



**Kimeli v Hughes (Personal Representative of the Estate of John Joseph Hughes) (Environment & Land Case E020 of 2022) [2024] KEELC 6905 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6905 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE E020 OF 2022  
JM ONYANGO, J  
OCTOBER 17, 2024**

**BETWEEN**

**JOHN KIMELI ..... PLAINTIFF**

**AND**

**EUGENIE DOROTHY HUGHES (PERSONAL REPRESENTATIVE OF THE  
ESTATE OF JOHN JOSEPH HUGHES) ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff's Originating Summons dated 9<sup>th</sup> September, 2022 is brought under Sections 3 and 3A of the *Civil Procedure Act*, Sections 37 and 38 of the *Limitation of Actions Act* and Order 37 Rule 7 of the Civil Procedure Rules. The Plaintiff seeks the following orders;
  - a. A declaration that the Defendant's rights over 78 Acres of that parcel of land known as L.R. No. 8637/2 AND 8637/3 (Originally L.R. 8637) (Eldoret Municipality Block 11/25) got extinguished by adverse possession upon expiry of 12 years and when the Plaintiff was in possession.
  - b. An order under Section 38 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya that 78 Acres of that parcel of land known as L.R. No. 8637/2 and 8637/3 (Originally L.R. 8637) (Eldoret Municipality Block 11/25) measuring approximately 372 Acres be registered in the name of John Kimeli herein as a proprietor or owner. the Land Registrar - Central Registry Nairobi to execute all such documents as could facilitate the transfer of the said acres of that land parcel L.R. No. 8637/2 AND 8637/3 (Originally L.R. 8637) (Eldoret Municipality Block 11/25) to the Plaintiff.
  - c. Costs of the suit
  - d. Any further or other order or relief this honourable court shall deem just to grant.



2. The Originating Summons is premised on the grounds set out in the Supporting Affidavit of the Plaintiff, John Kimeli. He deponed that he has been in occupation of L.R. No. 8637/2 And 8637/3 (Originally L.R. 8637) (Eldoret Municipality Block 11/25) measuring approximately 372.0 Acres (the suit property herein) registered in the name of John Joseph Hughes. He averred that they came into possession of the said property when his father, Kipngetich Tanui, acquired it from the registered owner in 1969. He deponed that an 84-Acre portion thereof was compulsorily acquired in 1988 leaving a chunk of it in their possession for over 12 years. He deponed that he has been in exclusive and open occupation of the suit property for over 50 years without interruption. He added that he has held the land to the exclusion of the Defendant and has changed its nature by developing, fencing, rearing animals on it and putting up structures. He alleged that his possession has been adverse to the Defendant's title.
3. The Plaintiff filed a Notice of Motion Application dated 12<sup>th</sup> June, 2023 seeking leave to serve the Defendant by way of substituted service, which was granted on 25<sup>th</sup> July, 2023. Despite service, the Defendant did not file any response. Further, on 17<sup>th</sup> October, 2023 the court directed that the OS herein be deemed as a Plaint and that the suit would proceed for formal proof hearing by way of viva voce evidence.

### **Plaintiff's Evidence**

4. On 16<sup>th</sup> November, 2023 John Kimeli, the Plaintiff herein, testified under oath as PW1 and adopted his witness statement dated 9<sup>th</sup> September, 2022 as his evidence-in-chief. He also produced the documents listed in his List and Bundle of Documents of even date as his PEX1-4. In the witness statement aforesaid, PW1 testified that he had sued Eugenie Dorothy Hughes as the personal representative of the estate of the late John Joseph Hughes, who was and still is, the registered owner of the suit property measuring 372 Acres. He stated that he has been in occupation of 78 Acres thereof, which he has fenced and developed, actions that are adverse to the interests of the Defendant.
5. PW1 added that this fact is known to all and sundry and that neither the Defendant nor her agents have interrupted his possession. That he has been in in exclusive, open and uninterrupted possession of the land for over 50 years. PW1 stated that his possession has been hostile, non-permissive and to the exclusion of the Defendant and her servants'/agents' despite mistaken disturbances, thus adverse to the Defendant's title. He prayed that he be registered as the owner of the suit property as per the prayers in the OS. The Plaintiff then closed his case without calling any witness.

### **Submissions**

6. After the close of the Plaintiff's case, the court directed that the Plaintiff file submissions. Despite confirmation by counsel on 3<sup>rd</sup> July, 2024 that she had filed submissions, I have not seen a copy of the said submissions in the court file or on the CTS online filing platform.

