



Thiong'o (Suing in her capacity as the administrator of the Estate of the Late Dedan Thiong'o King'ang'i) v Gicheru & 2 others (Environment and Land Case Civil Suit 1187 of 2015) [2023] KEELC 18330 (KLR) (15 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18330 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 1187 OF 2015
LN MBUGUA, J
JUNE 15, 2023

BETWEEN

JANE WANJIRU THIONG'O (SUING IN HER CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE DEDAN THIONG'O KING'ANG'I) PLAINTIFF

AND

PETER NDUNGU GICHERU 1ST DEFENDANT

SERAH N MUCHENE 2ND DEFENDANT

JOSEPH MUNGAI GICHERU 3RD DEFENDANT

JUDGMENT

1. This suit was filed by way of a plaint dated 19.11.2015, where the plaintiff claims that her father Dedan Thiong'o King'angi (deceased) is the registered sole proprietor of all those parcels of land known as Dagoreti/Uthiru LR No.1245,1246,1248,1249 and 1250 (suit plots) situate in Darogoretti. She accuses the Defendants of trespassing unto the said parcels of land. She seeks orders that the estate of Dedan Thiong'o King'angi be declared as the owner of suit plots and orders that the Defendants be enjoined from interfering with the said parcels. She also seeks costs of the suit.
2. The Plaintiff's claim is opposed by the Defendants who filed a joint statement of defence and counterclaim dated 28.12.2015. They aver that they purchased a portion of land from Dedan Thiong'o King'ang'i (deceased) sometimes in the year 1986. Dedan Thiongo' King'angi then showed them their portions which they have occupied since then. Their Counter Claim is that they have acquired title to such portions of the suit parcels which they occupy by operation of law, thus the plaintiff's title to the suit parcels has been extinguished and that Plaintiff's right of action is time barred. Further, they



seek an order that the Plaintiff holds the said parcel of land in trust for the Defendants. They also seek costs and interests.

3. In response to the Defendants' counterclaim, the Plaintiff filed a reply to defence and defence to counterclaim dated 24.2.2016. She denies the allegations in the counterclaim and contends that the Defendants' continued occupation of the suit property is forceful and fraudulent for the reasons that whilst they are in occupation, their claim that they had purchased the suit property from the deceased is false.
4. During the trial, the plaintiff Jane Wanjiru Thiong'o testified as PW1. She introduced herself as one of the administrators of the estate of Dedan Thiong'o. She adopted her witness statement dated 19.11.2015 as her evidence. She produced the 3 documents at page 7 of her bundle as P. Exhibit 1-3.
5. In her witness statement, she avers that the Defendants have trespassed and constructed on the parcels of land known as Dagoreti/Uthiru LR Numbers 1245, 1246, 1248, 1249 and 1250 which belong to her father Dedan Thiong'o kinga'ngi (deceased). That despite reporting the trespass to the police and provincial administration, they have refused to cease the trespass.
6. Upon cross-examination, PW1 stated that they sued Gicheru's family who are the Defendants on the basis that they own houses constructed on the suit plots. However, she cannot tell when the said houses were constructed. She further stated that she became administrator of the estate of her father on 13.3.2007 and by then, the Defendants were already on the suit land but she does not know how they entered the said land. Further, she does not know whether her father sold the land to the Defendants.
7. Referred to the sale agreement availed in Defendant's bundle of documents dated 4.2.1986, she stated that the same bears the signature of her late father who is indicated as vendor, ID No. 5696682/68, that it indicates that the seller was selling land to the Defendants and it was entered into in the presence of Kamonde Advocates.
8. Referred to the 2nd agreement still in defendant's bundle dated 27.3.1986, she stated that Dedan Thiongo kingangi (now deceased) acknowledges receiving money from the Defendants in fulfilment of the sale agreement. That Dedan Thiongo also acknowledges receipt of ksh.1,100/= vide an agreement dated 22.9.1988. Further, by an agreement dated 18.3.1995 and 21.9.1997, her father also acknowledged receipt of ksh.10,000/= and 45,000/= being part payment of balance outstanding on account of the sale agreement dated 4.2.1986. The acknowledgement agreements were also drawn by G. Kamonde Advocates and signed by all the parties.
9. She stated that the searches for parcels 1245-1250 are still in her father's name except parcel 1249 where one JJ Kinyanjui transferred to himself that land after her father had passed on.
10. She also stated that she had not been in the country, but when she came back and wanted to know the status of the suit plots, she was told to go to the Chief, Dagoreti. At the chief's place, they tried to settle the matter with the Defendants who admitted that the suit land was sold to them by one Wanjiru Jackson who co-owned the suit plots with her father.
11. She stated that the Defendants have built permanent and semi-permanent structures on the suit plots but she does not know if the structures were there when her father was alive as she was out of the country. Referred to P. Exhibit 3 which is a photograph, she stated that the same does not relate to the suit plot, it was placed in the wrong file.
12. Upon re-examination, PW1 stated that she was not in the country from 1982-2004 and that her father passed away on 11.2.2004 and at the time, the Defendants were on the suit land but she does not know whether her father had tried to evict them.



