



REPUBLIC OF KENYA



KENYA LAW
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**Nditu v Manyara (Environment & Land Case 278 of 2018)
[2023] KEELC 697 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 697 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 278 OF 2018
A OMBWAYO, J
JANUARY 26, 2023**

BETWEEN

JOHN KIHAGURU NDITU PLAINTIFF

AND

RICHARD KUNGU MANYARA DEFENDANT

JUDGMENT

1. The plaintiff commenced this matter by way of the Originating Summons dated August 9, 2018. The plaintiff sought for the determination of the following questions:
 - a. Has the John Kihaguru Nditu been in adverse, quiet and peaceful, open, exclusive, continuous and uninterrupted possession and use of all that parcel of land known as land reference No 464/15, Title No IR 168591 measuring 3.241 Hectares for a period of more than twelve years as at the time of filing this suit?
 - b. That if the answer to question 1 above is in affirmative, has John Kihaguru Nditu acquired prescriptive rights over land parcel known as land reference No 464/15, Title No IR 168591 measuring 3.241 Hectares
 - c. That if the answers to questions 1 and 2 are in the affirmative, has John Kihaguru Nditu ultimately acquired proprietorship rights of all that parcel of land known as land parcel known as land reference No 464/15, Title No IR 168591 measuring 3.241 Hectares by way of adverse possession as against the proprietor thereof- Richard Kung'u Manyara?
 - d. Has John Kihaguru Nditu dispossessed Richard Kung'u Manyara the exclusive quiet, peaceful, uninterrupted, continuous and open possession and use of all that parcel of land known as land reference No. 464/15, Title No IR 168591 measuring 3.241 Hectares for a continuous and uninterrupted period of over twelve years now?



- e. Should the registration of Richard Kungu Manyara as the proprietor of all that parcel of land known as land reference No 464/15, Title No IR 168591 measuring 3.241 Hectares be cancelled and a fresh/new certificate of title of the very same land parcel known as land reference No 464/15, Title No IR 168591 measuring 3.241 Hectares be issued in the names of John Kihaguru Nditu as the sole proprietor thereof?
- f. Who should bear the costs of this action?
2. In the supporting affidavit the plaintiff stated that the defendant is the registered owner of land parcel No land reference No 464/15, Title No IR 168591 measuring 3.241 Hectares situated along Lanet-Dundori road at Matundu sub-location in Nakuru County.
 3. The lease of the suit property expired on April 30, 2005 and was extended for another term of fifty years with effect from May 1, 2005 vide a Certificate of Title issued on October 26, 2015.
 4. On February 22, 2006, the defendant entered into a written and signed lease agreement over the suit property where the defendant leased to him three acres of the suit property with no definite period for his agricultural use and for his residence.
 5. That the suit property is agricultural land and therefore section 6(1)(a) of the *Land Control Act* is applicable. Section 8(1) of the *Land Control Act* provides that an application for consent of the Land Control Board should be made within six months from the date of making the agreement and unless time is extended by the High Court on application for extension of time. That failure to which the entire transaction becomes null and void.
 6. The plaintiff averred that he has been in occupation of the suit property from February 22, 2006 to date but that they did not get the said consent by August 2, 2006 and so the agreement became null and void. That the defendant has not interfered with his occupation to date.
 7. In response to the originating summons, the defendant filed a replying affidavit sworn on September 17, 2018 and filed on September 21, 2018.
 8. He stated that he had filed a suit seeking for the eviction of the Plaintiff from the suit property vide the originating summons dated February 22, 2017 and filed on July 6, 2018. That the said application is still pending in court and that the present application offends the mandatory provisions of Section 6 of the Civil Procedure Rules. He admitted that the plaintiff entered the suit property with his permission vide the lease agreement dated February 22, 2006.
 9. That since the entrance of the plaintiff on the suit property was with the consent of the defendant, the same does not amount to adverse possession as it was consensual. That the plaintiff remaining in possession of the suit property on the basis of a void transaction is a crime for which parties to the agreement can incur criminal penal sanctions.
 10. That the plaintiff's occupation was not continuous as it has been interrupted severally. That on June 3, 2015, the plaintiff received a notice to terminate the said lease after he failed to pay the stipulated rent, that on January 17, 2017 Airways Auctioneers were instructed to levy distress and on diverse dates including February 6, 2018 and February 18, 2018, the plaintiff issued cheques in satisfaction of the proclamation dated January 17, 2018.
 11. That when the plaintiff leased the suit property, there were permanent structures on it and that when he tried to construct, he was warned to stop. The defendant sought that the plaintiff's originating summons be dismissed and the plaintiff be ordered to pay mesne profits, general damages and costs.



