



**Ngatiri v Kimata (Environment & Land Case 343 of 2018)
[2023] KEELC 854 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 854 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 343 OF 2018**

**JO MBOYA, J
FEBRUARY 16, 2023**

BETWEEN

SAMMY NG'ANG'A NGATIRI S.S PLAINTIFF

AND

JANE KABURA KIMATA DEFENDANT

JUDGMENT

1. Vide Originating Summons dated August 5, 2018, the Plaintiff has approached the Honourable court seeking for the following reliefs.
 - i. Whether, the Applicant herein has become entitled to the parcel of land known as Kariobangi Light Industries Plot No 422.
 - ii. If the answer to the (1) above is in the affirmative, whether the Land owner registered in respect of the land be rectified to reflect the Applicant's name as the proprietor of the parcel of land.
 - iii. Whether, the Respondent should be ordered to surrender all documents necessary to affect transfer of the parcel of land herein to the Applicant, and in default whether the executive officer of this court should be ordered to execute the necessary transfer documents on behalf of the Respondent.
 - iv. Whether the intruders to the parcel of land since February 15, 2014 should be compelled by a Mandatory Injunction to hand over vacant possession-of the suit property to the applicant herein, and be compelled to pay Damages at a rate of Kshs 20,000/= per day since February 15, 2014 until the Applicant herein is reinstated to the parcel of land.
 - v. Any other Relief the Honourable Court may deem necessary to address the cause of justice.
 - vi. Who should bear the cost of this application.



2. The originating summons herein is premised and anchored on various grounds, which have been alluded to and stated in the body thereof. Besides, the summons is supported by an affidavit sworn by the Plaintiff and same is sworn on the August 5, 2020.
3. Though the originating summons was duly served upon the Defendant herein, however the Defendant neither entered appearance nor filed any Response, whatsoever and/ or howsoever.
4. Consequently and in the premises, the only set of pleadings obtaining and pertaining to the subject matter are the originating summons and the supporting affidavit thereto, filed by the Plaintiff herein.
5. Notwithstanding the foregoing, it is appropriate to state and underscore that when the matter came up for direction, the Plaintiff herein sought to tender and adduce *viva voce* evidence and indicated that same will be calling one witness. In this regard, directions were thereafter given that the matter shall proceed *vide viva voce* evidence.

Evidence By The Parties

a. Plaintiff's case

6. The Plaintiff's case gravitates and revolves around the evidence of the Plaintiff, who testified as PW1 and Stephen Njuguna Gicheru, who testified as PW2.
7. It was the testimony of PW1 that same entered into and took possession of plot number 422, Kariobangi Light Industries on or about the March 18, 1986, upon entering into and execution of a sale agreement with (sic) the owners thereof.
8. Furthermore, the witness added that same remained in occupation over and in respect of the named plot from the March 18, 1986, openly, freely and without any interruption, whatsoever.
9. Nevertheless, the witness averred that on or about the August 26, 2014, same was served with a demand notice from a firm of advocates, who purported to have been acting for and on behalf of the undisclosed owners/proprietors of the suit plot.
10. Additionally, the witness also testified that on or about the February 15, 2015, some persons, armed with fake documents purporting to come from court, came on to the suit property and with the assistance of police officer from Kariobangi Police Station, proceeded to and evicted him (witness) and his tenants from the suit property.
11. On the other hand, the witness added that upon being evicted from the suit plot, the persons who caused and occasioned his eviction proceeded to and erected a perimeter fence round the entire of the suit property.
12. In addition the witness testified that arising from the impugned actions of the persons who evicted same from the suit property, he (witness), thereafter proceeded to and issued a statutory notice to the Honourable Attorney General, indicating his desire and intention to sue the Honourable Attorney General on behalf of the Police officers, Kariobangi Police Station and the chief of Kariobangi Location, who were responsible for the illegal eviction.
13. In any event, the witness added that during the time when same was in occupation of the suit plot, same had erected/built temporary and semi-permanent structures on the suit plot, as well as erected a gate thereon. Besides, the witness also stated that he was also doing business therein including selling firewood, electrical goods and cloths.



