



**Mumma v Parkinyaro (Environment & Land Case 127 of 2018)
[2024] KEELC 13493 (KLR) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13493 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 127 OF 2018
LC KOMINGOI, J
NOVEMBER 21, 2024**

BETWEEN

CATHERINE MUYEKA MUMMA PLAINTIFF

AND

JEREMIAH KIMITI PARKINYARO DEFENDANT

JUDGMENT

1. By the Complaint dated 5th July 2016, Amended on 22nd October 2018 and Further Amended on 4th March 2020, the Plaintiff claims that she purchased property known as Kajiado/Kitengela/4482 measuring approximately 2.02 hectares which is equivalent of 5 acres (herein after referred to as “the suit property”) in June 1998 from the Defendant through his agent one Julius Muterian Kisoso. It is her case that a colleague introduced her to Julius Muterian Kisoso. Upon viewing the property, she purchased it for Kshs. 750,000/= and it was transferred to her on 8th June 1998.
2. The history of the suit property began from the original parcel of land number Kajiado/Kitengela/1839 which was subdivided to parcels 4245 and 4246 measuring 90.81 hectares and 40.47 hectares respectively. Land Parcel 4246 was further subdivided to parcels 4326, 4327, 4328, 4329, 4330 and 4331 respectively. Parcel 4330 which measured approximately 20.23 hectares was then subdivided to give rise to parcels 4475 up to 4482 which is the suit property.
3. Upon issuance of title, she took possession of the suit property, fenced it using wooden posts and barbed wire, planted trees all around it. She developed it and has been undertaking farming activities on the said land. All this while, the Defendant was in possession of the adjacent parcel of land Kajiado/Kitengela/4245. It was until on or about April 2016 when the Defendant started claiming that she had encroached on his property by three (3) acres. She argues that since she took possession of the suit property in 1998, the Defendant was aware of this and the extensive developments undertaken. It was only after being on the land for over eighteen (18) years that he sought to reclaim the three (3) acres. She thus claimed that she was entitled to the three (3) acres by way of adverse possession and prayed for:



- a. A declaration that the Defendant's title to 3 acres measuring approximately 1.21406 hectares and forming part of Kajiado/Kitengela/4245 has been extinguished through adverse possession thereof by the Plaintiff and that the Plaintiff is entitled to be registered as the proprietor of the 3 acres and/or that the Defendant does hold the said 3 acres of land subject to the interest of the Plaintiff as the adverse possession thereof.
 - b. An order directing that the Plaintiff be registered as proprietor, in place of the Defendant, of the 3 acre parcel of land measuring approximately 1.21406 hectares and forming part of Kajiado/Kitengela/4245 measuring approximately 90.81 hectares situate within Kajiado County.
 - c. An order directing the Defendant to carry out or cause to be carried out subdivision of Kajiado/Kitengela/4245 to excise three acres thereof measuring approximately 1.21406 hectares and to transfer the said three acre parcel to the Plaintiff.
 - d. An order that in default of the Defendant complying with the above, the Deputy Registrar of this Hon. Court be authorised to execute all documents and instruments necessary to effect the subdivision and transfer of the three acre parcel of land forming part of Kajiado/Kitengela/4245 and a title deed be issued to the Plaintiff.
 - e. A permanent injunction restraining the Defendant by himself, his agents, servants, employees, personal representatives or otherwise howsoever from entering, occupying, destroying, demolishing or erecting structures, selling, transferring, alienating or in any way dealing or interfering with the proprietary rights, and interest of the Plaintiff over 3 acre parcel of land measuring approximately 1.21406 hectares formerly part of Kajiado/Kitengela/4245.
 - f. Costs of the suit.
 - g. Any other orders that the Hon. Court deems just and appropriate to grant.
4. The Defendant in his amended statement of defence and counterclaim dated 16th May 2021 contested the Plaintiff's claim on the grounds that he had initially sold parcel 4482 to one Julius Muterian Kisoso who then sold to the Plaintiff. He acknowledged that parcel 4245 was his and he moved on it or about 2004 and started developing it. By this time, the Plaintiff had not taken possession of her parcel 4482. She only took possession and started fencing it sometime in 2009. As she was fencing, she encroached on to the Defendant's parcel and the Defendant made it known to her that she had put up a fence on part of his land, to which she agreed to remove the fence. He was rather surprised by the Plaintiff's claim to have been in peaceful possession of the property while she was aware of the encroachment.
5. The Defendant in his counter claim thus sought the following orders;
- a. An order that the Plaintiff give the 1st Defendant vacant possession of the suit property occupied by her on or about 2009.
 - b. An order that the Plaintiff remove temporary structures erected on the 1st Defendants land and in the event the Plaintiff fails to remove the structures within seven days from the date of the judgement, the 1st Defendant removes the same but at the Plaintiff's cost.
 - c. Cost of this suit be provided.

