



Ng'ang'a v Njenga; District Land Registrar Kiambu (Interested Party) (Environment and Land Case Civil Suit 335 of 2011) [2023] KEELC 21003 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEELC 21003 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 335 OF 2011
AA OMOLLO, J
OCTOBER 26, 2023**

BETWEEN

JACINTA NJERI NG'ANG'A PLAINTIFF

AND

GEOFFREY NJOGU NJENGA DEFENDANT

AND

DISTRICT LAND REGISTRAR KIAMBU INTERESTED PARTY

JUDGMENT

1. The Plaintiff filed this suit against Defendant vide Originating Summons dated 8th July 2011 further amended on 20th June 2022 seeking the following orders from court;
 - i. Declaring that the Plaintiff herein has acquired an overriding right over Land Reference Number Karai/Gikambura /581 (hereinafter called the suit premises) under Section 30 of the [Registered Land Act](#) Cap 300 Laws of Kenya.
 - ii. For an injunction to issue against any dealings on the suit premises pending hearing and determination of the Originating Summons herein.
 - iii. Directing the District Land Registrar Kiambu to register the Plaintiff herein as the proprietor of the suit premises in place of the Defendant herein Josphine Wanjiku.
 - iv. Declaring that the title of Kinuthia wa Gakura (deceased) became extinguished in or about the year 1992 under Section 17 of the Limitations of Actions Act.
 - v. Declaring that by the time Kiambu P.M.C Succession Cause No.185 of 2009 regarding the succession of the deceased was instituted the deceased's title had already been extinguished as aforesaid.



- vi. A declaration that the confirmation in the said succession case wherein the Defendant purportedly inherited the suit land from the deceased was an act in vain that the deceased's title to the suit premises had been extinguished aforesaid.
 - vii. A declaration that the subsequent transfer by transmission of the suit premises to the Defendant on 13th April 2007 was a fortiori null and void.
 - viii. A declaration that the Defendant's title to the suit premises is also null and void.
 - ix. A declaration that the Defendant holds the title of the suit premises in trust to the Plaintiff under Section 37 of the Limitations of Actions Act.
 - x. Such further orders as this Honorable Court may appear fit and just to grant.
 - xi. Costs of the suit.
2. The Summons was supported by the affidavit and supplementary affidavits sworn by Peter Nganga Ngurimu on 1st July 2011 and 19th June 2013 respectively. He stated that since the year 1973, his whole family began cultivating the suit premises after his father bought the land from one Njuguna Githere. He added that they lived on the property and in 1980 upon getting married, his father instructed him to build a house there and continued to live on the same with his family to date.
 3. The Applicant deposed that his brothers and nephew have also been instructed to build their homes which they did and produced photos showing the homes and the enclosing fence. The Plaintiff averred that having lived on the suit property for over 31 years, he acquired an overriding right over the same by dint of Section 30(f) of the *Registered Land Act* Cap 300 (repealed) Laws of Kenya. Hence, no action to recover the same can be brought against him under Section 7 of the *Limitation of Actions Act* as the twelve years expired in 1992.
 4. The Plaintiff stated that the suit property was until 2011 registered in the name of Kinuthia Wagakura, the deceased, who has held the same in his trust as under Section 37(a) of the *Limitation of Actions Act* after the expiry of the 12 years in the year 1992. He added that on 21st April 2011, he carried a search on the suit property and discovered that on 13th April 2011 it was transferred to one Josephine Wanjiku, the Defendant herein pursuant to orders obtained in Kiambu Succession Cause No.185 of 2009.
 5. The Plaintiff explained that in the year 2009 when the succession suit was instituted by the Defendant, their rights in the property had been extinguished in 1992 therefore it did not form part of the estate of Kinuthia Wagakura. Consequently, the transfer of the suit property to the Defendant is void.
 6. In contesting the suit, the Defendant (Josephine Wanjiku) filed a Replying Affidavit and a response to the supplementary affidavit dated 22nd August 2011 and 22nd July 2013 respectively. She deposed that she is the registered owner of the suit property after inheriting it from her father, Kinuthia Wagakura who died on 6th July 1973. Ms Wanjiku averred that she took out letters of administration and was issued with certificate of confirmation of a Grant on 26th May 2010 vide Succession Cause Number 185 of 2009.
 7. She asserted that the deceased has always been the registered owner of the suit property up to when she inherited the same and that at no time did he sell it to Njuguna Githere or any other person. The Defendant further stated that on 28th August 1973, 1 ½ months after the demise of her father, one James Njuguna Githere put a caution on the suit property claiming purchaser's interest. However, the caution was removed by the Land Registrar Kiambu on 4th March 2010 and no one made a claim to it thereafter.



