



**Njogu v Njogu & another (Environment & Land Case E005 of 2021)  
[2023] KEELC 20283 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20283 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE E005 OF 2021**

**JG KEMEI, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**KEZIAH WANJA NJOGU ..... PLAINTIFF**

**AND**

**JOSEPH NGETHE NJOGU ..... 1<sup>ST</sup> DEFENDANT**

**JOSEPHINE WANJIKU KAMITHA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Vide an Originating Summons dated the 2/2/2021 the Plaintiff filed suit against the Defendants seeking orders as follows;
  - a. THAT Keziah Wanja Njogu be declared to have acquired title to the parcel of land comprised in title number GITHUNGURI/GITHIGA/461 by reason of adverse possession thereof since 1992 before it was subdivided into parcels title number GITUNGURI/GITHIGA/461 and GITHUNGURI/GITHIGA/5744.
  - b. THAT Joseph Ng'ethe Njogu's title to the parcel of land comprised in the title number GITHUNGURI/GITHIGA/461 was extinguished upon expiration of a period of twelve (12) years since the Plaintiff took possession in 1992.
  - c. An order of this Honourable Court that the Land Registrar Kiambu do rectify the register by the cancellation of the subdivision of parcel GITHUNGURI/GITHIGA/5743 and GITHUNGURI/GITHIGA/5744.
  - d. An order that the Land Registrar, Kiambu to register the Plaintiff as the proprietor of parcel title number GITHUNGURI/GITHIGA/461 in place of Joseph Ng'ethe Njogu.
  - e. THAT the costs of these proceedings be borne by the Defendants.



2. The Summons are based on the Supporting Affidavit of Kezia Wanja Njogu sworn on the 2/2/2023.
3. The 1<sup>st</sup> Defendant denied the Plaintiff's suit and contended that his mother transferred the suit land to him in 1997 in fulfilment of a debt which he paid on her behalf in satisfaction of the decree in HCCC No 613 of 1993 – Unga Maize Millers Limited Vs Jane Wambui Njogu. That being the registered owner he subdivided the suit land into two portions; parcels 5743 and 5744 and caused them to be registered in the names of the Defendants respectively. That the Plaintiff moved onto the land in 1992 and lived thereon with the permission of his mother and her demise in 2008 he extended the permission to her and therefore the claim of adverse possession does not lie.
4. The 2<sup>nd</sup> Defendant did not file any defence to the Plaintiff's claim.
5. The Plaintiff presented three witnesses in support of her case. PW1-Keziah Wanja Njogu relied on her witness statement on record dated the 4/10/21 and produced documents marked as PEX No 1 - 4. That she and the 1<sup>st</sup> Defendant are siblings being the children of John Njogu and Jane Wambui Njogu, all deceased. That the suit land parcel 461 was initially allocated to her grandfather who gave her parents to build their matrimonial home thereon. That Njogu died in 1983 and the property devolved to her mother Wambui. That she moved onto the land in 1992 with her children and has lived there uninterrupted to date. It was her evidence that the suit land was registered in the name of the 1<sup>st</sup> Defendant in 1997 to hold in trust for himself and the other siblings. That they are 5 siblings in total but are survived by three. James Kimani Njogu and Stephen Ndichu Njogu are deceased. That the 1<sup>st</sup> Defendant was given family land at Githurai 44 in Nairobi and the suit land was to be shared with the rest of the siblings. That the 1<sup>st</sup> Defendant has never lived on the suit land. That her two brothers and mother were buried on the suit land. That he discovered in 2021 that the 1<sup>st</sup> Defendant had contrary to the trust subdivided the land into two portions and registered them in his name and that of the 2<sup>nd</sup> Defendant who is a complete stranger to her.
6. In cross she added that she had been married but when her relationship broke down she returned to the suit land in 1992 and her mother allowed her to stay on the land until her demise in 2008. That the land was registered in the name of Ngethe Mungai, her grandfather in 1963. That they lodged cautions on the land after they discovered that it had been transferred to the 1<sup>st</sup> Defendant. That in 2000 she leased a portion of the land to Hannah Wanjiru Kabaya but was stopped by the 1<sup>st</sup> Defendant claiming the land belonged to him. (See the lease agreement dated the 16/3/2009).
7. PW2 – Jane Wamboi Wanja stated that she is the daughter of the Plaintiff and that the 1<sup>st</sup> Defendant is her uncle. She relied on her witness statement dated the 23/7/2021 as her evidence in chief. That she and her mother have lived on the suit land since 1992 and no one has attempted to remove them let alone the 1<sup>st</sup> Defendant. That the lands belonged to her grandmother who died in 2008. That the 1<sup>st</sup> Defendant transferred the land to his name in unclear circumstances and that may explain why her grandmother lodged a caution on the register in 2000.
8. PW3 - Catherine Wanjiku Njogu relied on her witness statement dated the 23/7/21 and stated that she is the sister of the Plaintiff and the 1<sup>st</sup> Defendant. She stated that the suit land was registered in the name of the 1<sup>st</sup> Defendant as the first born as a trustee on their behalf and that it had been agreed in a family meeting that the 1<sup>st</sup> Defendant would take the Githurai 44 land and relinquish the suit land to the other siblings. She was emphatic that the 1<sup>st</sup> Defendant never paid any monies on behalf of their mother in satisfaction of any decree. That the transfer of the land was in 1997 and the proclamation came in 1998 and therefore the two transactions are at variance. In addition, she distanced herself from Catherine Wanjiku Mararo who is a beneficiary in the estate of the late Rahab Wanja Kimani, her grandmother. She however informed the Court that her late mother was a beneficiary of the estate of her grandmother



