



Nabea & another ((As Legal Representatives Of M’Emencu M’Akwalu – Deceased)) v Gikunda (Enviromental and Land Originating Summons 83 of 1997) [2024] KEELC 3521 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3521 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 83 OF 1997**

CK YANO, J

APRIL 11, 2024

BETWEEN

CATHERINE MUTHONI NABEA 1ST PLAINTIFF

WINFRED KANARIO KABURU 2ND PLAINTIFF

(AS LEGAL REPRESENTATIVES OF M’EMENCU M’AKWALU – DECEASED)

AND

JAPHET GIKUNDA DEFENDANT

JUDGMENT

1. M’Emenchu M’Akwaru (deceased) was the original plaintiff to the suit and was substituted by the current plaintiffs who are his children. The plaintiff instituted the suit by an originating summons dated 6th August 1997 which was amended on 27th April 2009 claiming to be entitled to land parcel no. Kiegoi/Kinyanka/734 registered in the name of the defendant by adverse possession. The originating summons is supported by the evidence and facts set out in the supporting affidavit of M’Emenchu M’Akwaru.
2. The defendant filed grounds of opposition dated 20th August 1997 and a replying affidavit dated 4th September, 1997.

The Plaintiff’s Case

3. The plaintiff avers that he is the registered proprietor of land parcel No. Kiegoi/Kinyanka/985 while the defendant is the registered proprietor of land parcel No. Kiegoi/Kinyanka/734 (the suit land) which the plaintiff states is right inside his above mentioned land.
4. The plaintiff states that during gathering and consolidation, he was shown his land which he proceeded to fence all round way back in the year 1964. That when the registration process was due, the plaintiff



was registered the owner of the said land parcel No. Kiegoi/Kinyanka/985. The plaintiff avers that the defendant's parcel No. 734 was clandestinely carved out of the plaintiff's plot as the same did not have acreage.

5. The plaintiff states that he has developed his entire parcel of land. That sometime around November, 1996, while the deceased plaintiff was in the process of subdividing his land, he learnt that there is a parcel No.734 in the defendant's name measuring 0.08 hectares right inside the plaintiff's tea plantation. The plaintiff has annexed a copy of his land certificate and a copy of the register in respect of the suit land. The deceased plaintiff stated that he learnt that the defendant was registered the owner in 1980 and took title in 1984.
6. It is the plaintiff's contention that he has been in continuous, open and uninterrupted occupation of the entire parcel since early 1960's and has not been disturbed by the registered proprietor after he was registered in 1980. The plaintiff is therefore seeking to be declared and registered the proprietor of the suit land by adverse possession.
7. Catherine Muthoni Nabea, one of the plaintiffs herein testified and adopted her statement dated 7th July, 2023 as her evidence in chief and was cross-examined and re-examined. She also produced copies of the title deed and green card as P exhibits 1 and 2 respectively. Her evidence basically repeated the contents in her late father's affidavit in support of the originating summons.
8. When PW 1 was cross examined by Mr. Nyaga, learned counsel for the defendant, she stated that her late father was known as M'emenchu M'akwaru alias George Kaburu. That his land is LR No. Kiegoi/Kinyanka/985 measuring about 14 acres, while the defendant's land is No. Kiegoi/Kinyanka/734. PW 1 stated that her father inherited Parcel No. 985 measuring 2 acres from her grandfather and bought the rest by small portions. She did not know where the defendant got his land from. That they are claiming land parcel No. 734 by way of adverse possession, adding that her late father had planted coffee, tea and bananas on part of the said land, as well as on parcel No. 985. The plaintiff stated that she was aware of a scene visit made by the court on 23rd September, 2008, but did not know if a report was filed. She stated that the defendant has developed part of parcel No. 734, though forcibly. She however, did not know when the defendant carried out those developments.

Defendant's Case

9. The defendant's case is that the entire originating summons is incompetent, frivolous and an abuse of the court process. That the plaintiff is a mere trespasser who wants to alienate the defendant's land. The defendant states that he has all along tried to evict the plaintiff from the suit land but the plaintiff has forcefully and violently sought to occupy the land. That the plaintiff does not live on the disputed land and has not put up any buildings or other developments thereon.
10. It is the defendant's contention that he has been having disputes in respect of the suit land since 1984 and there have been several cases to that effect. That the application seeks to deter the defendant's right to deal with his land, land which he rightly acquired. That the plaintiff is only a neighbour and at no time has the suit land been inside the plaintiff's land. The defendant avers that he has been in occupation and cultivating his land since 1973 and denied that the plaintiff is entitled to the orders sought.
11. The defendant testified and adopted his statement dated 14th December, 2023 and filed on 20th December, 2023 as his evidence in chief. He also produced copies of the registers of the suit parcels No. Kiegoi/Kinyanka/734 and 985, a surveyor's report, scene visit report, photographs and a memorandum as D exhibit 1 – 6 respectively. He was also cross-examined and re-examined. He stated that he bought the suit land from one M'Munjuri Kathuku (now deceased) during demarcation.



