Mwai & another v Wachira (Environment & Land Case 27 of 2019)
[2023] KEELC 18006 (KLR) (16 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18006 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ENVIRONMENT & LAND CASE 27 OF 2019

JO OLOLA, J

JUNE 16, 2023

BETWEEN

BERNARD KIHIURIA MWAI ..... 1ST APPLICANT

PATRICK NGATIA MWAI ..... 2ND APPLICANT

AND

GLADYS WAMBUI WACHIRA ..... RESPONDENT

JUDGMENT

1. By the Originating Summons dated 2nd October 2019, Bernard Kihiuria Mwai and Patrick Ngatia Mwai (the Applicants) pray for the determination of the following issues:

    (a) Whether the Applicants have been in continuous and adverse possession of parcel No. Iriaini/Cheche/1617 from well before 11th May, 2000 to date;

    (b) Whether the said occupation and utilization of land in (a) was continuous and exclusive and has spanned for over 12 years;

    (c) Whether the Applicants have since 2005 and 2006 respectively, been harvesting the tea bushes planted on the said land by themselves and Wachira Kibuchi (deceased), the predecessor in possession to Gladys Wambui whether, without let or hindrance from the Respondent herein;

    (d) Whether the Respondent would be entitled, under the law to enforce a Judgment of a Court entered on 11th May, 2000 vide Nairobi High Court Succession Cause No. 62 of 1991 as against the Applicants to defeat the already acquired prescriptive rights in adverse possession;

(e) Whether the Applicants herein have, by virtue of their continuous occupation and adverse possession over the full extent of land captured in the aforesaid Judgment of the Court; and later vide title number Iriaini/Cheche/1617, acquired prescriptive rights over the said extent of land, entitling them to be declared owners of the said land;

(f) Whether the Land Registrar Nyeri should be ordered to cancel the registration of the Respondent as owner of parcel No. Iriaini/Cheche/1617 and in her place register the Applicants herein as owners of the said parcel; and

(g) Who should pay the costs of these summons?

2. The Originating Summons is supported by an affidavit sworn by the 2nd Applicant – Patrick Ngatia Mwai wherein he avers that land parcel No. Iriaini/Cheche/1617 (the suit property) is registered in the name of Gladys Wambui Wachira (the Respondent). The Applicants further aver that the Respondent's husband obtained Judgment in his favour for land comprising of 6 acres out of what was then L.R No. Iriaini/Cheche/853, from the High Court at Nairobi on 11th May, 2000.

3. The Applicants aver that pursuant to the Judgment, the Respondent caused the land to be sub-divided in August, 2002 and obtained title to the suit land. It is however their case that even before the issuance of the title, the Respondent's husband had planted tea bushes on the land but the Applicants stopped him from harvesting the same.

4. The Applicants further aver that they have now planted more tea bushes on the land and constructed their dwelling houses thereon over the years and hence the prayers herein.

5. But in her Replying Affidavit sworn on 1st November 2019 as filed herein on 5th November 2019, Gladys Wambui Wachira (the Respondent) denies the Applicants claim and asserts that the parcel of land known as Iriaini/Cheche/853 was originally registered in the name of one Bildad Kihiuria.

6. The Respondent asserts that upon Bildad's death, her husband and Bildad's widow one Janetrude Gathigia Kihiuria petitioned for Letters of Administration in Nairobi High Court Succession Cause No. 814 of 1983 which was later transferred to the High Court at Nyeri as Succession Cause No. 789 of 2012.

7. The Respondent avers that her husband the late Wachira Kibuchi was entitled as a purchaser to 10 acres out of the said L.R No. Iriaini/Cheche/853. Following an arbitration process, after the Applicants' mother contested the interest of the Respondent's husband on the land, Judgment was entered on 16th October, 2000 wherein the Respondent's husband's entitlement was reduced to 6 acres.

8. The Respondent further avers that the said Judgment was executed and L.R No. Iriaini/Cheche/853 was subdivided with the result that her husband was registered as the proprietor of the 6 acres comprised in the suit property.

