



**Gachihi & 3 others v Gathii & another (Environment & Land Case 86 of 2015) [2023] KEELC 16476 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16476 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 86 OF 2015**

**JO OLOLA, J  
MARCH 23, 2023**

**BETWEEN**

**PATRIC WANJOHI GACIHI ..... 1<sup>ST</sup> PLAINTIFF  
GERALD GACIHI IRUNGU ..... 2<sup>ND</sup> PLAINTIFF  
ROBERT MUNYUA GACIHI ..... 3<sup>RD</sup> PLAINTIFF  
MATHEW KINGORI GACIHI ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**GERALD WAKAHU GATHII ..... 1<sup>ST</sup> DEFENDANT  
ALICE MUTHONI WAITHUKI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By the Originating Summons dated and filed on March 10, 2015 Patrick Wanjohi Irungu, Gerald Gachihi Irungu, Robert Munyua Gachihi and Mathew Kingori Gachihi (the Applicants) pray for orders as follows:
  1. A declaration that a customary trust was crated over the parcel of land LR No Othaya/Ihuririo/452 (hereafter referred to as “the original suit land”) in favour of the Applicants to the extent of 5.35 Acres;
  2. That the pleaded customary trust affects the sub-division of the original suit land, that is LR No Othaya/Ihuririo/1253, 1254 and 1255;
  3. That the pleaded customary trust be determined in part by registration of the Applicants as the proprietors of parcel of land LR No Othaya/Ihuririo/1255 (“the suit land”);



4. That in the alternative, the Applicants be declared as having acquired by adverse possession the suit land LR No Othaya/Ihuririo/1255 and they be registered as the absolute proprietors thereof;
  5. That the costs of the suit be provided for.
2. The Originating Summons is supported by an Affidavit sworn by the 2<sup>nd</sup> Applicant – Gerald Gachihi Irungu wherein the Applicants aver that LR No Othaya/Ihuririo/452 originally belonged to the 2<sup>nd</sup> Applicant’s grandfather Waithuki Wanjohi. The Applicants further aver that the late Waithuki Wanjohi left behind two adjacent parcels of land – the original suit land herein and LR No Othaya/Ihuririo/276 measuring 15.8 acres and 5.1 acres respectively hence an aggregate of 20.5 acres.
3. The 2<sup>nd</sup> Applicant asserts that the said grandfather had 2 wives, being the 2<sup>nd</sup> Respondent Alice Muthoni Waithuki and the 2<sup>nd</sup> Applicant’s grandmother Wangui Waithuki (deceased). The Applicants further aver that during his lifetime, their grandfather gave to each of the two houses a half-share of his aggregate acres of land, hence each house was to be a beneficiary of 10 acres or thereabouts.
  4. The 2<sup>nd</sup> Applicant avers that in order to effectuate the said trust, his grandfather transferred to him LR No Othaya/Ihuririo/276 to hold the same for his father’s house. In addition, his grandfather informally excised 5.35 acres from the original suit land and put him in exclusive possession of the same in the year 1981.
  5. The 2<sup>nd</sup> Applicant further avers that he was so made a trustee of his father’s house in conformity with Kikuyu Customary Law as his father Irungu Waithuki died in 1952 before land registration. The 2<sup>nd</sup> Applicant avers that he immediately settled on the said 5.35 acres of the original suit land in the early 1980’s wherein he planted tea bushes and his sons who are the Co-Applicants later settled on the land with their families and have remained in possession to-date.
  6. The 2<sup>nd</sup> Applicant further avers that in observance of the said trust, the clan confirmed the same in a meeting held in 1990. In breach of the said trust, the deceased’s estate was administered and distributed through Nyeri High Court Succession Cause No 134 of 1986 wherein even LR No Othaya/Ihuririo/276 under the 2<sup>nd</sup> Applicant’s name was included as part of the deceased’s property, thereby confirming the existence of the trust.
  7. The 2<sup>nd</sup> Applicant avers further that in further breach of the trust, the original suit land was distributed to the 2<sup>nd</sup> Respondent and her children in exclusion of the 2<sup>nd</sup> Applicant’s father’s house. The resultant grant was effected and the original suit land was sub-divided into LR No Othaya/Ihuririo/1253, 1254 and 1255. On May 16, 2013, the 2<sup>nd</sup> Respondent sold Parcel No 1255 (the suit land) to Gerald Wakahiu Githii (the 1<sup>st</sup> Respondent herein).
  8. The 2<sup>nd</sup> Applicant avers that it is on the suit land that he has taken substantial developments and his Co-Applicants reside thereon. He asserts that the 1<sup>st</sup> Respondent purchased the suit land while aware of the Applicants entitlement thereto as the Applicants were in possession and occupation thereof.
  9. The 2<sup>nd</sup> Respondent further avers that the 1<sup>st</sup> Respondent is now intent of taking possession of the suit land a fact that would entail their eviction therefrom and loss of their beneficial interest therein and hence the prayers made in the Originating Summons.