13. The Defendants called 2 witnesses, with the 1st Defendant testifying as DW1. He adopted his witness statement dated 7.2.2018 as his evidence. He also produced the 2 items in their list of documents dated 6.2.2018 as D. Exhibit 1 and 2.
14. In his statements, DW1 states that on 4.2.1986, he purchased 2 plots jointly with his brother and sister, the 2nd and 3rd Defendants from Dedan Thiongo Kingangi who was the registered as owner of LR No. Dagoreti/Uthiru 897 jointly with Wanjiru Jackson. They entered into a sale agreement, whereby the 2 plots cost them ksh.70,000/= each. The vendor received the entire purchase price and acknowledged the same through G. Kamonde Advocates.
15. The vendor subdivided the land into several plots; 1245-1250 and was selling the subdivision to several people who are in occupation. After subdivision, they occupy plot numbers 1247 and 1248. Immediately upon purchase, they took possession and have cultivated the plots and the vendor never interrupted their occupation for the last 40 years.
16. He stated that having paid the total purchase price and being in actual continuous and uninterrupted possession for more than 12years, their possession is adverse to that of the registered proprietor of the land or anyone claiming under them.
17. DW1 also stated that their father had purchased a piece of land from Wanjiru Jackson on the same parcel of land in 1969 and their mother is residing on the said land since then where she has permanent buildings.
18. When cross-examined, DW1 stated they did conduct a search on LR No. Dagoretti/Uthiru 897 before purchasing plots 1249 and 1248 which were a subdivision of the same. It was owned by Dedan Thiong'o King'angi jointly with Wanjiru Jackson but he dealt solely with Dedan Thiongo. The transaction was supposed to take 3 months. He stated that he did not breach the agreement. He completed his part of the agreement but he could not get hold of Thiongo who disappeared. They would write to him but he would tell them to wait and did not abide with the agreement. Dedan's lawyer then wrote to them through their lawyer but their lawyer has since passed on, thus he does not have such records.
19. He stated that they have built their houses on plot 4 and 5 and it is where Dedan showed them. He further stated that when they purchased the suit land, subdivision had not been done and he is not the one who did the subdivision, he was already on the plot when subdivision was done.
20. He stated that at the time of purchase, he gave his lawyer money, then his lawyer handed the money to Dedan Thiongo (deceased) but the lawyer has since passed on.
21. DW1 further stated that they started building houses on the suit land in 1986 and they have been there since then. He further stated that they have not been issued with a notice to vacate the suit land and no one has claimed it from them.
22. Upon re-examination, DW1 reiterated that they were paying money to Thiongo through Mr kamonde, their lawyer by instalments. They later cleared the payments and Thiongo acknowledged the same. He also stated that Thiongo bought 1 acre from Wanjiru Jackson and this is the land he sold to them before the subdivision which took place after they had settled on the suit land.
23. He further stated that while the time for completion was 3 months, Thiongo had no problem with them paying slowly but after they finished paying, he fled.
24. DW2 is the 2nd Defendant. She adopted her witness statement dated 7.2.2018 as her evidence. It mirror's DW1'S written statement.



