



**Kariuki & another v Mugo (Land Case 35 of 2023)  
[2024] KEELC 13422 (KLR) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13422 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA  
LAND CASE 35 OF 2023  
YM ANGIMA, J  
NOVEMBER 21, 2024**

**BETWEEN**

**PETER WAKIAMA KARIUKI ..... 1<sup>ST</sup> PLAINTIFF**

**TERASHISIO NDIRANGU THUITA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**SAMUEL MUNIU MUGO ..... DEFENDANT**

**JUDGMENT**

**A. Plaintiffs' Claim**

1. The material on record shows that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs filed separate originating summonses against the Defendant seeking adverse possession of the properties they claimed to occupy out of Title No. Nyandarua/Simbara/236 (Parcel 236). The first was Nyeri High Court Civil Case No.62 of 2005 (O.S.) - Tarashisio Ndirangu Thuita -vs- Sammy Muniu Mugo. The second one was Nyeri High Court Civil Case No.63 of 2005 (O.S.) – Peter Wakiama Kariuki -vs- Samuel Muniu Mugo. These suits were later transferred to the High Court at Nakuru and later on to the Environment and Land Court at Nyahururu and ultimately to the Environment and Land Court at Nyandarua and assigned the current case number.
2. In particular, the 1<sup>st</sup> Plaintiff, Peter Wakiama Kariuki sought adverse possession of 3.45 ha out of Parcel 236 on the basis that he had been in continuous, exclusive and uninterrupted occupation of the said portion since 1988 when he claimed to have bought it from one, John Thuita Murungi (Murungi) who was said to have bought it from Wilson Mwaura who was said to be a brother to the Defendant. His summons was supported by an affidavit he swore on 11.08.2005 in which he stated that he had fenced the said portion of land and developed it by constructing houses, cultivating crops thereon and rearing livestock.



3. On his part, the 2<sup>nd</sup> Plaintiff, Tarashisio Ndirangu Thuita sought adverse possession of a portion of 1.5 acres out of Parcel 236 on the basis that he had been in open, continuous and exclusive possession and occupation thereof since 1987 upon purchase from one Wilson Mwaura who was said to be a brother to the Defendant. His summons was similarly supported by an affidavit sworn by himself on 11.08.2005. He stated that he had fenced the said portion of 1.5 acres and developed it by, inter alia, constructing a house, a kitchen and by cultivating nappier grass and trees, and by rearing cows thereon.

## **B. Defendant's Defence**

4. The record shows that the Defendant filed a replying affidavit sworn on 30.08.2005 disputing the Plaintiffs' claim for adverse possession and asserting that they were in occupation of parts of Parcel 236 without his consent. He also filed a defence on 14.09.2005 which he amended on or about 08.06.2006 in which he pleaded that the 1<sup>st</sup> Plaintiff was a stranger and trespasser who was occupying his portion of land without his consent.
5. The Defendant also filed a further defence and counterclaim dated 07.10.2022 against the 2<sup>nd</sup> Plaintiff. He denied that the 2<sup>nd</sup> Plaintiff had been in occupation of 1.5 acres since 1987. He pleaded that he allowed the 2<sup>nd</sup> Plaintiff into his land in 2002 as a squatter since he was an Internally Displaced Person (IDP) from Burnt Forest area. He denied that the 2<sup>nd</sup> Plaintiff had purchased the said portion of land and put him to strict proof thereof. In the alternative, he pleaded that if any such sale took place, it was null and void since the purported seller had no beneficial interest in the property. The Defendant further denied that the 2<sup>nd</sup> Plaintiff had demonstrated the elements of adverse possession and pleaded that the claim was time-barred under the Limitation of Actions Act (Cap.22).
6. By his counterclaim, the Defendant reiterated the contents of his defence and pleaded that he was the legitimate owner of Parcel 236 by virtue of having been gifted the same by his late father. He pleaded that he fenced the said land in 1994 and constructed houses thereon and that he only allowed the 2<sup>nd</sup> Plaintiff to occupy a small portion of the land in 2002. He pleaded that the 2<sup>nd</sup> Plaintiff was guilty of fraud and misrepresentation in claiming that he had bought 1.5 acres out of Parcel 236 from one Samuel Karaho Muniu. As a result, the Defendant sought the following reliefs against the 2<sup>nd</sup> Plaintiff:
  - a. A declaration that the sale transactions between the 2<sup>nd</sup> Defendant and Samuel Karaho Mugo was unlawful, fraudulent, null and void ab initio.
  - b. A declaration that the 2<sup>nd</sup> Defendant has not acquired adverse possession over a portion of 1.5 acres in L.R. Nyandarua/Simbara/236 and the Plaintiff's title thereto has not been extinguished.
  - c. A declaration that the 2<sup>nd</sup> Defendant was permitted to occupy a portion of 1.5 acres by the Plaintiff in L.R. Nyandarua/Simbara/236.
  - d. An order of eviction of the 2<sup>nd</sup> Defendant and his entire family from the portion of 1.5 acres that he occupies and/or uses in L.R. Nyandarua/Simbara/236.
  - e. A permanent injunction restraining the 2<sup>nd</sup> Defendant, his family, kin, agents, employees, servants or anyone claiming under them from trespassing upon, claiming, subdividing, transferring, renting, leasing, cultivating, selling, disposing off, charging, alienating or in any other manner interfering with the Plaintiff's quiet possession and ownership of L.R. Nyandarua/Simbara/236.
  - f. Mesne profits from 12.08.2005 the date of filing this suit.