14. Be that as it may, the witness testified that same had been in continuous, uninterrupted and peaceful occupation, over and in respect of the suit plot for more than 30 years, by the time same was illegally evicted from the named Plot.
15. Furthermore, the Witness herein thereafter alluded to the Affidavit in support of the Originating summons and same sought to adopt and rely on the contents thereof. In this regard, the Contents of the named affidavit were adopted and constituted as further Evidence in chief of the Witness.
16. On the other hand, the Witness also referred to the Bundle of Documents which had been attached to and exhibited against the Supporting Affidavit and sought to adopt the same as exhibits in respect of the instant matter. Consequently, the various documents, which had been attached to the affidavit were duly admitted as Plaintiff's Exhibits.
17. The second witness who testified in the matter was Stephen Njuguna Gicheru, who indicated that same comes from Kinangop, within Nyandarua County.
18. Furthermore, the witness added that he is conversant with the Plaintiff herein, who is his uncle, by virtue of being a brother to his (witness) Father.
19. In addition, the witness testified and informed the court that same had recorded a witness statement dated the May 23, 2016, which he chose to rely on and to adopt.
20. Moreover, the witness stated that the Plaintiff herein used to occupy the suit plot and that same had been in occupation thereof for more than 30 years. For clarity, the witness added that he himself has also been on the suit plot alongside the Plaintiff.
21. However, the witness added that on or about the November 19, 2014, same was arrested by police officers, who contended that he (witness) had trespassed onto the suit plot belonging to a known owner.
22. Additionally, the witness averred that subsequently both the Plaintiff and himself were evicted from the suit plot by persons who claimed to be the lawful and legitimate owners of the suit property.
23. Other than the foregoing, the witness supported and corroborated the testimony of PW1, essentially, that the Plaintiff herein was entitled to the Suit Plot on account of Adverse Possession.
24. With the foregoing testimony, the Plaintiff's case was closed.

Defendant's Case

25. Though the Defendant herein was indicated to have been duly served with the originating summons herein, in terms of the affidavit of service filed, same however did not enter appearance or filed any replying affidavit to the originating summons or at all.
26. In addition, it is also worthy to note that the Defendant (sic) was variously served with the hearing notices, but yet again same neither appeared nor participated in the proceedings before the Honourable court.
27. In the premises, it is appropriate and expedient to state that the Plaintiff's suit was neither controverted nor opposed by the Defendant herein.



Submissions By The Parties

a. Plaintiff's submissions

28. The Plaintiff herein filed written submissions dated the February 9, 2023 and in respect of which, same has isolated, highlighted and amplified three issues for consideration by the court.
29. First and foremost, the Plaintiff herein has submitted that same bought and acquired the suit plot vide a sale agreement and hence same is the lawful and legitimate owner in respect of plot No 422, Kariobangi Light Industries. In this regard, the Plaintiff has invited the court to take cognizance of the sale agreement dated the March 18, 1986.
30. Secondly, the Plaintiff has submitted that upon purchase of the suit plot, same entered upon and took possession thereof. For clarity, the Plaintiff has averred that he remained in occupation of the suit plot up to and including the year 2015, when the intruders/purported owners of the suit plot came onto the property and evicted same, albeit using (sic) fraudulent eviction orders.
31. Additionally, the witness has contended that prior to and before the illegal and unlawful eviction, same had been in occupation and possession of the suit plot for more than 30 years, without any interruption or at all.
32. In the premises, the Plaintiff has thus contended that by virtue of the duration and longevity of occupation of the suit plot, same is therefore entitled to ownership vide adverse possession.
33. Thirdly, the Plaintiff has submitted that where a person has been in continuous and an uninterrupted possession of a designated property for more than 12 years, such a person is entitled to lay a claim of ownership of the named property *vide* adverse possession.
34. Furthermore, the Plaintiff has added that where a person and in this case, himself, has been in occupation and possession of the suit property, the rights and interests accruing to such a person cannot be interrupted *vide* a fraudulent eviction.
35. Consequently and in the premises, the Plaintiff has contended that by virtue of being in possession of the suit property for more than 30 years, the fraudulent eviction, which was perpetrated by persons claim to be the registered owners of the suit property, cannot (sic) interrupt his claim to the suit property on account of adverse possession.
36. To vindicate the foregoing submissions, the Plaintiff has cited and relied on various decisions *inter alia*, *Wambugu versus Njuguna* (1983)eKLR, *Mwangi Githu versus Livingstone Ndeete* (1973)eKLR, *Hosea versus Njiru & Others* (1974)EA 576, *Bridges v Mees* (1957) 2 ALL ER 577, *Jandu versus Kirpal* (1975)EA and *Mweu versus Kiu Ranching & Farming Cooperative Society* (1985)eKLR, respectively.
37. In a nutshell, the Plaintiff contends that same has been able to establish and prove the requisite ingredients belying a claim for adverse possession and in this regard, the Plaintiff has implored the honourable court to find and hold that the reliefs at the foot of the originating summons ought to be granted.

