



**Theuri v Njoroge & another (Environment & Land Case 13 of 2012)  
[2023] KEELC 18200 (KLR) (16 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18200 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 13 OF 2012**

**JO OLOLA, J  
JUNE 16, 2023**

**BETWEEN**

**PETER WANJUKI THEURI ..... APPLICANT**

**AND**

**HANNINGTON WAMBUGU NJOROGE ..... 1<sup>ST</sup> RESPONDENT**

**CHARITY NJERI GAITHO ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Background**

1. By the Originating Summons dated 18<sup>th</sup> December 2012, Peter Wanjuki Theuri (hereinafter “the Plaintiff”) prays for:
  - (i) A declaration that the administration of the estate of Njoroge Gathua (deceased) by the 1<sup>st</sup> Defendant in relation to the suit land L.R No. Tetu/Karaihu/107 was subject of a customary trust in favour of the Plaintiff over the whole of the suit land.
  - (ii) An order that the 2<sup>nd</sup> Defendant is registered as the proprietor of L.R No. Tetu/Karaihu/107 subject to a customary trust in favour of the Plaintiff to the extent of the whole of the land.
  - (iii) In the alternative, a declaration that the Plaintiff has acquired the right to be registered as the absolute owner of the suit land L.R No. Tetu/Karaihu/107 by adverse possession.
  - (iv) An order for rectification of the Register to the suit land L.R No. Tetu/Karaihu/107 by registering the Applicant as the absolute owner thereof in place of the 2<sup>nd</sup> Respondent; and
  - (v) Costs and interest.
2. The Originating Summons is supported by an Affidavit sworn by the Plaintiff wherein he avers that the suit property was originally registered in the name of the 1<sup>st</sup> Defendant’s father one Njoroge Gathua



- (deceased) in 1958. The Plaintiff avers further that the said Njoroge Gathua was so registered on the understanding that he was a trustee for the benefit of the Plaintiff through the Plaintiff's father one Theuri Wanjuki (now also deceased).
3. The Plaintiff asserts that he was given possession of the suit land in 1958 and that he has since resided thereon with his mother exclusively to-date. He further asserts that he has since substantially developed the suit land by building residential houses, planting trees and farming food and cash crops. He had severally sought to have the land transferred to his name but the said Njoroge Gathua passed on in the year 2000 before effecting the transfer.
  4. The Plaintiff further avers that the 1<sup>st</sup> Defendant had thereafter refused to co-operate in transferring the property to himself and that on 13<sup>th</sup> March 2012, he conducted a search which revealed that the suit land had on 6<sup>th</sup> September 2010 been transferred to the 2<sup>nd</sup> Respondent.
  5. The Plaintiff contends that the said transfer was done fraudulently and illegally to defeat his beneficial interest in the land and hence the orders sought herein.
  6. Hannington Wambugu Njoroge (the 1<sup>st</sup> Defendant) is however opposed to the grant of the said orders. In his Replying Affidavit sworn and filed herein on 14<sup>th</sup> February 2013, the 1<sup>st</sup> Defendant avers that his father was registered as the sole owner of the suit property during the period of land consolidation, demarcation and registration on 25<sup>th</sup> June, 1953.
  7. The 1<sup>st</sup> Defendant further avers that his father who passed away on 29<sup>th</sup> May, 2000 was a cousin to the Plaintiff and that the registration of his father as proprietor of the land was not as a trustee for anyone else.
  8. The 1<sup>st</sup> Defendant avers that after his father's registration, he had allowed the Plaintiff's mother to be cultivating the said parcel of land and that the Plaintiff's mother had been in occupation of the land as a licence after she refused to re-locate with her husband to Ihururu Village.
  9. The 1<sup>st</sup> Defendant further avers that during land consolidation and demarcation, the Plaintiff's father was the proprietor of title No. Thegenge/Ihithe/374 which he caused to be registered in the name of the Plaintiff's elder brother Gathua Theuri. It is on that land that the Plaintiff and the rest of his family members reside.
  10. The 1<sup>st</sup> Defendant further avers that the Plaintiff only put up a wooden structure on the suit land in 2012 after he discovered that the land had been sold. He further avers that his father sold the suit land to the 2<sup>nd</sup> Defendant after the Plaintiff who was given the first chance failed to raise the purchase price therefore and denies that there was any fraud in the transferring the land to the 2<sup>nd</sup> Defendant.
  11. Charity Njeri Ngotho (the 2<sup>nd</sup> Defendant) is equally opposed to the grant of the orders sought by the Plaintiff. In her Replying Affidavit sworn and filed herein on 15<sup>th</sup> January 2013, the 2<sup>nd</sup> Defendant states that she purchased the suit property pursuant to a sale agreement dated 29<sup>th</sup> January, 1999 for valuable consideration.
  12. The 2<sup>nd</sup> Defendant further avers that her name was included in Nakuru High Court Succession Cause No. 629 of 2003 filed after the death of the 1<sup>st</sup> Defendant's father and the Certificate of Confirmation of Grant issued on 31<sup>st</sup> October, 2008 confirmed her ownership of the property. The land was therefore validly and legally registered in her name on 6<sup>th</sup> September, 2010.



