



REPUBLIC OF KENYA



**Kerario v Masero (Environment and Land Case 9 of 2017)
[2024] KEELC 1198 (KLR) (20 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1198 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND CASE 9 OF 2017
MN KULLOW, J
FEBRUARY 20, 2024**

BETWEEN

ROMAN GABERI KERARIO PLAINTIFF

AND

ROBERT NYAITATI MASERO DEFENDANT

JUDGMENT

1. The Plaintiff herein commenced this suit by way of an Originating Summons dated 2nd February, 2017 against the Defendant seeking the following orders that: -
 - i. The Plaintiff's possession to the land reference No. Bukira/ Bwisaboka/ 3886 is adverse to the Defendant by virtue of his occupation since childhood.
 - ii. The Defendant be directed to transfer land reference No. Bukira/ Bwisaboka/ 3886 in the name of the Plaintiff and his family members.
 - iii. If the Defendant fails to execute documents of transfer and land control board, then the Court to issue a directive to the Land Registrar to issue title to the Plaintiff of land parcel No. Bukira/ Bwisaboka/ 3886.
 - iv. The Order directing the Land Registrar Kehancha to register the said land into the names of the Plaintiff as Roman Gaberi Kerario.
 - v. The Defendant be restrained from in any way interfering with the Plaintiff's peaceful possession of the said land reference number Bukira/ Bwisaboka/ 3886 until finality of this case.
2. On the other hand, the Plaintiff also sought other orders as follows: -



- a. A Declaration that the Defendant is holding land reference No. Bukira/ Bwisaboka/ 3886 in trust for the Plaintiff by way of fraud and the same be ordered transferred to the Plaintiff forthwith.
 - b. That the costs of this case be awarded to the Plaintiff.
 - c. Any other relief that the court deems fit to grant.
3. The Originating Summons is premised on the Plaintiff's Supporting Affidavit sworn on even date. It is the Plaintiff's claim that he was born in the year 1954 and has since lived on the suit land together with his parents. That all his parents are deceased and were both buried on the suit land. He deposed that even after the death of his parents, he has remained on the suit land together with his family and his 2 brothers.
 4. It is his contention that the suit parcel was originally parcel No. 653 and that due to an error in aerial mapping at the time of adjudication; his father's land and the Defendant's father's land were joined together to produced land parcel No. 653 which was registered in the name of the Defendant's father. He maintained that despite the two parcels of land being joined together, the same are separated by a distinct and intact boundary.
 5. He further contends that upon the death of the Defendant's father; the Defendant filed Succession Cause No. 176 of 2008 and upon its completion he was required to divide the said portion to him. The Defendant completed all the transfer forms and a Mutation was drawn to that effect, however, the said transfer in favor of the Plaintiff is yet to be effected to date.
 6. He averred that his father's land measured 20.54Ha and forms part of the suit parcel No. 3886. He further maintained that he has been in actual possession of the suit land together with his 2 brothers for over 65 years since they were born. He urged the court to allow the suit and grant the orders sought.
 7. The Defendant entered Appearance through the firm of Kerario Marwa & Co. Advocates and filed a Statement of Defence dated 3rd November, 2020; denying all the allegation raised by the Plaintiff. He denied the Plaintiff's claim of having acquired the suit land by virtue of adverse possession for the reason that parcel No. 3886 only came into existence on 2nd June, 2011.
 8. It was further his contention that he is the Administrator of the estate of his late father, Masero Nyaitati Masero; whose estate comprised parcel No. 653 measuring approx. 28.5Ha and vide Succession Cause No. 176 of 2008 at the Migori SPM's Court, he completed the distribution of the estate to the rightful beneficiaries. He maintained that the said beneficiaries to the estate of his late father are 4 and the Plaintiff is not included.
 9. He acknowledged having gone with the Plaintiff to the Land Control Board and even executed the transfer forms in his favor over a portion of the estate measuring approx. 20Ha on the understanding that the Plaintiff was buying the said portion for valuable consideration of Kshs. 500,000/=.
 10. It is his claim that the Plaintiff failed to fulfil his obligation thereby violating the transaction and he consequently sold the land to 2 other buyers who were subsequently confirmed in the Migori Succession Cause No. 176 of 2008 as beneficiaries claiming purchaser's interest. He thus maintained that the Plaintiff has never been an adverse possessor on the suit land and urged the court to dismiss the suit against him with costs.



