



**Mwangi v Wanjeru (Sued in her personal and representative capacities as the legal administrator of the Estate of Wambugu Ngera - Deceased) (Environment & Land Case 5 of 2020) [2023] KEELC 18199 (KLR) (16 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18199 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 5 OF 2020**

**JO OLOLA, J**

**JUNE 16, 2023**

**IN THE MATTER OF APPLICATION BY MARY WANGUI MWANGI TO  
BE REGISTERED AS HAVING ACQUIRED TITLE TO LAND PARCEL  
OTHAYA/KIHUGIRU/398 BY VIRTUE OF ADVERSE POSSESSION**

**BETWEEN**

**MARY WANGUI MWANGI ..... PLAINTIFF**

**AND**

**CECILIA THONGORI WANJERU (SUED IN HER PERSONAL AND  
REPRESENTATIVE CAPACITIES AS THE LEGAL ADMINISTRATOR OF THE  
ESTATE OF WAMBUGU NGERA - DECEASED) ..... DEFENDANT**

**JUDGMENT**

**Background**

1. By the Originating Summons dated 20<sup>th</sup> January 2020, Mary Wangui Mwangi (the Plaintiff) prays for the determination of the following issues:
  - (a) Whether the Plaintiff has become entitled to the 0.2 acres out of Othaya/Kihugiru/398 by virtue of adverse possession;
  - (b) Whether the Defendant’s title to 0.2 acres out of Othaya/Kihugiru/398 occupied by the Plaintiff has been extinguished by the Plaintiff’s adverse possession thereof for a period of over 12 years;
  - (c) Whether an order should be issued to the effect that the Registrar does cancel the name in the Register for 0.2 acres out of Othaya/Kihugiru/398 and in the substitution thereof register the Plaintiff as the proprietor; and



(d) Whether the Plaintiff should be granted the costs of this Summons?

2. The Originating Summons is supported by an Affidavit sworn by the Plaintiff wherein she avers that she has been in an open, quiet uninterrupted occupation and possession of 0.2 acres out of Othaya/Kihugiru/398 for a period in excess of 12 years. It is the Plaintiff's case that she entered the suit land in 1981 and that since 1995, she has utilized the same and built 23 rental houses thereon and that no one has ever challenged her occupation and use of the land.
3. Cecilia Thongori Wanjeru (the Defendant) is however opposed to the issuance of the orders sought. In her Replying Affidavit sworn and filed herein on 12<sup>th</sup> March 2020, the Defendant avers that she is the only surviving daughter of the late Wambugu Ngera who is the registered proprietor of the suit property.
4. The Defendant avers that her father died intestate in 1967 and that in 1992 a Petition for grant of Letters of Administration of his estate was filed by one Tarcisio Kariuki Wambugu. The grant which was confirmed on 17<sup>th</sup> November, 2006 included the Defendant as one of the dependents but the same was met by protests.
5. The Defendant states that the Plaintiff is illegally settled on the estate of the deceased while claiming to have prescriptive rights over the same. The Defendant asserts that the Plaintiff's claim is unfounded and thoroughly misguided as she claims to have entered and occupied the property in 1981 yet High Court Succession Cause No. 142 of 1992 was filed in protest of the grant issued. It is the Defendant's case that the Plaintiff's occupation was therefore never open, uninterrupted or peaceful.
6. The Defendant contends that the Plaintiff only enjoyed 7 years of quiet possession before the Succession Cause was lodged for the administration of the estate. She accused the Plaintiff of being an intermeddler who holds onto the land in disobedience of the said Succession Cause that was determined on 29<sup>th</sup> November, 2019.

### **THE PLAINTIFF'S CASE**

7. The Plaintiff called two witnesses in support of her case at the trial.
8. PW1 – Mary Wangui Mwangi is the Plaintiff and a business woman in Othaya. Relying on her Statement dated 20<sup>th</sup> January 2020, PW1 told the Court she first entered the suit property in 1981 and took possession of the 0.2 acres
9. PW1 further told the Court that the land is registered in the name of the late Wambugu Ngera and that High Court Succession Cause No. 142 of 1992 which was recently concluded had made the Defendant the Administrator of the estate of the deceased. PW1 told the Court she has since put up 23 residential houses on the land without any challenge from anyone.
10. On cross-examination, PW1 testified that she was given the piece of land by one Ngugi Ngera who was the son to Wambugu Ngera. PW1 told the Court it was Ngugi and his mother who gave her the land to use after Ngugi told her that her mother would die of hunger. PW1 thereafter started assisting Ngugi's mother by giving her some money to feed on. In 1995, PW1 and the two wrote a note to the effect that she had entered the land with the permission of Ngugi and his mother.
11. PW2 – Charles Kimani Mwangi is a son of the Plaintiff. Relying on his Statement dated 20<sup>th</sup> January 2020, PW2 told the Court that by the time he was growing up, his mother was already utilizing the 0.2 acres portion of L.R No. Othaya/Kihugiru/398. He



came to learn that his mother had entered the land following a sale agreement with one Ngugi Wambugu who was a son to the deceased proprietor of the land.

