



**Kagwi v Wangari (Environment & Land Case 125 of 2021)
[2023] KEELC 21112 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21112 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 125 OF 2021**

JG KEMEI, J

OCTOBER 31, 2023

BETWEEN

SHEM MUTHUMBI KAGWI PLAINTIFF

AND

ELIZABETH OLIVE WANGARI DEFENDANT

JUDGMENT

1. On 24/11/2021 Shem Muthumbi Kagwi the Applicant herein filed Originating Summons under Section 17 and 38 of the Limitations of Actions Act, Cap 22 and under Section 7(d) of the Land Act, Order 37 rule 7 of the *Civil Procedure Rules* seeking the following orders:-
 - a. Spent.
 - b. A declaration that the interest of the Respondent/Defendant has been extinguished by the Plaintiff's/Applicant adverse possession thereof for a period of more than 12 years in terms of Sections 17 and 38 of the Limitation of Actions Act.
 - c. A declaration that the Plaintiff has acquired the freehold interest in land parcel number Muguga/GITARU/536 by her adverse possession thereof for a period of more than 12 years.
 - d. An order directing the Land Registrar Kiambu to the order herein shall be an instrument of transfer of ownership of the whole suit land parcel Muguga/Gitaru/536 from the Defendant/Respondent to the Plaintiff/Applicant.
 - e. The costs of this suit be borne by the Defendant/Respondent.
2. The application is premised on the grounds and annexed Supporting Affidavit of the Applicant filed on 4/11/2021. The applicant avers that he has lived on the land from 2005 to date, a period exceeding 12 years. That the Respondent was fully aware of his occupation and possession and has never raised any



- objection and as such possession has been open notorious and in the knowledge of the Respondent. That he is therefore asserting a hostile title to the property.
3. Leave of the Court having been granted on 23/3/2022 the Respondent was served through substituted service by advertisement in the Standard Newspaper of 14/4/2022.
 4. Having been duly served with the Originating Summons as set out in the preceding paragraph, the Respondent failed to enter appearance nor file a response to the Originating Summons. On 22/2/2023 directions were taken with respect to the hearing of the Originating Summons viva voce.
 5. The evidence of the Applicant was led by PW1 – Shem Muthumbi Kagwi. He relied on his Supporting Affidavit filed on 4/11/2021 in evidence in chief and produced documents marked PEX. 1 – 2 being the official search dated 6/10/2021 alongside photographs of his alleged house (s). The Applicant informed the Court that the Respondent is his aunt and that he entered the land in the year 2007. He stated that the Respondent left the land to him to cultivate and that she has never lived on the suit land.
 6. He stated that the Respondent was aware of his occupation and possession of the land. He further informed the Court that the Respondent has not been seen on the land since 2006 and that he is not aware of her whereabouts.
 7. With that the Applicant closed his case.
 8. The Applicant submitted that he has been in occupation of the suit land continuously without interruption since 2005 to date. That he has constructed a permanent house in which he lives with his family. He added that the title of the Respondent has been extinguished by adverse possession in line with Section 17 and 18 of *Limitation of Actions Act*. The Applicant relied on the decision of the Court of Appeal in the case of Richard Wefwafwa Songoi Vs. Ben Munyifwa Songoi (2020)eKLR in which the Court stated as follows:-

“A person claiming adverse possession must establish the following: on what date he came into possession; what was the nature of his possession; whether the fact of his possession was known to the other party; for how long his possession has continued and that the possession was open and undisturbed for the requisite 12 years.”

9. Going by the above decision the Applicant submitted that he has been in occupation of the suit land for a period of 18 years, which is beyond the statutory requirement of 12 years. In addition, the Applicant submitted that he has constructed permanent structures as shown by the pictures attached to his Supporting Affidavit. Further he added that no one has ever laid claim on the suit land.
10. The Court was urged to find that the Applicant has proven his case to the required degree balance of probabilities.

