



Gichana v Mabeya & another (Environmental and Land Originating Summons E005 of 2021) [2024] KEELC 6159 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6159 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E005 OF 2021
M SILA, J
SEPTEMBER 26, 2024**

BETWEEN

JOHN KEENE GICHANA APPLICANT

AND

JOSEPH MOSWAGI MABEYA 1ST RESPONDENT

ALFRED GICHANA MABEYA 2ND RESPONDENT

JUDGMENT

1. This suit was commenced through an Originating Summons that was filed on 29 April 2021. Though the Originating Summons does not specify under what law it is lodged I can see that what the applicant principally seeks is that it be declared that he has acquired the whole of the land parcel West Kitutu/Mwakibagendi/1099 by way of adverse possession for reason that he has been in quiet, continuous, peaceful possession since 1977, which is a period of more than 12 years. The suit is opposed by the respondents who filed a replying affidavit.
2. In the Originating Summons and the supporting affidavit thereof, the applicant, deposed that his late grandfather had three wives, namely Moraa Mogire, Nyasuguta Mogire, and Nyobori Mogire. Moraa Mogire, of the first house, sired three sons one of whom was Keene Mogaka the plaintiff's father. It is deposed that the suit land was being occupied and cultivated by Keene Mogaka and his brother Kinaro Mogaka, and that the land belonged to Mogaka Mogire, who was their last-born brother. It is deposed that Keene and Kinaro agreed that the land of Mogaka Mogire was to be taken by Keene (applicant's father) and that it was him (Keene) who cultivated the suit land during his lifetime. It is further deposed that the applicant's father allocated to the applicant the suit land in the year 1977 and this is where the applicant cultivated and built on. It is averred that in 2019 the applicant came to learn that the respondents applied for letters of administration in respect of their late father (Mabeya Mogaka who was a son of Nyobonyi i.e of the third house) and caused the suit land to be transferred to the 1st respondent. The 1st respondent in turn transferred the land to one John Ogwaro Mokaya who



filed suit to evict the applicant. It is averred that some beneficiaries of the estate of Mabeya Mogaka filed an objection in the succession cause, which was allowed, and led to the cancellation of the title of the 1st respondent and the land reverted back to the name of Mabeya Mogaka. He filed a protest in the succession cause but he was advised to file an independent suit for the land hence this case. He has added that as he was preparing to file this suit, the respondents filed the suit Kisii ELC No. 31 of 2021 seeking his eviction from the land. He asserts that the suit land belongs to him as he has been in peaceful, open and uninterrupted possession for 44 years.

