



Muriungi (Suing in His Capacity as the Legal Representative to the Estate of Kathuku M'anampiu – Deceased) v M'mugambi (Environment & Land Case E001 of 2023) [2024] KEELC 4052 (KLR) (15 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4052 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E001 OF 2023**

CK NZILI, J

MAY 15, 2024

BETWEEN

JAMES GIKUNDI MURIUNGI (SUING IN HIS CAPACITY AS THE LEGAL REPRESENTATIVE TO THE ESTATE OF KATHUKU M'ANAMPIU – DECEASED) PLAINTIFF

AND

FRANCIS K. M'IGWETA M'MUGAMBI DEFENDANT

JUDGMENT

1. What is before the court is an originating summons dated 23.1.2023 in which the plaintiff suing as the legal representative of the estate of his mother, Kathuku M'Anampiu M'Anampiu (deceased), seeks to be declared the owner of ½ an acre of L.R No. Ntima/Igoki/5633 by virtue of adverse possession. It was averred that the deceased bought the land in 1970, took vacant possession and has extensively occupied and developed it to the exclusion of the owner for over fifty years.
2. At the trial James Gikundi M'Mugambi testified as PW 1 and adopted his supporting affidavit sworn on 23.1.2023 as his evidence in chief. He told the court his late mother bought the suit land, which was to be excised from L.R No. Ntima/Igoki/300, from M'Thuranira M'Arimi alias M'Thuranira M'Tuerandu in 1970, took vacant possession and settled her family therein.
3. PW 1 said the seller failed or refused to transfer the land but instead transferred it to a grandson, Stephen Thuranira Mung'ori, who colluded with the defendant and transferred it to him. The plaintiff told the court that the vendor was successfully sued in Meru SPMC No. 256 of 1985.
4. Again, PW 1 said his mother has been on the land throughout, and in 2002, she filed Meru H.C Succession cause No. 7 of 2002, which was unsuccessful due to the name change by the family and was directed to come to this court. PW 1 told the court the defendant filed Meru CMC ELC No.



- E21 of 2020 seeking to evict him from the land. The plaintiff produced a copy of a limited grant of letters of administration ad litem dated 1.9.2020, a copy of the record for L.R No. Ntima/Igoki/300, proceedings and ruling in Meru SPMCC No. 256 of 1985, letter dated 13.10.2003 from the lands department to the deputy registrar H.C Meru, ruling in Meru H.C Succession Cause No. 7 of 2002 and pleadings in Meru CM ELC No. E 21 of 2020 as P. Exh No's. 1-7. In the absence of the defense, the plaintiff was not cross-examined.
5. The defendant opposed this claim through a replying affidavit sworn on 20.2.2023. He acknowledged that L.R No. Ntima/Igoki/5633 was a subdivision of L.R No. Ntima/Igoki/300 originally belonged to M'Thuranira M'Arimi alias Stephen Thuranira Munyori and himself.
 6. The defendant averred that in 1978, he bought ½ an acre out of the original parcel from Stephen Thuranira Munyori and got registered as owner in common. He averred that the plaintiff's parents had initially trespassed into the land allegedly on the basis that they had bought ½ an acre from M'Thuranira M'Arimi.
 7. The defendant averred that he and Stephen Thuranira sought and obtained an eviction order against the plaintiff's family, which judgment was not appealed against, and a notice to vacate was issued, but the plaintiff found her way back after lodging a caution.
 8. The defendant averred that the plaintiff's mother filed Meru CMCC No. 256/1985, wherein they counterclaimed for the removal of a caution, which the lower court rejected. The defendant averred that he appealed against the order which the high court alleged in 1993.
 9. The defendant averred that the plaintiff's mother had also been charged for a forcible detainer in Meru CMC Cr. Case No. 570/2006 and also in Meru CMCC No. 183/2007, for injunction and eviction and also in Misc Application No. 57 of 2019, to stop the burial of the plaintiff's mother on the land.
 10. In his testimony, the defendant reiterated the contents of his replying affidavit and produced copies of proceedings and judgment in Meru SRMCC No. 1 of 1980; Meru CMCC No. 256/1985, Meru HCCA 28/1993, the order in Meru CMC Cr. Case No.183 of 2007, copies of judgment for Meru CMC Cr. Case No. 570 of 2006 and copies in Misc Application No. 57 of 2019 as D. Exh No. 1-6, respectively. He urged the court to find that the plaintiff's stay on the suit land has not been continuous, peaceful, and uninterrupted, for it has been beset with litigation at every turn of time.
 11. Further DW 1 said that the plaintiff has come to court under the guise of his mother and that he should not have instituted his claim on adverse possession. DW 1 told the court that he bought the land for great value, that he has been unable to use and or utilize the same, and that there should be no stay of Meru ELC No. 21 of 2021. DW 1 told the court that he was in possession of the title deed and a notice to show cause, and an eviction order was issued some while ago, and the plaintiff ought to vacate the land.
 12. In cross-examination, DW 1 told the court that he bought the land from Stephen Thuranira Mugendi in 1978, at the time when the land was under occupation and on development by the seller's father. DW 1 admitted that the plaintiff entered the land in 1980, which is why in D. Exh No. (1) a suit was filed on 31.1.1980 for vacant possession after the plaintiff allegedly erected a temporary structure on the land. He also admitted the existence of P. Exh No. (3) showing that the plaintiff's mother was decreed 1 acre of the land. DW 1 said an eviction order was issued and eventually executed against the plaintiff's mother. He said he took over vacant possession and developed the land with 14 rental houses, which were burned down in 1990.
 13. DW1 said that it was after 1990 that the plaintiff gained re-entry to the land and was charged with forcible detainer as per D. Exh No. (5). He said a title deed for L.R No. 5633 came out in 1998 as a



