



Mwaura v Joreth Limited & 2 others (Environment & Land Case 189 of 2009) [2024] KEELC 4181 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4181 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 189 OF 2009**

JA MOGENI, J

MAY 9, 2024

BETWEEN

JOSEPH KARANJA MWAURA PLAINTIFF

AND

JORETH LIMITED 1ST DEFENDANT

CHRISTOPHER MAINA WAMBUGU 2ND DEFENDANT

NANCY WANGECHI MAINA 3RD DEFENDANT

JUDGMENT

1. The suit was commenced through Originating Summons dated 27/04/2009 against the Defendants, claiming to be entitled to become registered as proprietor of the suit premises also known as Plot No. 498, Thome Farmers No. 5 Limited and now known as LR No. 13330/386. The Plaintiff therefore seeks determination against the Defendants on the issue of ownership and for the following orders: -
 - a. That Joseph Karanja Mwaura be declared to have acquired title by adverse possession to the suit premises known as Plot No. 498 Thome Farmers No. 5 Limited and also known as LR No. 13330/386.
 - b. That the registration of Christopher Maina Wambugu and Nancy Wangechi Maina as proprietors of L.R. No. 13330/386 and or any other persons deriving title from Joreth Limited based on the land previously known as Plot No.498 and now known as L.R. No. 13330/386 be cancelled forthwith and the Land Registrar do rectify the register to enter the name of the Plaintiff as registered proprietor of the said property in place of the 2nd and 3rd Defendants or anyone deriving title from the Defendants.
 - c. The costs of these proceedings be borne by the Defendants.



2. The Originating Summons is brought under the provisions of Order XXXVI of the Civil Procedure Rules, Section 38 of the Limitation of Actions Act, Section 28 and 30 of the Registered Land Act (now repealed) and other provisions of the Law.
3. The summons is premised on the grounds cited in the application and particularly the annexed Affidavit of Joseph Karanja Mwaura, the Plaintiff herein, sworn on 27/04/2009.
4. The Originating Summons is opposed vide a Replying Affidavit sworn by Dr. Jonathan Ciano, a manager of the 1st Defendant company herein on 2/12/2022 and a Replying Affidavit sworn by Christopher Maina Wambugu, on behalf of the 2nd & 3rd Defendants herein on 5/08/2009.
5. Upon pleadings being closed, the suit proceeded by way of viva voce evidence. The Plaintiff called one witness who testified on 30/10/2023. The 1st Defendant called one witness who also testified on 30/10/2023. The 2nd and 3rd Defendants called one witness who testified on 28/02/2024.

Plaintiff's Case

6. The Plaintiff claims to have been in continuous possession of the suit premises since 1995, exceeding 14 years, thereby acquiring title through adverse possession. He asserts that any claims to title by the Defendants or subsequent parties have been extinguished by his adverse possession. The Plaintiff holds a share in Thome Farmers No. 5 Limited since 1995, confirmed by Share Certificate Number 1404. He acquired the share by paying the full purchase price and has continuously occupied Plot No. 498, measuring ½ an acre, since then, engaging in agricultural activities and fencing the plot. The Plaintiff's occupation has been uninterrupted until strangers, allegedly sent by the Defendants, inspected the plot in April 2009. The Plaintiff alleges that the 1st Defendants have purportedly sold his property to the 2nd and 3rd Defendants without his knowledge or consent. Despite his request, the 2nd Defendant refused to provide a copy of the title. The Plaintiff fears the Defendants will demolish his property and has suffered injustice due to their actions. He claims to have acquired title through adverse possession and seeks redress through the court.