b. Defendant's Submissions

38. As pointed out elsewhere herein before, the Defendant neither entered appearance nor filed any responses, to the originating summons. In addition, it is also worthy to recall that though served with various hearing notices, the Defendant similarly did not attend court nor tender any evidence, whatsoever.



39. For completeness, it is also worthy to underscore that the Defendant also did not file any written submissions over and in respect of the subject matter.

Issues For Determination

40. Having reviewed the Originating Summons dated the August 5, 2018, albeit filed in court on the August 7, 2018, together with the supporting affidavit thereto and having reviewed the witness statement filed by and on behalf of the Plaintiff and having reviewed the oral evidence tendered before the court; and finally having taken into account the written submissions filed by the Plaintiff, the following issues do arise and are thus worthy of determination;
- i. Whether a claim for Adverse Possession can be maintained and sustained where the claimant also contends to be the lawful and legitimate owner of the suit property.
 - ii. Whether the Plaintiff herein has established and proved the requisite ingredients to warrant a declaration that same is entitled to the suit property vide Adverse Possession.

Analysis And Determination

Issue Number 1

Whether a claim for Adverse Possession can be maintained and sustained where the claimant also contends to be the lawful and legitimate owner of the suit property.

41. The Plaintiff filed and commenced the instant proceedings vide the originating summons dated the August 5, 2018 and same has contended that he has been in occupation of the named plot ever since the March 18, 1986. For clarity, the Plaintiff herein has underscored that his entry upon and occupation of the named property was as a result of a sale agreement that he (Plaintiff) entered into and executed with (sic) the owners of the suit property.
42. Furthermore, the Plaintiff has added that having lawfully bought and purchased the suit property, same was therefore entitled to enter upon and remain in occupation thereof, by virtue of being the lawful owner.
43. Nevertheless, the Plaintiff averred that on or about the August 26, 2014, same received demand notices from a firm of advocates, who were purporting to be acting and representing (sic) undisclosed owners/proprietors of the suit property.
44. Be that as it may, the Plaintiff added that the hitherto undisclosed owner/proprietor, later on turned out to be or transpired to be the Defendant herein.
45. Other than the averments/depositions contained in the body of the originating summons and the supporting affidavit thereto, the Plaintiff herein has also filed written submissions and same has reiterated his contention that he is the lawful and legitimate owner of the suit plot.
46. To be able to appreciate the position taken by the Plaintiff herein, it is appropriate and necessary to reproduce the pertinent aspects of the written submissions that underscores his claim to be the rightful owner of the suit plot.
47. For ease of reference, the relevant excerpts are reproduced as hereunder;

Your Lordship, the applicant here categorically state that he is the owner of plot No 422 Kariobangi Light Industries as per the sale agreement dated March 18, 1986.



Being candid to the Honourable Court, the applicant/ plaintiff say that he acquired the suit land by way of contract, but seeks orders on adverse possession, that he bought the land from a Mr & Mrs Jane Kabura Kimata and not from Julia Kabura Wainoga (reference to a court order dated January 22, 2010.

