



Wambua v Musyoki & 5 others (Enviromental and Land Originating Summons E023 of 2022) [2024] KEELC 13260 (KLR) (18 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13260 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E023 OF 2022
CA OCHIENG, J
NOVEMBER 18, 2024**

BETWEEN

URBANUS KIOKO WAMBUA PLAINTIFF

AND

LUCIA KANINI MUSYOKI 1ST DEFENDANT

DAVID MAINGI MUSYOKI 2ND DEFENDANT

JEREVAI MALUKI MUSYOKI 3RD DEFENDANT

MARTINA NDUNGWA MUSYOKI 4TH DEFENDANT

PETER MUNYAO MUSYOKI 5TH DEFENDANT

MWANZIA MUUTU 6TH DEFENDANT

JUDGMENT

1. What is before Court for determination is the Plaintiff's Originating Summons dated the 18th October, 2022 where the Plaintiff seeks the following Orders and Declaration that:-
 - a. There be a declaration that the Plaintiff, Urbanus Kioko Wambua, has acquired all proprietary rights and ownership of the parcel of land known as Mbiuni/Mumbuni/432 through adverse possession.
 - b. The Land Registrar, Machakos Land Registry be directed to register the Plaintiff, Urbanus Kioko Wambua, as the sole proprietor of Mbiuni/Mumbuni/432 and cancel the registration in favour of Koti Maithya.
 - c. The Hon. Deputy Registrar be directed to execute any transfer documents that may be necessary to implement the registration of the land parcel known as Mbiuni/Mumbuni/ 432 in favour of the Plaintiff, Urbanus Kioko Wambua.



- d. Any restriction, caution, inhibition or injunction that may be subsisting on the land parcel known as Mbiuni/Mumbuni/ 432 be lifted to facilitate registration of the Plaintiff, Urbanus Kioko Wambua as the proprietor of the parcel of land.
 - e. The Defendants be permanently restrained from trespassing, dealing or any manner disturbing the Plaintiff's quiet and peaceful ownership of the parcel of land known as Mbiuni/Mumbuni/432, and
 - f. The costs of this application be borne by the Defendants, jointly and severally.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of URBANUS KIOKO WAMBUA, where he deposes that land parcel number Mbiuni/Mumbuni/432, measuring 4.6 hectares, hereinafter referred to as the 'suit land', is registered in the name of Koti Maithya. He confirms that Koti was his cousin and he died in 2019. Further, that the 1st Defendant is the wife to Koti while the 2nd, 3rd, 4th and 5th Defendants are the sons and daughters of Koti. He avers that his father was called Wambua Nthama Mutyanzau (aka Nguu Nthama) and he died in 2014, while Koti was also known as Musyoki Maitho. He contends that, when Koti was getting married, Wambua Nthama gave him 22 goats, Kshs, 463, one bull, one bag of maize and four portions of traditional beer, to pay as dowry. Further, that Koti had moved to Yatta but Wambua assisted him get registered as owner of the suit land and after registration, Koti informed Wambua that he was giving him the said suit land to repay the debt of dowry payment. He claimed he entered the suit land in 1980, has exclusively and openly used it, by building a permanent home, planting fruits, food including cash crops. He states that he got married after occupying the suit land and all his children have been born and brought up thereon. Further, that both Koti and Wambua watched him exclusively use and develop the suit land and never raised any objection. He explains that in 2019, his sister Teresia Ndunge in collusion with the 1st, 2nd, 3rd, 4th and 5th Defendants illegally entered into an agreement for sale for the whole of the suit land with the 6th Defendant. Further, the 6th Defendant fenced off the suit land using barbed wire and blocked him and his family from accessing his home and he had to uproot a portion of the barbed wire to access his home. He reiterates that between 2019 and 2020, the Defendants actively used the local area Chief and the Deputy County Commissioner to harass him to vacate the suit land but when his advocate issued demand notices to them, including Teresia, the harassment ceased immediately. He reaffirms that he is entitled to the suit land through adverse possession and a permanent injunction should issue against the Defendants to restrain them from interfering in any manner with his quiet and peaceful enjoyment of the said land.
 3. The Defendants opposed the instant Originating Summons by filing a Replying Affidavit sworn by the 5th Respondent PETER MUNYAO MUSYOKI where he confirms that the suit land is registered in the name of Kuzi Maithya. He explains that Kiti Maithya who was also known as Musyoki Maitho was his late father who died on 1st May, 2014. He contends that the suit land has not devolved. He contends that the deceased Koti Maithya was not aware of any entry into his land having been away for a very long time. He argues that the documents annexed to the Supporting Affidavit sworn by the Plaintiff indicates a claim relating to goats, money, maize and liquor but not land. He avers that the Plaintiff moved to court after they had called on the Chief Mbiuni to notify him of the illegal trespass on the land being part of their father's estate. He disputes that the Plaintiff has been on the suit land for a period of 40 years as claimed.
 4. The Plaintiff filed a Supplementary Affidavit sworn by URBANUS KIOKO WAMBUA where he deposes that the 5th Defendant has not exhibited any authority to act, plead or swear the Replying Affidavit on his own behalf or behalf of the 1st, 2nd, 3rd, 4th and 6th Defendants. He insists that the suit land is Mbiuni/Mumbuni/432 and the correct name of the registered owner is Koti Maithya, not



