



**Maragara v Kamurara (Sued as an Administrator of the Estate of
Mwangi Kamurara Mathigi) (Environment & Land Case 22 of 2023)
[2024] KEELC 1078 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1078 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT & LAND CASE 22 OF 2023
YM ANGIMA, J
FEBRUARY 22, 2024**

BETWEEN

STEPHEN MWIHIA MARAGARA PLAINTIFF

AND

**MWANGI MACHARIA KAMURARA (SUED AS AN ADMINISTRATOR OF
THE ESTATE OF MWANGI KAMURARA MATHIGI) DEFENDANT**

JUDGMENT

A. Introduction

1. This is a judgment in respect of two consolidated suits. The first is the Defendant's suit for eviction of the Plaintiff from the portion of ½ acre of suit property in Nyahururu CM ELC No. 341 of 2018 – Mwangi Macharia Kamurara (Suing as the administrator of the estate of Mwangi Kamurara Mathigi – deceased) v Stephen Mwirigi Maragara. The second in the instant originating summons by the Plaintiff for adverse possession of a portion of ½ acre out of the suit property.

B. Defendant's Claim

2. By a plaint dated 20.09.2018 and amended on 30.08.2021 filed before the Chief Magistrate's Court at Nyahururu, the Defendant sued the Plaintiff seeking the following reliefs:
 - a. A permanent injunction restraining the Defendant by himself, his servants, workmen and agents, from entering on and/or from erecting or causing to be erected thereon any structures, or from in any way interfering with the use and enjoyment of the said property by the lawful beneficiaries.
 - b. An order of mandatory injunction requiring the Defendant to move out of the ½ acre he occupies on Title No. Nyandarua/Sabugo/85 and in default an order of eviction do issue.



- c. General damages and exemplary damages for trespass.
 - d. Mesne profits of Kshs.20,000/= per annum from the year 2018 until the Defendant vacates from the ½ acre of Title No. Nyandarua/Sabugo/85.
 - e. Costs of this suit.
 - f. Any other relief the court may deem fit to grant.
3. The Defendant pleaded that he was the administrator of the estate of the late Mwangi Kamurara Mathigi (the deceased) who was at all material times the registered owner of Title No. Nyandarua/Sabugo/85 (the suit property). He pleaded that sometime in 2018 the Plaintiff had wrongfully entered and erected structures on a portion of ½ acre of the suit property without lawful justification or authority. It was further pleaded that despite issuance of a demand and notice of intention to sue the Plaintiff had failed to vacate the said portion of land hence the suit.

C. Plaintiff's Response

4. The record shows that vide a defence amended on 21.09.2021 and counterclaim dated 21.09.2021 the Plaintiff denied the Defendant's claim. He pleaded that vide a sale agreement dated 10.11.2003 he purchased a portion of ¼ acre out of the suit property from a son of the deceased owner called David Irungu Mwangi (David) and took possession of the same immediately. He pleaded that he planted trees thereon which he harvested and sold in 2018.
5. He pleaded that later on in 2004 he purchased another portion of ¼ acre from one Joseph Gitahi who had in turn bought it from David and took possession thereof. It was his case that he had constructed a house and settled on the two portions of ½ acre. He consequently denied being a trespasser on the portion of ½ acre of the suit property.
6. In the alternative, the Plaintiff pleaded that he had acquired the said portion of ½ acre through the doctrine of adverse possession since he had been in occupation thereof since 2003. He also pleaded, in the alternative, that he was entitled to the said portion of land on account of the doctrine of constructive trust since he had been put in possession by one of the beneficiaries of the estate of the deceased.
7. By his counterclaim, the Plaintiff reiterated the contents of the amended plaint and pleaded that the Defendants in the counterclaim were aware of the sale and his occupation of the said portion of land and had concealed the same from the succession proceedings of the estate of the deceased. It was his contention that he was entitled to the ½ acre of land on account of the doctrine of adverse possession and had in that regard filed an originating summons for adverse possession before the Environment and Land Court. The Plaintiff contended that his demand and notice of intention to sue was not heeded hence the counterclaim.
8. As a result, the Plaintiff sought the following reliefs in the counterclaim:
- a. A declaration for a constructive trust or otherwise in favour of the Plaintiff over a portion of ½ an acre of land on L.R. No. Nyandarua/Sabugo/85 and for the trust to be registered.
 - b. In the alternative, judgment be entered in favour of the Plaintiff for a sum of Kshs.84,000/= being the refund of the purchase price with interest from 10/11/2003, Kshs.50,000/= being agreed penalty for breach of contract plus interest from 10.11.2003, general damages for breach of contract and compensation for the development erected on the ½ acre of land to be valued by a government valuer upon delivery of the judgment.



