



**Ngolya v Musembi & 2 others (Land Case (Originating Summons)  
E019 of 2024) [2024] KEELC 13317 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13317 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
LAND CASE (ORIGINATING SUMMONS) E019 OF 2024**

**A NYUKURI, J**

**NOVEMBER 21, 2024**

**IN THE MATTER OF LIMITATION OF ACTIONS ACT (CAP. 22)**

**AND**

**IN THE MATTER OF ACQUISITION OF TITLE BY ADVERSE  
POSSESSION BEING MACHAKOS MUA HILLS/167**

**BETWEEN**

**JOSEPH MWANIA NGOLYA ..... PLAINTIFF**

**AND**

**EZEKIEL MUSEMBI ..... 1<sup>ST</sup> DEFENDANT**

**ROBERT MICHOMA ..... 2<sup>ND</sup> DEFENDANT**

**BLANCHE MWENDE MUSEMBI ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**Introduction**

1. Before court is a notice of motion application dated 9<sup>th</sup> September 2024 filed by the plaintiff seeking the following orders;
  - a. That the application be certified urgent and proceed ex-parte in the first instance.
  - b. That leave be granted to the applicant for the hearing of the instant application during the period of the High Court Vacation.
  - c. That pending the hearing and determination of this application, an interlocutory injunction be issued restraining the defendants/respondents and/or their agents from evicting the plaintiff/applicant out of the parcel of land known as Machakos Mua Hills/167.



- d. That pending the hearing and determination of this application, an interlocutory injunction be issued restraining the defendants/respondents and/or their agents from evicting the plaintiff/applicant out of the parcel of land known as Machakos Mua Hills/167.
- e. That the costs of the application be provided for.
2. The application is premised on the supporting affidavit sworn by Joseph Mwanja Ngolya on 9<sup>th</sup> September 2024. The applicant's case is that he has been in active and actual possession of the parcel of land known as Machakos/Mua Hills/167 (suit property) through his father Ngolya Ndua, now deceased, who was allocated the land by Mua Hills Settlement Scheme in 1960. He stated that the deceased having been allocated the suit property, paid the purchase price of Kshs 4,000/- and a development loan of Kshs 2,000/- whereof he was issued with a certificate of outright purchase by the settlement scheme on 11<sup>th</sup> June 1984. That the scheme undertook to transfer the entire land to the deceased.
3. He further stated that the deceased stayed on the land until his death in 1993 and that the plaintiff continued living on the land where he has built permanent houses. He stated that in 1999, the 1<sup>st</sup> defendant filed Machakos HCC No 493 of 1995 and obtained eviction orders against the plaintiff and his brother. Further that the orders of 21<sup>st</sup> January 1999 have never been executed against him and hence became stale on 21<sup>st</sup> January 2011 and that therefore, the 1<sup>st</sup> defendant is barred by Section 4(4) of the *Limitation of Actions Act*.
4. He also averred that he had been in occupation of the suit property for over 50 years and had acquired the same by adverse possession. He stated that he received a demand notice dated 16<sup>th</sup> August 2024 from the 2<sup>nd</sup> defendant seeking that he vacates the suit property and that the defendants have begun digging holes around the suit property. He averred that the defendants were using armed goons to intimidate him. He attached a certificate of outright purchase; letter of area chief; photographs of his house; orders of 21<sup>st</sup> January 1999; certificate of official search; demand letter; photographs of the suit property and a letter by the plaintiff's advocate.
5. The application was opposed. Blanche Mwendu Musembi the 3<sup>rd</sup> defendant filed a replying affidavit sworn on 1<sup>st</sup> October 2024. He stated that the application was misconceived and calculated to defeat the decision made in Machakos HCC No 493 of 1995. That the application is intended to allow the applicant to argue afresh the claim on title to property which was settled by the High Court. He stated that the decision in HCC No 493 of 1995 was duly implemented. He stated that there was a valid court order issued on 16<sup>th</sup> May 2024 and that the applicant has failed twice in challenging eviction orders.
6. He stated that on 13<sup>th</sup> October 2016, the applicant was convicted for the offence of forcible detainer and contempt of court and sentenced to 12 months in prison in Criminal Case No 1233 of 2008 and that the applicant has not been in peaceful possession of the suit property. Further that the applicant is only in possession of ¼ an acre contemptuously and forcefully. He maintained that the suit property belonged to him. He attached a decree dated 17<sup>th</sup> September 2024; a copy of judgment in Criminal Case No 1233 of 2008; and a search certificate.
7. In a rejoinder, the plaintiff filed a supplementary affidavit dated 14<sup>th</sup> October 2024. He stated that the 3<sup>rd</sup> defendant has never been in possession of the suit property and that the orders made on 16<sup>th</sup> May 2024 presented by the 3<sup>rd</sup> defendant do not touch on possession and hence did not extinguish his right on adverse possession.



8. The application was canvassed by way of written submissions. On record are the plaintiff's submissions dated 14<sup>th</sup> October 2024 and the 3<sup>rd</sup> defendant's submissions dated 15<sup>th</sup> October 2024; both of which this court has considered carefully.