Kuzi Maithya or Kiti Maithya. He reiterates that the deceased prior to his demise was aware he was occupying, living and gainfully using the suit land and never complained anywhere. Further, that the deceased knew he entered the suit land in 1980. He is categorical that the Defendants' only complained after the deceased demise and illegally sold the suit land. He avers that the 6th Defendant unlawfully bought the suit land, fenced it off and blocked him from getting out. Further, that the 5th Defendant has failed to evict him from the suit land because he is permanently settled on it as well as exhaustively developed it. He further states that he has planted fruit trees thereon which are over 20 years old. He reaffirms that the issue before court is how he acquired proprietary rights over the suit land and reference to goats, maize including liquor was to demonstrate how he entered the said suit land with concurrence of the late Koti Maithya. He further reiterates that the 1st to 5th Defendants relocated to Yatta together with their deceased father and it is where they were served with summons. Further, upon the death of their father, they attempted to re-enter the suit land and sell to the 6th Defendant but they have been unable to pass a good title to the 6th Defendant.

5. The Originating Summons was canvassed by way of written submissions.

Submissions

Plaintiff's Submissions

6. The Plaintiff in his submissions reiterated his averments as per the Supporting Affidavit and contended that he has met all the conditions to prove he has acquired the suit land through adverse possession. Further, that a claim for adverse possession can be laid on a deceased person's estate. He insisted that he is hence entitled to the orders as sought. He sought for costs of the suit. To buttress his averments, he relied on the following decisions: *Mtana Lewa v Kahindi Ngala Mwangandi* (2015) eKLR; *Regina Wanjiru Mwago & Another v Lucy Wairimu Gichuhi & 2 Others* (2019) eKLR; *Phyllis Wanjiru Kamau v Wilson Gichuhi Gachagwe & 2 Others* (2019) eKLR; *Mate Gitabi v James Kaburu Muga & 3 Others Nyeri Court Civil Appeal No. 43 of 2015*; *Titus Kigoro Munyi v Peter Mburu Kimani* (2015) eKLR and *Republic v Rosemary Wairimu Munene: Ex parte Applicant v Ihururu Dairy Farmers Cooperative Society*.

Defendants' Submissions

7. The Defendants' in their submissions insisted that the Plaintiff had not fulfilled the claim for adverse possession because his occupation of the suit land was permissive. Further, that Koti entered into an agreement with Wambua, to give Wambua the suit land as a way of repaying a debt of dowry payment but the said agreement did not have a time limit. They argued that since the preexisting agreement did not have a time limit, the breach of the agreement could only occur upon the death of one of the parties. They confirmed that Wambua died in 2014 while Koti died in 2019, hence the ingredients of adverse possession were not fulfilled. They further submitted that the Plaintiff cannot claim that he has been in adverse possession for more than twelve (12) years, if time started running in 2020. Further, he has not proved he has been in open, continuous, uninterrupted occupation of suit land. To buttress their averments, they relied on the following decisions: *Nairobi CIV No. 283 of 1990 Gabriel Mbui v Mukindia Maranya* (1993) eKLR; *Christopher Kioi & Another v Winnie Mukolwe & 4 Others* (2018) eKLR and *Peter Njau Kairu v Stephen Ndungu Njenga & Another* [CA 57 of 1997](#).

Analysis and Determination

8. Upon consideration of the Originating Summons including the respective Affidavits, annexures and rivalling submissions, the only issue for determination is whether the Plaintiff Urbanus Kioko



Wambua, should be declared to have acquired proprietary and ownership rights over the parcel of land known as Mbiuni/Mumbuni/432 through adverse possession.

