



**Duda v Manda (Enviromental and Land Originating Summons  
40 of 2023 & Environment & Land Case (Nyahururu CM) 12 of 2019  
(Consolidated)) [2024] KEELC 4485 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4485 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 40 OF 2023 &  
ENVIRONMENT & LAND CASE (NYAHURURU CM) 12 OF 2019 (CONSOLIDATED)**

**YM ANGIMA, J**

**JUNE 6, 2024**

**IN THE MATTER OF SECTIONS 7 & 38 OF THE  
LIMITATIONS OF ACTIONS ACT, CAP. 22 LAWS OF KENYA  
(AS CONSOLIDATED WITH NYAHURURU CM ELC NO. 12 OF 2019)**

**BETWEEN**

**LUCY ODUOR DUDA ..... PLAINTIFF**

**AND**

**EMILY MUTHONI MANDA ..... DEFENDANT**

**JUDGMENT**

**A. Introduction**

1. This judgment is in respect of two consolidated suits. The first is ELCLC OS No. 40 of 2023 – Lucy Oduor Duda -vs- Emily Muthoni Manda being the Plaintiff’s claim for adverse possession of the suit property under the *Limitation of Actions Act* (Cap.22). The second is what was previously Nyahururu CM ELC No.12 of 2019 – Emily Muthoni Manda -vs- Lucy Oduor Duda being the Defendant’s claim seeking recovery of the suit property and eviction of the Plaintiff.

**B. Plaintiff’s Claim**

2. By an originating summons dated 27.06.2022 filed pursuant to Sections 7 and 38(1) of the *Limitation of Actions Act* (Cap.22) and Order 37 rule 7(1) & (2) of the Civil Procedure Rules, 2010 the Plaintiff sought the following reliefs against the Defendant:



- a. A declaration that the Applicant is entitled to be registered as the proprietor of all that Parcel known as L.R. No. Nyandarua/Ol Kalou Central/746 measuring approximately 0.037 ha by virtue of the doctrine of adverse possession.
  - b. An order do issue compelling the Respondent to execute all necessary documents to vest ownership of L.R. No. Nyandarua/Ol Kalou Central/746 to the Applicant and in default the Deputy Registrar be authorized to do so on behalf of the Respondent.
  - c. An order do issue compelling the Respondent to avail the original title deed for L.R. No. Nyandarua/Ol Kalou Central/746 to facilitate transfer and registration of L.R. No. Nyandarua/Ol Kalou Central/746 and vest ownership to the Applicant and in default and in default the District Land Registrar Nyandarua does dispense with the production of the original title deed for the said parcel at the time of registration.
  - d. That the cost of this said be awarded to the Applicant.
3. The Plaintiff's claim was that vide a sale of agreement dated 07.06.1991 her late husband David Oduor Duda (Duda) purchased the suit property then known as Plot No. 441 Ol Kalou Central from the Defendant's late husband, Peter Manda Mungai (Manda) at an agreed price of Kshs.20,000/= which Duda paid by instalments. The Plaintiff pleaded that Duda took possession and occupation of the suit property immediately upon execution of the agreement and that he later built a dwelling house and settled thereon together with his family.
  4. It was the Plaintiff's contention that although Manda did not transfer the suit property to Duda during his lifetime the latter's family has been in open, actual, continuous and exclusive possession of the suit property for over 30 years hence Manda or the Defendant had lost the right to recovery thereof and that she had acquired the same through the doctrine of adverse possession.
  5. The Defendant filed a replying affidavit sworn on 19.08.2022 denying the Plaintiff's claim for adverse possession in its entirety. It was denied that Duda had ever been in possession of the suit property. It was pleaded that he had defaulted in the payment of the balance of the purchase price in the sum of Kshs.15,000/=. It was further pleaded that the Plaintiff had only entered the suit property between 2012 and 2019 and constructed a temporary structure thereon without her consent or authority hence she had not satisfied the requirements for adverse possession as required by law.

