



**Mwangi v Njoki (Environment & Land Case E001 of 2023)  
[2023] KEELC 20818 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20818 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE E001 OF 2023  
LN GACHERU, J  
OCTOBER 19, 2023**

**BETWEEN**

**FLORENCE WAITHIRA MWANGI ..... PLAINTIFF**

**AND**

**EUDIUS WANGUI NJOKI ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff moved this Court vide an Originating Summon dated 23<sup>rd</sup> December 2022, and filed on the 3<sup>rd</sup> January 2023, for orders that; -
  1. That a declaration that the Plaintiff is entitled to be registered forthwith as the owner of land title number Loc 13/Gakoe/576.
  2. That a declaration that the title of the said land Loc 13/Gakoe/576, Measuring 0.68Ha has been extinguished by the Plaintiff's adverse possession and occupancy thereof for a period of more than 12 years in terms of Sections 17 and 38 of the *Limitation of Actions Act* Cap 22.
  3. That a declaration that the Plaintiff has acquired an interest to land in Loc 13/Gakoe/576, measuring 0.68 Ha, by virtue of adverse possession thereof for more than 12 years from 1965 to date.
  4. That the Plaintiff be registered as the proprietor of the whole of Loc 13/Gakoe/576, measuring 0.68 Ha in place of the Defendant
  5. That the Deputy Registrar and/or Executive Officer of the ELC Division in Murang'a Law Courts be directed and/ or ordered to execute the transfer instruments and all attendant documents to facilitate the transfer and registration of the said parcel of land that is Loc 13/Gakoe/576 in favour of the Plaintiff, in the event of default on the part of the Defendant



6. That there be an order of permanent injunction restraining the Defendant either by herself, agents, servants and/ or employees from interfering with the Plaintiff's peaceful possession and occupation of the said parcel of land Loc 13/Gakoe/576, in any manner whatsoever and/or however.
7. Costs of this Originating Summons be borne by the Defendant.
2. The Originating Summons is anchored on the eight grounds, set out on the face of it and the Supporting Affidavit of the Plaintiff – Florence Waithira Mwangi sworn on the 23<sup>rd</sup> December, 2022. It is the Plaintiff's case that she has enjoyed quiet and peaceful possession of the suit property, for over 58 years.
3. That despite the Defendant being the owner of the suit property, she has never gained ingress into the suit land to claim ownership and her whereabouts remains unknown. She added that she has occupied the suit property since 1965, and has buried her loved ones thereon.
4. The matter was set down for hearing and the Plaintiff called three witnesses.

### **Plaintiff's Case**

5. PW1, Florence Waithira Mwangi, adopted her witness statement dated 23<sup>rd</sup> December 2022, as her evidence in chief and produced the documents contained in the List of Documents to support her case.
6. PW2 and PW3 Lydia Wairimu Mwangi and Geoffrey Francis Thiong'o told this Court that they are the child and nephew of PW1, and maintained that they have lived on the suit property ever since and further added that they have put up a home thereon.
7. PW 2, the daughter to the Plaintiff told the Court that her father died in 1982, and was buried on the suit land. That they cultivate the land and have built a home and no one has ever asked them to move out of the suit land.
8. PW 3, the Nephew to the Plaintiff told the Court that the Plaintiff is his neighbour and has lived on the suit land for more than 50 years. That no one has ever asked her to move out of the suit land.
9. PW4 John Kamau Mwangi told this Court that he is the area chief and that he has known the Plaintiff for 15 years and that the Plaintiff has lived on the suit property for over 15 years.
10. At the close of the hearing, the Plaintiff was directed to file her written submissions. The written submissions were filed on 18<sup>th</sup> July, 2023, through the Law Firm of Njoroge Mwaura & Co. Advocates, wherein she raised three issues for determination.
11. It was her submissions that she has satisfied the ingredients for grant of the orders of adverse possession. That she was able through her witnesses to prove to this Court that she has been in occupation and had done developments on the suit land. She relied on a litany of cases to elaborate the ingredients of adverse possession and maintained that she has met them; among them the case of [Tabitha Waitthero Kimani v Joshua Nganga](#) (2017) eKLR, which spelt out the ingredients to be satisfied in a claim for adverse possession.
12. It was her further submissions that her occupation of the suit land had extinguished the Defendant's title, and as such she was entitled to be registered as the owner.
13. On the issue of a permanent injunction, she is urged this Court that she is entitled to the order for the sole reason that the Defendant's title over the suit property became extinguished by the doctrine of adverse possession. She relied on the cases of *Giella v Cassman Brown* {1973} EA 358 and [Mrao v](#)



*First American Bank of Kenya Limited & 2 Others* {2003} eKLR, to support her prayer for permanent injunction.

