



REPUBLIC OF KENYA



KENYA LAW
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**Mburu v Gacheru & 3 others (Land Case 98 of 2023)
[2024] KEELC 5714 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5714 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
LAND CASE 98 OF 2023**

**YM ANGIMA, J
JULY 25, 2024**

BETWEEN

NAOMI WAMBUJI MBURU PLAINTIFF

AND

GRACE NJOKI GACHERU 1ST DEFENDANT

DAVID IRUNGU 2ND DEFENDANT

JOHN GACHERU 3RD DEFENDANT

STANLEY MWANGI 4TH DEFENDANT

JUDGMENT

A. Plaintiff's Claim

1. By a plaint dated 27.06.2022 and filed on 08.08.2022 the Plaintiff sought the following reliefs against the Defendants:
 - a. A declaration that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of all that parcel of land known as Nyandarua/Turasha/444 ("the suit property").
 - b. A declaration that the Defendants whether by themselves or their servants or otherwise however are wrongfully in occupation of the suit property and are accordingly trespassers on the same.
 - c. A permanent injunction restraining the Defendants whether by themselves or their servants or agents or otherwise howsoever from remaining on or continuing in occupation of the suit property.
 - d. An order for eviction against the Defendants.



- e. General damages for trespass.
 - f. Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.
 - a. Any such other or further relief as this Honourable Court may deem appropriate.
2. The Plaintiff pleaded that she was the registered proprietor of the suit property which she obtained through succession proceedings in Naivasha High Court Succession Cause No. 1 of 2018 – In the matter of the estate of Charles Mburu Shadrack (the Succession Cause). She further pleaded that sometime in 1990 the Defendants encroached upon and occupied the suit property without any lawful justification or excuse with the consequence that she suffered loss and damage particulars whereof were pleaded in the body of the plaint.

B. Defendants' Response

3. The Defendants filed a joint statement of defence and counterclaim dated 28.09.2022. By their defence, they denied the Plaintiff's claim in its entirety and put her to strict proof thereof. The Defendants pleaded that by various sale agreements made between the Plaintiff's late husband, Charles Mburu Shadrack (Mburu) and the late husband of the 1st Defendant, Mwangi Macharia alias Ayub Kimani Mwangi (Mwangi), the former sold the suit property to the latter for valuable consideration between 1989 and 1998. It was further pleaded that Mwangi had paid the full purchase price for the suit property and that Mburu had signed a transfer form and obtained consent to transfer from the relevant Land Control Board (LCB) but he died before the transfer could be effected.
4. The Defendants further pleaded that they took possession of the suit property in 1990 during the lifetime of Mburu who never sought to evict them. The Defendants further pleaded that, in any event, the Plaintiff's right to recovery of the suit property had been extinguished by operation of law under the *Limitation of Actions Act* (Cap. 22) hence the suit was untenable.
5. By their counterclaim, the Defendants reiterated the contents of the defence and pleaded that they had been in open, continuous, exclusive and uninterrupted occupation of the suit property since 1990 and that the late Mwangi was buried thereon. The Defendants pleaded that they had acquired the suit property through adverse possession and that the Plaintiff had obtained registration thereof in the succession cause through concealment of material facts.
6. As a consequence, the Defendants sought the following reliefs against the Plaintiff in their counterclaim:
- a. A declaration that the title of Naomi Wambui Mburu to land parcel number Nyandarua/Turasha/444 (suit land) measuring approximately 15 acres or thereabouts has been extinguished by the Plaintiffs in the counterclaim on account of adverse possession thereof for a period in excess of twelve 12 years in terms of the Limitations of Actions Act.
 - b. The Land Registrar be directed to execute the necessary documents to effect transfer of the whole suit land from the Defendant in the counterclaim to the Plaintiffs in the counterclaim.
 - c. The costs of the suit and counterclaim be awarded to the Plaintiffs in the counterclaim

C. Plaintiff's Rejoinder

7. The Plaintiff filed a reply to defence and defence to counterclaim dated 03.11.2022. By her reply to defence, she joined issue with the Defendants upon their defence and reiterated the contents of her



plaint. She denied any concealment of material facts in the succession cause and put the Defendants to strict proof thereof.

8. By her defence to counter-claim, the Plaintiff denied all the allegations contained therein and put the Defendants to strict proof thereof. She denied the Defendants' claim for adverse possession and denied that they had been in open, continuous, and uninterrupted occupation of the suit property and put them to strict proof thereof. As a result, she prayed for dismissal of the defence and counter-claim and for entry of judgment in her favour.

