



**Gichunji v Joreth Limited (Environment & Land Case 513 of 2012)
[2023] KEELC 20439 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20439 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 513 OF 2012
LN MBUGUA, J
SEPTEMBER 28, 2023**

BETWEEN

NJUGUNA GICHUNJI PLAINTIFF

AND

JORETH LIMITED DEFENDANT

JUDGMENT

The Pleadings

1. The Plaintiff commenced this suit vide Originating Summons dated August 15, 2012 and amended on January 24, 2018 substituting the original Plaintiff one Njuguna Gichungi (deceased) with his son Joseph Chege Njuguna.
2. The Plaintiff seeks the following orders;
 - a. That Njuguna Gichungi be declared to have acquired title by adverse possession to the suit premises known as LR No. 13330/438 also known as Plot No. 589 Thome Farmers No. 5 Limited being a portion of LR No. 13330 and a permanent injunction restraining the Defendant from interfering with the Plaintiff's possession and title to the suit property.
 - b. That the registration of Joreth Limited as proprietor of the Plot known as LR No. 13330/438 also known as Plot No. 589 in Thome Farmers No. 5 Limited or any other title derived from the said LR No. 13330/438 also known as Plot No. 589 being a portion of LR No. 13330 be cancelled forthwith and the Chief Land Registrar do rectify the register and issue title in the name of the Plaintiff as the registered proprietor of the suit property being LR No. 13330/438 also known as Plot No. 589, Thome Framers No. 5 Limited being a portion of LR No. 13330 in place of the Defendant or anyone deriving title from the Defendant.
 - c. The costs of these proceedings be borne by the Defendant.



3. The summons are based on the Plaintiff's Supporting Affidavit sworn on August 15, 2012 as well as his Supplementary Affidavit dated August 5, 2013.
4. The defendant opposed the suit vide a Replying Affidavit sworn by its special Manager, one Peter Mungai on July 25, 2013 where the claim of the plaintiff is denied. The deponent avers that the defendant was registered as the owner of the suit property in year 2000, but the title was an amalgamation of titles L.R. 4920/3 and 4921/3 registered in the name of the defendant in 1950s.
5. He avers that in year 1992, the defendant filed a case HCCC 6206 OF 1992 against the trespassers of the suit land, but that the plaintiff was not one of them.

The Evidence

6. The case of the Plaintiff was advanced by 3 witnesses. PW1 was Joseph Chege Njuguna, a son of the initial plaintiff. He adopted his witness statement dated June 7, 2021 as, well as the original pleadings filed by his deceased father, Njuguna Gichungi including his witness statement dated August 15, 2012 as his evidence. He also produced the documents in Plaintiff's trial bundle dated August 15, 2012 as P. Exhibit 1-4 as well as 5 items in his late father's supplementary affidavit sworn on August 5, 2013 as P. Exhibit 5-9.
7. In his witness statement, he states that in July 1979, his father Njuguna Gichungi purchased a plot in the entity known as Thome Farmers No. 5 Limited for which he paid the full purchase price and other dues to the company and was issued with a ballot card and a share certificate No. 663 for 1 share which represented Plot No. 589 on the ground. The father had however been in possession of that land since 1975.
8. That sometime in 2002, the father leased the suit land to one Peter Waihumbu Muigai (PW3) who developed a permanent restaurant known as Jambo Grill on the suit plot.
9. He states that in year 2012, the said Peter Muigai informed his father that some strangers had come to the suit plot claiming that the Defendant had offered it to them for sale. Upon inquiry, the said Muigai discovered that Chege Wainaina & Company Advocates intended to sell the suit plot on the instructions of the Defendant unless his father, Njuguna Gichungi paid the Defendant ksh.4 million as purchase price which he rejected as the plot was his.
10. He further states that although the mother title is still in the Defendant's name, any claim to title by the Defendant over the suit plot has been extinguished by operation of the law as the plaintiff has acquired the suit plot by adverse possession, having been in uninterrupted and open occupation of the suit property since 1979 which is now a period of over 40 years.
11. He also states that they have established from the lands office that the subtitle in respect of plot No. 589 within LR No. 13330 has not been issued and is still contained in the mother title registered in the 1st Defendant's name.
12. Upon cross-examination, PW1 stated that he was born in 1969 and that he has lived in Kigumo, Githunguri where his father also lived but they would sometimes stay in Nairobi.
13. He further stated that he is aware that his father did due diligence before purchasing the suit land though he has not attached a search. That although it is stated in the original Originating Summons that the suit land was sold from the Defendant to Thome Farmers No. 5 Limited, he has not seen the sale agreement to that effect. He also stated that the purpose of the cheques on page 19 - 21 of the Plaintiff's bundle is not indicated and that he has no title to parcel 13330/438.