- subdivision of L.R No. 300 DW 1 said that after he bought the land on 5.10.1978, an application for correction of the name was made over the initial land owners particulars who in Meru H.C Succession Cause No. 7 of 2002 admitted that he was 15 years of age when the land was registered under his name. DW 1 said that he acquired the land following the change of names and was not aware of a prior sale of the same land to the plaintiff. He denied that the change of particulars was effected in order to defraud the plaintiff's mother of the land.
14. At the close of the defendant's case, parties were directed to file written submissions by 6.3.2024. The defendant relied on written submissions dated 20.2.2024. The defendant submitted that from D. Exh No's. 1-6, it is clear that parties herein have been in and out of court throughout, including High Court Succession Cause No. 7 of 2002 that was concluded on 1.7.2019 and a pending suit for eviction.
 15. Given the said litigation, the defendant submitted that the facts and evidence in this suit could not sustain a claim on adverse possession for the possession if any has not been peaceful, continuous, open, notorious, and uninterrupted on when time began to run he defendant submitted the same is not clear for the plaintiff was evicted from the land in 1980. However, somehow, she wriggled her way back into the land after that was followed by endless litigation. Reliance was placed on Maweu vs Lin Ranching & Farming Society (1985) KLR 430, Samuel Mwaki Waweru vs Jane Njeru Richiu C.A NO. 122 of 2001, Wambugu vs Njuguna (1983) KLR 172, M'Ikiara M'Rinkanya & another vs Gilbert Kabeere M'Mbijjwe C.A No. 124 of 2003 and Mtana Lewa vs Kahindi Ngala Mwangandi (2015) eKLR.
 16. The court has carefully gone through the pleadings, evidence tendered, and the law. The issues calling for determination are:
 - i. If the plaintiff is entitled to adverse possession.
 - ii. If the plaintiff's claim is sustainable in view of the previous suit, decrees and orders issued against his late mother.
 - iii. What is the order of costs?
 17. The plaintiff filed the suit in his capacity as the legal representative of the estate of Kathuku M'Anampiu, who had allegedly been sold and taken possession of ½ of an acre out of L.R No. Ntima/Igoki/300, whose resultant subdivisions under her occupation is L.R No. 5633 under the name of the defendant. He asked this court to declare him entitled to the portion by virtue of adverse possession. The plaintiff relied on P. Exh (3), and a ruling dated 15.4.1993 and 23.6.1999 as P. Exh No. 5 has raised fundamental issues, among them the creation of two parcels, L.R No's. Ntima/Igoki/5633 and 5634.
 18. The defendant, in paragraph 5 of his replying affidavit, avers that he bought ½ an acre of the land from Stephen Thurania Mungori, while in paragraph 6 thereof, he admits that there was trespass in the early 1970s. So, by the time the defendant acquired the land, the plaintiff was in occupation of the land, hence the reason the defendant admits in his replying affidavit that the plaintiff had trespassed into the land in the 1970's. The defendant admits that he bought ½ of the land in 1978, a resultant subdivision of L.R Ntima/Igoki/300.
 19. The defendant, however, pleaded and testified that the plaintiff was ordered to vacate the land by a court or decree as per D. Exh No. (1), that was executed and was forcefully removed from the land. Going by D. Exh No. No. (3), he says he successfully appealed in the High Court Meru Civil Appeal No. 28 of 1988 and that the order for the removal of the plaintiff from the land was confirmed.
 20. In D. Exh No. 4, the defendant had sued the plaintiff to restrain him from burying the late Fridah Kinya on the land, while in D. Exh No. (5), the late Kathuku M'Anampiu was charged with an offense of forcible detainer of L.R No. Ntima/Igoki/5633. The defendant relied on D. Exh No. 6 to demonstrate



