



M'amiru v M'etuaruchiu (Sued in His Own Capacity and as Legal Representative of the Estate of Mutua Kiringori) (Environmental and Land Originating Summons E013 of 2023) [2024] KEELC 13573 (KLR) (5 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13573 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E013 OF 2023
CK YANO, J
DECEMBER 5, 2024
IN THE MATTER OF LAND PARCEL NO. ITHIMA/ANTUAMBUI/239
AND
IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA
AND
IN THE MATTER OF THE REGISTERED LAND ACT AND THE LAND REGISTERED ACT
AND
IN THE MATTER OF ORDER 37 OF THE CIVIL PROCEDURE RULES
BETWEEN
NGILIKI M'AMIRU PLAINTIFF
AND
MUTIA M'ETUARUCHIU (SUED IN HIS OWN CAPACITY AND AS LEGAL REPRESENTATIVE OF THE ESTATE OF MUTUA KIRINGORI). DEFENDANT

JUDGMENT

1. The plaintiff instituted this suit by way of an Originating Summons dated 20th February, 2023, claiming to have become entitled to land parcel No. Ithima/Antuambui/2391 through adverse possession. The summons invited the court to determine the following questions;
 1. Has the plaintiff been open, notorious and uninterrupted possession of Land Parcel No. Ithima/Antuambui/2391 for a period of over 12 years.



2. Has the plaintiff been in exclusive possession of the land Parcel. No. ITHIMA/ANTUAMBUI/2391 for a period of over 12 years?
 3. Has the plaintiff's possession, occupation and user of land parcel No. ITHIMA/ANTUAMBUI/2391 been adverse to the interests of the defendant?
 4. Has the plaintiff been entitled by operation of the law to adverse possession of the suit land?
 5. Should the court's executive officer sign all documents necessary to effect transfer of the suit land to the plaintiff?
 6. Is the plaintiff entitled to costs of this suit?
2. The plaintiff is seeking the following reliefs-;
- i. A declaration that Ngiliki M'Amiru, the plaintiff herein has become entitled by way of adverse possession to all that parcel of land known as L.R No. ITHIMA/ANTUAMBUI/2391.
 - ii. An order for the rectification of the register and the said plaintiff be registered as the sole proprietor of all that parcel of land known as ITHIMA/ANTUAMBUI/2391.
 - iii. An order that the defendant herein do execute the required instruments and/or documents to effectuate transfer to the plaintiff of LR. NO. ITHIMA/ANTUAMBUI/2391.
 - iv. Costs of this suit be paid to the plaintiff.
3. The originating summons is premised on the grounds thereon and is supported by the affidavit of Ngiliki M'Amiru, the plaintiff herein, sworn on 20th February, 2023. The plaintiff avers that he is over 60 years old and was born and brought up on the suit land and has lived therein together with his family to-date. That his father passed away in the year 1984 leaving the plaintiff, his siblings and their mother.
 4. The plaintiff states that he has been in exclusive, open, uninterrupted and notorious possession and occupation of the suit land for over 60 years. That the registration of the defendant as owner of the land is against the plaintiff's proprietary interest by way of adverse possession. The plaintiff annexed copies of a search certificate, letters and O.B extracts.
 5. The defendant was duly served with the summons to enter appearance but he neither entered appearance nor filed a defence. The plaintiff sought leave to have interlocutory judgment entered against the defendant in default of defence which was granted and proceeded to fix the matter for formal proof hearing.
 6. During the hearing, the plaintiff gave oral evidence and called two witnesses. The plaintiff testified that when he was born, he found his father on the suit land. He stated that he has lived on the suit land together with his family ever since. The plaintiff adopted his statement dated 20th February, 2023 as his evidence in chief and produced copies of a search certificate, sketch map, letters dated 2nd February, 2000, 19th May, 2018, 17th January, 2000, 10th February, 2020, 14th December, 1999, 22nd June 2021 and 26th July, 2021 and an OB extracts dated 27th January, 2023, 2nd February, 2023 and 13th February, 2023 as P exhibits 1 to 10 respectively. The plaintiff urged the court to grant him the prayers sought in the originating summons plus costs of the suit.
 7. Peter Kobia testified as P W 2. He adopted his statement dated 20th February, 2023 his evidence in chief. He is the area manager of Antuambui location, Igembe North, Meru county. He is also a businessman. He testified that he has known both the plaintiff and the defendant since childhood. He stated that he was aware that the plaintiff has been living on the suit land together with his family for over 30 years.