D. Trial of the Action

9. At the hearing hereof, the Plaintiff testified on her own behalf as the sole witness adopted the contents of her witness statement dated 08.08.2022 as her evidence in-chief and produced the 14 documents in her list of documents as exhibits. Her evidence was to the effect that she was the legitimate owner of the suit property and that she was not aware of any sale by the late Mburu to the late Mwangi. She, therefore, considered the Defendants to be mere trespassers on the suit property.
10. On their part, the Defendants called two witnesses at the trial. The 1st Defendant adopted the contents of her witness statement dated 07.07.2023 as her evidence in-chief. She also produced the documents in the Defendants' list of documents save the photographs whose production the Plaintiff objected to. It was the 1st Defendant's evidence that she and her children had been in open, continuous and uninterrupted possession of the suit property for over 30 years and that the late Mburu never attempted to evict them during his lifetime. The second witness was the area assistant chief who witnessed the sale agreement between the late Mburu and the late Mwangi.

E. Issues for Determination

11. The court has noted that the parties did not file an agreed statement of issues for determination but they filed separate issues. As such, the court shall frame the issues for determination as provided for under Order 15 rule 2 of the *Civil Procedure Rules*. Under the said rule, the court may frame issues from any of the following:
 - a. The allegations contained in the pleadings or answers to interrogatories.
 - b. The allegations contained in statements sworn by or on behalf of the parties.
 - c. The contents of documents produced by the parties.
12. The court has considered the pleadings, evidence and documents on record. The court is of the opinion that the following key issues arise for determination herein:
 - a. Whether the Plaintiff has proved her claim against the Defendants.
 - b. Whether the 1st Defendant has proved her counterclaim against the Plaintiff.
 - c. Whether the Plaintiff is entitled to the reliefs sought in the suit.
 - d. Whether the 1st Defendant is entitled to the reliefs sought in the counter-claim.
 - e. Who shall bear costs of the suit and counterclaim.



F. Analysis and Determination

a. Whether the Plaintiff has proved her claim against the Defendants

13. The court has considered the material and evidence on record. The Plaintiff's claim for recovery of the suit property was based on the fact that she was the registered owner thereof hence entitled to immediate possession. She considered the Defendants to be trespassers on the suit property which previously belonged to her late husband, Mburu. She denied knowledge of sale of the suit property by Mburu during his lifetime and contended that the sale and transfer documents in the Defendants' possession were forgeries.
14. The Defendants' main answer to the Plaintiff's claim was twofold. First, that the claim was time-barred under the *Limitation of Actions Act* (Cap.22) and secondly, that they had acquired the suit property on account of the doctrine of adverse possession by virtue of the longevity of their occupation.
15. Section 7 of the *Limitation of Actions Act* stipulates thus:

“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.”
16. The evidence on record, that is, the land register shows that the suit property was registered in the name of the Plaintiff's late husband, Charles Mburu Shadrack, on 12.07.1991. The evidence on record shows that the Defendants entered the suit property in 1990 or thereabouts hence they were in occupation by the time Mburu was registered as proprietor in 1991.
17. It would thus follow that the right of recovery of the suit property first accrued to Mburu with effect from 12.07.1991. Thus, he had 12 years from that date to take legal proceedings for recovery thereof. The limitation period must have expired on or about 11.07.2003 during the lifetime of Mburu. The material on record shows that Mburu died on 01.05.2006 while domiciled in Kenya. In the premises, the court is satisfied that by the time the Plaintiff acquired the suit property in the succession cause any action for recovery thereof had already expired by effluxion of time.
18. The court is of the view that the change of ownership in the succession cause would not affect the running of time under the *Limitation of Actions Act* (Cap.22). The court is thus satisfied that the Plaintiff's action for recovery of the suit property is time-barred under Section 7 of the *Limitation of Actions Act* (Cap.22). As a result, the court finds and holds that the Plaintiff has failed to prove her claim against the Defendants to the required standard.

b. Whether the 1st Defendant has proved her counterclaim against the Plaintiff

19. The court has considered the material and submissions on record. The material on record shows that the 1st Defendant is the holder of a limited grant ad litem for the estate of her late husband, Mwangi Macharia. The court has already found and held that the Plaintiff's claim for recovery of the suit property is time barred. However, it is still necessary for the court to adjudicate on the 1st Defendant's counterclaim for adverse possession because, if successful, it may lead to her registration as proprietor in her capacity as the administrator of the estate of the late Mwangi.



