



Murithi & 4 others v Kanugu & another (Sued as the Legal Representative of the Estate of M'munyua M'muguongo alias Ikunywa Muguongo - Deceased) (Environmental and Land Originating Summons E016 of 2022) [2024] KEELC 1443 (KLR) (13 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1443 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E016 OF 2022
CK NZILI, J
MARCH 13, 2024

BETWEEN

MARGARET GAKII MURITHI 1ST PLAINTIFF
JOHN KIMATHI MURIUKI 2ND PLAINTIFF
SILAS K. KARIMBA AND HONESTY KAWIRA (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF CONSOLATA KANYUA KIMATHI – DECEASED) 3RD PLAINTIFF
JULIUS MWITURIA M'IMPWI 4TH PLAINTIFF
SILAS MAWIRA 5TH PLAINTIFF

AND

CERINA KANUGU 1ST DEFENDANT
GERVASIO KITHINJI THURANIRA 2ND DEFENDANT
SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF M'MUNYUA M'MUGUONGO ALIAS IKUNYWA MUGUONGO - DECEASED

JUDGMENT

1. The plaintiffs, suing as the legal representatives of the estate of Consolata Kanyua Kimathi, seek to be declared owners of 3 ⁵/₈ acres of L.R No. Nkuene/Ngonyi/273, which belonged to M'Munyua M'Muguongo, deceased now represented by the defendant as the legal representative by virtue of adverse possession.
2. The defendant opposed the claims by replying and further affidavits of Celina Kanugu Joseph sworn on 7.2.2023 and 11.5.2023 respectively. Additionally, the suit was opposed by the affidavits of co-



- administrator Gervasio Kithinji Thuranira, sworn on 29.3.2023 and 10.5.2023. On her part, Celina Kanugu Joseph acknowledged that the plaintiffs had been on the land with the knowledge of the estate of the deceased for many years and were not opposed to the claim save that there was a need at the hearing to engage all the beneficiaries to the estate to settle the matter once and for all.
3. Gervasio Kithinji Thuranira, on the other hand, opposed the claim as brought in bad faith due to a ruling dated 7.6.2022 in Meru H.C Succession Case No. 65 of 1993 that time was interrupted from running after the titles held by the plaintiffs were canceled due to fraud; the suit was an appeal in disguise and that as a co-administrator, he was overseeing other parcels of land apart from the suit land and that he was not privy to the transactions regarding the suit land.
 4. At the trial, Margaret Gakii Murithi testified as PW 1 and adopted her affidavit dated 24.10.2022, as her evidence in chief. PW 1 told the court that entry into 1½ acres of the land occurred in 2004 and has since cultivated the land with the knowledge and approval of the defendants, who live not more than 500 meters from the suit land. Further, produced copies of photographs as P. Exh No's (1) and (2). PW 1, in cross-examination, she said she was not aware of the probate cause. Similarly, the land was sold to them by Lawrence Mwebia, witnessed by the 1st co-administrator and her late mother Rebecca, who had assured them that after obtaining letters of administration, they would transfer the land to her. PW 1 said that after confirmation of the grant, it was issued to the co-respondent, transfers were effected, and the title deed was issued, only for a claim to arise that the title deed had been fraudulently obtained.
 5. Silas Karimba testified as PW 2 and adopted his affidavit sworn on 24.10.2022 as his evidence in chief. He told the court he took out as a guardian and administrator of the estate of Consolata Kanyua, who had occupied ½ acre of the suit land since 2004, tilling the land with knowledge of the defendants. He produced a copy of the limited grant as P. Exh No. (3), gazette notice as P. Exh No. (4), and photographs on the developments as P. Exh No. (5). In cross-examination, PW 2 said entry into the land started on 27.5.2004 and has never been evicted from the land by the actual owners after purchasing it from the beneficiaries of his estate. He also said that he was not aware of a pending succession cause when he bought the land, nor was he aware of the ruling delivered on 7.6.2022. He said, as per the photos produced, he had exclusively fenced his portion with a visible structure next to the river.
 6. John Kimathi Muriuki testified as PW 3 and adopted his supporting affidavit sworn on 24.10.2022 as his evidence in chief. He told the court that he took vacant possession of ½ of an acre of the suit land in 2004, next to PW 2 and commenced development therein by putting up a permanent fence with the knowledge of the defendants. He said he bought the land on 19.4.2004 from the late Rebecca, wife of the registered owner, who lived 500 meters away from the land. PW 3 said the co-administrator Gervasio was a cousin of Celina and his neighbour too. He denied knowledge of the pendency of succession cause when he bought the land. In any event, he said his claim was never determined in the probate cause.
 7. M'Impwi Julius Mwituria testified as PW 4. He adopted his affidavit sworn on 22.3.2023 as his evidence in chief. PW 4 said he entered into and occupied 1 1/8 of an acre of the suit land since 2004 belonging to the late Munyua Muguongo as per copy of the search and photographs produced as P. Exh No's. 6 & 7. He said he bought the land from the deceased, Lawrence, who had assured him of the transfer after obtaining letters of grant.
 8. Jeremiah Mwobobia, a neighbor of the plaintiff, testified as PW 5. As the area manager, he adopted his witness statement dated 15.11.2022 as his evidence in chief and confirmed that the plaintiff had been utilizing the respective parcels of land since 2004.
 9. Celina Kamuyu testified as DW 1 and adopted her two affidavits alluded to above as her evidence in chief. She said her late father passed on in 1978 and left behind five children and their late mother.



