not calling any witness on the basis of the evidence presented by the Plaintiffs that the land they are claiming is distinct from that of the Defendants. Consequently, a consent was recorded that the court orders granted on 23.3.2023 be varied and amended to apply specifically to LR No.209/11388/1, and any further orders herein to be limited to LR No.209/11388/1 only. Each party to bear their cost.
15. The Plaintiffs proceeded to file their submissions dated 20th November 2023 where they relied on the case of Nairobi Civil Case No.97 of 2009 *Tools and Paints Hardware Limited v Ramco Hardware Limited* [2010]eKLR to state that having tendered un rebutted evidence showing actual possession



since 1978 which is open, notorious, exclusive, hostile and uninterrupted for 12 years and they have proven their case on balance of probabilities.

Determination:

16. This is a claim for adverse possession brought by the Plaintiffs over a parcel of land described as LR No. 209/11388/1. The Plaintiffs have argued that they have been in occupation of the said property since the year 1978 and that they have their homes built on it connected to amenities such as water. They also stated that they have their businesses on the suit premises. In support of their case, the produced exhibits including a map showing the parcel they claim for adverse possession and various photographs taken at different angles to demonstrate their occupation.
17. It is submitted that their occupation was hostile to the Defendant's title and that they have demonstrated that the suit land is owned by the Defendant through the mother title. The Plaintiffs further averred that the mother title was subdivided and various plots transferred to third parties however subdivision number 11388/1 is still within the mother title and so the court should order the same to be transferred to them. In support of their case, they cited the case of *Tools and Paints Hardware Limited versus Ramco Hardware Ltd* (2010) eKLR.
18. The law on adverse possession is now settled that one must satisfy the following criteria stated in the case of *Maweu v. Liu Ranching and Farming Cooperative Society* 1985 KLR 430 where the Court held;

“Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”. (underline mine for emphasis).
19. The starting point for the Plaintiffs claims to succeed is to determine whether they have proved that the Defendant sued was the registered owner of LR No. 209/11388/1. To prove that ownership, they produced a certificate of official search for the original title LR No 11388. It is their evidence that the original land was subdivided and some subdivisions transferred to third parties. This is reflected in entry number three (3) showing subdivision into numbers 1-139. On its part, the Defendant stated they were only interested in subdivision numbers 141-150 and which the Plaintiffs were not claiming hence, their abandoning offering any defence evidence to the claim. Although the Plaintiffs witness said they had not seen any registration document in favour of the defendant for plots 141-150, the defendants had filed a copy of a judgement in their favour issued in ELC 614 of 1998.
20. Back to ownership of subdivision LR No 11388/1, the search document filed on 18th September 2023 and produced as exhibit is incomplete. The copy of the title (search) indicates the land LR No 209/11388 was registered on 15th March 1991 and has four (4) entries on the face of it and none of the entries indicate that the suit plot (11388/1) is in the name of the Defendant. The maps produced do not help the Plaintiffs' case as maps perse does not show who owns land. The Plaintiff ought to have taken a cue as soon as the consent was recorded that the Defendant lacked interest on plots other than numbers 141-151 to change tact and ascertain who owned the suit property as ownership cannot be inferred.
21. In the case of *Wambugu v Njuguna* (1983) KLR 73, the Court of Appeal

In order to acquire by statute of limitations title to land which has a known owner the owner must have lost his right to the land either by being dispossessed of it or by having continued his possession of it. Dispossession of the proprietor that defeats his title are acts which are



inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.
(underline mine for emphasis.

Further in the Case of *Ravji Karsan Sanghani v Peter Gakunu* [2019] eKLR the Court held that ;

“In my view, adverse possession can only run against the title of a registered proprietor and in the instant case the Defendant was first registered as proprietor of the suit land on 16th January 1990. Time could only run from that date.”

22. I find that though the Plaintiffs claim occupation, they did not bring out evidence showing that their occupation was hostile to a known registered owner as the Defendant sued denied any interest in the suit title LR No 209/11388/1. Thus, the orders of adverse possession cannot issue. The suit is struck out with no order on costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS DAY OF 29TH FEBRUARY 2024

A. OMOLLO

JUDGE

