



**Edungi v Cheserek (Enviromental and Land Originating Summons
10 of 2020) [2023] KEELC 913 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 913 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 10 OF 2020**

YM ANGIMA, J

FEBRUARY 16, 2023

BETWEEN

JAMES CHEMUSI EDUNGI PLAINTIFF

AND

MARIA TALA CHESEREK DEFENDANT

JUDGMENT

A. The Applicants' Claim

1. By an originating summons dated March 10, 2020 grounded upon section 38 of the *Limitation of Actions Act* (cap 22) and order 37 rule 7 of the *Civil Procedure Rules*, 2010, the plaintiff sought determination of the following questions:
 - a. Whether the plaintiff/applicant has acquired title deed by adverse possession over LR No Liakipia/UASO Narok/209 measuring approximately 1.40 Ha.
 - b. Whether land parcel LR No Liakipia/UASO Narok/209 should forthwith be registered in the names of James Chemusi Edungi and the defendant be ordered to sign all the necessary transfer instruments in favour of the plaintiff and in default the deputy registrar of the court be authorized to sign the same.
 - c. Whether the District Land Registrar should dispense with the production of the original title deed for LR No Liakipia/UASO Narok/209 while transferring the land to the plaintiff.
 - d. Who should pay the costs of the suit.
2. The said summons was based upon the grounds set out in the supporting affidavit of the plaintiff, James Chemusi Edungi, sworn on March 10, 2020 and the exhibits thereto. The plaintiff contended that he had been in open, continuous and exclusive possession of parcel 209 since the year 2001. He



stated that he had settled thereon with his family members and developed it by cultivating it, planting trees and constructing a semi-permanent house thereon.

3. The plaintiff further stated that it was only in 2013 that the defendant started claiming Parcel 209 and that on March 7, 2020 there was an attempt by the defendant to evict her from the said parcel using hired goons but the attempt was unsuccessful. The plaintiff therefore contended that he had acquired parcel 209 by virtue of the doctrine of adverse possession hence the suit.

B. The Defendant's Defence And Counterclaim

4. The defendant filed a statement of defence and counterclaim dated May 11, 2021. By her defence, she disputed the plaintiff's claim for adverse possession of parcel 209. It was further contended that the plaintiff had wrongfully occupied parcel 209 since his land parcel number was 167. The defendant asserted that she reported the plaintiff's unlawful occupation of her land to the location chief in 2007 for resolution. The defendant further pleaded that the dispute was also handled by various government offices such as the Deputy County Commissioner, the Land Registrar, the Ministry of Lands, and the National Land Commission (NLC). It was pleaded that the NLC had found vide its verdict dated February 28, 2018 that the plaintiff was unlawfully occupying Parcel 209.
5. The defendant further pleaded that the plaintiff was successfully evicted from parcel 209 on the basis of the decision of the NLC but he returned to the said property on the basis of the interim orders he obtained in this suit. The defendant further pleaded that, in any event, time for purposes of the Limitation of Actions Act could only start running from February 25, 2008 when she was registered as proprietor of parcel 209 and not from 2001.
6. The defendant further contended that by lodging a complaint which led to the arrest and prosecution of the plaintiff for forcible detainer in Nyahururu CM Criminal Case No 214 of 2013 *Republic vs James Chemusi Edungi* time had stopped running for purposes of a claim for adverse possession.
7. By her counterclaim, the defendant pleaded that she was the legitimate owner of Parcel 209 having been allocated the same by the government of Kenya. It was her case that she enjoyed quiet possession of the said parcel until 2005 when she discovered that the plaintiff had entered the land, built a semi-permanent house thereon, and started cultivating it.
8. The defendant reiterated the contents of her defence on how she reported the dispute to various government agencies and the steps taken towards resolution thereof, culminating in the decision of the NLC dated February 28, 2018 which declared her the legitimate owner of Parcel 209. It was her case that the verdict of the NLC had never been reviewed or set aside and she consequently urged the court to adopt and give legal effect to it. The defendant consequently sought the following reliefs in her counterclaim:
 - a. A declaration that the defendant is the legal proprietor of LR No Liakipia/UASO Narok/209 to the exclusion of the plaintiff and sundry and that the plaintiff's entry thereon amounted to trespass.
 - b. General damage for trespass and interest thereon at court's rate.
 - c. An order directing the plaintiff to vacate LR No Liakipia/UASO Narok/209 measuring approximately 1.40 Ha forthwith failing which he be evicted at his own costs.
 - d. An order of permanent injunction restraining the plaintiff, his agents, servants and/or any person claiming under his name and/or title from entering into cultivating and/or interfering



