



**Mwangi v Mwangi (Environment & Land Case 546 of 2014)
[2024] KEELC 685 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 685 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 546 OF 2014
JO OLOLA, J
FEBRUARY 15, 2024
(FORMERLY NYERI HCCC NO. 189 OF 2011)**

BETWEEN

MARGARET WANJA MWANGI PLAINTIFF

AND

MARY MUTHONI MWANGI DEFENDANT

JUDGMENT

Background

1. This suit was initially instituted in the year 2011 as Nyeri HCCC No. 189 of 2011. It was subsequently transferred to this Court and given its current reference in the year 2014.
2. By his Complaint dated 30th November 2011, Danson Mwangi Makanga (the Original Plaintiff) sought an order for the eviction of the Defendant herein, her family and properties from L.R No. Nyeri/Island Farm/223. In addition the Plaintiff sought damages for trespass.
3. Those prayers were the result of the Plaintiff's contention that at all times material he was the registered proprietor of the said L.R No. Nyeri/Island Farm/223 (the suit property). The Plaintiff accused the Defendant of unlawfully and wrongfully entering the suit property without any colour of right and remaining thereon in violation of the Plaintiff's property rights.
4. But in her Statement of Defence and Counterclaim dated 24th January, 2012 as amended on 29th March 2022, Mary Muthoni Githui (the Defendant) denies that the Plaintiff is the registered proprietor of the suit property. On the contrary, the Defendant asserts that she is in exclusive occupation of a portion of the suit property measuring approximately 7.14 acres and that she is entitled to be registered as the proprietor thereof.



5. The Defendant pleads the defence of acquiescence and avers that the Plaintiff's claim is time barred under the *Limitation of Actions Act*, Cap. 22 of the Laws of Kenya. In addition the Defendant avers that the Plaintiff's title to the suit property is subject to the Defendant's overriding interest under Section 30(f) of the Registered *Land Act*, Cap. 300, Laws of Kenya.
6. By way of the Counterclaim, the Defendant avers that she has been in adverse possession of a portion of the suit property measuring approximately 7.14 acres for a period of over 12 years and that she is entitled to be registered as the proprietor of the said portion in place of the Plaintiff.
7. Accordingly, the Defendant prays for Judgment against the Plaintiff for:
 - (a) A declaration that the Defendant is entitled to be registered as proprietor of the portion she now occupies on the suit land of approximately 7.14 acres by way of adverse possession;
 - (b) A declaration that the Plaintiff's title to a portion of approximately 7.14 acres of L.R No. Nyeri/Island Farm/223 has become extinguished by the Defendant's adverse possession;
 - (c) An order that the suit land, L.R No. Nyeri/Island Farm/223 be sub-divided into two portions and the Defendant be registered as absolute proprietor of one of the resultant sub-divisions measuring approximately 7.14 acres that she currently occupies;
 - (d) An order that the Plaintiff executes and signs all necessary documents and does all necessary acts to facilitate the said sub-division and transfer and in default, the deputy registrar of this Court be authorized and mandated to do so;
 - (e) A permanent injunction restraining the Plaintiff, his servants, agents or family from interfering with the Defendant's quiet use and enjoyment of the said portion of 7.14 acres of the suit land; and
 - (f) Costs of the Counterclaim.
8. As it turned out, the original Plaintiff passed away on 30th March, 2019 before the conclusion of the matter and was substituted by his daughter Margaret Wanja Mwangi.

The Plaintiff's Case

9. At the trial herein, the Plaintiff called 2 witnesses in support of her case.
10. PW1 – Margaret Wanja Mwangi is the substituted Plaintiff and a daughter of the original Plaintiff. PW1 testified that the Defendant is their neighbour occupying an adjacent parcel of land to their own. PW1 told the Court her father's land is parcel number 223 while that of the Defendant's is number 232.
11. PW1 denied that the Defendant had been on their land for a period of 30 years stating that they have had a long dispute as to the boundary of the two parcels over a long period of time. PW1 further told the Court that there is a road separating the two parcels but the Defendant wanted to curve out a portion from the land belonging to PW1's family. PW1 denied that the Defendant occupied 7 acres of the land. On the contrary she asserted that the Defendant only occupied 1/8 of an acre.
12. PW1 further testified that her father had procured the land in 1962 from the Settlement Fund Trustees (SFT).
13. PW2 – Kuyu Mwatha is a village elder in Kimahuri in Kiambu East. PW2 told the Court that in the year 2010, they held a meeting at the Chief's office on a dispute over the boundary of the suit property. The



