



REPUBLIC OF KENYA



KENYA LAW
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**Maramba v Gogo & another (Environment & Land Case 249 of 2017)
[2023] KEELC 219 (KLR) (18 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 219 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 249 OF 2017**

**MN KULLOW, J
JANUARY 18, 2023**

**IN THE MATTER OF AN APPLICATION FOR THE
DECLARATION OF A TRUST AND ACQUISITION BY
ADVERSE POSSESSION OF LAND REGISTERED UNDER
THE REGISTERED LAND ACT CAP 300 LAWS OF KENYA**

BETWEEN

RICHARD OWIGO MARAMBA PLAINTIFF

AND

PAUL DEBACKO GOGO 1ST DEFENDANT

MOSES OCHIENG ONJWAYO 2ND DEFENDANT

((FORMERLY KISII ELC CASE NO. 53 OF 2012 (O.S))

JUDGMENT

1. The Plaintiff herein commenced this suit by way of an Originating Summons dated February 14, 2012 against the Defendants for a determination of the following issues: -
 - i. Whether the 1st Defendant legally purchased the suit land from the Chargee or not and if so did he exercise the purchaser's rights and duties and in what way did he do so.
 - ii. Whether the 1st Defendant ever took possession of the suit property and if so what steps did he take against those in possession.
 - iii. Whether the Plaintiff who is in possession of Parcel No Kamagambo/ Kabuoro/1016 in his capacity as an administrator and the sole surviving son of the deceased proprietor/ chargor was made aware of the sale by the chargee and the subsequent purchase thereof.



- iv. Whether the Plaintiff has been in possession of the said land and if so for how long? And in what manner had he taken possession of the same? And for how long has he been in possession thereof with the knowledge of the Defendants?
 - v. Whether the 1st Defendant was under any obligation to inform the Plaintiff of the alleged sale by the bank and subsequently notify the Plaintiff that he had bought the land on which the plaintiff was living?
 - vi. Whether the deceased proprietor put the plaintiff in possession or occupation thereof and if so when did the plaintiff start to occupy the same?
 - vii. Whether the Plaintiff is entitled to a declaration that he has acquired title by way of adverse possession or that the Defendant holds the title to the suit land in trust for the Plaintiff.
 - viii. Whether an injunction should issue against the defendants, their agents, servants or anybody deriving authority from them, restraining them from evicting, dispossessing or in any way interfering with the plaintiff's occupation, use and quiet enjoyment of the land measuring 4hectares.
 - ix. Whether the 2nd Defendant is a bonafide purchaser for value without notice of the adverse possession by the Plaintiff.
 - x. Alternatively, whether the defendants hold the title to the said land in trust for the Plaintiff.
 - xi. Who should pay the costs of this suit?
 - xii. That such orders may be issued by the court as may attain the ends of justice.
2. The Originating Summons is premised on the Plaintiff's undated Supporting Affidavit filed on February 14, 2012. The Plaintiff avers that his deceased father, Maramba Mwonya was the sole registered proprietor of the suit parcel No Kamagambo/ Kabuoro/1016 measuring approx 4.0Ha and that he has been living on the said land since he was born in 1953 todate.
 3. It was further his claim that even though he was aware of the business loan taken by his late father from Kenya Commercial Bank Limited, he was never informed that his father defaulted in repaying the loan or that the suit land which had been used as security was auctioned by the chargee and sold to the 1st Defendant.
 4. That the 1st Defendant was thereafter registered as the proprietor of the suit land on February 3, 1994; however, he failed to issue notice either to him or his parents who were living on the suit land at the time.
 5. It is his contention that despite the suit land being registered in the name of the 1st Defendant sometimes in 1994, he has remained and/or continued living on the suit land with the full knowledge of the 1st Defendant and he has never been served with any notice whether oral or written.
 6. He further accused the 2nd Defendant for not being a bona fide purchaser for value and thus maintained that the transfer and registration of a portion of the suit land in his name ought to be set aside. He urged the court to allow his claim on adverse possession or trust as sought.
 7. The 2nd Defendant entered Appearance and filed a Replying Affidavit sworn on March 22, 2012 together with annexures thereto. It was his claim that he bought the suit parcel Kamagambo/ Kabuoro/ 1016 from the 1st Defendant sometimes in 2011 for a consideration price of Kshs 1,500,000/= . He



contended that the registration of the suit parcel in his name followed the due process of law and the title deed was issued on August 10, 2011.

