



REPUBLIC OF KENYA



Mwangi & another v Kirutho & another (Environment & Land Case 17 of 2019) [2023] KEELC 16425 (KLR) (16 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16425 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 17 OF 2019**

JG KEMEI, J

MARCH 16, 2023

BETWEEN

JOHN WAGECHE MWANGI 1ST PLAINTIFF

JAMES MWANGI WANGONYA (BOTH SUIING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF MWANGI NGOBIA). 2ND PLAINTIFF

AND

BERNARD GATUI KIRUTHO 1ST DEFENDANT

PETER KAMAU KIRITHO (BOTH SUIING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF KIRUTHO KIIRU) 2ND DEFENDANT

JUDGMENT

1. By an Originating Summons dated the 21/5/2019 the Plaintiffs filed suit against the Defendants and sought the following orders;
 - a. That there be a declaration that the Agreement for Sale executed on 14th June 1963, 12th December 1970, 14th January 1971, 17th January 1971 and 7th November 1974 between Kirutho Kiiru (Deceased) (physically executed by Peter Wokabi Kirutho (Deceased) as his Trustee and Mwangi Ngobia (Deceased) in respect of the suit property known as L.R. No. LOC. 9/ KANYENYAINI/709 situated in Muranga County by which Kirutho Kiiru (Deceased) sold to Mwangi Ngobia (Deceased) his 4.05Ha of the suit property which was subsequently followed by continuous and exclusive possession by Mwangi Ngobia (Deceased), his beneficiaries and Successors in Title, vested the said portion of 4.05Ha unto the said Mwangi Ngobia absolutely.



- b. That further and in the alternative there be a declaration that the said Mwangi Ngobia (Deceased) (his beneficiaries and successors in Title) having been in sole, open, continuous and uninterrupted possession of the entire suit property known as L.R. NO. LOC. 9/KANYENYAINI/709 situated in Muranga County with effect of 14th June, 1963 to date and to the total exclusion of Kirutho Kiiru (Deceased) and his successor in Title known as Bernard Gatui Kirutho, Rahab Wambui Wokabi, Rosemary Njeri Muiruri, Albert Muniu Kirutho, Grace Wacuka Kamau, Peter Kamau Kirutho, Rosemary Njeri Mbiri and Josephine Wangui Kirutho who have never demonstrated any interest to own or occupy the suit property for a period of more than thirty years and having carried out extensive developments thereon, has acquired an Overriding and Equitable Interest in the suit property that now warrants him to be registered as the sole owner of the suit property absolutely.
 - c. That consequently, an Order be made directing the Deputy Registrar to sign Transfer Documents in respect of all that piece of land known as L.R. NO. LOC. 9/KANYENYAINI/709 situated in Muranga County in order to facilitate the transfer of the 4.05HA of the suit property currently held by Kirutho Kiiru (Deceased) to the Plaintiffs to hold and distribute to all the other beneficiaries of the estate of Mwangi Ngobia (Deceased) accordingly or to hold the same jointly or as this Honourable Court may direct.
 - d. That permanent injunction do issue restraining the Defendants by themselves, their servants and/or agents from alienating, trespassing/interfering or dealing in any way with the portion of the suit property known as L.R. NO. LOC 9/ KANYENYAINI/709 situated in Muranga County other than in the manner this Honourable Court may direct.
 - e. That the costs of this Originating Summons be borne by the Defendants.
2. The Originating Summons is premised on the grounds annexed and the Supporting Affidavit of John Wangeche Mwangi and Simon Kiiru sworn on the 21/5/2019 and 3/12/2019.
3. The 1st Plaintiff deponed on his own behalf and on behalf of the 2nd Plaintiff, his co- administrator of the estate of Mwangi Ngobia (hereinafter called Ngobia), deceased. He avowed that Kirutho Kiiru, deceased (hereinafter called Kiiru) was the Uncle to Ngobia thus related. Kiiru sold land approx. 10 acres at the price of Kshs 500/- per acre to Ngobia in 1963 and put him in possession. The parties agreed to payment in instalments. Later in 1970 he learned from Ngobia that the land was renegotiated to Kshs 1000/- per acre. In 1973 Ngobia settled his family on the land while he worked at Kenya Railways until his retirement in 1980. That they have been in possession of the land since 14/6/1963 to date. Their possession has been open, exclusive continuous and interrupted. That Kiiru handed over the title to Ngobia in 1972 in contemplation of transfer of the land following full payment of the purchase price. Kiiru died on the 8/2/1972 before transferring the land to Ngobia. After his death his eldest son Peter Wokabi, (head of the family) continued to receive the final purchase price on behalf of his family but as fate would have it Peter Wokabi died in 1991 before effecting the transfer to Ngobia. In 1993 the 1st Defendant Petitioned for letters of grant of administration in the estate of his father without informing them and with the knowledge that they were in possession of the suit land.