Defendants were saying their land had crossed the road but that was not true as everyone was on their side of the road. He told the Court the Defendant resides at their home and not on the Plaintiff's land.

The Defence Case

14. On her part, the Defendant (DW1) testified as the sole witness in her case during the trial. DW1 told the Court she was 58 years old and that she had been born and brought up on the disputed portion of the suit property. DW1 further told the Court that the Plaintiffs have always known about and acknowledged her presence on the land.
15. DW1 testified that she had developed the land by building dwelling houses for herself and her children but the houses were burnt down by arsonists during the pendency of this matter in Court on 7th September, 2014.

Analysis And Determination

16. I have carefully perused and considered the pleadings filed by the Parties herein, the testimonies of their witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the written submissions and authorities placed before me by the Learned Advocates – Mr. Wahome Gikonyo for the Plaintiff and Mr. Waweru Macharia for the Defendant.
17. The original Plaintiff herein Danson Mwangi Makanga had by a Plaint dated 30th November, 2011 instituted Nyeri HCCC No. 189 of 2011 against the Defendant herein Mary Muthoni Githui averring inter alia that he was the registered owner of the parcel of land known as Nyeri/Island Farm/223 (the suit property). The Plaintiff accused the Defendant of trespassing upon the suit property without any colour of right and accordingly sought an order for the eviction of the Defendant and her family from the land. In addition, the Plaintiff has sought damages for the said trespass as well as an order for costs.
18. The Defendant rejected the Plaintiff's claim through her Defence and Counterclaim initially dated 24th January, 2012 and later amended on 29th March, 2022. It is the Defendant's case that she has been in exclusive use of approximately 7.14 acres of the suit property in respect of which she has acquired title through the Plaintiff's acquiescence, and that as a result, the Plaintiff's claim was time barred under the *Limitation of Actions Act*, Cap. 22 Laws of Kenya, rendering the Appellants title subject to her overriding interest under Section 30(f) of the now repealed Registered *Land Act* (Cap. 300).
19. In her Counterclaim, the Defendant has reiterated the contents of her statement of defence asserting that she was in adverse possession of the portion measuring approximately 7.14 acres of the suit property to which she was entitled to be registered as the proprietor. Accordingly she has asked the Court to declare that she is entitled to be registered as the proprietor of the said portion and that an order be made directing that the suit property be sub-divided into two portions as appropriate. In addition, the Defendant prays for a permanent order of injunction restraining the Plaintiff, his agents and/or servants from interfering with her quiet use and enjoyment of the said portion of 7.14 acres.
20. Some eight (8) years after he instituted this suit Danson Mwangi Makanga passed away on 30th March, 2019. He was thereafter substituted by his daughter and legal representative, Margaret Wanja Mwangi.
22. In support of their case, the said Margaret Wanja Mwangi (PW1) adopted the statement earlier on recorded by her deceased father and filed herein on 7th September, 2016. In the said Statement, the deceased avers as follows as from Paragraph 4 thereof:

“I am the absolute registered proprietor of L.R No. Nyeri/Island Farm/223 under the provisions of the Registered *Land Act*, Cap 300, Laws of Kenya.



The Defendant has without any colour of right unlawfully and wrongfully entered the said parcel of land and has refused to vacate the same.

I have severally in the past implored the Defendant to move out of my land and (she) was even arraigned in Court vide Nyeri CM Criminal Case Number 909 of 2011 for the offence of forcible detainer contrary to Section 91 of the Penal Code, Cap. 300, Laws of Kenya thus necessitating this suit.

