



**Kamau v Ngugi (Enviromental and Land Originating Summons
130 of 2023) [2024] KEELC 5507 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5507 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 130 OF 2023**

YM ANGIMA, J

JULY 25, 2024

BETWEEN

JOHN GITUIKU KAMAU APPLICANT

AND

SAMUEL NDIRANGU NGUGI RESPONDENT

JUDGMENT

A. Applicant's Claim

1. By an originating summons dated 19.11.2018 filed pursuant to Sections 7 and 38 of the *Limitations of Actions Act* (Cap.22), Order 37 rule 7(1) & (2) of the *Civil Procedure Rules*, 2010, and all other enabling provisions of the law, the Applicant sought the following orders:
 - a. A declaration that the Applicant is entitled by virtue of the doctrine of adverse possession to be registered as the sole and absolute proprietor of L.R. Nyandarua/South Kinangop/7346 measuring 1.458 hectares or thereabouts.
 - b. An order that the Deputy Registrar of this Honourable Court be authorized to execute all the necessary documents to facilitate the registration of the Applicant as the sole and absolute proprietor of L.R. Nyandarua/South Kinangop 7346.
 - c. The costs of the suit be awarded to the Applicant.
2. The originating summons was supported by an affidavit sworn by the Applicant on 19.11.2018 together with the annexures thereto. The Applicant pleaded that he had been in open, continuous and uninterrupted possession of Title No. Nyandarua South Kinangop/7346 (the suit property) measuring about 1.458 ha since 2002 and that he had developed the same by constructing houses and cultivating it over the years without the consent of the registered owner. In particular, it was pleaded that the Respondent had never taken any legal steps to recover the suit property since his registration



as proprietor on 30.06.2006. It was thus the Applicant's case that as a result, he had acquired the suit property through the doctrine of adverse possession.

B. Respondent's Response

3. The Respondent filed a replying affidavit sworn on 25.03.2019 in opposition to the originating summons. He pleaded that the suit property (which was initially part of Parcel 267) belonged to her maternal grandmother, Wambui Mwaura (Wambui) who transferred the same to him on 30.06.2006. It was pleaded that the Applicant's father, Bidan Kamau Kaigai (Kaigai) had at some point illegally occupied the suit property and that he had sued Wambui in Nairobi HCCC No. 519 of 1985 (the Nairobi Case) in connection to the land but lost the case. It was contended that vide an order dated 10.03.1989 made in the Nairobi Case Kaigai and his family was ordered to vacate the suit property.
4. The Respondent further pleaded that Kaigai had illegally built some houses on the suit property after his eviction in 1990 and that the Applicant had successfully attempted to re-enter the suit property in 2006 and 2007 without success. It was denied that the Applicant had been in occupation of the suit property since 2002. It was stated that the Applicant had made an attempt to re-enter the suit property only in 2007 which attempt was repulsed and the matter culminated into the institution of Naivasha Criminal No. 365 of 2007 (the criminal case) in which he was an accused person.
5. It was also the Respondent's response that the Applicant was only able to access the suit property and build a structure thereon in 2009 when he was in remand prison in respect of the criminal case. The Respondent also denied that the trees depicted in the Applicant's photographs were on the suit property. As a result, he urged the court to dismiss the claim for adverse possession.

C. Trial of the Action

6. At the trial hereof, the Applicant called 3 witnesses before closing his case. The Applicant testified as PW1 and he adopted the contents of his supporting affidavit sworn on 19.11.2008 as his evidence in-chief. He also produced the documents in his list and further list of documents as exhibits. The Applicant denied that either he or his father Kaigai had been evicted from the suit property by court bailiffs on the basis of any orders issued in the Nairobi Case. It was also his case that when his house was illegally demolished in 2007 he rebuilt it the following day while the suspects were in custody.
7. The Respondent similarly called 3 witnesses and closed his case. He testified as DW1 and adopted the contents of his replying affidavit sworn on 25.03.2019 as his evidence in-chief. He also adopted the contents of his undated witness statement filed on 25.03.2019 as part of his evidence in-chief. The gist of the Respondent's case was that the Applicant and his father were evicted from the suit property in 1990 pursuant to a court order made in the Nairobi Case and that the Applicant only regained possession in 2009 when he was in remand prison as a result of the criminal case. The Respondent thus contended that the Applicant had not made out a case for adverse possession of the suit property.

D. Directions on Submissions

8. Upon conclusion of the trial, the parties were accorded an opportunity to file and exchange their respective submissions. The parties were consequently granted timelines within which to file and exchange their submissions. The record shows that the Applicant filed written submissions dated 01.07.2024 whereas the Respondent's submissions were not on record by the time of preparation of the judgment.



E. Issues for Determination

9. The court has considered the pleadings, affidavits and evidence on record in this matter. It is evident that the Applicant is seeking adverse possession of the suit property which claim is vehemently opposed by the Respondent. The court is thus of the opinion that the following are the key issues which arise for determination herein:
- a. Whether the Applicant has proved his claim for adverse possession.
 - b. Whether the Applicant is entitled to the reliefs sought in the suit.
 - c. Who shall bear costs of the suit.

F. Analysis and Determination

a. Whether the Applicant has proved his claim for adverse possession

10. The court has considered the material and submissions on record. Whereas the Applicant contended that he had adequately demonstrated his claim for adverse possession, the Respondent contended otherwise. 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...”

11. 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.”

