



REPUBLIC OF KENYA



**Muchiri & another v Kimani (Environment & Land Case 795 of 2017)  
[2023] KEELC 16645 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16645 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE 795 OF 2017**

**JG KEMEI, J  
MARCH 23, 2023**

**BETWEEN**

**PAUL KARIUKI MUCHIRI ..... 1<sup>ST</sup> PLAINTIFF**

**MARTIN MUCHIRI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**STEPHEN WAINAINA KIMANI ..... DEFENDANT**

**JUDGMENT**

1. Vide a Plaint dated 16/10/2017 the Plaintiffs seek Orders that;
  - a. A permanent injunction be issued against the Defendants restraining them from interfering and trespassing, alienating, subdividing or in any way interfering with land parcel number Ruiru/Ruiru East Block 2/755.
  - b. The Defendant be ordered to demolish the structure erected on land parcel no. Ruiru/Ruiru East Block 2/755 and in the alternative the Plaintiffs be allowed to demolish the said structure with costs of such demolition being borne by the Defendant.
  - c. An order directing the Land Registrar Thika to remove the caution of land parcel no. Ruiru/Ruiru East Block 2/755.
  - d. Costs of this suit and interest thereon.
2. The Plaintiffs plead that they are administrators of the estate of Josephine Wacu Muchiri who is the registered owner of land parcel no Ruiru/Ruiru East Block 2/755 the suit land, situate at Ruiru, Kiambu county. They accused the Defendant of trespassing on the suit land and enumerated particulars thereof at para. 5 of the Plaint to wit; unlawfully invading the suit property; damaging the suit land and erecting a structure thereon hence the suit.



3. The suit is opposed by the Defendant in his statement of defence dated 28/5/2018. He denied the allegations levelled against him and put the Plaintiffs to strict proof. He contended that he has been in open, continuous, exclusive possession of the suit land since 1984. That the suit land was given to him by his mother Mary Wambui Muchina. Mary Wambui Muchina in turn got the land from her mother Mrs. Wangui Gichigi (the Defendant's grandmother). That Wangui Gichigi was the original allottee of the suit land vide Share Certificate No. 1514 and ballot No. 526 issued by Nyakinyua Investment Ltd.
4. On 20/5/2019 this suit was consolidated with ELC 834 of 2017 whose subject property is the suit land herein. In the former file, the Defendant herein moved the Court seeking in the main a declaration that he had acquired prescriptive rights over the suit land vide an Originating Summons dated 15/11/2017. In the Originating summons the Defendant urged that he is a bonafide owner of the suit land and has filed a suit ELC 834 of 2017 to assert his rights of title by way of adverse possession. In his counterclaim he urged the Court to determine the following questions;
  - a. Whether the Plaintiff Applicant has acquired prescriptive rights and title by adverse possession of one acre being parcel Ruiru/Ruiru East Block 2/755 (suit land).
  - b. Whether the Defendant /Respondent should transfer the aforesaid parcel of land to the Defendant/Applicant.
  - c. Whether if No b above is in the affirmative the District Land Registrar Thika is authorized to transfer the suit land to the Defendant.