10. In response to the Originating Summons Gerald Wakahiu Githii (the 1<sup>st</sup> Respondent) has sworn a Replying Affidavit herein on March 30, 2015 wherein he asserts that the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents are sons to the 2<sup>nd</sup> Applicant and that he has had no land transaction with any of the Applicants.
11. The 1<sup>st</sup> Respondent avers that he purchased LR No Othaya/Ihuririo/1255 from one Felisitas Wachinga Kibe, applied for and obtained consent to transfer the same. The 1<sup>st</sup> Respondent further avers that he had been informed that the said vendor's husband had died and that the parcel of land was part of her husband's estate which had been distributed. In confirmation of the status of the land, the 1<sup>st</sup> Respondent asserts that he was given a copy of the Certificate of Grant.
12. The 1<sup>st</sup> Respondent further avers that the vendor informed him that electric power had been installed in a house illegally constructed on her land. Accordingly on June 18, 2013, the 1<sup>st</sup> Respondent wrote to the Power Company urging them to have the poles removed and electricity disconnected therefrom. He was also made aware that the Applicants had started picking tea from the land following the death of the vendor's husband.
13. The 1<sup>st</sup> Respondent avers further that when he sent workers to the land to have it fenced, the Applicants uprooted the poles and chased away the workers.
14. Alice Muthoni Waithuki (the 2<sup>nd</sup> Respondent) is equally opposed to the orders sought in the Originating Summons. In her Replying Affidavit sworn and filed herein on March 30, 2015, the 2<sup>nd</sup> Respondent asserts that the suit herein is premised on half truths and failure by the 2<sup>nd</sup> Applicant to disclose full information. The 2<sup>nd</sup> Respondent avers that it was the 2<sup>nd</sup> Applicant and herself who instituted Nyeri High Court Succession Cause No 134 of 1986 to which the 2<sup>nd</sup> Respondent's son Samuel Gichuki Waithuki (now deceased) filed objection proceedings.
15. The 2<sup>nd</sup> Respondent avers further that after hearing the matter the court determined that LR No Othaya/Ihuririo/452 was for herself and her children while the 2<sup>nd</sup> Applicant was entitled to LR No Othaya/Ihuririo/276. A Certificate of Confirmation was then issued to that effect on February 14, 2003.
16. The 2<sup>nd</sup> Respondent further avers that if the 2<sup>nd</sup> Applicant was dissatisfied with the findings in the Succession Cause, he should have filed an appeal. She asserts that following the confirmation of the Grant LR No Othaya/Ihuririo/452 was sub-divided into several parcels namely; Othaya/Ihuririo/1253, 1255 and 1258 with the common denominator being Samuel Gichuki Waithuki (deceased).
17. The 2<sup>nd</sup> Respondent further avers that following the death of her son Samuel, his widow filed Nyeri High Court Succession Cause No 20 of 2009 to which none of the Applicants objected. She further avers that the 2<sup>nd</sup> Applicant has never and does not stay in any of the sub-divisions of LR No Othaya/Ihuririo/452 but upon the death of Samuel, he influenced his children to forcefully invade portions of the land and intimidate Samuel's wife thinking it would give them a right to the land.
18. The Originating Summons proceeded by way of oral evidence wherein the 2<sup>nd</sup> Applicant testified on behalf of the Applicants while the 1<sup>st</sup> Defendant testified on behalf of the Respondents. I have carefully considered the pleadings filed herein, the testimonies of the witnesses as well as the evidence adduced by the Parties. I have similarly perused and considered the written submissions and the authorities to which I was referred by the Learned Advocates acting for the Parties.
19. The four (4) Applicants have sued the two Respondents herein for a declaratory order that a customary trust was created over the parcel of land known as LR No Othaya/Ihuririo/452 (referred to as "the