8. It is the Defendant's averment that after the death of her father, her younger brother Njogu Kinuthia lived on the said property until he passed on about 15 years ago and was buried on the suit property without any objection from the Plaintiff.
9. She continued that in the year 2004 when she came to the suit property, she was chased by the Plaintiff. The Defendant narrated that she reported to the Chief of Karai Location, who summoned both of them for a meeting at the Chief's Office. The meeting was also attended by three elders. all residents of Gikambura in Karai Location and the Plaintiff was told not to trespass again.
10. The Defendant stated that the Plaintiff kept off the suit property until the year 2007 when he forcefully built a house for his two grown up grandsons. That she tried to enter and cultivate the land, but she was chased by the Plaintiff. The Defendant produced photos showing the semi-permanent structures built by the Plaintiff in the compound of the suit property.
11. In response to the Defendant's replying affidavit, the Plaintiff filed a supplementary affidavit sworn on 10th November 2011 by Daniel Njenga Njunge, a native of Gikambura village and the area sub chief of Karai sub-location in 1987-2001. He deposed that prior to his appointment he was aware that the Plaintiff lived on the suit property which he occupied till his office term ended. Mr Njenga deposed that he was not aware of any burial of the Defendant's brother that took place in the suit property.

Evidence:

12. PW1, who is the wife to Leonard Ngurimu Muthemba and mother to the Peter Nganga Ngurumu-deceased (original Plaintiff) testified by adopting her witness statement and the documents filed in support of the motion. She stated that her late husband bought the suit property from Mr.Githere James and has been in occupation since 1973. She stated that Kinuthia Wakarura-deceased was the original owner of the land who then sold to James Githere vide agreement dated 26th February 1973.
13. She stated that James Githere agreed with her late husband that they would farm on the suit property and that by then Kinuthia was not there because he had left the land to Githere. PW1 continued in evidence stating that she has lived on the suit property and had children who are now adults. That she owns another parcel across the suit property but built for her children in the suit property because the other parcel is small in size. She averred that her late husband was following up on the title and in fact registered a caution dated 26th April 2011 after there was a claim on the suit property but was frustrated by the Lands office.
14. PW2, the original Plaintiff's wife adopted his witness statement and sworn affidavit filed on 19th June 2013 as evidence in chief. She testified that since she was married in 1980, she has lived and cultivated on the suit property. She asserted the neighbours donot know Defendant as they live in Nyahuru.
15. The Defence called one (1) witness Godfrey Njogu Njenga who said he is a nephew to the original Defendant Josephine Wanjiku. He stated that the claim is bad in law and ought to be dismissed. DW1 asserts that the Plaintiff is purporting to enforce specific performance of an agreement done in 1973 and also circumventing the law on adverse possession through purported trust.
16. DW1 further stated that he was not aware of any sale of the suit property or that the Plaintiff lived on the property since 1973. He testified that they have always pursued their land by filing all relevant succession proceedings and none of the claimants raised any objection the succession cause. That by their own admission, the claimants confirm there has always been a dispute over the suit land before the local administration.



