Kimaita v Mbaya & 2 others (Enviromental and Land Originating Summons E001 of 2024) [2025] KEELC 776 (KLR) (12 February 2025) (Judgment)

Neutral citation: [2025] KEELC 776 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ENVIROMENTAL AND LAND ORIGINATING SUMMONS E001 OF 2024

JO MBOYA, J

FEBRUARY 12, 2025

BETWEEN

SILVERIA KATHUNI KIMAITA ..... PLAINTIFF

AND

MONICAH MWENDWA MBAYA ..... 1ST DEFENDANT

JOHN MBAYA M'IRIONGO ..... 2ND DEFENDANT

LUCY MWENDWA ..... 3RD DEFENDANT

JUDGMENT

Introduction And Background:

1. The Plaintiff herein approached the court vide the Originating Summons dated the 22nd May 2024; and wherein the Plaintiff has sought for various/ diverse relief[s]. For coherence, the reliefs sought at the foot of the Originating Summons are as hereunder;

    i. Whether the plaintiff has become entitled by adverse possession to land title number Kiirua/ Nkando/5149 registered under the *Land Registration Act*, 2012 in the name of the 3rd Defendant.

    ii. Whether the 3rd Defendant assumed and carries the burden of the 1st and 2nd Defendants with respect to land title number Kiirua/Nkando/5149.

    iii. Whether the 3rd Defendant's title to the said land has become extinguished and the plaintiff can now be registered as the proprietor in place of the 3rd Defendant.

    iv. Whether the Defendants would bear the costs of this suit.

    v. Questions 1, 2, 3 & 4 be declared in the affirmative.

vi. This court be pleased to make any further orders it may deem necessary to meet the ends of justice.

2. The Originating Summons beforehand is premised/anchored on the grounds that have been highlighted in the body thereof. In addition, the Originating Summons is supported by the supporting affidavit sworn by Silveria Kathuni Kimaita [deponent] and which is sworn on the 2nd of May 2024. Furthermore, the deponent has annexed assorted documents including a copy of the green card/ register of the suit property.

3. The Originating Summons was duly served upon the Defendants herein. However, despite service, the Defendants neither entered an appearance nor filed any Response to the Originating Summons. In this regard, the Plaintiff proceeded to and filed a request for [sic] entry of interlocutory judgment.

4. Moreover, the Plaintiff herein caused the matter to be listed for directions in accordance with the provisions of Order 37 Rules 16 & 17 of the Civil Procedure Rules. For clarity, directions were issued/ given that the matter proceeds on the basis of affidavit evidence. In addition, the Plaintiff covenanted to file written submissions within circumscribed timelines.

Parties Submissions:

a. Plaintiff's submissions

5. The Plaintiff filed written submissions dated the 6th February 2025 and wherein the Plaintiff adopted and reiterated the grounds contained in the body of the Originating Summons. Furthermore, the Plaintiff also adopted the averments contained in the body of the supporting affidavit.

6. Additionally, learned counsel for the Applicant ventured forward and highlighted two issues, namely; that the Plaintiff has acquired adverse possessory rights to and in respect of the suit property and that the 3rd Defendant's rights to recover the suit land have lapsed/extinguished.

7. In addition, learned counsel for the Plaintiff invoked and referenced Sections 7, 12, 13 and 17 of the *Limitation of Actions Act* Chapter 22, laws of Kenya, which highlights the ingredient[s] of adverse possession.

8. To support the foregoing submissions, Learned counsel for the Plaintiff cited and referenced various decisions inter-alia Kimani Ruchine & another vs Swift, Rutherfold Company Ltd & another (1977) eKLR; Wainaina vs Muraya and others (1976) eKLR; Peter Thuo Kairu vs Kuria Gacheru, Civil Appeal nO. 42 of 1978 [unreported] and Mwangi Githu vs Livingstone Ndeete Civil Appeal nO. 24 of 1979 [unreported].

9. Arising from the foregoing submissions, Learned counsel for the Plaintiff has submitted that the Plaintiff has laid and placed before the court plausible evidence to warrant a finding that same [Plaintiff] is entitled to the order[s] sought at the foot of the Originating Summons.

b. Defendant's submissions:

10. As pointed out elsewhere hereinbefore, the Defendants neither entered appearance nor filed any response to the Originating Summons. Furthermore, the Defendants did not attend court or otherwise.

11. Suffice it to underscore that the Defendants also did not file any submissions or at all. For coherence, the only set of written submissions on record are the submissions filed by and on behalf of the Plaintiff.

ISSUES FOR DETERMINATION

12. Having reviewed the Originating Summons; the supporting affidavit and the written submissions filed by the Plaintiff; the issues that do arise for determination are as hereunder;

    i. Whether the Plaintiff has established and demonstrated the requisite ingredients to warrant declaration of adverse possession or otherwise.

    ii. What orders, if any; ought to be granted.

Analysis And Determination:

Issue No. 1 Whether the Plaintiff has established and demonstrated the requisite ingredients to warrant declaration of adverse possession or otherwise.

13. The Plaintiff herein contended that same entered into a sale agreement with the 1st Defendant over and in respect of a portion of land hitherto known as Plot NO. 4343 [hereinafter referred to as original parcel of land]. In this regard, the Plaintiff posited that same [Plaintiff] was thereafter granted permission to enter upon and take possession of the sold portion of the original land.

14. It was the further testimony of the Plaintiff that same [Plaintiff] entered upon the suit property and fenced a portion thereof measuring 50 ft by 100 ft. In addition, the Plaintiff also averred that same has remained in occupation of the designated portion of land since the year 2009.

15. Moreover, the Plaintiff averred that despite the endeavors to have the 1st Defendant transfer the sold portion of land unto him [Plaintiff]; the Defendant failed to comply with the terms of the contract. In any event, the witness/Plaintiff contended that the sale agreement was frustrated and therefore rendered unenforceable.