- g. General damages for trespass.
  - h. Costs of the suit with interest.
  - i. Any other relief that this honourable court may deem just and fair to order.
7. The material on record also shows that the Defendant filed a replying affidavit on 14.09.2005 in answer to the 1<sup>st</sup> Plaintiff's originating summons. He denied that the 1<sup>st</sup> Plaintiff had been in occupation of 3.45 acres out of Parcel 236 and pleaded that he had only entered the land about 2 weeks prior to filing suit and illegally constructed a house thereon without his consent or sanction of a court order. It was his contention that the 1<sup>st</sup> Plaintiff had entered the said portion of land by force hence he ought to be charged with forcible detainer of his land. It was his further pleading that the 1<sup>st</sup> Plaintiff was simply a land grabber who was pretending to have bought it from Murungi who had no proper documents to sell it to him.
  8. The Defendant also filed a defence dated 08.06.2005 which he amended on 08.06.2006 denying the 1<sup>st</sup> Plaintiff's claim for adverse possession in its entirety. He pleaded that the 1<sup>st</sup> Plaintiff was a trespasser who had no legal right to occupy any part of Parcel 236. It was contended that he was occupying 3.45 acres of Parcel 236 "without proper document" from the registered owner hence he prayed for the court to order the 1<sup>st</sup> Plaintiff out of the land "without further delay".
  9. The record further shows that the Defendant filed a further defence and counterclaim dated 07.10.2022 against the 1<sup>st</sup> Plaintiff. He denied that the 1<sup>st</sup> Plaintiff had taken possession of a portion of 3.45 acres in 1988 and put him to strict proof thereof. It was pleaded that the 1<sup>st</sup> Defendant had trespassed into Parcel 236 on 15.05.2005 and filed his claim for adverse possession on 12.08.2005. He denied knowledge of any purchase of 3.45 acres from Murungi and contended that if such sale took place then it was null and void since the purported seller had no legal or beneficial interest in the property.
  10. It was contended that the 1<sup>st</sup> Plaintiff's claim was barred under the *Limitation of Actions Act* (Cap.22) since he had delayed for over 17 years from the date of the alleged purchase to lodge his suit. It was his further defence that the 1<sup>st</sup> Plaintiff had not demonstrated the elements of adverse possession hence he was not entitled to the reliefs sought in his originating summons.
  11. By his counterclaim against the 1<sup>st</sup> Plaintiff, the Defendant reiterated the contents of his further defence and pleaded that he was the legitimate owner of Parcel 236 and that 1<sup>st</sup> Plaintiff was trying to grab it through fraud and misrepresentation by wrongfully forging documents to support the alleged purchase from Murungi. As a consequence, he sought the following reliefs against the 1<sup>st</sup> Plaintiff:
    - a. A declaration that the sale transactions between the 1<sup>st</sup> Defendant, John Thuita Murungi and Wilson Mwaura Karurua were illegal, fraudulent, null and void ab initio.
    - b. A declaration that the 1<sup>st</sup> Defendant has not acquired adverse possession over a portion of 3.45 acres in L.R. Nyandarua/Simbara/236 and the Plaintiff's title thereto has not been extinguished.
    - c. A declaration that the 1<sup>st</sup> Defendant and his alleged family's occupation and use of a portion of 3.45 acres in L.R. Nyandarua/Simbara/236 is unlawful and the same amounts to trespass on private land.
    - d. An order of eviction of the 1<sup>st</sup> Defendant and his entire family from the portion of 3.45 acres that he occupies and/or uses in L.R. Nyandarua/Simbara/236.



