



REPUBLIC OF KENYA



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**Mwiti v M'arimi & another (Environmental and Land Originating Summons
E006 of 2022) [2024] KEELC 4449 (KLR) (29 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4449 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E006 OF 2022**

CK NZILI, J

MAY 29, 2024

BETWEEN

JULIUS MWITI PLAINTIFF

AND

MARGARET GAKII M'ARIMI 1ST DEFENDANT

ROSE KANYUA M'IMANYARA 2ND DEFENDANT

JUDGMENT

1. The plaintiff took out an originating summons dated 15.4.2021 seeking to be declared the owner of 0.36 ha out of L.R No. Ntima/Igoki/612 by virtue of adverse possession. The originating summons was supported by an affidavit sworn by Julius Mwiti on 4.4.2021.
2. The suit was opposed by a joint affidavit of Margaret Gakii M'Arimi and Rose Kanyua M'Imanyara, who are the defendants herein, sworn on 15.5.2023. The defendants averred that they are administrators of the estate of the late M'Arimi M'Matiri alias Ndeera M'Arimi M'Matiri. It was the defendants' case that their deceased husband jointly owned the Suitland in equal shares, having bought the land together as close relatives as well as business partners.
3. The defendants averred that during the lifetime of their late husband, they used to cultivate the land. They said that the deceased had directed that his share would be reserved for commercial plots to be developed by his children after attaining the age of majority. The defendants denied any alleged sale of his share to the plaintiff in 1991, 2009, or at all; otherwise, the plaintiff would have objected to the confirmation of the grant in Meru H.C Cause No. 117 of 2019. The defendants termed the plaintiff's claim as an attempt to disinherit the beneficiaries and or intermeddle with the estate of the deceased.
4. The defendants averred that the plaintiff had also declined to execute the necessary mutation and transfer forms to separate the land into two portions. The defendants averred that in the absence of cooperation from the plaintiff, the land registrar/surveyor should be implored to effect the transfer.



5. At the trial, Julius Mwiti testified as PW 1 and adopted his supporting affidavit dated 4.4.2022 as his evidence in chief. Briefly, PW1 told the court that in 1979, the late M'Arimi M'Magiri, the deceased, and himself jointly acquired L.R No. Ntima/Igoki/612 in equal shares as per the green card produced as P. Exh No. (1). He said that since 1979, he has been utilizing the land alone for the co-owner, now represented by the widows as the co-administrators of his estate, was living in at Mikumbune home. PW 1 said that he had developed the property by putting up several houses for himself and his children. Further, he said that the deceased, on 20.10.1991, sold his entire share to him. However, he passed on before transferring the portion to him. Eventually, the defendants, on 7.2.2009, sold the remaining portion measuring 0.25 acres to him.
6. PW1 told the court that the defendants refused to take out letters of administration, whereafter he filed a citation, which the defendants opposed, claiming that he was a stranger to the transaction. Further, PW 1 said that the defendants filed a succession cause without informing him. He urged the court to find him entitled to 0.36 ha of the suit land out of prolonged use and occupation. PW 1 relied on a copy of the official search for L.R No. Ntima/Igoki/ 612 as P. Exh No. (1), certificate of confirmation of grant as P. Exh No. (2), photographs as P. Exh No. 3 (a)-(h), copy of the sale agreement as P. Exh No. (4), (b) & (c) agreement for sale dated 7/2/2007 as P. Exh No. (5) citation to accept or refuse letters of administration as P. Exh No. (6), an answer to the citation as P. Exh No. (7) and a certificate of confirmation of grant as P. Exh No. (8).
7. In cross-examination, PW 1 termed the deceased as his uncle, while the defendants were his aunts, who participated in the 2nd sale agreement to sell and transfer the entire share of the deceased to him. He said that since 1978, he was the one who was exclusively utilizing the land, and none of the defendants or their children had utilized the land nor had they evicted him from the land.
8. Margaret Gakii M'Arimi testified as DW 1 and adopted the joint replying affidavit dated 25.5.2022 as her evidence in chief. She said the disputed land was under the joint names of the defendants and the plaintiff as per a copy of the title deed she produced as D. Exh No. (1).
9. DW 1 insisted that her late husband used to live with the plaintiff in the suit land until he grew old and sickly.
10. DW 1 said that she also used to cultivate the land until the plaintiff allegedly chased her away after objecting to his citation proceedings. Further, DW 1 told the court that her husband passed on in 1995. She denied being a signatory to the sale agreement produced as P. Exh No. (5). She said that after her husband passed on, she continued utilizing the land by planting maize and nappier grass on approximately one acre. DW 1, however, confirmed that her late husband never erected any structures on the land.
11. Rose Kanyua M'Manyara testified as DW 2 she associated her testimony with that of DW 1 that they used to till the land till 2018. She said that the intention of the deceased was to subdivide the land into plots in favor of all his children. DW 2 told the court that the plaintiff initially had developed his portion of the land, but he eventually encroached on their portion of the land.
12. At the close of the defense case, parties were directed to file and exchange written submissions by 7.4.2024. The plaintiff relied on written submissions dated 15.4.2024 and isolated three issues of the court's determination, namely:
 - i. Whether or not the plaintiff was a co-owner of the suit land and entitled to a claim of adverse possession.
 - ii. Whether or not he has proved adverse possession.



