



**Musyoka v Waithani & another (Environment & Land Case
E019 of 2021) [2023] KEELC 136 (KLR) (18 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 136 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E019 OF 2021
A NYUKURI, J
JANUARY 18, 2023**

BETWEEN

RICHARD MULWA MUSYOKA PLAINTIFF

AND

SAMUEL KARIUKI WAITHANI 1ST DEFENDANT

JOAN WANGARI KARIUKI 2ND DEFENDANT

JUDGMENT

Introduction

1. By an Originating Summons dated July 21, 2021 and supported by an affidavit sworn on even date, the Plaintiff sought the following orders;
 - a. That Richard Mulwa Musyoka be declared to have acquired land known by title No Machakos/Matuu/3503 measuring 0.10 hectares by way of purchase and consequently be registered as proprietor thereof.
 - b. That in the alternative and without prejudice to (1) the Plaintiff herein, Richard Mulwa Musyoka be declared to have acquired by adverse possession all that parcel of land known by title No Machakos/Matuu/3503 measuring 0.10 hectares and the Land Registrar, Machakos to cause the registration of the said parcel in to the names of the Plaintiff.
 - c. That the land register relating to land known by Title No Machakos/Matuu/3503 measuring 0.10 hectares be rectified in such a manner as it will reflect the Plaintiff herein as the registered proprietor thereof and the Plaintiff be issued with a fresh title deed thereof.
 - d. That this Honourable court be pleased to restrain the Defendants, whether by themselves, their agents, their servants or persons claiming through them howsoever by an order of permanent injunction from entering, alienating, disposing or in any other manner interfering



with the Plaintiffs exclusive possession, use and occupation of all that parcel of land known as Machakos/Matuu/3503 measuring 0.10 hectares.

- e. That the Defendants do forthwith effect transfer of parcel of land known as Machakos/Matuu/3503 measuring 0.10 hectares and in the alternative of noncompliance, an order to issue authorizing the Deputy Registrar to execute all the relevant documents, if any, required to be executed by the Defendant to effect changes and/or transfer at the Lands Office, Machakos County.
- f. That such other question as may be pertinent to the case be determined and appropriate directions and orders be given.
- g. That the costs of these proceedings be borne by the Defendants.

The Plaintiff's Case:

2. In the Originating Summons, the Plaintiff's case was that in February 2002, he purchased land parcel number Machakos/Matuu/3503 measuring 0.10 Ha (Suit property) from Samuel Kariuki Waithani and Joan Wangari Kariuki for a sum of Kshs 197,000/- by an oral agreement. He stated that he consequently took possession of the suit property immediately upon purchase, extensively developed it by constructing a residential home and an institution of learning.
3. It was the Plaintiff's contention that he had enjoyed a peaceful, open and exclusive possession of the suit property from 2002 upto the time of filing suit which was about 19 years. Further that the Defendants moved away from Matuu town where the suit property is situated and that they have never challenged the Plaintiff's occupation of the suit property. The Plaintiff attached copies of a certified extract of title and certificate of official search showing that the suit property was registered in the names of the Defendants in this matter. He also attached photographs showing permanent buildings on the suit property, which he claimed were put up by him.
4. Service of summons on the Defendants was done by substituted service by advertisement pursuant to the orders of the court made on October 19, 2021. However, upon service, the Defendants neither entered appearance, filed defence nor participated in these proceedings.
5. The hearing of the summons was by way of written submissions. On record are the Plaintiff's submissions dated March 11, 2022.

Submissions

6. Counsel for the Plaintiff submitted that Article 40 of the Constitution of Kenya 2010, protects the right to acquire and own property of any description in any part of Kenya. Counsel also relied on Section 38(1) of the Limitations of Actions Act and Section 28 (h) of the Land Registration Act 2012 to argue that where a person becomes entitled to land by adverse possession, he may apply to this court for an order that he be registered as proprietor thereof and that registered land is subject to overriding interests of rights acquired by virtue of any written law.
7. Reliance was also placed on the case of Kabugi Kingori & Another v Kartar Singh & Another [2019] eKLR for the proposition that to prove adverse possession a claimant must show that the land in issue is registered in the name of the respondent, and that the claimant is in open and exclusive possession in an adverse manner to the title of the owner, for a period of over 12 years.
8. Counsel further referred to the cases of Joseph Mutafari Situma v Nicholas Makhanu Cherongo [2007] eKLR and Peter Mbiri Michuki v Samuel Mugo Michuki [2014] eKLR to argue that where there is a



sale agreement the registered proprietor is merely the purchaser's trustee and that when a sale agreement is not supported by a consent of the Land Control Board the continued possession though illegal, becomes adverse from the time the transaction becomes void.

9. It was further submitted that the Defendants' registration of the suit property was subject to the overriding interests in accordance with Section 28 (h) of the *Land Registration Act*; which interests include adverse possession acquired by the Plaintiff.

Analysis and Determination

10. Having carefully considered the pleadings and evidence attached to the Originating Summons as well as the Plaintiff's submissions, it is my considered view that the sole issue that arise for determination is whether the Plaintiff is in adverse possession of the suit property.
11. The law on adverse possession is provided for in the *Limitation of Actions Act*. Section 7 of the Act provides 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.”

