



Kathare v Muriungi (Sued as the legal administrator of Muchoka Nkariro –Deceased) (Enviromental and Land Originating Summons E002 of 2021) [2024] KEELC 6269 (KLR) (25 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6269 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2021
CK YANO, J
SEPTEMBER 25, 2024**

BETWEEN

PETER KATHARE PLAINTIFF

AND

JOSEPHAT MURIUNGI (SUED AS THE LEGAL ADMINISTRATOR OF MUCHOKA NKARIRO –DECEASED) DEFENDANT

JUDGMENT

1. By an originating summons dated 1st February, 2021 which was amended on 10th May 2022 the plaintiff claims to have acquired 10 acres out of land parcel no. Tharaka/Marimanti/1582 by way of adverse possession and prays to be registered as owner thereof.
2. The defendants filed his replying affidavit on 23rd June 2021.

The Plaintiff’s Case

3. The originating summons was supported by an affidavit sworn by the plaintiff herein on 15th February, 2021 in which he annexed copies of a certificate of official search and a grant of letters of administration issued in Marimanti from Succession Cause No. 17 of 2020.
4. The plaintiff’s case is that in or about the year 1973, he occupied Land Parcel No. Tharaka/Marimanti/1582 measuring 5.99 hectares which land was later registered under the defendant’s deceased father, one Muchoka Nkarimo(deceased), after adjudication. The defendant is the legal representative of the estate of the deceased.
5. The plaintiff averred that he has occupied the suit land even before the adjudication process begun after the defendants’ father was registered as the owner of the land. That the defendant’s deceased father has never occupied the said land, even before his demise. That the fact that the deceased knew and had



seen the plaintiff and members of his family cultivate and work on the said land for a period exceeding 12 years without any move to claim the same meant that he lost any claim over the land. The plaintiff stated that during the entire period, he has occupied the land openly and without interference from the deceased or anyone else. The plaintiff therefore, prays to be declared the rightful owner of the suit land since he had acquired the same through adverse possession.

6. At the hearing, the plaintiff testified as PW1. He adopted his statement dated 15th February, 2021 and filed in court on 8th November, 2022 as his evidence-in-chief and produced a bundle of photographs, search for N.Tharaka/ Marimanti/1582 and Letter of Administration as P. Exhibits 1-3 respectively. He was then cross-examined and re-examined.
7. The plaintiff testified that the suit land was registered in the name of his grandfather's name, one Mukindia. That after the death of Mr. Mukindia's wife she was buried on the said land.
8. PW1 testified that after the death of his grandfather, the land was left with the deceased's son, one Njeru Mukindia who started cultivating the land up to 1973 when he decided to vacate from the land and went to another land. The plaintiff stated that the said Njeru Mukindia called him together with the plaintiff's mother and gave them the suit land for cultivation. The plaintiff further stated that he had been in occupation of the land since 1973 and has been cultivating the same since then.
9. The plaintiff stated that he occupied the suit land even before the adjudication process begun. That after the adjudication process, the defendant's father, Muchoka Nkariro, was registered as the owner of the said land, though he had never occupied the land. That having known and seen the plaintiff and his family cultivate and work on the land for a period exceeding 12 years without taking any steps to claim the land from the plaintiff, the defendant's father lost any claim over the land. It is the plaintiff's contention that he has been in occupation of the land wherein he cultivates food crops openly and without any interferences from anyone, including the defendant and his father.
10. When he was cross-examined by Mr. Kaimenyi, learned counsel for the defendant, the plaintiff stated that his father owns another parcel of land. That his mother lives on the suit land. He also admitted that the family of the defendant live on the suit land. The plaintiff further admitted that he has his own land parcel No. 1949 measuring about 10 acres that is near the suit land. He stated that he lives on his own land, and that it is only recently in 2020 that he discovered that the defendant and his family are living on the suit land.
11. The plaintiff stated that when they were given titles, they were assured that everyone will be given title for the land they were staying in and working on. He stated that during demarcation he did not fill any objection since he was still in school. That he left school in form 2 in 1986, while demarcation was done in that area in 1985. PW1 further stated that his parents were alive by then and were still alive to date. The plaintiff admitted that his father was given his own land. He stated that he came to know that the suit land belonged to the defendant in the year 2020 when the area chief wrote him a letter. He admitted that the defendant's father had two wives and the both of them live on the suit land. He also admitted that the photographs he had produced as exhibits show the land occupied by the defendant. PW1 stated that the defendant surveyed the land only recently. The plaintiff stated that he was ploughing the suit land parcel No. 1592 which is in Makomango Village, while living in Irarani Village. That the two villages are separated by a river.
12. When he was re-examined by Ms. Muthoni, learned counsel for the plaintiff, the plaintiff stated that the defendant's family were not using the whole land and that they started using the suit land during the pendency of this suit. That he did not lodge a complaint during demarcation since he did not know the defendant's family had taken the land. That he has lived on the suit land together with his mother since his childhood and had never vacated therefrom.



