



Joses (Suing as the Legal Representative of the Estate of Jepson Ndege – Deceased) v Stanley (Sued as the Administrator of the Estate of Mugira M’rimbria - Deceased) (Environmental and Land Originating Summons 57 of 2019) [2024] KEELC 3442 (KLR) (30 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3442 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 57 OF 2019**

CK YANO, J

APRIL 30, 2024

BETWEEN

ROBERT MBAABU Joses (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JEPSON NDEGE – DECEASED) PLAINTIFF

AND

KABURU STANLEY (SUED AS THE ADMINISTRATOR OF THE ESTATE OF MUGIRA M’RIMBRIA - DECEASED) DEFENDANT

JUDGMENT

Introduction

1. Pursuant to an originating summons dated 16th October, 2019 and amended on 23rd December, 2021 and further amended on 14th June 2023, the plaintiff is mainly claiming to be entitled to a portion measuring 0.22 Hectares of parcel of land known as L.R No. Igoji/Kinoro/2504 registered in the name of Mugira M’Rimberia (deceased) by way of adverse possession.
2. The originating summons is supported by the affidavits of Robert Mbaabu Joses sworn on 16th October, 2019 and 14th June 2023 and is premised on the grounds that the plaintiff has been in exclusive, open, notorious, unhindered, undisturbed and uninterrupted occupation of the suit land adversely since 1970. That the plaintiff has made substantial developments on the said land on which he has planted coffee, napier grass, maize and arrow roots.
3. The plaintiff’s claim is opposed by the defendant who filed replying affidavits dated 10th August 2020, 31st May 2022 and 10th July, 2023.



Plaintiff's Case

4. It is the plaintiff's case that land parcel No. Igoji/Kinoro/2504 is registered in the name of Mugira M'Rimberia (deceased) but the defendant filed Meru Succession cause No. 500 of 2012 in which the plaintiff filed an objection and the same was allowed and the petitioner in the said succession cause was directed to leave out the parcel herein so that the plaintiff could file this case.
5. It is the plaintiff's case that Jepson Ndege (the original plaintiff who passed away during the pendency of this suit and was substituted by his brother, Robert Mbaabu Joses who is the administrator of his estate and the current plaintiff) peacefully, openly, continuously and exclusively used 0.22 hectares of the suit land which directly borders his own property known as Igoji/Kinoro/697 since 1970 with no quarrel from the registered owner of L.R No Igoji/Kinoro/2504 during his lifetime. That this includes the time that the property known as Igoji/Kinoro/2504 was part of the larger property known as Igoji/Kinoro/594 prior to subdivision.
6. Robert Mbaabu Joses, the current plaintiff, testified as P.W 1. He testified that Jepson Ndege (deceased) was his brother while the defendant is his neighbour. He adopted his statement dated 1st February, 2022 as his evidence in chief and produced copies of mutation form for L.R NO. Igoji/Kinoro/ 594 dated 26th June 2008, protest dated 12th November, 2018, search for Igoji/Kinoro/2504, confirmed grant in Meru HC Succession cause NO. 500 of 2012, photographs and Limited Grant in Meru Misc. Succ. No. E076 of 2021 as P exhibits 1 – 6 respectively. He was cross examined and re-examined.
7. 1 testified that his deceased brother was using the suit land freely from the year 1970 until his demise. That even after his death, his family has been cultivating on the land and are still doing so. That after the death of the defendant's father, his heir subdivided land parcel No. Igoji/Kinoro/594 and interfered with the boundaries of land Parcel No. Igoji/Kinoro/579 and one of the subdivisions which is land Parcel No. Igoji/Kinoro/2504 whose title deed was issued on 27th October, 2011 and still in the name of Mugira M'Rimberia (deceased)
8. That the defendant filed Meru Succession cause No. 500 of 2012 and Jepson Ndege (deceased) filed an objection which was allowed and the petitioner was directed to leave out the said land so that the deceased plaintiff could file this case over the same.
9. It is the evidence of P.W 1 that his late brother had been using the suit land openly since 1970 and had made various developments thereon, including planting coffee, maize, napper grass and arrow roots. That his late brother had without the permission of the defendant been in exclusive, actual, open and uninterrupted possession of the suit land for more than 12 years and the plaintiff is thus entitled to be the owner of the same under the doctrine of adverse possession.
10. 2 was M'Ikiugu M'Murithi who adopted his statement dated 1st February, 2022. He stated that the plaintiff and the defendant have been his neighbours for the last 40 years. He testified that the plaintiff has been cultivating on the suit land since 1970 and was never stopped by the defendant at any one time. That the defendant has never cultivated the suit land.
11. The plaintiff filed submissions on 5th March 2024 through the firm of Mbaabu M'Inoti & Co. Advocates wherein he gave brief facts of the case. It is submitted that the plaintiff has proved his case of adverse possession against the defendant on a balance of probabilities and is therefore entitled to the orders sought. The plaintiff's counsel cited the *Limitation of Actions Act* Cap 22 Laws of Kenya and relied on the case of James Maina Kinya V Gerald Kwendaka [2018] eKLR and submitted that from the analysis of the evidence on record, and the testimony of witnesses at trial, it is apparent that Jepson Ndege (the former plaintiff) openly and exclusively adversely occupied, and utilized the suit land for a