9. Accordingly, the Respondent asserts that it is not correct to say she is attempting to enforce the Judgment which had been executed. It is further her case that her husband had during his lifetime taken possession of the suit property and had planted 7,000 tea bushes on a portion thereof which bushes the Respondent continued harvesting after his death.

10. The Respondent further avers that the Applicants have been harvesting her tea bushes illegally but they do not reside on the suit property from which they have now forcibly stopped the Respondent from harvesting tea through threats of violence.

The Applicant's Case

11. At the trial herein, the 2nd Applicant (PW1) testified as the sole witness. Reiterating the averments made in the Supporting Affidavit to the Originating Summons as well as his Statement attached thereto, PW1 told the Court that the 1st Applicant is his brother and that they took possession of the suit property in the year 2004.

12. PW1 told the Court they instituted this suit in 2019 because some people including the Respondent went to the land on 23rd July, 2019 to survey the land. The Applicants resisted the survey.

13. On cross-examination, PW1 testified that his grandfather Bildad Kihiuria who passed away in 1971 was the registered owner of L.R No. Iriaini/Cheche/853. He told the Court he was aware of a case filed in Nairobi in 1983 and that it was his mother Agnes Muthoni who was objecting to a grant being issued jointly in the name of his grandmother and that of the Respondent's husband. The matter went to arbitration and it was determined that the Respondent's husband be given 6 acres of land.

14. PW1 conceded that subsequent to the decision, L.R No. Iriaini/Cheche/853 was sub-divided into portion numbers 1617 (the suit property), 1618 and 1619. He told the Court his grandmother who is still alive gave him the suit property in the year 2007.

The Respondent's Case

15. The Defendant (DW1) similarly testified as the sole witness in her case and reiterated the averments made in the Replying Affidavit filed in response to the Originating Summons. She told the Court she had been using the land and had planted 7,000 tea bushes thereon before the Applicants chased her away from the land on a date she could not remember.

16. On cross-examination, DW1 testified that she was given the land by an order of the Court in the year 2000. Her husband had however been allowed by Janetrude Gathigia to use the land before the Court's order. The said Janetrude is the one who sold the land to DW1's husband.

17. DW1 further told the Court the Applicants' mother had objected to the Succession Case filed by Janetrude and her husband as the Applicants' mother wanted a portion of the land. DW1 told the Court that the Applicants' mother got a portion of the land, formerly belonging to Janetrude's husband Bildad Kihiuria.

18. DW1 testified that PW1 had chased her away from the land when they went with a Surveyor to put boundaries on the land. PW1 and other people removed the beacons and chased them away. She further told the Court she was aware the Applicants have been picking her tea over the years.

Analysis and Determination

19. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses 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 Advocates representing the Parties herein.

20. By their Originating Summons instituted herein on 2nd October, 2019, the two Applicants are essentially seeking to be declared the owners of the parcel of land known as Iriaini/Cheche/1617 (the suit property) on account that they have acquired prescriptive rights thereto through adverse possession.

21. According to the Applicants, their occupation of the said parcel of land has been continuous and exclusive for a period exceeding twelve (12) years. They assert that they have since dispossessed the

Respondent who is the registered proprietor of the suit property, of the same and that they have now planted tea bushes and built houses on the land which they continue to harvest and utilize to the exclusion of the Respondent.

22. In her Replying Affidavit to the Originating Summons, the Respondent denies that the Applicants have acquired the suit land by way of adverse possession. She further denies that she is attempting to enforce the Judgment delivered on 11th May, 2000 and asserts that while the Applicants have chased her away from the land and have been harvesting her tea bushes thereon, they do not reside on the land and that their occupation thereof has not been quiet, peaceful and uninterrupted.

23. From the material placed before me, the circumstances leading to this claim for adverse possession are rather interesting. The two Applicants are the sons of one Mwai Kihiuria and Agnes Muthoni Kihiuria. They are the grandchildren of one Bildad Kihiuria who passed away on 26th February, 1971 and one Janetrude Gathigia Kihiuria. Their father Joseph Mwai Kihiuria is said to have passed away on 2nd March, 1982. That is the same year the 2nd Applicant, who has sworn the Affidavit in support of the Originating Summons was born.