3. The respondents filed a replying affidavit sworn by Joseph Moswagi Mabeya, the 1st respondent. He deposed that his father, Mabeya Mogaka, was registered as proprietor of the suit land; that this was a first registration and thus the issue that the land belonged to the applicant's father or his brothers does not arise. He deposed that after his father acquired ownership the applicant's father and/or uncle trespassed into the land and were jailed for trespass. It is added that the applicant himself was also jailed on the complaint of John Mokaya when he tried to cultivate the land in 2018. It is further deposed that in 2018 the applicant's wife attempted to forcefully cultivate the land and a scuffle ensued with the 2nd respondent which led to the 2nd respondent being charged in Criminal Case No. 1079 of 2018 but the charge terminated in favour of the 2nd respondent. It is deposed that in February 2019 the applicant attempted to enter a portion of the suit land and erected a semi-permanent structure. It is pleaded that he also lodged a protest in the succession cause which was not successful and he has thus not enjoyed peaceful possession.
4. The applicant filed a further affidavit where he affirmed that he filed a protest and that the court decreed that the confirmation of grant be stayed pending determination of ownership of the land in the appropriate court and it is then that he filed this suit. On the case filed by John Ogwaro Mokaya, which is Kisii CMCC No. 11 of 2019, he averred that the same was withdrawn. He deposed that he was in occupation since 1977 and that the respondents started claiming it in 2019.
5. Directions were taken that the suit be heard by way of viva voce evidence.
6. PW -1 was the applicant himself. He acknowledged that the title is currently in the name of Mabeya Mogaka (deceased) who was a son of the third house of his grandfather and step-brother to his father. He asserted that the suit land belonged to Mogaka Mogire, who was given the land by his mother. He stated that he died unmarried in 1966 and that he was buried on the suit land. He testified that upon his death his father took over the land and used it until he was too old and unable to work it. He stated that his father started getting sick in 1975 and died in 1977; that upon his death he (applicant) started using the land. In 2018 he was arrested together with his wife upon the complaint of John Ogwaro Mokaya who had bought the land and had a title deed. The title deed showed that he got it on 5 November 2007. He discovered that succession had been done for the estate of Mabeya Mogaka and he filed an objection which led to an order for the title to revert back to the name of Mabeya Mogaka. According to him the suit Kisii CMCC No. 11 of 2019 where John Ogwaro had sued him was dismissed. He testified that the land measures 3.5 acres, is fenced with Mauritius thorn and Kei-apple and that he cultivates maize, millet, groundnuts, beans and he has planted trees and napier grass. The rest of the land is used for grazing. He stated that he has put up a semi-permanent house and had no issue from 1977 till 2018. He claimed never to have parted with possession. He testified that John Ogwaro has never stepped into the land.
7. Cross-examined, he testified that he did not know that Mabeya Mogaka got registered as proprietor at the time of adjudication until the year 2018. He acknowledged that Mogaka Mogire never got registered as proprietor; he died before adjudication. He testified that there was never a dispute between Mabeya Mogaka and his late (applicant's) father. He denied any knowledge that his father was arrested and jailed from a complaint lodged by Mabeya Mogaka. However, on being pressed on the issue he



conceded and stated that he was aware of the case which led to his father being jailed for 6 months in 1968. He claimed that his father came back to the land upon completion of the sentence. He conceded that his father had land registered in his name which is the parcel No. 1198 and it is here that his father put up his homestead. In 2018 John Ogwaro, who then had title in his name, caused him and his wife to be arrested and also filed the civil suit Kisii CMCC No. 11 of 2019 for his eviction on allegation that he had entered the land by force. He claimed to have been living in peace. He was aware that one Alfred Gichana Mabeya (2nd respondent) had an altercation with his wife around the year 2018/2019 when she was weeding crops and he struck her with a jembe. He denied that John Ogwaro was in possession of the land from 2007 and that they took over the land by force in 2018. He was aware that the respondents sued him in the suit Kisii CMCC/ELC No. 31 of 2021. Shown a picture of the house he stated that he built, he denied that he built it in 2018 and stated that he built it in 2007. He conceded that his homestead is not on the suit land but on separate land that he purchased which is the parcel No. 1934 which is separated from the suit land by one other parcel. He stated that he built the structure on the suit land for his sons.

