



Muchiri v Rutere (Environmental and Land Originating Summons 319 of 2017 & Environment & Land Case 315 of 2017 (Consolidated)) [2023] KEELC 295 (KLR) (25 January 2023) (Judgment)

Neutral citation: [2023] KEELC 295 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 319 OF 2017
& ENVIRONMENT & LAND CASE 315 OF 2017 (CONSOLIDATED)**

CK YANO, J

JANUARY 25, 2023

BETWEEN

LUCIA NTIGAU MUCHIRI PLAINTIFF

AND

FREDRICK PHARES RUTERE DEFENDANT

JUDGMENT

1. For determination is the plaintiff's originating summons dated 18th October, 2017 as consolidated with ELC Case no. 316 of 2017 lodged by the defendant herein vide a plaint also dated 18th October, 2017. By consent of the parties recorded in court on 10th July 2019, the file in *case No. 319 of 2017* (O.S) was taken to be the lead file while the claim in *case no.319 of 2017* was regarded as the counterclaim.
2. In the originating summons the plaintiff is seeking for orders that:
 - a. A declaration that Luciah Ntigau Muchiri the plaintiff has become entitled by adverse possession to the whole lad LR. No. Kiirua/Nkando/326.
 - b. An order that the plaintiff be registered as sole proprietor of land parcel LR. No. Kiirua/Nkando/326.
 - c. An order compelling the defendant to execute all transfer instruments on or documents to transfer land parcel LR. No. Kiirua/Nkando/326 to the plaintiff and in default the Honourable court to empower its deputy Registrar to execute the same on behalf of the defendant.
 - d. The costs of this suit be borne by the defendants.
3. The summons was supported by the affidavit of Luciah Ntigau Muchiri sworn on 18th October, 2017 in which she avers that the plaintiff and her family have been in exclusive, open and uninterrupted



- occupation and user of the whole land parcel LR. No. Kiirua/Nkando/326 (hereinafter referred to as “the suit property”) since the adjudication process began in 1967. The plaintiff states that she has built her home and buried her husband on the suit land.
4. The plaintiff avers that they were given the suit property and took possession of the same in 1969 as some of the pioneer occupiers of the area. That the defendant who is related to the then minister for land and settlement the late Jackson Angaine somehow hijacked the allocation of the land and kept mum about it.
 5. The plaintiff states that in the year 1991, her husband went to check the records of the land at the adjudication office and was astonished to find that the defendant was registered as the owner of the land. That her husband lodged an objection on 30th October, 1991 against the defendant but the objection has never been heard after the demise of the plaintiff’s husband in the year 2005.
 6. The plaintiff states that since taking possession of the land, they endeavored to clear borders and till the same and established their home therein. The plaintiff has annexed some photographs marked “LNM 1”. The plaintiff states that their children were born and raised in the suit land and they do not know any other home, adding that when her husband passed on in the year 2005, he was buried on the said land without anyone objecting. It is the plaintiff’s case that their occupation of the suit land has been open unhindered and continuous since the year 1969 a period of over 12 years and that even though the defendant was registered as the owner, he has never stepped on the land. The plaintiff therefore claim to have acquired the suit land by way of adverse possession.
 7. In response to the originating summons, the defendant filed a replying affidavit sworn on 5th February, 2020 in which he admits being the registered owner of the suit parcel of land measuring 8.6 hectares or thereabout. The defendant avers that the suit land borders L.R No. Kiirua/Nkando/3406 measuring 0.75 hectares which is registered in the name of the late Domiciano Muchiri M’ikandi (the plaintiff’s deceased husband). It is the defendant’s contention that at all material times, the plaintiff and her family resided and worked and still reside and work on LR. No. Kiirua/Nkando/3406.
 8. The defendant avers that he was allocated L.R No. Kiirua/Nkando/326 in the year 1969 by the then committee of lands and that through his late father, he contracted the late Domiciano Muchiri M’Ikandi to help fence his parcel of land and he built a temporary house thereon where he lived and worked since his home was far away. He states that around the year 1989, the land adjudication office instructed people to identity their boundaries for purposes of survey and that it was during that time that the late Domiciano Muchiri M’Ikandi started claiming the defendant’s parcel of land and filed an objection in 1990.
 9. The defendant avers that the objection was heard and the late Domiciano Muchiri M’Ikandi was allocated two acres from the defendant’s land just like others who were residing on private land benefitted. That Domiciano Muchiri M’Ikandi’s 2 acres was given parcel No. Kiirua/Nkando/3406 while the defendant’s remaining parcel measuring 21 acres was given LRNo. Kiirua/Nkando/326. The defendant states that he marked the boundaries with reinforced concrete posts at each corner of his land.
 10. The defendant further avers that Domiciano Muchiri M’Ikandi filed an appeal to the minister but the minister maintained the award of 2 acres in the year 1995. That they continued living in harmony and each of them would cultivate their own part of the land. That after the demise of Domiciano Muchiri M’Ikandi around 2005, he was buried in his parcel No. Kiirua/Nkando/3406.
 11. The defendant states that after the death of her husband, the plaintiff continued using her portion of land until around September, 2017 when she encroached on the defendant’s land and damaged