### **The evidence**

5. The 2<sup>nd</sup> Plaintiff, Martin Thuku Muchiri testified as PW1 and adopted his witness statement dated 14/10/2019 as his evidence in chief. He produced the List of Documents marked as Pex.1-11 in support of his case. It was his testimony that the suit land is registered in the name of Josephine Wacu Muchiri, his late mother, having acquired the same in 1992 as a shareholder of Nyakinyua Co. Investment Limited. That he balloted in 1992 and got one and a ¼ acres of land. The one acre became land reference 755 while the ¼ acre became parcel 3387 which she got titles on the 18/3/1983 and 16/3/1993 respectively. That in 1995 her mother Josephine Wacu informed them that she had received a letter from Nyakinyua claiming that the land belongs to one Wangui Gachigi. They took the letter to the Company to inquire of its contents whereupon Nyakinyua denied issuing such a letter. They however did not present the letter from the Company denying the contents thereof. That fast forward in 2003 the District Officer Ruiru summoned the said Josephine to his office concerning the dispute of the suit land. The matter was thereafter referred to the Land Dispute Tribunal (LDT) that was disbanded before the hearing commenced. That in 2012 they realized a third party had entered the land and constructed a house. Thereupon sought that the Defendant vacate the land through the demand letter by their advocates Messrs Chege, a demand that was not heeded by the Defendant. That on the 21/2/2013 Nyakinyua issued a clearance letter to their mother showing that she was the rightful owner of the land.
6. In cross, PW1 when shown page 16 of the trial bundle stated that the receipts are dated 1/9/76 and 24/11/82 and that the land was available before 1984. Shown page 25 of the trial bundle admitted that the letter dated 19/2/2003 was written by District Officer – a Mr. Muchiri addressed to PW1's mother and copied to Wangui Gichigi concerning a dispute on the suit land ownership between the two ladies. He denied any relation to the said Wangui or the Defendant. PW1 further denied that the Defendant settled on the suit land in 1984. Shown page 65 of Defendant's trial bundle the letter dated 29/9/95 from Nyakinyua Investment Co. Ltd stating that the suit land belonged to Wangui Gichigi but disagreed with Wangui's clearance thereof. PW1 maintained that they held a clearance certificate



- issued on 23/20/15. At page 17 of Plaintiff's trial bundle she stated that Share Certificate No 319 and ballot superimposed on the Share Certificate that the ballot was signed by the surveyor.
7. The 1<sup>st</sup> Plaintiff Paul Kariuki Muchiri took the stand as PW2. Similarly, he adopted his witness statement dated 14/10/2019 as his evidence in chief. His testimony was similar to PW1 and reiterated that his mother's Share Certificate is 1314/91 and the land was not occupied in 1992.
  8. In cross, PW2 told the Court that as at 1995 the Defendant was claiming the suit land and that he was aware that the Company issued a Clearance Certificate stating that Wangui was the suit land owner; that the Company would later disown the said letter. Shown page 26 of trial bundle a letter dated 2/10/12 from C K Chege Advocates asking the Defendant to vacate the suit land. He confirmed that the caution was placed but he did not know by whom. He denied any collusion with the Company to change ownership documents to favour his late mother.
  9. PW3 – Nyambura Gachanja adopted her Witness statement dated 28/9/22. She testified that her brother Lawrence K. Gachanja died in 2014. That Lawrence told her there were people constructing on Kariuki's land in 2012.
  10. In cross, PW3 confirmed that her evidence was hearsay as she did not go to Murera to witness the happenings on the ground.
  11. The Defendant, Stephen Wainaina Kimani testified solely as DW1. He relied on his witness statement dated 19/8/19 as his evidence in chief, his counter claim in ELC 834 of 2017 and produced the list of documents marked as Dex 1 – 6 contained on pages 45 – 46 of the Defendant's trial bundle.
  12. It was his testimony that his mother and grandmother worked and lived at Murera where he was raised. That his grandmother, one Wangui Gichigi was a shareholder of Nyakinyua Investment Limited vide certificate No 1514. The grandmother was allocated two acres vide ballot No 526, that the ballot got lost on 5/1/1995 which loss was reported to the Police Station vide Police Abstract on record. It was his testimony that she paid all the plot outgoing necessitating the transfer of the land to her. That out of the two acres she distributed them to her two daughters namely; Mary Wambui Muchina and Leah Njeri who got one acre each. Leah Njeri got her title for her portion of her one acre. That her mother Mary Wambui 's share was given to him and he settled on it from 1984 to date. That in 1995 he sought to obtain the title but found out that the plot had been registered in the name of Josephine Wacu Muchiri, the mother of the Plaintiffs and a title issued in 1993. That upon raising the issue with the Nyakinyua Investment, the Company in a letter of 1995 confirmed that the said Josephine Wahu had been registered as owner of the property by mistake. The Company sought the intervention of the local administration to resolve the matter but Josephine Wacu was uncooperative. That by the time Josephine was issued with a title in 1993 he had been in possession since 1984. That he has constructed a semi-permanent house fenced the land and carries out farming thereon. That even after acquiring title neither the said Josephine nor the Defendants have dispossessed him since 1984 to date.
  13. In his further testimony he stated that he buried his mother on the land in 1997 without any objection from the Plaintiffs or their mother. He denied receiving the letter by C.K Chege Advocates asking him to vacate the suit land. He was emphatic that he entered the suit land in 1984 and he has not left to date.
  14. In cross, DW1 conceded that Nyakinyua was a women group and his grandmother was a member before her demise in 2007. He did not have any Letters of Administration and that his mother was not given any ballot. DW1 confirmed that before 2007 there was a dispute between the Plaintiffs' mother and his grandmother. That Wangui's ballot was 526 though it got lost and replaced in 1995. DW1 did not have any document to show that the ballot 526 refers to parcel 755. He also confirmed that Nyakinyua records shows that the land belongs to Wacu; shown page 65 – letter signed by John