- of a land in Kiambaa which is yet to be distributed. That she and the Plaintiff caused a restriction to be placed on the land. That her brother James Kimani Njogu and her mother also cautioned the title but the cautions were removed.
9. The Defendants case was presented by two witnesses in support of their defence. DW1- Joseph Ngethe Njogu stated that he is the registered owner of the suit land. He relied on his witness statement dated the 27/10/21 as his evidence in chief and produced the documents marked as DEX1-15 in support of his defence. That the land belonged to his father's Aunt namely Charity Wanjiku and later registered in the name of Ngethe Mungai, his grandfather to hold in trust for his father as John Njogu was in his infancy then. That Njogu died in 1983 before the land was transferred to him and therefore the land devolved to his mother Jane Wamboi Njogu. That upon the death of his father in 1983 her mother closed the wholesale shop that his father had established at Ndumberi, Kiambu. That his father's second wife, the 2<sup>nd</sup> Defendant with her two children vacated the premises and left.
  10. That her mother had been sued by Unga Maize Millers Limited in the HCCC No 613 of 1996 (Unga Maize Millers Limited Vs Jane Wambui Njogu T/A Njogu Stores) for recovery of the sum of Kshs 365,969.95 as shown in the proclamation dated the 19/5/1998. That his mother sought his help and he agreed to bail her out and in return she transferred the suit land to him in 1997 and he allowed his mother to stay on the land. That later the Plaintiff joined her and again extended the same permission to her and her children. That after the demise of his mother in 2008 he continued to allow the Plaintiff to reside on the suit land. That he stopped Keziah from renting the suit land in 2009 as she did not own it and had not sought his consent and authority. That later the Plaintiff and PW3 caused a restriction to be registered on the suit land, which restriction was duly removed in 2011. That thereafter he subdivided the suit land into two portions and caused one of the portions to be registered in the name of the 2<sup>nd</sup> Defendant, his step mother for the sake of his two step sisters. Further that the Plaintiff is a beneficiary in the estate of his grandmother and therefore it is not true that she will be rendered landless.
  11. In cross he stated that he did not have any evidence to support payment in satisfaction of the decretal amount shown in the proclamation notice as the land was transferred in 1997 before the said notice. In addition, he stated that he was given the suit land as a gift. That he did not occupy the land as he lived in Githurai 44. Whilst admitting that his mother lodged a caution on the title in 2000, he stated that he did not know the reason why she did so. With respect to the marital status of the 2<sup>nd</sup> Defendant he informed the Court that he did not have any evidence to support his averment that the 2<sup>nd</sup> Defendant was married to his father. That since the Plaintiff lived with their mother on the land he assumed that she was aware of the transfer of the land to his name and that she agreed with it. That he did not hold the land in trust for his siblings. He admitted that his mother, brother and the Plaintiff filed cautions over the land claiming beneficiaries' interest.
  12. DW3 – Josephine Wanjiku Kamiitha led evidence and relied on her witness statement dated the 27/10/2021. That she has two daughters namely Ann and Mary. That PW3 called her daughters and informed them that they would be given part of their father's land. That DW1 gave her the title of the land. That though she was not married to Njogu, the girls were his. That Njogu was his employer, had a relationship and lived with him in Ndumberi where he run a whole sale business. That she has not tendered any evidence that the two daughters were sired by Njogu. That she is aware that the Plaintiff is in occupation of the land. That she was shown the portion of the land by a surveyor and she confirmed that the Plaintiff lives on one part of the land where she was given a title is not occupied.
  13. The Plaintiff filed written submissions on the 8/8/2023 through the law firm of S G Mbaabu & Co Advocates.