25. When cross-examined, DW2 stated that she bought her land from Dedan Thiongo (deceased) in 1986 when the land was LR No. Dagoretti/Uthiru 897 and it had not been subdivided. She currently occupies it and neighbors her brother. She added that Dedan Thiongo allowed them to occupy that land pursuant to the sale agreement between them; they paid him via instalments through their advocate and Thiongo's acknowledged receipt.
26. She also stated that the sale agreement shows that the transaction was to be completed in 3 months (on 30.6.1986). However, Dedan told them to continue occupying. By June 1986, they had paid half the purchase price. She added that Thiongo would go to the suit parcel physically to tell them to wait for subdivision and they chose to wait, thus they did not take legal action against him.
27. She stated that while she does not know the date of subdivision of LR No. Dagoretti/Uthiru 897, it was done much later. She is not aware that the land was transferred to one Johnson Joshua Kinyanjui in the year 2004 as she did a search when it had an old number, 897 and was in the name of Dedan Thiongo and Wanjiru Jackson.
28. She further stated that she occupied that land from 1986 and they have permanent buildings. She added that they were to go to land control, but she could not recall if she applied for consent at the control board. DW2 also stated that she has no claim for parcels 1246, 1245 and 1250.
29. When re-examined, she stated that on the ground, she is able to point out their parcels as this is where they occupy. She further stated that they did not file any case in court, they only went to the chief with Thiongo and he said that he was pushing to have the title issued to them.
30. The Plaintiff's written submissions are dated 19.12.2022 where she argues that the defence and counterclaim herein should be struck out for ambiguity as the same does not describe the suit property. On this point, the case of *A & B & Another v R.B (2015) eKLR* was cited.
31. The Plaintiff points out that in their witness statements, the Defendants claim that they are in occupation of subdivision parcels Dagoretti/ Uthiru 1247 and 1248, but during the hearing DW1 stated that they occupy 1248 and 1249 while DW2 who allegedly lives with the 3rd Defendant claimed that they occupy 1247 and 1248. She relies on the cases of *Hilary Jutine Ileri & Another v Fredrick Kahama Chege & Another [2015] eKLR*, *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR*, *Raila Amolo Oding & Another v IEBC & 2 others [2017] eKLR*, *Daniel Otieno Migore v South Nyanza Sugar Co Ltd [2018] eKLR*, *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others [2013] eKLR*, *Grace Adhiambo Akumu v Independent Electoral & Boundaries Commission & 2 others [2018] eKLR*, *Independent Electoral and Boundaries Commission & Ano v Stephen Mutinda Mule & 3 others [2014] eKLR* to submit that a party is bound by their pleadings.
32. The Plaintiff argues that the sale agreement dated 4.2.1986 alleged to have been entered into between Dedan Thiongo (deceased) and the Defendants must be disregarded for failing to give evidence to any matter that is specifically pleaded in the defence and counterclaim. She adds that the defendant's claim under the sale agreement is barred under Section 4 of the *Limitation of Actions Act*.
33. She further submits that the Defendants breached the said sale agreement by their failure to pay the full purchase price, and as such cannot claim purchaser's interest over the same agreement they breached. To this end, reference has been made to the case of *Gathoni v Kenya Co-operatives Creameries Ltd [1982] KLR*, the case of *Iga v Makerere University [1972] E.A* as well as the case of *South Nyanza Sugar Company Limited v Dickson Aoro Owuor [2017] eKLR*.