Mwangi who had passed on, DW1 contradicted himself on receipt of letter asking him to vacate and confirmed he received it in 1995. He stated that he sued the owner in Kerugoya ELC 681 of 2013 and filed a suit before the LDT though he did not have any evidence to prove the LDT suit. He maintained that he lived on the suit land from 1995.

### **The submissions**

15. The Plaintiffs through the firm of Kanyi Kiruchi & Co. Advocates filed submissions dated 30/11/2022. They submitted that the Defendant lacks the requisite locus standi to file Thika ELC 834 of 2017 having admitted that his mother has since passed on and he has not obtained any letters of administration. On the claim for adverse possession, it was argued that for such a claim to succeed, a claimant must prove that he has been in open, uninterrupted continuous occupation of the land for a period exceeding 12 years adverse to the owner's interests.
16. That the Defendant's allegation of entering the suit land in 1984 are unproven and thus the burden upon him under Section 107 of *Evidence Act* remains undischarged. That on their part, upon learning of the Defendant's encroachment on the land, they approached C.K Chege Advocates who wrote a demand letter to the Defendant to vacate but he never heeded the request. Lastly that the Plaintiffs have demonstrated their locus standi by way of letters of admin of their mother's estate who was the registered owner of the sit land and beseeched the Court to allow their case with costs.
17. On the other hand, the Defendant filed submissions dated 8/2/2023 through the firm of Jesse Kariuki Advocates. He drew three issues for determination; whether the Plaintiffs have proven their case; whether the Defendant has proven his counter claim and who bears costs of the suit. The Defendant contended that the suit land registration in the name of Josephine Wacu was unprocedurally done as the same ought to be in the name of Wangui Gicichi's name. That the Defendant's adverse possession started to run in his favor upon the registration of Josephine on 1/3/1993 as the owner of the suit land despite his permissive entry at Wangui's instance in 1984. Accordingly, that the filing of this suit in 2017 flies in the face of Section 7 *Limitation of Actions Act* which according to him estopped the late Josephine or her estate's administrator to claim recovery of the suit land out of time.
18. Secondly the Defendant argued that he has been in adverse possession of the suit land for over 24 years and more specifically since he discovered Josephine's registration over the suit land on 1/3/1993. That he led evidence to demonstrate his adverse occupation by settling his family and burying his late mother thereon. Lastly on the issue of costs, the Defendant reiterated that costs follow events and having established his case, the Plaintiff be ordered to pay the attendant costs.

