



Wambugu v Wanjeru (Sued in her personal and representative capacities as the legal administrator of the Estate of Wambugu Ngera - Deceased) (Environment & Land Case 2 of 2020) [2023] KEELC 18198 (KLR) (16 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18198 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 2 OF 2020**

JO OLOLA, J

JUNE 16, 2023

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT, CAP 22

AND

**IN THE MATTER OF AND PARCEL NO. OTHAYA/KIHUGIRU/398
REGISTERED IN THE NAME OF WAMBUGU NGERA (DECEASED)**

AND

**IN THE MATTER OF APPLICATION BY JOSEPH WANG'ONDU WAMBUGU
TO BE REGISTERED AS HAVING ACQUIRED TITLE TO LAND PARCEL
OTHAYA/KIHUGIRU/398 BY VIRTUE OF ADVERSE POSSESSION**

BETWEEN

JOSEPH WANG'ONDU WAMBUGU 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 14th January 2020, Joseph Wang'onde Wambugu (the Plaintiff) urges the Court to determine the following issues:
 - (a) Whether the Plaintiff has become entitled to the 0.1 acres out of Othaya/Kihugiru/398 by virtue of adverse possession;



- (b) Whether the Defendant's title to 0.1 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 0.1 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 he avers that he has been in an open, quiet and uninterrupted occupation and possession of the said portion of land measuring 0.1 acres for over 12 years. The Plaintiff asserts that he entered and occupied the portion of the land in the year 1998 even though the Defendant and other beneficiaries to the estate have been the absentee registered owners.
 3. The Plaintiff further avers that High Court Succession Cause No. 142 of 1992 relating to the estate of one Wambugu Ngera was recently concluded and that the Defendant was made the administrator of the estate. He asserts that since his entry onto the land, he has since built a permanent house thereon and a stone-wall gate. The Plaintiff further avers that when his wife passed away in the year 2009, he buried her on the 0.1 acre portion of land without any challenge from any quarter and that the Defendant's rights and interest over the land had since been extinguished.
 4. Cecilia Thongori Wanjeru sued in her personal and representative capacities as the administratrix of the Estate of Wambugu Ngera (the Defendant) is opposed to the Plaintiff's claim. In her Replying Affidavit sworn on 10th August 2020, the Defendant avers that she is the only surviving daughter of the late Wambugu Ngera who is the registered proprietor of the parcel of land known as Othaya/Kihugiru/398.
 5. The Defendant avers that her father died intestate in 1967 and that in the year 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 17th November, 2006 included the Defendant as one of the dependents but the same was met by protests.
 6. 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 he claims to have entered and occupied the property in 1998 yet High Court Succession Cause No. 142 of 1992 was on-going. It is the Defendant's case that the Plaintiff's occupation of the land was therefore never open, uninterrupted or peaceful.
 7. The Defendant accuses the Plaintiff of being an intermeddler who holds onto the land in disobedience of the said Succession Cause that was only recently determined on 29th November, 2019.

The Plaintiff's Case

8. At the trial herein, the Plaintiff (PW1) testified as the sole witness in his case. Relying on his Statement dated 14th January 2020, the Plaintiff reiterated the averments made in the Supporting Affidavit to the Originating Summons as his evidence-in-chief.
9. On cross-examination, PW1 conceded that the Certificate of Official Search attached to his Supporting Affidavit revealed that the land was registered in the name of the late Wambugu Ngera. He further told



the Court that he had entered the land in the year 1998 with the permission of one Ngugi Wambugu who was a son to the late Wambugu Ngera.

10. PW1 further testified that he did not buy the land as such but was just helping the said Ngugi Wambugu with food and other means of subsistence. PW1 told the Court the said Ngugi Wambugu had also since died and that since he did not leave behind any wife or child, it was PW1 who had buried him.

The Defence Case

11. On her part the Defendant called two witnesses who testified at the trial.
12. DW1 – Cecilia Thongori Wanjeru is the Defendant herself. She told the Court she was the last born child of Wambugu Ngera. DW1 further testified that following Wambugu’s death, the family filed Nyeri High Court Succession Cause No. 142 of 1992 upon whose conclusion the Court distributed the land to the family.
13. DW1 told the Court that while she resided on their land, the Plaintiff was occupying a portion which belonged to her step-mother. As an Administrator of the estate of her late father, she had not allowed the Plaintiff to enter their land.
14. On cross-examination, DW1 told the Court that the portion of land occupied by the Plaintiff belongs to her father Wambugu Ngera. She conceded that they did not inform the Plaintiff about the Succession Cause although the Plaintiff was at one point Summoneed to Court but failed to attend.
15. DW1 told the Court they had never taken any steps to remove the Plaintiff from the suit land since there was a case pending in Court. She further told the Court that the Plaintiff had brought policemen on the land when he was burying his wife and they could therefore not stop the burial.
16. DW1 conceded she was married and was not living on the land. She however told the Court the land belonged to Wambugu’s children and his grandchildren and that the Plaintiff was wrongly occupying the same.
17. DW2 – Thomas Gatutha Wahome is a grandson of the late Wambugu Ngera. He told the Court the Defendant is his aunt and that he was a beneficiary of the suit property.
18. DW2 testified that the Plaintiff was brought into the land in 1998 by one Ngugi Wambugu who was a son to DW2’s grandfather. The family instituted Succession Cause No. 142 of 1992. DW2 told the Court that even though the Plaintiff was aware of the case in Court, he proceed to enter and occupy the land.
19. On cross-examination, DW2 conceded that the Plaintiff had built a stone house with an iron gate on the 0.1 acre portion of the land. He admitted that the Plaintiff buried his wife on the land. He told the Court they had tried to stop the Plaintiff but he brought Policemen to the land and proceeded with the burial.