14. Having now considered the available evidence and the written submissions, it is not in doubt from the attached copy of Green Card that the Defendant herein- Eudius Wangui Njoki is the registered proprietor of the suit property as is evident in the entries No 7 and 8. Interestingly, the suit property was first registered in the name of Mwangi Thiongo, and which this Court notes and appreciates is a name also referenced in the Chief's letter. Whether the same refers to one and the same person is not clear to this Court and even so that was not a matter in contention.
15. The Plaintiff's claim is on adverse possession, by dint of occupation of the suit land for a period which she says is over 50 years, and which she maintains has been peaceful and uninterrupted. Even though no extract of title Deed was produced before this Court as required by Order 37 Rule 7 of the *Civil Procedure Rules*, it is sufficient that a copy of a Green Card was availed, which clearly shows that the owner of the suit property is the Defendant, who was issued with a title deed on 9<sup>th</sup> April, 2003.
16. The Defendant's title as issued is subject to Statutory protection as guaranteed under Section 24(1)(a) of the *Land Registration Act*, which conferred on the Defendant indefeasible and absolute rights over the suit property. Also, Section 26 of the same Act is protective of the Defendant's title. It provides:

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner ... and the title of that proprietor shall not be subject to challenge, except –

  - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
17. However, this right of a registered proprietor is subject to overriding interests as enumerated in Section 28 of the *Land Registration Act*, which makes provisions that:

Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

  - (a) .....
  - .....
  - (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
  - .....
18. Thus, the Plaintiff herein has a duty to sufficiently lead evidence for this Court to invoke the aforementioned overriding interest.
19. It is important to point out that the suit was unopposed and Plaintiff's testimony remained uncontroverted. However, be that as it may, the Plaintiff maintains the duty to prove her case, and it is trite law that uncontroverted evidence is subject to the rules of evidence and therefore the Plaintiff has duty to prove her case to this Court on a balance of probability. This was well discussed in the



case of *Samson S Maitai & another v African Safari Club Ltd & Ano.* (2010) eKLR, where the Court held that: -

“.....I have not seen judicial definition of the phrase ‘formal proof’. ‘Formal’ in its ordinary dictionary meaning refers to being ‘methodical’ according to rules of evidence. On the other hand, according to *Halsburys Laws of England*, Vol. 17 Paragraph 260, proof is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption”.

20. Further, in the case of *Gichinga Kibutha v Caroline Nduku* [2018] eKLR, the Court held as follows;

“The hearing referred to above is the one commonly known as “Formal proof”. The *Civil Procedure Rules* do not define “Formal Proof”. *Black’s Law Dictionary* defines “Formal” as including “rules established by an institution according to certain processes”. This particular hearing is for the claimant to prove his claim. It is not automatic that in instances where the evidence is not controverted, the claimant’s claim shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”

21. The Plaintiff therefore must lead evidence to support her claim. Having stated as above, and having analyzed the pleadings, the evidence adduced and having read through the written submissions, and the authorities cited, the Court finds the issues for determination are-

- i. Whether the Plaintiff has made out a case for Adverse possession?
- ii. Whether the Plaintiff is entitled to the prayers sought?
- iii. Who should pay for the costs of the suit?

#### **I. Whether the Plaintiff has made out a case for Adverse possession?**

22. Section 7 of the *Land Act* contemplates that land can be acquired by inter alia prescription and any other manner prescribed by an Act of Parliament. The law on adverse possession is provided for under the *Limitation of Actions Act*. Section 7 of the Act provides

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.

23. Section 13 on the other hand provides;

- (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
- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued,



and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

- (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land”.
24. Section 17 extinguishes the rights of a registered owner where there is a successful claim for adverse possession. Section 38 on the other hand provides;
- (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.”
25. The principle of adverse possession was more elaborately set out in the case of *Wambugu v Njuguna* [1983] KLR 172, where the Court held that:

“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 of which he intended to use it.”

And that:

“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 of the requisite number of years.”

26. This right is adverse to land and does not automatically accrue unless the person in whose title it has accrued takes action. Section 38 of the Act gives authority to the claimant to apply to Court for orders of adverse possession. In the case of *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR, the Court of Appeal held:-

“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.”

27. Again, in the case of *Mbira v Gachubi* (2002) 1 EALR 137:the court stated as follows;

“... 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 statutorily prescribed period without interruption...”



28. In Kisumu Civil Appeal No27 of 2013;- *Samuel Kihamba v Mary Mbaisi* [2015] eKLR, the Court held:

“Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land”

29. In order to determine whether the claimant’s right has accrued, the Court will seek answers to these questions;

- i. How did the Plaintiff take possession of the suit property?
- ii. When did they take possession and occupation of the suit property?
- iii. What was the nature of her possession and occupation?
- iv. How long have the Plaintiff been in possession?

30. The Plaintiff did not expressly state to the Court how she gained entry into the suit land, but what came out of her evidence is that she entered into the suit property, without permission. Her entry was thus non-permissive. It was her case that the Defendant has never entered into the suit property, and her whereabouts is unknown. It is evident from the Green Card that the Defendant became the registered owner of the suit property in 2003, by dint of a succession cause, In Murang’a SPM Succ’ No 87/01. It is not clear to this Court as to why the Defendant has never entered and/ or visited the suit property as alleged by the Plaintiff. Even so, adverse possession accrues on land and not title. Additionally, failure of a registered proprietor to visit a suit property does not take away their proprietary rights over land.