Plaintiff's Evidence

7. PW1 – Joseph Karanja Mwaura adopted his witness statement dated 18/01/2023 as his evidence in chief. He also produced a trial bundle dated 13/02/2023, items no. 2 – 11 as his evidence before this court marked as PW Exh 1-10 in the order they appear. PW1 testified that he purchased Plot No. 498, which is currently LR No. 13330/386, from Mr. James Mwaragu in 1995 through shares at a cost of Kshs. 375,000. He received a share certificate from Thome Farmers No. 5 Ltd on 3/02/1995 as evidence of his ownership. He asserted that he has been in continuous possession of the property since then, having fenced it and even constructed on it in 2009.
8. During cross-examination, he confirmed the authenticity of his ownership with Thome Farmers, stating that he physically entered the property in 1995 and engaged in agricultural activities on it. However, he admitted lacking documents to substantiate his possession other than the sale agreement. Furthermore, he claimed ignorance regarding any past court cases related to the property and expressed surprise at being sued in 2009 without prior knowledge of any legal disputes.
9. In re-examination, he reiterated the details of his purchase, efforts to confirm ownership, and emphasized his lack of disputes with Thome Farmers No. 5 Ltd over the property.
10. With that evidence, the Plaintiff closed his case.



Defence Case

1st Defendant

11. The 1st Defendant claims to be the registered owner of the land known as Land Reference Number 13330, registered on 19/12/2000. They assert that the suit property, LR Number 13330/386, is a subdivision of LR Number 13330 and has never been registered in the name of Thome Farmers No. 5 Limited or any other person. The 1st Defendant denies any affiliation with Thome Farmers No. 5 Limited and argues that the Plaintiff's ownership of shares in that company does not entitle him to any property owned by the 1st Defendant. They contend that the Plaintiff's alleged occupation of the suit premises without interference is not possible, as the 1st Defendant has been engaged in the subdivision of LR Number 13330 for over 30 years, part of which includes the suit property. Furthermore, they claim that the Plaintiff's possession was interrupted by a lawsuit filed by the 1st Defendant in 1992.
12. The 1st Defendant asserts that the suit property has already been sold to third parties, making the orders sought by the Plaintiff irrelevant. They argue that the Plaintiff has not presented a prima facie case with a probability of success and has not approached the court with clean hands, thus not deserving equitable relief.

2nd and 3rd Defendants

13. The 2nd Defendant, along with the 3rd Defendant (his wife), claims to be the registered proprietors of the property known as L.R.NO. 85119/312. They assert that they bought the suit premises from the 1st Defendants with vacant possession and that the Plaintiff was not in possession at the time of the purchase. They state that the Plaintiff began construction on the suit premises without their authorization, which they discovered during a visit. The 2nd Defendant reported the matter to the police, who advised it was a civil matter. They contend that the Plaintiff's actions are illegal and intended to defeat their title to the property. The 2nd Defendant filed a civil suit against the Plaintiff to restrain them from constructing on the plot. They argue that the Plaintiff has not proven ownership of the suit premises and that his suit is contradictory and misconceived.
14. Additionally, they assert that the Plaintiff's claim of possession is unfounded, as the vegetation on the land is natural, not planted by the Plaintiff. They argue that the Plaintiff's suit is fatally defective, incompetent, and an abuse of the court process, and request its dismissal.

Defendant's Evidence

15. DW1- Dr. Jonathan Ciano testified that he works for Joreth Limited. He filed a replying affidavit dated 2/12/2022 which he adopted as his evidence in chief together with his bundle of documents at page 5-108 as his exhibits. He marked the documents as 2-9. DW1 testified that LR No. 13330/386 originated from the amalgamation of LR 4920/3 and 4921/3, approved by the Board of Directors to facilitate the sale of the properties. In 1992, when a sale to Thome Ltd was frustrated, Joreth filed HCCC 6206 of 1992 to reclaim its land. The court settlement in 2002 returned the land to Joreth, inviting anybody who was a trespasser beyond the 22 who were sued to take advantage of the order. Advertisements and publications were made, with copies provided, including adverts in the Daily Nation on 7/04/2006 for the sale of the suit property.
16. During cross-examination, DW1 affirmed the authenticity of documents regarding the sale and transactions related to LR No. 13330/386. However, he couldn't confirm if the Plaintiff saw the adverts or was aware of the sale. He also testified that the 2 titles were owned by Joreth since 1960s. at page 33, there is a resolution where Joreth Ltd agreed to sell the 2 parcels and the resolution is signed



by the 3 directors. The documents at page 34-38 relate to payments made to Thome Farmers but he is not able to relate the payments to the land sold to Thome. He never however filed anything to rebut the authenticity of those documents filed by the plaintiff. The letter at page 53 of the plaintiff's bundle was written by Magugu in his capacity as director and shareholder but not as Jareth. Survey work was done openly and in the knowledge of Joreth Ltd but they filed a case in 1992 and this is evidence of objection of Joreth to process.