4. He averred that in 1997 the 1st Defendant his brother Albert Muniu and a friend namely Francis Karanja bought Ngobia beer and when drunk tricked Ngobia to sign a letter which purported that he was a caretaker on the land. On realization of the trickery several meetings were held to resolve the matter where Ngobia produced several agreements in support of his purchaser's right and to dispel the allegation that he was a caretaker of the suit land. This sparked a series of Succession Causes by the Defendants to try and wrestle the suit land from Ngobia. Upon carrying out a search on the title, Ngobia discovered that the land had been registered in the names of the Defendants. This led to lodgement of a caution on the title on the 4/1/1998. Vide a letter dated the 13/1/1998, the Defendants through their advocates asked Ngobia to vacate the lands within 30 days. Ngobia filed suit HCC No 2051/1998 which suit was stayed pending the determination of the Succ Cause No 760/1993 in the estate of Kiiru. Both Defendants were appointed as joint administrators of the estate of Kiiru in 1996.
5. Simon Kiiru reiterated the evidence of the 1st Plaintiff and stated that he is the brother of Ngobia and nephew of Kiiru. Their mother Waithira Ngobia was the sister of Kiiru, their uncle. Kiiru relocated to Limuru in 1928 where he worked as a cook at a settler's farm and lived there with his family on his own land. He had two wives. He sold the suit land to Ngobia and used the proceeds to purchase land at Limuru and Longonot where he settled his two families. Upon the death of Peter Wokabi in 1991 the 1st Defendant laid claim on the suit land initially by filing the succession cause alone without involvement of his other brothers despite their father having two wives. He avowed that Ngobia bought the land and paid the entire purchase price. He was put in possession and has lived on the land with his family from 1963 to date. That the claim by the Defendants is mischievous and intended to deprive the Plaintiffs of their right in the land.
6. Bernard Gatui Kirutho denied the Plaintiffs claim vide his Replying Affidavit sworn on the 14/2/2020 and filed on even date. He stated he is the son of Kiiru and one of the administrators of his estate together with the 2nd Defendant. He averred that his father was allocated land around January 1962 as shown in the Certificate of Demarcation on record. He was issued with a title in 1969. Since his father worked and lived in Limuru with his family, he allowed Ngobia, his nephew, to stay on the land as a caretaker.
7. He averred that by the time of Kiiru's death in 1972 he had not sold the suit land nor parted with ownership. He reasoned that even if there was a sale agreement between Kiiru and Ngobia the same was void due to lack of Land Consent Board consent. He argued that if there was any sale the same ought to have been completed before the death of his father. That on visiting the land in 1994, found that Ngobia had constructed semi-permanent structures whereupon they gave him notice to vacate the land but he declined.
8. On 18/10/1997 a meeting was held in Highland Bar - Muranga between himself, Albert Muniu and Francis Karanja on one side and Ngobia, Simon Kiiru and his son on the other hand to discuss the offer to sell land to Ngobia. The said offer collapsed when he was unable to raise the purchase price. Vide a letter dated the 13/1/1998 Ngobia was asked to vacate the suit land. In the process of distributing the estate to the beneficiaries in 2011 or thereabouts, they realised that Ngobia had lodged a caution on the land. Ngobia sought to revoke the confirmation of grant of letters of administration but died in 2013. His family still lives on the suit land. He averred that Ngobia was a licensee of Kiiru and the suit ought to be dismissed.
9. In an apparent counterclaim the 1st Defendant sought urged the following orders;
 - a. The Plaintiff's suit be dismissed with costs as the Plaintiffs are not entitled to the reliefs sought.