24. At some point in time before the 2nd Applicant was born, either their deceased grandfather Bildad Kihiuria and or their grandmother Janetrude Gathigia sold some land said to have been measuring some 10 acres to one Wachira Kibuchi. The said Wachira Kibuchi who is also now deceased was the husband to the Respondent herein. The 10 acres of land that were sold to him were to be hived off a parcel of land then known as L.R No. Iriaini/Cheche/853 then measuring 46 acres.

25. In order to enable them sub-divide the said parcel of land to enable the Respondent's husband to get his 10 acres, the Applicants' grandmother Janetrude Gathigia and the Respondent's husband Wachira Kibuchi petitioned the High Court at Nairobi in Succession Cause No. 62 of 1991. A grant of Letters of Administration was issued to the two on 15th March, 1991 before being confirmed on 17th May, 1991.

26. Subsequently and by an application dated 18th June 1991, the Applicants' mother Agnes Muthoni Mwai petitioned for the revocation of the said grant naming her mother-in-law Janetrude Gathigia and the Respondent's husband Wachira Kibuchi as the Respondents. In a Replying Affidavit sworn on 19th July, 1991 filed in the Succession Cause on 22nd July, 1991 in response to her daughter-in-law's application, Janetrude Gathigia Kihiuria states as follows at paragraphs 3 to 6 thereof:

> " 3. That when the Applicant applied to inherit her husband's lands and properties she never gave me anything and likewise I need not give her anything from my own properties from my husband;
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> 4. That the deceased Bildad Kihiuria had two wives namely:
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> 1. Esther Wangu Kihiuria; and
>
> 2. Janetrude Gathigia Kihiuria;
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> 5. That the deceased had during his lifetime shared his land measuring 98.9 acres to his family as follows:-
>
> (a) Esther Wangu Kihiuria 25 acres for herself and her 4 daughters;
>
> (b) Janetrude Gathigia Kihiuria (myself) – 46 acres out of which I was to transfer 10.0 acres to the second Respondent who had bought them from the deceased, and the rest 36 acres were

mine alone. Attached hereto is a copy of the Sale Agreement evidencing the sale marked "A";

(c) Mwai Kihiuria husband of the Applicant Agnes Muthoni Mwai 27.9 acres in land reference Iriaini/Cheche/569 out of which she sold. 13.8 acres leaving 14.1 acres which rightfully belong to the Applicant Agnes Muthoni Mwai.

6. That when I filed the succession suit I did so in respect of my own entitlement in L.R Iriaini/Cheche/853 and I did not have to include the Applicant Mrs Agnes Muthoni Mwai as (she) is not the wife of my deceased husband and she is not entitled to any portion thereof."

27. The Applicants' grandmother goes on in the said Replying Affidavit to accuse the Applicants' mother of demanding to be given the entire parcel of land. At Paragraph 8 thereof, the Applicants' grandmother offers a glimpse as to how the two Applicants came to be on a portion of the land where she states as follows:

> " 8. That out of my own generosity I gave to Agnes Muthoni Mwai's 2 sons namely:
>
> 1. Bernard Kihiuria Mwai 10 acres.
>
> 2. Patrick Ngatia Mwai 10 acres and I also gave to my daughters son Bernard Kihiuria Gatimu 6 acres and I was left with 10 acres only for myself. Agnes Muthoni Mwai should therefore not be heard to complain."

28. The said Nairobi High Court Succession Cause 62 of 1991 was subsequently referred to arbitration by a Panel of Elders chaired by the District Officer for Mathira Division of the then Nyeri District. The award arrived at by the Elders was adopted as the Judgment of the Court on 11th May, 2000. By the said award and Judgment, the Respondent's husband was granted 6 acres out of the said L.R No. Iriaini/Cheche/853.

29. While the Applicants contend that the Respondent has been attempting to enforce the Judgment of 11th May, 2000 more than 12 years after the same was delivered, it was apparent that the Judgment was acted on and that L.R No. Iriaini/Cheche/853 was sub-divided and a portion measuring 6 acres known as Irianini/Cheche/1617 (the suit property) was created and registered in the name of the Respondent following the death of her husband.

