



Biriri & another (As the administrators of the Estate of the Late Francis Biriri Waihenya) v Land Registrar, Kiambu (Environment & Land Case E023 of 2022) [2023] KEELC 20187 (KLR) (27 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20187 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E023 OF 2022
JG KEMEL, J
SEPTEMBER 27, 2023**

BETWEEN

VERONICA NYAMBURA BIRIRI 1ST PLAINTIFF

JOSEPH KARONJO BIRIRI 2ND PLAINTIFF

**AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE FRANCIS
BIRIRI WAIHENYA**

AND

THE LAND REGISTRAR, KIAMBU RESPONDENT

JUDGMENT

1. Vide the Originating Summons dated the 22/6/2022 the Plaintiff filed suit seeking the following orders;
 - a. A declaration that the suit land being Ndumberi/Ndumberi/T.49 (suit land) belongs to Francis Birir Waihenya, deceased.
 - b. The Court do order the County Land Registrar Kiambu to issue a title in respect of the suit land to Veronica Nyambura Biriri, the widow of Francis Biriri Waihenya, deceased.
 - c. In default of b) above the Deputy Registrar of the Court be allowed to initiate the transfer of the title in favour of Veronica Nyambura Biriri.
 - d. In the alternative to b and c above, an order under Section 38 of the *LAA* be issued that Veronica Nyambura Biriri be registered as owner of the suit land
 - e. Costs be provided for.



2. It is the Plaintiffs case that their husband and father Francis Biriri Waihenya purchased the suit land in 1964 from Kiarie Kamau but the transaction was not concluded. Efforts to trace the seller so that he may conclude the transaction has borne no fruits over the years. That the Plaintiffs and their families have occupied the suit land where they carry out farming from 1964 to date. Upon the death of Francis Biriri Waihenya the Plaintiffs were appointed legal administrators of the estate of deceased, Waihenya. That vide the confirmation of grant issued on the 28/7/2021 the suit land devolved wholly to the 1st Plaintiff.
3. That the late Waihenya was entitled to the suit land and upon his demise the property should pass to his beneficiaries, the Plaintiffs. That they are entitled to a declaration that the suit land belongs to them and in the alternative that they are now entitled to the suit land by way of adverse possession.
4. The respondent opposed the summons vide the grounds of opposition dated the 22/6/2022 on the following grounds;
 - a. That the orders sought by the Plaintiffs can only be granted upon the hearing of the suit and that the Plaintiffs ought to have initiated a substantive suit by way of plaint in accordance with Section 19 of the *Civil Procedure Act* and Order 3 of the *Civil Procedure Rules*.
 - b. That the issues raised by the Plaintiffs are substantial issues that can only be determined after a full trial and on proof.
 - c. That the applicants have failed to enjoin the estate of the registered owner of the suit land as a party to the suit.
 - d. That it is in the interest of justice that all parties to the suit be given a chance to be heard at a full trial to rebut the issues raised by the Plaintiffs.
 - e. That the application is an abuse of the process of the Court
 - f. That the Originating Summons is devoid of any merit and the same ought to be declined.
5. At the hearing of the suit, PW1- Joseph Karonjo Biriri testified and stated that he is the son of the 1st Plaintiff and the late Francis Waihenya Biriri (Waihenya). That Waihenya passed away in 2016 and he and his mother were appointed as administrators of his estate. He relied on the Originating Summons, the Supporting Affidavit dated the 22/6/2022 and the annexures marked as JKB 1-8 as contained in the trial bundle.
6. In support of the suit, he stated that Waihenya purchased the suit land measuring 0.24 acres from Kiarie Kimani (Kimani) in 1964 vide an agreement of sale in Kikuyu language (no English translation was provided). That later efforts to trace Kimani for purposes of concluding the transaction did not bear fruit leaving the land untransferred to Waihenya by the time he died in 2016. That he entered into the land at his infancy with his parents in 1964 and has remained therein to date. During the whole time no one has removed them from the land. That all the witnesses to the agreement are deceased.
7. The witness stated that inquiries from the area chief on the whereabouts of Kimani were futile. That the purchase price was not paid in full, with a sum of Kshs 220/- pending. The total sum was Kshs 720/- out of which 500/- was paid to Kimani. That he sued the respondent for orders that the land should be transferred to the Plaintiffs.
8. At the close of the Plaintiffs case Mr Mwambuno, Learned State Counsel for the Defendant informed the Court that it wished to close its case without tendering any evidence. With that the Defendant's case closed.