### **The Plaintiff's Case**

13. The Plaintiff testified as the sole witness in his case. Testifying as PW1, he reiterated the averments made in his Affidavit filed in support of the Originating Summons.
14. PW1 testified that he got into the land as a young boy in the company of his mother. He told the Court that his mother who passed away in 1995 had planted pyrethrum on the land. From around 1980, PW1 begun planting maize and growing trees on the land. He had also planted tea on the land.
15. PW1 testified that in 2021, the 2<sup>nd</sup> Defendant went to the land to remove his tea bushes. He reported the matter to the area Chief and filed this suit seeking an order of injunction. Earlier in 2020, the Defendants had demolished the two-roomed house he had erected on the land.
16. On cross-examination, PW1 told the Court he was born in 1954 and was therefore about 4 years old in 1958. He conceded that the 1989 licence to grow tea that he had produced in Court did not indicate the parcel of land he was to grow the tea on.
17. PW1 testified that his father had nine (9) wives with his mother Ann Wahito as the last wife. He told the Court his mother had 7 children and that he was the last born. He further testified that the 1<sup>st</sup> Defendant's father was his Cousin. He refuted claims he had told his Cousin he had no money to buy the land. Instead he told the Court he had told him that he will look for money and pay him for the land. PW1 did not know that his Cousin had sold the land to the 2<sup>nd</sup> Defendant who is his neighbor.
18. PW1 further told the Court he had erected a house on the land for the purpose of keeping farm implements. He also had a bed in the house. He testified that he resides on Plot No. 374 – Thegenge where he has a house and has lived for long. The parcel of land is registered in the name of his brother Gathua Theuri.

### **The Defence Case**

19. The Defence called two witnesses who testified in support of their case during the trial.
20. DW1 - Hannington Wambugu Njoroge is the 1<sup>st</sup> Defendant. Relying on his Statement filed herein on 10<sup>th</sup> July 2013, he told the Court the suit property measures about 1.0 acre and that the same had been registered in the name of his father Njoroge Gathua. He further told the Court that following the death of his father, he filed Nakuru High Court Succession Cause No. 629 of 2003.
21. DW1 further reiterated that his father had allowed the Plaintiff's mother to cultivate the suit property as a licensee on the land. Otherwise, the Plaintiff and the rest of their family reside in Land Parcel No. Tetu/Ihithe/374 where the Plaintiff's mother is buried.
22. DW1 further testified that by an agreement dated 29<sup>th</sup> January 1999, his father sold the suit property to the 2<sup>nd</sup> Defendant. DW1's father however passed away on 29<sup>th</sup> May, 2000 before the land was transferred to the 2<sup>nd</sup> Defendant. After the Succession Cause, the 2<sup>nd</sup> Defendant was given the land in pursuance of the agreement.
23. On cross-examination, DW1 denied that his father was registered as the proprietor of the land in trust for the Plaintiff's father. He told the Court the Plaintiff's mother was only licenced to do subsistence farming on the land. He however conceded that there were some tea bushes on the land although he did not know who had planted them. He told the Court he lives in Nakuru and that he does not know who picks the tea.



