



**Ngunjiri v Kimani (Sued as the Administrator of the Estate of Harun  
Kimani Musa) & another (Environment & Land Case 43 of 2023)  
[2024] KEELC 1081 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1081 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA  
ENVIRONMENT & LAND CASE 43 OF 2023  
YM ANGIMA, J  
FEBRUARY 29, 2024**

**BETWEEN**

**JOHN MAINA NGUNJIRI ..... PLAINTIFF**

**AND**

**ESTHER WACEKE KIMANI (SUED AS THE ADMINISTRATOR OF THE  
ESTATE OF HARUN KIMANI MUSA) ..... 1<sup>ST</sup> DEFENDANT**

**MOSES NGARI KIMANI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

DIVISION - A. Plaintiffs' Claim

1. By an originating summons dated 29.07.2019 filed pursuant to Section 38 of the [Limitation of Actions Act](#) (Cap.22), and Order 37 rule 7(1) & (2) of the Civil Procedure Rules, 2010, the Plaintiff sought determination of the following questions:
  - a. Whether the Plaintiff is entitled to be registered the proprietor of land parcel No., Gituamba/ Muhotetu Block 2/2486 being one of the sub-divisions of land parcel No. Gituamba/ Muhotetu Block 2/2411 for the reason that the Plaintiff acquired title to the said property by way of purchase for value from the registered owner, the late Harun Kimani Musa.
  - b. In the alternative, whether the Plaintiff is entitled to be registered the proprietor of land parcel No. Gituamba/Muhotetu Block 2/2486 being one of the sub-divisions of land parcel No. Gituamba/Muhotetu Block 2/2411, the Plaintiff having been in possession and occupation of the property for a duration of over 12 years and having acquired title thereto by adverse possession.



- c. Further in the alternative, whether the Plaintiff is entitled to be registered as the proprietor of Gituamba/Muhotetu Block 2/2486 being one of the sub-divisions of Land Parcel No. Gituamba/Muhotetu Block 2/2411, by virtue of the Plaintiff having acquired rights thereto by prescription.
  - d. Should the respondents be ordered to execute the necessary and relevant conveyance documents to effect registration in favour of the applicant as the proprietor of the portion of Land Parcel No. Gituamba/Muhotetu Block 2/2486 being one of the sub-divisions of land parcel No. Gituamba/Muhotetu Block 2/2411, within 7 days of service and on default the Deputy Registrar to execute such documents; and
  - e. Who should meet the costs of the suit.
2. The originating summons was based upon the grounds set out on the face of the summons and the contents of the supporting affidavit sworn by the Plaintiff, John Maina Ngunjiri on 29.07.2019 and the exhibits thereto. The Plaintiff pleaded that he had been in open, continuous and exclusive possession of Title No. Gituamba/Muhotetu/Block 2/2486 (the suit property) for a period exceeding 12 years without any interruption from the Defendants or anyone claiming through them.
  3. The Plaintiff stated in his supporting affidavit that on or about 08.11.1996 he bought a portion of 2.5 acres of land from the then registered owner, the late Harun Kimani Musa (the deceased) at an agreed purchase price of Kshs.90,000/= which was fully paid. The said portion was later on registered as Parcel 2482 but was found to have a shortfall of 1.2 acres. The Plaintiff contended that the deceased then showed him a separate portion of 0.405 ha as a top-up which portion was later on registered as Parcel 2486.
  4. It was the Plaintiff's case that by the time the deceased passed on he had not transferred the said portions of land to him and that when the 1<sup>st</sup> Defendant was appointed the administrator of the estate of the deceased, she only transferred Parcel 2482 to him and refused to transfer Parcel 2486 as well. He further pleaded that despite having been in possession of Parcel 2486 for over 2 decades, the 1<sup>st</sup> Defendant decided to transfer it to his son, the 2<sup>nd</sup> Defendant in the proceedings.

## **B. Defendants' Response**

5. The Defendants filed a replying affidavit sworn by the 2<sup>nd</sup> Defendant, Moses Ngari Kimani, on 07.10.2019 in opposition to the originating summons. They disputed the authenticity and validity of the sale agreement of 08.11.1996 on the basis that it was not signed by either of the contracting parties. It was also pointed out that the said agreement although dated 08.11.1996 stated that the sale had taken place on 08.08.1996.
6. The Defendants pleaded that at all material times the deceased was the owner of what was initially Title No. Gituamba/Muhotetu Block 2/177 (Muhotetu) and that vide an agreement dated 18.01.1996 he had sold a portion of 1 acre only to the Plaintiff for the sum of Kshs.35,000/=. They stated that the Plaintiff was shown the said portion by the deceased whereupon he took possession and settled thereon. They disputed that the deceased had sold 2.5 acres of land to the Plaintiff.
7. The 1<sup>st</sup> Defendant conceded that she undertook succession proceedings upon the death of the deceased and that she formally transferred the said portion of 1 acre to the Plaintiff which was then registered as Parcel 2482. It was pleaded that the estate of the deceased was distributed in accordance with the certificate of confirmation of grant issued in the succession cause.