with the defendant's quiet possession, use and occupation of LR No Liakipia/UASO Narok/209 measuring approximately 1.40 Ha.

- e. Costs of this counterclaim, interest thereon at court's rate and any other relief that the honourable court may deem fit, just and expedient grant.

C. The Plaintiff's Reply To Defence And Defence To Counterclaim

9. The plaintiff filed a reply to defence and defence to counterclaim dated May 20, 2021. By his reply to defence, the plaintiff joined issue upon the defendant on her counter-claim and reiterated the contents of his supporting affidavit. The plaintiff denied having vacated Parcel 209 at any time since 2002. He therefore prayed for dismissal of the defendant's defence.
10. By his defence to counterclaim, the plaintiff denied each and every allegation contained in the counterclaim and put the defendant to strict proof thereof. He pleaded that the criminal case of forcible detainer against him was dismissed by the criminal court. He further contended that he had been in continuous, peaceful and uninterrupted occupation of Parcel 209 hence entitled to the orders sought. The plaintiff further pleaded that the Deputy County Commissioner had no legal authority to execute any decision of the NLC hence his attempted eviction was unlawful.

D. The Defendant's Reply To Defence To Counterclaim

11. The defendant filed a reply to defence to counterclaim dated May 26, 2021. By the said reply the defendant joined issue with the plaintiff upon his defence to counterclaim and reiterated the contents of her defence and counterclaim. No new allegations were raised in the said reply.

E. Summary of Evidence at the Trial

The plaintiff's evidence

12. The plaintiff testified on his own behalf as the sole witness. The plaintiff's evidence was that although he was allocated Parcel No 167 by the government the plot he was shown on the ground and on which he settled was Parcel No 209. It was his evidence that he had been in open, continuous and exclusive possession of Parcel 209 since 2001 and that he had developed it by fencing and cultivating it. He further testified that he had constructed a semi-permanent thereon where he resided with his family members.
13. It was the plaintiff's evidence that he was acquitted of the criminal charge of forcible detainer and that he had never been evicted from Parcel 209 by the defendant. It was his evidence that there was an attempted eviction on March 7, 2010 which was not successful. He contended that the attempted eviction was unlawful since it was not backed by a court order. He, therefore, maintained that he had acquired Parcel 209 through adverse possession

The Defendant's Evidence

14. The defendant also testified at the trial on her own behalf as the sole witness. Although the claim before the court was for adverse possession the defendant went to great detail to demonstrate that she was the legitimate owner of Parcel 209. She explained the manner in which she acquired Parcel 209 and the attempts she made over several years to have various government offices resolve the dispute with the plaintiff. She testified that the plaintiff was charged with forcible detainer over Parcel 209 and that although he was acquitted, the NLC later on gave a verdict dated February 28, 2018 affirming her ownership of Parcel 209 and directing the plaintiff to vacate.



15. The defendant's further evidence was that she first discovered in 2005 that the plaintiff had wrongfully trespassed into her Parcel No 209, constructed a house thereon and started cultivating it without any lawful justification. It was her evidence that the plaintiff was evicted therefrom in 2020 by the Deputy County Commissioner but he returned afterwards. What was unclear from the pleadings and evidence is whether the plaintiff returned to Parcel 209 through force or on the basis of a court order. The defendant maintained that the plaintiff had not acquired Parcel 209 through adverse possession.

F. Directions on Submissions

16. Upon conclusion of the trial the parties were given timelines within which to file and exchange their respective submissions. The record shows that the plaintiff's submissions were filed on September 30, 2022 whereas the defendant's submissions were filed on October 31, 2022.