- b. That an order be issued directing the Lands Registrar to remove the caution put by Mwangi Ngobia (Deceased) to allow the Administrators of the Estate of Kirutho Kiiru to distribute the suit and to the beneficiaries.
 - c. An Order of eviction be issued for eviction of the Plaintiffs from the suit land through the assistance of the relevant authorities.
 - d. A permanent order of injunction prohibiting the Plaintiffs from trespassing and/or interfering with the Defendants' possession and/or use of the suit property.
 - e. Any other relief that his Honourable Court may deem fit to provide.
10. In a further Supplementary Affidavit sworn on the 17/7/2020 Simon Kiiru stated that Kiiru had other parcels of land namely Naivasha -Maimahiu, Limuru Kiawaroga, Limuru Githia and a plot at Githia. He had two wives. He distributed his assets in his lifetime and that explains why the confirmation of grant was in respect to the suit land only. The suit land was not part of distributed assets because it had been sold to Ngobia. Ngobia was employed at Kenya Railways until his retirement in 1980 and therefore could not have been a caretaker of the suit land.
11. In his Further Affidavit sworn on 14/8/2020, Bernard Gatui Kirutho decried the untruths in the affidavit of the 1st Plaintiff and stated that they are orchestrated to snatch their inheritance. He denied that his father distributed his estate in his lifetime. Ngobia lived on the land under license of the late Kiiru. Simon Kiiru was a witness to the 1997 letter where Ngobia stated that he was a caretaker of the suit land. Peter Wokabi was never a trustee or transacted on behalf of the family and if he did so the said transactions would be illegal null and void. Ngobia had an ancestral/family adjacent to the suit land and therefore could not have bought the suit land.
12. In further Supplementary Affidavit sworn on the 2/12/2020 the 1st Plaintiff deponed that they filed a suit CMCC No 323 of 2018 seeking eviction of Ngobia from the suit land.

The evidence

13. The Plaintiffs led evidence through 2 witnesses. PW1- John Wangeche Mwangi testified and relied on the OS dated the 21/5/2019, the Supporting Affidavit dated the 21/5/2019 Further Affidavit dated the 10/2/2021 and Supplementary Affidavit dated the 13/3/2020. He produced documents marked as PEX 1-3.
14. He stated that Ngobia bought the suit land from Kiiru in 1963. The purchase price was Kshs 10,000/- which price was paid by instalments until completion. Upon the death of Kiiru in 1972 the balance of the purchase price was paid to Peter Wokabi, the son of Kiiru. Kiiru left the title to Ngobia in expectation of the transfer of the title to him. In 1997 the Defendants made his father to sign a letter purporting that he was a caretaker of the land. That this was denied by Ngobia in his affidavit sworn on the 16/3/1998. He was not present in the said meeting but the 2nd Plaintiff was. In 2020 the Defendants changed their position and purported the caretaker to be Waithira, their grandmother, a position that was untrue since Waithira lived on her family land about 5 kilometres away from the suit land. His father worked at Kenya Railways from 1948 – 1980 when he retired and so was unavailable as a caretaker of the suit land. That his father, mother and siblings are buried on the suit land.
15. In further testimony he stated that he lived on the suit land with his father. He was born in 1959. His father entered the suit land in 1963 upon purchase. He planted crops in 1965 and settled his family in 1973 on the land. The titles were given to Ngobia by Kiiru and that Waithira did not collect the



same from Muranga Lands Office. It was Kiiru who did it. He stated that in the 1970s there was no legal requirement for Land Consent Board before transferring land. He averred that the cases filed by Ngobia were dismissed/withdrawn. That the filing of this suit was recommended by the Court in Succ. Cause No 760/1993 as the issue of title ownership is within the jurisdiction of the ELC Court.