8. The Defendants denied that the Plaintiff had been in possession of Parcel 2486 and pleaded that he only started utilizing the same by growing nappier grass thereon in 2017 after its registration in the name of the 2<sup>nd</sup> Defendant. It was contended that, in any event, Parcel 2486 only came into existence on 11.10.2012 whereas the Plaintiff planted his nappier grass thereon in 2018 hence the Plaintiff had not satisfied the requirements of adverse possession in relation to the suit property. The court was consequently urged to dismiss the originating summons with costs.

### **C. Trial of the Summons**

9. When the originating summons was listed for directions it was directed that the same shall be treated as the plaint whereas the replying affidavit in answer thereto was to be treated as the defence. It was further directed that the suit shall be canvassed through oral and documentary evidence and that the parties shall file and exchange their respective case summaries, issues for determination and trial bundles in preparation for trial.
10. At the trial hereof, the Plaintiff testified on his own behalf and called 3 additional witnesses in support of his claim for adverse possession. One of the witnesses (PW4) was the Chief of Muhotetu Location where the suit property is located. The evidence of PW4 was to the effect that the Plaintiff took possession of the 2 portions of land he had bought from the deceased in 1999.
11. The Defendants, on the other hand, testified at the trial on their own behalf and called 2 more witnesses in opposition to the Plaintiff's claim for adverse possession. The gist of the Defendants' evidence was that the Plaintiff had purchased only one acre of land from the deceased and that is what was transferred to him after succession proceedings were concluded. They disputed that the Plaintiff had been in possession of the suit property and contended that the land had been lying vacant and unutilized since 1996 until 2018 when the Plaintiff planted nappier grass thereon.

### **D. Issues for determination**

12. The court has considered the pleadings, the evidence and documents on record in this matter. The court is of the opinion that the following issues arise for determination herein:
- a. Whether the Plaintiff has proved his claim for adverse possession of the suit property.
  - b. Whether the Plaintiff is entitled to the reliefs sought in the suit.
  - c. Who shall bear costs of the suit.

### **E. Analysis and Determination**

#### **a. Whether the Plaintiff has proved his claim for adverse possession of the suit property**

13. The court has considered the material and submissions on record on this issue. Whereas the Plaintiff submitted that he had satisfied all the requirements of adverse possession, the Defendants contended otherwise. Although the Plaintiff sought to prove that his sale agreement with the deceased was for a portion of 2.5 acres the Defendants sought to demonstrate that the agreement was for the sale of one acre only. The Plaintiff also sought to convince the court that he had been in occupation of the suit property since 1996 whereas the Defendants sought to persuade the court that his possession only commenced in 2018.
14. The court is of the opinion that nothing much really turns on the genuineness or validity of either of the sale agreements relied upon by the parties since the Plaintiff is not seeking enforcement or specific agreement of the sale agreement he made with the deceased. By filing the instant summons for adverse



- possession he implicitly conceded that the deceased was the rightful title holder of the suit property. What he is seeking to demonstrate in the summons is that he has since acquired title to the suit property on account of adverse possession under Section 38 of the *Limitation of Actions Act* (Cap.22).
15. There is no evidence on record to show that the Plaintiff entered the suit property secretly, or through force or threats of violence. The court shall, therefore, solely consider the elements of adverse possession since that is the Plaintiff's claim before the court.
  16. It is evident from the pleadings and evidence on record that the Plaintiff's claim will largely turn on when he took possession of the suit property. Whereas he claimed to have taken possession in 1996, fenced the same and planted trees and crops, the Defendants contended that he took possession in 2018. In fact, some of the Defendants' witnesses claimed that nobody had been utilizing the suit property since 1996 and that they had never seen the Plaintiff utilize the same.
  17. The court is of the view that the Plaintiff and his witnesses (save PW4) may have exaggerated their evidence on the date when the Plaintiff took possession. Similarly, the court is unable to believe the Defendants when they claimed that the Plaintiff took possession in 2018 after the death of the deceased. If the Plaintiff took possession after the death of the deceased, then who showed him the land and the boundaries thereof? The court is inclined to believe the evidence of PW4 who was the Chief of Muhotetu Location. She testified that the Plaintiff took possession in 1999 and that he was merely cultivating the suit property whereas he had built and settled on Parcel 2482.
  18. The court having seen and observed the demeanor of PW4 it is satisfied that she was a credible and truthful witness who did not appear to have any special interest in the matter. She also testified that sometime in 2011 the parties had presented their dispute before her for resolution and that when she was unable to reconcile them she referred them to the District Officer at Rumuruti for resolution of the dispute. The court has also noted from the evidence on record that PW4 has been a resident on the area since 1992 and that she knew the litigants well even before the land dispute arose.
  19. Taking the Plaintiff's effective date of possession as 1999 then it would mean that the deceased had at least 12 years to sue for recovery of the suit property and that period expired in 2011. So, by the time the Plaintiff filed the instant summons in 2019 the deceased's right (or that of his personal representative) to seek recovery of the suit property had already been extinguished under Section 7 of the *Limitation of Actions Act* (Cap.22).
  20. The elements of adverse possession were summarized in the case of *Kasuve v Mwaani Investments Ltd & 4 Others* [2004] 1KLR 184.