### **C. Defendant's Claim**

6. By a plaint dated 29.10.2019 the Defendant sued the Plaintiff before the subordinate court in Nyahururu CM ELC No. 12 of 2019 seeking recovery of the suit property and the eviction of the Plaintiff from the suit property. The Defendant also sought costs of the suit.
7. The Defendant pleaded that she was the registered proprietor of the suit property and as such entitled to enjoy all the rights of a proprietor including the right to immediate possession. It was her case that during some unknown period of time the Plaintiff had wrongfully entered the suit property and constructed some temporary structures thereon where she had settled. It was further pleaded that despite issuance of a demand and notice of intention to sue the Plaintiff had failed to vacate the suit property thus rendering the suit necessary.
8. The Plaintiff filed a defence to the action dated 12.03.2019 denying liability for the Defendant's claim. It was pleaded that the late Duda had bought the suit property from Manda for valuable consideration in 1991 whereupon he took possession and settled thereon with his family. It was further pleaded that



the Plaintiff was the legal and rightful owner of the suit property by virtue of his relationship to Duda. She consequently prayed for dismissal of the Defendant's suit.

#### **D. Trial of the suit**

9. The material on record shows that the Defendant's civil suit before the subordinate court was transferred to this court whereupon it was consolidated with the instant suit vide an order made on 05.10.2022. It was also directed that the Plaintiff's originating summons shall be deemed as the main suit whereas the Defendant's claim for recovery of the suit property shall be treated as the counterclaim.
10. At the trial hereof, the Plaintiff testified on her own behalf as the sole witness. She adopted the contents of the supporting affidavit sworn on 27.01.2022 and her witness statement dated 27.03.2019 as her evidence in-chief. She then produced the documents in her trial bundle as exhibits. It was her evidence that she and her children had never vacated the suit property since they entered the same during the lifetime of Duda and that even upon his demise she had been in occupation thereof for more than 12 years prior to the filing of the originating summons. It was thus her case that she had acquired the suit property on account of the doctrine of adverse possession.
11. The Defendant similarly testified on her own behalf as the sole witness. She adopted the contents of her replying affidavit sworn on 19.08.2022, witness statement dated 06.02.2019 and further statement dated 17.01.2022 as her evidence in chief. She also produced the documents contained in her trial bundle as exhibits. It was her case that she was the registered proprietor of the suit property hence entitled to recovery thereof. It was her evidence that Duda had failed to pay the balance of the purchase price in the sum of Kshs.15,000/= as per the terms of the sale agreement dated 07.06.1991 hence the Plaintiff was not entitled to the suit property.

#### **E. Directions on Submissions**

12. Upon conclusion of the trial the parties were given timelines within which to file and exchange their respective submissions on both the suit and counterclaim. The record shows that the Plaintiff filed submissions dated 18.03.2024 whereas the Defendant's submissions were dated 17.05.2024.

#### **F. Issues for Determination**

13. The court has considered the pleadings, evidence and documents on record in this matter and is of the opinion that the following are the key issues for determination herein:
  - a. Whether the Plaintiff has proved her claim for adverse possession of the suit property.
  - b. Whether the Defendant has proved her counterclaim against the Plaintiff.
  - c. Whether the Plaintiff is entitled to the reliefs sought in the suit.
  - d. Whether the Defendant is entitled to the reliefs sought in the counterclaim.
  - e. Who shall bear costs of the consolidated suits.

#### **G. Analysis and Determination**

##### **a. Whether the Plaintiff has proved her claim for adverse possession of the suit property**

14. The court has considered the material and submissions on record on this issue. The court has noted that the Defendant's evidence at the trial was that the Plaintiff was not entitled to the suit property because the late Duda had defaulted in payment of the full purchase price as agreed with Manda. It was further the Defendant's contention that Plot No.441 which Duda intended to purchase was different



from Parcel 746 which was the subject of the instant proceedings and that the two portions of land were not related.