14. The Defendants filed written submissions through the law firm of E . Kinyanjui & Co Advocates on the 4/8/2023.
15. I have read and considered the written submissions and take this opportunity to thank Counsel for their highlights.

### **Analysis and determination**

16. The key issues for determination are;
  - a. Whether the Plaintiff has established title by way of adverse possession
  - b. Who pays the costs of the suit?
17. It is not in dispute that the Plaintiff and the 1<sup>st</sup> Defendant are siblings being the children of John Njogu and Jane Wanjiku Njogu, all deceased. Evidence was also led that they were raised on the suit land and it is therefore not in dispute that the family of Njogu lived in the suit land for the larger part of their lives. It is not in dispute that the Plaintiff returned home after her marriage broke down and lived on the land with her mother. That her mother consented to her stay on the land.
18. The Plaintiffs claim is based on adverse possession, that is to say that she has occupied the suit land uninterrupted for a period of 29 years from 1992 to date. The 1<sup>st</sup> Defendant on the other hand rebutted the claim and contended that the Plaintiff occupied the land with his consent and authority and therefore adverse possession does not lie.
19. In the case of Mtana Lewa Vs Kahindi Ngala Mwangandi [2015] eKLR, the Court defined adverse possession 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 person in assertion of his title for a certain period, in Kenya, is 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.”
20. In order to do so, a party needs to acquire possession or reside on that property for a period of 12 years. The doctrine is not new. In the case of Bejoy Chundra Vs Kally Prosonno (1878) 4 Cal 1327 the late My Justice Markby, as he then was, defined adverse possession as follows;

“By adverse possession I understand to be meant possession by a person holding the land on his own behalf (or on behalf) of some person other than the true owner, the true owner having a right to immediate possession.”
21. To be successful in a claim for adverse possession one must prove that he has been in exclusive possession of the land openly and as of right and without any interruption for a period of 12 years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition. Further the claimant must show that he is using the land as of right and that he has the necessary animus possidendi to use the land to the exclusion of the owner.
22. The Defendants have countered the Plaintiffs evidence on the ground that she is a licensee. That the Plaintiff occupied the land but on the permission of the mother and later that of the 1<sup>st</sup> Defendant. It is trite that a licence, consent and or permission destroys a claim of adverse possession.



