



REPUBLIC OF KENYA



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**Kariuki v Nyahururu D.E.B. Primary School (Environment & Land Case
377 of 2017) [2023] KEELC 320 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 320 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 377 OF 2017**

**YM ANGIMA, J
JANUARY 19, 2023**

BETWEEN

CATHERINE WANGUI KARIUKI PLAINTIFF

AND

NYAHURURU D.E.B. PRIMARY SCHOOL DEFENDANT

JUDGMENT

A. The Plaintiff's Claim

1. By the plant dated December 19, 2012 the Plaintiff sued the Defendant seeking the following reliefs:
 - a. A declaration that the leasehold interest in Title No Nyandarua/Nyahururu Municipality Block 6/650 manifests in her absolutely.
 - b. An interim order of injunction restraining the Defendant either by itself, its agents, servants or anybody claiming either under it or in its name from in any manner whatsoever interfering with the suit land pending the hearing and determination of the suit.
 - c. A permanent order of injunction do issue restraining the Defendant either by itself, its agents, servants or anybody claiming either under it or in its name from in any manner whatsoever interfering with the suit land.
 - d. Costs of the suit and interest
2. The Plaintiff pleaded that she was the registered proprietor of Title No Nyandarua/Nyahururu Municipality Block 6/650 (the suit property) which she acquired through succession proceedings in Nakuru High Court Succession Cause No 55 of 2007 upon the demise of her late husband, Charles Peter Mugo Kariuki (the deceased). It was the Plaintiff's case that the deceased had been allocated the suit property by the Commissioner of Lands in 1994 and issued with a certificate of lease in 1996.



3. The Plaintiff pleaded that the Defendants had been interfering with the suit property since June 13, 2002 without any lawful justification or excuse. It was contended that the Plaintiff's attempt to fence and develop the suit property had been met by hostility from the Defendant's agents who had fenced off and annexed the suit property as part of the school. It was contended that despite demand and notice of intention to sue the Defendant had failed to make good the Plaintiff's claim hence the suit.

B. The Defendant's Response

4. By a defence dated December 17, 2014 the Defendant denied the Plaintiff's claim in its entirety and invited strict proof thereof. The Defendant pleaded that the suit property had always been part and parcel of the school's land according to Approved Development Plan No 34 for Nyahururu Township. It was pleaded that in the premises the suit land was not available for allocation to the deceased hence the allocation was done in violation of the Government Lands Act and the Physical Planning Act in force then.
5. The Defendant further pleaded that it had been in continuous occupation of the suit property since the establishment of the school in 1951 and that neither the deceased nor the Plaintiff had taken possession thereof at any given time. The Defendant further pleaded that, in any event, the Plaintiff's suit was time barred under the *Limitation of Actions Act* (Cap 22) hence it intended to file a claim for adverse possession of the suit property. The court was consequently urged to dismiss the suit with costs.

C. The Defendant's Claim for Adverse Possession

6. By an originating summons dated June 18, 2018 brought under Sections 7 and 38 of the *Limitation of Actions Act* (Cap 22), Order 37 rule 7(1) & (2) of the *Civil Procedure Rules, 2010* and all other enabling provisions of the law, the Defendant sought the following orders against the Plaintiff:
 - a. A declaration that the Plaintiff is entitled to be registered as proprietor of Title No Nyahururu Municipality Block 6/650 by virtue of the doctrine of adverse possession.
 - b. An order do issue authorizing the Deputy Registrar of the honourable court to execute all necessary documents to vest the ownership of Title No Nyahururu Municipality Block 6/650 to the Plaintiff.
 - c. Costs of the suit be awarded to the Plaintiff.
7. The said originating summons was based upon the grounds set out on the face of the summons and the contents of the supporting affidavit sworn by Mary Njeri Munene on June 18, 2018 together with the exhibits thereto. It was contended that the Defendant had been in continuous, exclusive and quiet possession of the suit property for periods exceeding 12 years without any interruption from the deceased or the Plaintiff. It was further contended that such possession was without their permission and that no prior action for recovery of the suit property had been filed until after expiry of the limitation period.
8. The Defendant contended that on May 28, 1976 the school applied to the Commissioner of Lands for extension of the school site through the District Commissioner - Nyandarua. It was further contended that vide a letter dated July 24, 1976 the District Commissioner confirmed that the area applied for was already part of the school land according to Approved Development Plan No 34 for Nyahururu Township. It was therefore contended that the deceased must have irregularly acquired the suit property which was all along planned for the school.



