



**Gathura v Ngethe & another (Environment & Land Case 229 of 2012)
[2023] KEELC 20102 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20102 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 229 OF 2012
A OMBWAYO, J
SEPTEMBER 22, 2023**

BETWEEN

JAMES MWANGI GATHURA PLAINTIFF

AND

ANN WANJIKU NGETHE 1ST DEFENDANT

DENNIS KARIUKI KINUTHIA 2ND DEFENDANT

JUDGMENT

1. James Mwangi Gathura hereinafter referred to as the plaintiff has come to court against Ann Wanjiku Ngethe, hereafter referred to as the defendant by way of Originating Summons claiming adverse possession of Kiambogo/Kiambogo Block2/405, 2 portions sub-divided thereon and assigned description of Kiambogo/Kiambogo Block 2/16733 and Kiambogo/Kiambogo/block 2/16734 against the title of Ann Wanjiku Ngethe in the parcel of land described Kiambogo/Kiambogo.Block 2/405 and later subdivided portions described as Kiambogo/Kiambogo/Block 2/16733 and Block 2/16734.
2. The plaintiff seeks the court to determine the following issues:-
 1. Whether Ann Wanjiku Ngethe and Dennis Kariuki Kinuthia are the registered owners of Kiambogo/Kiambogo Block2/405.
 2. Whether Ann Wanjiku Ngethe has caused the subdivision of Kiambogo/Kiambogo Block2/405 into land parcels reference no. Kiambogo/Kiambogo Block2/16733 and Kiambogo/Kiambogo Block2/16734.
 3. Whether James Mwangi Gathura has been in continuous and an interrupted possession of Kiambogo/Kiambogo Block2/405 and in particular the subdivided portions being referenced



as Kiambogo/Kiambogo Block 2/16733 and Kiambogo/Kiambogo Block2/16734 for at least 12 years and/or more with full knowledge of Ann Wanjiku Ngethe.

4. Whether Dennis Kariuki Kinuthia acquired an interest in the parcels of land aforesaid subject to the overriding interest in the nature of adverse possession in favor of the applicant.
 5. Whether the transfer of the parcels of land known as Kiambogo/ Kiambogo Block2/1 16734 Kiambogo/Kiambogo Block2/1 16733 were done against the doctrine of lis pendens.
 6. Whether James Mwangi Gathura is entitled to claim Kaimbogo/Kiambogo Kiambogo/kiambogo Block/ Kiambogo/ kiambogo 2/16734 against the title of Anne Wanjiku Ng'ethe thereto and to continue with his possession thereof.
 7. Whether Ann Wanjiku Ng'ethe's and/or Dennis Kariukis titles to Kiamboco/Kiambogo Block 2/405 Kiambogo/Kiambogo Block2/16733 and Kiambogo/Kiamboco Block 2/16734 should be cancelled and the latter two titles be registered in the name of James Mwangi Gathura.
 8. Whether Ann Wanjiku Ngethe and-Dennis-kariuklkinujhia should bear the costs of this cause.
 9. Whether a prohibitory order should issue in respect of BLOCK 2/405, Kiambogo/Kiamboco Block 2/16733 and Kiambogo/Kiambogo Block2/16734 against any dealings at the land registry pending the determination of this summons,
3. In the supporting affidavit, the applicant states that on or about the year 1998 he purchased two plots/parcels of land through Gain Insurance and Commercial Agencies situated on a large parcel of land described as Kiambogo/Kiambogo Block2/405 and immediately fenced the two plots and began cultivating thereon.
 4. That he has been in possession of the two plots from then, continuously to date, cultivating and working on the land without any interruption from anyone. That the land in question was registered in the name of Ann Wanjiku Ngethe the respondent herein but he continued to occupy the two parcels which he bought with her full knowledge.
 5. That however Ann Wanjiku Ngethe caused subdivision of larger parcel of land described as Kiambogo/ Kiambogo Block2/405 into portions and the portions he occupies were given new numbers, being Kiambogo/ Kiambogo2/16733 and Kiambogo/kiambogo 2/1 6734 respectively.
 6. The applicant alleges that he has been in possession of the two for a period of 13 years and more with full knowledge of Ann Wanjiku Ngethe and therefore claims adverse possession of the same against her and against her title thereto. That while this suit was pending and in an attempt to defeat the claim for adverse possession, the 1st defendant transferred the two titles to the 2nd defendant. He was advised by his advocate on record that the transfer of the titles while the case was pending is contrary to the doctrine of lis pendens.
 7. In the replying affidavit the defendants state that in 1976, the 1st respondent bought one share equivalent to two and half acres in Mwariki farm company limited which land thereafter came to be known as Kiambogo/Kiambogo Block2/405.
 8. That in the year 2008 the 1st respondent decided to subdivide the land into small parcel(plots) for purposes of disposing (selling) the same to willing buyers.
 9. That after selling the plots, 1st respondent reserved two plots (parcels) for her own use. That the said parcels (plots) Kiambogo/Kiambogo Block2/16733 and Kiambogo/Kiambogo Block2/ 16734 belong to the 1st respondent solely and that she has not sold the same nor permitted or allowed any person