On 22nd February, 1982 the District Settlement Officer Nyeri wrote to the Provincial Settlement Controller confirming that the dispute herein was solved by the Director of Settlement on 26th August 1981.

On 18th August, 2010 we held a meeting to solve the dispute herein and on 11th September, 2010 we held another one where I pointed out that I needed to use my land by November, 2010 and if the dispute will not have been solved will move to Court.

The Defendant was claiming a boundary dispute and that her parents land, L.R Island Farm/232 extends to my parcel.

She should therefore be evicted from my parcel of land and restrained from entering thereof.

The Defendant's occupation of the suit land is intermittent and has been interrupted."

23. As it were, the Defendant did not deny having entered into the suit property. It was however her case that the Plaintiffs had always known about and had acquiesced to her presence on the suit property. She asserted that she had been in exclusive use of the said portion of the land and that she had acquired title thereto by way of adverse possession.
24. From the onset, it was apparent that the Plaintiff was accusing the Defendant of trespassing upon the land in the guise of a boundary dispute. That would explain why the deceased asserted in his statement that the Defendant was claiming a boundary dispute in that L.R No. Nyeri/Island Farm/232 extends to the suit property herein.
25. Testifying in support of their case, the substituted Plaintiff put lots of emphasis on the fact that they had had a long boundary dispute with the Defendant. It was her case that due to the said dispute the Land Registrar and Surveyors had gone to the suit property to sort out the issue but the Defendant had refused to co-operate.
26. In further support of that position, the Plaintiffs produced "Minutes" of some meetings said to have been held in the year 2010 for purposes of resolving the dispute.
27. Looking at the totality of the pleadings herein and the evidence placed before the Court, I was not however persuaded that what was before the Court was a boundary dispute. That would explain the reason in their closing submissions before the Court, the Plaintiffs were totally silent on that aspect. As it were, none of the Parties herein has cited any issue of a boundary dispute in their pleadings before the Court.
28. It was apparent that they could not do so as the cited L.R No. Nyeri/Island Farm/232 is not in the Defendant's name and the registered proprietor thereof is not a Party to this suit. It was further evident that the Plaintiff had not placed any proof before the Court that there had been compliance with Section 18(2) of the *Land Registration Act*, 2012 which ousts the jurisdiction of this Court unless and until the Land Registrar had fixed the boundaries of the parcels of the land.



29. Arising from the foregoing, the only issues before the Court were whether or not the Defendant had trespassed onto the suit property and if the Plaintiff was entitled to have her evicted therefrom and whether or not the Defendant had acquired title to the property by dint of adverse possession.
30. As it were, it was common ground that the Defendant had moved into and was in occupation of a portion of the suit property. While the Defendant asserted that she had lived on that portion of land ever since she was born, the Plaintiff asserted at Paragraph 4 of the Plaint that the Defendant had entered the suit land and had refused to vacate.
31. From the material placed before the Court, it was evident that even if the Defendant had not been born on the suit property as she contended, she had been there for a considerable period of time. In admission of the Plaintiff's position that the Defendant was indeed charged with the offence of Forcible Detainer in regard to the suit property in Nyeri CMCN No. 909 of 2011, the Defendants have exhibited certified copies of the proceedings and the Ruling of the Court delivered on 17th July, 2012.
32. From a perusal of the Ruling, it was apparent that the Defendant was charged with being in possession of land parcel number Nyeri/Island Farm/223 (the suit land) the property of Danson Makanga without any colour of right and in a manner likely to cause a breach of the peace against the complainant who was entitled to be in possession of the said land between 5th January, 1988 and September, 2019.
33. Those proceedings also capture the deceased Plaintiff to have told the Court in his testimony rendered before the Court on 30th November, 2011 that the Defendant herein settled on the suit property in the year 1992. Even if one was to assume that there was an error in the charge sheet, it was evident that the Defendant had been on the suit land for some 19 years before the charges against her were brought to Court.
34. As it were, the Defendant was acquitted of the said charges after the Learned Trial Magistrate found the evidence insufficient to support a conviction. In the course of those criminal proceedings, the deceased Plaintiff instituted this claim against the Defendant.
34. In regard to a civil claim for recovery of such land, Section 7 of the *Limitation of Actions Act* provides as follows:
- “An action may not be brought by any person to recover land after the date on which the right of action accrued to him.”
35. As to when the period of limitation begins to run, Section 9(1) of the *Limitation of Actions Act* provides thus:
- “Where the person bringing an action to recover land or the person through whom he claims, has been in possession of the land and has while entitled to the land been dispossessed or discontinued his possession, the right of action accrues on the date of the dispossession or discontinuance.”
36. And as to what happens to such a person's title, Section 17 of the *Limitation of Actions Act* provides as follows:
- “Subject to Section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land, the title of that person to the land is extinguished.”