24. DW2 – Peter Ndung’u Ngotho is a farmer in Subukia and a son to the 2<sup>nd</sup> Defendant. He told the Court his mother suffers from dementia and hence the decision to substitute DW2 in her stead.
25. DW2 told the Court that on 29<sup>th</sup> January 1999, his mother had entered into a Sale Agreement for the purchase of the suit property with the 1<sup>st</sup> Defendant’s father. The land was sold for Kshs.150,000/- and DW2’s mother paid a deposit of Kshs.100,000/- on the date of the agreement. The balance was to be paid upon transfer.
26. DW2 testified that the vendor passed away before transferring the land and it was the 1<sup>st</sup> Defendant who transferred the same after petitioning for a Grant in Nakuru High Court Succession Cause No. 629 of 2003.
27. DW2 further told the Court that at the time of the purchase, there was no building thereon and nobody resided thereon. His mother took possession of the land and built a wooden structure thereon. Her health however started deteriorating and DW2 took her away to Subukia leaving a caretaker on the land.
28. On cross-examination, DW2 told the Court he was not there when her mother started purchasing the land. He told the Court the Plaintiff started putting structures on the land after he realized that the land had been sold.

### **Analysis and Determination**

29. I have carefully perused and considered the pleadings filed by the Parties, the testimonies of their 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.
30. By the Originating Summons dated 18<sup>th</sup> December, 2012 expressed to be based on Order 37 Rule 1 of the Civil Procedure Rules, the Plaintiff has sought a declaration to the effect that the registration of the 2<sup>nd</sup> Defendant as proprietor of L.R No. Tetu/Karaihu/107 (the suit property) was subject to a customary trust in his favour. In the alternative, the Plaintiff asserts that through the passage of time, he had acquired a right to be registered as the absolute owner of the suit property on account of adverse possession and as such, he craves an order for the rectification of the Register so that he is registered as the proprietor of the suit property in place of the 2<sup>nd</sup> Defendant.
31. In support of his case, the Plaintiff told the Court that the suit property was in the year 1958 registered in the name of the 1<sup>st</sup> Defendant’s father one Njoroge Gathua (now deceased) on the understanding that he was a trustee for the benefit of the Plaintiff through the Plaintiff’s father one Theuri Wanjuki.
32. It was the Plaintiff’s case that he was given possession of the suit land in the year 1958 aforesaid as the eldest son in his father’s family and that he has since resided thereon exclusively with his mother to-date. He further told the Court that he has since substantially developed the land by building residential houses thereon, planting trees and cultivating both food and cash crops. He told the Court he had severally sought to have the suit property transferred to his name but the 1<sup>st</sup> Defendant’s father had passed on in the year 2000 before transferring the same to his name.
33. As it were, a customary trust must be proved by way of evidence. In the matter herein, other than the fact that the Plaintiff’s father and the 1<sup>st</sup> Defendant’s father were cousins, nothing much was placed before the Court to support the contention that the suit property was registered in the name of the father of the 1<sup>st</sup> Defendant to hold in trust for the family of the late Theuri Wanjuki.