12. The defendant called one witness, Geoffrey Ncubiri who also adopted his statement dated 14th December, 2023 as his evidence in chief.
13. At the close of the case, both parties filed submissions through their respective advocates on record.

Determination

14. This court has carefully considered the pleadings, the evidence and the submissions filed. I have also considered the legal authorities proffered by the parties. The court identifies the following issues for determination;
 - i. Whether the plaintiff has acquired parcel Kiegoi/Kinyanka 734 measuring approximately 0.08 ha through adverse possession.
 - ii. Whether the plaintiff is entitled to the reliefs sought.
15. A claimant for land by way of adverse possession must demonstrate that he has been in peaceful, continuous and uninterrupted occupation of the claimed land for a period in excess of twelve (12) years. The doctrine of adverse possession in Kenya is embodied in Section 7 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya. Justice Asike Makhandia J.A in *Mtana Lewa v Kabindi Ngala Mwangandi* (2005) eKLR described adverse possession as below-;

“Adverse possession is essentially a situation where a person takes possession of land and asserts right over it and the person having title neglects to take action against such person in assertion of his title for a certain period. In Kenya the period 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 license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the owner.”
16. 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 measuring 0.08 ha for a period of over twelve (12) 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.
17. In *Wambugu v Njuguna* (1983) KLR 173, the Court of Appeal restated the principles for adverse possession and held 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 of 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.”
18. 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 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.”
19. Section 13 of the same *Act* further makes provision for adverse possession as follows-;
- “(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 section 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 again takes adverse possession of the land.”
20. Section 38 (1) of the *Limitation of Action Act* provides that-;
- “(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 or lease in place of the person then registered as proprietor of the land.”
21. In the instant case, there is no dispute that land Parcel Number LR Kiegoi/Kinyanka/734 measuring approximately 0.08 Ha is registered in the name of the defendant. A copy of the title of the said property which was produced as an exhibit indicates that the land was first registered in the defendant’s name on 10th March 1980 and title issued on 17th August 1984.
22. The plaintiff’s case is that he is the registered proprietor of land parcel No. Kiegoi/Kinyanka/985 which is not in dispute herein. It is the plaintiff’s case that the suit land was clandestinely curved out of land parcel No. Kiegoi/Kinyanka/985. The plaintiff avers that the suit land is within his land No. 985. This of course is denied by the defendant who contends that they are just neighbours and accused the plaintiff of claiming his land.
23. I have considered the evidence adduced. In this case, the plaintiff claims to have acquired the whole of land parcel No. Kiegoi/Kinyanka/734 by way of adverse possession. A copy of the title produced indicates that the suit land is measuring 0.08 hectares. When PW 1 was cross examined she testified that they have planted coffee on part of the suit land. She also admitted that the defendant has developed part of the suit land. However, there was no indication of what size the alleged portion measures.



24. Further, pursuant to an order of court and with the consent of the parties, the court made a scene visit on 13th October, 2008 in the presence of the parties and their advocates. Following that scene visit, a report was filed on 23rd October, 2009. The said report indicated that both the plaintiff and the defendant use an access road to enter into their respective parcels of land. The said report further indicated that the defendant's land was not inside the plaintiff's land. This report clearly contradicts the plaintiff's allegation that the defendant's land is inside the plaintiff's parcel No. Kiegoi/Kinyanka/985.
25. From the material on record, it is clear that both the plaintiff and the defendant have their respective parcels of land. As per the report filed, the two parcels share a boundary. Whereas the plaintiff is claiming the whole of the suit land, the evidence adduced does not support the claim. Moreover, the plaintiff's witness admitted that they are only utilizing a portion of the suit land. Even then, the size of the said portion has not been given. On his part, the defendant maintained that he has developed his land. In this case, I find that there are a lot of contradictions on the plaintiff's pleadings and evidence. I cannot safely arrive at a finding that the plaintiff's case has been proved to the required standard.
26. Based on the evidence adduced and the material on record, I am not satisfied that the plaintiff has proved his case on a balance of probabilities. Consequently, the plaintiff's suit is dismissed with costs to the defendant.
27. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 11TH DAY OF APRIL 2024.

In the presence of:-

Court Assistant – Tupet

Nyaga for defendant

Ms Mugo holding brief for E. Kimathi for plaintiff

C.K YANO

JUDGE