Trial

11. The Plaintiff's case proceeded for hearing on 26/01/2021³⁰; the Plaintiff testified as PW1 and called 2 witnesses. It was his testimony that the suit land No. 3886 measures approx. 20.54Ha and is a subdivision of the original parcel No.653, which measured 28.5Ha.
12. He also produced the documents on his list of documents dated 2/2/2017 to be marked as Plaintiff Exhibits 1 – 11 as follows; a copy of P& A 5 in respect to Migori Succession Cause No. 176 of 2008 as Pexh.1, a copy of the Map for L.R. No. Bukira/ Bwisaboka/ 653 as Pexh.2, copy of the Mutation for L.R. No. Bukira/ Bwisaboka/ 653 as Pexh.3, copy of the ruling dated 25th November, 2016 in respect to Migori High Court Misc. Application No. 10 of 2015 as Pexh.4, copy of the Transfer Form for L.R. No. Bukira/ Bwisaboka/ 3886 as Pexh.5, copy of letter of consent for L.R. No. Bukira/Bwisaboka/ 3886 as Pexh.6, copy of the Application for Consent of Land Control Board for L.R. No. Bukira/ Bwisaboka/ 3886 as Pexh.7, a copy of the certificate of search dated 2/6/11 as Pexh.8, a copy of the National Identity Card for the Defendant and the Plaintiff as Pexh.9, a copy of the KRA Certificate for both the Plaintiff and the Defendant as Pexh.10 and pleadings, Affidavits and all documents filed in respect of the instant case as Pexh.11 in further support of his case.
13. On cross-examination, it was his testimony that paragraph 6 of his supporting affidavit is a demonstration of how the original parcel No. 653 was produced. He further stated that adjudication in the area was conducted in the year 1965 while the title deed to the original land No. 653 was issued in the year 1989.
14. He also stated that he discovered the anomaly in the adjudication records in the year 2009 and confirmed that his late father did not raise any complaint regarding the suit land. Further, it was his contention that the Defendant took him to the area LCB in his capacity as the Administrator of the estate of his late father as shown in Pexh. 6.
15. Mtongori Kerario testified as PW2. He adopted his witness statement dated 17/12/2021 as his evidence in chief. It was also his testimony that the suit land belongs to the plaintiff and the court had visited the same to see the boundaries between the Plaintiff's and the Defendant's land.
16. He further stated that the 2 parcels of land belonging to the plaintiff and the defendant had been registered as one parcel but each of the parties has their own distinct parcel.
17. On cross-examination; it was his testimony that they want a share of their father's land that overlapped to that of the Defendant's land sometimes in the year 1960's. He admitted that he neither knew when the adjudication was done in the area nor who caused the problem. He conceded that their father died in the year 1979 and he did not take any steps to address the adjudication problems.
18. He also confirmed that the Defendant's father is registered as the owner of the suit land No. 653 even though he is since deceased. He conceded that the Defendant had instituted succession proceedings in respect of his late father's estate and the estate had already been subdivided to the beneficiaries.
19. He however maintained that they are claiming their share from the said land; that they live on parcel No. 3886 and the same is registered in the defendant's name though he does not have any certificate of search to confirm the same.
20. He testified that they have a title to their parcel, even though he did not adduce any evidence in support of the same. He confirmed that he is aware that there are other interested parties who have since bought portions of the suit land from the defendant.



21. Pauline Boke Tegire testified as PW3. The Plaintiff is her brother in-law. She adopted her witness statement dated 9/12/2021 and relied on the same as her evidence in chief. It was her testimony that the suit land belongs to her and its boundaries are well defined.
22. On cross- examination, it was her testimony that the suit land is registered in the name of Roman Gaberi and he lives on the land and has been living therein for many years though she could not state the exact period. She further stated that there was no dispute between the parties until recently when they started fighting.
23. The Defence case proceeded for hearing on 19/9/2023, the Defendant testified as DW1 and did not call any witness. It was his testimony that the Plaintiff, who is his neighbour, is laying claim on a parcel that belonged to his father. He further stated that the estate of his late father has since been subdivided among all the beneficiaries and the claim by the Plaintiff is therefore baseless.
24. On cross- examination, he reiterated that the suit land was the property of his late father. He conceded that the Plaintiff had been included in the Succession Cause but maintained that he was included since he wanted to purchase the land. He confirmed that he signed the transfer forms in favor of the Plaintiff but stated that he could not remember the acreage that he transferred.
25. Upon close of the defence case, I issued directions on the filing of submissions. Both parties filed their rival submissions and authorities which I have read and considered.