8. He maintained that he is a bonafide purchaser for value and that he followed the right procedure in acquiring the land and further that the Plaintiff had always been aware of the said transaction between him and the 1st Defendant.
9. He further stated upon the Plaintiff's request; he allowed him to continue occupying the land where his homestead was on the condition that he would refund the price for the said portion, the plaintiff however failed to raise the money as agreed. He dismissed the Plaintiff's claim on adverse possession and urged the court to dismiss the plaintiff's suit with costs.
10. The 1st Defendant Entered Appearance and filed a Replying Affidavit sworn on July 20, 2019. It is his claim that he purchased the suit parcel by auction from Kenya Commercial Bank sometimes in February 1994. That at the time of the sale, the family of Maramba Mwonya was still in occupation of the suit parcel of land and after discussion it was mutually agreed that Mwonya would remain on the said parcel for an initial period of three years as he tries to relocate his family. However, after the said three years, Mwonya informed him that he had not managed to obtain an alternative piece of land. He maintained that the Plaintiff's continued occupation and use of the said parcel was with his express consent.
11. Later, when a proposed buyer, the 2nd respondent inquired about the land and agreed to purchase the suit parcel; It is his claim that he notified the Applicant of the impending sale and the purchase price and he even offered to sell to him the land at the same purchase price.
12. The applicant being unable to raise the said consideration amount of Kshs 1500,000/=; he was asked to render a vacant possession of the suit premises since the same had been sold to the 2nd Defendant. It is further his claim that despite the said notice to vacate, the Applicant has remained on the suit parcel by false pretence that he would secure an alternative parcel of land to date.

Trial

13. The matter proceeded for the Plaintiff's case on February 9, 2022; the Plaintiff testified as PW1, he adopted his witness statement dated April 18, 2018 as his evidence in chief. He reiterated that the suit parcel Kamagambo/ Kabuoro/ 1016 belonged to his father but was later sold to the 1st Defendant by public auction in and registered in his name in the year 1994. He further maintained that he has never been asked to vacate the suit parcel which is about 4 acres.
14. He also produced the following documents as exhibits in support of his case as follows;
 - a. Copy of the Adjudication Report – PExhibit 1
 - b. Pleadings in Kisii Case No 269 of 2010 – PExhibit 2
 - c. Copies of the Green Card for LR No Kamagambo/ Kabuoro/ 1016 – PExhibit 3
 - d. Copy of the Green Card for the subdivision of No 1016 into 6543, 6544 and 6545 – PExhibit 4
15. On cross- examination he stated that even though he was aware that the land was auctioned, he did not know when the Defendants obtained the title and further conceded that even though he was living on the suit parcel, he had not shown any photographs in support of the said averments. He thereafter closed his case.