Evidence of the Plaintiffs

6. PW1, Catherine Muyeka Mumma adopted her witness statement dated 9th October 2022 as part of her evidence in chief. She also adopted her bundle of documents which were marked as P. Exhibit 1 to 6.



7. On cross examination she stated that she was the registered owner of land parcel known as Kajiado/Kitengela/4482 having purchased it from the Defendant through his agent and paid Kshs. 750,000 although she did not have evidence of the payment. She stated that she visited the suit property together with a surveyor and was shown the beacons. She was also shown the mutation form that gave rise to the suit property. On being asked about the prayers in Further Amended Plaintiff she stated that she claimed adverse possession because she was in possession of the suit property from the year 1998 until 2016 when the Defendant claimed she had encroached on it. She was thus not trying to legitimise any alleged illegal occupation of the property. On being asked if the Defendant was present when she visited the suit property, she stated that she could not recall but that he was present when she took possession of the property in 1998 and has been her neighbour since then. She confirmed that in 2016 when the defendant found her workers on the land, he asked them to leave and fenced off the portion he claims to be his. She said her caretaker was not a witness in this case.
8. On re-examination she stated that the suit property was hived off from the defendant's parcel as per the copy of the green card produced and it was clear that the Defendant's parcel 4475 is adjacent to the suit property.

Evidence of the Defendant

9. DW1, Jeremiah Kimiti Parkinyaro the Defendant adopted his witness statement dated 22nd July 2016 as his evidence in chief. He stated that he never sold the land to the Plaintiff, but to one Julius Kisoso. It is his case that he started residing on his property in the year 2004 which by this time, the Plaintiff had not taken possession of her parcel. It was not until 2010 when she moved in and fenced and as a result encroached onto his land. The Defendant called his surveyor to map out the beacons and so did the Plaintiff. The Plaintiff later asked the Defendant for time to remove her structures from his portion of land and he was thus seeking an order for her to remove the structures from his portion.
10. On cross examination he confirmed that he sold the land to Mr. Kisoso measuring 5 acres and Mr. Kisoso immediately sold the property to the Plaintiff. He stated that the Plaintiff's parcel was 4482 and his was 4245 which the plaintiff had encroached on by about 2.5 acres. He indicated that he had not called Julius Kisoso as his witness restating that by the time the Plaintiff started occupying the property in 2010 he was already in occupation. He confirmed that she put up a live fence, sunk a borehole and also had a caretaker on the land and upon her encroachment, he informed her although the notice was not in writing.
11. On re-examination he stated that the parcel of land encroached by the Plaintiff was not part of the land he had sold to Kisoso but an additional parcel.
12. At the close of the oral testimonies parties tendered final written submissions.

The Plaintiff's submissions

13. On whether the suit can be heard and determined as filed notwithstanding it was not instituted as Originating Summons, counsel submitted that in the original Plaintiff dated 5th July 2016, the Plaintiff was seeking injunctive orders against one Jeremiah Mutunkei Kiponyi for encroaching on the suit property. However, the Plaintiff withdrew her suit against him vide Notice of Withdrawal dated 22nd September 2017 and adopted on 21st March 2018. The Plaintiff would then amend the Plaintiff and joined Julius Kisoso, the Chief Land Registrar and the Director of Surveys seeking a rectification of the registry map of the property 4245 to align with the beacons of property 4482. The Plaintiff once again sought to further amend this Plaintiff and claimed adverse possession against the Defendant. As such, the suit was properly before court even though not instituted by Originating Summons citing Court



of Appeal in Gulam Miriam noordin vs Julius Charo Karisa [2015] eKLR and Chevron (K) Ltd vs Harrison Charo Wa Shutu [2016] eKLR. Counsel went on to submit that even by use of the Plaintiff, they had adhered to Order 37 Rule 7(2) of the Civil Procedure Rules by annexing the Defendant's title to property 4245 which he also produced as his evidence confirming that the property was his.

