



REPUBLIC OF KENYA



**Waruingi & 5 others v Kiama & 16 others (Environment and Land Appeal
36 of 2019) [2023] KEELC 17070 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 17070 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL 36 OF 2019**

**JO OLOLA, J
APRIL 27, 2023**

BETWEEN

**JONATHAN KIMARI WARUINGI 1ST APPELLANT
AGNES WAITHIRA GUANDARU 2ND APPELLANT
PETER GACHARA GACHINA 3RD APPELLANT
PETER KAHIGA THUKU 4TH APPELLANT
GLADYS KANUTHUA MAIRO 5TH APPELLANT
JOSEPH NGATIA MUTURI 6TH APPELLANT**

AND

**JENNIFER WANGARI KIAMA 1ST RESPONDENT
JULIUS ROBERT GACHIE KABUGA 2ND RESPONDENT
NJOGO GICHOHI 3RD RESPONDENT
DANIEL THIRIKWA KININI 4TH RESPONDENT
SAMUEL KAGUONGO KAMOCHÉ 5TH RESPONDENT
LOISE WANJERA WAMBUGU 6TH RESPONDENT
SEVERINO GITIBA MUGAMBI 7TH RESPONDENT
CHARLES KIBIRI MUTERU 8TH RESPONDENT
ONESMUS NDIINGORI MUTHAMAI 9TH RESPONDENT
MARGARET WAKINI NJOGO 10TH RESPONDENT
JOSEPH MURIITHI KIHINDO 11TH RESPONDENT
CHARLES MWANGI KAGOMA 12TH RESPONDENT**



JAMES GICHUKI KING'ORI	13TH RESPONDENT
JACKSON KANYI GICHUKI	14TH RESPONDENT
JOHN MWAI JAMES	15TH RESPONDENT
JAMES WAMBUGU MWANIKI	16TH RESPONDENT
DAVID GITHAE KIRIRO TAITI	17TH RESPONDENT

JUDGMENT

1. This is an appeal arising from the Judgment of the Honourable R Kefa – Senior Resident Magistrate delivered on November 25, 2019 in Nyeri CME & LC Case No 78 of 2018.
2. By a Plaint dated August 4, 2015 as amended on March 21, 2016 filed in the trial Court the Seventeen (17) Respondents had sought against the six (6) Appellants for:
 - (a) An injunction order restraining the Defendants, their agents, servants, terror gangs and/or any other person acting under their instructions or dealing in any way with the suit lands comprising land parcel No Mwoiyogo/Labura Block 2/Mukoe/86, 147, 143, 154, 152, 153, 91, 122, 134, 75, 136, 138, 139, 60, 65, 59, 66, 87, 90, 74, 11, 5, 55, 70, 71, 58, 67, 95, 96, 190 and 10;
 - (b) An order that the Defendants occupying any of the land parcels above-mentioned to vacate these land leaving them vacant for the legal buyers and/or the absolute proprietors occupation;
 - (c) An order that the Kieni West County Commissioners Administration through the County Commander, the OCPD and the OCS Mweiga to enforce the said order to remove the Defendant from the Plaintiffs listed lands and offer security to the Plaintiffs upon occupying their lands;
 - (d) In the alternative, a declaration that the Plaintiffs are the legal, lawful and the rightful owners (individually) of their (parcels of land) bought from the defunct Mukoi Farm Limited and which the directors sub-divided and sold to some Plaintiffs while others bought from Mukoi Farm Limited;
 - (e) Costs to be provided for.
3. Those prayers arose from the Respondents contention that between the years 1992 and 2014 they had each bought the parcels of land from lawful members and/or shareholders of the defunct Satima Peak Farmers Company Limited following which they were issued with title deeds for their respective parcels of land.
4. The Respondents accused the Appellants of invading their said parcels of land removing the beacons placed thereon and threatening to cause physical harm to themselves should they set foot on the suit properties.
5. In their joint Statement of Defence and Counter-Claim dated November 18, 2015, the Appellants denied the Respondents' contention and asserted that they were in exclusive occupation and that the Respondents had no capacity to institute the suit.
6. In the alternative, the Appellants averred that they had acquired title to the suit land and were entitled to be registered as the proprietors thereof.