- e. A permanent injunction restraining the 1<sup>st</sup> Defendant, his family, kin, agents, employees, servants or anyone claiming under them from trespassing upon, claiming, subdividing, transferring, renting, leasing, cultivating, selling, disposing off, charging, alienating or in any other manner interfering with the Plaintiff's quiet possession and ownership of L.R. Nyandarua/Simbara/236.
- f. Mesne profits from 15.05.2005 when the 1<sup>st</sup> Plaintiff trespassed on the portion of the suit land to the full determination of the suit.
- g. General damages for trespass.
- h. Costs of the suit with interest.
  - i. Any other relief that this honourable court may deem just and fair to order.

### **C. Plaintiffs' Reply**

12. The 1<sup>st</sup> Plaintiff filed a reply to defence and defence to counterclaim dated 16.11.2022 in answer to the Defendant's amended pleading. He joined issue with the Defendant on his further defence and reiterated the contents of the supporting affidavit to his originating summons. He denied having entered Parcel 236 in May, 2005 and pleaded that he entered the land in May, 1988. He denied liability for the Defendant's counterclaim and denied that the Defendant ever took possession of the disputed land in 1994 and fenced it and erected houses thereon. He denied the fraud and misrepresentation pleaded against him in the counterclaim and put the Defendant to strict proof thereof.
13. The 2<sup>nd</sup> Defendant similarly filed a reply and defence to counterclaim dated 16.11.2022. He joined issue with the Defendant upon his further defence and reiterated the contents of his originating summons and supporting affidavit. He denied that he entered the disputed property in 2002 or that he was an IDP who was permitted by the Defendant to enter the property. He also denied the Defendant's counterclaim in its entirety. He denied the allegations of fraud and misrepresentation pleaded against him and put the Defendant to strict proof thereof. He denied that the Defendant had in 1994 fenced the disputed property and constructed houses thereon and put him to strict proof thereof.

### **D. Trial of the Action**

14. At the hearing hereof, the Plaintiffs called 5 witnesses in support of their claim before closing their case. Among the witnesses called was one who once served as an assistant chief and locational chief in the area in dispute.
15. On his part, the Defendant called 3 witnesses at the trial who all disputed the Plaintiffs' claims for adverse possession. They all contended that the Defendant had taken possession of the entire Parcel 236 in 1994, whereupon he fenced it and constructed houses thereon.

### **E. Directions on Submissions**

16. Upon conclusion of the hearing the parties were granted timelines within which to file and exchange their respective submissions. The record shows that the Plaintiffs filed submissions dated 11.10.2024 whereas the Defendant's submissions were dated 05.11.2024.



## **F. Issues for Determination**

17. The court has noted that the parties did not file an agreed statement of issues for determination. 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 in 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.
18. The court has perused the pleadings, evidence and documents on record in this matter. The court is of the view that the following are the key issues which arise for determination herein:
  - a. Whether the 1<sup>st</sup> Plaintiff has proved his claim for adverse possession of a portion of 3.45 acres out of Parcel 236.
  - b. Whether the 2<sup>nd</sup> Plaintiff has proved his claim for adverse possession of a portion of 1.5 acres out of Parcel 236.
  - c. Whether the Defendant has proved his counterclaim against the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs.
  - d. Who shall bear costs of the suit and counter-claim.