Submissions

17. The Plaintiff and Defendant filed submissions dated 21st June 2023 and 26th April 2023 respectively.
18. The Plaintiff submitted that after Kinuthia Wagakura passed on in 1973, Josephine Wanjiku filed succession Cause Number 185 of 2009 and became the registered owner of the suit property on 13th April 2011 and when she passed on, the Defendant herein applied for letters of Administration in Kikuyu vide Succession Cause Number 83 of 2020. She submitted that filing of succession case does not amount to assertion of rights that could stop time from running citing the case of *Stephen Mwangi Gatunge v Edwin Onesmus Wanjau* ELC No.7 of 2021(O.S) Muranga.
19. The Plaintiff relied in the case of *Samuel Kibamba v Mary Mbaisi* [2015] eKLR, which stated that for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, without force, without secrecy and without license or permission of the land owner with the intention to have the land. That there should be an intention to have the land.
20. The Defendant submitted that this suit is a claim for adverse possession over the suit property but during the hearing there was a claim to enforce a contract for sale of land as per the sale agreement produced by the Plaintiff. The Defendant also submitted that there is no doubt that the original registered owner of the suit property was Kinuthia Wagakura who was the biological father of Josephine Wanjiku-deceased. Josephine filed for succession cause No. 185 of 2009 at Kiambu and later became the registered owner of the suit property on 13th April 2011.
21. He stated that the original plaintiff Peter Nganga Ngurimu claimed that his father bought the suit property from Njuguna Githere, and instructed him and his brothers to build on the property in 1980. The Defendant contended that one cardinal rule of adverse possession of land is a quiet uninterrupted occupation of a property for a period of at least twelve (12) years. However, in this case, the Plaintiff's own testimony and documentary evidence indicate that even before the suit herein was filed in the year 2011, there was a long-standing dispute on the ownership of the suit property against one Peter Ng'ang'a Ngurimu-deceased, now represented by the Plaintiff herein.
22. The Defendant submitted that the court should consider the ruling of Hon. P. Nyamweya, J, delivered in this matter on 14/5/2012 where the learned judge noted that the Plaintiff had no evidence of the possession of the suit land. Additionally, that PW1 admitted that she does not live on the suit property at all but on a different family parcel nearby. Noting, that Pw2 in her testimony produced photographs on purported occupation of the land which did not pass evidentiary threshold as the same was not prepared by an expert thus difficult to relate the photos to the subject property.
23. The Defendant submitted that the law of succession requires that objections should be filed to the succession cause within sixty days of publication of the petition in the Kenya gazette which the plaintiff failed to do.
24. The Defendant also submitted that, the Plaintiff testified in court that her father-in-law had purchased the suit property from one Njuguna Githere and indeed produced a purported Sale Agreement on the said transaction but did not produce any evidence showing how Njuguna Githere had purchased the land from Kinuthia Wagakura (original Plaintiff's father). Further, it was Pw1's testimony that the purported vendor allowed them to take over the property meaning they entered the suit land with the permission of the owner.
25. It is the Defendant submission that it is not possible to sustain a claim for adverse possession against a person who was not the registered owner of the land. In this case, twelve (12) years had not expired since this suit was filed for the Plaintiff to lay a claim of adverse possession against Josephine Wanjiru-



deceased who got registered on 13th April 2011. In support of their argument, the Defendant cited the case of *Gabriel Mbui v Mukindia Maranya* (1993) eKLR which dismissed a claim for adverse possession for lack of proof.

Determination:

26. The original parties to this suit (a husband to the current Plaintiff) and (an aunt to the current Defendant) are both deceased. The Plaintiff's claim is premised on adverse possession over the suit property claiming that they have lived on it since the year 1973 after his father purchased it from one Njuguna Githere. It is not contested that the original owner of the suit property was Kinuthia Wakarura (Wagakura) who sold it to James Njuguna Githere as shown in the sale agreement dated 26th February 1973 adduced by the Plaintiff.