Analysis and Determination

26. I have reviewed the pleadings herein, the respective exhibits and parties' rival submissions in totality; it is my considered opinion that the following issues arise for determination: -
 - a. Whether the Plaintiff has sufficiently proved his claim on Adverse Possession.
 - b. Whether the Plaintiff is entitled to the reliefs sought.

I. Whether The Plaintiff Has Sufficiently Proved His Claim On Adverse Possession

27. Sections 7,13, 17 and 38 (1) and (2) of the [Limitation of Actions Act](#) and Section 28 (h) of the [Land Registration Act](#) provides the statutory framework for the doctrine of adverse possession.
28. Makhandia, JA in [Mtana Lewa v Kabindi Ngala Mwangandi](#) [2015] eKLR defined the doctrine of adverse possession as follows: -

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, it is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the [Limitation of Actions Act](#).....”

29. The requirements for a claim of adverse possession are now well settled; The land in question must be registered in the name of a person other than the Applicant, the Applicant must demonstrate that he took possession of the parcel of land, asserted his rights over it in an adverse manner to the title of the land owner and the said title holder did not take any precipitate action against the said Applicant for a period of 12 years. Lastly, he must demonstrate that his possession and occupation of the said land was



not by force or under the licence of the land owner and that the said possession was open, in continuity for an uninterrupted period of over 12 years.

30. With regards to the possession; the claimant must also establish the date he took possession, the nature of his possession, the duration of his possession and whether the same was open and uninterrupted for the 12 years' statutory period. See Court of Appeal decision in *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR)
31. The first ground to be established is the registration of the suit land. The onus is on the Plaintiff to demonstrate and prove the registration of the suit land. It is the Plaintiff's claim that the original land parcel No. 653 was registered in the name of the Defendant's father. This fact was confirmed by both PW1 and the Defendant in his pleadings and testimony in court. However, no evidence was adduced to further prove the same either in the form of a Green Card or a Certificate of Official Search.
32. It is also not in dispute that the original land parcel No. 653 has since been subdivided into 4 portions to wit, Nos. 3886, 3887, 3889 and 3840 as evidenced by the Mutation Form produced by the Plaintiff as Pexh.3. It is the Plaintiff's claim that suit land falls in parcel No. 3886.
33. It is however important to note that the Plaintiff did not produce any evidence to show who is the current registered owner of the suit land No. 3886; either in the form of a Green Card or Certificate of Search. The certificate of search produced as Pexh. 8 dated 2/6/2011 was done way before the filing of the instant suit.
34. Further, it was the evidence of DW1 that the suit land has since been sold to third parties and who are not parties in the instant suit. This was confirmed by PW2 during cross-examination where he admitted that the suit land which was part of the estate of the defendant's father had been subdivided and sold to third parties by the Defendant. It is therefore not clear to this court, who is indeed the actual registered owner of the suit land No. 3886. The Defendant confirmed on oath that he is not the registered owner of the suit land, which had already been sold to third parties pursuant to the Confirmed Grant issued in Succession Cause No. 176 of 2008. This court is careful not to grant orders in limbo, particularly where the said orders may adversely affect persons who are not parties to the suit.
35. The next issue for determination is the Plaintiff's possession, occupation and use of the suit land. The onus is on the Plaintiff, who is alleging the occurrence of an event to demonstrate the duration and nature of his possession and whether he has acquired any prescriptive rights over the suit land, capable of registration.
36. It is the Plaintiff's claim that he was born on the suit land in the year 1954 and has lived on the suit land all his life. At paragraph 6 of the supporting affidavit, it is his claim that the original suit land No. 653 was formed as a result of an error made during the adjudication process; where due to the aerial mapping, his father's land was joined together with the Defendant's father's land and together the two parcels formed No. 653, which was registered in the name of the Defendant's father.
37. The Defendant on the other hand dismissed the Plaintiff's claim on adverse possession for the reason that parcel No. 3886 only came into existence on 2/6/2011. Respectfully, this is not the right position in law. It is well settled that adverse possession is a fact to be observed upon the land and is not to be seen on the title, thus, the demonstration of adverse possession is premised on the occupation of the suit land and not on the registration of the title of the suit land in the year 2011 as alleged. See Court of Appeal decision in *Gachuma Gacheru vs Maina Kabuchwa* [2016] eKLR.
38. Be that as it may, the question that follows is whether the Plaintiff's occupation and use of the land can be said to amount to adverse possession. The onus is on the Plaintiff to demonstrate the adverse nature of his occupation and use of the land against the rights of the Defendant over the same land.