D. Defendants' Reply and Defence to Counter-claim

9. The Defendants filed a reply to amended defence and defence to counterclaim dated 19.10.2021. By their reply to defence they joined issue upon the Plaintiff's amended defence. They denied all the allegations contained therein and reiterated the contents of the amended plaint. They denied that David Irungu Mwangi had the capacity to sell any portion of the suit property since it belonged to the deceased. They denied that the Plaintiff took possession of the land in 2003 and contended that he only took possession in 2018 during the subsistence of the suit.
10. The Defendants denied that the Plaintiff was entitled to the portion of $\frac{1}{2}$ acre claimed either on account of the doctrine of constructive trust or the doctrine of adverse possession and they put him to strict proof thereof. It was contended that the Plaintiff had not been in quiet possession of the said land for 12 years and that his possession was forcible and in violation of various court orders.
11. By their defence to counterclaim, they denied all the allegations contained in the counter-claim and put the Plaintiff to strict proof thereof. It was pleaded that the purported vendors had no legal capacity to sell any portion of the suit property to the Plaintiff since it belonged to the deceased at the material time.
12. They denied that the Plaintiff had been in quiet and uninterrupted possession of the portion of $\frac{1}{2}$ acre for a period exceeding 12 years and pleaded that the Plaintiff had only taken possession in 2018 and not before. It was pleaded that the counterclaim was res judicata and sub judice hence the same should be dismissed with costs.

E. Plaintiff's Rejoinder

13. The Plaintiff filed an amended reply to defence to counterclaim dated 27.10.2021 and amended on 13.01.2022. He simply denied all the contents of the defence to counterclaim and reiterated the contents of his amended defence.

F. Plaintiff's Originating Summons

14. Vide an originating summons dated 21.09.2021 brought under Sections 7 and 38 of the *Limitation of Actions Act* (Cap.22), Order 37 rule 7(1) & (2) of the Civil Procedure Rules, 2010 and all other enabling provisions of the law, the Plaintiff sought the following orders:
 - a. A declaration that the Plaintiff is entitled to be registered as the proprietor of a portion measuring $\frac{1}{2}$ (0.5) an acre to be excised from land Parcel L.R. No. Nyandarua/Sabugo/85 by virtue of the doctrine of adverse possession.
 - b. An order do issue authorizing the respondent to execute all necessary documents to vest the ownership of the said portion of $\frac{1}{2}$ (0.5) an acre out of title deed L.R. No. Nyandarua/Sabugo/85 to the Plaintiff and in default, the Deputy Registrar be authorized to do so on behalf of the Defendant.
 - c. Costs of the suit be awarded to the Plaintiff.
15. The Plaintiff pleaded that he had been in open, continuous and exclusive possession of a portion of $\frac{1}{2}$ acre out of the suit property for a period exceeding 12 years without any interruption. He pleaded that his possession was with the full knowledge of the Defendant who the administrator of the estate of the deceased. It was his case that he had acquired the said portion of land through purchase transactions which were void for want of the consent of the relevant Land Control Board (LCB).



16. The Plaintiff pleaded that he had purchased two portions of $\frac{1}{4}$ acre each in 2003 and 2004 out of the beneficial entitlement of David who was a son of the deceased. He stated that upon purchase he took possession of the said portions of land and developed them by planting 300 trees, building a semi-permanent house, fencing and cultivating the same. It was further his case that in 2018 he harvested and sold his mature cypress trees and that in 2014 he was compensated by Kenya Power and Lighting Company (KPLC) for some of the trees they had felled on his portion of land.
17. The Plaintiff contended that he had been in continuous occupation of his portion of land without interruption until 2018 when the Defendant filed a civil suit for his eviction in Nyahururu CM ELC No. 341 of 2018. It was thus his case that he had acquired the said portion of $\frac{1}{2}$ acre on account of the doctrine of adverse possession since the suit for eviction was filed 15 years after he took possession of the land.