27. The doctrine of adverse possession is one of the ways of land acquisition in Kenya. In the case *Gabriel Mbui v Mukindia Maranya* [1993] eKLR cited by the Defendant, Justice R.C.N. Kuloba cited,

“Jandu v Kirpal and another [1975] E A 225, at p 232 thus, ... from a consideration of the many cases decided, it is possible to define “adverse possession” more fully, as the nonpermissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owners enjoyment of the land for the purposes for which the owner intended to use it.”

28. In the case of *Wilson Njoroge Kamau v Nganga Muceru Kamau* [2020] eKLR the court discussed some of the statutory provisions that underpin the doctrine of adverse possession as set out in the Limitations of Actions Act Cap 22 and the Registration of *Registration of Land Act* No 6 of 2012 as follows;

Section 7 states that; “An action 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”

Further in Section 13(1), “A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as Adverse Possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in Adverse Possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.”

29. Section 16 of the *Limitation of Actions Act* provides answer to the twin question raised by the Defendant on why the Plaintiff did not take out objection proceedings in the succession cause of Kinuthia Wakarura and whether 12 -year period had lapsed since the Defendant acquired title. The Plaintiff needed not to object since his interest was premised on the doctrine of adverse possession. The section provides as follows;

“For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been



no interval of time between the death of the deceased person and the grant of the letters of administration.”

“Section 2 (1) of the *Law Reform Act* stipulates that on the death of any person, all causes of action subsisting against or vested in him shall survive against or as the case may be, for the benefit of his estate. The proviso to the sub-section indicates the causes of action that do not survive...”

30. In the case of *Joseph Kamau Gichuki (Suing as the Administrator of the Estate of Gichuki Chege (Deceased) v James Gatheru Mukora & Another* [2019] eKLR the court held that:

“Under the *Limitation of Actions Act*, Chapter 22 Laws of Kenya, death of a registered owner of land does not stop time from running for the purposes of adverse possession.”

31. The ingredients of adverse possession which must be proved for a party to succeed in a claim for adverse possession were laid out in the case of *Tabitha Waittherero Kimani v Joshua Ng'ang'a* [2017] eKLR *inter alia*;

“(A) Open and notorious use, where the adverse party’s use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim. If a 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: which refers to the adverse party must, hold that property continuously for the entire limitations period, and use it as a true owner would for that time.

(C) Exclusive use: – The adverse party holds the land to the exclusion of the true owner.

32. It is noteworthy that the above discussed ingredients must be met conjunctively and not disjunctively. In the case of Samuel Miki Waweru v. Jane Njeru Richu, Civil Appeal No. 122 of 2001, the Court of Appeal delivered the following dictum:

“...it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise.”

33. The record shows that the original Plaintiff entered into the suit property pursuant to a sale agreement in 1973 between his father and one Njuguna Githere. The entry in 1973 was therefore permitted by the then alleged owner Njuguna Githere. However, the property was not registered under Njuguna Githere but Kinuthia Wagakura, father to the Original Defendant. The original Plaintiff therefore entered the suit property without the permission of the registered owner. In any event, if the permission was pursuant to a sale agreement with the former deceased owner, time started running for adverse possession immediately the time lapse for obtaining Land Control Board Consent lapsed (six months from the date of the agreement).

34. The Defendant argues that the Plaintiff’s claim is for enforcement of the agreement of 1973. However, the Plaintiff was specific in their pleadings before the court that they are seeking to be declared as owners



of the land pursuant to their long occupation. The sale agreement in my opinion was produced to explain how the entry into the suit property was obtained. In the case of *Public Trustee v. Wanduru, Madan J A* stated as follows; -

“.... that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run”.