16. PW2 – Simon Kiiru stated that he is the younger brother of Ngobia. He lived in Limuru and enjoyed a close relationship with his Uncle Kiiru. He relied on his affidavit sworn on the 3/12/19; Supplementary Affidavit dated the 17/7/2020 affidavit dated the 10/2/2021. His mother was called Waithira while the father was Charles Ngobia Kabetu. Ngobia bought the suit land and was never a caretaker. Neither was Waithira a caretaker as she was busy with her family land located 5 kilometres away from the suit land. Kiiru collected his title from Murang'a land office and not his sister Waithira. Ngobia planted tea on the land and supplied the local tea factory. Kiiru and his first wife were buried at Peter Wokabi's land. That in all the years, none of Kiiru's family interfered with the possession and occupation of the land by Ngobia and his family. That trouble started in 1997 when the Defendants showed up and demanded the land. This was after the demise of their brother Peter Wokabi. He added that his father gave Ngobia Kshs 1500/- as part of his inheritance which monies he utilised towards the purchase of the land and that explains why he was not given part of the family land.
17. With that the Plaintiffs closed their case.
18. The Defendant's evidence was led by two witnesses. DW1 – Benard Gatui Kirutho stated that he lives in Longonot in the Rift Valley on a parcel that he purchased in 1967. He relied on the Replying Affidavit dated the 14/2/2020, Further Affidavit of 14/8/2020 and witness statement dated the 8/12/2020 as his evidence in chief. He stated that he was born in 1942 and is the son of Kiiru. That his father did not sell the land to Ngobia. Initially Waithira took care of the land. He was categorical that neither Ngobia nor Waithira were paid for taking care of the suit land. The title was left in her custody for purposes of payment of compensation of electric power connection.
19. In cross he stated that his father worked in Limuru as a cook for a white settler. He also lived there on his own land. Ngobia's father lived on his land which was separate from the suit land. That after the death of Peter Wokabi he took over the family leadership and filed suit to recover the land.
20. DW2 – Peter Kamau Kirutho testified and relied on his witness statement dated the 8/12/2020 as evidence in chief. He is one of the administrators of the estate of Kiiru alongside the 1st Defendant. He was born in 1945. The suit land is now registered in the names of the Defendants to hold for themselves and to hold in trust for their siblings. The land measures 10 acres comprising of one portion of 9 and 1 acres respectively. The portion of 9 acres has tea. That the title of the suit land was in the custody of Kiiru but later handed over to Waithira for purposes of compensation for the road and on her death, her children retrieved it. He stated that his father never sold the suit land to Ngobia.
21. That he and the 1st Defendant were appointed as administrators of the estate in 1997. That upon the death of his father Peter Wokabi became the leader of the family. That after his death in 1991 the 1st Defendant and Albert Muniu filed a succession cause in 1993. That the land in Limuru was distributed in the 1970s during the lifetime of Kiiru and the only asset for distribution under the current Succession Cause is the suit land. That Ngobia lived and worked in Nairobi and his family/ancestral land was about 2 kilometres from the suit land. That his father never sold the suit land to him but was a caretaker of the land.