G. The Issues for Determination

17. The court has considered the pleadings, evidence and documents in this matter. The court is of the opinion that the following issues arise for determination herein:
- a. Whether the plaintiff has demonstrated his claim for adverse possession.
 - b. Whether the plaintiff is entitled to the reliefs sought in the suit.
 - c. Whether the defendant has demonstrated her counterclaim against the plaintiff.
 - d. Whether the defendant is entitled to the reliefs sought in the counterclaim.
 - e. Who shall bear costs of the suit and counterclaim.

H. Analysis and Determination

Whether the plaintiff has demonstrated his claim for adverse possession

18. The court has considered the material and submissions on record on this issue. Whereas the plaintiff submitted that he had demonstrated his claim for adverse possession, the defendant contended otherwise. It is evident from the material on record that the defendant made every effort to demonstrate that she was the legitimate owner of Parcel 209. She emphasized that she had a valid title deed for the property and that the NLC had made a determination of ownership in her favour and urged the court to uphold her ownership. The court shall, however, confine itself to the examination of the elements of adverse possession.
19. The elements of adverse possession were summarized in the case of *Kasuwe vs Mwaani Investments Ltd & 4 Others* [2004] 1KLR 184 as follows:
- “...and 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 and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, *Wanja vs Sakwa* No2 [1984] KLR 284. A title by adverse possession can be acquired under the *Limitation of Actions Act* for part of the land...”
20. It is evident from the material on record that the defendant became registered as proprietor of Parcel 209 on February 25, 2008. The court shall take this date as the commencement date for purposes of the



- claim for adverse possession. Prior to that date it was that government of Kenya which was the owner hence time could not run against it under the *Limitation of Actions Act* (cap 21).
21. The defendant in her evidence stated that she found the plaintiff on the suit property in 2005 having constructed a semi-permanent house thereon whilst at the same time cultivating crops thereon. There is no credible evidence on record to show that the defendant ever regained possession of the suit property thereafter. There is also no evidence that the defendant ever regained effective possession and control of the property with the assistance of the Deputy County Commissioner. The material on record merely shows that there was an attempted eviction and destruction of property on March 7, 2020 but the plaintiff moved to court on March 10, 2020 and forestalled his eviction.
 22. The court has noted that the defendant's abortive re-entry into Parcel 209 was not peaceful and that the involvement of police officers or other hired persons was not sanctioned by a court order. Even if the defendant had succeeded in the eviction the same would have been unlawful hence it could not defeat the plaintiff's claim for adverse possession. The court cannot countenance a violent and extra-judicial eviction.
 23. The court has further noted that although the defendant testified at the trial that the plaintiff had regained possession of the suit property by violently chasing her away with a machete, that allegation was not pleaded either in her defence or counterclaim. On that the contrary, the defendant had pleaded in her defence that the plaintiff had regained occupation on the basis of a court order. Accordingly, the court does not accept the defendant's evidence that the plaintiff regained or maintained possession through forcible or violent means. Moreover, there was no evidence to show that a report was made to a police station of the plaintiff's alleged violent action.
 24. The court has considered the defendant's counterclaim that time stopped running for purposes of adverse possession the moment the plaintiff was charged with the offence of forcible detainer before the criminal court. Whereas the court agrees that where interruption of possession occurs then time stops running under the law, the court is not satisfied that the criminal case was an action by the defendant for recovery of the suit property.
 25. In the case of *Githu vs Ndeete* [1984] KLR 776 it was held, inter alia, that:

“Time ceases to run under the *Limitation of Actions Act* either when the owner takes or asserts his right or when his right is admitted by the adverse possessor. Assertion occurs when the owner takes legal proceedings or makes effective entry into the land, giving notice to quit cannot be effective assertion of the right for the purpose of stopping the running of time under the *Limitation of Actions Act*.”
 26. The court is further of the opinion that the verdict of the NLC dated February 28, 2018 affirming the defendant's ownership of the suit property is of no avail to the defendant in a claim for adverse possession. There is really no contest that the defendant is the registered owner of the suit property. By filing the instant originating summons the plaintiff conceded as much save that he pleaded that the defendant's right to sue for recovery thereof had been extinguished by effluxion of time.
 27. It is evident from the material on record that the plaintiff's entry into the suit property was without the permission or consent of the defendant. That is why the defendant pleaded in her defence and counterclaim that plaintiff's entry was unlawful and that he was a mere trespasser. It is also evident from the material on record that by taking possession and excluding the defendant from the suit property the plaintiff thereby dispossessed the defendant thereof. By constructing a semi-permanent house, cultivating crops, and settling on the suit property the plaintiff clearly demonstrated the requisite



animus possidendi to utilize the land as if it were his own. The court therefore finds that the plaintiff's possession was hostile in nature.