Defendant's Case

13. The defendant stated that on 16th November, 2020 he was granted letters of administration intestate in respect of his deceased father's estate, the late Benjamin Muchoka alias Mwathi Nkariro Karinga (deceased) in Marimanti SPM Succession Cause No. 17 of 2020. He denied that the family occupied either 24.75 hectares or 5.99 hectares of the suit land, adding that the plaintiff owns a neighbouring parcel of land where he does not even live. The defendant also denied that the plaintiff has been in exclusive occupation and use of the whole suit land. The defendant stated that he was the one in occupation of the land together with his siblings. The defendant averred that his late father had two wives/homes with several children who he named all of whom are in exclusive possession of the suit land. The defendant accused the plaintiff of encroaching on their father's land by shifting the boundaries of the land parcel No. N. Tharaka/Marimanti/1582 belonging to the defendant's father and the plaintiff's land which borders that land. He termed the plaintiff's allegation that he had been in occupation of the suit land since 1973 as false since by then the plaintiff was a minor. That during the adjudication process, the plaintiff or his father who is still alive did not file any objection to the suit land being registered in the name of the defendant's late father during his lifetime. That this suit is an attempt by the plaintiff to grab the suit land.
14. In the replying affidavit, the defendant has annexed copies of the grant of letters of administration intestate, photographs, a letter from the Districts Land Registrar, Meru South/Tharaka District and a map. The defendant urged the court to dismiss the plaintiff's suit with costs.
15. At the hearing, the defendant testified as DW1 and adopted his statement dated 20th March, 2023 as his evidence-in-chief. He produced the Grant of Letters of Administration Intestate, Photographs and a copy of map as D. Exhibits 1-3 respectively. He was also cross-examined. The defendant's evidence mirrored the averments contained in the replying affidavit and which I have summarized herein above. The defendant reiterated that the plaintiff lives in Irarani Village, Kaguuma Sub-location, Tharaka Nithi County, which is about 5 kilometres away from the defendant's home. That the plaintiff has another land parcel No. 1949 which is near the suit land and which he cultivates. The defendant denied that the plaintiff buried his grandmother on the suit land. DW1 reiterated that he was born and brought up and has always lived on the suit land, and denied seeing the plaintiff cultivating the land. That the plaintiff has been cultivating on parcel No.1949.
16. The defendant pointed out that the photographs that the plaintiff produced as D.Exhibit 2 are the defendant's houses, adding that they are the ones cultivating the whole land and denied that the plaintiff was occupying any part of it.
17. When he was cross-examined by Ms. Muthoni, learned counsel for the plaintiff, the defendant confirmed that the plaintiff is his neighbour and cultivates, but does not live in land parcel No. 1949. He stated that there is a road that passes through the middle of parcel No. 1582, the suit land herein. That the suit land is measuring approximately 24.75 hectares and borders parcel No. 1949. The defendant denied taking over the suit land when this case was filed and served. He reiterated that that is where he was born and brought up. He stated that there was a letter written by the lands office indicating that there was a boundary dispute which need to be fixed. That in his replying affidavit, he stated that the plaintiff had encroached onto the land of the defendant's late father and extended the boundary slowly by slowly. He denied that the plaintiff's grandparents were buried on the suit land. He stated that he did not know them since they were living about 10 kilometers away from their land.