The written submissions

22. The firm of Olando & Co Advocates filed written submissions on behalf of the Plaintiffs while that of Muigai Kemei & Associates filed on behalf of the Defendants. I have read and considered the written submissions.
23. The Plaintiffs through the firm of Orlando & Co. Advocates filed submissions dated 19/12/2022. they drew four issues for determination to wit; whether the Plaintiffs own Loc 9/Kanyenyaini/709 as bona fide purchasers for value; whether the Plaintiffs have proven a claim for adverse possession; what orders should the Court grant and who bears costs of the suit.
24. On the first issue the Plaintiff submitted that they have proven the acquisition of the suit land vide Pex. Nos. 1(a), (b), (c) & (d) produced in Court. That the Defendants have never alleged the loss or theft of the title deed save for unsubstantiated claims on how Mwangi Ngobia obtained the original title deed. That it is evident that Kirutho Kiiru in handing over the title deed was effectively giving ownership to Ngobia. That the Defendants are estopped under the doctrine of estoppel from denying the factual position that they approved the leadership and actions taken by Peter Wokabi in administration of the estate.
25. On whether the Plaintiffs have proven adverse possession, reliance was placed on Section 7 Limitation of Actions Act, Court of Appeal decision in Wambugu Vs Njuguna [1983] KLR PP 179 and this Hon. Court's decision in Wilson Njoroge Kamau Vs Nganga Muceru Kamau [2020] eKLR. That period for adverse possession started to run for twelve years after Mwangi Ngobia made the last payment of the agreed purchase price i.e Kshs. 10,000/= . That the Plaintiffs have been in open, continuous possession of the suit land not only since 7/2/1974 but since 1963 when Ngobia paid the deposit to Kirutho Kiiru and therefore the title deed was held in trust for the Plaintiffs.
26. In the end the Plaintiffs are emphatic that they have proven their case as pleaded and beseech the Court to grant the Orders sought with costs and interests.
27. The firm of Muigai, Kemei & Associates Advocates filed submissions dated 29/11/2022 on behalf of the Defendants.
28. Firstly, they took issue with the 2nd Plaintiff who is said not to have participated in this suit as a witness. That the inference thereto is that James Mwangi Wangonya's name was included simply because his name appears in the Grant issued in the Estate of Mwangi Ngobia in Succ. Cause No. 3079 of 2013. That the suit land herein did not form part of Ngobia's estate in respect of which the two Plaintiffs were appointed co-administrators. Further that none of the 1st Plaintiff's siblings testified in Court in support of this case.
29. Further that the two Defendants herein were appointed as administrators in the Estate of Kirutho Kiiru in Succ. Cause No. 760 of 2013. That the said estate was determined and the suit land was distributed in equal to share to the two admins to hold in trust for other named beneficiaries.
30. The Defendants also submitted that one year after the demise of Ngobia, his purchaser's claim upon the suit land abated under Order 24 rule 3(2) Civil Procedure Rules since no substitution was made to that effect hence the Plaintiffs' claim is baseless. That the caution over the suit land placed by the late Ngobia ought to be lifted to allow the registered beneficial owners to enjoy the land. That besides abatement of Ngobia case, the Defendants argued that no sale of land took place between Kiiru and Ngobia since the balance of the purchase price was not paid. That Ngobia's entry to the suit land was through a license granted to his mother and as such period for adverse possession cannot run in those circumstances. They urged the Court to dismiss the Plaintiffs' suit with costs.



31. Having read and considered the Pleadings, the affidavit evidence, the evidence adduced at the hearing, the written submissions and all the material placed before the Court, the issues for determination are;
- a. Whether there was a valid agreement for sale between the Plaintiffs' and the Defendant's father
 - b. Whether the Plaintiffs are entitled to orders of adverse possession
 - c. Who meets the cost of the suit?
32. It is commonly acknowledged that both parties are related. Kiiru was the Uncle of Ngobia. Ngobia's mother Waithira was the sister of Kiiru. Both parties are therefore cousins suing on account of the estates of their deceased fathers.
33. It is not in dispute that the suit land is registered in the name of Kiiru having been allocated to him during the adjudication and land demarcation in 1959. It is not in dispute that the Plaintiffs father was in possession of the land from 1963 to his demise in 2013 and the Plaintiffs have continued in possession to date.
34. The Plaintiffs case is that their father Ngobia purchased the suit land from Kiiru in 1963, planted tea and trees in 1965 and settled his wife and children on the land in 1973. He retired in 1980 and joined his family until his demise in 2013. That in 1963 Kiiru sold the land at Kshs 500/- and Ngobia paid Kshs 2500/- as deposit. It was a term of the sale that the purchase price would be paid in instalments. That in 1970s the purchase price was reviewed upwards from 5000/- to Kshs 10,000/- . That Ngobia paid the purchase price in full, the last three instalments having been paid to Peter Wokabi after the demise of Kiiru. That Kiiru and Peter Wokabi died before the suit land was transferred to Ngobia and the Defendants have refused to transfer the land to the estate of Ngobia.
35. It is the Defendants' case that their father never sold land to Ngobia. That Ngobia was a licensee of Kiiru who was left to stay on the land as a caretaker. Inter alia, that Waithira was also a caretaker of the land. The Defendants have challenged the alleged sale on grounds that Ngobia never paid the purchase price in full and even if there was a sale, which they deny, the same was void for lack of LCB approval.
36. In answering this point, the starting point is the law with respect to contract of sale of land. The Law of contract was enacted in Kenya in 1960 and therefore this transaction would fall under it. Section 3(3) of the [*Law of contract Act*](#) states as follows;
- “No suit shall be brought upon a contract for the disposition of an interest in land unless-
- a. The contract upon which the suit is founded-
 - i. is in writing;
 - ii. is signed by all the parties thereto; and
 - b. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”
37. The Defendants have challenged the agreements on record on the grounds that; there was no sale; Ngobia was a caretaker and that there was no LCB consent. The Defendants led evidence that they were not present when the agreements were signed as they were only 21 and 18 years respectively having been born in 1942 and 1945 respectively. They are therefore unable to comment on the agreements on record and their evidence cannot be credible.