- original suit land”) to the extent of 5.35 acres. They urge the Court to find that the pleaded customary trust affects the sub-division of the said original suit land that has since resulted into LR Nos. Othaya/Ihuririo/1253, 1254 and 1255.
20. The Applicants urged the Court to determine the said customary trust by causing the Applicants to be registered as the proprietors of the parcel known as LR No Othaya/Ihuririo/1255 (referred to as the suit land). In the alternative, the Applicants urge the Court to declare that they have acquired the said LR No Othaya/Ihuririo/1255 by way of adverse possession and to have them registered as the absolute proprietors thereof.
  21. The Originating Summons was supported by an Affidavit sworn by the 2<sup>nd</sup> Applicant – Gerald Gachihi Irungu who happens to be the father of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Applicants. It was the Applicants’ case that before its sub-division, LR No Othaya/Ihuririo/452 was originally owned by the 2<sup>nd</sup> Applicant’s grandfather one Waithuki Wanjohi. The said Waithuki Wanjohi also owned another parcel of land known as LR No Othaya/Ihuririo/276.
  22. From the material placed before me, the said Waithuki Wanjohi was married to the 2<sup>nd</sup> Respondent herein – Alice Muthoni Waithuki as well as one Wangui Waithuki who was the 2<sup>nd</sup> Applicant’s grandmother and who has since passed on.
  23. According to the Applicants the late Waithuki Wanjohi had during his lifetime given each of the two houses half a share of the two parcels of land whose aggregate size was approximately 20.5 acres. He had however transferred LR No Othaya/Ihuririo/276 to the 2<sup>nd</sup> Applicant to hold the same in trust for his father’s house since the 2<sup>nd</sup> Applicant’s father Irungu Waithuki had passed on earlier in the year 1952.
  24. The 2<sup>nd</sup> Applicant told the Court that in order to effectuate the said trust, his grandfather also informally did excise some 5.35 acres from LR No Othaya/Ihuririo/452 and thereafter put him in exclusive possession thereof in the year 1981. He told the Court that he soon thereafter settled on the said 5.35 acres and planted tea bushes thereon. His sons who are the Co-Applicants have since settled on that portion of the land and reside thereon with their families.
  25. The two Respondents however disputed the Applicant’s contention that there was a customary trust imposed or existing in regard to LR No Othaya/Ihuririo/452. It was instead their case that the said parcel of land was decreed by Court to belong to the 2<sup>nd</sup> Defendant and her children. It was further their case that following the decree of the Court in Nyeri High Court Succession Cause No 134 of 1986, they had proceeded to sub-divide the said LR No Othaya/Ihuririo/452 and the resultant portions were distributed amongst the 2<sup>nd</sup> Respondent’s children.
  26. According to the Respondents, the parcel of land LR No Othaya/Ihuririo/1255 had been distributed to the 2<sup>nd</sup> Defendant’s son one Samuel Gichuki Waithuki and upon Samuel’s death, his wife Felicitas Wachinga Kibe had sold the same to the 1<sup>st</sup> Respondent Gerald Wakahiu Githii following succession proceedings that she had filed in Nyeri High Court Succession Cause No 20 of 2009.
  27. The Respondent accuse the Applicants of invading the said LR No Othaya/Ihuririo/1255 shortly after Samuels Gichuki Waithuki’s death in the year 2009 and proceeding thereafter to erect various structures thereon.
  28. As it were, whether or not a customary trust exists over a piece of land is a matter of evidence. As the Supreme Court stated in *Isaak M’Inanga Kiebia v Isaaya Theuri M’Lintari [2018] eKLR*:

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard we agree ... that



what is essential is the nature of the holding of the land and the intention of the Parties. If the said holding is for the benefit of other members of the family then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land;
2. The claimant belongs to such family, clan or group;
3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous;
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; and
5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”

29. In his Affidavit filed in support of the Originating Summons, the 2<sup>nd</sup> Applicant avers that his grandfather transferred to him LR No Othaya/Ihuririo/276 to hold in trust for his father’s household. He further avers that during his lifetime, his grandfather gave to each of the two households a half share of his aggregate acres of land and that each household was to be a beneficiary of 10 acres.
30. The 2<sup>nd</sup> Applicant does not however point out when or how his grandfather distributed the two properties to the two households. While he states that his grandfather informally excised 5.35 acres from LR No Othaya/Ihuririo/452, he does not explain how the informal excision was done and/or how he came to determine that the portion given to him was 5.35 acres in size. His Co-Applicants are his children and there is no evidence that the 2<sup>nd</sup> Applicant’s grandfather gave any land directly or otherwise to them.
31. As it were, both LR No Othaya/Ihuririo/452 and 276 were the subject matter directly in issue in Nyeri High Court Succession Cause No 134 of 1986; In the matter of the Estate of Waithuki Wanjohi. From the Applicants’ own documents, it was apparent that the said Succession Cause was instituted jointly by the 2<sup>nd</sup> Applicant and the 2<sup>nd</sup> Respondent herein. Following the institution of the Cause, both the 2<sup>nd</sup> Applicant and the 2<sup>nd</sup> Respondent were issued with Letters of Administration for the estate on May 4, 2000.
32. Aggrieved by the decision, Samuel Gichuki Waithuki, a son to the 2<sup>nd</sup> Respondent lodged an Affidavit of Protest against the Confirmation of Grant on July 26, 2000 wherein he accused the 2<sup>nd</sup> Applicant of trying to mislead his mother (the 2<sup>nd</sup> Respondent) to include him in the Succession Cause when the deceased had already in his lifetime given LR No Othaya/Ihuririo/276 to the 2<sup>nd</sup> Applicant.
33. It was also apparent that the Objection Proceedings were heard and that they were successful. On February 14, 2003, a Certificate of Confirmation of Grant was issued wherein LR No Othaya/Ihuririo/276 measuring 5.1 acres was decreed to the 2<sup>nd</sup> Applicant while LR No Othaya/Ihuririo/452 measuring 6.39 Ha. was decreed to the 2<sup>nd</sup> Respondent (to have a life interest) and to her children Samuel Gichuki Waithuki, Hanah Njeri Waithuki, Veronica Wanjiku Waithuki and Teresa Njeri Waithuki.