34. The Plaintiff also submits that the Defendant's claim on adverse possession is time bared for prematurity. She argues that Thiong'o (deceased) did not become owner of the suit property until 25.3.2003, thus he could not have been adversely dispossessed by the Defendants before this date.
35. She also submits that the Defendants did not produce any proof of ownership of occupation of the suit land.
36. She further submits that if the allegation by the Defendants is that the deceased allowed them to take possession courtesy of the sale agreement is anything to go by, then they were on the suit property with the permission of the deceased subject to the completion of the sale agreement and time could only have started running after full payment of the purchase price. Since there is no proof that the entire purchase price was paid, the time limit for adverse possession has never started running. She relies on the case of Wambugu v Njuguna (1983) KLR 172, James Maina Kinya v Gerald Kwendaka [2018] eKLR, Ruth Wangari Kanyagia v Josephine Muthoni Kinyanjui [2017] eKLR and Titus Kigoro Munyi v Peter Mburu Kimani civil Appeal No.28 of 2014 [2015] e KLR.
37. The Plaintiff also submits that the sale agreement is invalid as it states that the Defendants were buying sub divisional portions 4 and 5, but it does not indicate which exact parcel it is being referred to. She adds that the agreement is invalid for lack of land control board consent as provided under Section 6 and 8 of the *Land Control Act*. She relies on the case of David Sironga ole Tukai v Francis Arap Muge & 2 others [2014] eKLR and the case of Willy Kimutai Kitilit v Michael Kibet [2018] eKLR.
38. It is also the Plaintiff's submission that she is not holding the suit property in trust for the Defendants as they have not shown that they qualify for creation of a trust over the suit property. She adds that Section 7 of the *Land Control Act* would be the only option left for the Defendants if they were to prove existence of a sale agreement on payments made, but they did not specifically plead and prove the same.
39. The Plaintiff also relies on the case of Koyomkei Multi-purpose Co-operative Society Limited and 17 others v Rael Chepng'etich koech [2019] eKLR to submit that the Defendant's occupation does not grant them the right to defeat the Plaintiff's legal and registered rights over the suit property thus the defence and counterclaim ought to be dismissed.
40. On their part, the Defendants filed submissions dated 30.3.2023. They submit that their occupation of the suit property was not a secret, it was known by the Plaintiff's deceased father and the Plaintiff herself, but Dedan Thiong'o never took any step to evict them.
41. They argue that since the Plaintiff claims that they are trespassers, she ought to have filed a claim for trespass by 2007, 3 years after Dedan Thiongo was registered as owner of the suit land as contemplated by Section 4 (2) of the *Limitation of Actions Act*.
42. The Defendants also argue that the Plaintiff was not able to prove their occupation on all the parcels of land cited and she failed to procure the evidence of a qualified surveyor to prove that the Defendants trespassed in all the aforementioned parcels. They point out that since the Plaintiff stated that she is in court with one JJ Kinyanjui over ownership of Dagoretti/Uthiru/1249, she cannot seek orders on property which does not belong to her.
43. On the issue of obtaining consent from the land Control Board, they submit that the vendor was obliged to seek the same within 6 months since he was the custodian of the title. They rely on the case of Njuguna Ndatho v Masai Itumo & 2 Others [2002] eKLR as well as the case of Stephen Njoroge Kiboli v David Mwaele Nguli [2019] eKLR to buttress their claim.



Determination

44. Having regard to the pleadings of the parties, the evidence tendered and the rival submissions, I deem it fit to frame the issues for determination as follows;
- a. Are the Defendants trespassers on the parcels of land known as Dagoreti/Uthiru LR No.1245, 1246, 1248, 1249 and 1250?
 - b. Whether the claim of adverse possession and or trust advanced by the defendants is merited.
45. The Plaintiff's claim is that the Defendants are trespassers on the parcels of land known as Dagoreti/Uthiru LR No. 1245, 1246, 1248, 1249 and 1250 registered in 2003 to Dedan Thiong'o Kinga'ng'i (deceased). It emerged during the hearing of the case from the testimony of DW1 and DW2 that the said parcels are a subdivision of a larger parcel of land known as LR No. Dagoretti/Uthiru 897 registered jointly to the said Dedan and one Wanjiru Jackson.
46. The Defendants claim that before subdivision of LR No. Dagoretti/Uthiru 897, they purchased the land described in their sale agreement dated 4.2.1986 as; "sub -divisional portions numbered "4 and 5" of Dedan Thiong'os (deceased) share of the piece of land known as Dagoretti/Uthiru/164 for ksh.140,000/=.
47. Under clause 4 of the said agreement, completion was to be on 30.6.1986 and the purchasers (Defendants) were to take possession upon paying the full purchase price. Ksh.20,000/= was paid on execution. Evidence tabled by the Defendants indicate that they paid their last instalment of ksh.45,000/= on 21.9.1997.
48. DW1 and DW2's evidence that they took possession of the suit land in 1986 is uncontroverted as PW1 told the Court that she was outside the country between 1982-2004. Further, she told the court that when she returned in 2004, she found the Defendants already in occupation and they had built permanent and semi-permanent houses. The possession thereof was therefore open, uninterrupted and based on a claim of right as purchasers.
49. Section 3 (1) of the Trespass Act, Cap 294 provides that:
- " Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on private land without the consent of the occupier thereof shall be guilty of an offence."
50. From the evidence analyzed above, the Defendants cannot be said to be trespassers.
51. Are the Defendants in adverse possession of the portions of land they occupy? In *Peter Mbiri Michuki v Samuel Mugo Michuki* [2014] eKLR, the Court of Appeal stated that;
- "Our reading of the record shows that the plaintiff entered the suit property pursuant to a sale agreement in 1964 as a bona fide purchaser for value. The entry in 1964 was with permission of the Appellant qua vendor. In the case of *Public Trustee v Wanduru*, (1984) KLR 314 at 319 Madan, J.A. stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run."