38. For purposes of emphasis I shall reproduce the agreements as follows;

“ 12/12/70

Agreement For Kirutho Wa Kiiru And Mwangi Ngobia

Today dated 12/12/70 I Kirutho Kiiru do receive 3,650/- (three Hundred Six Hundred Fifty Shillings Only) because of my land which we have agreed that its price is shillings 1,000 (One Thousand Shillings only) per acre. We have agreed he shall come on 31/12/70 upto on 4/1/71 when he will bring the reply to say when he will bring the money which have remained.

Seller Buyer

Kirutho Kiiru (Left hand thumb print) Mwangi Ngobia

Witnesses of the Seller Witnesses of the buyer

Muhoro Njoroge Michael Mbiriri

Writer

Signature”

14/6/63

Price Of Mwangi S/o Ngobia

And

Kirutho S/o Kiiru

I, Kirutho S/o Kiiru have received Shsh. 2,500/- (Two Thousand Five Hundred) from Mwangi S/o Ngobia because I am selling to him the land which is mine which is at Loc. 9 at Chief Kanyongo’s Village in Kanyenyaini (Forthall District).

We have agreed I will sell to him 0.1 acre Shs. 500 (Vie Hundred). So the price of the land shall be determined by the area of acres of the land:

Witnesses (1) Thairu Nyaga

Seller Signature

Kirutho Kiiru

Signature Mwangi Ngobia

14/1/71

Agreement For Kirutho Kiiru

And Mwangi S/o Ngobia

Today dated 14/1/71, I Mwangi S/o Ngobia have given Kirutho some money Shs. 3000/- (Three Thousand Shillings Only) for the land which is at Forthall which is at the village of Kanyenyaini. I have totalled Six Thousand and Six Hundred Fifty 6650/-. The remaining money I will give out on Thirty First March 31/3/71.

Witnesses

Njihia Mbiriri



Muchai Muniu

Tom Kinyanjui

Writer - Joseph Muiruri

Seller - Peter Wokabi (for Kirutho)

Buyer - Mwangi Ngobia.

17/1/71

Today dated 17/1/71 I being Mwangi have given Kirutho Shillings Five Hundred and Fifty (550/-) totalling Shillings Seven Thousand and Two Hundred (7200/-).

Writer Signature

On 13-7-76 inside the Railway goods office I have given Mr. Peter Kirutho Shs. 100/- (One Hundred) because of the price of the land that has been mentioned hereinabove. Signature.

At Kakamega Bar on 1/10/76 I have given Mr. Peter Wokabi Kirutho Shs. 300 (Three Hundred Shillings) because of the information of that land.

Signature 1/10/76.