8. Re-examined, he denied that he came to possess the land in 2018 and insisted that he had been in possession since 1977 and that it was in 2018 that his possession started being disturbed.
9. PW – 2 was Ombati Auma. He introduced himself as cousin of the applicant and that he was born in 1948. He is from the second house of their grandfather, Mogire Mogaka. He testified that the three wives of his grandfather had separate land. According to him the suit land was of Mora a the first wife of his grandfather, and was owned by Mogaka Mogire her third born son. He stated that upon his death in 1966 his land was left to be taken over by the applicant's father. He testified that the applicant's father used the land until he died and he left it to the applicant. He could not however recall when the land was handed over to the applicant. He testified that during adjudication the land was registered in name of Mabeya Mogaka to hold it on behalf of the first house since only one person was being selected per house for purposes of registration. He denied that the applicant came into the land in 2018. He stated that the applicant is the one that uses the land and that he has a house on it.
10. Cross-examined, he testified that he does not know that the suit land is registered in name of Mabeya Mogaka. He was not aware that Mabeya Mogaka had caused the arrest of the applicant's father and that he was charged and convicted since he was working in Kericho in the tea plantations from 1958 until 1962. He did not know if he came back to the land if at all he was arrested and jailed. He mentioned that he lives about 2km away from the suit land. He was not aware that a succession matter was filed by the family of the respondents. He did hear that the applicant and his wife were arrested in 2018 for trespass. He was however not aware that the 2nd respondent had an altercation with the wife of the applicant over the land. According to him the land belongs to the first house of his grandfather.
11. PW – 3 was Omosa Ochwangi, who stated that he was born in 1935 and lives about 50 metres from the suit land. His evidence was that the land belonged to Mogaka and that he died unmarried. He stated that the applicant has been living on the disputed land from 1967 to date, has built houses on the land and lives there. Cross-examined he stated that he was aware that the 2nd respondent and the wife of the applicant had a fight over the land. The reason they fought is because the applicant's wife came to cultivate the land. He insisted that it is on the suit land that the applicant lives with his wife and children and denied that he lives in adjacent land.
12. PW – 4 was Omosa Nyambane, a village elder who stated that he was born in 1950 and lives about 300 metres from the suit land. He resides in Nyakome 'B' village. He testified that the 1st respondent does not live in this village but lives in Nyakome 'A' village whereas the 2nd respondent lives in Irungu 'B' village. He stated that he is aware that the suit land belonged to Mogaka Mogire who died without



leaving a family. That upon his death his two surviving brothers agreed that the land be taken over by Keene, the applicant's father. He stated that before he died in 1977, he handed over the land to the applicant. He testified that the applicant has been on the land since then and has planted napier grass, bananas, maize and apportioned an area for grazing. He has never seen the respondents on the land. He mentioned that he has been a village elder since 1989 and knows the area well. He was not aware of any fight having ensued over the land. He testified that he came to learn that the land got registered in name of Mabeya Mogaka; on investigations he found out that he was a member of the Committee that was surveying the land and alleged that he abused his position to illegally register the land in his name. He has never seen his family using the land or living in it.

13. Cross-examined he was aware that the applicant has other land where he has built his home. He acknowledged that the applicant does not live on the land but cultivates it and has built a structure in it. There is nobody who lives in this house. He could not remember if the house was built in 2018. He testified that Mabeya Mogaka could not have been properly registered as owner of the land as he was from the third house.
14. With the above evidence the applicant closed his case.
15. DW – 1 was the Joseph Moswagi Mabeya, the first respondent. He is son of Mabeya Mogaka under whose name the suit land is registered. The registration was first done in 1968. The 2nd respondent is his brother and together they are the administrators of the estate of their late father. His evidence was that the suit land belonged to his late father and that he was using the land for cultivation; he had not built any house on it. He testified that it was in 2018 that the applicant built a small house on the land so that he could use it to lay a claim on the land. He stated that the applicant came into the land by force and built the house by force. He reported the matter to the police. In the same year, the 2nd respondent had an altercation with the wife of the applicant and he was charged. On the title to the land, he testified that upon obtaining the grant they sold the land to John Ogwaro Mokaya and transferred title to him. The said John Ogwaro sued the applicant. He testified that the father of the applicant never came back to the land after he was charged and that it was only in 2018 that the applicant made entry to the land.
16. Cross-examined, it emerged that he applied through Succession Cause No. 34 of 2007 to be sole administrator of the estate of his late father. That he was issued with a grant on 25 July 2007 and on 3 August 2007 he got himself registered as proprietor of the suit land before the grant was confirmed. On 5 November 2007 he transferred the suit land to John Ogwaro. In 2009 an objection was filed inter alia by his brother, the 2nd respondent, to have the grant revoked. The grant was duly revoked vide a ruling delivered on 19 April 2016 with the court making an order for the suit land to revert back to the Estate. In 2019 John Ogwaro, who still held title in his name, sued the applicant in the suit Kisii CMCC No. 11 of 2019. The 2nd respondent was also charged with assaulting the wife of the applicant on an alleged assault that took place on 16 March 2018. There was also a complaint made at Rioma Police Station on an allegation of Forcible Detainer against the applicant in November 2018. He reiterated that the applicant only started cultivating the land in 2018 and that is when he put up a house in order to lay claim to the land. He stated that what the village elder and Ombati Auma said was not true. He testified that there was an earlier proceeding where the applicant sued his mother which case he claimed was dismissed.
17. With that evidence the defence closed their case.
18. I invited counsel to file submissions which they did and I have taken note of these before arriving at my decision.