- That the plaintiff inherited the land from his late father, M'ameru Meru (deceased) and accused the defendant of fraudulently registering the land in his name.
8. 3 was Grace Kalangi, the plaintiff's wife. She adopted her statement dated 20th February, 2023 as her evidence in chief. She stated that she was over 50 years and was married to the plaintiff when she was 18 years old. That since she got married, they have lived and raised their children on the suit land. That their first born is over 34 years old. The witness testified that they have always known the suit land to be their home.
 9. Having considered the plaintiff's case, and having taken into consideration that the defendant has neither entered appearance nor has he filed a defence, I find the following issues for determination-;
 - a. Whether the plaintiff has on a balance of probabilities proved that he is entitled to the suit land by way of adverse possession.
 - b. Whether the plaintiff is entitled to the orders sought.
 10. It is trite law that even though the suit is undefended, it is incumbent upon the plaintiff to prove his case on a balance of probabilities. Adverse possession is a common law doctrine under which a person in possession of land owned by someone else may acquire title to it. In Kenya this doctrine is alive in Section 7 of the *Limitation of Actions Act* which states as follows-

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”
 11. Section 38 (1) of the *Limitation of Actions Act* provides as follows-

“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”
 12. In *Alfred Welimo Vs Mulaa Sumba Barasa*, C.A No. 186 of 2011, the Court of Appeal expressed itself as follows-

“It is trite that adverse possession is not established merely because the owner has abandoned possession of his land and ceased to use it for as Robert Megarry aptly observed in his *Megarry's manual of the law of property*, 5th ed. Page 490 the owner may have little present use for the land and that land may be used by others without the users demonstrating a possession inconsistent with the title of the owner. So, the mere fact that the appellant abandoned possession of the land and went to leave at Ndalun scheme by and of itself does not establish adverse possession. The abandonment of possession must be coupled with the respondent taking possession of the land with *animus possidendi* (the intention to possess) and asserting thereon rights that are inconsistent with those of the appellant as the owner of the land...”
 13. The Court of Appeal has further held that for a claim founded on adverse possession to succeed, the person in possession must have a peaceful and uninterrupted use of the land. In *Wambuku Vs Njuguna* (1983) KLR 173, the Court of Appeal held that adverse possession contemplates two concepts possession and discontinuance of possession. It was further held that the proper way of



assessing proof of adverse possession is whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years. The Court of Appeal also discussed the principles of adverse possession in *Mtana Lewa Vs Ngala Mwangandi* [2015] eKLR among others.

14. The plaintiff testified that he has been in possession and occupation of the suit land for over 60 years. That his possession and occupation has been open, notorious and uninterrupted for all those years. That is a period of over 12 years. The evidence tendered by the plaintiff and his witnesses have not been contradicted. The defendant was even served with the summons to enter appearance, but they never entered appearance nor defended the suit.
15. Based on the undisputed and undefended evidence by the plaintiff which has not been challenged at all, I find that the plaintiff has on a balance of probabilities proved his claim over the suit land by way of adverse possession. I find the Originating Summons dated 20th February 2023 has merit and I answer all the questions listed for determination in the affirmative.
16. Consequently, judgment is entered for the plaintiff against the defendant as follows-;
 - a. A declaration is hereby made that the plaintiff herein has become entitled by adverse possession of all that parcel of land known as LR. ITHIMA/ANTUAMBUI/2391.
 - b. The plaintiff is entitled to be registered as proprietor of the suit land in place of the defendant.
 - c. An order is made that the defendant herein do execute the required instruments and/or documents to effectuate transfer of the said land to the plaintiff, in default, the Deputy Registrar of this court to execute those transfer documents.
 - d. Since the defendant did not defend the suit, I order that each party bears their own costs.
17. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 5TH DAY OF DECEMBER, 2024

In the presence Of

Court Assistant- Lenah

Gikunda holding brief for Omari for plaintiff

No appearance for defendant

C.K YANO

JUDGE