the concrete posts, prompting the defendant to file Meru ELC case no. 316 of 2017 after the plaintiff ignored the area assistant chief's notice dated 6th October, 2017. The defendant denies that the plaintiff and her family have been in adverse occupation of the defendant's parcel of land as they only encroached thereon in the late 2017. It is the defendant's contention that the originating summons is ill-advised, lacks any basis in law and fact and argues that it should be dismissed with costs.

12. In ELC case no. 316 of 2017, the defendant's claim was that the plaintiff and her children had trespassed on his land parcel No. Kiirua/Nkando 326 and sought orders of a declaration that the said land belongs to him and a permanent injunction against the plaintiff and her children. Pursuant to an order issued by the court on 6th November, 2017, the Deputy Registrar visited the suit parcels of land on 23rd February, 2018 and filed a report dated 17th July, 2018.
13. At the hearing, the plaintiff testified as P.w 1 and adopted the contents of the affidavit in support of the originating summons as her evidence in chief and produced the photographs as P exhibit 1. The plaintiff denied that the defendant is using the land.
14. When cross-examined by Mr. Omemo learned counsel for the defendant the plaintiff stated that the land she is using is parcel No. 326 and that there was no boundary fence between the two parcels of land. P.w 1 admitted that there was a dispute between her and the defendant before the elders in the year 2017. She maintained that she was claiming the suit land because she has been in occupation thereof for a period of over 12 years.
15. 1 stated that she was aware that her late husband sued the defendant sometimes around 1990/1991, and that her deceased husband was not satisfied with the decision of the adjudication committee and filed an appeal but passed on while the appeal was pending. The plaintiff testified that the defendant came to the land and chased her away and that is when she filed a case in court. That the defendant first came in 1972 and then in 2017.
16. 2 was Ibrahim Muriungi Inoti who adopted his witness statement as his evidence in chief and was cross examined. He stated that he has known the plaintiff and her late husband since 1971 when the deceased was working at the public works Isiolo and that he used to visit them frequently. P.w 1 denied ever seeing the defendant on the suit land.
17. 2 stated that in 1971 he was about 6 -7 years old.
18. The defendant testified as D.W 1 and called four witnesses. D.w 1 adopted his statement dated 13/1/2020 as his evidence in chief and produced search certificates and sketch map for the two parcels of land, demand letter dated 6th October, 2017, decision in objection No. 49 dated 21/8/1990 and decision of appeal to the minister dated 18th May 1995 as D exhibit 1 – 6 respectively.
19. When cross examined by Mr. Kithinji, learned counsel for the plaintiff, the defendant stated that he was given land parcel No. 326 by the land committee and denied that his late father was chairman or member of the committee. He however admitted that his uncle, the late Jackson Angaine was the minister for lands. He stated that he was given the land while he was a student at the ministry of works training school where he had gone for a course while already employed. That he drew the sketch map using what he copied from the map. He confirmed that he is the one who filed an objection (D Exhibit 5) for correction of name. That the document does not show if Mr. Muchiri (the plaintiff's deceased husband) was heard though he stated that he filed another objection. D.w 1 stated that he was involved in minister appeal case no. 236 of 1994 (D exhibit 6) which is undated and not signed.