7. By way of their Counter-Claim, the Appellants asserted that they have been in adverse possession of the suit land for a period of over twelve (12) years and were entitled to be registered as proprietors of the suit land in place of the Respondents. Accordingly, the Appellants had urged the trial Court to dismiss the Respondent's suit and to instead enter Judgment in their favour for:
- (a) A declaration that the Defendants are entitled to be registered as proprietors of the suit land being L R Nos Mwiyo/Labura Block II/Mukoe/86, 147, 143, 154, 91, 122, 134, 75, 136, 138, 139, 60, 65, 59, 66, 87, 90, 74, 11, 5, 55, 70, 71, 58, 67, 95, 96, 190 and 10 by way of adverse possession;
 - (b) A declaration that the Plaintiffs' title to the said suit land L R Nos Mwiyo/Labura Block II/Mukoe/86, 147, 143, 154, 91, 122, 134, 75, 136, 138, 139, 60, 65, 59, 66, 87, 90, 74, 11, 5, 55, 70, 71, 58, 67, 95, 96, 190 and 10 has become extinguished by the Defendant's adverse possession;
 - (c) An order that the Defendants be registered as absolute proprietors of the suit land L R Nos Mwiyo/Labura Block II/Mukoe/86, 147, 143, 154, 91, 122, 134, 75, 136, 138, 139, 60, 65, 59, 66, 87, 90, 74, 11, 5, 55, 70, 71, 58, 67, 95, 96, 190 and 10;
 - (d) An order that the Plaintiffs execute and sign all necessary documents and does all necessary acts to facilitate the said transfer of the suit land L R Nos Mwiyo/Labura Block II/Mukoe/86, 147, 143, 154, 91, 122, 134, 75, 136, 138, 139, 60, 65, 59, 66, 87, 90, 74, 11, 5, 55, 70, 71, 58, 67, 95, 96, 190 and 10 and in default the Deputy Registrar of this Court be authorised and mandated to do so;
 - (e) A permanent injunction restraining the Plaintiff, his servants agent or family from interfering with the Defendants' quiet use and enjoyment of the said suit land L R Nos Mwiyo/Labura Block II/Mukoe/86, 147, 143, 154, 91, 122, 134, 75, 136, 138, 139, 60, 65, 59, 66, 87, 90, 74, 11, 5, 55, 70, 71, 58, 67, 95, 96, 190 and 10; and
 - (f) Costs of the Counter-Claim.
8. Having heard the Parties, the Learned Trial Magistrate in her Judgment delivered on November 25, 2019 entered Judgment in favour of the Respondents against the Appellants in the following terms:
- (a) It is hereby declared that the Plaintiffs are the legal, lawful and rightful owners of the suit properties bought from the defunct Mwiyo Labura Block II(Mukoe);
 - (b) The Counter-Claim by the Defendants is hereby dismissed;
 - (c) An injunction is hereby issued restraining the Defendants their agents, servants and/or any other person acting under their instructions or dealing in any way in the suit land comprising of Mwiyo/Labura Block II/Mukoe/86, 147, 143, 154, 152, 153, 91, 122, 134, 75, 136, 138, 139, 60, 65, 59, 66, 87, 90, 74, 11, 5, 55, 70, 71, 58, 67, 95, 96, 190, 10, 192, 193, 194, 99, 100 and 101;
 - (d) The Defendants are hereby ordered to vacate the suit parcels of land within 45 days of this Judgment and to give vacant possession of the suit land to the Plaintiffs;
 - (e) The Kieni West County Commander, OCPD and OCS Mweiga to enforce the said orders and offer security to the Plaintiffs upon occupying the land; and
 - (f) The Defendants to bear the costs of the suit plus interest at Court rates from the time of delivery of the Judgment until payment in full.