15. The court is of the view that payment or full payment of the purchase price is not one of the ingredients of adverse possession. The Plaintiff is not seeking enforcement or specific performance of the sale agreement dated 07.06.1991. As a consequence, the court shall not consider whether or not any of the parties to the agreement had failed to abide by its terms. The court shall focus solely on the elements of adverse possession as known to law.

16. The court has noted that in her written submissions the Defendant deliberately sought to create confusion and mislead the court into believing that Plot 441 and Parcel 746 were separate and distinct parcels which were not connected. However, the Defendant's endeavour was betrayed by her own witness statement and documentary evidence. For instance, at page 24 of her trial bundle, she stated in her statement as follows:

“Before his demise on 07.06.1985 my husband bought Plot No. 441 Ol Kalou Central which is now known and described as L.R. Nyandarua/Ol Kalou Central/746 measuring 0.037 Ha from one P.M. Kanyitta...”

It is also evident from the copy of her demand letter dated 27.11.2018 authored by the firm of Njeri Wamithi & Co. Advocates that the two numbers refer to one and the same parcel of land. This is clear from the reference of the letter which reads “Sale Of Plot No. 441 Ol Kalou Central (now Parcel No. Nyandarua/Ol Kalou Central 746)”.

17. The elements of adverse possession were summarized in the case of Kasuve –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...”

18. Similarly, in the case of Chevron (K) Limited –vs- Harrison Charo Wa Shutu [2016] eKLR it was held, inter alia, that:

“At the expiration of the twelve-year period the proprietor's title will be extinguished by operation of the law and section 38 of the Act permits the adverse possessor to apply to the High Court for an order that he be registered as the proprietor of the land. Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it. See *Littledale v Liverpool College* (1900)1 Ch.19, 21.”

19. Although the Defendant disputed that the Duda took possession of the suit property in 1991 or thereabouts and that he left the Plaintiff in occupation upon his demise in 2006, the court is persuaded by the material on record that he actually took possession, constructed a dwelling house and settled



with his family thereon during his lifetime. The material on record further shows that the Plaintiff continued in occupation of the suit property upon the death of Duda and that no steps were ever taken by Manda, the then registered owner, or the Defendant to evict them.

20. The court is unable to believe the evidence of the Defendant because she was a totally incredible witness in the matter. First, at the trial hereof she tried to mislead the court that Plot No. 441 and Parcel 746 were separate and distinct parcels of land. Second, although she had pleaded in her plaint that the Plaintiff had entered the suit property at some “unknown” date she claimed in her witness statement that she entered the land between 2012 and 2019. However, at the trial she claimed that the Plaintiff only occupied the suit property in 2019 long after the demise of Duda. Third, the Defendant’s demand letters dated 09.06.2012 and 27.11.2018 clearly called upon the Plaintiff to either pay the outstanding balance of the purchase price or to vacate the suit property which was a clear concession that she was already in occupation. Thus, it could not be said that she took possession between 2012 and 2019 as claimed by the Defendant.
21. The court is of the view that Duda’s alleged default in payment of the purchase price is of no consequence in the instant proceedings because it is clear that the consent of the land control board was not sought and obtained within 6 months from the date of the sale agreement or at all. In the premises, the agreement became null and void under Section 6 of the Land Control Act (Cap.302) on or about 07.12.1991.
22. The material on record shows that upon the demise of Duda in 2006 the Plaintiff continued in occupation of the suit property and has remained thereon to date. The court is thus of the opinion that by the time the Defendant filed her suit for eviction on 29.10.2019 the action was already time barred under Section 7 of the Limitation of Actions Act (Cap.22).
23. The court is satisfied that the Plaintiff’s occupation has been open, notorious, continuous and exclusive for a period exceeding 12 years. The court is further satisfied that the Plaintiff’s occupation was adverse and without the consent of Manda, the then registered owner, or the Defendant. The material on record shows that the Plaintiff has been occupying and utilizing the suit property as if it was her own property. The fact that there was a change of ownership from Manda to the Defendant did not interrupt the Plaintiff’s possession and neither did the change of ownership from the previous owner to Manda. See *Githu -vs- Ndeete* [1984] KLR 776. As a result, the court is satisfied that the Plaintiff has demonstrated her claim for adverse possession to the required standard.