### **Analysis and determination**

9. The court having carefully considered the application herein, the response thereto and the parties' rival submissions, the only issue that arise for determination is whether the plaintiff is entitled to orders of temporary injunction.
10. Order 40 Rule 1 of the *Civil Procedure Rules* grants this court the jurisdiction to grant orders of temporary injunction where an applicant demonstrates that the disputed property is at risk of being wasted, damaged, alienated, wrongly sold in execution of a decree or the defendant threatens or intends to remove or dispose it in circumstances that show that there is probability of the plaintiff being obstructed or delayed in execution of a decree that may ultimately be passed in his or her favour.
11. Conditions for grant of temporary injunction are well settled. An applicant for temporary injunction must demonstrate a *prima facie* case with chances of success; demonstrate that he or she stands to suffer irreparable injury that may not be compensated in damages and where the court is in doubt, it shall decide the application on a balance of convenience (See *Giella v Cassman Brown* [1973] EA 358).
12. In the instant case, the plaintiff's claim is based on Section 4(4) of the *Limitation of Actions Act* and the plaintiff argues that although the High Court in Machakos HCC No 493 of 1995 ordered him to vacate the suit property, the defendants failed to execute the decree and cannot ask him to vacate the same. He contends that he has lived on the suit property peacefully for over 50 years and has acquired the same under the doctrine of adverse possession.
13. Section 4 (4) of the *Limitation of Actions Act* provides as follows;
- An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.
14. Therefore, a party in whose favour a judgment has been entered cannot execute such judgment after 12 years from the date of delivery of the judgment. As I understand the provisions of Section 4 (4) of the *Limitation of Actions Act*, it is the party who fails to execute a judgment in their favour that is barred from bringing an action ostensibly to implement such judgment after 12 years from the date of delivery of the judgment. In my view, Section 4(4) of the *Limitation of Actions Act* cannot be a basis for a cause of action for a party against whom a judgment was entered 12 years before. Simply put, the section can be used only as a shield and not as a sword. It is a defence against a suit after 12 years from the date of delivery of judgment, but cannot be the basis for a cause of action, since if that were the case, the legislature could have expressly provided as much. In this case, no suit has been filed by the defendants and therefore it is my finding that the said provision is inapplicable in this matter, and the plaintiff cannot in law rely on the said provisions to file suit against the defendants herein.
15. Section 7 of the *Limitation of Actions Act* prohibits a person from filing suit for claim of land, 12 years after accrual of the cause of action. Section 17 of said Act provides that at the end of the limitation period, for recovery of land, the title of an owner of land is extinguished. On the other hand, Section



37 grants a right to person who claims to be entitled by adverse possession to land of another person, to apply to this court for an order that he be registered as owner of such land in the place of the real owner.

16. For a person to claim to be entitled to the land of another person by adverse possession, the claimant must demonstrate to have been in a peaceful, open and uninterrupted occupation of the land without the owner's permission for a continuous period of 12 years. He must show that he or she has dispossessed the true owner of the land for a continuous period of 12 years. In the case of *Gabriel Mbuvi v Mukindia Maranya* [1993] eKLR, the court described adverse possession as follows;

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 of which the owner intended to use it.

17. Has the applicant demonstrated at a *prima facie* level that he is entitled to the suit property by adverse possession? I do not think so. To begin with, the applicant himself confirms that a decision was made against him by the High Court in Machakos HCC No 493 of 1995 where eviction orders were issued against him on 21<sup>st</sup> January 1999. Besides, the defendants instituted a criminal case against him for forcible detainer and contempt of court in 2008 vide Criminal Case No 1233 of 2008, in which he was convicted, ordered to vacate the land and sentenced to 12 months in prison without option of a fine on 13<sup>th</sup> October 2016. This clearly show that the defendants have never stopped pursuing their right as against the plaintiff, since they instituted and or caused to be instituted Machakos HCC No 493 of 1995 and Machakos Criminal Case No 1233 of 2008 and in both cases the plaintiff was ordered to vacate the suit property. Therefore, it cannot be true that the plaintiff has continuously occupied the suit property openly and peacefully for over 12 years as it is now 8 years since he was ordered to vacate the suit property in Machakos Criminal Case No 1233 of 2008 vide the order of 13<sup>th</sup> October 2016. Therefore, it is apparent that the statutory period of 12 years has not been attained by the plaintiff. This court cannot assist a party who is clearly contemptuous of the court's decisions on the pretext of provisions of the *Limitations of Actions Act*.
18. For the above reasons, I am not convinced that the plaintiff has established a *prima facie* case to warrant orders of injunction. In any event all the prayers sought by the plaintiff herein having been sought to be granted pending hearing and determination of the application herein, are in my view spent, and at this juncture there is no prayer to be granted.
19. The upshot is that I find no merit in the application dated 9<sup>th</sup> September 2024 which I hereby dismissed with costs to the 3<sup>rd</sup> defendant.
20. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

In the presence of;

Mr. Musyimi for plaintiff



Mr. Tamata for 3<sup>rd</sup> defendant

Court assistant – Josephine