Plaintiff's Submissions

18. The plaintiff filed submissions dated 17th April, 2024 through the firm of Muthoni Ndeke & Company Advocates who gave brief facts of the case and the evidence adduced. The plaintiff submitted that the doctrine of adverse possession is anchored under Section 7 of the *Limitation of Actions Act* which provides that an action may not be brought by any person to recover land after the end of twelve years from the date of which the right action accrued to him. It is the plaintiff's submission that in view of that provision of law the family of the Muchoka Nkariro lost their right to 10 acres out of the suit land parcel No. N.Tharaka/Marimanti/1582 since the plaintiff had occupied the same from the year 1973 which is a period exceeding 12 years. The plaintiff also cited Section 13 of the same Act and submitted that he had never ceased to occupy the said 10 acres since 1973. That he had also never paid any rent to the family of the Late Muchoka Nkariro (deceased) for the said period. The plaintiff further submitted that the family of the late Muchoka Nkariro (deceased) never made any claim over the land to regain possession. The plaintiff relied on the case of Ruth Wangari Kanyagia vs Josephine Muthoni Kinyanjui[2017]eKLR which quoted the case of Hawa Alodilahi vs Isaac Ndege Arap Chumo(sued separate as administrator of the estate of Malakwen A. Chego[2019]eKLR. The plaintiff further submitted that his occupation of the said 10 acres of the suit land has been peaceful, open and continuous. That he adduced evidence to confirm that there has never been any dispute over his occupation of the land. It is the plaintiff's submission he has proved his claim for adverse possession on a balance of probabilities and prayed that the prayers sought in the amended originating summons be allowed as drawn.

Defendant's Submission

19. The defendant filed submissions dated 19th April, 2024 through the firm of Kaimenyi Kithinji & Company Advocates. The defendant also gave brief facts of the case and the evidence adduced. The defendant submitted that contrary to the allegation by the plaintiff that he has been in occupation of the suit land herein, the plaintiff has been encroaching on the deceased's estate by frequently changing the boundaries of L.R No. N. Tharaka/Marimanti/1582 and his land L.R No. N. Tharaka/Marimanti/1949 which borders the deceased's land as evidenced by the letter of District Land Registrar Meru South/Tharaka District dated 13th August, 2019.
20. The defendant further submitted that the allegations by the plaintiff that he has been in occupation of the suit land since 1973 is totally absurd since by that time he was a minor and that during the adjudication process, the plaintiff or his father who is still alive did not file any objections to the suit land being registered in the deceased's name during his lifetime. It is also the defendant's submissions that the plaintiff's assertion that the defendant resorted to interfering with his occupation of the suit land to the extent of harassing and issuing threats to his family is ridiculous and untrue since the plaintiff and his family live and reside in Irarani village and not on the suit land.
21. The defendant further submitted that the plaintiff in his evidence was very evasive. That he was not sure of his claim from the time he served the defendant's mother with demand letter and later filed a citation *No. E003 of 2020* where he was claiming the entire L.R No. N. Tharaka/Marimanti 1582 and also in his original summons he was claiming the entire suit land but in the amended originating summons, he is now claiming 10 acres. The defendant contended that this connotes a fishing expedition by the plaintiff as the suit is therefore an attempt by the plaintiff to grab the deceased's land while he knows very well the he has never occupied the same.
22. The defendant submitted that the plaintiff has never occupied the suit land which is still registered in the name of the defendant's deceased father and that his occupation has not been peaceful or



uninterrupted. The defendant relied on the case of *Ali Wanje Ziro vs Abdulbasit Abeid Said & Another* [2022]eKLR and *Wambugu vs Njuguna* [1983]eKLR.

23. It is the defendant's submission that the plaintiff did not bring material evidence to support his claim of occupation of the suit land and did not even produce photographs in terms of developments to show that he occupies the defendant's land L.R No. N Tharaka/Marimanti/1582 which is distinct as per the map on record.
24. The defendant urged the court to find that the plaintiff has failed to prove his case and dismiss it with costs.