37. Arising from the foregoing, I was persuaded that the Plaintiff cannot by this claim prove trespass by the Defendant to the suit property as his title to that portion of the suit property that is occupied by the Defendant had long been extinguished by operation of the law.
38. On her part, the Defendant asserted that she has been in exclusive possession and occupation of 7.14 acres of the suit property and that she had acquired the same by way of adverse possession. In *Gabriel Mbui -vs- Mukindia Maranya* (1993) eKLR, adverse possession was defined as:
- “... the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by the occupying stranger inconsistent with the true owner’s enjoyment of the land for purposes for which the owner intended to use it.”
39. In *Mtana Lewa -vs- Kahindi Ngala Mwangandi* (2015) eKLR, the Court of appeal defined 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 omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor 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.”
40. In the matter before me, and as we have seen from the testimony of the deceased in Nyeri CMCR No. 909 of 2011, he did admit that the Defendant herein had been in occupation of the portion of land she stays in since the year 1992. Asked during cross examination about the Defendant’s stay of his land, the said proceedings capture the deceased Plaintiff to have stated as follows:
- “They had built 2 houses on my side of the road. That is where the accused now lives. She came back there. It was in 1962. The accused was a child then. The accused and her brother cultivated on my part of the land. I do not go to that part of the land since we have d dispute. There is a live fence between my homestead and the accused’s homestead.”
41. Arising from the foregoing, I was persuaded that the Defendant had atleast since 1992 been in exclusive occupation of the portion of the suit property. While the Survey Report dated 3rd July, 2000 prepared by one Joseph Ndoria Murimi placed the extent of encroachment to be 7.14 Ha, the Defendant did clarify that it was only 7.14 acres.
42. In the premises herein, I was not persuaded that the Plaintiff had proved his claim of trespass. I was however persuaded that the Defendant had justified her claim for adverse possession of the 7.14 acres comprised in the suit land.
43. Accordingly, I hereby dismiss the Plaintiff’s suit and enter Judgment for the Defendant in the following terms:



- (a) A declaration is hereby made that the Defendant is entitled to be registered as the proprietor of the portion she now occupies on the suit land measuring approximately 7.14 acres by way of adverse possession;
- (b) A declaration is hereby made that the Plaintiff's title to a portion of approximately 7.14 acres comprised in L.R No. Nyeri/Island Farm/223 has become extinguished by the Defendant's adverse possession;
- (c) An order is hereby made that the suit land, L.R No. Nyeri/Island Farm/223 be subdivided into two portions and the Defendant be registered as the absolute proprietor of one of the resultant sub-divisions measuring approximately 7.14 acres that the Defendant occupies currently;
- (d) An order is hereby made that the Plaintiff does execute and sign all necessary documents and does all necessary acts to facilitate the said sub-division and transfer and in default, the Deputy Registrar of this Court is hereby authorized and mandated to do so;
- (e) A permanent order of injunction is hereby issued restraining the Plaintiff, his servants and/or agents from interfering with the Defendant's quiet use and enjoyment of the said portion measuring 7.14 acres comprised in the suit land.
- (f) Each Party shall bear their own costs.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 15TH DAY OF FEBRUARY, 2024.

In the presence of:

Mr. Wahome Gikonyo for the Plaintiff

Mr. Waweru Macharia for the Defendant

Court assistant - Kendi

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J. O. OLOLA

JUDGE

