



REPUBLIC OF KENYA



KENYA LAW
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**Mwaura v Ng'ang'a (Environment and Land Appeal E004 of 2021)
[2023] KEELC 15829 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15829 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E004 OF 2021
A OMBWAYO, J
FEBRUARY 23, 2023**

BETWEEN

SIMON KABEI MWAURA APPELLANT

AND

JOSEPHN KANGETHE NG'ANG'A RESPONDENT

*(Being an Appeal from the judgment of honorable Elizabeth, Usui (Chief Magistrate)
delivered at Nakuru on the 12th day of March, 2021 in Nakuru CMCC ELC
No.95 of 2018 between Joseph Kangethe Ng'anga'a v Simon Kabeni Mwaura)*

JUDGMENT

1. The appellant Simon Kabeni Mwaura was sued in lower court by the respondent Joseph Kangethe Ng'ang'a by way of plaint where the respondent claimed that on or about the 22nd April, 1997, he bought a piece of land known as Ngomongo Gilgil Market plot 176 from one Harry Kiptoo Kipsuto, whom the said parcel of land had been allocated to by the County Council of Nakuru on 10th June, 1996 and the plot was duly transferred in favour of the respondent.
2. The respondent was at all material times, the lawful and rightful owner of the suit property.
3. In the year 2014, the respondent visited the suit property with the intention of developing it and he found the appellant who had illegally trespassed on the suit property and remained in possession thereof without the respondents consent and or any other lawful mandate or justification.
4. By virtue of the appellants acts of trespass the respondent has been denied use and enjoyment of the suit property and his claim against the appellant in the lower court was for an eviction order and permanent injunction restraining the appellant either by himself, servant and or agents from trespassing and or interfering with the suit land in any way.



5. That Despite pleas by the respondent to the appellant to stop trespassing, the appellant has persisted in the said trespass and continues his wrongful occupations of the suit property.
6. By reason of the matter aforesaid, the respondent suffered loss and damage. The respondent prayed for orders:-
 - (1) A declaration that the respondent is the lawful and rightful owner of the suit property and is entitled to exclusive and unimpeded right of possession and occupation of all the peace of land known as Ngomongo Gilgil Market plot 176.
 - (2) A declaration that the appellant whether by himself, or his servants and/or agents is in wrongfully in occupation of the suit property being Ngomongo Gilgil Market plot 176 and is accordingly, trespasser on the same.
 - (3) A permanent injunction restraining the appellant, whether by himself, servants and/or his agents from remaining on or continuing in occupation of the suit property.
 - (4) An order of eviction against the appellant from the suit property being Ngomongo Gilgil market plot 176 and General damages for trespass. Cost of this suit together with interest thereon at such rate ad for such period of time as this Honorable court may deem fit to grant.
7. The appellant entered defence and claimed adverse possession and that he was the lawful owner.
8. When the matter came up for hearing the respondent adopted the statement whose gist was that on or about 10th June, 1996 one Harry K. Kipsuto was allocated plot No.Gilgil/176 GN Residential Ngomongo area in Gilgil Town and he was issued with a letter of allotment by the defunct County Council of Nakuru. On or about 22nd April 1997, the allottee Harry K. Kipsuto sold the plot to the appellant at Kshs.250,000/= which he paid and they both executed the necessary transfer documents which were also signed by the clerk to the Nakuru County Council. He paid all the necessary fees to the council. The plot was shown to the respondent and he inspected and verified the perimeter boundaries which existed and found that the plot was vacant. He continued inspecting the plot at least once a year and paid all the council fees, till the year 2014 when he visited the plot with the intent of developing it and found a stranger who was cultivating the plot and had erected temporary structures without the respondents knowledge, permission and/or authority. He wrote a letter of complaint to the administrative officer of Gilgil sub-county and requested him to instruct the intruder and/or trespasser to vacate the said plot for him to develop. The administrator called several meetings to investigate the ownership of the plot.
9. Gilgil sub-county administrator indeed confirmed that the plot was legally allocated to the respondent.
10. The appellant on his part testified that he was allocated the suit land and has been paying rates. He has been living on the land for 18 years from 1997 with his family. He stated that the respondent land was different. He produced the allotment letter that is not dated. He produced rate payment receipt for 13th November 2014. He produced some receipts showing that Simon Kabeni Mwaura paid for the plot in the years 2005.
11. The learned magistrate found that the plot in question is one and the same plot that is being claimed by the parties. On the rightful owner of the plot the court found that:-

“On who is the rightful owner the court has considered the plaintiffs testimony and the documents produced in support thereof. The plaintiff states that he bought the plot from an allottee and produced an allotment letter dated 10th June 1996 its in the name of Hurry K.