31. The Court of Appeal in Nyeri Civ. Appeal No 153 of 2017;- *Chairman Board of Governors Murang’a College of Technology Primary School v Julius Ngigi Munjuga* [2018] eKLR quoted with approval the case of *Alfred Welimo v Mulaa Sumba Barasa*, CA No 186 of 2011 held:-

“It is trite that adverse possession is not established merely because the owner has abandoned possession of his land and ceased to use it; for as Robert Megarry aptly observed in his Megarry’s manual of the Law of Property, 5th ed. Page 490, the owner may have little present use for the land and that land may be used by others, without the users demonstrating a possession inconsistent with the title of the owner. So the mere fact that the appellant abandoned possession of the suit property and went to live at Ndalu scheme by and of itself does not establish adverse possession. The abandonment of possession must be coupled with the respondent taking possession of the land with animus possidendi (the intention to possess) and asserting thereon rights that are inconsistent with those of the appellant as the owner of the land. In such circumstances, the appellant would be said to have been dispossessed of the suit property by the respondent.”

32. Similarly, the Court of Appeal in Nairobi CoA No218 of 2017; - *Christopher Kioi & another v Winnie Mukolwe & 4 others* [2018] eKLR, when dismissing an Appeal on a judgment that dismissed an Originating Summons held;

“The appellants have laid great emphasis on the fact that Kituri did not use the suit property in his lifetime, but that in itself is not conclusive evidence of dispossession because where



the owner has little use of his land, others may use it without that possession amounting to dispossession or being inconsistent with the owner's title".

33. PW4 testified that he has known the Plaintiff for over a period of 15 years, and he confirmed that she has lived on the suit property exclusively. There was a mutual testimony that the Plaintiff has developed on the suit property, and she produced photographs to buttress her claim. The act of putting up a home shows the intention of dispossessions the owner. As per the Chief's letter, the Plaintiff has buried her loved ones on the suit property, and this goes further to supporting the Plaintiff's nature of possession and occupation of the suit property.
34. The Plaintiff told this Court that she entered into the suit property in 1965, and it is what she maintained throughout the proceedings. This Court has no reasons to doubt the Plaintiff's evidence.
35. There was no evidence adduced to the effect that there was an attempt to evict the Plaintiff. Beneficial to this suit was the testimony of PW4, who told the Court that he is the area chief and was thus well acquainted with the suit land. Even though he did not give testimony as to when the Plaintiff gained entry into the suit land, this Court had no reasons to doubt the evidence of the Plaintiff. To this end, the Court finds and holds that the Plaintiff has established a claim for adverse possession on a balance of probability.

## **II. Whether the Plaintiff is entitled to the prayers sought?**

36. Having established the ingredients of adverse possession as stated above, it is inevitable that the Defendant's title shall be defeated by adverse possession in favour of the Plaintiff. The Plaintiff wants the Defendant to be permanently enjoined from the suit land. It is her submissions that she be protected from other any interference having been exclusively and peacefully in occupation of the suit property.
37. A permanent injunction unlike a temporary one determines the rights of parties and has a final effect. The reason it is issued after hearing parties (See the case of *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR). The Plaintiff seems to anchor this prayer on protecting her right to the suit property in the event the Defendant re-surfaces and attempts to take ownership of the land. This Court is persuaded by the principles for grant of permanent injunction laid out in *Margaret Ngubi Mbugua v Ruth Kari Kagwe, Mary Njoki Gichuru & another* [2019] eKLR where the Court held;-

To be granted a permanent injunction, a plaintiff must establish the existence of a right and violation of that right by the defendant.

38. The Plaintiff has met the threshold for grant of an order of adverse possession. There is evidence that she is utilizing the suit property and there is also evidence that the Defendant has title to the suit property. Even though no evidence has been adduced before this Court that the Defendant is likely to deny the Plaintiff the use and occupation of the suit land, this Court finds that it is fair and just that the Plaintiff who has now acquired title to the suit land be protected by way of an injunction.
39. Additionally, in light of the Plaintiff's allegations that the Defendant cannot be traced, it is inevitable that she may not be traced for purposes of executing the orders of this Court. Resultantly, it is fair that prayer 5 be allowed. Therefore, it follows that the Plaintiff is entitled to the prayers sought.



### **III. Who should pay for the costs of the suit?**

40. It is trite law that the successful party is entitled to costs. Presently the Plaintiff is the successful party, and she is thus entitled to costs. However, this Court has the discretion to make such orders as to costs. The Plaintiff has intimated that the Defendant's whereabouts remain unknown, and thus condemning her to pay costs yet she cannot be traced may be an order in futility. Therefore, this Court shall direct that each party will bear their own costs.
41. Having considered the available evidence, the Court finds and holds that the Plaintiff has proved her case on the required standard of balance of probability.
42. For the above reasons, Judgement is entered for the Plaintiff against the Defendant in terms of prayers No 1, 2, 3, 4, 5 & 6 of the Originating Summons dated 23<sup>rd</sup> December 2022, with an order that each party bear his/her own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 19<sup>TH</sup> DAY OF OCTOBER, 2023.**

**L. GACHERU**

**JUDGE**

Delivered online in the presence of; -

Mr Mwaura for the Plaintiff

Defendant - Absent