The Plaintiff's Response to the Originating Summons

9. The Plaintiff filed a replying affidavit sworn on January 2, 2019 in answer to the originating summons for adverse possession. The Plaintiff disputed the Defendant's claim for adverse possession and contended that the Defendant had not demonstrated that it had been in continuous, exclusive and quiet possession of the suit property for at least 12 years.
10. The Plaintiff contended that although the suit property was initially planned as a special purpose plot, the user was subsequently changed to commercial in 1993 by the Director of Physical Planning in the Ministry of Lands. It was further contended that the Commissioner of Lands had properly allocated the suit property to the deceased and that the defunct Municipal Council of Nyahururu had no role to play in the matter.
11. The Plaintiff further contended that since she was registered as proprietor of the suit property in 2008 after confirmation of grant in the aforementioned succession cause the time for the purpose of adverse possession should only be computed with effect from 2008 and not 1996 when the deceased acquired the suit property. It was her contention that 12 years had not lapsed by the time she filed her suit in 2012 to assert her property rights over the suit property.

D. Directions on Submissions:

12. Upon conclusion of the trial, the parties were granted timelines within which to file and exchange their respective submissions on the suit and counterclaim for adverse possession. The record shows that the Plaintiff's submissions were filed on November 6, 2022 whereas the Defendant's submissions were not on record by the time of preparation of the judgment.

E. The Issues for Determination

13. The court has noted that the parties did not file an agreed statement of issues for determination. The Defendant filed its own statement of issues whereas there is no indication on record of the Plaintiff having filed any. The court shall therefore proceed to frame the issues as stipulated under Order 15 rule 2 of the Civil Procedure Rules. Under the said rule, the court may frame issues from any of the following:
 - a. The allegations contained in the pleadings.
 - b. The contents of documents produced by the parties.
 - c. The statements made on oath by or on behalf of the parties.
14. The court has considered the pleadings, documents and evidence in the matter and is of the opinion that the following issues arise for determination in the suit and counterclaim:
 - a. Whether the suit property was planned for expansion of the school.
 - b. Whether the suit property was lawfully allocated to the deceased.
 - c. Whether the Plaintiff has proved her case against the Defendant to the required standard.
 - d. Whether the Plaintiff is entitled to the reliefs sought in the suit.
 - e. Whether the Defendant has proved its claim for adverse possession to the required standard.



- f. Whether the Defendant is entitled to the reliefs sought in the counter-claim.
- g. Who shall bear costs of the suit and counter-claim.