14. He reiterated that his late father leased the suit plot in 2002, of which their tenant Mr. Muigai has operated the Jambo Grill facility since then, but the tenant was not aware of Joreth's suits when he was leasing the suit land. He added that he was not aware that in the case 6206/92, the Defendant had sued all the trespassers.
15. PW1 also stated that at page 10 of his bundle, he has referred to the affidavit of Joseph Wambua but he is not aware that the suit land was preserved via a court. He added that the title for parcel 13330 is dated February 19, 2000 and it is at page 5 of his bundle of documents.
16. Upon re-examination, PW1 stated that as per the Defendant's admission in the witness statement of David Karanja dated June 15, 2021, the Defendant's title came about due to amalgamation of their own titles so they have owned the suit land since 1950's. He further stated that his father was shown the physical location of the suit plot in 1979 and he took possession. At the time, there was no title for 13330/438 as this came about during amalgamation.
17. He reiterated that he was not aware of the case No. 6206 of 1992, and he did not know its outcome.
18. PW2 was Francis Kimani Njuguna another son of the initial plaintiff. He adopted his witness statement dated June 17, 2021 as his evidence. His evidence is more or less similar to that of his brother but he added that he was working for Kenya Breweries which was in the vicinity of the suit land. He used the plot to store sand, stones and ballast and also cultivated the said land.
19. In cross examination, PW2 confirmed that his father leased the land to Waihumbu.
20. PW3, Peter Waihumbu Muigai adopted his witness statement dated November 5, 2019 as his evidence. He stated that he carries on a business under the name of Jambo Grill which is located on LR No. 13330/438 also known as Plot Number 589 along Thika Road since 2002, having leased the plot from the Plaintiff who was in possession and occupation by then.
21. Upon cross-examination, PW3 stated that prior to leasing the premises in year 2002, there were iron sheet structures and the plot was fenced.
22. The Defendant called 1 witness, namely Jonathan Ciano DW1. He adopted his witness statement dated June 15, 2021 as his evidence. He produced 3 documents in the Defendant's bundle dated July 25, 2013 as D. Exhibit 1-3.
23. DW1 a director of the Defendant stated that the latter is the registered owner of parcel LR No. 13330 having been so registered on December 19, 2000. That the said title was as a result of amalgamation of the Defendant's 2 titles known as LR No. 4920/3 and 4921/3 which titles were held by the defendant since the early 1950's. He contends that parcel 13330 was subsequently subdivided into several plots including LR Number 13330/438 which was not sold, let, assigned or licensed to anyone thus structures currently erected thereon are illegal.
24. He also states that they had problems with illegal occupation of their land, thus the Defendant filed a case HCCC No. 6206 of 1992 against several identifiable trespassers who had trespassed on LR No. 13330. The said suit was determined in 2002 by a consent order in which parties agreed that the illegal occupants would purchase the properties at an agreed price from the Defendant herein.
25. He adds that the Plaintiff did not legally and rightfully buy the suit plot from the Defendant, yet he continues to occupy the same to the detriment of the Defendant.