- that the plaintiff's alleged peaceful, open, exclusive, and notorious occupation of the land has not been adverse to his rights.
21. Additionally, he pleaded that there was also Meru ELC No. E021 of 2020 and Meru H.C Succession Cause No. 7 of 2002, which was concluded on 1.7.2019.
 22. From P. Exh No. (6) it appears the probate court did not pronounce itself on the issues of proprietary interest or fraud over the acquisition of the suit premises between the parties herein.
 23. In D. Exh No. (5), the trial court did not find the late Kathuku M' Anampiu guilty of forcible detainer. The court observed that there were several pending civil cases on the dispute. On the aspects of forcible eviction or execution of a decree against the plaintiff or his late mother as per D. Exh No. (1) & (3) this court was not supplied with any executed decree thereof.
 24. It is trite law that a decree must be executed within 12 years; otherwise, it becomes stale under Section 4 (4) of the *Limitation of Actions Act*. In Willis Onditi Odhiambo vs Gateway Insurance Co. Ltd (2014) eKLR, the court of appeal observed that the term action covers the execution of judgments, and the time to execute could not be extended once expired. See M'Ikiara M'Rinkanya & another Gilbert Kabeere M'Mbijiwe (supra).
 25. The material regarding previous litigation brought by the defendant did not establish that the issues herein formed part of those pleadings. My finding is that the issue of adverse possession was not determined to finality by any court of competent jurisdiction, for the doctrine of res judicata to apply, as held in IEBC vs Maina Kiai & others (2017) eKLR.
 26. Adverse possession occurs when a true owner omits or neglects to remove an intruder to his land who enters into remains and conducts acts adverse to the owner's use of the and with an intention to possess for a period of 12 years. See Mtana Lewa vs Kahindi Mwangandi (supra), Maweu vs Lin Ranching (supra) and Wambugu vs Njuguna (supra).
 27. Adverse possession out of an aborted sale agreement was discussed in Jandu vs Kilpa (1975) E. A 225. The court said adverse possession does not occur until the end of the permitted period of entry. In Wambugu vs Njuguna (supra), the court observed that where a claimant pleads the right to land under an agreement and, in the alternative, seeks an order for adverse possession, the possession is deemed to have become adverse to that of the owner after payment of the last installment of the purchase price and if he has occupied the land for 12 years after such payment. See also Public Trustee vs Wanduru Ndegwa (1984) KLR 314.
 28. In Peter Mbiri Michuki vs Samuel Mugo Michuki (2014) eKLR, the court cited Public Trustee vs Wanduru (supra) that adverse possession is not affected by the provisions of the *Land Control Act* for the claim is by operation of the law. Additionally, the court observed that prior to the amendment of Section 3 (3) of the *Law of Contract Act* in 2003, all that was required for a party was to satisfy the court that he either took possession of the suit property in part performance of the said oral contract or that being already in possession of the land he continued in possession in part performance of the oral contract for Section 3 (7) of the *Law of Contract Act* made exception to oral contract for sale of land complied with part performance.
 29. In Kimani Ruchine vs Swift Rutherford K. Co. Ltd (1980) KLR 10, the court observed that a claimant to adverse possession must, through evidence, show that he has used the land which he claims as of right with no force or secrecy or persuasion with the knowledge of the valid owner continuously for 12 years without interruption.