Analysis and Determination

20. I have carefully perused and considered the pleadings filed by the Parties 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.
21. By the Originating Summons dated 14th January 2020, Joseph Wang’ondu Wambugu (the Plaintiff) prays for a determination that he has become entitled to a portion of land measuring 0.1 acres which



portion is part of a larger parcel of land known as Othaya/Kihugiru/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 so far as the 0.1 acre portion is concerned.

22. In the end, 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 0.1 acre portion is concerned and to substitute his name therewith as the registered proprietor.
23. In support of his case, the Plaintiff told the Court that he had first entered that portion of the suit property in the year 1998 and that he had since developed the same by building a permanent house thereon complete with a stone-wall gate. The Plaintiff further told the Court that when his wife passed away in the year 2009, he had buried her on the land without any resistance from any quarter.
24. It was the Plaintiff's case that since the year 1998, he had enjoyed an open, quiet and uninterrupted possession of the 0.1 acre portion of the land without any challenge and that he had hence acquired his title thereto by way of adverse possession.
25. From a perusal of the Certificate of Official Search dated 9th January, 2020 attached to the Plaintiff's Supporting Affidavit and evidence herein, it was apparent that LR No. Othaya/Kihugiru/398 was on 24th September, 1958 registered in the name of one Wambugu s/o Ngera. It did emerge in the cause of the trial that the said Wambugu s/o Ngera died intestate way back in 1967 and that the Defendant herein, Cecilia Thongori Wanjeru is his sole surviving daughter and was recently appointed the administratrix of his estate.
26. 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 misguided as he claims to have entered and occupied the land in 1998 yet there was a High Court Succession Cause that had been filed in 1992 to determine the administration and distribution of the estate.
27. As was stated in *Mtana Lewa v Kabindi 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.”

28. 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 in the Affidavit in support of the Originating Summons or in his Statement how he came to occupy the land, this is what he told the Court during cross-examination:

“The Search Certificate shows the land was in the name of Wambugu Ngera. I entered the land in 1998.

I entered the land with the permission of Ngugi Wambugu who was the son to the registered owner. I did not buy. I was just helping Ngugi with food and other assistance ... Ngugi Wambugu has since died. He had no son or wife. I am the one who buried him. I did not know if that amounted to intermeddling with the estate of Wambugu Ngera.”



29. That indeed the Plaintiff entered into the suit land with the permission of a section of the family was not a matter in dispute. Giving his testimony-in-chief at the trial, Thomas Gatutha Wahome (DW2) confirmed their knowledge thereof when he told the Court thus:

“The Defendant is my aunt. I know the Plaintiff since 1998. He was brought to the land in 1998 by Ngugi Wambugu who was the son to my grandfather.

We did a Succession Cause No. 142 of 1992. The Plaintiff knew about it but nevertheless entered the land.”

30. It was apparent from the material placed before me that the Succession Cause being referred to by DW2 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 said cause on 29th 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 some 8.2 acres in total.

31. That would explain how the Defendant’s step-brother Ngugi Wambugu was able to “give” the Plaintiff the portion of land in dispute herein without any protest from the other members of the family.

32. 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 aforesaid, the Plaintiff herein was one of those who did not. From the Affidavits he swore herein, it was his case that he only learnt of the Succession Cause when it was nearing conclusion. Some two months after the Judgment of the Court which declared the Defendant herein as the sole administratrix of the Estate of Wambugu Ngera, the Plaintiff came to terms with the ramifications of the said Judgment and hence this claim for adverse possession.

33. As we have found herein above however, 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 he had dispossessed the family of the land and/or that the family had discontinued its possession of the suit land.

34. Having so obtained the land from Ngugi Wambugu, it was also self-evident that the Plaintiff could not escape the fate that befell the so-called purchasers in the Judgment delivered in the Succession Cause on 29th November, 2019. And this is what the Honourable Justice Jairus Ngaah 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. Except in so far as expressly authorized by this Act, or by any other written law, (1) 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.”

35. 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.”

36. 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 sanctioning what was otherwise an illegality. In that regard, it did not matter that the Plaintiff was unaware that his actions amounted to intermeddling for ignorance of the law is no defence.

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

38. Each Party shall bear their own costs.

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

In the presence of:

Mrs. Machira for the Plaintiffs

Mr. Makura for the Defendants

Court assistant - Kendi

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J. O. Olola

JUDGE