### **Analysis and determination**

19. Having read and considered the pleadings of the parties, the evidence adduced on trial the documents produced on trial the written submissions and all the materials placed before the Court there are 3 issues for determination;
  - a. Whether the Plaintiffs are the rightful owners of the land
  - b. Whether the Defendant has proven his claim for title under adverse possession
  - c. Who meets the cost of the suit?
20. It is not in dispute that the origin of the parcel of land is traced to Nyakinyua Investment Co Limited, a land buying Company that both parties have contested that their predecessors in title were shareholders. It is the Plaintiff's case that they have urged the claim for trespass and eviction of the Defendant from the suit land as the legal representatives of their deceased mother namely Josephine



Wacu Muchiri who died in 2014. It is their case that their mother was issued with a title for the suit land in 1993. That the Defendant has now trespassed onto the suit land and urged the Court to order eviction, demolition of the structures on the land and removal of caution lodged on the title among other orders.

21. The Defendant on the other hand has adverted a claim for adverse possession. That he has been in possession of the land since 1984 after he was given the land by his mother Mary Wambui who inherited it from her mother, the original shareholder of Nyakinyua namely; Wangui Gachigi.
22. In answer to the 1<sup>st</sup> issue, there is no contest on the ownership or title of the suit land. The Defendants case as I understand is that they have been in possession of the land since 1984 while the Plaintiffs are claiming to be the rightful owners of the land hence the orders of eviction.
23. Section 25 of the [Land Registration Act](#) provides as follows-

“Rights of a proprietor.

The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-

- a. To the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- b. To such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.”

24. Section 26 the [Land Registration Act](#) provides as follows-

“26. Certificate of title to be held as conclusive evidence of proprietorship

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
  - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”



25. I find that the title of the Plaintiffs have not been challenged under any of the grounds set out above. Having not assailed the title of the Plaintiffs, I find that the title belongs to the Plaintiffs' mother as shown in the title issued in 1993.
26. The second question is whether the Defendant has proven a claim for adverse possession.
27. The *Limitation of Actions Act* does not expressly define "adverse possession" as a term. Section 13(1) of the said Act however, provides that a right of action in recovery of land does not accrue unless the land is in the possession of some person whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession).
28. Section 7 of the Limitation Act bars an owner of a parcel of land from an action to recover it at the expiry of twelve years. What amounts to adverse possession is that first, the parcel of land must be registered in the name of a person other than the Applicant, the Applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.
29. The following principles, among others, regarding adverse possession are now settled; "Adverse possession is not available to a party who is on the registered owner's land with his consent or where the entry and occupation was lawful and based on some agreement. In other words where the title of the owner is admitted there can be no claim for adverse possession. See *Samuel Miki Jane v Jane Njeri Richu* Civil Appeal No. 122 of 2001; The occupation of the land must be nec vi, nec clam, nec precario. See *Mtana Lewa v Kabindi Ngala*, Civil Appeal No. 56 of 2014; The adverse possessor must prove that through his occupation the true owner has been dispossessed or his possession discontinued. See *Wambugu v Njuguna* (1983) KLR 172; It is equally established that adverse possession does not arise merely by occupation and use. See *Alfred Warimo v Mulaa Sumba Baraza*, Civil Appeal No. 186 of 2011 (Ksm); The filing of a suit for recovery of land or any other recognized assertion of title to the land by the owner stops time from running for purposes of Section 38 of the *Limitation of Actions Act*. See *William Gatubi Murathe v Gakuru Gathumbi*, Civil Appeal No. 49 of 1996."
30. In the case of *Samuel Miki Waweru v Jane Njeri Richu*, Civil Appeal No. 122 of 2001, (UR), this Court delivered the following dictum:
- " ... it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in *Jandu v Kirpal* [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted."
31. Equally in the case of *Wambugu – v- Njuguna*, (1983) KLR 172 at holding 4, this Court held:
- "Where the claimant is in exclusive possession of the land with leave and license of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined."
32. In this case the Defendant led evidence that he has been on the land since 1984 openly exclusively and without any interference by the Plaintiffs. The fact of occupation and possession is supported by the



letter dated the 29/9/95 addressed to the District Officer by none other than Nyakinyua Investments Limited which stated interalia;

“..... Wangui Gacigi has been in this piece of land since 1984 and has fully developed this land  
....”