30. It was however apparent that subsequent to the Judgment, the Applicants grandmother Janetrude Gathigia Kihuria had had a change of mind. That would probably explain why the Applicants told the Court that their grandmother had given them the land to use in or about the year 2004 or 2005.

31. Sometime on 13th March 2003, the Applicants grandmother teamed up with their mother and jointly petitioned for the revocation of the confirmed grant on the grounds that the Respondent and one Charles Mwangi Njogu ought not to have initiated the confirmation proceedings and secondly, that the arbitral award which had been adopted as the Judgment of the Court was inequitable and unjust, and that it was not in any event supported by any evidence.

32. The Summons for revocation of grant was however dismissed for want of prosecution on 3rd September, 2008. In dismissing the Summons, the Court further directed the removal of a restriction

that had been placed on the land. A month later in October 2008, the suit property was registered in the name of the Respondent and a title deed was issued to her.

33. Less than a year later and by yet another Summons for revocation of grant dated 4th June 2009, the Applicants mother and grandmother again jointly sought to have the Certificate of Grant issued on 11th May, 2000 to be revoked on the grounds that the elders award which was adopted as the Judgment of the Court was null and void and that the grant was obtained by means of an untrue allegation of fact.

34. The Succession Cause initially filed at the High Court in Nairobi was subsequently transferred to Nyeri as High Court Succession Cause No. 789 of 2012. Having heard the parties and in a Judgment delivered at Nyeri on 2nd February 2015, the Honourable Justice Jairus Ngaah dismissed the application for revocation of the grant having found the same incompetent, misconceived and deficient of merit.

35. Some six (6) months later, on 12th August 2015, the two Applicants herein together with their five (5) other siblings joined the fray by filing yet another Summons for revocation of grant issued on 11th May, 2000. In their said application, the Applicants sued the Respondent herein, the said Charles Mwangi Njogu together with their own mother and grandmother as the Respondents.

36. The grounds upon which the new application was brought were stated on the face thereof as follows:

    (a) That all the Applicants being beneficiaries to the estate of (Bildad Kihiura) were not involved at all;

    (b) That the matter herein was sent for arbitration as opposed to being heard by Court through oral evidence as ordered on 28th April, 1983.

    (c) That the award entrenched an illegality where a confessed intermeddler was awarded 6 acres of land;

    (d) That no application for confirmation of grant was made as per the rules, served on all the beneficiaries to include the applicants, and their voices heard in opposition or affirmation of the proposals for distribution; and

    (e) That the proceedings herein were illegal and amounted to compounding of an illegality to wit, intermeddling and it should be set aside ex debito justiciae.

37. In the Supporting Affidavit to the application sworn on behalf of the Applicants by their sister Mercy Wanjiru Mwai, they told the Court that they are the children of the only son of the deceased and that they were therefore beneficiaries of their grandfather's estate.

38. The Applicants further swore that their mother had only recently informed them that there was already a Judgment in the Cause which shared part of their land with strangers without their involvement or knowledge and that the illegal process that was followed had robbed them of 6 acres of prime land without any consideration.

39. The Respondent raised a Preliminary Objection dated 22nd April, 2016 stating that the new application for revocation of grant was res judicata. That Preliminary Objection was heard and was upheld by the Honourable Justice Teresia Matheka in a Ruling delivered on 23rd October, 2017.

40. Exactly some two years later in October 2019, the two Applicants instituted this suit contending that they had now acquired the six (6) acres comprised in the suit property under the doctrine of adverse possession. It is their case that long before the Respondent acquired title to the land they had prevented her husband from harvesting his tea from the land and that they have now developed the same by planting more tea bushes and putting up buildings thereon.

41. Arising from the foregoing circumstances, it was apparent to me that this claim for adverse possession was yet another attempt by the Applicants to unnecessarily prolong the very same issues that the Parties herein and their predecessors had been litigating on since the 1980s. As Kuloba J. (as he then was) stated in Gabriel Mbui v Mukindia Maranya [1993] eKLR on matters of adverse possession:

> " The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use and de facto occupation must be shown."