12. The court on February 10, 2022 directed that the Originating Summons be heard by way of written submissions and the witness statements filed by the parties be deemed to be their evidence.
13. The plaintiff in his statement dated November 7, 2019 reiterated that he entered into a lease agreement with the defendant on February 22, 2006 on land reference No 464/15, Title No IR 168591 measuring 3.241 Hectares and took possession. That he has been in occupation to date. That they failed to get the Land Control Board consent by August 2, 2006 and so the transaction became null and void.
14. He stated that he has been in peaceful occupation of the suit property for a period of over twelve years and has constructed permanent residential houses, stores, a perimeter concrete fence around the entire land, cow sheds, a children's playground and a lunar park. He therefore sought that the court allows his Originating Summons as prayed.
15. The defendant filed a statement dated January 17, 2020 on the same date. He stated that he is the registered owner of land parcel No 464/15 Dundori measuring around 8 acres. He also stated that around February 22, 2006, he entered into a lease agreement with the plaintiff of three acres of the suit property at annual rate of Kshs 10,000/= per year as land rent and Kshs 2,000/= per month for the house.
16. That the plaintiff paid for his rent by post dated cheques and that there were no official receipts issued for the rent paid. That on the portion of the land that was not leased he planted some trees in the year 2008 which did not germinate well. That the plaintiff on seeing this, went ahead and planted napier grass without consulting him.
17. That in 2015, the plaintiff commenced construction of a lunar park project and that he instructed him to stop the said construction. That he entered into a new lease agreement with the plaintiff that was to take effect from January 2016 to December 31, 2018 and agreed that a surveyor would be involved and the Lessee to strictly lease only three acres of the suit property.
18. The said lease agreement emphasized that the plaintiff was not to construct any permanent structures. That before the commencement of the lease agreement, he changed his mind and instructed his advocates to serve the plaintiff with a one-year Notice to Vacate the premises in accordance to their previous lease agreement.
19. That around November 2015, the plaintiff begun constructing an extension to the previous permanent perimeter wall and he reported the matter to their area Chief Madam Mutuku who asked the Plaintiff to stop the construction. That they tried to meet several times to try and resolve the various misunderstandings between them but they were not able to.
20. On January 28, 2016 they held a meeting with the Chief and it was agreed that the plaintiff would cut the napier grass planted on the excess acreage and he was given one week to uproot the wattle trees.
21. That on January 30, 2016 he was summoned by officers of Dundori Police Station and that when he went there, he found the plaintiff and since their dispute was not criminal, they were referred to the Assistant County Commissioner. That the Assistant County Commissioner advised them to discuss the matter with their advocates and report back to him on February 8, 2016.
22. He stated that the plaintiff's entry to the land did not amount to adverse possession as it was consensual and that the plaintiff did not have exclusive, peaceful and uninterrupted possession of the suit property.
23. That he filed an originating Summons dated February 22, 2017 seeking for the eviction of the plaintiff while the plaintiff filed case number 72 of 2016 before the Chief Magistrate's Court, Nakuru.



24. There is a second witness statement filed by Loise N Githingu dated January 17, 2020. She stated that she has been the secretary to the defendant and is conversant with this matter as she had been dealing with it. She reiterated the averments of the defendant in his witness statement.
25. The originating summons was canvassed by way of written submissions. The plaintiff filed his submissions dated October 4, 2022 on the same date while the defendant filed his submissions dated January 25, 2023 and filed on January 24, 2023.
26. The plaintiff in his submissions relied on the case of *Wambugu v Njuguna* [1983] KLR 172 and submitted that the time started running as an adverse possessor when the lease agreement by operation of the law was considered null and void due to lack of the consent from the Land Control Board as per the law.
28. The plaintiff also relied on the case of *Jandu v Kirpal & another* [1975] EA 225 and submitted that for a party to successfully claim adverse possession, they have to prove that the possession was peaceful, open and continuous. He went on to submit that he has produced photographs that show the extensive developments he has made on the parcels of land comprising of permanent buildings and planting of crops which the defendant was aware of but that he did not take any action or exercised his proprietary rights over the suit property.
29. The plaintiff relied on the case of *Wilson Njoroge Kamau v Nganga Muceru Kamau* [2020] eKLR and concluded his submissions by seeking that the court allows his originating summons dated August 9, 2018.
30. The defendant in his submissions reiterated the contents of his replying affidavit, witness statement and relied on the cases of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, *Isaac Maobe Okeri v Magero Nyaosi alias Maute Okeri* [2016] eKLR, *Martins v Ram* [2022] eKLR.
31. He submitted that the plaintiff has not made out a case for adverse possession as he entered on three acres of the property with his permission and the rest of the five acres around the year 2014.
32. He reiterated that he filed a suit seeking for the eviction of the plaintiff from the suit property which is ELC Case Number 65 of 2017 and therefore the present matter is an afterthought and so it should be dismissed with costs to the defendant.