- to build/occupy on the said parcels. That 1st respondent transferred the title in the name of the 2nd respondent who is her son in the year 2013. That they have not built on the said parcels nor allowed anybody to build on the said parcels and as a matter of fact, the said plots are vacant. That as the owners of the aforesaid parcels of land they have a right to deal with the same in any way as required by law.
10. That all issues raised in the affidavit of the applicant thereof is not truthful since the Kiambogo/ Kiambogo (Mwariki) Bloc 2/ 405 was just subdivided in 2008. That the entire summons should be dismissed the same being an abuse of the court process.
 11. When the matter came for hearing the plaintiff testified that he is a retired Civil Servant and does some business. He relied on his witness statement and the supporting affidavit. He bought the suit land from Gains Commercial Agencies although he was not given any written agreement but he was issued with receipts. He bought the lands in 1998. He was shown the plot by Gains Commercial Agencies, and fenced and started farming on the same. In 2005 Gains Commercial Agencies collapsed. Later he found out that the plots had been registered in the names of the 1st defendant and on request that she transfers the land to him, she refused. He has continued in occupation to date. On cross examination, he states that he has cultivated the land every year since 1998. He has fenced the land using barbed wires. .
 12. PW2 Elizabeth Macharia Thiongo testified that the plaintiff is his neighbour at Mzee Wanyama. She owns a plot away from the plaintiffs land. That the plaintiff cultivates on his land. He has resided on his plot for 15 years and found the plaintiff residing on his land. He relied on his witness statement. On cross examination he confirmed that the plaintiff has been cultivating the land for the 15 years he has occupied his.
 13. PW3 Stephen Njuguna Mugiri testified that he is a construction worker and knows the plaintiff. The plaintiff employed him as his worker on the land between 1998-2006. He was a shamba boy and nobody claimed the land when he worked on the land. On cross examination he confirmed what he stated in examination in chief.
 14. DW1 Dennis Kariuki a mechanic relied on his statement which was adopted as his evidence in chief. He was registered as the owner of the land in 2013 after being gifted by his mother. There was no objection by the plaintiff. He is not aware that the plaintiff has been tilling the land. His grandfather used to keep goats on the land. The land has been used by his grandfather. On cross examination he states that before subdivision the land was Kiambogo/Kiambogo Block2/405 and that the 1st Registration was in 1989 in the names of Kamau Ngethe who got title on 8th November 1989. Anne Wanjiku was registered on 25th November 1999. The case was filed in 2012, 13 years thereafter. The land was transferred to DW1 after the case had been filed. He has not visited the land. He has not taken possession. He has never lived on the land. His grandfather was adjacent the two parcels of land. His mother never lived on the land.
 15. DW2 Anne Wanjiku Kamau testified that she was given the land in 1976 by her father in law. Her mother in law utilized the land before she died. She has seen nobody plough the land. She does not know the plaintiff. On cross examination, she states that she has never lived on the land. She lives in Kitengela but utilizes the land. She contradicted herself by stating that she has never ploughed to land as well as her son.
 15. The gravamen of the plaintiff's submissions is that he has made a case for adverse possession because he called 2 witnesses who have given evidence that he has been utilizing the land for the last 13 years before filing the case without any interference, permission and with the knowledge of the owner.



