



Tulenge & another v Wafula & 2 others (Environment & Land Case 70 of 2012) [2024] KEELC 820 (KLR) (20 February 2024) (Judgment)

Neutral citation: [2024] KEELC 820 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 70 OF 2012
EC CHERONO, J
FEBRUARY 20, 2024**

BETWEEN

ALFRED MACHIMBO TULENGE 1ST PLAINTIFF

SALANGU TULIENGE 2ND PLAINTIFF

AND

PAUL WAFULA 1ST DEFENDANT

DICKSON WANJALA 2ND DEFENDANT

FRANCIS WANJALA SITATI 3RD DEFENDANT

JUDGMENT

a. Introduction and Pleadings

1. The Plaintiffs brought this current claim under Section 17 & 38 of the *Limitations of Actions Act* Cap 22 and under section 7 (d) of the *Land Act*; Order 37 rule 7 of the *Civil Procedure Rules* seeking the following orders;
 - a. The applicant be registered as owners of land parcel no. Ndivisi/muchui/2010 measuring 3.28 Ha as they have continuously peacefully and quickly occupied it from 1972 to-data
 - b. In the alternative and without prejudice to the prayer 1 above that the current registered owner, Dickson Tom Wanjala holds it in trust for them.
 - c. Cost of tis suit be in the cause.
2. It was the plaintiff’s case that they have continuously, peacefully and quietly occupied and enjoyed the use of 3.28 Ha of Land Parcel No. Ndivisi/muchui/2010 “the suit land” since 1972 to the time of filing the current case. They averred that Land Parcel No. Ndivisi/muchui/2010 was a resultant sub-division of Land Parcel No. Ndivisi/muchui/999 which gave forth parcel no. 2010 and 2011 with parcel no.



- 2010 being transferred and registered in the name of the 2nd defendant to hold in trust for their father after they were displaced during the construction of pan paper Mills in 1972.
3. The plaintiffs further stated that due to the relationship between their deceased father and the 1st defendant, he (the 1st defendant) was entrusted to purchase land from the 3rd defendant and settle them which he did in 1972 and they settled in a portion measuring 3.28 Ha. That in 1980, the 1st defendant fraudulently sold the two parcels of land i.e. Land Parcel No. Ndivisi/muchui/2010 and Land Parcel No. Ndivisi/muchui/2011 to the 2nd defendant to their detriment.
 4. In a replying affidavit sworn on 29th June 1999, the 2nd defendant stated that there were existing cases on the same issues pending in other courts being Eldoret HCCC No. 108 of 1987 Kisiangani Tulienge & 2 others v Paul Wanjala & 2 others wherein judgment had been delivered on 29th July, 1992. The second case was said to be Webuye Criminal Case No. 417 of 1982 which case was dismissed after hearing and the defendants herein acquitted by the Court in a judgment delivered on the 13th July, 1982.
 5. It was further the 2nd defendants' case that Bungoma HCCC NO. 70 of 1998 was pending determination and thus the current case could not be sustained and ought to be struck out. Lastly, the 2nd defendant stated that the plaintiffs had not made a case for adverse possession since their occupation to the suit land was not peaceful and uninterrupted due to the multiple court cases.
 6. Parties took directions and agreed to proceed with the hearing by viva voce evidence. The case proceeded between 6/7/2023 and 2/11/2023 with the plaintiffs calling two witnesses and the defendant calling one witness.

b) - Evidence of Parties

7. PW1 Joseph Siangu Tulieng gave sworn testimony and sought to adopt his witness statement dated 31/12/2018 and filed in court 10/6/2022 as his evidence in chief. He also referred to his list of documents dated 3/7/2023 which he produced into evidence as P-Exhibit 1-3. In cross examination, he testified that the suit land belonged to his father who bought it in the year 1972 from the 3rd defendant. He further stated that the property was initially measuring approximately 11.5 Acres and his father bought 5 Acres while the 2nd defendant bought 5.5 Acres.
8. The witness also testified that their claim was for 8 Acres which he and his co-plaintiffs currently occupy. PW1 confirmed that they had been sued in Webuye Criminal case No. 417 of 1982 for trespass.
9. PW2 Alfred Machumba also gave sworn testimony and asked the court to adopt his witness statement filed in court on 10/6/2023 as his evidence-in-chief. In cross examination, he testified that with his co-plaintiff, they have lived on the suit land from the year 1972 after they were displaced on establishment of Pan paper Mills. He thereafter reiterated the evidence as stated by PW 1. The plaintiff's case was thereafter closed.
10. The 2nd defendant called one witness namely Dickson Tom Wafula (DW1) who testified that he bought 5 Acres from the 3rd Defendant, Wanjala Sitatai which was curved out of Land Parcel No. Ndivisi/muchi/999 in the year 1975. He testified that he thereafter attended the Land Control Board in 1978 and obtained a consent and the property was eventually sub-divided and a transfer effected in his favour for Land Parcel No. Ndivisi/muchi/2011 in the year 1980. He stated that he thereafter took possession of the 5 Acres.
11. The witness further testified that sometime in the year 1980, he again bought a further 3 acres from the 3rd defendant and another 5 acres from 1st Defendant, Paul Wafula. He testified that he did not take possession of the newly acquired 8 acres since the plaintiffs were in occupation. DW1 also testified that



he asked the plaintiffs to vacate the suit land but they declined prompting him to file a trespass case. The witness testified that he has been engaged in court battles with the plaintiffs since the his purchase of the suit property.