“...and in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, *Wanja vs Sakwa No.2* [1984] KLR 284. A title by adverse possession can be acquired under the *Limitation of Actions Act* for part of the land...”
  21. Similarly, in the case of *Chevron (K) Limited –vs- Harrison Charo Wa Shutu* [2016] eKLR it was held, inter alia, that:

“At the expiration of the twelve-year period the proprietor's title will be extinguished by operation of the law and section 38 of the Act permits the adverse possessor to apply to the High Court for an order that he be registered as the proprietor of the land. Therefore the critical period for the determination whether possession was adverse is 12 years and the



burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it. See *Littledale v Liverpool College* [1900]1 Ch.19, 21.”

22. The court is satisfied on the basis of the material on record that the Plaintiff has been in open, continuous and exclusive possession of the suit property at least since 1999. The court is satisfied that he has fenced and developed the suit property by planting trees and crops among them nappier grass. The court has noted that in his evidence in-chief, the 2<sup>nd</sup> Defendant testified that although the Plaintiff planted nappier grass on the suit property in 20018, he did not know whether he was utilizing the land prior to that date. During cross-examination by the Plaintiff's advocate the 2<sup>nd</sup> Defendant stated thus:

“I do not reside on Parcel No. 2486. I do not use or cultivate it. What I saw on the land was nappier grass and trees. I was informed it was the Plaintiff who planted the nappier grass. I do not know who planted the trees...”

23. The court is satisfied that the Plaintiff has been in possession of the suit property *nec vi, nec clam, nec precario*, that, is without force, without secrecy and without evasion. There is no evidence to show that his possession has ever been interrupted in the legal sense. The Plaintiff has also sufficiently demonstrated *animus possidendi* as evidenced by his developments on the suit property. As a result, the court is satisfied that the Plaintiff has proved his claim for adverse possession on a balance of probabilities.

#### **b. Whether the Plaintiff is entitled to the reliefs sought in the suit**

24. The court has found and held that the Plaintiff has proved his claim for adverse possession of the suit property. It would, therefore, follow that the Plaintiff is entitled to the reliefs sought in the originating summons. In particular, the Plaintiff is entitled to a declaration that he is entitled to be registered as proprietor of the suit property on account of the doctrine of adverse possession. The court is also inclined to make the necessary consequential orders to facilitate his registration as proprietor of the suit property.

#### **c. Who shall bear costs of the suit**

25. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful litigant should not be awarded costs of the suit. As a consequence, the Plaintiff shall be awarded costs of the suit.

#### **F. Conclusion and Disposal Order**

26. The upshot of the foregoing is that the court finds and holds that the Plaintiff has proved his claim for adverse possession on a balance of probabilities. As a result, the court makes the following orders for disposal of the originating summons dated 29.07.2019:



- a. A declaration be and is hereby made that the Plaintiff John Maina Ngunjiri, has become entitled to be registered as proprietor of Title No. Gituamba/Muhotetu Block 2/2486 on account of the doctrine of adverse possession.
- b. The Land Registrar – Laikipia shall cause the Plaintiff, John Maina Ngunjiri, to be registered as proprietor of Title No. Gituamba/Muhotetu Block 2/2486 in place of the current registered proprietor, Moses Ngari Kimani, on account of the doctrine of adverse possession.
- c. The 2<sup>nd</sup> Defendant shall execute all forms, documents and instruments to facilitate the transfer of the suit property to the Plaintiff within 30 days from the date hereof in default of which the Deputy Registrar of the court shall do so on his behalf.
- d. The Land Registrar - Laikipia County shall dispense with the production of the original title deed and all documents in the possession, custody or control of the 2<sup>nd</sup> Defendant while transferring the suit property to the Plaintiff.
- e. The Plaintiff is hereby awarded costs of the suit.

It is so decided.

**JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 29<sup>TH</sup> DAY OF FEBRUARY, 2024  
AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

In the presence of:

Mr. Okumu for the Plaintiff

Mr. Nderitu Komu for the 1<sup>st</sup> & 2<sup>nd</sup> Defendants

C/A - Carol

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**Y. M. ANGIMA**

**JUDGE**