14. On whether the Plaintiff had acquired 3 acres of Defendant's property 4245 by way of adverse possession, counsel submitted that the Plaintiff had been in open, peaceful, uninterrupted and exclusive possession of 3 acres of parcel 4245 for over 12 years. The Defendant's title had thus been extinguished after the expiry of 12 years as per Section 7 of the *Limitation of Actions Act* and was entitled to be registered as the owner by dint of Section 38 of the *Limitation of Actions Act*. Reference was made to the Court of Appeal's case of Mtana Lewa vs Kahindi Ngala Mwangandi and the Chevron (K) Ltd case cited above. He also submitted that time started running when the Plaintiff became the registered owner of the suit property on 8th June 1998. Submitting that the defendant in his witness statement confirmed that when he started fencing his land, he looked for Julius Kisoso who talked to the Plaintiff and they met on the land, which was a confirmation that the Plaintiff was in possession of the suit property. Therefore, time started running in 2018 and stopped in 2016 when this suit was filed.
15. Counsel went on to submit that it was on record that the Defendant did not sell the property to the Plaintiff and therefore, her possession on his 3 acres of land was without his consent and it was on record that she had developed the said property. And at no time did the defendant actively assert his rights over the 3 acres of land. as such, she is entitled to the reliefs sought.

The Defendant's submissions

16. Counsel for the Defendant submitted that a look at the amendments of these pleadings showed that the Plaintiff was not sure of what she was claiming for. If her claim was one for adverse possession, then that it is the relief she ought to have sought from her initial Plaintiff, noting that she was an Advocate of the High Court of Kenya and thus well versed with matters land. Counsel submitted that it was on record that the land purchased was 5 acres on paper but only 2 acres on the ground adding that there was no surveyor's report as evidence of the actual land she is in possession of. Counsel also added that the matter of time in this suit was not certain submitting that while the Plaintiff claims to have taken possession in 1998, the Defendant submitted that she took possession in 2009. Therefore, the Court cannot be asked to grant orders with such time uncertainty. Counsel went on to submit that a claim for adverse possession cannot succeed if the person claiming gained possession by consent as was held by the Court of Appeal in Samuel Miki Waweru vs Jane Nheru Richu [2007] eKLR.
17. As such, the Plaintiff's suit should be dismissed and the Defendant's counterclaim allowed with costs.

Analysis and Determination

18. I have considered the pleadings, the evidence on record, the rival submissions and the authorities cited. I find that the issues for determination are:
 - i. Whether the Plaintiff has proved her entitlement to the claim of adverse possession of 3 acres of the Defendant's land Kajiado/Kitengela/4245;
 - ii. Whether the Defendant is entitled to vacant possession of the property occupied by the Plaintiff as prayed in his counterclaim;
 - iii. Who should bear costs of the suit?
19. The Plaintiff claims that she purchased five (5) acres which is the property known as Kajiado/Kitengela/4482 from the defendant through his agent one Julius Kisoso. The Defendant confirmed



that he had sold five (5) acres to the said Julius Kisoso who in turn sold to the Plaintiff. The Plaintiff produced a title deed issued on 8th June 1998 for parcel land parcel known as Kajiado/Kitengela/4482 measuring approximately 2.02 hectares. This translates to approximately five (5) acres. As such, there is no contention on the ownership of property Kajiado/Kitengela/4482 which measures five (5) acres as per the Title deed issued. However, the Defendant claimed that there was an issue on acreage because the area on the title deed was not the actual area on the ground.