26. Upon cross-examination, DW1 stated that he is familiar with the outlook of the suit land from far and he is not disputing the existence of the buildings thereon as depicted in the photographs availed by the plaintiff.
27. DW1 also stated that the Defendant has never sued the Plaintiff in singular. He further stated that Thome 5 Limited intended to buy their land but the sale did not go through.
28. He is aware that the mother title was subdivided by Kamwere and associates and the said subdivision was effected by Thome 5 Limited and the Defendant did not object to the said subdivision. However, the Defendant took Thome 5 to court with 23 others in Case No. 6206 of 1992. The judgment was against anyone who had occupied the property but Njuguna Gichunge was not a party to that suit.
29. Upon re-examination, PW3 stated that the judgment in 6206/1992 was directed to all who had occupied the suit property, and that he had availed the order issued in the said matter.

Submissions

30. The submissions of the plaintiff are dated May 3, 2023 where it is argued that plaintiff's occupation and possession of the suit land since 1979 has been uncontroverted, and that such occupation was without the Defendant's permission. Further, the said occupation was open and continuous, without interruption, where the developments built on the property is clear evidence of possession by the plaintiff. To this end, reference was made to the cases of Ndathi v Itumo & 2 others (2002) 2 KLR and C.A No. 213 of 1996 Benjamin Murima & others v Gladys Njeri (Unreported).
31. It was submitted that the fact that there was a change of numbering of title to the suit property by the amalgamation of 2 previous titles into 1 did not affect plaintiff's claim. On this point, reference was made to the case of Githu v Ndeete, 1964-KLR 776.
32. It was also submitted that whereas the Defendant purports to have filed Case No. 6206 of 1992 against some persons trespassing on the mother title LR No. 13330, the said suit has no relevance to this suit since it was determined by a consent order dated June 27, 2000 which is not binding to the plaintiff who was not a party to that suit.
33. The plaintiff avers that 12 years from 1979 expired in 1991, such that even by the time of filing that case in 1992, the Defendant's title had been extinguished by adverse possession.
34. The Plaintiff also submits that in Patrick Magu Mwangi v Joreth Limited 2015 eKLR, where facts and circumstances were exactly similar to those obtaining in this suit, the Court of Appeal found that the Appellant was entitled to be registered as proprietor of the suit property through adverse possession.
35. He adds that in ELC 101 of 2020 Edward Mbogo v Joreth Limited, ELC No. 512 of 2012 Nelson Njoroge Githina v Joreth Limited and another and in ELC No. 610 of 2012 Haree construction Limited v Joreth Limited & 7 others, the Courts upheld the Plaintiffs' claim by adverse possession.
36. The submissions of the defendant are dated June 6, 2023 where they address the question as to whether the Plaintiff has a claim to the suit land based on adverse possession. It was submitted that for a party to succeed in a claim of adverse possession, they must meet the criteria of a peaceful occupation which is open and continuous possession for a period of 12 years or more.
37. It was argued that the Plaintiff has not provided any proof of their possession of the suit land since 1979. That there was no evidence of approved developments, activities prior to 2002, nor lease agreements and that the photographs are undated. To this end, reference was made to the case of John Mbatia Kibe v Joash Adamba [2018] eKLR, where it was stated that mere temporary structures in photographs



is not evidence of possession. The Defendant also relies on the case of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR, the case of *Karuntimi Raiji v M'Makinya M'itunga* [2013] eKLR as well as the case of *David Matheri Waruinge v Joreth Limited & another* [2020] eKLR.

38. It also argues that time for adverse possession stops running when a suit is filed in Court by the owner of the land against the trespassers. It points out that it sued all trespassers in 1992 in HCCC 6206 OF 1992 which was finalized by a consent entered in 2002, therefore the time for adverse possession ceased to run between the years 1992 and 2002. Thus Plaintiff cannot claim to have met the statutory requirement of possession of the suit land for a period of 12 years before filing this suit in 2012.
39. It was also submitted that the cases cited by the Plaintiff being ELC 101 of 2020 *Edward Mbogo v Joreth Limited* and *Patrick Magu Mwangi v Joreth Limited* 2015 eKLR cannot be used to persuade this court since in those cases, there was evidence of possession which guided the Court in finding possession of the suit property. He adds that case No. ELC 610 OF 2012 *Harree Construction Limited v Joreth*, is the subject of the Court of Appeal.