What amounts to dispossession in a claim for adverse possession has been held to be acts done by the adverse possessor which are inconsistent with the true owner's enjoyment of the soil for the purpose for which he intended to use the same. See Court of Appeal decision in *Wilson Kazungu Katana & 101 others v. Salim Abdalla Bakshwein & another* [2015] eKLR)

39. From the explanation tendered in court and contained in the pleading filed herein, the Plaintiff's occupation does not amount to adverse possession. The dispute herein clearly originated during the adjudication process and the Plaintiff cannot invoke adverse possession as a remedy to the said problem.
40. The *Land Adjudication Act* provides the steps to be taken by any person affected/ aggrieved by the adjudication process and register. Sections 26 on the objection to the adjudication register and 29(1) on Appeals provides as follows: -
 - 26 (1) Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.
 - 26 (2) The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit he shall determine the objection.
 - 29 (1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—
 - (a) delivering to the Minister an appeal in writing specifying the grounds of appeal;
 - (b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.
41. The *Land Adjudication Act* outlines an elaborate process to be followed by persons aggrieved by the process of adjudication. In the instant case, even though the Plaintiff has acknowledged and admitted that the dispute herein arose during the adjudication process, he has not demonstrated that the process under sections 26 and 29 was exhausted within the set timelines before the filing of this suit. PW1 confirmed during cross-examination that his father did not raise any complaint over the suit land. This fact was also admitted by PW2 who stated that his late father never took any steps to address the adjudication problems.
42. Further, it is important to note that the Plaintiff and his witnesses only stated that they have lived on the suit land since they were born and that all his parents were buried on suit land. It is the Plaintiff's contention that the land originally belonged to his late father and was erroneously joined and registered in the name of the Defendant's father. He maintained that the suit land belonged to his late father and they are therefore entitled to their rightful share.
43. It is therefore clear that the Plaintiff's possession and use of the land was on the belief that the same belonged to his late father and their family. He has challenged the Defendant's title as the rightful and actual owner which is contrary to any claim under adverse possession. Further, there is no demonstration of when the Plaintiff's occupation and use of the suit land became adverse or when time for adverse possession started running, other than stating that they have been living on the suit



land for over 60 years. It is now well settled that long possession does not necessarily amount to adverse possession.

44. While this court acknowledges that the Plaintiff indeed produced copies of Consent and transfer forms in exhibit as proof of the initial steps taken by the Defendant in his favor, it is my considered view that the suit as filed ought not to have been for a claim of adverse possession.
45. The totality of the foregoing is that the Plaintiff has not sufficiently demonstrated that he has acquired prescriptive rights over the suit land. Therefore, it is my finding that the Plaintiff has not proved his claim on a balance of probabilities to warrant the reliefs sought.
46. Having held that the Plaintiff has not proved his claim on adverse possession against the Defendant's title to the required standard, I accordingly find that he is not entitled to the reliefs sought.

Conclusion

47. The upshot of the above is that the Plaintiff has failed to prove his claim against the Defendant and the Originating Summons dated 2nd February, 2017 is hereby dismissed with costs to the Defendant. It is so ordered!

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MIGORI ON 20TH DAY OF FEBRUARY, 2024.

MOHAMMED N. KULLOW

JUDGE

In presence of; -

Plaintiff in person

No appearance for the Respondent

Court Assistants - Tom Maurice/Victor