Agreement of Peter Wokabi and Mwangi Ngobia

Because of the price of the land which have been sold to me by Kirutho I Peter Wokabi do receive Shs. 600/-.

Peter Wokabi

7/11/74

Witness

Solomon Mugo.”

39. It is evident from the above that the price of the land was reviewed from 5000/- to Kshs 10,000/- and Ngobia paid a total of Kshs 9000/- and Kshs 1000 was paid to Kiirus son after the death of Kiiru. The last instalment was paid on the 7/11/74. Evidence was led to the effect that the title to the suit land was handed over to Ngobia by Kiiru and this must have been in contemplation of the transfer of the land to Ngobia. The Court is satisfied that there was a valid sale between Ngobia and Kiiru. What was pending was the formalities of transferring the land to Ngobia, actual possession and the original title having been handed over to him. The Defendants failed to lead any evidence to show that the title in hands of the Plaintiffs was obtained illegally or through fraudulent means. The Defendants held the title in trust for the Plaintiffs fathers' estate.
40. The 1st issue is answered in the affirmative.

Adverse possession.

41. Adverse possession is one of the recognised ways of acquiring land in Kenya. The legal framework is found in Section 7, 13, 17 and 38 of the *Limitation of Actions Act*.



42. The definition of adverse possession is found in the case of *Mtana Lewa Vs Kahindi Ngala Mwangandi* [2015] eKLR, the Court defined adverse possession as follows;

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

43. In the case of *Bejoy Chundra Vs KallyProsonno* (1878) 4 cal 1327 the late My Justice Markby, as he then was, defined adverse possession as follows;

“by adverse possession I understand to be meant possession by a person holding the land on his own behalf (or on behalf) of some person other than the true owner, the true owner having a right to immediate possession.”

44. In order to proof adversity of title, the Applicant must proof that he has been on the land for the full span of 12 years openly, exclusively and without force and secrecy. See the case of *Kimani Ruchine vs Swift Rutherford & Co. Ltd* (1980) KLR 10 the Court stated that:

“...The Plaintiffs have to prove that they have used this land which they claim as of right. *Nec vi, Nec Clam, Nec Precario* (no force, secrecy or persuasion) ...show that the company had knowledge of possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavors to interrupt it or by way of recurrent consideration.”

45. Further in the case of *Wambugu Vs Njuguna* (1983) KLR 172 the Court of Appeal stated that in order to acquire land by virtue of the statute of limitation, the claimant must show that the owner has lost his right to the land upon being dispossessed or by the owner discontinuing possession by his volition. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community, of the exercise of dominion over the land. (emphasis is mine).

46. It is trite that permission on account of licensee or such other consent destroys the doctrine of adverse possession. The Defendants have forcefully argued that the Plaintiffs father Ngobia was a caretaker of the land. That Kiiru lived and worked in Limuru and he asked Ngobia who lived adjacent to the land to look after it for him. Evidence was led by the Defendants nonetheless that Waithira lived about 5 kilometres away from the suit land and was busy on her husband’s land. She never lived on the land. Secondly that Ngobia worked in Kenya Railways and therefore could not have been available to look after the land in Muranga while working in Rift Valley and in Nairobi. The Defendants’ evidence was full of contradictions when they kept shifting evidence of caretaker from Waithira to Ngobia so much so that their evidence cannot be taken as credible. The Court agrees with the Plaintiffs that the letter of 13/1/1998 has no truth in it seeing that Ngobia denied it in his affidavit sworn on the 16/3/1998. It is not lost on the Court that if indeed Ngobia was a caretaker, there would not have been any reason to give him the original title or lodge a caution for that matter on the land. These actions were taken in cognizance that Ngobia was a purchaser and not a mere caretaker. In any event the Defendants have not presented any evidence in support of any licence or payment to Ngobia for managing the land as a caretaker.