Determination

40. The sole issue for determination is whether the Plaintiff has established that he is entitled to the premises known as LR No. 13330/438 also known as Plot No. 589 Thome Farmers No. 5 Limited by way of adverse possession.
41. The Ingredients of adverse possession were aptly stated in the case of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR and *Titus Mutuku Kasuve v Mwaani Investment Limited & 4 others* [2004] eKLR, that a claimant must prove non-permissive, open, notorious, exclusive occupation of the land for the statutory prescribed period of 12 years or more without interruption. It is a situation where a claimant takes Possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for that statutory period.
42. In *Virginia Wanjiku Mwangi v David Mwangi Jotham Kamau* [2013] eKLR the Court stated that:-

“The Applicants claim is based on principles of adverse possession whose import is that any person who claims to be entitled to land by adverse possession must prove possession of the land exclusively and openly as of right and without interruption for a period of 12 years, Adverse possession requires basic conditions being met to perfect the title of the adverse part”
43. The Plaintiff stated that he took possession of the suit property in 1979. He argued that by the time of filing this suit, he had been in possession of the suit land for a period of more than 30 years which is beyond the threshold of adverse possession as per Section 7 of the Limitations of Actions Act.
44. The documents availed by the plaintiff in their list dated August 8, 2012 give an account of how the plaintiff entered the suit land. He was issued with a share certificate dated July 29, 1979 issued by Thome Farmers No.5 Limited which translated to Plot No. 589. It was the plaintiff's case that the Defendant had sold LR No. 4920/3 and 4921/3 to Joreth Limited and the land was subdivided and shareholders of Thome Farmers Limited began to take possession as from 1979.
45. The plaintiff's witnesses have given a consistent account of their occupation of the land from 1979, of which the land was leased to PW3 in year 2002. The defendants have not rebutted that evidence of occupation. If anything, the defendants do not appear to have ever had possession of that land, and DW1's evidence is that he only sees buildings thereon from afar. Further at paragraph 1 of the witness statement of DW1 (Jonathan), he admits that “the plaintiff has continued to occupy the suit premises.”



46. The defendant contends that the sale of the land to Thome did not materialize, thus the filing of the suit no 6206 of 1992. This far, it is apparent that any occupation of the suit land by the plaintiff was without permission of the defendant.
47. DW1 did admit that in the year 2000, the parcel LR No. 13330 came to be from an amalgamation of parcels 4920/3 and 4921/3 held by the defendants since 1950s. It follows that the amalgamation does not affect calculation of time for purposes of adverse possession. It does not change the fact that the suit property was hived from the parcels which were eventually amalgamated.
48. Further the 1st Defendant's evidence that the Plaintiff's possession of the suit land was interrupted by the Defendant's filing of HCCC 6206 of 1990 does not hold water. In the said matter, the Defendant had sued 23 Defendants who occupied various portions of parcel LR 13330. DW1 admitted that the Plaintiff was not a party to the said suit. Therefore, the consent entered therein cannot be said to bind the Plaintiff. This conclusion is assisted by the findings of the Court of Appeal in Patrick Magu Mwangi Kimunyu v Joreth Limited [2015] eKLR where a similar issue was raised. It follows that plaintiff's occupation of the suit land was not interrupted from year 1979 to date.
49. In the final analysis, I find that plaintiff has proved his claim of adverse possession in respect of the suit land. I hence proceed to give the following orders;
- I. It is hereby declared that the estate of Njuguna Gichunji is entitled to LR No. 13330/438 also known as Plot No. 589 Thome Farmers No. 5 Limited by way of adverse possession.
 - II. An order is hereby issued for the registration of parcel LR No. 13330/438 also known as Plot No. 589 Thome Farmers No. 5 Limited to the Estate Of Njuguna Gichunji.
 - III. The production of the original title for parcel 13330/438 is hereby dispensed with in the implementation of this judgment.
 - IV. Each party is to bear their own costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF SEPTEMBER, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Kingara for plaintiff

Njueni holding brief for Mrs Wangai Koech for Defendant

Court Assistant: Eddel

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