



Manasseh (Suing as the Administrator of the Estate of Manasseh Githinji Kirugu - Deceased) v Kamau & another (Both Sued as the Administrators of the Estate of Epharus Nyambura Nduati - Deceased) (Environment and Land Case 32 of 2023) [2024] KEELC 4965 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4965 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND CASE 32 OF 2023**

YM ANGIMA, J

JUNE 20, 2024

BETWEEN

MARY NYAMBURA MANASSEH (SUING AS THE ADMINISTRATOR OF THE ESTATE OF MANASSEH GITHINJI KIRUGU - DECEASED) PLAINTIFF

AND

CAROLINE WANJIKU KAMAU 1ST DEFENDANT

PAUL N. NDUATI KAMAU 2ND DEFENDANT

BOTH SUED AS THE ADMINISTRATORS OF THE ESTATE OF EPHARUS NYAMBURA NDUATI - DECEASED

JUDGMENT

A. Plaintiffs' Claim

1. By an originating summons dated 01.04.2022 brought, inter alia, under sections 7 and 38 of the [Limitation of Actions Act](#) and Order 37 of the [Civil Procedure Rules](#) the Plaintiff sought determination of the following questions:
 - a. Whether two (2) acres of land from the larger parcel No. Nyandarua/Ol Joro Orok Salient/1881 belonging to the estate of Epharus Nyambura Nduati (deceased) were a subject of trust created in favor of the Applicant subsequent to purchasing the same and taking possession.
 - b. Whether the fraudulent removal of the name of the Applicant from the list of beneficiaries of the estate of Epharus Nyambura Nduati (deceased) in Nyahururu Principal Magistrate Succession Cause No. 96 of 2007 estate of Epharus Nyambura Nduati later filed as Nakuru



High Court Succession Cause No. 549 of 2009 (transferred to Nyahururu as High Court Succession Cause No. 12 of 2019) was a breach of the said trust.

- c. Whether the Applicant is entitled to be registered as a proprietor of two (2) acres of land from parcel No. Nyandarua/Ol Joro Orok Salient/1881 by virtue of adverse possession.
 - d. Whether failure to obtain the consent of the Land Control Board in the circumstances of this case invalidated the sale of two acres of land by the deceased (represented by the Respondents) to the Applicant from parcel No. Nyandarua/Ol Joro Orok Salient/1881 and whether this Hon. Court should extend the time within which to apply for the consent of the Land Control board and a declaration that the Applicant is entitled to two (2) acres of land by way of purchase from the larger parcel No. Nyandarua/Ol Joro Orok Salient/1881.
 - e. Whether the Applicant is entitled to compensation from the estate of the deceased Respondent and how much compensation is suitable in the circumstances taking into consideration the inflation and passage of time from when the Applicant purchased the two acres.
 - f. Whether any compensation payable to the Respondent should be equal to the current value of two acres of land within the area where the subject parcel of land is situated.
2. The originating summons was supported by an affidavit sworn by the Applicant on 01.04.2022 and the annexures thereto. The Plaintiff pleaded that she was the administratrix of the estate of the late Manasseh Githinji Kirugu (Manasseh) whom she claimed had bought for valuable consideration a portion of 2 acres out of Nyandarua/Ol Joro Orok Salient/1881 (the suit property) from the late Epharus Nyambura Nduati (Epharus) whose estate the Defendants were administering vide sale agreements dated 06.06.1994, 28.06.1994 and 24.02.1995.
 3. The Plaintiff pleaded that upon purchase Epharus showed and handed possession of the said portion of 2 acres to Manasseh who fenced the same and planted trees thereon. It was pleaded that when Epharus died before he could transfer the said portion of land to Manasseh the family of the former filed Nyahururu High Court Succession Cause No. 96 of 2007 (the Succession Cause) whereby Manasseh was included as a beneficiary of 2 acres out of the suit property.
 4. The Plaintiff pleaded further that during confirmation proceedings in the succession cause the Defendant fraudulently caused the name of Manasseh to be removed from the list of beneficiaries even though other purchasers of portions of the suit property from Epharus were included in the certificate of confirmation of grant. It was contended that Manasseh's portion of 2 acres was instead given to Titus Kariko Ngatia (Titus) who was issued with a title deed No. Nyandarua/Ol Joro Orok Salient/18876. It was pleaded that thereafter Titus sub-divided the said land into Parcel No. 18956 which was registered in his name whereas the other Parcel being No. 18955 was registered in the name of his wife.
 5. It was the Plaintiff's case that when Manasseh applied for revocation of the confirmed grant in the succession cause the High Court revoked the same but referred the issue of the purchase of the 2 acres to the Environment and Land Court for determination of the following questions:
 - a. Whether want of the land control board consent and limitation of time would give rise to a claim for adverse possession.
 - b. The extent of refund and compensation available to the Plaintiff.
 6. The Plaintiff contended that by the year 2009 when the dispute with the Defendants arose, she and Manasseh had been in possession of the disputed 2 acres of land for more than 12 years hence he had acquired the same through the doctrine of adverse possession. The Plaintiff also pleaded that since



Epharus had sold and handed possession of the land to Manasseh for over 15 during then Epharus was holding it in trust for Manasseh in equity hence his estate ought to be bound by the trust.