19. I will start by observing that the pleadings of the applicant are heavy on the contention that this land belonged to his uncle, the late Mogaka Mogire, who died without leaving any descendants and that the family agreed that his land should vest in the father of the applicant who was his elder brother. Indeed, there was a wealth of evidence on the family history and the alleged devolving of this land to the father of the applicant. I will however remain focused that what I have before me is not a case of land held in trust and neither is it a succession dispute. What I have is a case for adverse possession. Although history may help in determining how one came into possession, this court must remain steadfast and be convinced that the applicant has proved the ingredients required in sustaining a case for adverse possession. In essence the applicant must prove possession which is *nec vi, nec clam, nec precario*, that is without force without secrecy and without permission, for a continuous uninterrupted period of 12 years prior to filing suit. The burden of proof of course rests in the person who alleges. It is thus my duty to determine whether the applicant has presented sufficient evidence on a balance of probabilities that supports his case for adverse possession.
20. In his pleadings, the applicant claims to have been in possession of the suit land from 1977 to the time of filing suit. In his evidence, he stated that he took over possession in this year after his father, whom he claimed had hitherto been in possession, died. This is of course refuted by the respondents who contend that the applicant only came into possession in the year 2018 or thereabouts. I need therefore determine whether the evidence adduced supports the contention of the applicant on a balance of probabilities.
21. Since the applicant claims to have taken over possession from his late father, I will go a little further than 1977. It is common ground that the land was first registered on 29 December 1969 in the name of Mabeya Mogaka who was father to the respondents. There is of course contention by the applicant that the land ought not to have been registered in his name and insinuation that he got himself registered as proprietor because he was in the adjudication committee. There is no evidence of any fraud or any proof that the land got registered in his name by illegal means. I observe that this was a first registration and nobody filed any suit to challenge his registration as proprietor or assert in any way that he ought not to have been registered as proprietor until his death on 4 April 1987. It is also common ground, that at some point in 1969 or thereabouts, the father of the applicant tried to take possession of the suit land and Mabeya Mogaka took action by making a report to the police and criminal proceedings were commenced against him. The said proceedings and outcome thereof were not availed but it is not disputed that the father of the applicant was found guilty and he was jailed for some time. He could therefore not have been in possession at this time because he was in jail. I would think that if at all there was any objection to the proprietorship of Mabeya Mogaka, this would have been the time for this to be asserted but it is apparent that nobody came forward to challenge his registration as proprietor.
22. I observe from the evidence that during cross-examination the applicant tried to say that he was not aware of the fact that his father was arrested and jailed for being on the land but subsequently conceded that he had this knowledge when he was pressed further. That did not help his credibility as a witness.
23. In his evidence, the applicant contended that after completing his 6 month jail term, his father came back to the suit land and kept possession of the land until he died in 1977; this is of course denied by the respondents. I have no tangible evidence of possession by the father of the applicant after he came out of jail and I have no tangible evidence that the applicant's father handed over possession to the applicant at any one point when he was still alive. I also note that when he recorded his statement on 14 February 2023, the applicant stated that he was 63 years old. It would mean that he was born in 1960. He would be 17 years and still a minor in the year 1977. I doubt that he would be handed over land at that age.