Kipruto. He was allocated plot No.176 Ngomongo Gilgil. On the 22nd April, 1997 he wrote a letter to the clerk of the County Council of Nakuru informing him that he had transferred the plot to the plaintiff. On the same date the plaintiff paid land rates to the County Council of Nakuru and was issued with a receipt. He also paid from survey, transferred clearance fees. In the time the plaintiff appears to have received other demand from land rates to the sub County offices and parties summoned present their case. The defendant denies that he attended that meeting but for the county in it's o letter its clear he did. In the letter, the County government came to a conclusion that the defendant bought the land from another party by name PDI Kemei. This is evidence that the defendant has tallied to disclose to the court the said letter is relevant in view of the indicated allotment letter.”

12. The appellant appeals on grounds that the learned trial magistrate erred in law and in fact finding that the respondent's case had merit. That the learned magistrate erred in law and in fact in failing to find that the respondent had not proved his case to the required standard or at all. That the learned magistrate erred in law and in failing to find that the appellant had a meritorious defence. That the learned magistrate erred in law and in fact in failing to consider the submissions made on behalf of the Appellant.
13. The appellant prays: -
 1. The judgment delivered on 12th March, 2021 be set aside.
 2. The judgment be substituted with an order of dismissal of the respondent's case with costs to the appellant
 3. The costs of this appeal be borne by the respondent.
14. I have considered the submissions record and do find that the respondent case was that he bought the land from an allottee. He produced an allotment letter that was dated. He produced letter showing that he bought the land from the allottee in 1996. The appellant allotment letter was not dated hence not authentic. The appellant did not prove adverse possession as required in law and therefore the defence did not hold. There was no counter claim.
15. I do find that the learned magistrate did not err in his judgment as he rightfully held that the parcel of land belonged to the respondent and that the doctrine of adverse possession was not properly invoked and demonstrated to apply. Even if it was properly invoked the appellant did not demonstrate that he was in adverse possession because he did not prove knowledge by the respondent that he has been in possession for 18 years.
16. Asike-Makhandia, JA described adverse possession in *Mtana Lewa v Kahindi Ngala Mwagandi* [2015] eKLR 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. This doctrine in Kenya is embodied in Section 7 of the Limitation of Actions Act, which is in these terms:-

“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.”

17. Section 38 of the Limitation of Actions Act only specifies the High Court(ELC) as the court before which a person who claims to have become entitled to land by adverse possession may seek an order that he be registered as the proprietor of the land. The section provides as follows:

38. Registration of title to land or easement acquired under Act.

- (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, 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) shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.
- (3)
- (4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.
- (5) [

18. Further provisions regarding how to institute such proceedings are found at order 37 rule 7 of the Civil Procedure Rules which states as follows:

7.

- (1) An application under section 38 of the Limitation of Actions Act shall be made by originating summons.
- (2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.
- (3) The court shall direct on whom and in what manner the summons shall be served.

19. The letter dated 6th January 2015 from Paul G Kariuki was clear evidence that the appellant was occupying the plot illegally as the respondent had the authentic documents. However, the appellant did not prove that the respondent was aware that the appellant was in occupation hence the doctrine of adverse possession does not apply.

20. The court of appeal in Francis Gicharu Kariri v Peter Njoroge Mairu, Civil Appeal No. 293 of 2002 (Nairobi) approved the decision of the High Court in the case of Kimani Ruchire v Swift Rutherford & Co. Ltd. (1980) KLR 10 at page 16 letter B, where Kneller J. held that:

“The plaintiffs have to prove that they have used this land which they claim as of right: *nec vi, nec clam, nec precario* (no force, no secrecy, no persuasion). So the plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the



possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it by way of recurrent consideration”.

21. In conclusion I do find that the appeal lacks merit and is dismissed with costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIA EMAIL AT NAKURU THIS 23RD DAY OF FEBRUARY 2023.

A O OMBWAYO

JUDGE