continuous period of 12 years with no quarrel by the registered owner, Mugira M'Rimberia (deceased) and the defendant, both of whom were aware of the former plaintiff's adverse use of the property to their exclusion but never bothered to evict him. That the plaintiff has satisfied the requirements for adverse possession and has thus proved his case on a balance of probabilities.

Defendant's Case

12. The defendant stated that the late Mugira M'rimberia (deceased) owned land Parcel No. Igoji/Kinoro/594 which was subdivided into Parcel Nos. Igoji/Kinoro/2498 – 2504. That the plaintiff's father owns Land Parcel No. Igoji/Kinoro/679 which is adjacent to the suit land. That the plaintiff's father is a trespasser who has breached and disregarded the common boundary between his land Parcel No. 679 and the defendant's late father's land Parcel No. 2504, and is attempted to annex the suit land. The defendant stated that his late father planted the trees and crops and other developments on the suit land which the plaintiff is now claiming to be his properties. He wondered why the plaintiff's father waited until the death of the defendant's father in the year 2010 before lodging the claim. That the plaintiff's father could not have occupied the land parcel No. 2504 since the year 1970 as the land was only registered in 2009. That the plaintiff's father only tills a small portion of the suit land on and off.
13. Kaburu Stanley testified as D.W 1 and adopted the facts contained in his replying affidavit dated 10th August 2022 as his evidence in Chief, and produced copies of the green cards, searches and cadastral area map as D exhibits 1 -4 respectively, and was cross examined and re-examined. He stated that one Francis Gitari (now deceased) who was a brother to the deceased plaintiff planted some trees on a small portion of the suit land without knowing it was the defendant's. That when they discovered that the plaintiff was using their land, they reported to the area chief.
14. Mbaabu Stanley testified as D.W 2 and adopted his statement dated 10th August 2020 as his evidence in chief. He is a brother to D.W 1. He basically gave evidence that mirrored that of D.W 1.
15. The defendant filed submissions dated 5th March 2024 through the firm of Gichunge Muthuri & Company Advocates wherein he gave a brief background of the case. It was submitted on behalf of the defendant that the plaintiff lacks capacity to prosecute the suit since he was only issued with a Grant of Letters of Administration Ad litem on 28th May 2021 over the estate of Jepson Ndege Joses Mutunga (deceased). That the powers limited and granted the plaintiff under the Grant Ad Litem were exhausted and the plaintiff was required to obtain a full grant to enjoy all rights of legal representative. The defendant's counsel cited the provisions of Sections 71(1), 73, 83, 67, 68, and 45 of the [Law of Succession Act](#) and relied on the case of Stanley Muiro Njuguna & another Vs SK [2019] eKLR and Re-Estate of Cyrus Kingori Ngotho (deceased) [2021] eKLR which cited Macfoy Vs United Africa Ltd (1961) 3 11 FR 1169.
16. It is also submitted on behalf of the defendant that the plaintiff's claim has not been proved on a balance of probabilities. The defendant's counsel relied on the case of Daniel Kimani Ruchine & others Vs Swift, Rutherford Co. Ltd & another [1977] eKLR and cited Sections 107 and 108 of the [Evidence Act](#). The court was urged to dismiss the suit with costs to the defendant.