20. D.w 1 stated that he left the land in the year 2017 having taken over actual possession in 1994. He further stated he fenced parcel No. 326 but the fence was destroyed by the plaintiff, adding that the only other development he has done on the land is farming.
21. D.W 2 was Patrick Muriuki M'Twamwari who adopted his statement dated 13th January,2020 as his evidence in chief. He was the area manager Kiirua Nkando from 1972 upto 2002. He stated that he accompanied the defendant to the land in 1974 when he was showing a worker how to fence it and stated that the defendant cultivates parcel No. 326.
22. D.W 3 was Geoffrey Kiriinya who also adopted his witness statements dated 13th January, 2020 and was cross examined and re-examined. He testified that the defendant used to utilize the land from 1973 upto 2005, and that the plaintiff is using a portion of it. That the remaining portion is not used by anyone. That the defendant stopped using the land in 2017.
23. D.W 4 was Paul Kirimi Manyara who also adopted his witness statement and was cross-examined. His evidence was that the defendant was using the land until 2012 and that the plaintiff is the one using the land and did so from 2012.

Submissions

24. The plaintiff filed her submissions on 27th July 2022 through the firm of Kithinji Kirigiah & Co. Advocates while the defendant filed his on 27th October, 2022 through the firm of J.M Kirimi & Company Advocates.
25. In their submissions, the plaintiff's advocates cited the provisions of section 7,13(1), 16 and 38 (1) & (2) of the *Limitation of Actions Act*, Section 28 (h) of the *Land Registration Act* and Section 7 of the *Land Act* and relied on the case of *Kasuve v Mwaani Investments Limited & 4 others* 1KLR 184 and *Celina Muthoni Kithinji v Sofiya Binti Swaleh & 8 others* [2018] eKLR and submitted that the originating summons is merited and the same should be allowed.
26. The defendant submitted that it was true that the land was allocated to the plaintiff, the prayers before court should be those of declarations of her rights as owner of the suit land and not that of adverse possession adding that one must not be heard seeking both at the same time.
27. It is the defendant's submissions that the plaintiff has not met the threshold for adverse possession since there is no period of twelve consecutive years that the plaintiff enjoyed open and notorious use of the suit land. That the defendant consented to the tilling of one (1) acre by the plaintiff's husband. Counsel for the defendant relied on the case of *Kasuve v Mwaani Investment Ltd & 4 others (supra)* and *Tabitha Waittherero Kimani v Joshua Ng'anga* [2017] eKLR and the Deputy Registrar's observation during the scene visit. The defendant's advocates also relied on case of *Gabiel Mbui v Mukindia Maranya* [1993] eKLR.
28. It was further submitted that the plaintiff has concealed that she has been in occupation of land parcel LRNo. Kiirua/Nkando/3406. That the amended scene visit report indicates that the plaintiff's houses has been constructed on her piece of land LRNo. 3406 and not LRNO. 326.
29. The defendant further submitted that it is also evident from the testimonies of the defence that the occupation has been riddled with interruptions and even adjudicative sittings. The defendant relied on the case of *Richard Wefwafwa Songoi v Ben Munyifwe Songoi* [2020] eKLR and urged the court to dismiss the suit with costs and instead issue permanent injunctive orders against the plaintiff barring her from trespassing into LRNo. Kiirua/Nkando/326. They also relied on the case of *Titus Kigoro Munyi v Peter Mburu Kimani* [2015] eKLR and submitted that time stopped running on



19th October, 2017 when the defendant lodged ELC no. 315 of 2017. That further, time has been interrupted in 1990, 1994, 2015 and finally 2017. The defendant's advocates also cited Section 27 (1) of the *Civil Procedure Act* and relied on the case of *Cicilia Karuru Ngayu v Bank of Kenya & another* [2016] eKLR and urged the court to dismiss the plaintiff's suit with costs to the defendant.

Analysis and Determination

30. This court has carefully considered the pleadings the evidence adduced and the submissions filed by the parties to buttress their assertions. I have also taken into account the legal authorities relied on by the parties. The court identifies the following issues for determination;
- i. Whether the plaintiff has acquired land parcel No. Kiirua/Nkando/326 by adverse possession.
 - ii. Whether the defendant is entitled to the injunctive orders sought against the plaintiff.
 - iii. Who should be awarded costs of the suit?