### **Analysis and Determination**

7. I have considered the pleadings, testimony of the Plaintiff as well as the law on adverse possession. It is my considered view that the issues that this court needs to determine are:-
  - a. Whether the Plaintiff is entitled to the orders sought; and
  - b. Who shall bear the costs of this suit?
8. I need not belabour the fact that the main basis of a decision in any case is a properly laid out claim, the evidence presented in support thereof and the law applicable. A court may therefore hear or



even dispense with final submissions. See *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR, where the Court of Appeal held that:-

“Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”

9. As a result, this court, properly guided by the decision of the superior court above, proceeded to determine the issues framed above without the Plaintiff’s Submissions.

a. Whether the Plaintiff is entitled to the orders sought

10. In short the Plaintiff seeks a declaration that he has acquired the suit property herein by way of adverse possession for reason that he has had possession of the land for decades. He claims to have gained entry through his father who allegedly acquired the suit property from John Joseph Hughes (now deceased), and has sued the legal representative of his estate for the said orders.

11. In *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR the Court of Appeal defined adverse possession 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 of stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

12. It is settled law that a claim for adverse possession must be instituted against the registered owner of the suit property because it is the owner of land that is entitled to possess the land. It is also the registered owner who has the right of re-entry into the subject land. Courts have repeatedly held that possession cannot be adverse if it is against a person who is not himself entitled to possess the land. It is ownership of the land, proven by the holding of a title thereto, that would vest in the registered owner the right to eject the adverse possessor. As provided under Section 26 of the *Land Registration Act*, a Certificate of Title is prima facie proof that the person named therein is the indefeasible owner of the land.

13. Therefore, as a matter of law, in any claim for adverse possession, the Claimant is required to annex a copy of the Certificate of Title, which is necessary in identifying the owner of the property being claimed. Order 37 Rule 7 clearly provides that:-

“Adverse possession [Order 37, rule 7]

- (1) An application under section 38 of the *Limitation of Actions Act* (Cap. 22) 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.”



14. It would be misleading to say that the Plaintiff herein failed to attach the title to the suit property. He did in fact attach 2 copies of the Grant showing that the land was on 17<sup>th</sup> August, 1954 registered in the name of John Joseph Hughes. However, it goes without saying that the title is annexed to enable the court assure itself that the person named in the suit is the rightful owner/party to be sued. That way, any orders the court would make would be for/against the proper owner of the land. It is for this reason that in lieu of a copy of the Title, Courts have accepted Certificates of Search or even Green cards to the land because they serve the same purpose. The rationale behind attaching a copy of the title was expressed by Wabwoto J. in *Adbirashid Adan Hassan v The Estate of W H E Edgley* [2022] eKLR where he explained that:-

“Secondly, the effect under Section 17 of the *Limitation of Actions Act* would be to extinguish the title, therefore there is need for reference or production of a copy of a title. A claim for adverse possession must be brought against the registered proprietor since it seeks a declaration that the proprietor’s title has been extinguished by prescription. It follows therefore that the proceedings must be in respect of the correct parcel of land and whose ownership is verified by an annexed extract of title in terms of Order 37 rule 7 of the Civil Procedure Rules. In the instant case, the Applicant only adduced a deed plan as Applicant’s Exhibit 2 which is inconclusive proof of ownership of the property. In determining the issue of adverse possession, this Court cannot extinguish an ‘non-existence and unknown title.’”

15. The concern that arises from the copies of the title herein is whether it sufficiently identifies the registered owner of the suit property. The suit herein was filed in the year 2022, 68 years after the initial registration. While it is possible that the late John Joseph Hughes is still registered as proprietor thereof, it is also possible that the property has changed hands. My sentiments are bolstered by the “Letter of Consent” annexed to the Plaintiff’s Supporting Affidavit as “JK2” which shows that the Uasin Gishu Land Control Board approved the transfer of the suit property from John Joseph Hughes to 6 individuals namely Nasser Singh Suraj, Rajinder Singh Suraj, Kiereng Arap Mibei, Joseph Arap Tuigeny, Jacob Cheuiyot and Kipngetich Tanui.