9. Adverse possession is governed by Sections 7 and 38(1) and (2) Limitation of the Actions Act. Section 38(1) and (2) stipulates thus:

“(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. (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”

10. Judge Angote in the case of Haro Yonda Juaje V Sadaka Dzengo Mbauro & Another (2014) eKLR provided the parameters an applicant is required to prove in a claim over land through adverse possession and stated thus:-

- “a) That one has made physical entry on the land and is in actual possession of the land for the statutory period;
- b) That the said occupation is non permissive;
- c) That the occupant has the clear intention of excluding the owner from the property (animus possidendi);
- d) The acts done by the claimant are inconsistent with the owners enjoyment of the land for the purpose which he intended to use it; and
- e) that the possession was continuous, uninterrupted and unbroken for the statutory period.”

11. In the current scenario, both the Plaintiff and Defendants have admitted that the Plaintiff has been on the suit land, which is registered in the name of Koti Maithya (deceased). The 1st to 5th Defendants are beneficiaries of Koti Maithya while the Plaintiff's father was a cousin to Koti Maithya. The Defendants have admitted that the Plaintiff indeed entered the suit land as a result of an agreement between their father and the Plaintiff's father wherein the said land was used as a consideration for the repayment of the resources Wambua had given Koti Maithya to pay for his wife's dowry. The Defendants in their submissions have contended that since the entry was permissive, the Plaintiff has not acquired the suit land through adverse possession and that the Agreement between Koti Maithya and Wambua Nthama was terminated when both parties died.

12. In the case of Daniel Kimani Ruchine & Others versus Swift Lothorford & Co. Ltd and Anor (1977) eKLR the court held that

“The Plaintiffs have to prove that they used the land as of right, nec vi, nec clam, nec precario (no force, no secrecy, no evasion).”



13. While in *Wambugu v Njuguna* 1983 KLR 174 as cited in *Karuntimi Raiji Vs. M'makinya* (2013) eKLR, the Court of Appeal observed that:-

“In order for a person to acquire title by the operation of the statute of limitation to land which has a known owner, the 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 suit for purposes for which he intended to use it. The Plaintiff is required to prove that he has dispossessed the defendant of the suit land or that the Defendant had discontinued possession of the suit land for a continuous period of 12 years so as to entitle the plaintiff to the title to the suit land by adverse possession.”

14. Further, on a claim for adverse possession by a purchaser, the Court of Appeal in the case of *Peter Mbiru Michuki Vs Samuel Mugo Michuki* (2014) eKLR held that:-

“Our reading of the record shows that the plaintiff entered the suit property pursuant to a sale agreement in 1964 as a bona fide purchaser for value. The entry in 1964 was with permission of the appellant qua vendor. In the case of *Public Trustee – v- Wanduru*, (1984) KLR 314 at 319 Madan, J.A. stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run.34. In *Mwangi & Another –v – Mwangi*, (1986) KLR 328, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights. In the case of *Public Trustee – v- Wanduru*, (1984) KLR 314 at 321 it is stated that a purchaser in possession has an overriding interest under the provisions of the Registered *Land Act*. Order 24 Rule 1 of the Civil Procedure Rules provides that the death of a plaintiff shall not cause the suit to abate if the cause of action survives or continues. The issue is whether the claim for adverse possession survives the death of a plaintiff. Section 16 of the *Limitation of Actions Act* (Cap 22 of the Laws of Kenya) provides that actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration. The effect of this provision is that when the letters of administration was granted for the estate of the plaintiff in this case, the administration of the estate dates back to the date of death and an order reviving an abated suit does not operate prospectively to establish an interval of time between the abatement and revival of the suit but is retroactive; an order reviving a suit revives the case from the date the suit was filed by the deceased. 35. The dicta in *Mwangi & another –v – Mwangi*, (1986) KLR 328, establishes the principle that the rights of a person in possession or occupation of land are equitable rights which are binding on the land. In *Public Trustee – v- Wanduru*, (1984) KLR 314 at 324, it is stated that in adverse possession, the title of a registered proprietor is not extinguished but is held by him in trust for the person who, by virtue of the *Limitation of Actions Act*, has acquired title against the proprietor. In the instant case, the plaintiff was in occupation of the suit property and his possessory rights are not only equitable rights but an overriding interest binding on the land. Section 18 of the *Limitation of Actions Act* provides that subject to Section 20(1) of the Limitations Act, the Act applies to equitable interests in land ... and accordingly a right to action to recover the land ... accrues to a person