42. In the matter before me, it was evident from the plethora of suits and applications previously instituted by the Applicants and their relatives that until August, 2015 when they filed the last Summons to revoke the grant issued to the Respondent's husband and their grandmother, they did not consider themselves to be in adverse possession of the land. Even if they were in occupation and possession of the land as they claim, the Respondent would have been completely out of order to eject them from the same during the long period that the matter was under litigation.

43. As the Court of Appeal stated in Mtana Lewa v Kahindi Ngala Mwagandi [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 extents to show that possession is adverse to the title owner."

44. In the matter herein, it was apparent that until 23rd October, 2008 when the Respondent was issued with her title to the land, the same was registered in the name of the Applicants' grandmother who had herself inherited the same from the Applicants' grandfather. It was the Applicants' grandmother who had gifted portions of her parcel of land L.R No. Iriaini/Cheche/853 to the Applicants. That was the parcel of land that was sub-divided with the consent of the same grandmother to create the suit property now registered in the Respondent's name.

45. It was further apparent that the Respondent had not neglected to assert her rights over the suit property. That much is clear from the fact that some two years after the end of the last case she had with the Applicants, the Respondent moved into the land with Surveyors to carry out a demarcation thereof on 23rd July, 2019. It was then that the Applicants ganged up and chased the Respondent and the Surveyor from the land. Some three (3) months later, they instituted this claim.

46. Evidently, the Applicants have kept their stranglehold on the land through the use of force. While they admit that the Respondent has tea bushes on the land, they told the Court that they had prevented her from harvesting the land. Other than through the use of force and threats of violence, it was unclear to me how else they could prevent the owner of the tea bushes from harvesting the same and utilizing the land.

47. By filing this suit, the Applicants are urging this Court to give a stamp of approval to their actions. That, since they have forcefully kept the Respondent from using her parcel of land, this Court should now give it to them. This Court declines that invitation. They have not acquired any rights and have not established any entitlement thereto.

48. In dismissing the Applicants application for revocation of grant on 23rd October 2017, the Honourable Lady Justice Teresia Matheka quoted the words of the Honourable Justice Kuloba as expressed in Mwangi Njogu v Meshack Mbogo Wambugu & Another, Nairobi HCCC No. 2340 of 1991 (unreported). Those words found favour with Lenaola J (as he then was) in Jane Mukomburia Mworia v Margaret Mukomunene & Another [2007] eKLR while dealing with a similar situation. As the Applicants have failed to take heed of the Court's injunction, I am left with no option but to repeat the same words here to them:

> "Justice requires that every cause should be once fairly tried, and public tranquility demands that having been tried once, all litigation about that cause should be concluded forever between those parties and their privies ... ... if it were not for the conclusive effect of all such determination, there would be no end to litigation and no security of any person; the rights of the Parties would involve endless confusion and great injustice often done under the cover of law; while, the Courts stripped of their most efficient powers to stop repetitive litigation, would become little more than meaningless halls of debate, or at best mere advisory bodies; and thus, the most important function of the state, namely that of ascertaining and enforcing rights; would go unfulfilled."

49. By instituting this new claim against the Respondent barely two years after they failed to wrestle the land from the Respondent in the Succession Cause, the Applicants have done nothing but to convert our Courts into meaningless halls of debate or at best mere advisory bodies. This Court once again declines the invitation to become one such body.

50. In the result, I was not persuaded that the Applicants have proved their case to the required standard. As they claim to have planted tea bushes on the land and built various structures thereon, I make the following orders for the ends of justice and to bring this matter to an end.

    (a) The issues raised under Prayers (a) to (f) of the Applicants' Originating Summons dated 2nd October, 2019 are answered in the negative with the result that the said Originating Summons is dismissed.

    (b) The Applicants have 30 days from today to clear and remove any structures and or developments they may have erected on the suit land. In default the Respondent shall be at liberty to remove any such structures and/or developments at the Applicants' cost; and

    (c) The Applicants shall bear the costs of this suit.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 16TH DAY OF JUNE, 2023.

In the presence of:

Ms Miriti for the Appellants

Ms Lucy Mwai for the Respondents

Court assistant – Kendi

.....

J. O. Olola

JUDGE