## **G. Analysis and Determination**

### **Whether the 1<sup>st</sup> Plaintiff has proved his claim for adverse possession of a portion of 3.45 acres out of Parcel 236**

19. The court has considered the material and evidence on record on this issue. Whereas the 1<sup>st</sup> Plaintiff submitted that he had adequately proved his claim for adverse possession, the Defendant contended otherwise. It was the 1<sup>st</sup> Plaintiff's evidence that he bought the disputed portion of land in 1989 from Murungi who had in turn bought it from Wilson Mwaura. It was his evidence that he took possession of the said land in 1988 and developed it by constructing houses, growing crops, and planting trees thereon over the years. His evidence in that regard was supported by the evidence of PW3 who served as an assistant chief and location chief at the material time in issue.
20. At the trial, the Defendant denied that the 1<sup>st</sup> Plaintiff was in occupation of the disputed land and he disputed the evidence of PW3 on the question of the alleged sale by Wilson Mwaura and the 1<sup>st</sup> Plaintiff's occupation. He even denied that the photographs tendered in evidence by the 1<sup>st</sup> Plaintiff were taken on the disputed property.
21. The court has fully considered the evidence tendered by both sides. The court is inclined to accept the evidence of the 1<sup>st</sup> Plaintiff and his witnesses. The court was impressed by the evidence of PW3 as being credible and truthful. He knew the families of the 1<sup>st</sup> Plaintiff and the Defendant well and he served as an assistant chief of their sub-location as far back as 1982. He was later on promoted to the position location chief. He did not appear to have any interest in the outcome of the litigation hence he had no reason to mislead the court with false evidence. The evidence of the Defendant was not credible and he appeared to have filed previous pleadings contracting the position he took at the trial.



22. The elements of adverse possession were summarized in the case of Kasuve –vs- Mwaani Investments Ltd & 4 Others [2004] 1KLR 184 as follows:

“....and in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, Wanja vs Sakwa No.2 [1984] KLR 284. A title by adverse possession can be acquired under the Limitation of Actions Act for part of the land....”

23. Similarly, in the case of Chevron (K) Limited –vs- Harrison Charo Wa Shutu [2016] eKLR it was held, inter alia, that:

“At the expiration of the twelve-year period the proprietor’s title will be extinguished by operation of the law and section 38 of the Act permits the adverse possessor to apply to the High Court for an order that he be registered as the proprietor of the land. Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner’s permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner’s enjoyment of the soil for the purpose for which he intended to use it. See *Littledale v Liverpool College* (1900)1 Ch.19, 21.”

24. For the reasons given in the preceding paragraphs, the court is satisfied that the 1<sup>st</sup> Plaintiff has been in open, continuous, exclusive and uninterrupted occupation of the portion of 3.45 acres of Parcel 236 from at least 1988 when he acquired the same from Murungi. The court is satisfied that such occupation was without the consent of the Defendant. The court is further satisfied on the basis of the material on record that the 1<sup>st</sup> Plaintiff’s occupation was hostile and inconsistent with the rights of the true owner. The 1<sup>st</sup> Plaintiff has clearly demonstrated animus possidendi by utilizing the 3.45 acres as his own land since he constructed houses, cultivated crops, reared livestock and planted trees on the land.

25. There is no evidence of interruption of the 1<sup>st</sup> Plaintiff’s possession in the legal sense since the Defendant did not file any suit for recovery of the disputed property until he filed his counterclaim in 2022. The court does not agree with the Defendant’s contention that time could not run against him under the Limitation of Actions Act (Cap.22) until the said property was actually registered in his name. The court takes the view that a change of ownership does not affect the running of time for purposes of a claim for adverse possession. See *Githu -vs- Ndeete* [1984] KLR 776. The court is thus satisfied that the 1<sup>st</sup> Plaintiff has proved his claim for adverse possession on a balance of probabilities.

#### **Whether the 2<sup>nd</sup> Plaintiff has proved his claim for adverse possession of a portion of 1.5 acres out of Parcel 236**

26. The court has considered the material and submissions on record on this issue. Whereas the 2<sup>nd</sup> Plaintiff submitted that he had demonstrated his claim to the required standard, the Defendant contended otherwise. It was the 2<sup>nd</sup> Plaintiff’s evidence that he had been in open, continuous, exclusive and uninterrupted occupation of a portion of 1.5 acres out of parcel 236 since 1987 upon purchase form



Samuel Karaho. It was his case that upon taking possession he developed the said land by fencing it, cultivating crops, constructing houses and rearing cows thereon.