entitled in possession to such an equitable interest in the like manner and circumstances and on the same date as it would accrue if his interest were a legal estate in the land. Sub-Section 18 (4) provides that where land held on trust for sale is in the possession of a person entitled to a beneficial interest in the land or in the proceeds of sale, not being a person solely and absolutely entitled thereto, a right of action to recover the land accrues during such possession to any person in whom the land is vested as trustees or to any other person entitled to a beneficial interest in the land or the proceeds of sale. 36. It is our considered view that when the appellant entered into a sale agreement with the plaintiff in 1964 and received the purchase price for the suit property, the appellant became a trustee holding the suit property in favour of the plaintiff. The plaintiff having paid the purchase price and took possession acquired an equitable beneficial interest in the suit property. Section 18 (4) of the *Limitation of Actions Act* applies in the instant case and the right to recover the suit property was not extinguished by death of the plaintiff. The plaintiff having been in possession of the suit property, Section 13 (1) of the *Limitation of Actions Act* applies as it provides that a right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run.”

15. While, Madan JA in the case of Public Trustee Vs Wanduru (1984) KLR 314, held that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve (12) years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off, possession.
16. Based on the evidence that I have enumerated above including the documents annexed to the affidavits, I find that the Plaintiff did not enter the suit land with permission as claimed by the Defendants as there was an agreement between his father Wambua Nthama and their father Koti Maithya wherein the suit land was used as a consideration to repay a debt where Wambua Nthama had paid for Koti Maithya dowry for his wife. Further, from the photographs, which were not disputed by the Defendants/ Respondents, I note there are permanent structures on the suit land, mature fruit trees and evidence of cultivation of the said land. From the correspondence from the chief, it is further evident that the Plaintiff was indeed on the suit land while the Defendants did not deny that they do not reside thereon. What is baffling is that the deceased who was the owner of the suit land never bothered to evict the Plaintiff and the issue of eviction seems to have arisen after the demise of Koti Maithya.
17. It is against the foregoing while associating myself with the judicial authorities cited above, I find that Plaintiff indeed entered the suit land in 1980 and his entry was not permissive. Further, that he has been thereon for over twelve (12) years with the full knowledge of the late registered owner who never took any action to evict him during his lifetime. He was also undertaking activities on the suit land and the Defendants had never conducted any activities thereon. I hence find that Section 18(4) of the *Limitation of Actions Act* applies in this instance because the right to recover the suit land was not extinguished by death of the Koti Maithya who was its registered proprietor. Further, that since the Plaintiff was in occupation of the suit land, his possessory rights were not only equitable rights but an overriding interest binding on the land and the land was hence not capable of being sold to the 6th Defendant. In my view, the Plaintiff has proved he dispossessed the deceased during his lifetime including the Defendants from the suit land even though they attempted to sell the said suit land to the 6th Defendant knowing fully well, their title to the said land already had extinguished by the Plaintiff's possession thereon.
18. In the circumstances and for the reasons I have given above, I find that the Plaintiff has proved his claim of adverse possession over the suit land and hence find the Originating Summons dated the 18th October, 2022 merited. I will hence enter Judgment in his favour as against the Defendants.



19. I will proceed to make the following final Orders:-

- a. A declaration be and is hereby issued that the Plaintiff, Urbanus Kioko Wambua, has acquired all proprietary rights and ownership of the parcel of land known as Mbiuni/ Mumbuni/432 through adverse possession.
- b. The Land Registrar, Machakos Land Registry be and is hereby directed to register the Plaintiff, Urbanus Kioko Wambua, as the sole proprietor of Mbiuni/Mumbuni/432 and cancel the registration in favour of Koti Maithya (deceased).
- c. The Hon. Deputy Registrar be directed to execute any transfer documents that may be necessary to implement the registration of the land parcel known as Mbiuni/Mumbuni/ 432 in favour of the Plaintiff, Urbanus Kioko Wambua.
- d. Any restriction, caution, inhibition or injunction that may be subsisting on the land parcel known as Mbiuni/ Mumbuni/ 432 be lifted to facilitate registration of the Plaintiff, Urbanus Kioko Wambua as the proprietor of the parcel of land.
- e. The Defendants be and are hereby permanently restrained from trespassing, dealing or any manner disturbing the Plaintiff's quiet and peaceful ownership of the parcel of land known as Mbiuni/Mumbuni/432, and
- f. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 18TH DAY OF NOVEMBER, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:

Ms. Waiyego holding brief for Mbiyu Kamau for Defendant

Ms. Thuku for Dr. Musau for Plaintiff

Court Assistant – Simon/Ashley