12. In cross examination, he testified that the plaintiffs have been in occupation of Land Parcel No. Ndivisi/muchi/2010 measuring approximately 8 acres. It was his further evidence that the plaintiffs were in occupation of the suit land when he purchased it and they continue to be in occupation to date. The 2nd defendant thereafter closed his case.

d. Analysis and Determination

13. This case has a long history in the court corridors dating back to the year 1998 but I will restrict myself to the issues arising from the present case. I have carefully considered the pleadings and the evidence presented before court by the parties and I find that the following are the issues that commend for determination.

- a. Whether the plaintiff's occupation of the Suit Land is adverse to the defendant's Title?
- b. Who should bear costs?

14. It is not in dispute that the Applicants' claim in the Originating Summons is based on adverse possession. What is adverse possession? The doctrine of adverse possession in Kenya is embodied in Section 7 of the *Limitation of Actions Act*, CAP 22 Laws of Kenya, which provides that: -

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

15. It is clear that Section 17 of the *Limitation of Actions Act* extinguishes the rights of a registered owner where there is a successful claim for adverse possession. Section 38 on the other hand provides thus;

“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land.”

16. The doctrine of adverse possession, being a common law doctrine has been the subject of numerous decisions, each of which has enriched and clarified the considerations to be taken into account by a Court called upon to make a determination as to whether or not the doctrine is applicable in the case before it.

17. The Court of Appeal in the case of *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] e KLR, a portion of which has been cited by the Plaintiffs defines the doctrine of adverse possession and the circumstances giving rise to the same 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, 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.”



18. Further guidance is found in the Court of Appeal decision in *Ruth Wangari Kanyagia v Josephine Muthoni Kinyanjui* [2017] e KLR where the Court held;

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won’t affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continues. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

19. The import of the authorities and statues as stated above dictates that a person alleging a right of title on adverse possession must show by clear and unequivocal evidence that his possession was not permissible, open, with the knowledge of the true owner and excluded the true owner from the enjoyment of his property.
20. An evaluation of the present facts reveals that the plaintiffs have been in occupation of the suit land i.e. Land parcel no. Ndivisi/muchi/2010 measuring 3.28Ha since 1972. This Honourable Court also finds that the 2nd defendant purchased the suit land in 1980 from the 1st defendant. It is clear from the evidence that the parties herein have been engaged in various court battles with the first being Webuye District Magistrate Court Criminal case no. 417 of 1982, Eldoret HCCC No. 108 of 1987 and Bungoma HCCC 87 of 1998.
21. Webuye District Magistrate Court Criminal case no. 417 of 1982 was instituted by the 2nd defendant against the plaintiffs for trespass over land parcel no. Ndivis/Muchi/2011 where the plaintiffs/accused persons were acquitted. Eldoret HCCC No. 108 of 1987 was instituted by the plaintiffs herein who sought to recover the suit land from the 1st and 2nd defendant claiming that the same was obtained fraudulently and that a charge in favour of KCB Bank who were the 3rd defendants therein was null. Bungoma HCCC 87 of 1998 was a case by the plaintiffs herein on the basis of adverse possession.
22. An evaluation of the present facts under the litmus of the foregoing decisions reveals the following with regards the elements to consider:
23. The first element to consider in determining this matter is whether the plaintiff is in actual possession of the suit property. From the evidence presented in court, it is not in contention that the plaintiffs are and have been in actual possession and occupation of the suit land. The 2nd defendant in his testimony stated that when he purchased the suit land, he knew that the plaintiffs were in occupation and as such, he did not take possession and occupation of the land. It was further his testimony that the plaintiffs are still in possession and occupation of the suit land even at the time of the hearing of this case.
24. The second element to consider is whether the actual possession and occupation of the suit property by the Plaintiff was without permission, peaceful, notorious and uninterrupted for at least twelve (12) years. This court is guided by the principle outlined in the case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR where the learned judge stated: -

“ a)



- c) The occupation of land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupant.
- d) The non-permissive, actual possession hostile to the current owner must be unequivocally exclusive, and with an evinced unmistakable animus possidendi, that is to say occupation with the clear intention of excluding the owner as well as other people.” (emphasis added).

- 25. As earlier stated, the 2nd defendant in his testimony stated that when he purchased the suit land, the plaintiffs were in actual possession and occupation of the suit land and no evidence was tendered to show any action taken by him to evict them. It emerges from the evidence presented that the 2nd defendant vide Webuye District Magistrate Court Criminal case no. 417 of 1982 sought to enforce his rights over Land parcel no. Ndivisi/muchi/2011. Notably, the plaintiffs in this suit are claiming for rights under Land parcel no. Ndivisi/muchi/2010 and not Land parcel no. Ndivisi/muchi/2011.
- 26. As such, this court finds that there was no interruption of the plaintiff’s peaceful occupation of the suit land and therefore, time did not stop in anyway. Suffice to state that the 2nd defendant slept on his rights by failing to evict the applicants from the suit land upon purchase. From the material presented in court, the next case with regard to the suit property was filed in the year 1987 which is 15 years from 1972 when the plaintiffs occupied the suit land.
- 27. The foregoing leads the court to the conclusion that the Plaintiffs’ continued occupation of the 3.82 Ha portion of the suit land since 1972 has been open, notorious continuous and without permission and therefore became averse to the title of the registered proprietor.
- 28. It is my finding that the plaintiffs’ have proved their case on the required standard and are therefore entitled to the orders sought in the amended Originating Summons dated 28th November 2001. Consequently, the same is allowed as prayed with costs.
- 29. It is so ordered.

DATED SIGNED AND DELIVERD AT BUNGOMA THIS 20TH DAY OF FEBRUARY, 2024.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

Mr. Omukunda for Applicants/Plaintiffs

2nd defendant-present

1st defendant-absent

3rd Defendant/respondent-absent

Bett C/A