9. Aggrieved by the said determination, the Appellants lodged a Memorandum of Appeal herein dated December 24, 2019 urging the Court to set aside the Judgment and to substitute the same with an order allowing the Appellants' Counter-Claim on the grounds that:
 1. The Learned Trial Magistrate erred in law and in fact in finding that the Respondent's case was merited;
 2. The Trial Magistrate failed to consider the evidence produced by the Appellants herein and thus misled herself to a wrong Judgment;
 3. The Trial Magistrate failed to consider that the Respondents herein could not have had a clean title to the suit land while the Appellants herein demonstrated that they had custody of the original title under the Registration of Titles Act;
 4. The Trial Magistrate failed to consider that the evidence by the Land Registrar was moot and sketchy and had no relevance in so far as the material legal question before Court was concerned;
 5. The Trial Magistrate failed to consider that the Land Registrar could not demonstrate to the Court how the Respondents herein had titles while the original title under the Registration of Titles Act was still in possession of the Appellants;
 6. The Trial Magistrate erred in law and fact in failing to consider the totality of the issues before her and the evidence tendered by the Parties thereby misleading herself into a wrong Judgment; and
 8. That the entire Judgment and subsequent decree is misleading and is against the weight of evidence and against the principles of a fair trial.
10. As it were, an Appeal to this Court from a trial by the Lower Court is by way of retrial and the principles upon which this Court acts in such an Appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. [See *Gitabu Imanyara & 2 Others v Attorney General* [2016]eKLR].
11. I have accordingly carefully re-evaluated the evidence that was placed before the Trial Court as well as the Judgment of the Learned Trial Magistrate.
12. The Respondents had instituted this suit in person in August, 2015 and as would be expected, their pleadings were quite long and winded. The amendments brought by their Advocates vide the Amended Plaint dated March 21, 2016 did not make things any easier. It was however clear from their prayers that they sought orders of injunction to restrain the Defendants from dealing in any manner with the suit properties being Land Parcel Nos Mwiyo/Labura Block II/Mukoe/86, 147, 143, 154, 152, 153, 91, 122, 134, 75, 136, 138, 139, 60, 65, 59, 66, 87, 90, 74, 11, 5, 55, 70, 71, 58, 67, 95, 96, 190 and 10.
13. In addition, the Respondents sought orders of vacant possession against the Appellants which orders they sought to be enforced by the Kieni West County Commissioner and the Police. In the alternative, the Respondents sought a declaration that they were the lawful owners of their parcels of land having bought the same from an entity known as Mukoe Farm Limited either directly or from the legal shareholders thereof.



14. It was the Respondents case that they were the registered proprietors of the suit properties having acquired the same between 1992 and the year 2014. They accused the Appellants of denying them quiet possession by constantly interfering with their use of the land, burning their houses thereon and proceeding to occupy the same without any lawful cause.
15. It was apparent from the pleadings filed in the trial Court that there was no dispute that the Respondents were the registered proprietors of the listed properties. The Appellants' contention was that even though the Respondents were so registered, it was the Appellants who were in occupation and possession of the suit properties. By their Counter-Claim, the Appellants asserted at paragraph 19 of the Statement of the Defence and Counter-Claim that they had acquired adverse possession for a period of over 12 years and that they were therefore entitled to be registered as the proprietors of the land in place of the Respondents.
16. That position was indeed supported by the Statement of the 1st Appellant dated November 18, 2015 which was the only Statement filed in support of the Appellant's case. At Paragraph 1 and 2 of the said Statement, the 1st Appellant – Jonathan Kimari Warungi states as follows:

“I am one of the Defendants in this matter. I live on the suit land. I have lived on the suit land for more than 12 years. I use and cultivate the suit land and the land is my livelihood. I have acquired title to the land.

The Plaintiffs though registered as owners of the land, have never been on the land, nor ever used the land. The Plaintiffs were registered illegally as the owners of the land.”

17. Arising from the foregoing, there was no contention that the Respondents were the registered proprietors of the suit lands. Even if there was any contention, the trial Court had occasion to listen to the Land Registrar Nyeri Ms Susan Mueni. Her testimony in chief is captured on the Record as follows:

“The suit property was originally L R No 3381 registered under RTA and boundaries were fixed. On application of owners Mukoye Farmers Ltd, a land buying company, they applied for boundaries to be relaxed to general boundaries and the requirement was ... To be prepared by Surveyor which was prepared and an area list for members was prepared forwarded to Chief Land Registrar for approval. The Chief Land Registrar approved the relaxation of the boundaries as well as sub-division of L R No 3381 into 198 Parcels. The original title was surrendered and titles were issued under L R regime to the people in (the) members list. The property is registered in (the) names of the Plaintiff(s) who hold L R titles among others. The acquisition of property before registration can only be obtained from (the) Chief Land Registrar. We used members list provided to the Chief Land Registrar by Mukoye Farmers. I wish to produce the RIM map and list of members as evidence in this case (Px1 and Px2) respectively.”