G. Defendant's Response

18. The Defendant filed a replying affidavit sworn on 23.12.2021 in answer to the originating summons. He disputed that the Plaintiff had been in possession of the suit property for a period exceeding 12 years. He challenged the validity of the sale transactions for the $\frac{1}{2}$ acre and pleaded that the purported vendors had no capacity to do so since they had no title to the suit property. It was further contended that the relevant sale agreements were time barred under the law of limitation of actions and void for lack of consent of the LCB.
19. The Defendant pleaded that the Plaintiff only took possession of the land in September, 2018 and undertook developments thereon in violation of a court order. It was the Defendant's contention that the Plaintiff ought to have conducted due diligence to establish the true owner of the suit property and that his actions amounted to intermeddling in the estate of the deceased which was a criminal offence. He consequently prayed for dismissal of the Plaintiff's claim for adverse possession.

H. Issues for Determination

20. The court has considered the pleadings in both the civil suit and the originating summons for adverse possession. The court has also considered the documents and evidence on record and is of the opinion that the following are the main issues which arise for determination herein:
 - a. Whether the Plaintiff has proved his claim for adverse possession.
 - b. Whether the Defendant has proved his claim for recovery of the suit property from the Plaintiff.
 - c. Whether the Plaintiff is entitled to the reliefs sought in the originating summons.
 - d. Whether the Defendant is entitled to the reliefs sought in his claim.
 - e. Who shall bear costs of the civil suit and originating summons.

I. Analysis and Determination

a. Whether the Plaintiff has proved his claim for adverse possession

21. The court has considered the evidence and submissions on record on this issue. Whereas the Plaintiff submitted that he had demonstrated his claim for adverse possession, the Defendant contended



otherwise. The elements of adverse possession were summarized in the case of *Kasuve v Mwaani Investments Ltd & 4 Others* [2004] 1KLR 184 as follows:

“...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 v 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...”

22. Similarly, in the case of *Chevron (K) Limited v 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.”

23. There is no doubt from the material on record that at all material times the suit property was registered in the name of the deceased. There is no dispute that the said portion of ½ acre was sold by David who was one of the beneficiaries of his estate. There is no contest that the sale transactions were void for want of consent of the LCB under the *Land Control Act*. It is also clear from the material on record that the sale transactions took place before confirmation of grant in contravention of the provisions of the *Law of Succession Act* (Cap. 160).

24. The material on record also shows that the Plaintiff has been in possession of the said portion of ½ acre. What was hotly contested, however, was when he took possession thereof. Whereas the Plaintiff contended that he took possession immediately purchase in 2003 and 2004, the Defendant contended that he took possession in 2018 when he deposited building materials and built a dwelling house thereon.

25. The court finds that there is credible evidence on record to demonstrate that the Plaintiff took possession of the claimed portion of land much earlier than 2018. The court believes the Plaintiff’s evidence that he planted cypress trees on the land soon after purchase and harvested them upon maturity in 2018. There is documentary evidence on record to show that, indeed, the Plaintiff sold some 200 trees in July, 2018. The record shows that there was a joint inspection of a “private plantation” in the presence of the chief of Matunda Location in Mirangine. The seller was indicated as the Plaintiff whereas the buyer was one, Johnson Ndirangu Watitu. The joint inspection report indicated that the felling was to take place between 06.07.2018 and 10.07.2018.

26. There is no indication on record to show that the Defendant or other beneficiaries of the estate of the deceased ever protested the harvesting of those trees even though they claimed the trees were planted by the deceased. There is no claim or counterclaim in these proceedings for the value of the 200 trees which were sold by the Plaintiff. The court finds and holds that it is practically impossible for the Plaintiff to have planted and tendered trees to maturity which were harvested in July, 2018 if he truly



took possession of the land in September, 2018. The court is thus inclined to believe the Plaintiff's evidence that he actually took possession of the land in 2003 and 2004 and planted trees which he tended to maturity before selling them in 2018.