24. Apart from the above, it is apparent that the applicant never settled on the suit land. He claimed to have built a structure on the land in 2007 for his sons. There is nothing to show that the structure was indeed built in 2007 and there is no evidence of any of his sons having lived in that structure. You would imagine that if anyone lived there from 2007 there would be the usual accompanying structures for such rural homes such as a pit latrine, an external kitchen, and some sort of compound. There was a picture that was produced by the applicant but it only shows a single small house with no pit latrine and no kitchen. That, to me, does not appear to be a place where people have lived from 2007. None of the applicant's sons came to court to testify and assert that they indeed lived in that structure or ever cultivated the land.
25. I have carefully analysed the evidence of PW-2, PW-3, and PW-4 and also gone through their pre-recorded statements. Nowhere in their statements do they give any year of when the applicant took possession of the suit land. They only state that he has been in possession for many years. They all state that the land was used by the father of the applicant and that he handed it to the applicant upon his death. I have already discounted this probability as shown two paragraphs above. In their oral evidence in court, PW-2 and PW-3 again never provided any year of when the applicant came to be in possession of the suit land. PW-2 stated in examination in chief that he could not recall when the applicant was handed over the suit land by his late father. I also find it unbelievable, that he would claim that he was not aware that the father of the applicant was arrested and charged for being in possession of the suit land, given that he is a cousin to the parties herein and he was born in 1940 thus about 29 years in 1969. Also, despite him insisting that he knows what happens on the suit land, he claimed not to be aware of the altercation between the 2nd respondent and the wife of the applicant which occurred in 2018. I was not persuaded as to his credibility, but even then, as I have pointed out, he gave no evidence of when the applicant came to be in possession of the suit land.
26. PW-3's written statement also does not provide any year that the applicant came to be in possession of the suit land only claiming that the land was given to the applicant by his late father which I have already discounted. In court, during examination in chief, he did testify that the applicant has been staying on the suit land from 1967 to date but this cannot be true. In 1967, the applicant was a 7 year old boy. In 1969 or thereabouts his father was arrested and jailed. Clearly, there is no possibility that the applicant would have been in possession in 1967 or soon thereafter as claimed by PW-3. The credibility of PW-3 was even made worse in cross-examination when he contended that the applicant lives on the suit land with his wife and children; he categorically denied that he does not live on a different parcel of land. This of course is an untrue statement as the applicant himself affirmed that he does not live on the suit land.
27. Similarly, PW-4 did not state when the applicant came to possess the land. His evidence as can be observed was heavy on the aspect that the land ought not to go to the third house. It will also be recalled that he could not remember when the house which is on the suit land was built.
28. As I stated earlier, the burden of proof is upon the applicant. It is the applicant who needed to provide evidence on a balance of probabilities that he took possession of the suit land in 1977 as he has claimed and continued being on the land without interruption until he filed suit. I have already pointed out that I am not persuaded on a balance of probabilities that the applicant took possession of the suit land in 1977 as he has alleged. He was a minor at that age. I find it difficult to disparage the contention of the respondents that the applicant actually took possession of the suit land in 2018 or thereabouts and the assertion that it was in 2018 that he built the one structure on the suit land. In his submissions, Mr. Momanyi, learned counsel for the applicant, pointed me to a letter addressed to his firm by the police allegedly on an investigation of Forcible Detainer that they were investigating. In the response it is alleged that the applicant has been in possession since 2007. There is not much weight that can be



given to this response. First it was never tested in court. Secondly, the report contradicts the applicant's assertion that he has been on the land since 1977. I really do not see how that can help him.

29. In essence I am not persuaded that the applicant has proved his case to the required standard. That being the case his suit is hereby dismissed with costs to the respondents.

30. Judgment accordingly.

DATED AND DELIVERED THIS 26 DAY OF SEPTEMBER 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of:

Mr. Momanyi for the applicant

Mr. Soire for the respondents

Court Assistant – David Ochieng'