Whether the plaintiff has acquired land Parcel No. Kiirua/Nkando/326 by adverse possession

31. In deciding whether or not the plaintiff has proved her claim for adverse possession to the required standard in civil cases, the plaintiff must prove that she has been in occupation of the suit land for a period of over twelve (12) years, that such occupation was open, peaceful and continuous without interruption from the registered owner and that such occupation was adverse, i.e inconsistent with the right of the registered owner.
32. In *Wambugu V Njuguga* (1983)KLR 173, the court of appeal restated the principles for adverse possession and held as follows;

- “ 1. The general principle is that until the contrary is proved, possession in law follows the right to possess.
2. In order to acquire by the statute of limitation title to land which has a known owner, that owner must have lost his right to the land by either 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 soil for the purpose for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed or had discontinued possession of the suit land for a continuous statutory period of twelve years as to entitle him, the respondent, to title to that land by adverse possession.
3. The Limitation of Actions Act, on adverse possession contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or had discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years”

33. In the case of *Mtana Lewa v Kabindi Mwangandi* [2015] eKLR the Court of Appeal (Makhandia J.A) stated as follows;

“ Adverse possession is essentially a situation where a person takes possession of land and asserts right over it and the person having title to it omits or neglects to take action against



such person in assertion of his title for a certain period, in Kenya is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner”

34. Section 7 of the *Limitation of Actions Act* provides that;

“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”

35. Section 13 of the same *Act* further makes provisions for adverse possession as follows-;

“(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of Limitation can run (which possession is in this Act referred to as adverse possession and where under Section 9, 10, 11 and 12 of this Act a right of action to recover possession on the date, a right of action does not accrue unless and until some person takes possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land”.

36. Section 38 of the *Limitation of Actions Act* provides that;

“Where a person claims to have become entitled by adverse possession to land registered under any 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”

37. In the instant case, there is no dispute that land Parcel LRNo. Kiirua/Nkando/326 measuring 8.6 Hectares or thereabout is registered in the name of the defendant while LR. No. Kiirua/Nkando/3406 measuring approximately 0.75 hectares is registered in the name of the late Domiciano Muchiri M’Ikandi (the plaintiff’s deceased husband). The two parcels of land border each other.

38. The plaintiff’s case is that her family has been in exclusive, open and uninterrupted occupation and use of the whole parcel LR. No. Kiirua/Nkando/326 since 1967 and that even her deceased husband was buried thereon when he passed on in the year 2005 without anyone objecting. On his part, the defendant’s evidence is that through his late father, he contracted the late Domiciano Muchiri M’Ikandi to help fence his parcel of land and that he built a temporary house thereon to live in as he worked since his home was far away. The defendant further stated that during his lifetime the deceased filed an objection claiming the defendant’s land and that when the objection was heard, the deceased was allocated 2 acres from the defendant’s land which was given parcel Number Kiirua/Nkando/3406 and the remaining parcel was given LRNo. Kiirua/Nkando/326 measuring 21 acres registered in the defendant’s name.

39. The plaintiff filed this originating summons on 19th October, 2017 while the defendant filed his replying affidavit on 5th February, 2020. There was no further or supplementary affidavit filed by the



plaintiff challenging the averments made by the defendant in his response to the originating summons. Therefore the averments made by the defendant under oath have not been challenged or controverted by the plaintiff.

40. Further, the court gave directions for a scene visit to be conducted to determine who is in occupation of the two parcels of land, who is utilizing them and whether there were any developments thereon. In the report dated 17th July 2018, it is stated that the parties “also agreed that the plaintiff’s house is constructed on the smaller portion parcel No. Kiirua/Nkando/3406”. The report further stated that the plaintiff on her part agreed that her husband used to work for the defendant’s father (and) when he failed to pay him for sometime he gave her husband the land in lieu of the salary arrears”.
41. It is trite law that where an employee is in possession of land or a house by virtue of employment, he/she cannot seek to have that land by adverse possession. This was the decision in *Delamere Estates v Ndungu Njai & others* [2006] eKLR and *Wellington Lusweti Barasa & 75 others v Lands Limited & another* [2014] eKLR where it was held that;