12. The court has considered the contradictory evidence on the question of possession of the suit property. The Applicant’s evidence was to the effect that his father Kaigai had taken occupation of the suit property in 1965 or thereabouts and that he was never evicted therefrom until his demise in 2002 despite having lost the Nairobi Case to Wambui. It was his evidence that Kaigai left him on the suit property upon his demise and that he has continued with occupation to date and that he was never been evicted despite demolition of his house in 2007 since he rebuilt it soon afterwards.



13. The court has keenly considered the evidence of DW2 who was the assistant chief of Rwanyambo since 2000. He stated as follows during cross-examination:

“...I do not remember the year Bidan was evicted from Parcel 267. I am not the one who undertook the eviction. The police officers from Njabini police station are the ones who evicted him. Bedan died in 2003 or thereabouts. He was still residing on the land. Yes, he was residing there with the plaintiff. He left his wife and the plaintiff on the suit land upon his demise...”

14. The court believes the evidence of the Applicant and DW2 that the late Kaigai was still in possession of the suit property at the time of his demise in 2002. The court further believes the Applicant’s evidence that he remained in possession of the land thereafter. There is no credible evidence on record to demonstrate that Kaigai and the Applicant were ever evicted from the suit property at any given time. In particular, there is no credible evidence on record to demonstrate that the eviction order issued on 10.03.1989 was ever executed by any court bailiffs.

15. The evidence on record only shows that the Applicant’s house was demolished on the evening of 06.09.2007 in a bid to evict him from the suit property. The court is satisfied that the attempted eviction was not successful since the prime suspects (who included the Respondent) were promptly arrested and prosecuted whereas the Applicant re-built his house on the suit property. It does not matter that the house was rebuilt while the suspects in the criminal case were in custody. The Applicant was not legally obligated to await the release of the suspects or the conclusion of the criminal case for him to rebuild his house. It must be remembered that the demolition was done without a court order to that effect hence illegal.

16. The court has noted from the evidence on record that all the defence witnesses conceded at the trial that the Applicant was cultivating and utilizing the suit property but their concern was that he was not physically resident on the land. In this regard, DW3 stated as follows during cross examination by the Applicant’s advocate:

“...Yes the plaintiff still cultivates the land. The plaintiff has a semi-permanent structure on the land but he lives in a rented house elsewhere.”

17. On his part, the Respondent stated as follows during cross-examination:

“...There is one small house on the land but the plaintiff does not reside there. The plaintiff usually cultivates the land and he plants potatoes. I do not know if the plaintiff grazes on the land...”

18. The court is thus satisfied that the Applicant has been in possession of the suit property since 2002. The court is satisfied that he has been utilizing the land by cultivating it and that he has a structure on the land. The court is further satisfied that his possession has been open, continuous and uninterrupted for a period exceeding 12 years. There is no legal requirement that an Applicant must physically reside on the claimed property. It is sufficient if he has exclusive control and is utilizing the property for his own purposes for the requisite statutory period, without the consent of the true owner.

19. The court is unable to find evidence of interruption of the Applicant’s possession in the legal sense. The material on record shows that it was Kaigai who filed the Nairobi Case against Wambui in order to vindicate his perceived property rights whilst the suit property was still part of Parcel 267. The said



suit was ultimately dismissed. The record further shows that an eviction order was issued in the said case on 10.03.1989 against Kaigai.

20. However, there is no credible evidence on record to show that Kaigai was ever evicted from the suit property within the limitation period stipulated under Section 4(4) of the *Limitation of Actions Act* (Cap.21) or at all. There is no evidence to back up the Respondent's claim that Kaigai and the Applicant were evicted by court bailiffs in 1990 pursuant to the eviction order issued on 10.03.1989. On the contrary, the evidence of DW3 who was the area assistant chief showed that the late Kaigai was still in possession of the suit property at the time of his demise in 2002 and that he left the Applicant in possession thereof. The court is of the opinion that by the time Kaigai died in 2002 the order of 1989 had already expired in 2001 under Section 4(4) of the *Limitation of Actions Act*. The court is thus satisfied that the Applicant has proved his claim for adverse possession to the required standard.

b. Whether the Applicant is entitled to the reliefs sought in the suit

21. The court has already found that the Applicant has proved his claim for adverse possession of the suit property on a balance of probabilities. It would, therefore, follow that the Applicant is entitled to the reliefs sought in the suit and any other consequential orders to facilitate his registration as the proprietor thereof.

c. Who shall bear costs of the suit

22. 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 Applicant shall be awarded costs of the suit.

G. Conclusion and Disposal Order

23. The upshot of the foregoing is that the court finds and holds that the Applicant has proved his claim for adverse possession of the suit property. As a consequence, the court makes the following orders for disposal of the suit:
- a. Judgment be and is hereby entered for the Applicant against the Respondent in the following terms:
 - i. A declaration be and is hereby made that the Applicant, John Gituiku Kamau, has become entitled to be registered as the proprietor of Title No. Nyandarua/Sough Kinangop/7346 on account of the doctrine of adverse possession.
 - ii. The Deputy Registrar of the Court is hereby authorized to execute all the necessary forms, documents and instruments to facilitate the registration of the Applicant as the proprietor of Title No. Nyandarua/South Kinangop/7346.
 - iii. The Land Registrar - Nyandarua shall dispense with production of all the documents in the possession, custody or control of the Respondent for the purpose of registration of the Applicant as proprietor of the suit property.
 - b. The Applicant is hereby awarded costs of the suit.
- It is so decided.



JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 25TH DAY OF JULY, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. Kinyua Njogu for the Applicant

Mr. David Gichuki for the Respondent

C/A - Carol

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Y. M. ANGIMA

JUDGE