Section 13 provides as follows;

1. A right of action to recover land does not accrue unless the land is in the 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 Sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse on possession on that date, a right of action does not accrue unless and until some person takes Adverse 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 Adverse Possession, the right of action does not accrue unless and until some person again takes Adverse Possession of the land.
3. For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with Section 12 (3) of this Act, the land in reversion is taken to be adverse possession of the land.

Section 17 states as follows;

“Subject to Section 18 of this Act at the expiration of the period prescribed by this Act for person to bring an action to recover land (including a redemption action) the title of that person to the land is extinguished.”

Section 38 (1) and (2) of the Act states 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.
12. Section 28 (h) of the *Land Registration Act* recognises rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription, as overriding interests, which registered land shall be subject to.
13. Therefore, where a proprietor of land, does not take legal action against an adverse possessor who has occupied his land for over 12 years, he is by law barred from bringing any action against such adverse possessor as his title is extinguished by lapse of the period of 12 years. Hence the person adversely occupying the land for over 12 years, can apply to this court to be registered in the place of the registered proprietor.
14. The principles governing adverse possession in Kenya are well settled. For a person to prove that he has acquired another person's land by adverse possession, they must demonstrate that the suit property is registered in the name of the person they are claiming against, and that they have been in open, continuous and exclusive possession of the land for over 12 years. The adverse possessor must demonstrate that he has dispossessed or discontinued the possession of the suit land of the registered owner thereof.
15. In the case of *Kaswe v Mwaani Investments Limited & 4 Others 1KLR 184*, the Court of Appeal started as follows;

“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.”
16. Similarly, in *Mtana Lewa v Kabindi Ngala Mwagandi [2015] eKLR*, the Court of Appeal held as follows;

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights 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 licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”
17. In the instant case, as shown in the extract of title produced by the plaintiffs, the land in issue is registered in the names of Samuel Kariuki Waithani and Joan Wangari Kariuki, who are the defendants in this suit. The Plaintiff states that he did purchase the suit property in the year 2002 by an oral agreement and took possession thereof in the same year 2002. He attached photographs of several permanent houses to show that he has developed the same and that he is in open and exclusive possession thereof.
18. No response was filed by the Defendants to challenge the Plaintiff's assertions and evidence. Although the Plaintiff sought to be declared to have acquired the suit property by way of purchase, he confirmed that the purchase was by oral agreement. Therefore there is no written agreement to prove purchase. Section 3 (3) of the *Law of Contract Act* provides that no suit shall be brought on a contract for



disposition of an interest in land unless the contract is in writing, signed by all the parties and the signature of each party has been attested by a witness who was present at the signing of such contract. It is my view therefore that in the absence of a written contract demonstrating purchase, the plaintiff cannot enforce an oral agreement for sale of land. I therefore find that his prayer that he be declared to have acquired the suit land by way of purchase must fail, as the same was not in compliance with the law, and there is no evidence that the sale occurred.

19. On whether the Plaintiff is in adverse possession of the suit property, he produced photographs showing he has constructed permanent houses and buildings on the suit property. He stated that he had been in open, continuous and exclusive possession of the suit property for about 19 years, having taken possession in 2002. This evidence was not challenged by the defendants in any way as they did not file a response to the Originating Summons. In my view the Plaintiff has shown that he has exclusive, open and continuous possession of the suit property, having put up several permanent buildings thereon. I therefore find and hold that the Plaintiff is in adverse possession of the suit property and he ought to be registered as proprietor thereof in the place of the Defendants who never filed any suit against the Plaintiff to challenge his possession of the suit property for a period of over 12 years as provided for under Section 7 of the Limitation of Action Act. I am therefore satisfied that the Plaintiff has proved his case on a balance of probabilities.
20. In the premises, I enter judgment for the Plaintiff against the Defendants jointly and severally as follows;
 - a. The Plaintiff be and is hereby declared to have acquired by adverse possession all that parcel of land known as Machakos/Matuu/3503 measuring 0.10 hectares and the Land Registrar Machakos to cause the registration of the said parcel in the names of the Plaintiff.
 - b. That the land register relating to land known by title No Machakos/Matuu/3503 measuring 0.10 hectares be rectified in such a manner as to reflect the Plaintiff herein as the registered proprietor thereof and the Plaintiff be issued with a fresh title deed thereof.
 - c. That the Defendants by themselves, their agents, their servants or persons claiming through them howsoever be and are hereby restrained by an order of permanent injunction from entering, alienating, disposing or in any other manner interfering with the Plaintiff's exclusive possession, use and occupation of all that parcel of land known as Machakos/Matuu/3503 measuring 0.10 hectares.
 - d. That the defendants do forthwith effect transfer of the parcel of land known as Machakos/Matuu/3503 measuring 0.10 hectares to Richard Mulwa Musyoka, and in default, the Deputy Registrar of this court be and is hereby authorised to execute all the relevant documents, to effect the said transfer.
 - e. As the Plaintiff has not shown that he sought and the defendant declined to transfer the land to him, I make no order as to costs.
21. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 18TH DAY OF JANUARY 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A NYUKURI

JUDGE

In the presence of;



Mr Kyalo for the Plaintiff

No appearance for the Defendant

Josephine – Court Assistant