B. Defendants' Response

7. The Defendants filed a replying affidavit sworn by Paul Nduati Kamau on the 28.04.2022 in opposition to the application. It was contended that Manasseh had failed to pay the entire purchase price of Kshs.114,000/= since he had paid only Kshs. 107,000/= thereby leaving an outstanding balance of Kshs.7,000/=. It was disputed that Manasseh was ever put in possession of the 2 acres the subject of the suit hence it was contended that the claim for adverse possession could not arise.
8. It was the Defendants' case that the disputed 2 acres was sold to Titus in 2008 and that he took possession thereof in the same year. It was further pleaded that the sale agreements between Epharus and Manasseh were null and void in law for want of the consent of the land control board hence the Plaintiff could not validly rely on them. As a result, the court was urged to dismiss the originating summons with costs for the lack of merit.

C. Trial of the Action

9. When the originating summons came up for directions, it was directed that the same shall be canvassed through oral and documentary evidence. The originating summons was to be treated as the plaintiff whereas the replying affidavit in answer thereto was to be treated as the defence to the action.
10. At the trial hereof, the Plaintiff called 3 witnesses in support of her claim whereas the Defendants called one witness. The Plaintiff adopted the contents of her supporting affidavit sworn on 01.04.2022 as her evidence in chief. She also called 2 more witnesses who testified that Manasseh had bought the 2 acres from Epharus and cultivated it for many years thereafter.
11. The 1st Defendant testified on his own behalf and on behalf of the 2nd Defendant. He adopted the contents of his replying affidavit sworn on 28.04.2022 as his evidence in chief and produced the documents in his list of documents as exhibits. He disputed that the Plaintiff was entitled to 2 acres out of the suit property. His evidence was to the effect that Epharus had sold the same property to third parties due to Manasseh's default in payment of the balance of the purchase price. It was further his evidence that Manasseh had rejected to take over the land of his own accord.

D. Directions on Submissions

12. Upon conclusion of the trial, the parties were granted timelines within which to file and exchange their respective submissions. The record shows that the Plaintiff's submissions were filed on 04.06.2024 whereas the Defendants' submissions were filed on 18.05.2024.

E. Issues for Determination

13. The court has considered the pleadings, evidence and documents on record. It is evident from the material on record that the estate of the late Epharus was distributed in the succession cause save that distribution of the disputed 2 acres claimed by the Plaintiff was deferred pending resolution of the question of what remedies are available to the estate of Manasseh before this court.
14. The court does not agree with the Defendants' submission that the Plaintiff should be strictly limited to the two (2) issues identified by the High Court in the succession cause. The court is of the view that the High Court deferred distribution of the 2 acres claimed by the Plaintiff so that this court may determine what remedies, if any, are available to the estate of Manasseh arising out of the sale agreements of 1994 and 1995 bearing in mind the issue of the consent of the Land Control Board



(LCB) and limitation of actions. The High Court was not suggesting that the only remedies which may be available in the circumstances of this case are adverse possession and monetary compensation. This is because the Plaintiff may be able to demonstrate entitlement to the 2 acres through, for instance, the doctrine of trust.

15. For the same reason, the High Court did not exclude the determination of issues such as the issue of locus standi. The court may thus legitimately consider and determine the issue of the Plaintiff's locus standi to file and prosecute the instant suit.
16. The court is thus of the view that the following are the key issues which arise for determination herein:
 - a. Whether the Plaintiff has locus standi to file or prosecute the instant suit.
 - b. Whether the Plaintiff has demonstrated her claim for adverse possession over the disputed land.
 - c. Whether the Plaintiff has demonstrated her claim to the disputed 2 acres on account of the doctrine of trust.
 - d. Who shall bear costs of the suit.

F. Analysis and Determination

Whether the Plaintiff has locus standi to file or prosecute the instant suit

17. The court has considered the material and submissions on record on this issue. The Defendant submitted that the limited grant obtained by the Plaintiff in 2012 only authorized her to be joined in the succession cause in place of Manasseh but did not allow her to file and prosecute the instant suit. The Defendants cited the case of *Lydia Ntembi Kairanya & Another -vs- Attorney General* [2009] eKLR whereby it was held that a limited grant ad litem which authorized a person to file a suit does not authorize the prosecution of the suit unless the aspect of prosecution was expressly included in the limited grant.
18. The court has noted that the limited grant issued by the court at Nakuru on 30.11.2012 authorized the Plaintiff to do at least two things on the face of it. First, it was issued for the purpose of "filing suit" until further representation is granted by the High Court. Second, it was issued for the purpose of "substituting" her in Succession Cause No. 549 of 2009. The court is, therefore, unable to agree with the Defendants' submissions that the first purpose is to be ignored altogether. The two purposes included on the face of the grant must be given their full meaning and effect. The court is thus satisfied that the Plaintiff has the requisite locus standi to file and prosecute the instant suit. The court takes the view that a litigant who is issued with a limited grant ad litem is at liberty to prosecute the suit once filed without waiting a further representation or a full grant.