Analysis And Determination

17. This court has carefully considered the pleadings, the evidence adduced and the submissions filed. The issues I find call for determination are -:
 - i. Whether the plaintiff has the legal capacity to prosecute the suit.



- ii. Whether the plaintiff has acquired Land parcel No. IGOJI/Kinoro/2504 through adverse possession.
 - iii. Whether the plaintiff is entitled to the reliefs sought.
18. The defendant's counsel has submitted that it is clear that the plaintiff is representing the estate of Jepson Ndege (deceased) on the authority of a Grant of Letters of Administration Ad Litem issued on 28th May 2021. That the said Grant Ad Litem produced as P exhibit 6 appointed the plaintiff as an administrator "but limited only for purposes of instituting civil suits" on behalf of Jepson Ndege Joses Mutunga (deceased). The defendant took exception to the notion that the plaintiff has capacity to prosecute this suit to conclusion. It is submitted that upon filing his application dated 5th July, 2021 to substitute the initial plaintiff with himself as the plaintiff, the powers limited and granted to the plaintiff under the Grant Ad Litem were exhausted and the plaintiff was then required to obtain a full grant to enjoy all rights of a legal representative. That a limited grant is not of equal standing to a full grant.
19. To constitute and prosecute (and also to defend) an action in respect of a deceased person, a litigant is clothed with locus upon obtaining a limited grant or a full grant of Letters of Administration. In the case of Otieno Vs Ougo & Another [1986 – 1989] EALR 468, the Court of Appeal stated as follows-;
- “...An administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception...
- ... To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to ...”
20. In this case, the plaintiff's suit was instituted by Jepson Ndege (now deceased). It is not in dispute that upon the demise of Jepson Ndege, Robert Mbaabu Joses was appointed the administrator of the deceased plaintiff and was issued with a Grant Ad Litem which was produced as P exhibit 6. Robert Mbaabu Joses was therefore substituted as plaintiff in place of the deceased. The said Grant Ad Litem as rightly conceded by the defendant, was limited only for purpose of instituting and defending civil suits on behalf of the estate of the deceased. In my view, this included taking over and prosecuting the suit herein on behalf of the deceased. Therefore, I am not persuaded that the plaintiff herein lacks capacity to prosecute the suit, and the defendant's submissions on that ground must fail.
21. The next issue is whether the plaintiff has proved that he has acquired the suit property by way of adverse possession and whether he is entitled to the reliefs sought.
22. 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 as follows-;
- “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.”
23. Section 13 of the same Act states that-;
- “(1) (1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (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 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 takes adverse possession of the land.”

24. Section 38 (1) of the same Act provides as follows-;

- (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 in place of the person then registered as proprietor of the land.”

25. In deciding whether or not the plaintiff has proved his claim for adverse possession to the required standard, in civil cases, the plaintiff must prove that he has been in occupation of the suit land for a period of over twelve years, that such occupation was open, peaceful and continuous without interruption from the registered owner and that such occupation was adverse, i.e inconsistent with the right of the registered owner.

26. In *Wambugu Vs Njuguna* (1983) KLR 173, the Court of Appeal restated the principles for adverse possession as follows-;

- “1. The general principle is that until the contrary is proved, possession in law follows the right to possess.
2. In order to acquire by the statute of Limitation 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 for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed or had discontinued possession of the suit land for a continuous statutory period of twelve years to enable him, the respondent to title to that land by adverse possession.
3. The *Limitation of Actions Act*, on adverse possession contemplates two concepts: Dispossession and discontinuance of possession. 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.”