20. The elements of adverse possession were summarized in the case of *Kasuve v 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 v 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. Similarly, in the case of *Chevron (K) Limited v 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.”
22. The court has noted from the plaint that the Plaintiff pleaded in the original plaint that the Defendants had trespassed into the suit property in the 1990s as a consequence whereof she had suffered loss and damage. The particulars of loss and damage were enumerated as follows:
- a. The Plaintiff has been deprived of the use and quiet enjoyment of the suit property.
 - b. The Defendant’s erection, without the Plaintiff’s consent, of houses and fences on the suit property are an eye sore and have therefore defaced the suit property.
 - c. The Defendants’ felling of trees for charcoal and firewood has led to deforestation of the suit property which is a water catchment area.
 - d. The Defendants’ misuse of the suit property’s resources, including flora and fauna and the water source and poor husbandry methods has led to environmental degradation of the suit property.
 - e. The Defendants’ have utilized the resources of the suit property, including flora and fauna, water sources and kept livestock without the express knowledge, consent and authority of the Plaintiff.
23. The court is thus satisfied that the late Mwangi and his family occupied the suit property for over 12 years and that they utilized it as of right by constructing houses, fences, felling trees and enjoying the natural resources on the suit property. They also reared livestock on the suit property. There is no indication that the late Mburu ever took steps to evict them from the suit property during his lifetime by either making an effective entry into the land or filing legal proceedings for that purpose.
24. The material on record shows that the last instalment of the purchase price was made in July, 1993 hence for purposes of the claim for adverse possession that is the date from which time should start



running. The court is thus of the view that the limitation period should run with effect from that date until July, 2005. It is thus evident that by the time of Mburu's demise in 2006 he had already lost his right of recovery of the suit property. The court is therefore satisfied that the 1st Defendant has adequately proved her counterclaim for adverse possession of the suit property on a balance of probabilities as required by law.

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

25. The court has already found that the Plaintiff's claim is time-barred under the [Limitation of Actions Act](#) hence she has failed to prove her claim on a balance of probabilities. It would, therefore, follow that the Plaintiff is not entitled to the reliefs sought in the suit, or any one of them.

d. Whether the 1st Defendant is entitled to the reliefs sought in the counterclaim

26. The court has found that the 1st Defendant has adequately proved her claim for adverse possession of the suit property. It would follow that the 1st Defendant is entitled to the reliefs sought in the counterclaim together with any consequential orders to facilitate her registration as proprietor in a representative capacity.

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

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 v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the Defendants shall be awarded costs of the suit whereas the 1st Defendant shall be awarded costs of the counterclaim as well.

G. Conclusion and Disposal Orders

28. The upshot of the foregoing is that the court finds and holds that the Plaintiff has failed prove her claim against the Defendants to the required standard whereas the 1st Defendant has proved her counterclaim for adverse possession. As a consequence, the court makes the following orders for disposal of both the suit and counterclaim:

- a. The Plaintiff's suit against the Defendants be and is hereby dismissed in its entirety.
- b. The 1st Defendant's counter-claim be and is hereby allowed in the following terms:
 - i. A declaration be and is hereby made that the Plaintiff's right to recover Title No. Nyandarua/Turasha/444 has become extinguished under Section 7 of the [Limitation of Actions Act](#) (Cap.22).
 - ii. The 1st Defendant, Grace Njoki Gacheru, has become entitled to be registered as proprietor of Title No. Nyandarua/Turasha/444 on behalf of the estate of Mwangi Macharia alias Ayub Kimani Mwangi on account of the doctrine of adverse possession.
 - iii. The Deputy Registrar of the court shall sign all necessary forms, documents and instruments on behalf of the Plaintiff to facilitate the transfer of the suit property to the 1st Defendant.
 - iv. The Land Registrar – Nyandarua County shall cause the 1st Defendant to be registered as proprietor of the suit property as aforesaid in (ii) hereof and shall for that purpose



dispense with the production of all documents in the possession, custody or control of the Plaintiff.

- c. The Defendants are hereby awarded costs of the suit whereas the 1st Defendant is awarded costs of the counterclaim as well.

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. Wanjohi for the Plaintiff

Mr. Ndegwa for the Defendants

C/A - Carol

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Y. M. ANGIMA

JUDGE