52. In *Sisto Wambugu v Kamau Njuguna* [1983] eKLR, the Court of Appeal stated that;

“... once payment of the last instalment of the purchase price had been effected, the purchaser’s possession became adverse to the vendor and that he thenceforth, by occupation for twelve years, was entitled to become registered as proprietor of it.”

53. The last instalment paid by the defendants to the deceased was on 21.9.1997. It follows that time started running from this date for purposes of computation of time, of which the requisite period of 12 years had been met by the defendants in so far as their claim of adverse possession is concerned.

54. An argument has been advanced by the plaintiff in their submissions that Dedan only came to own the suit parcels in year 2003, hence the claim of adverse possession cannot run before that year. True, the certificates of official search availed by the plaintiff indicate that Dedan was registered as the owner of the suit parcels in year 2003. In the case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, the court held that;

“The entry and occupation must be with, or maintained under, some claim or colour of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else. In other words, the intruder must have some apparent title, the appearance or semblance of title but not the reality of it, for the expression “colour of title” in law means, that which is title in appearance but not in reality. He must have with him his own apparent right which affords him some semblance of title under which he claims to found his occupation of the land independently of anyone else’s power.”

Also see *Kweyu vs Omutut* [1990] KLR 709.

55. The color of right or title in which the defendants are pegging their claim is clearly explained by DW1 and 2. They bought the suit parcels way back in year 1986 from Dedan when the land was not subdivided.

56. In any event the mere change of ownership of the land which is occupied by another under Adverse Possession does not interrupt such person’s adverse possession – see *Githu v. Ndeete* [1984] KLR 776. Thus any change of ownership of the suit land through the decades does not in any way affect the defendants claim of adverse possession on the said suit parcels.

57. Further, there is evidence that the transaction between Dedan Thiong’o (deceased) and the Defendants was largely frustrated by the deceased who failed to obtain the requisite consent and to transfer the portions occupied by the Defendants to them. Instead of transferring their portions to them, he caused subdivision of the parcels known as Dagoreti/Uthiru LR No.1245, 1246, 1248, 1249 and 1250 which were registered in his name.

58. In *Cathy Alucia Jebor Kiplagat v Vincent Komen Krelkut* [2018] eKLR, the court stated as follows concerning adverse possession where a registered owner frustrates a buyer who is in possession;

“..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 or under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner”.



59. What resonates from the analysis herein is that the counterclaim of the defendants has been proved in so far as their claim through operation of the law is concerned. Their claim however is only in respect of parcels they occupy which they have identified as parcels 1247 and 1248.

Final orders

60. In conclusion, I hereby grant orders in the following terms.

1. Plaintiff's suit is hereby dismissed.
2. The counterclaim of the defendants is hereby allowed to the extent that the defendants are declared to be entitled to the parcels Dagoreti/ Uthiru/1247 and 1248 by way of adverse possession.
3. An order is hereby issued for the defendants to be registered as the owners of parcels Dagoreti/ Uthiru/1247 and 1248.
4. On costs, I direct that each party should bear their own costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JUNE, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

M/s Maina for plaintiff

Oyugi for defendant

Court Assistant: Philis