16. The matter proceeded for Defence Hearing on February 23, 2022; the 2nd Defendant testified as DW1, he adopted his witness statement filed on March 23, 2012 and his Further Statement filed on June 21, 2018 as his testimony in chief. He further stated that the plaintiff does not live on the suit land neither has he built any structure thereon.
17. He produced the documents on his list of documents dated June 21, 2018 as defence exhibits in support of his case as follows;
 - a. Copy Certificate of Official Search dated November 22, 2018 –DExhibit 1
 - b. Copy of the Consent of the Land Control Board– DExhibit 2
 - c. Letter of Consent dated February 17, 2011 – DExhibit 3
 - d. Copy of Transfer of Land Form - DExhibit 4
 - e. Copy of the Title Deed issued to the 1st Defendant - DExhibit 5
 - f. Copy of the Title Deed issued to the 2nd Defendant – DExhibit 6
18. On cross-examination, he stated that he was not aware whether the 1st Defendant had lived on the suit parcel after buying it but maintained that he lawfully purchased the land from the 1st Defendant. It was also his testimony that sometimes in 2010 the plaintiff demolished his house and moved out of the suit land, he changed his stand on this after the site visit by the Registrar which confirmed that the Plaintiff was still living on the suit land and had 3 houses thereon. He however conceded that he was not aware about the happening on the suit land before the year 2011 when he purchased the same.
19. Calvince Okoth Okendo testified as DW3; he adopted his witness statement filed in court on June 21, 2018 as his testimony in chief. He further stated that they purchased a portion measuring 1 acre from the 1st Defendant. That upon the payment of the purchase price, they built their houses on their portion.
20. On cross- examination he conceded that he had not produced any sale agreement in support of his claims of purchase. He further stated that at the time they purchased the land, there was no one living the said land though he did not produce any photographs in support of his averments. The Defence thereafter closed their case.
21. Upon close of the defence case, I issued directions on the filing of submissions. Both the Plaintiff and the 2nd Defendant filed their rival submissions and authorities which I have read and taken into account in arriving at my decision as hereunder;

Analysis And Determination

22. I have considered the pleadings, the evidence and the submissions filed herein and I find the issues arising for determination are as follows: -
 - a. Whether the claim of Adverse Possession has been proved by the Plaintiff.
 - b. Whether the Plaintiff is entitled to the reliefs sought.
 - c. Who should bear the costs of the suit



A. Whether the Claim of Adverse Possession has been proved by the Plaintiff.

23. The legal framework for adverse possession is provided for in various statutory provisions to wit; Sections 7,13, 17 and 38 (1) and (2) of the [Limitation of Actions Act](#) and Section 28 (h) of the [Land Registration Act](#).
24. The court in [Samuel Kibamba v Mary Mbaisi \[2015\] eKLR](#) on the issue of adverse possession held as follows: -

' Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land'
25. It is the Plaintiff's contention that he has been in possession and occupation of a portion of the suit property since his childhood. It is his claim that his deceased father was the sole owner of the suit title and after his death he became the only sole beneficiary. He however avers that it only came to his knowledge that his father had taken out a loan from Kenya Commercial Bank and the suit parcel which had been used as security was sold when he defaulted, in the year 2010. He asserts that the sale of the suit parcel via public auction and the subsequent transfer and registration of the land in the name of the 1st Defendant was marred with fraud hence null and void. He contends that even though the said land was sold, transferred and registered in the name of the 1st Defendant and subsequently in the name of the 2nd Defendant; he has remained in occupation and use of the said land to date and has as a result acquired rights and interests over the suit parcel which are adverse to the registered proprietor's rights.
26. The 1st Defendant on the other hand maintained that he lawfully purchased the suit parcel through a public auction; he visited the property and found the family of the Plaintiff occupying the same and informed them that he had acquired the said property. It is his contention that they had an agreement with the family of the Plaintiff that they would continue staying on the suit parcel as they look for an alternative land to resettle. When he subsequently found a buyer for the said parcel and sold the same upon notifying the Plaintiff to give a vacant possession or pay the agreed purchase price. He thus maintains that the Plaintiff's continued use and occupation of the suit land has always been with his express consent.
27. The 2nd Defendant on the other hand; maintained that he is an innocent purchaser for value without notice. It is his claim that before buying the suit land, he did his due diligence and was satisfied as to the ownership of the said land. He confirmed that even though the plaintiff was occupying the land at the time, there was an agreement and/or arrangement that the Plaintiff would either buy off the portion where his homestead sits or he would get an alternative land and vacate the said land.
28. It is clear that the Plaintiff and his family have been in actual occupation and use of the suit parcel. However, what is in dispute is whether such possession, occupation and use of the suit parcel was with the consent of the Defendants or not. The plaintiff contends that he has remained in occupation and use of the suit land for a period of over 12 years, despite the change in ownership of the land from his deceased father, 1st Defendant and subsequently the 2nd Defendant. That as a result of the said occupation, he has acquired prescriptive rights and interests over the said land which are adverse to the rights and interests of the Defendants therein. It is also important to note that the Plaintiff submitted



that he only became aware of the said loan and the subsequent sale by public auction in the year 2010 when he was accused of being a trespasser.

