



Macharia v Kabaga (Environmental and Land Originating Summons E019 of 2022) [2024] KEELC 1640 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1640 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E019 OF 2022**

**JO OLOLA, J
MARCH 20, 2024**

BETWEEN

JOHN MWANGI MACHARIA APPLICANT

AND

MILCAH WANJA KABAGA RESPONDENT

JUDGMENT

1. By an Originating Summons dated 27th September 2022, John Mwangi Macharia urges the Court to determine the following questions and issues:
 1. Whether the Defendants title to Land parcel Number Othaya/Ihuririo/232 has been extinguished by the Plaintiff's adverse possession thereof for a period of more than twelve (12) years in terms of Section 38 of the *Limitation of Actions Act* Cap. 22 Laws of Kenya;
 2. Whether the Plaintiff has acquired title to the said Land Parcel No. Othaya/Ihuririo/232 by adverse possession thereof for a period of more than 12 years that is from 1987 to date;
 3. Whether the Plaintiff ought now to be registered as absolute proprietor of the whole of the said Land Parcel No. Othaya/Ihuririo/232;
 4. Whether the Land Registrar Nyeri should now be ordered to register the whole of the said Parcel Number Othaya/Ihuririo/232 in the name of the Plaintiff as absolute proprietor; and
 5. Whether the Respondent should be condemned to pay the costs of this suit.
2. The Originating Summons is supported by an Affidavit sworn by the Applicant and is premised on the grounds that:



- (a) The Applicant and the entire family of his father Macharia Karundo have been living on the said parcel of land since the year 1987 when the land was mysteriously and fraudulently transferred to the Respondent;
 - (b) The Applicant and his family have carried out extensive and valuable development on the suit land and neither the Respondent nor her family have ever interfered with the said use and enjoyment of the suit land;
 - (c) The total period of occupation and utilization of the said parcel of land by the Applicant is now thirty five (35) years and the Applicant has therefore acquired title thereto by way of adverse possession; and
 - (d) It is mete and just that the Applicant be registered as the absolute proprietor of the whole of the said land.
3. Having failed to trace the Respondent Milcah Wanja Kibaga for service, the Applicant instituted a Chamber Summons application dated 8th February, 2023 seeking to serve the Respondent by way of substituted service through an advertisement in the newspapers. The said application was allowed on 20th March, 2023. Subsequently by an advertisement placed in the Daily Nation Newspaper of 5th April 2023, the Respondent was served with notice of this suit and required to respond and attend Court on 8th May, 2023 when the matter was scheduled for mention. Despite such service, the Respondent has neither appeared nor responded to the suit and this matter accordingly proceeded by way of formal proof.
4. The matter proceeded by way of Affidavit evidence after the Applicant who was unrepresented indicated that he would be relying entirely on what he had stated in the various Affidavits he had filed in Court. I have accordingly carefully perused and considered the Applicants Affidavits as well as the documents attached thereto.
5. By his Originating Summons before the Court, the Applicant urges the Court to determine that he has acquired the suit property by way of adverse possession and that the title of one Milcah Wanja Kibaga now registered as the proprietor of the suit property has been extinguished by operation of the law.
6. As it were, the doctrine of adverse possession is well settled under the *Limitation of Actions Act*. Section 7 of the said Act places a bar on actions to recover land after 12 years from the date on which the right accrued. Further Section 13 of the said *Act* provides as follows:
 - “ 13 A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run
 - (1) (which possession is in this *Act* referred to as adverse possession), and, where under Sections 9, 10, 11 and 12 of this *Act* a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
 - (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.”



7. Section 38 of the *Limitation of Actions Act* further provides thus:

“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 or lease in place of the person then registered as the proprietor of the land.”

8. As was stated in *Wambugu -vs- Njuguna* (1983) KLR 172:

“In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.”

9. The Court in the *Wambugu case* (*supra*) further stated that:

“The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”

10. In the matter before me, the Applicant avers that prior to November 1987, the parcel of land known as Othaya/Ihuririo/232 was registered in the name of his father one Macharia Karundo who died on 12th April, 1966. Some 20 years after the death of his father, the Applicant’s mother one Maria Wanjiku Thuku filed Nyeri SRM Succession Cause No. 330 of 1986 in regard to the estate of the said Macharia Karundo. The said matter was apparently later transferred to the High Court at Nyeri as Nyeri High Court Succession cause No. 257 of 1999. According to the Applicant, the matter remains pending to-date.

11. From the material placed before the Court, it was also apparent that the Applicant’s mother, the said Maria Wanjiku Thuku passed away on 13th August, 1989 and that a grant of Letters of Administration intestate were issued to the Applicant and his brother one Peterson Nginga Macharia for the estate of their father on 19th June, 2001.

12. At Paragraph 8 of the Supporting Affidavit, the Applicant asserts that the entire family of Macharia Karundo has always lived on the land. In support of that position, the Applicant has produced a copy of the Green Card for the land parcel No. Othaya/Ihuririo/232 (Pexh 4) which indicates that the parcel of land was indeed registered in the name of the Applicant on 19th March, 1958.

13. In addition, the Applicant has produced a copy of an Official Search dated 31st August, 2022 (Pexh.2) which confirms that when he visited the Lands Office at Nyeri on the said date, he did find that the title had on 23rd November, 1987 been registered in the name of one Milcah Wanja Kibanga (the Respondent herein). It is the Applicant’s case that the Respondent is not a member of the family and that she is unknown to them. It is further his case that they are unaware of the circumstances under which the Respondent came to be registered as the proprietor of the land.

14. As it turned out, the Respondent was given notice of these proceedings by way of an advertisement carried out in the Daily Nation Newspaper of 5th April, 2023. She did not however make appearance to enable her explain the circumstances under which she became registered as the proprietor of the suit



proprietor. The Applicant's averments herein therefore remain uncontroverted and this Court did not find reason to doubt the same.

15. As it is, some 35 years had indeed lapsed from the year 1987 when the Respondent got registered as the owner of the suit property, until the year 2022 when the Applicant initiated this suit.
16. As was stated by the Court of Appeal in *Mtana Lewa -vs- Kabindi Ngala Mwangandi* (2015) eKLR:

“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, 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 nor under the licence of the owner. It must be adequate in continuity, in publicity and extent to show that possession is adverse to the title of the owner.”
17. In the circumstances herein, I was persuaded that the Applicant had established the elements of adverse possession over the suit property. I note from the Paragraph 14 of the Supporting Affidavit that the Applicant is seeking to have the land registered in his name for purposes of distribution of the estate of their deceased father.
18. From the summons for confirmation of Grant dated 11th April, 2002 produced as Exhibit 5, it is apparent that the suit property measuring some 12.3 acres was to be sub-divided into 3 portions measuring 4.1 acres to be transferred to the Applicant and his siblings.
19. Accordingly and subject thereto, the questions and issues raised by the Applicant for determination from No. 1 to 4 are hereby answered in the affirmative.
20. I make no order as to costs.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 20TH DAY OF MARCH, 2024.

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J. O. OLOLA

JUDGE

In the presence of:

Mr. John Mwangi Macharia – the Plaintiff/Applicant present in person

No appearance for the Respondent

Court assistant - Kendi