12. PW2 told the Court that the said Ngugi Wambugu received the whole purchase price but declined to transfer the land after stating that there was an ongoing Succession Cause. Believing that information, PW2's mother continued using the land. In 2008, PW2's mother decided to extensively develop the land by building 23 permanent houses thereon. PW2 oversaw the construction as the project's foreman.

### **THE DEFENCE CASE**

13. The Defence equally called two witnesses in support of their case at the trial.
14. DW1 - Thomas Gatutha Wahome is a farmer in Othaya and a grandson to the late Wambugu Ngera. He told the Court the Defendant is her aunt and that the Plaintiff was brought into the suit property by the Defendant's brother.
15. DW1 told the Court his grandfather passed away intestate in 1967 and that a Succession Cause was filed to administer the estate in 1992. He accused the Plaintiff of being an intruder into their land.
16. On cross-examination, DW1 told the court he was unaware of the acreage of land occupied by the Plaintiff. He conceded the Plaintiff had permanent buildings on the land even though he could not recall when she started putting them up. He told the court they could not remove her from the land as they did not have an administrator of the estate at the time. An administrator was appointed by the Court in 2019.
17. DW2 – Cecilia Thongori Wanjeru is a famer in Othaya and the Defendant herein. She told the Court her late father Wambugu Ngera was the registered proprietor of the suit property. She is the Administrator of his Estate.
18. DW2 told the Court she was aware the Plaintiff claims a portion of their land. DW2 told the Court it was her step-brother Ngugi Wambugu who had put the Plaintiff on their land. DW2 heard that the Plaintiff bought the land from Ngugi. By then the family had not even filed the succession cause.
19. On cross-examination, DW2 told the Court that contrary to what she had stated in her recorded statement, the Plaintiff was not yet on the land when they filed the Succession Cause in 1992. She told the Court the Plaintiff started building on the land when the owner who sold it to her was lying in the mortuary. DW2 told the Court the land belongs to her father's grandchildren and not the Plaintiff.

### **ANALYSIS AND DETERMINATION**

20. I have carefully perused and considered the pleadings filed by the Parties herein, as well as the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before me by the Learned Counsels representing the Parties herein.
21. By this Originating Summons filed on 22<sup>nd</sup> January 2020, Mary Wangui Mwangi (the Plaintiff) prays for a determination that she has become entitled to a portion of land measuring 0.2 acres which portion is part of a larger parcel of land known as Othaya/Kihuguru/398 under the doctrine of adverse possession. Accordingly, the Plaintiff urges the Court to find that the title of the registered proprietor of the said parcel of land has been extinguished in so far as the 0.2 acres portion is concerned.



22. Ultimately, the Plaintiff craves an order of this Court directed to the Land Registrar, Nyeri to cancel the name of the registered proprietor of the suit property in so far as the 0.2 acre portion is concerned and to substitute her name therewith as the registered proprietor.
23. In support of her case, the Plaintiff told the Court that she had first entered that portion of the suit property as far back as 1981 and that since the year 1995, she had utilized and developed the same and built some 23 rental houses thereon. It was the Plaintiff's case that for the said period, she had had an open, quiet and uninterrupted possession of the said portion of land without any challenge from anyone and that she had hence acquired her title thereto by way of adverse possession.
24. From a perusal of the Certificate of Official Search dated 9<sup>th</sup> January, 2020 attached to the Plaintiff's Supporting Affidavit and produced in evidence herein, it was apparent that L.R No. Othaya Kihugiru/398 was on 24<sup>th</sup> September 1958 registered in the name of one Wambugu s/o Ngera. It did emerge in the course of the trial that the said Wambugu s/o Ngera died intestate a long time back in 1967 and that the Defendant herein, Cecilia Thogori Wanjeru is his sole surviving daughter and was recently appointed the administratrix of his estate.
25. It was the Defendant's case that the Plaintiff is illegally settled on the estate of her deceased father claiming to have acquired prescriptive rights thereto over a period of time. The Defendant asserted that the Plaintiff's claim is unfounded and quite misguided as she claims to have entered and occupied the suit property in 1981 yet there was a High Court Succession Cause that had been filed in 1992 to determine the administration and distribution of the estate.
26. As was stated in *Mtana Lewa -vs- Kahindi Ngala Mwangandi* (2015) eKLR:  
"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 a person in assertion of his title for a certain period, in Kenya, 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."
27. As it were, the circumstances under which the Plaintiff came to occupy and develop a portion of the suit property are rather interesting. While the Plaintiff does not state how she came into the land in her recorded Statement, this is what she told the Court in cross-examination:  
"I am 65 years old. I know I have produced a Search Certificate. It shows the land is in the name of Wambugu Ngera. The land was given to me by Ngugi Ngera who was a son to Wambugu. He gave me the land (together) with his mother. He told me his mother would die of hunger. I started assisting her. That was in 1981 when I entered the land.  
I used to give Ngugi and his mother the money to feed them. We also wrote (a note) in 1995 that I had entered the land with their permission."
28. That indeed the Plaintiff entered the land with the permission of a section of the family was brought out in a more forthright manner by the Plaintiff's son Charles Kimani Mwangi (PW2). This is what



he told the court in Paragraphs 3 and 4 of his Statement dated 20<sup>th</sup> January, 2020 filed in support of his mother's claim:

“When I was growing up, my mother was already farming land on 0.2 acres out of Othaya/Kihugiru/398.