48. From the foregoing excerpts, what becomes apparent and evident is that the Plaintiff herein is laying a claim to and in respect of the suit property as the lawful owner and the proprietor thereof, on the basis of (sic) the sale agreement dated the March 18, 1986.
49. In addition, the Plaintiff has also contended that same acquired the suit land by way of contract. In this regard, what I understand the Plaintiff to be saying is that same is the lawful owner thereof.
50. Premised on the foregoing, the question that does arise is whether a person (read the Plaintiff) who contends to be the lawful owner of the impugned property can contemporaneously lay a claim to the same property by way of adverse possession.
51. In my humble view, the claim based and anchored on ownership of land as of right, is antithetical and at variance with a claim for adverse possession.
52. Put differently, a person laying a claim to ownership of land/named property, vide adverse possession, must admit and acknowledge that the title to the named property lawfully belongs to and inheres in the impleaded Defendant/third party.
53. In addition, the person claiming ownership vide adverse possession, must concede the propriety and validity of the title of the impleaded Defendant. In this regard, it cannot lie in the mouth of the claimant to say that the title of (sic) the impleaded Defendant was acquired by fraud or otherwise.
54. Furthermore, the claimant/Plaintiff herein cannot also be heard to stake a claim to be the lawful owner and proprietor of the suit property and in the same vein, (sic) to claim the same property vide adverse possession.
55. Clearly, it was incumbent upon the Plaintiff to exercise a right of election, either to stake a claim over and in respect of the suit property by virtue of being the lawful owner thereof or on account of adverse possession.
56. Be that as it may, I wish to add that the Plaintiff herein cannot implead the two causes of action simultaneously and contemporaneously, in the same suit and (sic) be successful in both.
57. To my mind, where a Claimant, like the Plaintiff beforehand mixes the causes of action of ownership and adverse possession, in one suit, the entire pleading beforehand becomes inextricable muddled up and thus same constitutes an abuse of the Due process of the court.
58. In this respect, it is imperative to restate and reiterate the holding of the Court of Appeal in the case of *Catherine Koriko & 3 Others versus Evaline Rosa* (2020)eKLR, where the Court of Appeal stated and observed as hereunder;

In the application, the appellants sought to lay claim to the suit property on the basis of adverse possession. A claim for adverse possession is inconsistent with the claim for being a beneficiary of the estate of a deceased person. In the original suit, the appellants did not concede that indeed the respondent was the true owner of the suit property.

59. Furthermore, the issue as to whether one can lay a claim to ownership of the suit property and at the same time seek to be declared to have acquired the same property vide adverse possession, was also



canvassed and deliberated upon in the case of *Haro Yonda Juaje v Sadaka Dzenzo Mbauro & Kenya Commercial Bank* (2014) eKLR.

60. For coherence, the Honourable court stated and observed as hereunder;

(29) One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession.

If the Plaintiff's averment is that the title which was issued to the Defendant was fraudulently acquired, then his cause of action would be for the rectification of title by cancellation pursuant to the provisions of Section 143 of the *Registered Land Act* and not adverse possession. He cannot use the doctrine of adverse possession to go around the decision of the Minister.

61. In view of the foregoing observations and coupled with the erudite espousal of the law *vide* the decisions alluded to in the preceding paragraphs, I come to the conclusion that the Plaintiff herein cannot raise, originate and maintain the twin claims of being the rightful owner of the suit property, whilst at the same time staking a claim thereto *vide* adverse possession.

62. In a nutshell, the Plaintiff's claim is substantially muddled up and thus constitutes an abuse of the Due process of the court. For coherence, it was incumbent upon the Plaintiff to exercise election as to which cause of action, same was keen to propagate.

Issue Number 2

Whether the Plaintiff herein has established and proved the requisite ingredients to warrant a declaration that same is entitled to the suit property *vide* Adverse Possession.

63. Before venturing to address and answer the issue herein, it is imperative to state and observe that a claim for adverse possession can only arise and accrue where the claimant has been and remains in actual, physical and active possession/occupation of the named property or a defined portion thereof.

64. For clarity, it then means that a person who was hitherto in possession/occupation of the named property or a portion thereof, but who has since been removed or evicted therefrom, can no longer lay a claim for adverse possession.

65. To my mind, the eviction of the claimant, who was (sic) hitherto in possession or occupation of the named property or a defined portion thereof, terminates actual and physical possession and by extension negates the pertinent ingredients that bely a claim for adverse possession.

66. In this regard, it is appropriate to reiterate the holding of the Court of Appeal in *Mtana Lewa versus Kabindi Ngala Mwangandi* [2015] eKLR, where the honourable court stated and held as hereunder;

“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 or 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.”

67. Additionally, the ingredients to be proved and established prior to and before a claimant can partake of a favourable order pertaining to and concerning a claim for adverse possession, were also revisited and summarized in the case of *Mate Gitabi versus Jane Kabubu Muga Alias Jane Kaburu Muga & 3 Others* [2017] eKLR.