17. In re-examination, he clarified that there was no sale agreement following the resolution and that certain individuals, including Samuel Mwaragu, were not sued in 1992 but were affected by the outcome as shareholders of Thome Ltd. It was also his testimony that the letter of Mr. Magugu at page 53 is not proof that there was a sale agreement.
18. With that evidence, the 1st Defendant closed its case.
19. DW2 – Christopher Maina Wambugu testified that he does transport and picking business. He confirmed that he is the 2nd Defendant and his wife is the 3rd Defendant. He adopted his replying affidavit dated 5/08/2009 as his evidence in Court. He also produced a list of documents dated 6/10/2023 with documents at page 1-41 as exhibits for the 2nd and 3rd Defendants. He also produced the Plaint for case no. 170 of 2009 at page 23.
20. During cross-examination, DW2 asserted his ownership of the suit property, acquired from the 1st Defendant after due diligence, confirming the property's vacancy. Despite a court order halting construction, the Plaintiff continued building. Referring to his witness statement, DW2 mentioned a sale agreement not provided to the court, relying instead on adverts from 2004 to 2006. He first engaged with the 1st Defendant in 2007, contradicting his witness statement's timing. DW2 questioned the Plaintiff's claim of ownership without a title and didn't address points in Joseph Wambaa's affidavit.
21. In re-examination, DW2 clarified his due diligence, conducted at the 1st Defendant's office, ensuring the property was for sale. He emphasized the vacant nature of the land upon purchase and dismissed interest in its history, focusing on the acquisition process.
22. With that evidence, the 2nd and 3rd Defendants closed their case.

Written submissions

23. At the close of hearing on 28/02/2024, the Court gave directions on filing of written submissions. By the time of writing this Judgment, it was only the Plaintiff and the 1st Defendant who had duly submitted and I have duly considered them and will refer to them in the resolution of the issues raised. The Plaintiff filed his written submissions dated 19/03/2024 on the even date and the 1st Defendant filed his written submissions dated 2/05/2024 on the even date.

Issues For Determination

24. I have considered all the material presented before this court and the following arise as the issues for determination: -
 - i. Whether the Plaintiff has acquired title through adverse possession.
 - ii. Who should bear costs?

Analysis And Determination

Whether the Plaintiff has acquired title through adverse possession.



25. In the instant case, the Court-room fight was over a claim of title of land, based on the doctrine of adverse possession. The claim arises from a contract for sale of land entered into in 1995. The Plaintiff filed his originating summons dated 27/04/2009 together with an affidavit in support seeking to be declared the owner of LR No. 13330/386 (the suit property) having acquired the same through adverse possession. It is the Plaintiff's case that he has been in occupation and possession of the suit property for a period of 14 years.
26. On the other hand, the 1st Defendant contends that LR No. 13330, which includes the suit property, has been under its ownership since 19/12/2000, and has never been registered to Thome Farmers No. 5 Limited or any other individual. They argue that the Plaintiff couldn't have occupied the premises openly and continuously without interference, as LR No. 13330 comprises over 600 subdivisions under their ownership. Additionally, they cite a suit filed in 1992 against trespassers on LR No. 13330, which was settled in 2002 by a consent order, challenging the Plaintiff's claim of uninterrupted occupation. The 1st Defendant presented documents, including an indenture from 1958 and a title deed for LR No. 13330 registered on 19/12/2000, to support their case.
27. The Plaintiff claims a right to the suit land by way of Adverse possession. Adverse possession is a common law doctrine under which a person in possession of land owned by someone else may acquire valid title to it. In Kenya, this doctrine is alive in Section 7 of the *Limitation of Actions Act* Cap 22 Laws of Kenya provides that:
- “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.”
28. Section 38 of the *Limitation of Actions Act* provides that:
- “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 (registered land), 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.”
29. In the case of *Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others* [2018] eKLR, the Court enumerated the elements required to prove adverse possession as follows:
- “Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non-permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, nec vi nec clam nec precario.”
30. In the case of *Kweyu –v- Omuto* (1999) KLR 709, the Court of Appeal (Gicheru JA) stated inter alia that:
- “By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite periods (12 years), it confers an indefeasible title upon the possessor.....