35. The next question begs if the occupation of by the Plaintiff was uninterrupted for 12 years. The Plaintiff's witnesses inter alia, stated that they started using the suit property since 1980 through cultivation and later had his sons settled on the suit land. She produced photographs showcasing old houses that were confirmed by the Defendant in her pleadings. In his evidence, the Defendant contended that the photos do not pass evidentiary threshold as the same were not prepared by an expert to relate the photos to the subject property.
36. Besides the photographs, the Plaintiff filed a supplementary affidavit sworn on 10th November 2011 by Daniel Njenga Njunge, a native of Gikambura village and who deposed that he was the area sub chief of Karai sub-location (where the suit property is located) between 1987-2001. He stated that prior to his appointment into office he was aware that the deceased Plaintiff lived on the suit property and which occupation was continuous till his office term ended.
37. Ms Josphine Wanjiru -deceased in her replying affidavit deposed that she did not live on the suit property but came in the year 2004 when she found the Plaintiff there and that the Plaintiff chased her away. She reported him to the area chief in the year 2004 accusing him of trespassing on the suit property. According to her, the Plaintiff was warned not to trespass on the land any more. However, the Defendant did not provide evidence to contradict the Plaintiffs assertion of occupation from 1973-1980 so that by the time he was being given any warning in 2004, the rights of the registered owner had been extinguished.
38. In terms of denying that her father never sold the land to Njuguna Githere, the family of Kinuthia Wagakura would have challenged it since the said Njuguna Githere registered a caution on the suit title in 1973 claiming purchaser's interest. The deceased defendant at paragraph 7 of her replying affidavit stated that the caution was only removed in the year 2010. The existence of the caution placed by the Njuguna Githere does corroborate the evidence by the Plaintiff of how they placed into possession of the suit land (pursuant to sale). Although she deposed that she had a brother who lived, died and was buried on the suit property, no documentary evidence of that death and or place of burial was availed to this court to corroborate the assertion.
39. The witness who substituted the deceased Defendant said there was no evidence of purported occupation and if there was any, the same comprises trespass. He also stated that the Plaintiffs admitted there has been a dispute over the suit property before the local administration. Mr Njogu Njenga did not however elaborate what use they have put the land to that would have ejected the Plaintiff. The dispute before the local administration was accusing the Plaintiff of trespassing on the suit land and which evidence confirmed that the Plaintiff was on the land. As stated herein above, by 2004, the rights of the Defendant over the suit land had been extinguished by operation of the law.
40. I am persuaded by the Plaintiff's version of events that they entered the property in the year 1973, has had the continuous, and uninterrupted occupation for a period in excess of 12 years. This means that



the ownership of the suit property by the registered owner, Kinuthia Wagakura, (father to the deceased Defendant) and his successors in title expired in the year 1985. In the words of Gicheru, JA:

“In deciding the issue of adverse possession, the primary function of a court is to draw legal inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of fact, the question whether that possession is adverse or not is matter of legal conclusion to be drawn from the findings of acts” Kweyu v Omuto, C A Civ Appeal 8 of 1990 (as yet unreported).

41. The conclusion reached by this court based on the totality of the evidence adduced is that the Plaintiff has proved his case. Therefore, I enter judgement for him on the following terms:
- a. An order be and is hereby given declaring that the Plaintiff has acquired an overriding right over Land Reference Number KARAI/GIKAMBURA /581 by virtue of the doctrine of adverse possession.
 - b. An order of permanent injunction is issued against the Defendant, her representatives or any persons claiming as beneficiaries of the estate of Kinuthia Wagakura from interfering with the Plaintiff's user and occupation of the suit premises.
 - c. The Defendant's legal representative to execute all the necessary documents to avail and facilitate the transfer of the suit land KARAI/GIKAMBURA /581 in the names of the plaintiff or his representative within 30 days of the date of this judgement. In default, the Deputy Registrar of this court to execute the said documents.
 - d. An order is made directing the District Land Registrar Kiambu to register the Plaintiff herein as the proprietor of the suit premises in place of the Defendant herein Josphine Wanjiku.
 - e. Each party to bear their costs of the suit.

JUDGEMENT DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH OCTOBER, 2023.

A. OMOLLO

JUDGE