47. It is not in dispute that Ngobia was in possession from 1963 to 2013 and thereafter by the Plaintiffs. This evidence was admitted by the Defendants at the hearing. The next question is whether the possession was adverse to the Defendants.
48. In the case of Public Trustee Vs Wanduru, (1984) KLR 314 at 319 Madan, J.A. stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run. By 1974 when Ngobia paid the full purchase price, he became a person in whose favour the period of limitation would run. For the period of 12 years adversity crystalized and accrued in his favour in 1986 so much so that by the time the Defendants were filing for succession in 1993 and later in 1998, adverse possession had crystalized in favour of Ngobia. The title held by the Defendants is being held in trust for the Plaintiffs.
49. If the argument made by the Defendants that Ngobia was a caretaker is to be accepted, (which has not been proven) then the license would have ceased on the death of Kiiru in 1972. Then time for calculating adverse would start running in 1972 and would crystalize in 1984.
50. Whichever way you look at it, it is clear that adversity had crystalized and title accrued in favour of Ngobia long before the Defendants started the clamour to recover the suit land.
51. Evidence was led that the Plaintiffs have developed the land and constructed temporary homes, planted tea, and buried Ngobia, his wife and siblings. Evidence of water and electricity connection was given as well as compensation by the Kenya power for power connection. All these go to show that the Plaintiffs have established animus possidendi that is to hold the land in a manner inconsistent with that of the Kiiru.
52. All in all, there is no evidence that the Plaintiffs relinquished their possession nor that Kiiru and the Defendants reentered the suit land. The record shows that Kiiru was disposed in 1963 when he handed over possession to Ngobia and neither he nor his dependants have disposed the Plaintiffs.
53. In the end I enter judgement in favour of the Plaintiffs as prayed.
54. Final orders
 - a. That there be a declaration that the Agreement for Sale executed on 14th June 1963, 12th December 1970, 14th January 1971, 17th January 1971 and 7th November 1974 between Kirutho Kiiru (Deceased) (physically executed by Peter Wokabi Kirutho (Deceased) as his Trustee and Mwangi Ngobia (Deceased) in respect of the suit property known as L.R. No. LOC. 9/KANYENYAINI/709 situated in Muranga County by which Kirutho Kiiru (Deceased) sold to Mwangi Ngobia (Deceased) his 4.05Ha of the suit property which was subsequently followed by continuous and exclusive possession by Mwangi Ngobia (Deceased), his beneficiaries and Successors in Title, vested the said portion of 4.05Ha unto the said Mwangi Ngobia absolutely.
 - b. That there be a declaration that the said Mwangi Ngobia (Deceased) (his beneficiaries and successors in Title) having been in sole, open, continuous and uninterrupted possession of the entire suit property known as L.R. NO. LOC. 9/KANYENYAINI/709 situated in Muranga County with effect of 14th June, 1963 to date and to the total exclusion of Kirutho Kiiru (Deceased) and his successor in Title known as Bernard Gatui Kirutho, Rahab Wambui Wokabi, Rosemary Njeri Muiruri, Albert Muniu Kirutho, Grace Wacuka Kamau, Peter Kamau Kirutho, Rosemary Njeri Mbiri and Josephine Wangui Kirutho who have never



demonstrated any interest to own or occupy the suit property for a period of more than thirty years and having carried out extensive developments thereon, have acquired title by way of adverse possession.

- c. That consequently, an Order be and is hereby made directing the Deputy Registrar to sign Transfer Documents in respect of all that piece of land known as L.R. NO. LOC. 9/ KANYENYAINI/709 situated in Muranga County in order to facilitate the transfer of the 4.05HA of the suit property currently held by Kirutho Kiiru (Deceased) to the name of Mwangi Ngobia, deceased.
- d. That permanent injunction do issue restraining the Defendants by themselves, their servants and/or agents from alienating, trespassing/interfering or dealing in any way with the portion of the suit property known as L.R. NO. LOC 9/KANYENYAINI/709 situated in Muranga County.
- e. That the costs of this Originating Summons be borne by the Defendants.

DELIVERED, DATED AND SIGNED AT THIKA THIS 16TH DAY OF MARCH, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ombiri holding brief for Orlando for the Plaintiff

Joan Njoroge holding brief for Ms. Mungai for Defendant

Court Assistants – Esther / Kevin