9. The Plaintiffs filed written submissions on the 9/6/2023 which I have read and considered. The Defendant intimated to the Court that it was not filing any written submissions.
10. As to whether the deceased and his beneficiaries are entitled to the ownership of the suit land/registered as proprietors of the suit land, the Plaintiffs submitted that it is not in doubt that there is a valid agreement between Waihenya, deceased and Kimani and that Waihenya was put in possession of the suit land in 1964 where he lived with the Plaintiffs until his death in 2016 aged 89 years old. It is their case that interest in the suit land passed to Waihenya albeit registration having not been concluded.
11. The Court was referred to the decision in *Prabhagauri Shashikant Maru v Martha Kalova Nzivo* (2018)eKLR on the proposition that an unregistered document though ought to be so registered by law is binding on the parties who signed it inter se. That an unregistered document affecting immovable property under any law may be received as evidence of contract in a suit or as evidence of any collateral transaction. That such a document can be relied upon to ascertain the nature of the transaction as between the parties without binding third parties. The Court was urged to rely on the agreement of sale in Kikuyu language and to hold that indeed there was an agreement between Waihenya and Kimani and order the registration of the suit land in the names of the 1st Plaintiff.
12. As to whether the deceased and his beneficiaries acquired the suit land by way of adverse possession, the Plaintiffs argued that Waihenya took possession of the land in 1964 and has been upto the time of his death in 2016. That the Plaintiffs have occupied the land since 1964 to date. They relied on the case of *Jackson Andrew Nyabuto v David Ogega Omare* (2020) EKLR to urge the Court to grant orders of title by way of adverse possession in their favour.
13. The key issues for determination are; whether the deceased and his beneficiaries are entitled to ownership of the suit land; whether the deceased and his beneficiaries have acquired title by way of adverse possession.
14. Before I delve into the determination of the issues framed by the Court, I would like to determine the grounds of opposition raised by the Defendant.
15. I understand the key objection raised by the Defendant to be that the suit is devoid of merit on account that the registered owner of the suit land and/or his estate has not been enjoined to the suit to answer to the claim levelled against the suit land by the Plaintiffs. That it is in the interest of natural justice that they are enjoined so that they are not condemned unheard.
16. Title by adverse possession is one of the ways in which one may acquire land in Kenya just like in other civil legal jurisdictions. Section 7 of the *Limitation of Actions Act* Cap 22 states that;

“Actions to recover land may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”
17. Section 38 of the *Limitation of Actions Act*, Cap 22;

“Registration of title to land or easement acquired under Act (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”



18. In this case the Plaintiffs have sued the Land Registrar seeking the orders of entitlement to land by way of an agreement of sale and in the alternative adverse possession. The law requires that the person seeking adverse possession must acknowledge the title of the registered owner. It is that person that has failed to take any action to remove the adverse possessor for the full period of 12 years. According to the official search dated the 4/7/2016 the suit land is registered under the name of Kiarie Kimani as at 9/1/1959. There is no evidence on record that the title to the suit land was ever issued. There is also no evidence that the Defendant is the registered owner of the suit land.
19. In the case of *Ridge v Baldwin* (1964) AC at page 40 Lord Diplock as (he then was) stated that the right of a man to be given a fair opportunity of hearing what is alleged against him and of presenting his own case is so fundamental to any civilized legal system that it is to be presumed that Parliament intended that failure to observe the same should render null and void any decision reached in breach of this requirement.
20. The rule of *audi alteram partem* (hear the other side) was further amplified in the Indian case of *Sayeedar Rehman v State of Bihar* (1973) 3 SCC 333 where the Court held that;

“The unwritten right of hearing is fundamental to a just decision by any authority which decides a controversial issue affecting the rights of a rival contestant. This right has its roots in the notion of fair procedure. It draws the attention of the party concerned to the imperative necessity of not overlooking the other side of the case before coming to its decision for nothing is more likely to conduce to just and right decision than the practice of giving hearing to the affected parties.”
21. The right to be heard is embedded in Article 50 of the [Constitution](#) of Kenya which states as follows;

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body.”
22. In the interest of justice the Court holds that in the absence of joinder of Kiarie Kimani, or his legal representatives, having been the registered owner of the suit land, his rights to a fair hearing will not have been observed.
23. The Court is of the considered view that the commendable orders in the suit is not to tend to the merits of the suit but to strike it out to allow the Plaintiffs, if so desired, to file suit and enjoin the necessary parties.
24. Final orders and disposal;
 - a. The suit be and is hereby struck out
 - b. No orders as to costs.
25. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 27TH DAY OF SEPTEMBER, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;



Mungai for 1st and 2nd Applicants

Respondent - Absent

Court Assistants – Phyllis & Lilian