16. The Plaintiff claims that he was put in possession after his father, Kipngetich Tanui, who is listed as one of the transferees in the Letter of Consent, had acquired the land from John Joseph Hughes. There is no proof that he is indeed the son of the said Kipngetich Tanui. The Plaintiff further deponed at paragraph 3 of the said Supporting Affidavit that his annexures marked as “JK1(a)” and “JK1(b)” were copies of a search certificate, however, the two annexures are copies of the Grant to the suit property herein. Although page 1 of both copies of the Grant are very legible, there are 2 endorsements appearing at page 2 thereof whose entries are not legible. It is not clear what transactions were intended to be recorded by the said endorsements/entries or whether indeed one of them was the transfer to the 5 individuals named above or even to a third party.

17. This court is therefore not convinced that the said John Joseph Hughes is still the registered proprietor of the suit property herein. For this reason, when this matter initially came for judgement on 24<sup>th</sup> July, 2024 this court directed the Plaintiff to furnish a current Search Certificate. Instead, what was filed in court on 9<sup>th</sup> August, 2024 is another copy of the Grant allegedly certified by the Land Registrar on 30<sup>th</sup> July, 2024 as a true copy of the Original. This document is blurry and illegible and it is not clear how the Registrar read and compared the contents thereof with what he has in his records, enough to be able to certify that it was a true copy of the original being held at the Lands Office. Suffice is to say that, the endorsements/entries in the newly certified copy are still not clear and the court still cannot verify who the current owner of the suit property is.



18. As a result, the court is not convinced on the current ownership of the suit property, and the Plaintiff has not cleared the air, on a balance of probabilities, that the property is still registered in the name of John Joseph Hughes. The current registered owner cannot be identified, and despite being requested to avail a Certificate of Search over the suit property, the Plaintiff failed to do so. Since the Plaintiff failed to attach an extract of title that clearly identifies the actual owner, the claim is bound to fail.
19. The Plaintiff testified in court that he had sued Eugenie Dorothy Hughes as the personal representative of the estate of John Joseph Hughes, who was and still is, the registered owner of the suit property. The last entry on the copies of Title annexed to the Originating Summons herein, and the only one that is clear shows that the said Eugenie Dorothy Hughes was registered as the executrix of the Estate of the late John Joseph Hughes. That entry was however crossed out and this court cannot fathom what necessitated that action. It is possible that the said Eugenie Dorothy Hughes appointment as executrix was successfully challenged, however, this is mere speculation. The fact is however, that no Grant of Probate was filed as proof that she is indeed the personal representative of this estate, thus there is a possibility she had no locus standi to appear on behalf of the estate in the first place.
20. Be that as it may, adverse possession requires that the claimant must prove the adverse nature of his possession. In *Mukindia v Maranya* [1983] eKLR, Kuloba J. (as he then was) held that:-

“It is well-known in our law, that the adverse character of the intruder’s possession of another’s land must be proved as a clear fact, and cannot be assumed as a matter of law from mere exclusive possession, no matter how long it is continued. From the clearly proved facts, the Court is to draw legal inferences as to whether there was or there was no adverse possession. The inference one way or the other is a legal one. This means that the acts of possession are factual data from which a legal conclusion may or may not arise as to whether they amount to adverse possession. In the words of Gicheru, JA:

‘In deciding the issue of adverse possession, the primary function of a court is to draw legal inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of fact, the question whether that possession is adverse or not is matter of legal conclusion to be drawn from the findings of acts’ *Kweyu v Omuto*, CA Civ Appeal 8 of 1990 (as yet unreported).”
21. On this same issue, in the case of *James Maina Kinya v Gerald Kwendaka* [2018] eKLR, the court held that:-

“The fact that the Plaintiff has extensively developed the suit property is a demonstration of animus possidendi, (intention to possess) to the exclusion of the defendant. He is also using or occupying the land in contrast to the title (hostile) usage to the right of the title own (Defendant). The open continuous and hostile occupation has not been broken from 1983, a period in excess of 12 years. It has been admitted by the Defendant that the Plaintiff collects rent from the property and has excluded him from possession. This demonstrates exclusive control of the suit property by the Plaintiff which is an essential ingredient in establishing adverse possession.”
22. Moreover, in his oral testimony, the Plaintiff told this court that he has been in occupation of 78 Acres of the suit land, which he has fenced and developed, actions that are adverse to the interests of the Defendant. The sentiment is reiterated in his written witness statement dated and filed in court on 9<sup>th</sup> September, 2022. At paragraph 6 of the Supporting Affidavit, the Plaintiff also deponed to being in occupation of the suit land for decades and had even fenced and developed the land. His annexures