F. Analysis and Determination

a. Whether the suit property was planned for extension of the school

15. The court has considered the material and submissions on record on this issue. The Defendants' evidence was that the area in dispute was planned for educational purposes as per the Approved Development Plan (DP) No 34 for Nyahururu Township which was approved by the Commissioner of Lands on February 26, 1972. It was the Defendant's case that the suit property was not available to the deceased for commercial purposes without undertaking a proper re-planning in accordance with the law.
16. Although the Plaintiff conceded in her replying affidavit sworn on January 2, 2019 that the suit land initially fell within a special purpose plot, she contended that the user was changed via a Part Development Plan (PDP) approved by the Director of Physical Planning. In a bid to demonstrate the change of user, she annexed a copy of a letter dated May 12, 1993. A perusal of the said letter, however, reveals that it was a letter from the District Physical Planning Officer forwarding a copy of the PDP to the Commissioner of Lands for 'processing' and 'documentation'. It was not evidence of approval of the PDP for allocation of the suit property as a commercial plot.
17. When the court issued witness summons to the County Physical Planner who produced a certified copy of DP No 34, he informed the court that the area in dispute fell within Zone 24 which was planned for educational purposes. It was his evidence that if there was a need to change the planning a PDP was required to be prepared and approved. It was his further evidence that he did not come across any duly approved PDP changing the user of the area from educational to commercial. In fact, it was his evidence that most of the PDPs which purported to re-plan the area were not approved.
18. The court has noted that the PDP relied upon by the Plaintiff was not approved. During cross-examination, the first Plaintiff's witness (PW1) who was the holder of the Plaintiff's power of attorney to prosecute the suit was referred to a copy thereof on page 23 of the Plaintiff's trial bundle. He confirmed that there was no approval on the face of the plan. He also conceded that the deceased's letter of allotment dated May 31, 1994 on record was not accompanied by an approved PDP.
19. In the circumstances of this case, the court is satisfied on a balance of probabilities that the suit property was since 1972 planned as a special purpose plot for educational purposes. This is evident from the Approved Development Plan No 34 for Nyahururu Township. The court is further satisfied that the attempts to re-plan the area for commercial purposes were not successful since there was no approved PDP to demonstrate that indeed DP No 34 was lawfully altered. The court has further considered the contents of the letter dated July 24, 1976 from the District Commissioner – Nyandarua to the Headmaster of the Defendant whereby it was stated that the area in dispute was already part of the school land as per the Zoning in the DP hence the school was at liberty to develop it as it wished.

b. Whether the suit property was lawfully allocated to the deceased

20. The court has considered the material and submissions on record on this issue. Whereas the Plaintiff contended that the allocation of the suit property by the Commissioner of Lands was lawful and regular, the Defendant contended otherwise. The Plaintiff relied upon the letter of allotment, the payment receipts, lease and certificate of lease and maintained that she was the absolute and indefeasible owner of the suit property. The Defendant's position was that the suit land was already planned for



educational purposes and the school was already in possession by the time the deceased was allocated the same. According to the Defendant, the suit property was not available for allocation in the first place and that the Commissioner of Lands had no authority to allocate it under the Government Lands Act which was then in force.

21. The court has already found and held that the suit property was already planned for educational purposes. The government had already assured the Defendant as far back as 1976 that the land was planned for expansion of the educational facility. There was no evidence that the approved DP No 34 was ever altered or amended through any lawful process. In the premises, the court is of the opinion that it was not open to the Commissioner of Lands to purport to allocate a special purpose plot for commercial purposes without following due process. He had simply no legal authority to disregard the laid down allocation process in order to benefit a private individual with public land.

c. Whether the Plaintiff has proved her case against the Defendant to the required standard

22. The court has already found that the suit property was planned for a special purpose plot for educational purposes. The court has further found that there was no approved PDP for change of user or amendment of the approved DP No 34 for Nyahururu Township. The court has further found that the Commissioner of Lands had no authority to allocate a special purpose plot (for public purposes) to a private individual for commercial purposes without following due process of re-planning.
23. In the opinion of the court, the mere fact that the deceased paid for the allocation does not cure the illegality in the allocation process. The mere fact that a lease and certificate of lease were prepared and issued to the deceased cannot sanitize the flawed process. Even Article 40 of the Constitution of Kenya, 2010 recognizes that the right to own private property does not extend to protection of property which is found to have been illegally acquired. Accordingly, the court finds and holds that the Plaintiff has failed to prove her claim against the Defendants to the required standard.

d. Whether the Plaintiff is entitled to the reliefs sought in the suit

24. The court has found that the Plaintiff has failed to prove her claim against the Defendant to the required standard. It would, therefore, follow that the Plaintiff is not entitled to the reliefs sought in the plaint, or any one of them.

e. Whether the Defendant has proved its counter-claim for adverse possession against the plaintiff

25. The court has considered material and submissions on record on this issue. Since the court has found that the alienation of the suit property by the Commissioner of Lands was not lawful, it means that the Plaintiff's title to the suit property shall not be upheld. In the premises, it shall not be necessary to consider whether or not the Defendant has demonstrated its counter-claim for adverse possession. The court is further of the opinion that upon nullification of the Plaintiff's title the suit property shall revert to the Government of Kenya against whom a claim for adverse possession is not maintainable. The Defendant shall, however, be at liberty to pursue a formal allocation of the suit property and the processing of title documents to secure the suit property for school.

f. Whether the Defendant is entitled to the reliefs sought in the counter-claim

26. The court is of the opinion that the claim for adverse possession does not lie in the circumstances since the suit property reverts to the government. In the premises, the Defendant shall be at liberty to pursue allocation of the suit property through the established legal mechanisms. The court is not inclined to usurp the mandate of the allocating authorities under the law.