16. The defendant on his part submits that the plaintiff has not proved on a balance of probability that he is in adverse possession of the suit property. He submits that the plaintiff mode of entry was permissive as he has given permission.
17. I have considered the pleadings, evidence and submissions and do find that the suit property was initially Kiambogo/Kiambogo/405 before subdivision and registration in the name of Government of Kenya on 3rd December 1988 when the register was opened. Later, it was registered in the name of Kamau Ngethe on 8th November 1989 and title issued on 23rd November 1999. It was registered in the names of Anne Wanjiku and title issued on 25th November 2001. On 25th May 2008 the title deed was closed on sub-division. On subdivision, the new titles were created thus Kiambogo/Kiambogo/Block 2/16733 and 16734. Both were registered in the names of Anne Wanjiku Ngethe on 22nd May 2008. On the 25th September 2013 both parcels of land were registered in the in the name of Dennis Kariuki Kimathi and title issued on 9th October 2013. All the transfers to Dennis Kariuki Kinuthia and registration and issuance of title was done after the suit had been filed.
18. I have carefully listened to the plaintiff PW2, and PW3 and do find that the plaintiff entered the land in 1998 and is still in occupation todate. He has fenced the land and has been farming on the land. The defendants in their testimony stated that they have never utilized the land. The allege that their grandmother has been utilizing the land but did not call any evidence to support the allegation that their grandmother has been utilizing the land. The defendants did not call any of their neighbors including the 1st defendant mother in law who is the 2nd defendant grandmother to prove that they have been utilizing the land.
19. The plaintiff's claim is based on principles of adverse possession whose import is that any person who claims to be entitled to land by adverse possession has the right to apply to the Environment and Land Court for an order that he be registered as the proprietor of the land. The person must prove that he has been in occupation and possession of the land exclusively and openly and as of right and without interruption for a period of 12 years. The plaintiff must prove that he has dispossessed the defendant owner of the property and must openly occupy the property exclusively, keeping out others, and use it as if it were his own.
20. Some jurisdictions permit accidental adverse possession as might occur with a surveying error. Generally, the openly hostile possession must be continual, although not necessarily continuous or constant without challenge or permission from the lawful owner, for a fixed statutory period to acquire title. Where the property is of a type ordinarily occupied only during certain times, the adverse party may need to have only exclusive, open, and hostile possession during those successive useful periods, making the same use of the property as an owner would for the required number of years.
21. Adverse Possession requires at a minimum five basic conditions being met to perfect the title of the adverse party. These are namely:-
 - a. open and notorious use of the property. For this condition to be met the adverse party use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim. The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about.
 - b. Continuous use of the property – The adverse party must, for statute of limitations purposes, hold that property continuously for the entire limitations period, and use it as a true owner



would for that time. This element focuses on adverse possessor's time on the land, not how long true owner has been dispossessed of it. Occasional activity on the land with long gaps in activity fail the test of continuous possession. Incidences such as merely cutting timber at intervals, when not accompanied by other actions that demonstrate actual and continuous possession, fails to demonstrate continuous possession. If the true owner ejects the adverse party from the land, verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party return. He cannot count the time between his ejection by the true property owner and the date on which he returned.

- c. Exclusive use of the property – The adverse party holds the land to the exclusion of the true owner. If, for example, the adverse party builds a barn on the owner's property, and the owner then uses the barn, the adverse party cannot claim exclusive use. There may be more than one adverse possessor, taking as tenants (i.e. owners) in common, so long as the other elements are met.
 - d. Actual possession of the property – The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not establish actual possession. The actions of the adverse party must change the state of the land, as by clearing, mowing, planting, harvesting fruit of the land, logging or cutting timber, mining, fencing, pulling tree stumps, running livestock and constructing buildings or other improvements. If the property is residential, such actions may include mowing the yard, trimming trees and hedges, changing locks, repairing or replacing fixtures (such as a swimming pool, sprinkler system, or appliances), or other actions so as to maintain the property for its intended use, to the exclusion of its true owner.
 - e. Non-permissive, hostile or adverse use of the property – The adverse party entered or used the land without permission. Renters, hunters or others who enter the land with permission are not hostile. The adverse party motivations may be viewed by the court in several ways: Objective view—used without true owner's permission and inconsistent with true owner's rights. Bad faith or intentional trespass view—used with the adverse possessor's subjective intent and state of mind . Good faith view where the party mistakenly believed that it is his land. The law requires that the adverse party openly claims the land against all possible claims.
22. The law on Adverse Possession is now well settled and the essential requirements that one has to meet in order to succeed in an application for Adverse Possession have been discussed by the courts. In *Wambugu -v- Njuguna* (1983) KLR 173, the Court of Appeal held that Adverse Possession contemplates two concepts: Possession and discontinuance of Possession. It further held that the proper way of assessing proof of Adverse Possession would 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 or she has been in Possession for the requisite number of years.
21. The requirements for Adverse Possession in Kenya has also been set out in the case of *Mbira -v- Gachuhi* (2002) IEALR 137 in which the court held that:
- “a person who seeks to acquire title to land by the method of Adverse Possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and Adverse use by him or those under whom he claims for the statutory prescribed period without interruption....”