Analysis and Determination

33. The plaintiff is seeking to be declared to have acquired by way of adverse possession land reference No 464/15, Title No IR 168591 measuring 3.241 Hectares.
34. The plaintiff alleges that he entered into a lease agreement with the defendant on February 22, 2006 where the defendant leased to him three acres of the suit property with no definite period. He further alleges that they failed to get the land control board consent so the transaction became null and void. That since he has been in quiet and peaceful possession of the suit property for a period of twelve years, he seeks to be declared to have acquired the property by way of adverse possession.
35. The defendant on the other hand admits that he entered into a lease agreement dated February 22, 2006 with the plaintiff where he leased three acres of the suit property to him. He states that the plaintiff entered his property with his consent and therefore he cannot claim the property by way of adverse possession.
36. The defendant also alleges that the plaintiff's occupation of the property has not been peaceful as he filed ELC case No 65 of 2017 seeking for his eviction and further that they have been having



misunderstandings with regard to the plaintiff's construction on the suit property that was reported to the chief and not resolved. The only issue for determination is whether the plaintiff is entitled to the suit property by virtue of adverse possession.

37. Section 38(1) and (2) of the [Limitation of Actions Act](#) provides as follows:

“(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.

38. The Court of Appeal in the case of [Kasuve v Mwaani Investments Limited & 4 others](#) [2004] 1 KLR 184, stated as follows on what an applicant in a claim of adverse possession has to prove:

“In order to be entitled to land by Adverse Possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

39. The Court of Appeal also in the case of Kisumu Civ App No 110 of 2016 [Richard Wefwafwa Songoi v Ben Munyifwa Songoi](#) [2020] eKLR indicated that a person claiming adverse possession must establish the following:

- (a) On what date he came into possession.
- (b) What was the nature of his possession?
- (c) Whether the fact of his possession was known to the other party.
- (d) For how long his possession has continued and
- (e) That the possession was open and undisturbed for the requisite 12 years.

40. The Court also in the case of [Haro Yonda Juaie v Sadaka Dzengo Mbauro & another](#) [2014] eKLR held as follows:

“The position, as was held in the above case, is therefore not whether or not the claimant has proved that he has been in possession for the requisite number of years but whether he had the animus possidendi to acquire the land by way of adverse possession. The Claimant can only prove that he had the requisite animus possidendi by showing the circumstances under which he dispossessed the true owner of the land or the circumstances under which the true owner discontinued his possession.

41. It is not disputed that the defendant is the registered owner of the suit property and the plaintiff has annexed a copy of the Certificate of title in the name of the defendant.

42. As indicated before, the plaintiff in this matter stated that he took possession of the suit property upon entering into a lease agreement with the defendant. The defendant admits that he entered into a lease agreement with the plaintiff over the suit property.



43. It is clear from the pleadings that the plaintiff is in the suit property with the permission of the defendant. The lease agreement is dated February 22, 2006 with one of the terms of the lease being that it will be renewable every year.
44. The other terms of the lease were that the plaintiff was to pay rent of Kshs 2,000/= per month for the house and Kshs 10,000/= for the land. The defendant annexed to his replying affidavit a letter dated June 3, 2015 from Obura Mbeche & Company Advocates addressed to the plaintiff indicating that the plaintiff had been in occupation of more than three acres which was contrary to the particulars of the lease agreement.
45. The letter further stated that the plaintiff had been in rent arrears from the year 2007 to 2015. Another letter was also annexed dated January 16, 2017 from Obura Mbeche & Company Advocates addressed to Airways Auctioneers instructing them to levy distress against the plaintiff.
46. The defendant annexed a Proclamation of Attachable movable Property dated January 17, 2017. Annexed also to the defendant's replying affidavit is a letter dated February 3, 2016 from the chief detailing the issues that the plaintiff and the defendant were having.
47. The defendant further annexed pleadings of ELC Case No 65 of 2017 between the plaintiff and the defendant herein where the defendant is seeking for the eviction of the plaintiff from the suit property.
48. The Court of Appeal in the case of *Samuel Miki Waweru v Jane Njeri Richu* [2007] eKLR held as follows:

It is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise.
49. The court further in the case of *Andrew Kiprotich Langat v Joseph Kipruto Maina* [2022] eKLR held as follows:

30. It is trite law that the critical period for the determination as to whether possession is adverse is 12 years and that the onus is on the person or persons claiming adverse possession to prove that they are in actual occupation of another person's land of which they claim as of right, without the true owner's permission and that the possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration.
50. It is not disputed that the plaintiff in this matter entered the suit property with the permission of the defendant. The court in the case of *Emmanuel Njogu Muchina v Judy Njeri Micere* [2021] eKLR held as follows:

The possession by the plaintiff is therefore with permission and not hostile. That ground alone in my view disqualifies the plaintiff from the claim of Adverse Possession. I find it a waste of judicial time to go into the other elements of Adverse Possession.
51. It is my view that in addition to the plaintiff being in possession of the suit property with the permission from the defendant, the possession by the plaintiff has not been quiet or peaceful. This has been demonstrated by the defendant and the various documents annexed to his replying affidavit.
52. Based on the foregoing, it is my view that the plaintiff's originating summons dated August 9, 2018 lacks merit and should be dismissed.



**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 26TH DAY OF
JANUARY, 2023.**

AO OMBWAYO

JUDGE