27. In the case of *Mtana Lewa Vs Kahindi Ngala Mwangandi* [2015] eKLR, the Court of Appeal (Makhandia JA) stated 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 nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

28. The Court of Appeal in the case of Ruth Wangari Kanyagia Vs Josephine Muthoni Kinyanjui [2017] eKLR while acknowledging that adverse possession is a common law principle reiterated the same by citing the India Supreme Court decision in the case of Kamakata Board of Wakf Vs Government of India & others [2004] 10 SCC 779 where the court stated thus-;

“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 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 continuous. The possession must be adequate in continuity, in publicity and in extent to show 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.”

29. Therefore, a person claiming under the doctrine of adverse possession must demonstrate actual occupation or possession of another’s land, without the consent of that other, and in such a way that the occupation or possession is open, peaceful and continuous for a period of 12 years and above. The Court of Appeal in Kwegu V Omututu [1990] eKLR observed inter alia, that-;

“The adverse character of the possession must be proved as a fact, it cannot be assumed as a matter of law from the mere exclusive possession, however long continued. The proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms (“claim or colour of title”) mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all other irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land or the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant’s use done publicly and notoriously.”

30. In the present case, the plaintiff avers that prior to his death, Jepson Ndege (deceased) had peacefully, continuously and exclusively occupied and used 0.22 hectares of LR No. Igoji/Kinoro/2504 for a period of 12 years. The plaintiff testified that the deceased entered the land in the 1970’s and since then continuously and exclusively used it. That when the defendant filed Meru Succession cause No. 500 of 2012, the plaintiff filed an objection which was allowed and the suit land was left out to enable the plaintiff file this case.

31. I have perused the documents produced by the plaintiff as exhibits. Among the said exhibits is an affidavit of protest to the making of the confirmation of grant in succession cause No. 500 of 2012 (P exh2). In that protest, the plaintiff averred that he was protesting as the owner of the land LR NO. Igoji/Kinoro/2504 which was wrongly included in the name of the deceased during subdivision while the same was part of the plaintiff’s land. One of the grounds relied on by the plaintiff (ground 3) was that “the boundary between parcels No. Igoji/Kinoro/2504 was surveyed on the area occupied



by the plaintiff on the ground and which formed part of his land since 1970's." Considering this averment, in my view the plaintiff's claim for adverse possession cannot succeed. This is because during the occupation and use, the plaintiff believed (wrongly) that the land was part of his land. He therefore was not occupying it adversely as against the true registered owner. In my view, the possession and occupation of the suit land by the plaintiff was not adverse since he believed that the same formed part of his land. In this case, there was no proof that the plaintiff was aware that the suit land belonged to the defendant, and therefore continued to occupy and use it adversely as against the defendant as the registered owner. The impression one gets is that the plaintiff believed the land was his until the defendant subdivided his land and this led to a boundary dispute.

32. Having considered the material and evidence on record, it is clear that both the plaintiff's land parcel No. Igoji/Kinoro/679 and the defendant land parcel No. Igoji/Kinoro/594 which was later subdivided into L/R Nos Igoji/Kinoro/2498 – 2504 share a common boundary. The plaintiff did not know the boundary of his land until the time when the defendant subdivided his land No. Igoji/Kinoro/594 and discovered that one of the resultant subdivisions being the suit land parcel Igoji/Kinoro/2504 had encroached into the portion that the plaintiff has been using all along. It is my opinion that the evidence adduced does not support the claim for adverse possession. Instead, this is a boundary dispute between the parties. Having regard to the foregoing analysis, it is my determination that the plaintiff has failed to prove his case on a balance of probabilities and accordingly order the plaintiff's suit dismissed with costs to the defendant.

JUDGMENT DATED, SIGNED AND DELIVERED AT MERU THIS 30TH DAY OF APRIL 2024.

C.K YANO

JUDGE

In The Presence Of

Court assistant – Tupet

Ms Mugo for defendant

Ms Kinyanjui holding brief for Mbaabu M'Inoti for plaintiff