34. Indeed while the Plaintiff purported at Paragraph 4 of the Supporting Affidavit that he was claiming the alleged trust property for his family as the eldest son, it did emerge at the trial herein that he was the last born of the ninth (9<sup>th</sup>) wife of the late Theuri Wanjuki. During his cross-examination herein, the Plaintiff conceded that he was the seventh (7<sup>th</sup>) and last born child of Ann Wahito who was his father's last wife. Neither his mother nor any of his elder siblings had made any claim over the suit property based on the alleged customary trust.
35. On the other hand, the Plaintiff told the Court that he had taken exclusive possession and had occupied, used and resided on the land from the year 1958 and hence the justification for his claim for adverse possession. For a claim of adverse possession to succeed, one must prove by clear and unequivocal evidence that his possession was non-permissive, open, continuous, exclusive and uninterrupted over a period of time, which in Kenya, is 12 years.
36. As was stated in *Gabriel Mbui -vs- Mukindia Maranya* (1993) eKLR:
- “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.”
37. Speaking on the same issue in *Mtana Lewa -vs- Kahindi Ngala Mwangandi* (2015) eKLR, the Court of Appeal held 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 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.”
38. In the matter before me, while the Plaintiff avers in the Supporting Affidavit that he has since 1958 been residing with his mother on the suit property, it was clear from his testimony before the Court that neither himself nor his mother had been residing on the suit property. During his cross-examination, the Plaintiff conceded that they live on L.R No. Thegenge/Ihithe/374. That parcel of land is registered in the name of the Plaintiff's elder brother the late Wagera Theuri. It is on that parcel of land that the Plaintiff's mother was buried when she passed away in 1995. It was further his case that he had only erected a two roomed house on the suit property for keeping farm implements.
39. From his own testimony before the Court, the Plaintiff was barely four (4) years old in 1958 and there was no way it could be said that he had taken exclusive possession of the land as at that time. There was however ample evidence that by some arrangement between the Plaintiff's mother and the 1<sup>st</sup> Defendant's father, the Plaintiff's mother had been allowed to use the suit property for a long period of time.



40. The Plaintiff was aware of that arrangement. That must be the reason he entered into negotiations in 1989 to buy the suit property from the 1<sup>st</sup> Defendant's father. Asked about the issue in cross-examination, the Plaintiff responded thus:

“I never told my Cousin (the 1<sup>st</sup> Defendant's father) that I had no money to buy the land. I told him I will look for money and pay him. I never knew he sold the land to the 2<sup>nd</sup> Defendant.”

41. Prodded further on the same issue by his own Advocate in re-examination, this was the Plaintiff's response:

“I was asked to buy the land in 1989. We agreed I look for money. We went on with the understanding until 1997 but that is when I noticed some change in the 1<sup>st</sup> Defendant. I never saw him again.”

42. By entering into negotiations to purchase the land from the 1<sup>st</sup> Defendant's father, the Plaintiff had acknowledged his ownership thereof in a manner that was clearly inconsistent with his claim to exclusive use and possession thereof.

43. From the material placed before me, it was apparent that the Plaintiff did not purchase the land despite being given the first opportunity to do so. Some four (4) years after the death of the Plaintiff's mother, the 1<sup>st</sup> Defendant's father entered into an agreement to sell the land to the 2<sup>nd</sup> Defendant on 29<sup>th</sup> January, 1999. That Sale Agreement produced by the 1<sup>st</sup> Defendant in evidence reveals that the suit property was sold for a sum of Kshs.150,000/-.

44. It is apparent from a perusal of the Agreement that the 1<sup>st</sup> Defendant's father was paid a sum of Kshs.100,000/- on the date of execution of the Agreement and that the balance of Kshs.50,000/- was to be paid upon transfer of the suit property. As fate would have it, the 1<sup>st</sup> Defendant's father passed away a year later on 29<sup>th</sup> May, 2000 before the transfer was effected. The suit property was later transmitted to the 2<sup>nd</sup> Defendant pursuant to a Grant issued in Nakuru High Court Succession Cause No. 629 of 2003. That Grant remains in force and has not been revoked.

45. In the circumstances herein I was not persuaded that the Plaintiff had any legitimate claim either under customary trust or by dint of adverse possession. His claim is misconceived and lacking in merit.

46. It follows that this suit is dismissed with costs to the Defendants.

**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:**

Mr. C. M. King'ori for the Plaintiffs

No appearance for the 1<sup>st</sup> Defendant

Mr. Theuri Mwangi for the 2<sup>nd</sup> Defendant

Court assistant - Kendi

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**J. O. Olola**

**JUDGE**

