



**Njiru v Mburu (Environmental and Land Originating Summons
215 of 2020) [2024] KEELC 941 (KLR) (27 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 941 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 215 OF 2020
NA MATHEKA, J
FEBRUARY 27, 2024**

BETWEEN

ELIZABETH WANJIRA NJIRU PLAINTIFF

AND

PETER W. MBURU DEFENDANT

JUDGMENT

1. The plaintiff has filed this organizing summons seeking for orders that;
 1. That the Respondent's interest in Mombasa/Mwembelegeza/ 756 measuring 0.05 ha has been extinguished.
 2. That the Applicant be registered as the proprietor of all that parcel of land Mombasa/Mwembelegeza/756 measuring 0.05 ha which said piece of land is comprised in a Certificate of Title in the District Land Registry at Mombasa in place of Respondent reason of the fact that the Applicant has become entitled to the said land by adverse possession.
 3. That the orders referred to in paragraph 1 and 2 above be registered against the title Mombasa/Mwembelegeza measuring 0.05 ha which said piece of land is comprised in a Certificate of Title in the District Land Registry at Mombasa in terms of Section 38 (2) of the *Limitation of Actions Act*, (CAP 22) Laws of Kenya
 4. That the costs of this Originating Summons be provided for.
2. This summons is based on and supported by the Affidavit of Elizabeth Wanjira Njiru sworn on the day of 21st October 2020 and on the following grounds that the Applicant has been in uninterrupted exclusive physical occupation of Mombasa/Mwembelegeza /756 measuring 0.05 ha for a continuous period of over 12 years which is more than the 12 years required by the law. That the Respondent has shown no interest in this plot neither has he given any notice to vacate from the suit land to the



Applicant. That the Respondent's rights and/or interest in all that parcel of land known as Mombasa/Mwembelegeza /756 measuring 0.05 ha vis—vis those of the Applicant have been extinguished. That it is fair and just that the Applicant be registered as the owner of land known as Mombasa/Mwembelegeza /756 measuring 0.05 ha so she together with her family members can live in peace without fear of losing the said land, which is their only home. That the Applicant has peacefully exercised proprietary rights over the suit property for over 12 years and lay claim to it by law to acquire a legal right over the suit property. That the Applicant has no other place to call home but the suit property.

3. In his replying affidavit sworn on 15/9/2022, the respondent attached his national identity card, his passport and deed poll and a gazette notice which demonstrated that indeed he is a resident in the UK. He also attached a copy of the title deed to the suit property. Furthermore, he raised doubts as to the possession of the applicant as there were no structures on the suit property and even alleged the title produced by the applicant is not genuine.
4. The applicant in her further affidavit of 17/10/2022 stated that he is not the Peter Waweru Mburu named in the title and that the owner was another person whom the applicant alleged was the father of her children during hearing. She also averred that she has been conducting her business of supplying building materials on the suit property. PW1, the applicant adopted her statement and list of documents and stated that PETER WAWERU MBURU is the father of her children and that she lives on another plot in Bamburi where she has constructed her residence. She described that she does construction in Nyali and Vipingo.
5. DW1, the respondent also adopted his statement and list of documents and testified that he is an engineer in the UK where he resides but was previously a lecturer at Technical University of Mombasa. DW 1 explained that he changed his previous name of Peter Waweru Mburu to the current one sometime in 2015 and that he did not see the need to do a correction of name on the title. He testified that he had gone to the Directorate of Criminal Investigation who determined that the title held by the applicant is not genuine and that his title was the real one.
6. He denied that the applicant ever lived there and narrated that he had put a mabati structure and a caretaker named Odhiambo on the suit property who later relocated to Kisumu in 2015. He also stated that he had erected a chain link fence which was uprooted in 2017. At that point he sent his brother to check on the status of the suit property who found building materials dumped on the same. Finally, he explained that he had applied for the afore mentioned discharge but it was collected by the applicant.
7. DW2, Stephen Mucheru Mburu adopted his affidavit filed on 27/5/2022 which had attached photos of the suit property and the court noted that the suit property has no structures. It is bare save for furniture placed next to the road presumably are for sale. DW2 testified that there was another caretaker named Omondi before he was made a caretaker together with the respondent's brother named Eliud Kimani Mburu. He claims that there was a mabati structure which was later stolen. He denies that there was a fence or a small house. He also stated that the respondent relocated to the UK sometime between 2002 and 2003.
8. Section 26 of the *Land Registration Act* No. 3 of 2012 states as follows:
 1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—



- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”
9. There is no dispute that Peter W. Mburu is the registered owner of the suit property. Section 108 of the [Evidence Act](#) Cap 80 states that;

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
10. Section 109 of the [Evidence Act](#) states that;

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
11. In *Mbuthia Macharia vs Annah Mutua & Another* (2017) eKLR the court of appeal discussed the burden of proof and stated as follows;

The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence? In this case, the incidence of both the legal and evidential burden was with the appellant.”
12. The respondent produced his identification documents. He produced his national identification card number 4643881 issued on 12th November 1996 stating that his name was Peter Waweru Mburu. He further produced a deed poll on change of names dated 21st December 2015 stating that he has changed his name to Peter Murathimme Mburu. I am satisfied that the defendant is the owner of the suit property. Section 116 of the [Evidence Act](#) which states;

When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.”
13. The plaintiff claims adverse possession. In the case of *Mombasa Teachers Co-operative Savings & Credit Society Limited vs Robert Muhambi Katana & 15 others* (2018) eKLR, the Court explained the required elements to prove adverse possession as follows;

Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12years as espoused in the Latin maxim, nec vi nec clam nec precario.”



14. Further in Kisumu Civil Appeal No. 27 of 2013 Samuel Kihamba vs Mary Mbaisi (2015) eKLR where the court held that;

Strictly, for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land”

Paragraph 5 of the supporting affidavit sworn by the applicant on 21/10/2020 states as follows:

5. That I have peacefully and openly occupied, developed, raised a family and conducted other activities in the suit land over the years without any interruption”

15. The plaintiff testified that she lives on another plot in Bamburi where she has constructed her residence. She described that she does construction in Nyali and Vipingo. The plaintiff is a dishonest person as in the previous hearing she had told the court that she had built on the suit plot and lived there with her children since 2006. The said father of her children whose name is Peter Waweru Mburu as alleged never testified and this court cannot establish his existence if at all. I find that the plaintiff has failed to establish her case on a balance of probabilities and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF FEBRUARY 2024.

N.A. MATHEKA

JUDGE