.....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.”

31. Section 17 of the *Limitation of Actions Act* provides as follows:

“Subject to Section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action, to recover land (including a redemption action) the title of that person to the land is extinguished.”

32. The period of twelve years starts to run from the moment the trespasser takes adverse possession of the land and the registered proprietor is regarded as having been dispossessed or having discontinued his possession. In the case of *Wambugu –v- Njuguna* (1983) KLR 173, the Court of Appeal held inter alia, that:

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 limitations 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.....”

33. The ingredients were recently discussed by the court of appeal in the case of *Mtana Lewa –v- Kahindi Ngala Mwangandi* (2015) eKLR where it was stated:

“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 neglect 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.”

34. The Plaintiff has to prove that he has used the suit land as of right: *Nec vi, nec clam, nec precario*. He must show that the registered owner of the land had knowledge (or means of knowing, actual or constructive) of the possession or occupation. Further, the possession must be continuous.

35. The burden of proof lies on the Applicant to prove that they have a valid claim of adverse possession on the suit land. Section 107(1) of the *Evidence Act* Cap 80 Laws of Kenya, provides:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

36. As I have indicated herein, the rule in adverse possession is that the party claiming must have been in possession for over 12 years. To prove a claim under adverse possession, all that the Plaintiff had to do was to establish that he came into occupation and took possession exclusively and has lived on the suit property continuously without interruption for a period of over 12 years.



37. One of the essential elements of the doctrine of adverse possession is that there must be sufficient degree of physical occupation of the land and that possession of the land must be actual, notorious, exclusive and continuous, and apparent and manifest to the actual landowner.
38. In the case of *Richard Wefwafwa Songoi v. Ben Munyifwa Songoi* [2020] eKLR, the Court of Appeal was of the opinion that a person claiming adverse possession must establish the following:
- i. On what date he came into possession;
 - ii. What was the nature of his possession;
 - iii. Whether the fact of his possession was known to the other party;
 - iv. How long his possession continued; and
 - v. That the possession was open and undisturbed for the requisite period of 12 years.

On what date he came into possession;

39. On when the Plaintiff came into possession of the suit property, it has been established that the sale agreement was executed on 24/01/1995, with a deposit paid on the same date and the balance settled on 3/02/1995. It has been argued that possession was taken upon completion of the purchase price, on 3/02/1995. However, it is evident that the Plaintiff only became aware of a potential change in ownership in April 2009 when informed by his workman. Despite claiming possession since February 1995, the Plaintiff's testimony reveals that construction on the suit property occurred in 2009, indicating that he did not reside there continuously from 1995. Therefore, whereas the Plaintiff claims to have taken possession in 1995, it is clear his actual occupation commenced later, which then suggests a shorter duration of possession.

What was the nature of his possession;

40. To determine the nature of possession, this Court [Maraga, JA. (as he then was) and Anzangalala and Kantai; JJ.A.] in *Samuel Kihamba v Mary Mbaisi* [2015] eKLR held:

“Strictly for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the landowner, with intention to have the land. There must be an apparent dispossession of the land from the landowner.”

41. In addressing the nature of the Plaintiff's possession, it is asserted that he claimed to have been in possession since February 1995, stating that he fenced the plot in the same year and planted crops such as bananas, napier grass, trees and other crops. However, no evidence was presented to substantiate these claims, and the photos provided to the Court were taken in 2009, not 1995. Furthermore, the Plaintiff admitted to commencing construction on the property in early 2009, indicating that he had not resided there continuously since 1995. Additionally, it is highlighted that the 1st Defendant was the registered owner of the property at the material time, and there is no evidence to suggest that the Plaintiff dispossessed or interfered with the 1st Defendant's rights. While the Plaintiff produced documents such as a sale agreement and a share certificate to assert ownership, this evidence is insufficient to prove open and physical possession of the suit property. Given the absence of improvements and actual occupation, it is not reasonable to conclude that the Plaintiff had open and physical possession of the suit property at the material time.