27. The court has further noted that there is credible evidence on record to demonstrate that as at 2014 the Plaintiff was compensated by KPLC for trees it felled in order to make way for a powerline. There is a property damage report from KPLC indicating that the company compiled the report in the presence of the Plaintiff and a wayleave's officer of the company. The court is, therefore, unable to believe the Defendant's evidence that the Plaintiff took possession in 2018.
28. The court is of the opinion that there is a difference between a party taking possession on the one hand and taking physical occupation on the other. As soon as a party has taken exclusive control of the land by fencing, cultivating, or planting trees, or undertaking other developments thereon then his possession kicks in. He does not have to construct a dwelling house or to reside thereon in order to be said to have taken possession. The taking of control and utilization of land is sufficient evidence of possession. It would appear that the Defendant was referring to the taking of physical occupation in 2018 since the Plaintiff appears to have constructed a dwelling house on the land in that year.
29. There is no doubt from the material on record that the Plaintiff's possession and utilization of the claimed portion of ½ acre became adverse upon expiry of 6 months from the making of the relevant agreements due to lack of consent of the LCB. His possession was henceforth hostile and inconsistent with the ownership rights of the true owner. There is also no doubt from the material on record that the Plaintiff had the requisite animus possidendi to possess and utilize the land as his own as evidenced by the planting of trees and other developments on the land.
30. The court does not believe the Defendant's claim that the Plaintiff entered the claimed portion of land forcibly. There is no evidence of any report to the local administration or law enforcement agencies to that effect. In his plaint dated 20.09.2018 and amended on 30.08.2021 the Defendant did not allege that the Plaintiff had entered the land through use of force or violence. The Defendant only pleaded that he entered the land in violation of some interim orders granted by the magistrate's court. As it turned out, the said interim orders were subsequently set aside on appeal.
31. The court must observe that the Defendant was not a candid and truthful witness. When he was questioned during cross-examination on who was paid compensation by KPLC for the trees which were felled to make way for a powerline, he claimed that he did not know who was paid the money. So, how could the administrator of the estate of the deceased fail to know who was compensated for trees which he claimed belonged to the estate? At the trial, he also denied that his brother, David had sold any portion land to the Plaintiff despite being shown the relevant sale agreement.
32. The court is thus satisfied that the Plaintiff has proved his claim for adverse possession to the required standard. The court is satisfied that by the time the Defendant filed his civil suit for recovery of the ½ acre in the Plaintiff's possession in 2018 the claim was already statute barred under Section 7 of the [Limitation of Actions Act](#) (Cap.22) since it was filed more than 14 years after the accrual of the cause of action.

b. Whether the Defendant has proved his claim for recovery of the suit property from the Plaintiff

33. The court has already found and held that the Plaintiff has proved his claim for adverse possession to a portion of ½ acre out of the suit property. It would, therefore, follow that the Defendant's civil suit for recovery of the said portion of land must fail on account of the [Limitation of Actions Act](#) (Cap.22). The holding of the court is that the Defendant has failed to prove his claim against the Plaintiff.



c. Whether the Plaintiff is entitled to the reliefs sought in the originating summons

34. Since the court has already found and held that the Plaintiff has adequately proved his claim for adverse possession, it would follow that the Plaintiff is entitled to the reliefs sought in the originating summons to enable him realize the fruits of his judgment.

d. Whether the Defendant is entitled to the reliefs sought in the civil suit

35. The court has found and held that the Defendant has failed to prove his claim for recovery of the portion of ½ acre in the Plaintiff's possession on account of the Limitation of Actions Act (Cap.22). It would, therefore, follow that the Defendant is not entitled to the reliefs sought in the suit, or any one of them.

e. Who shall bear costs of the civil suit and the originating summons

36. 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 v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful party should not be awarded costs of the action. Consequently, the Plaintiff shall be awarded costs of the originating summons and the civil suit which was filed by the Defendant.

J. Conclusion and Disposal Order

37. The upshot of the foregoing is that the court finds and holds that the Plaintiff has proved his claim for adverse possession to the required standard. The court further finds and holds that the Defendant has failed to prove his claim for recovery of the disputed portion of land to the required standard. As a result, the court makes the following orders for disposal of the originating summons and the civil suit:

- a. A declaration be and is hereby made that the Plaintiff, Stephen Mwihia Maragara, is entitled to be registered as proprietor of a portion of ½ acre to be excised from Title No. Nyandarua/Sabugo/85 on account of the doctrine of adverse possession.
- b. An order be and is hereby made directing the Defendant to execute all the necessary forms, documents and instruments to facilitate the transfer of ½ acre out of Title No. Nyandarua/Sabugo/85 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.
- c. The Defendant's civil suit for recovery of the said portion of ½ acre out of the suit property and for a permanent injunction and mesne profits is hereby dismissed in its entirety.
- d. The Plaintiff is hereby awarded costs of the originating summons and the civil suit.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 22ND DAY OF FEBRUARY, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Ms. Wanjiru Muriithi holding brief for Mr. Waichungo for the Plaintiff

Mr. Ojore holding brief for Mr. Ndegwa Wahome for the Defendants



C/A - Carol

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Y. M. ANGIMA

JUDGE