Analysis & Determination

25. The court has carefully considered the pleadings, the evidence and the submissions filed by the parties to support their respective positions. I have also considered the legal authorities cited by the parties. The issues for determination are whether the plaintiff has proved his claim for adverse possession to the required standard and whether the plaintiff is entitled to the reliefs sought.
26. In deciding whether or not the plaintiff has proved his claim for adverse possession, the plaintiff must prove that he has been in occupation of a portion of 10 acres out of L.R No. N. Tharaka/Marimanti/1582 for a period of over twelve (12) years, that such occupation was open, peaceful and continuous without interruption from the registered owner and that such occupation was adverse i.e inconsistent with the right of the registered owner.
27. In *Wambugu – vs- Njuguna* (1983) KLR 173, the Court of Appeal restated the principles of adverse possession and held as follows-;
 - “(1) The general principle is that until the contrary is proved, possession in law follows the right to possess.
 - (2) In order to acquire by the statute of Limitation title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The Respondent could and did not prove that the appellant had either been dispossessed or had discontinued possession of the suit land for a continuous statutory period of twelve years to enable him, the respondent to title to that land by adverse possession.
 - (3) The *Limitation of Actions Act*, on adverse possession contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”
28. In the case of *Mtana Lewa Vs Kahindi Mwangandi* [2015]eKLR the Court of Appeal (Makhandia JA) stated as follows:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against



such person in assertion of his title for a certain period, in Kenya is twelve(12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

29. The doctrine of adverse possession is embodied in Section 7 of the *Limitation of Actions Act* which provides-;

“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.”

30. Section 13 of the same Act further makes provisions for adverse possession as follows-;

“(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession,) and, where under Section 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.”

31. Section 38 (1) of the *Limitation of Actions Act* provides that-;

“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the acts cited in section 37 of this act, or land comprised in a lease registered under any of those acts, he may apply to the High court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

32. Order 37 Rule 7 of the Civil Procedure Rules states that-:

“(1) An application under Section 38 of the *Limitation of Actions Act* shall be made by originating summons.

(2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

(3) The court shall direct on whom and in what manner the summons shall be served.”

33. In the present case, the plaintiff has the burden to adduce credible and believable evidence to prove on a balance of probabilities, that he has acquired prescriptive rights over the suit land. That his possession of the suit land was as of right and in a manner inconsistent with the rights of the registered owner that is to say: the occupation has been open, actual, continuous, uninterrupted, peaceful, exclusive and with the knowledge but without the consent or permission of the registered owner for the prescribed



period of 12 years. In *Kimani Ruchure vs Swift Rutherfords & Co. Ltd* (1980) KLR 10 Kneller J held that “the Plaintiffs have to prove that they have used the land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion)

34. In the case of *Gabriel Mbui vs Mukindia Maranya* [1993] eKLR adverse possession was defined as

“..the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owner’s enjoyment of land for purposes for which the owner intended to use it.”

35. For one to succeed in a claim of adverse possession, he must satisfy the following criteria stated in the case of *Maweu vs. Liu Ranching and Farming Cooperative Society* 1985 KLR 430 where the Court held;

“Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”.

36. In the case of *George Ogake Pius -vs- Esther Nyasani Makori & 2 Others* [2018] eKLR, it was held as follows: -

“There is no express definition of adverse possession in the *Limitation of Actions Act*. However, Section 13(1) of the Act provides that a right of action in recovery of land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession in the Act is referred to as adverse possession). It is evident thereof, that the doctrine of adverse possession is invariably tied to Section 7 of the Act ... which bars an owner of a parcel of land from an action to recover it after the expiry of twelve years. In Black’s Law Dictionary, 10th Edition adverse possession is defined as: -

“The enjoyment of real property with a claim of right when that enjoyment is opposed to another person’s claim and is continuous, exclusive, hostile, open and notorious.”