23. In this case, the Plaintiff returned to the land in 1992 and lived with the mother until her demise in 2008. She has continuously been in possession of the land to date with her children and her grandchildren. Evidence was led to show the permanent buildings on the suit land where the Plaintiff, PW2 and her grandchildren live. PW1-PW3 led unchallenged evidence that they have no other place to call home. That it is the land from which she derives her livelihood and that of her children is not in doubt. The 1<sup>st</sup> Defendant has not shown where the Plaintiff and her children will go to. His action of subdividing the land and registering in a third party's name is aimed at disentiing the Plaintiff of the right to the land.

24. This Court concurs with the persuasive decision of the Court in the case Charles Muriuki M'mwari Vs. M'mbogori M'ambutu [2017] eKLR where the Court faced with similar facts stated that ;

“ 29. I find that Defendants root of his title is now inconsistent with the provisions of the supreme law of the land which guarantees property rights as well as social economic rights.

30. Article 19(2) of *the Constitution* provides that:-

“The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings”.

30. Article 20 (4)(a) of *the Constitution* further provides that: -

“in interpreting the bill of rights, a Court, tribunal or other authority shall promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom.”

25. Equally in the case of Eunice Karimi Kibunja Vs. Mwirigi M'ringera Kibunja [2013]eKLR while determining a case of adverse possession between relatives, the Court had this to say;

“In this case before us, there was no dispute that Eunice was in possession, indeed according to her, and her witnesses she always lived on the suit land with her parents since she was not married but according to the respondent, she returned to the land in 1965 after she was divorced by one Stephen M'Ringera, due to lack of children. Whichever the case, whether she was married or not, by the time she filed this case, she was in exclusive possession of the suit land, this was also openly and as of right and without any interruption for a period of over 12 years. She was also in open occupation and as of right because she participated and paid for the adjudication fees for the suit land to be registered in the name of the respondent then a minor in 1963. She continued in occupation without interruption, developed the suit land and the members of the clan deliberated on her case and decided that she should be given 5 acres. Unfortunately the determination by clan elders had no legal force and Eunice had to pursue her claim in Court.

Although the respondent's Counsel maintained that Eunice was a licensee, we are disinclined to belabor this point as the learned Judge discounted that notion in his Judgment when he opined in part of the Judgment;-



“An aunt, uncle, nephew, niece or other relatives who has lived, built, planted permanent commercial crops and harvests crops on ancestral land as described above, does not fit to qualify in any of a description of a licensee as analyzed above.

Thus far, we agree with the learned Judge that Eunice could not be regarded as a Licensee. We however part company with the learned Judge when he goes on to point out that Eunice cannot be in adverse possession. The logical argument about a licensee is because for instance, Eunice was a child of the original owners, she occupied the land as a child, later on the land changed hands and she actively participated in securing the land by registering it in the name of the respondent. The land ceased to be her father's and she continued to occupy it as of right, she did not require permission from the registered owner. We do not see how the learned Judge was able to draw the dichotomy here to exclude Eunice's claim from the category of claims under adverse possession. The Judge clearly misapprehended the fact that land changed ownership from the appellant's father to a step-brother's son.

.... that the appellant proved her claim adverse to the registered owner. First, that there was no dispute Eunice was in continuous, uninterrupted possession of the suit land as of right without permission of Mwirigi .....