68. For coherence, the Honourable court stated and observed as hereunder;

“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 secrecy, without force, 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 maxim *nec vi, nec clam, nec precario*. See also ... *Kasuve vs Mwaani Investments Limited & 4 Others* [2004] 1KLR where this Court stated as follows:

‘In order to be entitled to land by adverse possession, the claimant must prove that she has been in exclusive possession of land openly and as of right and without interruption for 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.’”

69. Having made the foregoing observation, it is appropriate to return home and consider whether the facts placed before the honourable court, as pertains to the subject matter, satisfy the requisite ingredients that must be established and proved prior to a declaration being made in favor of the claimant.

70. In respect of the instant matter, it is not lost on the Honourable court that the Plaintiff himself testified and stated as hereunder;

Paragraph 5 of the supporting affidavit;

On the February 15, 2015, armed with fake documents purporting to come from the court and with the help of officers from Kariobangi Police Station evicted me and my tenants.

Paragraph 7;

When I was evicted, the plot was fenced and subsequently the fence was removed whereby a twenty-litter container was placed therein.

71. My understanding of the foregoing averments is that the Plaintiff is conceding and acknowledging that same was evicted from the suit property and hence his occupation/ possession thereof was effectively interrupted, nay, terminated.

72. Furthermore, though the Plaintiff is seeking to be declared as the owner of the suit property *vide* adverse possession, the Plaintiff admittedly is no longer in possession or occupation of the suit plot.

73. In the premises, it is difficult to understand and appreciate on what basis one (read the Plaintiff) can seek to be declared as the owner *vide* adverse possession long after being removed from the suit property.



74. Despite the plea by and on behalf of the Plaintiff herein, I am constrained to state and underscore that the doctrine of adverse possession cannot be invoked and relied upon by a party who has since ceded possession and occupation of the suit property.
75. Before departing from the issue herein, it is appropriate to state and reiterate that even where a suit is not defended, like the instant one, it is still incumbent upon the claimant/Plaintiff, to place before the court sufficient evidence and material to prove his/her claim. For clarity, the burden of proof still lies on the shoulders of the Plaintiff even when the suit is undefended.
76. Put differently, it does not mean that where a suit is undefended or proceeds on the basis of a formal proof, then the Plaintiff/Claimant, must no doubt get his/her wish, read, Judgment. Clearly, that is not the position of the law.
77. In this respect, it is worthy to invite the attention of the Plaintiff to the established and hackneyed position which was elaborated upon by the Court of Appeal in the case of *Daniel Toroitich Arap Moi versus Mwangi Stephen Muriithi & another* [2014] eKLR, where the honourable court of appeal stated as hereunder;

With respect, that was entirely a wrong approach to this case and the entire practice of civil litigation. Whether or not the appellant had not denied the facts by affidavit or defence, when the 1st respondent came to court, he was bound by law and practice to lay the evidence to support existence of the facts he pleaded. That is what we understand Section 108 of the *Evidence Act* to be demanding of a party like the 1st respondent that:

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”

That he did not do. The claim he put forth that three limited liability companies existed, they had shareholders including himself, each holding a certain percentage of shares, were not proved. The claim that those companies held certain properties which were sold and transferred was also not proved. Accordingly, the learned judge fell in error to assume that those facts indeed existed.

It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.

78. In the circumstances, I come to the conclusion that the claim for adverse possession herein, was neither established nor proved, in the manner required under the law. For clarity, the Plaintiff herein was bound by the provisions of Sections 107, 108 and 109 of the *Evidence Act*, Chapter 80 Laws of Kenya.
79. In a nutshell, there is no gainsaying that the Plaintiff's suit was not only misconceived and mistaken, but also legally untenable.

Final Disposition

80. Having reviewed and examined the issues for determination and which were highlighted on the body of the Judgment herein, it is evident and apparent that the Plaintiff's claim vide adverse possession, is not only premature but same is misconceived and bad in law.



81. Additionally, it is also imperative to state and underscore that the Plaintiff's claim is similarly devoid and bereft of merits.
82. Consequently and in the premises, the originating summons dated the August 5, 2018, albeit filed in court on the August 7, 2018, be and is hereby Dismissed with no orders as to costs.
83. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF FEBRUARY 2023.

OGUTTU MBOYA

JUDGE

In the Presence of;

Benson - Court Assistant.

Mr. Sammy Ng'ang'a Gatiri (Plaintiff) – present.

N/A for the Defendant.