18. That testimony in my view, settled the issue of the ownership of the land as well as the legality of the titles held by the Respondents. That is so because Section 26(1) of the [Land Registration Act](#) provides as follows:

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... 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 of the land 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.”

20 The Appellants have faulted the Learned Trial Magistrate for failing to consider that the Respondents could not have had a clean title to the suit land while the Appellants had demonstrated that they had custody of the original title under the Registration of Titles Act. That the Court failed to consider that the evidence of the Land Registrar was moot and sketchy and that the Land Registrar could not demonstrate to the Court how the Respondents herein had titles when the original titles was still in possession of the Appellants.

- 21. I was however unable to find the basis for those submissions. As we have seen hereinabove, the Land Registrar gave an elaborate Statement on the origin of the Respondents’ title and it was *inter alia*, her testimony that the original title for L R No 3381 which was registered under the Registration of Titles Act was surrendered before the new ones were issued. While the Appellants claim to be in possession of the original title, they neither cross-examined the Land Registrar on that assertion nor did they produce a copy of the same in support of their case.
- 22. Arising from the foregoing, I was unable to fault the Trial Court’s conclusion that the Respondents were the lawfully registered proprietors of the suit properties.
- 23. The other issue that was raised by the Appellants in their Counter-Claim was the assertion that they had acquired the suit properties by way of adverse possession having been in possession thereof for a period exceeding twelve (12) years.
- 24. The doctrine of adverse possession is well settled under the *Limitation of Actions Act*, Cap. 22 Laws of Kenya. Section 7 of the Act places a bar on actions to recover land after 12 years from the date on which the right accrued. Section 13 of the said Act however provides as follows:
 - “(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession) and, where under Sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
 - (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
 - (3) ...
- 25. On the procedure to be applied Section 38 of the said Act provides



thus:

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 of this Act, or land comprised in a lease registered under any of those acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

26. As was stated in *Wambugu v Njuruna* [1983] KLR 172:

“In order to acquire by the statute of limitation title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.” ...

27. The Court in the Wambugu Case (*supra*) further went on to state that:

“The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed, or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”

28. Again and as was stated by the Court of Appeal in *Mtana Lewa v Kabindi Ngala Mwamgandi* [2015] eKLR:

“The process (of adverse possession) 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 nor 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.”

29. In support of their claim for adverse possession, this is what the 1st Appellant states in his recorded Statement dated November 18, 2015 aforesaid.

“The whole process of granting title to the Plaintiffs is illegal and the Court of Appeal has ordered for the dispute concerning the suit land to be heard afresh between Satima Peak Farm Company Limited and the original owners of the parent title. The Plaintiffs got title deeds long after I had settled on the land.

The Plaintiffs case should be dismissed as they no longer have any legally recognised title to the land. I am therefore not a trespasser. I believe the plaintiff’s claim to the land is now time barred and I should be registered as the true owner of the land. I pray that the Plaintiff’s case be dismissed and my claim be allowed and I be registered as the owner of the land I occupy.”

30. As can be seen from that Statement, it neither mentions the Appellants’ date of entry into the land nor the parcel number of the land that is alleged to have been occupied either by the 1st Appellant or his five (5) co-Appellants. I have similarly looked at the evidence of the other 5 witnesses before the trial Court, none of them was clear on when they entered the land.



31. It was also clear that the Appellants did not consider themselves to be in adverse possession of the land. DW2 – Agnes Waithera for instance told the Court she was on the land by virtue of being a member or shareholder of an entity known as Satima Peak Farmers while DW3 – Gladys Kanuthu Mairo conceded she did not live on the land but had her home on a parcel of land she had acquired.
32. It was also clear as was properly found by the Learned Trial Magistrate that the Appellants were forcefully holding onto the land and that they kept on disrupting activities aimed at surveying or subdividing the same. There was therefore no evidence that their occupation of the land was continuous, open and notorious and/or that the Respondents as the registered owners of the land had been dispossessed of the same.
33. The evidence placed before the Court demonstrated that the Appellants had maintained their stranglehold on the land by constant harassment of the registered owners and threats of violence. Their claim for adverse possession was therefore equally neither substantiated nor proved.
34. In the premises, I did not find any reason to disturb the decision of the Learned Trial Magistrate rendered on November 25, 2019. This Appeal therefore fails and is dismissed with costs.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 27TH DAY OF APRIL, 2023.

In the presence of:

.....

J O Olola

JUDGE