- “JK4” comprises of 4 photographs which are meant to be proof of this fact. What those photographs show however, is open fallow land. There is neither a fence nor buildings/developments thereon. There are no crops showing that the Plaintiff was even cultivating the land or plants/trees, save for what appears to be random bushes and tufts of sisal.
23. Such developments, had they been shown in the said photographs, would indicate the Plaintiff’s alleged possession of the property, which ideally, does not align with the interests of the registered owner. However, the status of the land as showcased in the photographs produced in evidence does not prove the fact of possession or occupation by the Plaintiff. There is nothing on record to indicate that the Plaintiff is in fact in exclusive possession of the land, be it adverse or otherwise. The Plaintiff did not deem it necessary to call independent evidence to confirm that he has indeed been in exclusive, open and continuous occupation of the suit property. From the evidence on record, the the adverse character of the Plaintiff’s possession of the suit property has not been established as required.
24. With regards to the period of possession, Section 7 of the *Limitation of Actions Act* provides that:-
- “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”.
25. In the instant suit however, it is impossible to determine the exact period the Plaintiff has occupied the suit property since it is not clear when he went into the land or when time started to run in his favour. The Plaintiff alleged that he came into possession through his father who acquired the suit property from John Joseph Hughes in the year 1969. It is trite that for a purchaser in possession of land purchased, his possession becomes adverse after having paid the purchase price in full. In *Jaswantkumarba Benesingh Jethwa v Postal Corporation of Kenya* [2015] eKLR, the Court of Appeal held that:
- “It is however necessary to distinguish between a purchaser in possession under an agreement of sale pending completion and a purchaser in possession, who has paid the whole of the purchase price, pending registration of transfer so far as it relates to when the time starts running for purposes of adverse possession. This distinction was clearly brought out in *Wambugu vs Njuguna* (supra). There, it was held that where a claimant is in exclusive possession under a contract of sale pending completion, he is in possession with leave and licence of the vendor and possession can only be adverse once the contract is repudiated or rescinded (see also *Mungania v Imanyara* (supra)).
- It was further held that where a claimant is in exclusive possession under a contract of sale, the claimant’s possession is deemed to have become adverse to that of the owner after payment of the last instalment of the purchase price. Where, however, the purchaser is put in possession after paying the full purchase price, his possession becomes adverse to that of the vendor when he took possession for that is the time when vendor’s possession was discontinued (*Public Trustee vs Wanduru* (supra)).”
26. Time would thus start to run in favour of the Plaintiff from the point of completion of the purchase price. I have not seen any sale agreement between John Joseph Hughes and the Plaintiff’s late father Kipngetich Tanui to be able to determine the terms of the sale with regards to the purchase price or when it ought to have been paid. And even if this court were to assume that the Plaintiff’s alleged father gained entry in 1969 going by the fact that the Letter of Consent exhibited in this court is dated 14<sup>th</sup> August, 1969, the Plaintiff still has not indicated whether the purchase price was paid in full. The



Letter of Consent cannot be used as proof that the purchase price was at all paid and neither has he produced any evidence to this end.

27. This court is therefore unable to make a finding that the Plaintiff has been on the land for the 12 years required by law. For all the above reasons, it follows that the Plaintiff's claim for adverse possession must fail.

b. Who shall bear the costs of this suit?

28. As regards costs of this suit, it is now well established that costs are awarded at the discretion of the Court, which principle is enshrined at Section 27 (1) of the *Civil Procedure Act* Cap. 21 Laws of Kenya. The Proviso to Section 27(1) provides that costs follow the event, which term denotes the outcome or result of any legal action. Ideally, therefore, costs are granted to the successful party in any litigation. The Plaintiff having failed to prove his claim cannot be termed a successful party in terms of Section 27 of the *Civil Procedure Act*. That being the case, he is not entitled to costs of this suit.

29. Consequently, the Court finds that the Plaintiff herein has not proved his case on a of balance of probabilities. For this reason, the Plaintiff's Originating Summons dated 9<sup>th</sup> September, 2021 is dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 17<sup>TH</sup> DAY OF OCTOBER 2024**

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**J.M ONYANGO**

**JUDGE**

In the presence of;

1. Miss Kosgey for the Plaintiff
2. No appearance for the Defendant

Court Assistant: Brian