29. The Defendants on the other hand maintain that the Plaintiff's continued possession and use of the suit land is and has always been with their express consent as he tries to get an alternative land to relocate to.
30. Adverse possession starts with a wrongful dispossession of the rightful owner and same must be actual, visible, exclusive and continued over the statutory period of 12 years. It is important to note that the Plaintiff herein is challenging the ownership/title of the Defendants over the suit parcel. It is his contention that the sale by the Kenya Commercial Bank of the suit land to the 1st Defendant by way of public auction was marred with fraud thus null and void and consequently, the said sale could not have passed a proper title to the 1st Defendant.
31. In this regard, I wish to point out that the sale by the public auction was in exercise of the Bank's Statutory Power of sale upon the default by the Plaintiff's father in repaying the loan. The issues as to the legality or otherwise of the said sale ought to have been challenged upon following the proper procedure and the mechanisms provided in law. It is however common ground that the Plaintiff cannot challenge the Defendant's title and on the same length allege to have acquired prescriptive rights against his proprietary rights over the said title of the 1st Defendant.
32. Further, it is the Defendant's contention that the Plaintiff's continued occupation and use of a portion of the suit land where his homestead stands was on express consent. The use of land in a claim of adverse possession must be with the intention to dispossess and the same must be non-permissive. No further and/or Supplementary affidavit was sworn by the Plaintiff in response to the assertions of consent stated by the Defendants in their Replying Affidavits.
33. This court was further tasked to establish the status quo of the land and a Report was filed by the Deputy Registrar. In the said report, she outlined the parcels occupied by the Plaintiff, Defendant and other third parties and from the same it was clear that the Plaintiff was not in possession of the entire suit parcel as alleged. To this end and in totality of the foregoing; I am inclined to hold in favor of the Defendants in finding that the continued use of the said portion of land was by their express condition and an extension of an olive branch as he seeks to find an alternative land to resettle.
34. Further, there has not been any demonstration by the Plaintiff of when his possession and occupation of the suit land became adverse. Initially, it was his contention that his deceased father was the sole registered proprietor of the suit parcel and that he only found out about the loan taken by his late father from Kenya Commercial Bank after the land had already been sold to the 1st Defendant through a public auction, which sale he considers fraudulent.
35. Possession and occupation are one of the key requirements that need to be demonstrated in a claim for adverse possession. In view of the foregoing, it is therefore my finding that the Plaintiff has not sufficiently demonstrated when his possession and occupation of a portion of the suit land became adverse to warrant the reliefs sought.
36. Consequently, I find and hold that the Plaintiff has not satisfactorily proved his case on a balance of probabilities that to warrant the reliefs sought.

B. Whether the Plaintiff is entitled to the reliefs sought

37. In view of the foregoing, having held that the Plaintiff's claim on adverse possession has not been proved, it follows therefore that he is not entitled to the reliefs sought.



Costs of the Suit

38. Costs generally follow the event and in this case, having held that the Plaintiff is not entitled to the reliefs sought, I find that the Defendants are entitled to costs.

Conclusion

39. In the upshot I find that the Plaintiff has failed to prove his claim on adverse possession to the required threshold and I accordingly dismiss the Originating Summons dated February 14, 2012 with costs to the 2nd Defendant. Further, I hereby direct that any eviction should strictly comply with the statutory provisions in the [Land Act](#). It is so ordered!

DATED, SIGNED and DELIVERED Virtually at **MIGORI** on **18th day** of **JANUARY, 2023**.

MOHAMMED N. KULLOW

JUDGE

In presence of; -

Non-Appearance for the Plaintiff

Non-Appearance for the 1st Defendant

Non-Appearance for the 2nd Defendant

Court Assistant - Tom Maurice/ Victor

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| <i>MIGORI ELC CASE NO. 249 OF 2017 (O.S) –JUDGMENT</i> |
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