I later came to learn that my mother and one of the sons of the deceased one Ngugi Wambugu who is also deceased initially entered into a sale agreement which allowed the Plaintiff to initially enter into the suit land for 0.2 acres out of Othaya/Kihugiru/398.

The said Ngugi Wambugu upon receiving the whole purchase price refused to transfer the plot to the Plaintiff stating that a Succession Cause was ongoing and the transfer would be effected once the Succession Cause came to an end. My mother believing this information to be true continued to occupy, farm and even fence the said parcel of land and later she decided to extensively develop the 0.2 acres. In the year 2008, I oversaw my mother's project as a foreman whereby she built permanent houses thereon being 23 rental houses; 8 single room houses, 5 double room houses, 5 bedsitter houses, 1 two bed-room house and 4 one bedroom houses.”

29. It was apparent from the material placed before me that the Succession Cause being referred to by PW2 was none other than Nyeri High Court Succession Cause No. 142 of 1992; In the Matter of the Estate of Wambugu Ngera (Deceased). From a

perusal of the Judgment delivered in the Succession Cause on 29<sup>th</sup> November 2019, it was apparent that the late Wambugu Ngera had four (4) wives and that following his death in 1967, members of the four households assumed “ownership” of various portions of his parcel of land – Othaya/Kihugiru/398 measuring 8.2 acres in total.

30. That would explain how the Defendant's step-brother Ngugi Wambugu jointly with his mother were able to “give” the Plaintiff the portion of land in dispute herein without any protest from the other members of the family. Testifying as DW2 before the Court, the Defendant confirmed that position when she told the Court thus:

“I am aware the Plaintiff wants a portion of our land. I am not the one who allowed her on the land. It is my step-brother Ngugi Wambugu who put her on the land. She bought from Ngugi. By then we had not even filed the succession cause. I cannot recall when she entered the land.”

31. From a perusal of the Judgment delivered in the said Succession Cause, it was also apparent that it was not just the Plaintiff but a number of other individuals who laid a claim on portions of the late Wambugu Ngera's parcel of land as purchasers. While a number of them filed protests in the Succession Cause, the Plaintiff herein did not. The Plaintiff opted to wait for the Succession Cause to be determined first. Some two (2) months after the Judgment of the Court which declared the Defendant herein as the sole administratrix of the estate of Wambugu Ngera, the Plaintiff must have realized the ramifications thereof and hence this claim of adverse possession.

32. As we have found herein above, the claim for adverse possession does not lie as the Plaintiff occupied the land with the authority or consent of a beneficiary of the estate of Wambugu Ngera. There was no sense then in which it could be said that they had dispossessed the family of the land and/or that the family had discontinued its possession of the suit land.



33. Having so obtained the land, it was also evident that the Plaintiff could not escape the fate that befell the so-called purchasers in the Judgment delivered in the Succession Cause on 29<sup>th</sup> November, 2019. This is what Judge Ngaa Jairus told them at page 10 of his Judgment.

“My only concern with this scheme is that it has been proposed that part of the estate should devolve upon people who have been identified as “purchasers” some of whom have, as noted, protested against the proposed scheme.

As much as the so-called purchasers or interested parties have voiced their concern and laid a claim on the deceased’s estate, I find those claims to have no foundation in law; at their very best, they are based on illegalities. I have come to this conclusion because they have confirmed in their evidence that they transacted on the deceased’s estate and purported to dispose of it long after his demise and obviously before the grant had been confirmed. In so doing, they have infringed the provisions of (Section) 45(1) of the Law of Succession Act which protects a deceased person’s estate against intermeddling; that Section states as follows:

45.

- (1) Except in so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”

34. The Learned Judge went onto emphasize the position of the law in such matters as follows:

“Perhaps to underscore the protection attached to such an estate against alienation without the authority of the Court, Sub-section (2) spells out the sanctions that accrue if the deceased’s estate is intermeddled with; that provision of the law states as follows:

- (2) Any person who contravenes the provisions of this Section shall –
  - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
  - (b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

35. In the circumstances herein, it was clear to me that if this Court were to sustain the Plaintiff’s claim herein, the Court would be perpetuating what was otherwise an illegality.

36. In the premises, I find and hold that there is no merit in the suit herein and I dismiss the same.

37. Each Party shall bear their own costs.

**Judgment dated, signed and delivered in open Court and virtually at Nyeri this 16<sup>th</sup> day of June, 2023.**

In the presence of:

Mrs. Machira for the Plaintiff

Mr. Makura for the Defendants

Court assistant - Kendi



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**J. O. Olola**

**JUDGE**

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