Whether the fact of his possession was known to the other party;

42. In considering this, it has been established that the Plaintiff did not have open and physical possession of the suit property at the material time, as evidenced by the lack of improvements and actual occupation. Therefore, it is my considered view that it was not possible for the 1st Defendant to be aware of any intrusion by the Plaintiff onto the suit property with the intention of dispossessing the 1st Defendant. Furthermore, it is evident that the 1st Defendant was aware of trespassers on LR No. 13330, initiating legal action to evict them and recover possession when he filed HCCC No. 6206 of 1992. DW1's testimony was that although the Plaintiff was not a party to that suit, its outcome affected all the shareholders of Thome Farmers No. 5 Limited.
43. Evidence before me demonstrates that the 1st Defendant did not know of the Plaintiff's alleged possession. Consequently, I am of the view that the Plaintiff's possession was not apparent to the 1st Defendant, as evidenced by the 1st Defendant's lack of awareness of the Plaintiff's alleged possession or any assertion by the Plaintiff of rights over the suit property that were inconsistent with the rights of the 1st Defendant as the owner of the property.

How long his possession continued;

44. In the decided case of Githu vs Ndeete [1984] KLR 776, the Court held that:
- “Time ceases to run under the Limitations of Actions act either when the owner takes or asserts his right or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes effective entry into land, giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the *Limitation of Actions Act*.”
45. The evidence presented before the Court delineates a complex narrative concerning the ownership and possession of LR No. 13330. While the Plaintiff contends that he acquired the plot from a shareholder of Thome Farmers No. 5 Limited, the 1st Defendant disputes this, asserting that LR No. 13330 emerged from the amalgamation of LR No. 4920/3 and LR 4921/3, facilitated by a resolution of the Board of Directors in 1974. Thome Farmers No. 5 Limited then acquired these parcels, with payments made to individual directors of the 1st Defendant between 1975 and 1977. Subsequent to this acquisition, shareholders, including the Plaintiff, were allotted individual plots and permitted to occupy them from 1976 onwards. However, the 1st Defendant initiated a trespass suit in 1992 (HCCC No. 6206 of 1992) against Thome members, signaling a challenge to their possession. The consent order given in 2002 returned the land to the 1st Defendants through a settlement. This consent order halted the running of time under the Limitations of Actions Act, as the owner asserted their rights to the suit property. Consequently, in my view, the Plaintiff's claim for adverse possession could not be sustained beyond 2002.

Disposal orders

46. All in all, the Plaintiff has failed to established all the elements necessary for a person claiming adverse possession. The Court has not seen evidence to show that the Plaintiff entered into the suit property with the intention to dispossess the 1st Defendant. The claim for adverse possession is thus not available to him.
47. In the end, I find and hold that the Plaintiff has not proved on a balance of probabilities, that his right of action as against the Defendants had accrued as at the time of filing this suit for the suit property to



be said to have fallen into his possession pursuant to the provisions of Section 38 as read together with Sections 7, 9 and 13 of the Limitation of Actions Act.

48. For the foregoing reasons the Court is satisfied that the Plaintiff's suit has no merit and finds as follows;
- a. On the merits of the case, the Court finds that the Plaintiff has not proved the claim that he is entitled by way of adverse possession to LR No. 13330/386 also known as Plot No. 498 in Thome Farmers No. 5 Limited registered in the joint names of the 2nd and 3rd Defendants.
 - b. The Originating Summons dated 27/04/2009 is hereby dismissed.
 - c. The costs of this suit are awarded to the Defendants.

49. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 9TH DAY OF MAY, 2024

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MOGENI J

JUDGE

In the Virtual presence of:

Mr. Kingara for Plaintiff

Ms. Njueni for 1st Defendant

Mr. Gichuki for 2nd & 3rd Defendant

Caroline Sagina: Court Assistant

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