- D.W. 1 told the court she was aware of the occupation by the plaintiff of the suit parcels of land after purchasing them from her deceased brother, Lawrence Mwebia in 2004.
10. Gervasio Kithinji Thurinira testified as DW 2 and adopted his two affidavits dated 29.3.2023 and 10.5.2025 as his evidence in chief. He said the dispute was heard in Meru H.C Succession Case No. 65 of 1993. He produced the judgments as D. Exh No. (1). In cross-examination, DW 2 said he was appointed as a joint legal administrator with D.W. 1 over L.R No. Abogeta/Nkachie/33 but was not privy to the transactions involving the plaintiffs over L.R No. Nkuene/Ngonyi/273. He confirmed that the plaintiffs have been occupying the suit land since 2004, though not as beneficiaries to the estate. He said that he had never visited the land, though he had learned of the occupation by the plaintiffs.
 11. The plaintiffs filed written submissions dated 29.2.2024. Relying on Articles 40 & 64 (c) of the Constitution as read together with Sections 7, 12 (3), 13, 16, 17, 38 (1) & (2) of the Limitations of Actions Act and Sections 28 (b) of the Land Registration Act, the plaintiffs submitted an entry into the land occurred in 2004 going by their pleadings and evidence tendered which was admitted by the defendants.
 12. Therefore, the plaintiffs submitted that they had established the ingredients of adverse possession extinguishing the title of the proprietor to the land after 12 years as per *Maweu vs. Liu Ranching & Farming Cooper* (1985) KLR 430. The plaintiffs submitted that the critical test was whether the owner had disposed of or had discontinued possession of the property as held in *Kasuve vs Mwaani Investment Ltd & 4 others* (2004) eKLR. The plaintiffs submitted that the defendants had never filed a suit in any court asserting their right over the property against them save for the succession case. Reliance was placed on *Joseph Gachumi Kiritu vs Lawrence Munyambu Kabura C. A No. 20 of 1993*, on the proposition that the assertion of right occurs when the adverse possessor admits his right, the owner takes legal proceedings or makes an effective entry into the land.
 13. The plaintiffs submitted that after they acquired the land as purchasers for value, time began to run for adversity upon clearance of the purchase price as held in *Public Trustee vs. Wanduru Ndegwa* (1984) KLR.
 14. The plaintiffs submitted adverse possession is established by the court after drawing legal inferences from proven facts of possession and after that, legally concluding whether the possession was adverse or not. Going by the testimony of DW 2 the plaintiffs submitted that the title of the valid owner was not extinguished by the ruling in the probate court but in accordance with the law after 12 years of occupation expired. Therefore, the actual owner continued to hold the title in trust for the adverse possessors under Sections 37 and 38 of the Limitation of Actions Act (Cap 22). The plaintiffs relied on Section 75 (6) (v) of the retired Constitution, *Littledale vs Liverpool College* (1900) 1 Ch. 19, 21, *Sophie Wanjiku John vs Jane Mwihaki Kimani NRB ELC No. 490 of 2010*, *Adman vs Earl of Sandwich* (1877) 2 QB 485 and *Maweu vs Liu Ranching* (supra).
 15. The 1st defendant relied on written submissions dated 13.2.2024. It was submitted that the simple question for the court's determination was whether the plaintiffs were entitled to a cumulative 3 and 5/8 acres of land out of L.R No. Nkuene/Ng'onyi/273, under adverse possession as per the amended originating summons dated 24.10.2022. The 1st defendant submitted that adverse possession was a fact to be observed on the land but not seen in a title going by the case of *Stephen Mwangi Gatunge vs Edwin Onesmus Wanjau NRB Civil No. 283 of 1990*, which cited with approval *Mbui vs Maranya* (1993) eKLR, *Wambugu vs Njuguna* (1983) ELL 172 and *Mombasa Teachers Coop Savings & Credit Society Ltd vs Robert Katana & others* (2018) eKLR.
 16. The 1st defendant, drawing from the cited case law, submitted that adverse possession occurs where a person having title to it omits to take actions against the intruder for 12 years, who is neither



there by force or stealth nor under a license of the owner, which is in continuity, in publicity and in extent to show that the possession was adverse to title. The 1st defendant submitted that both in her replying affidavit and evidence in chief, she has not disputed the occupation by the plaintiffs without interruptions exclusively and, therefore, was entitled to the suit land.