For a claimant to succeed in a claim of adverse possession to land such claimant has to satisfy the following: -

1. The parcel of land must be registered in the name of a person other than the claimant.
2. The claimant must be in open and exclusive possession of that parcel of land in an adverse manner to the title of the real owner.
3. The claimant must have been in that occupation/possession for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.”



37. In the present case, the plaintiff averred that in or about 1973, he occupied 10 acres out of N.Tharaka/Marimanti/1582 measuring 5.99 hectares which land was later registered under the defendant's deceased father, Muchoka Nkariro, after adjudication. That he has been in exclusive occupation of that portion of land since 1973 and has been cultivating food crops on the whole of the said parcel of land. The plaintiff further averred that for the entire period, he has occupied openly and without disturbance from the defendant, his deceased father or anyone else. The plaintiff's claim is for 10 acres out of N.Tharaka/Marimanti/1582 registered in the name of Muchoka Nkariro(deceased).
38. When he was cross-examined, the plaintiff admitted that he had his own land and that the family of the defendant live on the suit land. The submission by the plaintiff corroborates the evidence by the defendant to the effect that the plaintiff is not living on the suit land and has never been in occupation thereof. The defendant was categorical that the plaintiff lives in Irarani village, Kaguuma Sub-location, Tharaka Nithi County which is about five kilometers away from the suit land. Moreover, the plaintiff did not produce any evidence to confirm that he is in occupation of 10 acres out of the suit land, if at all. In this case, the plaintiff merely pleaded that he has been and still is in occupation of 10 acres out of L.R. No. N. Tharaka/Marimanti/1582. However, there was no evidence tendered by the plaintiff to demonstrate how the said 10 acres were arrived at. While testifying during the hearing, the plaintiff admitted that the defendant and his family are occupying and living on the suit land. That means the possession and occupation by the plaintiff, if any, was not exclusive. From the evidence on record, it is clear that the defendant was not dispossessed of the land for the statutory period. It has been held that the person relying on the statute must prove that he was in exclusive possession and that the true owner was out of possession. That it is not sufficient to prove that the claimant enjoyed the use of the land in common with the true owner. That it is a fallacy to assume that it is a presumption of law or fact that when two people live on the same land, the whole or any part of the land is in view of the law of limitation of actions, in the possession of the person who happens to be using the land for cultivation, building, grazing or howsoever. That there is no foundation for such a doctrine either in law or in fact (see Gabriel Mbui v. Mukundia Maranya[1993]eKLR).
39. In this case, the plaintiff admitted that the photographs he produced as exhibits are for the portion that is being occupied by the defendant and his family. There was no evidence tendered by the plaintiff to support his alleged possession and occupation of the 10 acres he is claiming. It is trite law the adverse possession rests on de facto use and occupation by an entrant. Possession is a matter of fact, depending on all particular circumstances of the case, and the type of conduct which indicates possession and varies with the type of land. There must be actual possession which requires some sufficient degree of physical occupation for the requisite period. (See Gabriel Mbui v. Mukindia Maranya[1993]eKLR);Athman Bwana and Alim Bwanhave v Haji Abdulla Ibrahim and Hussein Hayi Abdul Irehman (1948) is EACA 7; Ahmed Abdulkarim and Another v Memner for Lands and Mines and Another(1971) EASSO; Jandu v Kirpal and Another (1975)EA225; Gatimu Kingura v Muya Gathangi(1976) KLR 253, among others).
40. Considering the totality of the evidence availed in this case, and applying the legal principles outlined in law, I am not satisfied that the plaintiff has proved his case on balance of probabilities. It is my finding that the plaintiff has failed to bring himself within the limits of the doctrine of adverse possession.
41. In the result, it is my finding that the plaintiff's claim is without merit and must fail. It has not been supported by facts. Consequently, the plaintiff's suit is dismissed with costs to the defendant.
42. Orders accordingly.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 25TH SEPTEMBER, 2024.



In the presence of:

Court Assistant – Moses

Ms. Kamonchu holding brief for Ms. Muthoni for Plaintiff

Kaimenyi for Defendant.

C.K YANO

JUDGE