“If a person is an employee of another and by virtue of his employment he is allowed to reside on his employer’s property, his entry and occupation thereon is not adverse to his employer’s rights because he entered therein with permission of his employer”
42. Similarly, a person who occupies as licensee cannot claim land by dint of the doctrine of adverse possession. This was the holding in the case of *Hughes v Griffin (1969) ALL ER 460* where it was held that a licensee or tenant at will, does not have time running in his favour, for the purposes of a claim for adverse possession.
43. In this case, the plaintiff’s occupation and utilization of the suit land was with the express authority of the defendant or his father and therefore a claim for adverse possession cannot stand. Additionally, the plaintiff admitted that she was aware of the decision of the Land Adjudication Board that sat in 1990 though she stated that she was not aware of the findings of the appeal lodged by her deceased husband in 1994. It is also evident from the testimonies of the witnesses who testified both in court and at the scene visit that the occupation by the plaintiff and her family has been riddled with interruptions and disputes such as adjudicative sittings. Moreover, the amended scene visit report confirmed that apart from the confirmation that the plaintiff’s house is constructed on parcel No. Kiirua/Nkando/3406, both parcels are situate in a semi- arid area with about a quarter of it being rocky and not cultivated. The report further confirmed that only two trees were planted by the plaintiff while the rest are natural most of them shrubs. That in my view, does not support the plaintiff’s claim that she has been in exclusive occupation and use of the entire parcel No. Kiirua/Nkando/326. It is only a portion measuring approximately 2 acres that was confirmed to be occupied and used by the plaintiff and that portion is land Parcel No. Kiirua/Nkando/3406.
44. On the balance of probabilities, the plaintiff has not proved to this court that her possession has been open, exclusive, notorious use of the suit property. Further, the occupation, if any, has not been peaceful as it was riddled with disputes including objections before the Adjudication Board and Committee as well as an appeal to the minister. Additionally, their occupation and possession was with the leave and licence of the defendant. It is also worth to note that the plaintiff pleaded that the land was allocated to her late husband and the defendant used his relationship to the then Minister for Lands to acquire the land. In my view, those are declaration of the plaintiff’s rights as owner of the suit land and I am in agreement with the defendant’s submissions one must not be heard to seek adverse possession orders and declaration of rights as to title at the same time. The singular conclusion in the instant case is that the plea of, and the claim of title based upon the doctrine of adverse possession must fail since the same has not been supported by the facts.



Whether the defendant is entitled to the orders of injunction sought against the plaintiff

45. It is evident from the evidence and material on record that the defendant holds title to the parcel of land LRNo. Kiirua/Nkando/326. The evidence was corroborated by the evidence of the plaintiff who is claiming the said parcel of land by way of adverse possession. The defendant's title over the suit property is therefore not challenged on any of the grounds in section 26(1) of the Land Registration Act which provides inter alia, that the certificate of title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner thereof and that the said title shall not be challenged save on grounds of fraud or misrepresentation to which the holder is shown to be a party or where the title is acquired illegally, unprocedurally or through a corrupt scheme. In addition, section 24 (1) of the same Act provides that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of the land together with all rights and privileges associated with that status. Therefore as the absolute proprietor of land parcel LR. No. Kiirua/Nkando/326, the defendant is entitled to enjoy rights and privileges associated with such ownership which includes exclusive use, possession and enjoyment thereof without interference by any third party, including the plaintiff herein and her family. Accordingly, I do find that the defendant has proved his counterclaim on a balance of probabilities.
46. Consequently, I will enter judgment for the defendant against the plaintiff in the following terms;
- a. The plaintiff's suit is dismissed.
 - b. A permanent injunction restraining the plaintiff by herself, her family, their servants, agents, assigns or anybody else claiming under their name or title from trespassing on the defendant's land parcel No. Kiirua/Nkando/326.
 - c. The defendant shall have costs of the suit.
47. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 25TH DAY OF JANUARY, 2023.

In the presence of

C.a Kibagendi

Munene Kirimi holding brief for Kithinji Kirigiah for plaintiff

No appearance for defendant

C.K YANO

ELC JUDGE