27. The Plaintiff submitted that the court ought not to cancel her title to the suit property because that prayer was not specifically sought by the Defendant. The court, with due respect to the Plaintiff, is of a contrary opinion. The court is of the opinion that where it has made a finding that the initial alienation of the suit property by the Commissioner of Lands was unlawful and irregular, it must pronounce a suitable remedy. It cannot simply sit back and allow the illegality to stand simply because the Defendant did not seek cancellation of the certificate of lease. The legal consequence of such illegality must be pronounced for the adjudication to be complete.
28. In the case of *Gulam Mariam Noordin –vs- Julius Charo Karisa [2015] eKLR* the Respondent had not specifically counter-claimed for registration of the suit property on account of adverse possession of the suit property before the trial court. Nevertheless, the Court of Appeal held that:
- ' When the respondent elected to raise the defence of adverse possession without a counter-claim, he denied himself the opportunity to apply to be registered the proprietor of the suit property. The power of the court to do substantive justice is today wider than before. We see no harm to make appropriate orders flowing from a finding that the respondent's occupation of the suit property was adverse to that of the Appellate, and that the latter's title was so extinguished. By Section 3(2) of the *Appellate Jurisdiction Act*, we order the appellant to transfer the suit property to the respondent at the latter's expense within 30 days from the date hereof failing which the Deputy Registrar, High Court Malindi will execute on behalf of the appellant all the necessary transfer documents.'
29. The court also disagrees with the Plaintiff's submission that title to land can only be cancelled or nullified where the proprietor was guilty of or privy to fraud, illegality, misrepresentation, or corrupt conduct under the *Land Registration Act*. Whereas no fraud or illegality was alleged against the Plaintiff in the defence, it was specifically pleaded that the suit property was at all material times planned for educational purposes under DP No 34 hence it was not available for allocation to the deceased as a commercial plot. It was also pleaded that the Commissioner of Lands had no authority under the Government Lands Act to make the allocation as he did.
30. Section 26(1) of the *Land Registration Act*, 2012 stipulates that:
- ' The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except:
- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.'
31. It is thus clear that under Section 26(1)(b) of the Act, the proprietor does not have to be guilty of or privy to the vitiating factors. Thus, as long as the evidence on record reveals that the title was processed and issued illegally, unprocedurally or through some corrupt scheme, the same becomes liable to be cancelled without any default being proven on the part of the title holder. (See – *Elijah Makeri Nyang'wara –vs- Stephen Mungai Njuguna & Another [2013] eKLR*)



g. Who shall bear costs of the suit and counterclaim

32. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). Accordingly, the successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See – *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co Ltd [1967] EA 287*. Since the parties have failed in their respective claim and counterclaim, the court is of the opinion that each party should bear his own costs of both the suit and counterclaim.

G. Conclusion and Disposal

33. The upshot of the foregoing is that the court finds and holds that the Plaintiff has failed to prove her claim against the Defendant to the required standard. The court is thus inclined to cancel the Plaintiff's title to the suit property for the same to revert to the government as a special purpose plot. The court has further found that in the circumstances, the Defendant's claim for adverse possession is untenable. Consequently, the court makes the following orders for disposal of the suit and counterclaim:

- a. The suit against the Defendant be and is hereby dismissed in its entirety.
- b. The Plaintiff's title to the suit property be and is hereby cancelled hence the suit property shall revert to the government.
- c. The Defendant's counterclaim for adverse possession is hereby dismissed.
- d. Each party shall bear his own costs of the suit and counterclaim.

34. It is so decided.

JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 19TH DAY OF JANUARY, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Ms. Mwaniki for the Plaintiff

Ms. Ndegwa for the Defendant

C/A - Carol

Y. M. ANGIMA

JUDGE