33. The Plaintiffs were unsuccessful in demonstrating any evidence before the Court that this letter was ever denied by the Company as not emanating from it. The evidence is credible and is believable in the absence of any other evidence to assail it. This evidence is in line with the Plaintiffs evidence led in chief. Unchallenged evidence was led that Wangui gave the land to her daughter Mary Wambui who in turn gave it to her son the Defendant. The import therefore is that the Defendant entered the land with his mother and have lived on it since 1984.
34. It is not in dispute that in 2003 the Plaintiffs mother was summoned by the District officer to appear before the Ruiru Land Dispute Tribunal with respect to the dispute concerning this land. The letter is copied to Wangui Gacigi who by then was in possession of the suit land as stated in the letter of 1995. It is commonly acknowledged that the proceedings at the Land Dispute Tribunal was not concluded following the repeal of the Act in early 2000.
35. The letter dated the 2/10/2012 addressed to the Defendant seeks to have him demolish the structures on the land and vacate the suit land. The letter is authored on instructions of the Plaintiffs. It is not in dispute that the Defendant did not heed the same. The Defendant was neither dispossessed nor relinquished his possession following this letter. He stayed on in the land upto the filing of the suit in 2017.
36. The Plaintiffs have not led any evidence that the Defendant has occupied the land with permission consent and or licence from the registered owner or themselves as legal representatives of the original owner. I find that the Defendants possession is adverse to the Plaintiffs.
37. The next question is when did time start running for purposes of calculating adverse possession. It is the law in Kenya that adverse possession is declared upon the full span of 12 years from the time of entry into the land and if with initial permission from the time the said consent is withdrawn or terminated. In this case the Defendant led evidence that he entered the land in 1984. The Plaintiffs have countered the evidence by stating that they received information from PW3 that the Defendant entered the land and constructed in 2012. PW3 in cross stated that she was informed by her deceased brother namely Lawrence that the Plaintiffs land had been invaded. That she lived in Mwea and the land is in Murera. This evidence at best is a hearsay and cannot be relied to be a credible account of the events of the day. It is rejected.
38. Going by the evidence led above it is the finding of the Court that the Defendant entered into the land in 1984 and for 12 years that is on the 1996 adverse possession had crystalized and vested in the Defendant. By 1993 when the Plaintiffs were demanding vacation of the land adversity had accrued in favour of the Defendant.
39. The Defendant has led unchallenged evidence that he buried his mother on the land without any objection by the Plaintiffs. Equally he has developed the land by constructing a semi-permanent house farmed and fenced the suit land hence demonstrating his animus possidendi that is to say utilizing the land in an inconsistent manner to the title of the paper holder.
40. The Court having found that the claim of the Defendant is allowable, the claim of trespass is untenable and the same is dismissed.
41. The Court finds that the Plaintiffs are holding title in trust for the Defendant.



42. In the upshot the Plaintiffs' suit is dismissed and the counterclaim of the Defendant is allowed.
43. Final orders and disposal
- a. The Plaintiffs' suit is dismissed.
  - b. The Defendant's counterclaim is allowed.
  - c. It is hereby declared that the Defendant has acquired title to Ruiru/Ruiru East Block 2/755 (suit land) by way of adverse possession.
  - d. The title of the Plaintiffs be and is hereby extinguished in favour of the Defendant.
  - e. The Plaintiff be ordered to transfer the title to the Defendant within a period of 15 days. In default the Deputy Registrar of this Court be and is hereby ordered to execute all the necessary documents to effectuate the orders of this Court.
  - f. The costs shall be in favour of the Defendant.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 23<sup>RD</sup> DAY OF MARCH VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of:**

Kanyi for 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs

Jessee Kariuki for Defendant

Court Assistants – Kevin/Lilian