30. Further, the court cited with approval *Mwangi & another vs Mwangi* (1986) KLR 328, that the rights of a person in possession or occupation of land were equitable rights binding on the land and, therefore, survive the death of the actual owner more so against an administrator of his estate for the grant of letters of administration duties back to the date of death.
31. Regarding interruption in adverse possession in *Githu vs Ndeete* (184) KLR 776, the court observed that time ceases to run under the *Limitation of actions Act* (Cap 22) either when the owner asserts his right or when the adverse possessor admits his right. The court held that assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land.
32. In this suit, the defendant admits that he bought the land in 1978, whereas the plaintiff's family had been illegally on the land since the 1970s. P. Exh No. (2) shows that the land came under the registered name of M'Thuranira M'Ikiara and Stephen Thuranira Mungori in 1970 and 1978, respectively.
33. The defendant became the registered owner on 13.10.1978, while a caution and prohibitory order was registered, against the register by Kathuku M'Anampiu on 18.2.1988 and 3.8.1992, respectively, pursuant to Civil Case No. 256 of 1985.
34. Exh No. (3) shows that the late Karuku M'Anampiu was the one who filed Meru SPMCC No. 256 of 1985 against the defendant, among other parties. P. Exh No. (5) confirms the history of Parcel No. 300 and how it was registered under the defendant and subsequently partitioned into L.R no. Ntima/Igoki/5633 and 5634, the former, in favor of the defendant on 22.1.1998.
35. By the time the land came under the name of the defendant in 1998, there is no evidence that the plaintiff's family and, in particular, his mother had been evicted from the suit land from the time that the defendant admitted in his pleading that trespass occurred in 1970. In my view, therefore, there is evidence that the plaintiff's late mother was on the land as an intruder asserting adverse rights, including undertaking activities inconsistent with the purpose for which the defendant intended to use the land.
36. Eviction of the plaintiff's late mother and her entire family has not been proved by way of an eviction decree by the defendant. Even though the defendant averred in paragraph 8 of his replying affidavit that despite the eviction exercise, the plaintiff's mother found her way back into the land and placed a caution on the title, no evidence to that effect was produced. As indicated above, the caution was placed on 18.2.1988. The same appears to have been vacated by the decision in Meru HCCAA No. 28 of 1993. Forcible detainer claim was lodged in 2006. Eviction orders were alleged to have been sought by the defendant in Meru CMCC No. 183 of 2007. There is, however, no evidence that a decree to that effect was issued and effected against the plaintiff or his late mother, before he moved to the probate court and before this court.
37. The law is that if the valid owner evicts the adverse party from the land, verbally or through legal action, and after some time, the adverse party returns and disposes him again time for adversity starts all over again. See *Manason Ogendo Afwanda vs. Alice Awiti Orende & another* (2020) eKLR. In my view, the defacto use and defacto occupation by the plaintiff on top of that of his late mother, as a matter of fact, has been proved. See *Mbui vs Maranya* (1993) eKLR. A clear intention to exclude the defendant from the land since 1978 and adversely hold it as of right has been shown by the plaintiff. The defendant lost his right to the land by being dispossessed of it and or by having discontinued possession of it.
38. In *Wambugu vs Njuguna* (supra), the court observed that discontinuance of the proprietor is what defeats his title by acts that are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The court observed that the proper way of assessing the proof of adverse possession is whether or not the title holder has been disposed of or has discontinued his possession of the statutory



period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.

39. In *Mtana Lewa vs Kahindi Ngala Mwagandi*, the court held that adverse possession accrues when the person in whom this right has accrued takes action by applying for court orders of adverse possession due to default or inaction by the owner. In *Samuel Kihamba vs Mary Mbaisi* (supra), the court observed that a claimant must prove apparent dispossession of the land from the land owner with the intention to have the land.
40. Looking at the circumstances of this suit, I think the plaintiff has demonstrated the intention of dispossessing not only the initial owner but also the successor in title in the open, without secrecy, and with the sole intention of acquiring ownership. By the time the originating summons was filed, the plaintiff had been in possession of the land for over fifty-three years. In *Isaac Cypriano Shingore vs Kipketer Togom* (2016) eKRL, the court cited *Githu vs Ndeete* (supra) and *Benson Mukuwa Wachira vs Assumption Sisters of Nairobi Registered Trustees* (2016) eKLR, that for the interruption to occur, the proprietor must evict or eject the trespasser.
41. The upshot is that I find that the plaintiff has proved his suit to the required standard to be entitled to the relief of adverse possession.
42. The plaintiff is declared as entitled to ½ acre of L.R No. Ntima/Igoki/5633 by virtue of adverse possession. The defendant is directed to sign the subdivisions and transfer forms in favour of the plaintiff within 2 months in default of which the Deputy Registrar of this court shall sign them.
43. Costs to the plaintiff.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 15TH DAY OF MAY, 2024

In presence of

C.A Kananu

Plaintiff

Miriti for the plaintiff

Mokua for the defendant

HON. C K NZILI

JUDGE