28. A computation of time from the date of the defendant's registration, that is, February 25, 2008 to the date of filing the instant originating summons, that is, March 10, 2020 indicates that the plaintiff had been in exclusive possession of the suit property for a period exceeding 12 years. The court is thus satisfied that the plaintiff has satisfied all the requirements for proving his claim for adverse possession of the suit property.

Whether the defendant has proved her counterclaim against the plaintiff

29. By her counterclaim, the defendant considered the plaintiff to be a trespasser on the suit property hence the reason she sought a declaration that she was the legal proprietor of the suit property; general damages for trespass; an eviction order; and a permanent injunction against the plaintiff.
30. There was really no contest as to who was the registered proprietor of the suit property. The main question for determination was whether the defendant had lost her right to recover the suit property due to effluxion of time and whether the plaintiff had acquired the same through adverse possession. The court having found that the plaintiff has proved his claim for adverse possession then it would follow that the defendant's claim for recovery of the suit property outside the limitation period is not tenable. The plaintiff's claim and the defendant's counterclaim are mutually exclusive. Since the plaintiff's claim has succeeded then the defendant's claim for recovery of the suit property is untenable.

Whether the plaintiff is entitled to the reliefs sought in the suit

31. The court has found and held that the plaintiff has proved his claim for adverse possession. It would, therefore, follow that the plaintiff is entitled to the reliefs which shall facilitate his registration as the proprietor of suit property on account of the doctrine of adverse possession

Whether the defendant is entitled to the reliefs sought in the counterclaim

32. The court has found and held that the defendant has not proved her counterclaim and that the same is untenable since her right to recovery of the suit property has been extinguished by operation of law. It would, therefore, follow that the defendant is not entitled to the reliefs sought in the counterclaim.

Who shall bear costs of the suit and counterclaim

33. 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). A 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. The court has, however, noted from the material on record that either the parties were shown the wrong parcels on the ground or there was a mismatch between Parcel 167 and Parcel 209 as they appeared in the map and their respective locations on the ground. Accordingly, the court is of the opinion that each party should bear his own costs of both the suit and counterclaim.

I. Conclusion and Disposal Orders

34. The upshot of the foregoing is that the court finds and holds that the plaintiff has proved his claim for adverse possession to the required standard whereas the defendant has failed to prove her counterclaim. Consequently, the court makes the following orders for disposal of the suit and counterclaim:



- a. A declaration be and is hereby made that the plaintiff, James Chemusi Edungi, has become entitled to be registered as proprietor of Title No Laikipia/UASO Narok/209 measuring approximately 1.40 ha on account of adverse possession under section 38 of the *Limitation of Actions Act* (cap 22).
- b. The defendant is hereby ordered to transfer Title No Laikipia/UASO Narok/209 to the plaintiff, James Chemusi Edungi within 21 days from the date hereof in default of which the Deputy Registrar of the court shall sign all necessary forms, documents and instruments to facilitate transfer of the suit property to the plaintiff.
- c. The District Land Registrar, Laikipia County shall dispense with production of the original title deed and all documents in the possession, custody or control of the defendant while transferring the suit property to the plaintiff.
- d. The defendant's counterclaim is hereby dismissed in its entirety.
- e. Each party shall bear his own costs of the suit and counterclaim.

It is so decided.

**JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 16TH DAY OF FEBRUARY, 2023
AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

In the presence of:

Ms. Wanjiru Muriithi for the plaintiff

Mr. Mathea for the defendant

C/A - Carol

Y. M. ANGIMA

JUDGE