17. The issue calling for my determination is whether the plaintiffs have proved the ingredients of adverse possession to be entitled to the relief set out in the amended originating summons dated 22.3.2023. Adverse possession occurs when a registered owner of the land amount or neglects to take action against an intruder for a period of 12 years, who continues uninterrupted in undertaking actions on the land that are inconsistent with the purpose for which the true owner intended to use the land. See *Mtana Lewa vs Kahindi Mwangandi* (2016) eKLR.
18. In *Richard Wefwafwa Songoi vs. Ben Munyifwa Songoi* (2020) eKLR, the court said adverse possession is a hostile possession by a clear assertion of hostile title in denial of the title of the true owners, which starts with wrongful dispossession of the rightful owner. A person claiming adverse possession, therefore, has to establish the date he came into possession, the nature of his possession, if the opposite party knew of the possession, for how long his possession was continued, and whether the possession was open and undisturbed for 12 years.
19. Regarding adverse possession out of an aborted sale agreement or through a permissive entry, time starts to run after clearance of the last installment. See *Wanyoike vs Kahiri* (1979) eKLR and *Public Trustee vs Wanduru Ndegwa* (supra).
20. Moreover, a party to adverse possession must prove commission on the land of acts inconsistent with the rights of a true owner and the intention to possess. In *Kiambi vs Mboti ELC No. 18 of 2020* (2022) KEELC 13290 (KLR) (5th October 2022) (Judgment), the court cited *Munyaka Kuna Co*, that a party must prove *animus possidendi*. In *Macharia Mwangi Maina & 811 others vs Davidson Mwangi Kagiri* (2014) eKLR, the court held that the appellants, who were purchasers put into possession by the respondent, were protected under the doctrine of a constructive trust.
21. Applying the distilled principles cited in the caselaw, the entry of the plaintiffs to the suit land in 2004 or thereabout is not disputed by the defendants. DW 1, in her replying affidavit and testimony, admitted that she was aware a sale of the portions of the share belonging to her late brother took place and as a matter of fact, was known by the family of the registered owner, that the plaintiffs were on the land as of right.
22. The plaintiffs pleaded, and which facts are admitted by the defendants, that entry since 2004 or thereabouts was continuous, open, uninterrupted, and adverse to the true owner's purpose for which he intended to use his soil. The 1st defendant did not deny any consideration was received from the plaintiffs. Similarly, the defendants did not plead that they made an assertion of their right over the land occupied by the defendants and made an effective entry therein to drive out the plaintiffs or perhaps sue for recovery of the land.
23. Adverse possession runs with the land but not the title. The defendants have admitted that they are the legal representatives of the estate of the deceased registered owner. DW 1 produced D. Exh No. (1), a ruling delivered in *Meru H.C Succession Cause No. 65 of 1993*. Lawrence Mwebia was removed for intermeddling with the suit land. The subdivisions of L.R No. 273 were cancelled for the land to revert to the name of the late M'munyua M'Muguongo. The defendants were confirmed as the legal representatives of the estate. The rights of the plaintiffs herein as purchasers for value were not determined in the succession cause. Therefore, it is not valid, as pleaded by DW 2, that the same issues were before the probate court and were determined with finality.



24. In *Mbiri vs Michuki* (2014) eKLR, the court of appeal cited *Public Trustee vs Wanduru Ndegwa* (supra) that if the purchaser takes possession of the property out of a sale agreement, the actual owner is disposed of possession and time for adversity starts to run in his favor. In *Daniel Kimani Ruchine vs Swift Rutherford Co. Ltd* (1979) eKLR, the court said a plaintiff has to prove *nec vi, nec clam, nec precario*.
25. Looking at the totality of the evidence tendered and admitted by DW1, the plaintiffs have, on a balance of probabilities, proving possession of the suitland with the knowledge of the true owner, without permission, in no secrecy and or evasion. I find them entitled to the respective portion of land as pleaded and proved.
26. The defendants shall subdivide and execute the transfer forms in favor of the plaintiffs within two months from the date hereof in default of the Deputy Registrar of this court to do it. There will be no order as to costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU
ON THIS 13th DAY OF MARCH, 2024**

In presence of

C.A Kananu

Miss Kerubo for Miss Kiome for the plaintiff

Mrs. Otieno C. for the 1st defendant

2nd defendant

HON. C K NZILI

JUDGE

AMENDED AND SIGNED THIS 10TH DAY OF JUNE 2024.

HON. C K NZILI

JUDGE

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