Likewise, in *Jandu –v- Kirplal & Another* (1975)EA 225, it was held:

“to prove title by Adverse Possession, it is not sufficient to show that some acts of Adverse Possession must be adequate in continuity, in publicity and in extent to show that it is Adverse to the owner. It must be actual, visible, exclusive, open and notorious. ”

The ingredients were recently discussed by the court of Appeal in the case of *Mtana Lewa –v- Kabindi Ngala Mwangandi* (2005)eKLR where it was held that:

“ Adverse Possession is essentially a situation where a person takes Possession of land, asserts rights over it and the person having title to it omits or neglects to take a action against such person in assertion of his title for a certain period, in Kenya 12 years.”

22. It is also a well settled principle that a party claiming Adverse Possession ought to prove that this Possession was “nec vi, nec clam, nec precario,” that is, peaceful, open and continuous. The Possession should not have been through force, no in secrecy and without the authority or permission of the owner. This being a claim for Adverse Possession, the plaintiffs must show that they have been in continuous Possession of the land for 12 years or more; that such Possession has been open and notorious to the knowledge of the owner and that they have asserted a hostile title to the owner of the property.
23. I do find that the plaintiff has proved on a balance of probabilities that he has had been in an open, notorious and exclusive occupation of the suit land more than 12 years before the filing of the suit and that the defendant were aware and never took any action, and they never gave permission to the plaintiff to occupy the land. The plaintiff has proved the five basic minimum and do find that he has proved his case on a balance of probabilities and do make the following declarations:-
 1. That Ann Wanjiku Ngethe and Dennis Kariuki Kinuthia were the registered owners of Kiambogo/Kiambogo Block2/405.
 2. That Ann Wanjiku Ngethe has caused the subdivision of Kiambogo/Kiambogo Block2/405 into land parcels reference no. Kiambogo/Kiambogo Block2/16733 and Kiambogo/Kiambogo Block2/16734.
 3. That James Mwangi Gathura has been in continuous and an interrupted possession of Kiambogo/Kiambogo Block2/405 and in particular the subdivided portions being referenced as Kiambogo/Kiambogo Block2/16733 and Kiambogo/Kiambogo Block2/16734 for at least 12 years and/or more with full knowledge of Ann Wanjiku Ngethe.
 4. That Dennis Kariuki Kinuthia acquired an interest in the parcels of land aforesaid subject to the overriding interest in the nature of adverse possession in favor of the applicant.
 5. That the transfer of the parcels of land known as Kiambogo/Kiambogo Block2/116734 Kiambogo/Kiambogo Block2/1 16733 were done against the doctrine of lis pendens.
 6. That James Mwangi Gathura is entitled to claim Kaimbogo/kiambogo Kiambogo/kiambogo Block/ Kiambogo/kiambogo 2/16734 against the title of Anne Wanjiku Ng’ethe thereto and to continue with his possession thereof.
 7. That Ann Wanjiku Ng’ethe’s and/or Dennis Kariukis titles to Kiamboco/Kiambogo Block 2/405 Kiambogo/Kiambogo Block2/16733 and Kiambogo/Kiamboco Block 2/16734 should be cancelled and the latter two titles be registered in the name of James Mwangi Gathura.



8. That Ann Wanjiku Ngethe and-Dennis-Kariuki kinujhia should bear the costs of this cause.

Orders Accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 22ND DAY OF SEPTEMBER 2023.

A O OMBWAYO

JUDGE