- iii. Who pays the cost of the suit?
13. On the first issue, the plaintiff submitted that it was not disputed that the suit land was co-owned by the plaintiff and the deceased with effect from 20.3.1995 in equal shares, hence governed by Section 91 of the *Land Registration Act* 2012. Relying on *Isabel Chelangat vs Samuel Tiro Rotich & 5 others* (2012) eKLR, the plaintiff submitted that the doctrine of survivorship applied and, therefore, in a joint tenancy, there was no co-owner with better rights than the other.
 14. The plaintiff submitted that the land in question was not co-owned, and that is why it was subjected to the probate cause. As to tenancy in common, the plaintiff submitted that each co-tenant has a separate portion as stated in the title, and one tenant in common can sue the other for trespass.
 15. Following from this, the plaintiff submitted that the suit for adverse possession was tenable and properly before the court. On adverse possession, the plaintiff submitted that he had met all the ingredients after the two sale agreements became null and void. Reliance was placed on *Muchanga Investments Ltd vs Safaris Unlimited Africa Ltd & others* (2009) eKLR, *David Sirona Ole Tukai vs Francis Arap Muge & others* (2014) eKLR, *Kariuki vs Kariuki* (1983) KLR 225, *Wambugu vs Njuguna* (1983) KLR 173, *Jandu vs Kirpal & another* (1975) E.A 225 and *Mtana Lewa vs Kahindi Ngala Mwangandi* (2005) eKLR.
 16. Adverse possession arises when a valid owner neglects or omits to take action against an intruder to his land who lives there as of right and commits acts inconsistent with the purpose he intended to use the land. See *Mtana Lewa vs Kahindi Ngala Mwangandi* (supra).
 17. Order 37 of the Civil Procedure Rules provides that a party seeking adverse possession must attach a copy of the title of the land he wishes to be declared as his by virtue of adverse possession. As to adverse possession out of an aborted sale agreement in *Public Trustee vs Wanduru* (1984) KLR 319, the court held that time for adversity begins to run after payment of the last installment or when the contract is terminated or repudiated. See *Peter Mbiri Michuki vs Samuel Mugo Michuki* (2014).
 18. Adverse possession must be without force, with no secrecy or evasion, openly, notoriously, continuously, and with the intention to own. See *Daniel Kimani Ruchine vs Swift Rutherford Co. Ltd & another* (1977) eKLR, *Ndiema Samburi Soti vs Elvis Kimtai Chepkeses* (2010) eKLR and *Mbui vs Maranya* (1993) eKLR.
 19. Moreso, adverse possession is a matter of evidence. There must be dispossession of and discontinuance of possession by the true owner. See *Wanje & others vs A.K Saikwa & another* (1984) eKLR and *Loise Nduta Itotia vs Aziza Said Hamisi* (2020) eKLR.
 20. The burden was on the plaintiff to prove that his possession of the land was without the permission of the true owner and that he discontinued possession and became dispossessed of half share of the suit land by acts inconsistent with the true owner's enjoyment of the soil for the purpose for which he intended to use the land. See *Chevron (K) Ltd vs Harrison Charo Wa Shutu* (2016) eKLR.
 21. A copy of the title deed produced by D.W. 1 shows that the suit land is held in common between the plaintiff and the defendants with effect from 7.9.2022 P. Exh No. (1) shows that the suit land as of 20.3.1979 was held in the plaintiff's name in half share with the late M'Arimi M'Matiri.
 22. The law is that once co-tenant to property held in defined shares dies the share of the tenant is not affected by the death. The two have separate interests only that it is undivided unlike in joint proprietorship. The doctrine of survivorship does not apply in tenancy in common. In this respect, the only share that devolved to the defendants was the half share. Parties should, therefore, have severed the tenancy in common for the plaintiff to retain his share as 0.307 ha. See *Isabel Chelangat vs Samuel Tiro*



- Rotich (supra). Unfortunately, D. Exh No. (1) shows that the shares for the three joint owners are not defined. The plaintiff appears to have merged or united his tenement with that of the two defendants.
23. Both parties have unity of possession, unity of interest, unity of title and unity of time. No one co-owner has a better right to the property than the other. Both hold one estate. See Isabel Chelangat vs Samuel Tiro Rotich (supra).
 24. Given the current status of the title, can the plaintiff seek adverse possession against the defendants? Upon the merger of his half share with the administrators of the estate of the co-tenant, the plaintiff lost the opportunity to claim the other half by virtue of adverse possession, even if the right had accrued by 2007. Had the plaintiff sought a partition or the subdivision of the land before the issuance of the title deed on 7.9.2022, perhaps adverse possession would have been maintainable.
 25. The ouster of the registered owner occurs through exclusive occupation, development, and acts inconsistent with the purpose for which the true owner intended to use the soil. There must be a hostile title to the true owner. The plaintiff cannot sustain a claim against himself after 2022.
 26. It is also not possible for time to start running against the land. In Gatimu Kinyaru vs Muya Gathangi (1976) eKLR, the court held that where there is a successful claim by adverse possession, there is a total ouster of the owner from the title, and there is no room for a tenancy in common or a joint tenancy. The court said it was all or nothing.
 27. The plaintiff cannot use the path of adverse possession, run away from the joint tenancy, or negate the title held by the three of them. See Gatimu Kinguru vs Muya Gathagi (supra). The plaintiff has not alleged fraud or mistake in the manner the title was registered under the three names. Adverse possession cannot apply to rectify the register and or cancel the registration. The name of the plaintiff was included in P. Exh No. (8). He was a beneficiary to the estate of the deceased. The plaintiff should have severed his half-share from L.R No. Ntima/Igoki/612.
 28. The upshot is that the suit is dismissed with no order as to costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 29TH DAY OF MAY, 2024

In presence of

C.A Kananu

Ochieng for Kiyuki for respondent

No appearance for the plaintiff

HON. C K NZILI

JUDGE