20. The Plaintiff has therefore approached this court seeking adverse possession over three (3) acres of the Defendant's property Kajiado/Kitengela/4245, claiming that she has been in possession of that portion from the year 1998. An allegation the Defendant contested stating that the Plaintiff moved to the property between the year 2009 and 2010 and that is when she began fencing it and encroached on to his property.
21. Has the Plaintiff therefore established her claim for adverse possession over three acres of Kajiado/Kitengela 4245 registered in the Defendant's name?
22. It has been settled that for a claim of adverse possession to be sustained, one must prove that they were openly in possession of the property and without permission or consent of the owner. The Court of Appeal in Samuel Kihamba v Mary Mbaisi [2015] eKLR affirmed this by holding:

“...Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario...”
23. In this particular case, the Plaintiff gained entry/possession by consent. She purchased parcel known as Kajiado/Kitengela/4482 which measured approximately 5 acres and was shown the beacons of the said property, took possession and fenced it. Therefore, her presence on the portion of the land was not by force, but she occupied that land based on the boundaries/beacons showed to her. Therefore, her entry was by consent. Once again the Court of Appeal in the above cited case of Samuel Kihamba held:

“...Occupation of land by consent or license does not accrue any right of adverse possession on the claimant... Consent, may be oral or written. It may also arise by way of a license, whether implied or written, or through a valid tenancy agreement. The question of whether one is a licensee, to water down a claimant's case, is a question of fact that needs to be determined by court...”
24. Secondly, has this possession dispossessed the owner of his property for a period of 12 years? The Defendant claims that he made it known to the Plaintiff that she had encroached on his parcel of land and the Plaintiff acknowledged in her testimony when she admitted that her caretaker was chased away by the Defendant. She however claims that by this time she had already been in possession for over 12 years. A claim that is also denied by the Defendant. From the evidence on record, this Court is not satisfied that the Plaintiff dispossessed the Defendant of the disputed portion of land as per the required threshold as held by the Court of Appeal in Ramco Investment Limited v Uni-Drive Theatre Limited [2018] KECA 590 (KLR) where it was stated;

“...The principles that guide the court when determining whether a claim for adverse possession against the respondent met the legal threshold or not required the appellant as the claimant for adverse possession to demonstrate existence of exclusive possession and control



over the disputed portion and to have dispossessed the respondent as the undisputed legal owner...”

25. The next ingredient to be satisfied is on the time of the possession. The Plaintiff’s case is based on a duration beginning from 1998 but the Defendant averred that the Plaintiff started residing thereon sometime in 2009-2010 when she put up the fence that encroached on to his property. Adverse possession being a matter of forceful possession of one’s land, should only be granted in the clearest of cases where there is no doubt in the Court’s mind. In this case, the contention about the time and when it started running casts doubt on when the Plaintiff claims to have dispossessed the Defendant.
26. The claim of adverse possession cannot stand and hence the Plaintiff’s case fails.
27. What emerges from this suit is that there is contention of three (3) acres of land as acknowledged by both parties. The Plaintiff purchased five (5) acres and was shown the beacons on the ground. And the Defendant acknowledged that he sold five (5) acres of land to one Julius Kisoso, who then sold the same to the Plaintiff. However, the Defendant also testified that the five (5) acres on paper was not the actual five (5) acres on the ground but was two (2) acres. Therefore, what ought to be done is re-establishment of boundaries and beacons to reflect the true position of what is on the title deed vis a vis what is on the ground. Which is a mandate bestowed upon the Land Registrar by Section 18 of the *Land Registration Act*.
28. The Defendants claim for vacant possession can only be granted after the above exercise stated in paragraph 27 above has been undertaken.
29. The Land Registrar and Land Surveyor are therefore directed to visit properties Kajjado/Kitengela/4245 and Kajjado/Kitengela/4482 to re-establish and ascertain the boundaries as per the mutation forms and their records at the Lands registry. Parties are at liberty to apply to court for further orders.
30. Each party shall bear their own costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 21ST DAY OF NOVEMBER 2024.

L. KOMINGOI

JUDGE.

IN THE PRESENCE OF:

Mr. Obok for the Plaintiff.

Mr. Koin for the Defendant.

Court Assistant – Mutisya.