16. Despite the fact that the sale agreement was frustrated and rendered unenforceable, the Plaintiff contended that same remained in occupation and possession of the sold portion of the original parcel of land. For good measure, the Plaintiff averred that same [Plaintiff] has been in occupation of the designated portion of land since the year 2009 to date. Additionally, it has been averred that the Plaintiff has been in occupation of the designated portion of land openly, continuously and uninterrupted for more than 12 years.

17. On the other hand, it was contended that neither the 1st Defendant, nor the rest of the Defendants have taken any action and/or steps to evict and or remove same [Plaintiff] from the designated portion of the suit property. In this regard, the Plaintiff contends that same has acquired and accrued adverse possessory [prescriptive] rights to and in respect of the designated portion.

18. Notwithstanding the foregoing, the Plaintiff averred that the 1st Defendant herein purported to transfer the resultant sub-division of the Original parcel of land and more particularly, the portion that captures the sold portion to the 3rd Defendant. For good measure, the Plaintiff has referenced the suit property to be the one that corresponds with the designated ground portion that was sold unto him.

19. At any rate, the Plaintiff averred that having been in occupation of the portion that now constitutes the suit property for more than 12 years, the 1st Defendant had no rights and or interests capable of being sold and or transferred to the 3rd Defendant. Furthermore, it has been posited that the 3rd Defendant acquired no lawful rights or interests over the suit property.

20. Pertinently, the rights of the 1st Defendant over and in respect of the suit property, which had been under the occupation of the Plaintiff, lapsed and or stood extinguished upon the expiration of 12 years. [See Section 7 of the *Limitation of Actions Act* Chapter 22 Laws of Kenya].

21. To the extent that the 1st Defendant rights to and or in respect of the suit property lapsed and or stood extinguished, neither the 1st nor the 2nd Defendant could vest, convey and or confer upon the 3rd Defendant any lawful rights. Further and in any event, it suffices to state that adverse possession attaches to the land [namely, is an act in rem] and thus impacts upon anyone, the 3rd Defendant not excepted, who buys/purchases land that is affected by adverse possessory rights/prescription. [See Mwangi Githu v Livingstone Ndeete [1980] eKLR].

22. Having taken into account the totality of the evidence on record and which evidence has not been controverted, I come to the conclusion that the Plaintiff herein has indeed satisfied and or met the requisite ingredients that underpin a claim for adverse possession. Notably, the requisite ingredients that underpin a claim for adverse possession were highlighted and elaborated upon in Jandu v/s Kirpal & Another 1975 EA 225; Kweyu versus Kweyu Omuto CA Civil Appeal No. 8 of 1990 [unreported] and Mtana Lewa v Kahindi Ngala Mwagandi [2015] eKLR.

23. In a nutshell, my answer to issue number One [1] is to the effect that the Plaintiff has proven that same has acquired and or accrued adverse possessory/ prescriptive rights to and in respect of the suit property.

Issue No. 2 What orders, if any; ought to be granted

24. Having come to the conclusion that the Plaintiff has established and proven the requisite ingredients that underpin a claim for adverse possession, there is no gainsaying that the Plaintiff is entitled to the various reliefs sought at the foot of the Originating Summons. In particular, the Plaintiff is entitled to a declaration that same [Plaintiff] has acquired adverse possessory rights to and in respect of the suit property.

25. Additionally, the title held by the 3rd Defendant and pertaining to the suit property stands extinguished by effluxion of time. In this regard, same merits cancellation. For coherence, the title held by the 3rd Defendant is hereby cancelled, rescinded and or invalidated.

26. Finally, it is apposite to order that the title of the suit property be registered in the name of the Plaintiff. In this regard, the Deputy Registrar of the court be and is hereby mandated to prepare, execute and engross the requisite transfer instruments to facilitate the effective transfer and registration of the suit property in the name of the Plaintiff.

Final Disposition:

27. Flowing from the observations [which have been highlighted in the body of the Judgment] it must have become apparent that the Plaintiff has proven his case on a balance of probabilities. [See Sections 107, 108 and 109 of the *Evidence Act*, Chapter 80 Laws of Kenya].

28. In the circumstances, Judgment be and is hereby entered in favour of the Plaintiff on the following terms;

    i. A declaration be and is hereby issued that the Plaintiff herein has since acquired adverse possessory rights to and in respect of Kiirua/Nkando/5149.

    ii. The 3rd Defendant title to and in respect of Kiirua/Nkando/5149, be and is hereby declared to have been extinguished by effluxion of time.

iii. Consequently, the 3rd Defendant title to and in respect to L.R Kiirua/Nkando/5149 be and is hereby cancelled, revoked and invalidated.

iv. The Suit property, namely, L.R No. Kiirua/Nkando/5149 shall be transferred and registered in the name of the Plaintiff herein.

v. The Deputy Registrar of the court be and is hereby mandated to prepare, execute and engross the requisite transfer instruments to facilitate the effective transfer and registration of the suit property in the name of the Plaintiff.

vi. There be and is hereby granted an order of permanent injunction to restrain the defendants either by themselves, agents, servants and or employees from interfering with the plaintiff's occupation, possession, use and ownership of the suit property in any manner whatsoever and or howsoever.

vii. Costs of the suit be and are hereby awarded to the Plaintiff.

29. It is so ordered.

DATED SIGNED AND DELIVERED ON THE 12TH DAY OF FEBRUARY, 2025

OGUTTU MBOYA

JUDGE.

In the presence of

Mr. Mutuma/Mustafa – Court Assistants:

Mr. Mwirigi Mbaya for the Plaintiff.

N/A for the Defendant.