34. The 2<sup>nd</sup> Applicant was aware of that determination before filing this suit. Asked during his cross-examination at the trial herein, about the Court's determination, the 2<sup>nd</sup> Applicant responded as follows:
- “Yes it is true I appealed the decision in the Succession (cause). I have not filed anything to show that I appealed on how the estate was to be sub-divided. I was comfortable but some people came and bought the land. I am not satisfied as to how the land was given to the 2<sup>nd</sup> Defendant.
35. As it were, the Succession Cause did determine how the estate of the late Waithuki Wanjohi was to be distributed. If the 2<sup>nd</sup> Applicant and/or his sons were dissatisfied, that Cause was the right forum for them to express their grievances by way of an Appeal. From the material placed before me, there was no evidence of any Appeal that had been filed.
36. What was clear was that the Applicants waited until the objector Samuel Gichuki Waithuki passed away on September 4, 2007 before they staked another claim to the land. It was also clear that following the issuance of the Certificate of Grant for the estate of Waithuki Wanjohi, on February 14, 2003, LR No Othaya/Ihuririo/452 had been sub-divided and distributed to the beneficiaries.
37. As a beneficiary, the objector's name was registered in the resultant's parcels numbers LR Othaya/Ihuririo/1253, 1255 and 1258. Following the objector's death, his wife Felicitas Wachinga Kibe and one Cecilia Muthoni Chuma were issued with a confirmed Grant in Nyeri High Court Succession Cause No 20 of 2009 on November 5, 2010 and were therefore the proprietors of the suit property parcel No 1255 as at the time this suit was filed. The two were not sued by the Applicants and this claim cannot succeed against them. As the owner of the suit property, the objector's wife had every right to dispose of the same in the manner she is said to have sold the same to the 1<sup>st</sup> Respondent.
38. The Applicants have also made an alternative prayer for a declaration that they have acquired the said parcel of land under the doctrine of adverse possession. That doctrine is anchored under Sections 7, 13 and 38 of the *Limitation of Actions Act*, Cap 22 of the Laws of Kenya which essentially provides that upon expiry of the statutory period of 12 years, a person may not bring an action to recover land as that person's title is considered to have been extinguished by operation of the law.
39. For adverse possession to succeed, the Applicant must demonstrate that he has been in an open, continuous, notorious and uninterrupted possession of the subject property without the consent or approval of the registered owner for a period of 12 years. In the matter herein, while the 2<sup>nd</sup> Applicant maintained in his Affidavit that he had taken over some 5.35 acres of the suit property and had settled thereon in the 1980's, there was no evidence adduced to support such a contention.
40. Indeed during his cross-examination, the 2<sup>nd</sup> Applicant (as PW1) testified that he had built his home on LR No Othaya/Ihuririo/276 that he was given by his grandfather during his lifetime. As regards LR No Othaya/Ihuririo/1255, he told the court that his three sons (Co-Applicants) had built their houses thereon sometime around 2010. That would be some 5 years before this suit was filed and a claim for adverse possession certainly cannot hold.
41. In the premises I was neither persuaded that there was a Customary Trust in existence over the suit property in favour of the Applicants nor that the Applicants had acquired the same under the doctrine of adverse possession.
42. The Applicants have therefore failed to prove their case against the Respondents. Their suit is dismissed with costs to the Respondents.



**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 23<sup>RD</sup> DAY OF MARCH, 2023.**

**In the presence of:**

**Mr. C. M. King'ori for the Applicants**

**No appearance for the Respondents**

**Court assistant – Kendi**

**J. O. Olola**

**JUDGE**