Whether the Plaintiff has demonstrated her claim for adverse possession of the disputed land

19. The court has considered the material and submissions on record. The Plaintiff submitted that since the sale agreements were made in 1994 and 1995 then by the time the dispute over the claimed 2 acres arose in 2009 she and Manasseh had been in occupation for more than 12 years hence the right of Epharus to recover the 2 acres had been extinguished by operation of law and that Manasseh had acquired the land through the doctrine of adverse possession.



20. The elements of adverse possession were summarized in the case of [*Kasuwe –vs- Mwaani Investments Ltd & 4 Others*](#) [2004] 1KLR 184 as follows:

“....and in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, *Wanja vs Sakwa* No.2 [1984] KLR 284. A title by adverse possession can be acquired under the [*Limitation of Actions Act*](#) for part of the land....”

21. The court is satisfied on the basis of the material on record that Manasseh and the Plaintiff had been in occupation of the disputed 2 acres for more than 12 years from the time of taking possession in 1995. The court is further satisfied that neither the late Epharus nor the Defendants took any legal steps to evict them from the disputed portion of 2 acres which they cultivated and utilized for many years either personally or through their agent called Irife. Court has, however, noted from the copy of the green card for the suit property that the late Epharus was only registered as proprietor of the property on 14.01.2009. Prior to that, the Settlement Fund Trustees were registered as owner.

22. The computation of time for purposes of the claim for adverse possession shall therefore be reckoned from 14.01.2009 when Epharus was registered as proprietor of the suit property. A mathematical calculation indicates that by the time the Plaintiff filed the instant suit on 01.04.2022 more than 13 years had lapsed since the registration of Epharus as the proprietor of the suit property.

23. The court is of the view that since the consent of the LCB was never obtained by the parties then the sale agreements became null and void for want of consent upon expiry of 6 months from the date of the agreements. The record shows that the last of the sale agreements was dated 24.02.1995 hence the last date for seeking the consent of the LCB was 23.08.1995. In the absence of such consent the continued occupation by Manasseh and the Plaintiff became adverse to the interest of the true owner. See [*Situma -vs- Cheronogo*](#) [2007] eKLR.

24. The court is satisfied from the totality of the evidence on record that the Plaintiff has adequately demonstrated her claim for adverse possession of the disputed portion of 2 acres out of the suit property. The filing of the succession cause in 2007 for the administration and distribution of the estate of the late Epharus did not stop the running of time under the [*Limitation of Actions Act*](#) since those proceedings were not a suit or action for recovery of the suit property from the Plaintiff.

Whether the Plaintiff has demonstrated her claim to the disputed 2 acres on account of the doctrine of trust

25. The court has considered the material on record on this issue. Whereas the Plaintiff submitted that the late Epharus was holding the 2 acres in constructive trust for Manasseh upon payment of the purchase price, the Defendant contended otherwise. It was submitted that the absence of the consent of the LCB and the effluxion of time under the [*Limitation of Actions Act*](#) made it impossible for any such trust to be implied by the court.

26. The court is of the view that it is not necessary to determine the issue of trust since the court is satisfied that the Plaintiff has proved her claim on the basis of adverse possession. However, if the court were to determine the issue, there is abundant evidence on record to support a finding of trust. The court is further of the view that want of consent of the LCB cannot preclude the court from finding the existence of a trust. See [*Willy Kimutai Kitilit -vs- Michael Kibet*](#) [2018] eKLR. The court is of the view



that a trustee who is in breach of his trust obligation cannot legitimately plead the defence of limitation to evade his trust obligations. See Section 20 of the [Limitation of Actions Act](#) (Cap.22).

Who shall bear costs of the suit

27. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the [Civil Procedure Act](#) (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the Plaintiff shall be awarded costs of the suit.

G. Conclusion and Disposal Order

28. The upshot of the foregoing is that the court finds and holds that the Plaintiff has proved her claim for adverse possession of 2 acres out of the suit property. As a result, the court makes the following orders for disposal of the originating summons dated 01.04.2022:

- a. A declaration be and is hereby made that the Plaintiff has become entitled to be registered as proprietor of 2 acres out of Title No Nyandarua/Ol Joro Orok Salient/1881 (now registered as Title Nos. Nyandarua/ Ol Joro orok Salient/ 18955 & 18956) on account of the doctrine of adverse possession.
- b. The Plaintiff is not entitled to a refund of the purchase price or monetary damages in view of the remedy granted in (a) above.
- c. The Plaintiff is hereby awarded costs of the suit.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 20TH DAY OF JUNE, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

Y. M. ANGIMA

JUDGE

In the presence of:

Mr. Maina Kairu for the Plaintiffs

Mr. Gicheru Gakenia for the Defendants

C/A - Carol

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