**b. Whether the Defendant has proved her counterclaim against the Plaintiff**

24. The court has considered the material and submissions on record. The Defendant’s claim for recovery of the suit property was based on the fact that she was the registered proprietor hence entitled to immediate possession thereof. The material on record shows that she acquired the suit property from the late Manda who was her husband. It is noteworthy that the land register was opened on 19.10.1989 when Nitwirutaniree Investment Co. Ltd (the company) was registered as the proprietor (Entry No.1). The property was on 09.07.2018 transferred to Manda who was already deceased by that time. The Defendant was then, on the same date, registered as proprietor on account of transmission through succession proceedings.
25. Section 7 of the Limitation of Actions Act (Cap.22) stipulates 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.”



26. The court is of the opinion that the right to recovery of the suit property first accrued to the company as from 19.10.1989 and then to Manda with effect from 09.07.2018. Since neither of the two owners took steps for recovery of the suit property within the limitation period then their claim became time-barred by statute. The Defendant's subsequent registration as proprietor on 09.07.2018 did not revive the cause of action for reasons stated in the case of *Githu -vs- Ndeete* (supra). A right which has accrued on account of adverse possession is considered an overriding interest which runs with the land. It is thus the finding of the court that the Defendant's claim for recovery of the suit property is statute-barred under Section 7 of the *Limitation of Actions Act* (Cap.22).

**c. Whether the Plaintiff is entitled to the reliefs sought in the suit**

27. The court has already found and held that the Plaintiff has proved her claim for adverse possession to the required standard. It would, therefore, follow that the Plaintiff is entitled to the reliefs sought in the originating summons.

**d. Whether the Defendant is entitled to the reliefs sought in the counterclaim**

28. Since the court has found that the Defendant's claim for recovery of the suit property and other consequential reliefs is time-barred it would follow that the Defendant is not entitled to the reliefs sought in her suit or any one of them.

**e. Who shall bear costs of the suit and counterclaim**

29. 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 both the suit and the counterclaim.

**H. Conclusion and Disposal Orders**

30. The upshot of the foregoing is that the court is satisfied that the Plaintiff has proved her claim for adverse possession on a balance of probabilities whereas the Defendant has failed to prove her claim for recovery of the suit property since it is time-barred. As a consequence, the court makes the following orders for disposal of both suits:
- a. The Plaintiff's originating summons be and is hereby allowed in the following terms:
    - i. A declaration be and is hereby made that the Defendant's right to recover Title No. Nyandarua/Ol Kalou Central/746 has been extinguished and that the Plaintiff has become entitled to be registered as proprietor thereof by virtue of the doctrine of adverse possession.
    - ii. An order be and is hereby made directing the Defendant to execute all the necessary forms, documents and instruments to facilitate the transfer of the suit property to the Plaintiff within 30 days from the date hereof in default of which the Deputy Registrar of the court shall do so on her behalf.
    - iii. The Defendant is hereby directed to surrender the original title deed for the suit property to facilitate the Plaintiff's registration as proprietor thereof in default of which the Land Registrar – Nyandarua County shall dispense with its production.



- b. The Defendant's suit vide her plaint dated 06.02.2019 is hereby dismissed in its entirety.
  - c. The Plaintiff is hereby awarded costs of the consolidated suits.
- It is so decided.

**JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 6<sup>TH</sup> DAY OF JUNE, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

**In the presence of:**

Ms. Wanjiru Muriithi for the Plaintiff

Mr. Nderitu Komu for the Defendant

C/A - Carol

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**Y. M. ANGIMA**

**JUDGE**