27. The Defendant disputed the 2<sup>nd</sup> Plaintiff's claim and asserted that the 2<sup>nd</sup> Plaintiff was merely an IDP who was occupying a portion of 1.5 acres of his land with his permission. It was his case that the 2<sup>nd</sup> Plaintiff was supposed to vacate the disputed land upon acquiring his own land. The court has noted that the Defendant had previously filed a replying affidavit dated 30.08.2005 asserting that the 2<sup>nd</sup> Plaintiff was on his land without his consent. The court has further noted that in his initial and first amended defence the Defendant has requested the court to order the 2<sup>nd</sup> Plaintiff out of the dispute property.
28. For the same reasons given earlier on, the court believes the evidence of the 2<sup>nd</sup> Plaintiff and his witnesses. In particular, the court takes the evidence of PW3 as credible and truthful. He was a candid witness who once served as an assistant chief and location chief of the relevant area and had no reason to mislead the court on the question of possession and development of the disputed property. The court is satisfied on the basis of the material on record that the 2<sup>nd</sup> Plaintiff has been in occupation of the disputed portion of 1.5 acres at least since 1987 and that his possession has never been interrupted in the legal sense.
29. The court is further satisfied that the 2<sup>nd</sup> Plaintiff has developed the said portion of 1.5 acres as of right and to the exclusion of the Defendant. The court is also satisfied that he has adequately demonstrated animus possidendi by constructing houses, cultivating crops, planting trees and fencing the land as his own. There is no credible evidence on record to show that he entered the said property with the permission of the Defendant. As a result, the court is satisfied that the 2<sup>nd</sup> Plaintiff has adequately proved his claim for adverse possession on a balance of probabilities.

#### **Whether the Defendant has proved his counterclaim against the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs**

30. It is evident from the pleadings and material on record that the Plaintiffs' claim for adverse possession and the Defendant's counterclaims are mutually exclusive. In view of the court's finding that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs have proved their respective claims for adverse possession then it would follow that the Defendant's counterclaim seeking, inter alia, recovery of their disputed properties must fail. The court is thus of the opinion that the Defendant has failed to prove his counterclaim against the Plaintiffs.

#### **Who shall bear costs of the suit and counter-claim**

31. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the Plaintiffs shall be awarded costs of the suit and counterclaim.

#### **H. Conclusion and Disposal Orders**

32. The upshot of the foregoing is that the court finds and holds that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs have proved their respective claims for adverse possession against the Defendant to the required standard. The court also finds that the Defendant has failed to prove his counterclaim against the Plaintiffs. As a result, the court makes the following orders for disposal of the consolidated suits and counterclaims:



- a. A declaration is hereby made that the 1<sup>st</sup> Plaintiff, Peter Wakiama Kariuki has become entitled to be registered as proprietor of a portion of 3.45 acres out of Title No. Nyandarua/Simbara/236 by virtue of the doctrine of adverse possession.
- b. The Defendant is hereby directed to excise and transfer the said portion of 3.45 acres out of Title No. Nyandarua/Simbara/236 to the 1<sup>st</sup> Plaintiff within 30 days from the date hereof in default of which the Deputy Registrar of the court shall sign all the necessary forms, documents and instruments to facilitate the sub-division and transfer of the said portion of land to the 1<sup>st</sup> Plaintiff, Peter Wakiama Kariuki.
- c. A declaration is hereby made that the 2<sup>nd</sup> Plaintiff, Tarashisio Ndirangu Thuita, has become entitled to be registered as the proprietor of a portion of 1.5 acres out of Title No. Nyandarua/Simbara/236 by virtue of the doctrine of adverse possession.
- d. The Defendant is hereby directed to excise and transfer the said portion of 1.5 acres out of Nyandarua/Simbara/236 to the 1<sup>st</sup> Plaintiff within 30 days from the date hereof in default of which the Deputy Registrar of the court shall sign all the necessary forms, documents and instruments to facilitate the sub-division and transfer of the said portion of land to Tarashisio Ndirangu Thuita.
- e. The Defendant's counterclaim in the consolidated suits are hereby dismissed.
- f. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs are hereby awarded costs of the suit and counterclaim.

It is so decided.

**JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2024  
AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS PLATFORM.**

**Y. M. ANGIMA**

**JUDGE**

In the presence of:

Mr. Wahome Gikonyo for the Plaintiff

Mr. Siah for the Defendant

C/A - Carol