26. The 1<sup>st</sup> Defendant cannot be allowed to disentitle the Plaintiff and her household of the land while he enjoys land that emanated from the family. The principles of equity, human dignity and equality militate against the actions of the Defendants.
27. The 1<sup>st</sup> Defendant admitted that he lives in Githurai 44, land that was gifted to him by the family. By his own account he does not live on the land even after becoming registered as owner in 1997.
28. Going by the evidence on record it is admitted that the Plaintiff entered the suit land with the permission of the mother. That after the demise of the mother the 1<sup>st</sup> Defendant asserts that he allowed her to live on the land. The 1<sup>st</sup> Defendant however did not lead any evidence to support the averment. Even if the Court was to accept that the Plaintiff lived on the land with the permission of the mother, the Court finds that there are two instances in this case in which adverse arose; the first is in 1997 when the land was registered in the name of the 1<sup>st</sup> Defendant. Consequently the mother relinquished both the title and the permission ceased. Adverse started accruing in favour of the Plaintiff seeing that the 1<sup>st</sup> Defendant never took any steps to remove her from the land. He neither re-entered the land nor did the Plaintiff relinquish her possession. Admittedly she continued in possession of the land for the duration of 24 years uninterrupted.
29. In 2008 the Plaintiff's mother died. Even assuming that the permission of the mother expired on her death, it is on record that the Plaintiff continued to live on the land to date and for a period of 13 years prior to filing suit. There are no covert acts taken by the 1<sup>st</sup> Defendant to remove the Plaintiff, re-enter the suit land, file suit nor did the Plaintiff relinquish possession.
30. Evidence was led by the 1<sup>st</sup> Defendant that the Plaintiff entered into a leased agreement with a third party for purposes of leasing the land. The act of leasing the land is an expression of the animus possidendi - the Plaintiff utilising the land as of right in exclusion of the 1<sup>st</sup> Defendant. This coupled with the other activities carried on the land including burial of their mother and two brothers and farming on the land. In all these the 1<sup>st</sup> Defendant did little to assert title to the land.
31. In the case of Wambugu Vs. Njuguna (1983) KLR 173, the Court of Appeal held thus:-
  1. The general principle is that until the contrary is proved, possession in law follows the right to possess.



2. In order to acquire by the statute of Limitations title to land which has a known owner, that owner must have lost his right to, the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.
  3. The *Limitation of Actions Act*, on adverse possession, contemplates two concept; dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”
32. In this case the Plaintiff discontinued his possession so much so that whichever angle it is looked at, adversity crystallised in favour of the Plaintiff in 2009 or 2020.
  33. Going by the evidence analysed above the Court finds that the Plaintiff has proven that she has occupied the suit land from 1997 /2008 continuously, peacefully, openly, without permission and uninterrupted by the Defendants.
  34. It is the view of the Court that both Defendants held title in trust for the Plaintiff, the right to title by way of adverse possession having crystallised in her favour.
  35. In the end the Court finds that the Plaintiffs case has been proven. The Court enters Judgement in favour for the Plaintiff as follows;
    - a. THAT Keziah Wanja Njogu be and is hereby declared to have acquired title to the parcel of land comprised in title number GITHUNGURI/GITHIGA/461 by reason of adverse possession before it was subdivided into parcels title number GITUNGURI/GITHIGA/461 and GITHUNGURI/GITHIGA/5744.
    - b. THAT Joseph Ng’ethe Njogu’s title to the parcel of land comprised in the title number GITHUNGURI/GITHIGA/461 was extinguished upon expiration of the period of twelve (12) years since 2009 or 2020.
    - c. The Land Registrar Kiambu be and is hereby ordered to rectify the register by the cancellation of the subdivision of parcel GITHUNGURI/GITHIGA/5743 and GITHUNGURI/GITHIGA/5744 revert the land to its original No. GITHUNGURI/GITHIGA/461.
    - d. The Land Registrar, Kiambu be and is hereby ordered to register the Plaintiff as the proprietor of parcel title number GITHUNGURI/GITHIGA/461 in place of Joseph Ng’ethe Njogu.
    - e. The Land Registrar is mandated to dispense with the production of titles in the event that the Defendants become uncooperative to surrender the same to the Land Registrar.
    - f. THAT the costs of the suit shall be borne by the Defendants.
  36. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2023 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**



Plaintiff – Absent but served

Michuki for 1<sup>st</sup> and 2<sup>nd</sup> Defendant

Court Assistants – Phyllis/Lilian

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