Analysis and determination

11. Having analysed the Originating Summons, the grounds upon which it is premised, the Affidavit in support by the Applicant, the evidence adduced during trial, the written submissions filed by the Applicant and all the material placed before the Court, the Court finds the key issue for determination is whether the Applicant is entitled to the orders of title by way of adverse possession.
12. It is not in dispute that the Applicant's claim has not been rebutted. That said the Applicant continues to bear the burden of proof even in such an instance where the case is uncontested. The Court is



persuaded by the decision in *Gichinga Kibutha Vs. Caroline Nduku* (2018)eKLR where the Court stated:-

“It is not automatic that instances where the evidence is not controverted the Claimant shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

13. The above situation obtains under Section 107 of the *Evidence Act* which states as follows:-

“(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

14. Equally the burden of proof in a suit or proceeding lies on the person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on the person who wishes the Court to belief on its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.

15. The evidence by the Applicant is that the Respondent is a relative. He led evidence that he has been in occupation of the suit land from 2005, cultivated the land and constructed permanent houses in which he resides with his family. The Applicant informed the Court that he has occupied the land in excess of 12 years and is therefore entitled to title by way of adverse possession. In support of his claim the Applicant has annexed an official search of the land dated 6/10/2021 alongside pictorials of structures on the suit land.

16. The question before the Court is whether the Applicant has proved his claim on the required standard which is on balance of probabilities.

17. It is not in dispute that the Respondent was served vide substituted service by way of advertisement in the Standard Newspapers of 14/4/2022. In his Supporting Affidavit sworn on 21/2/2022 the Applicant deponed that the Respondent’s whereabouts were unknown. That he did not know her place of residence nor her workplace and so he sought for orders to serve the respondent by substituted service. In his evidence in Court he stated that the Respondent has not been seen since 2006.

18. The Court of Appeal in *Francis Gicheru Karini vs Peter Njoroge Mairu* (Civil Appeal No. 293 of 2002 (NRB) UR) - approved the High Court decision in *Kimani Ruchine vs Swift Rutherford & Co. Ltd* (1980) KLR 10 as per Kneller J. stating:

“...The Plaintiffs have to prove that they have used this land which they claim as of right. Nec vi, Nec Clam, Nec Precario (no force, secrecy or persuasion) ...show that the company had knowledge of possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavors to interrupt it or by way of recurrent consideration.”

19. The question that the Court should enquire is whether the occupation of the Applicant on the suit land was notorious, that is to say that it was open and in the knowledge of the Respondent. If as stated by the Applicant, the Respondent whereabouts is not known since 2006, clearly any occupation of the Applicant on the suit land cannot be said to be with the knowledge of the Respondent.



20. The Applicant led evidence that he entered the land in the year 2007. He further stated that the Respondent, who is his aunt, left the land to him to cultivate. The implication of this evidence is that he occupied the land with the permission of the Respondent. It is the law that permission destroys or negates the doctrine of adverse possession. The Court finds that on the evidence of the Applicant that he occupied the land with the permission of the Respondent and therefore adverse possession is totally untenable.
21. In either of the two scenarios described in paragraphs 19 and 20 of this Judgment, adverse possession is unfounded.
22. In the case of *Kasuve Vs. Mwaani Investment Ltd & 4 others* (2004)KLR 184 the Court stated as follows:-

“In order to be entitled to the land by adverse possession the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition.”
23. In this case no evidence was placed before the Court to support the dispossession of the owner or discontinuation of possession by the owner. Moreso, in the face of evidence on record that the Respondent has not been seen on the land or its environs since 2006, the Court finds that the evidence of the Applicant falls short of the threshold required to found a claim in adverse possession.
24. In the end the Court finds that the Applicant’s claim is not proven. It is dismissed with no orders as to costs.
25. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 31ST DAY OF OCTOBER, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Maina for Plaintiff/Applicant

Defendant/Respondent – Absent (undefended)

Court Assistants – Phyllis/Lilian

