



**Gatu v Kimani & 2 others (Environment & Land Case 16 of 2020)  
[2023] KEELC 20883 (KLR) (18 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20883 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 16 OF 2020**

**JG KEMEI, J**

**OCTOBER 18, 2023**

**BETWEEN**

**ROBERT NJOROGE GATU ..... APPLICANT**

**AND**

**KAMAU NJOROGE KIMANI ..... 1<sup>ST</sup> RESPONDENT**

**JOSPEH NJOROGE KAMAU ..... 2<sup>ND</sup> RESPONDENT**

**SIMON GITAU KAMAU ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**A. Brief Facts**

1. Robert Njoroge Kimani, the Applicant/Plaintiff herein moved the Court by way of Originating Summons filed on the 24/2/2020 seeking the determination of the following questions;
  - a. Whether the Applicant is entitled to be registered as proprietor of one (1) acre in Kiambu/munyu/1646 on the ground that since 1986 the Plaintiff has openly, peacefully and of right been in occupation of the above one (1) acre for a period of over 12 years preceding the presentation of this Summons in Court.
  - b. Whether the Applicant is entitled to be registered as proprietor of one (1) acre in Kiambu/munyu/1646 in place of the Respondents herein as their rights have been extinguished under Section 38 of the Limitations of Actions Act.
  - c. Whether the aforesaid occupancy by the Applicant has been done continuously as of right and without force from the Applicant and without permission from the Respondents.
  - d. Whether the Respondents should execute transfer and do all the acts necessary to convey the said title to the Applicant as proprietor, to enable him to be registered as such proprietor and



in default whether the Deputy Registrar be authorized to sign all the necessary documents on behalf of the Respondents.

- e. Whether the Applicant is entitled to costs of the suit.
2. The summons are premised on the grounds annexed thereto and the supporting affidavit of the Applicant sworn on the 21/2/2020. In brief the Applicant depones that on the 18/12/1986 the 1<sup>st</sup> Respondent approached him and sold him one acre of his inheritance in the estate of his late mother in parcel No Kiambu/munyu/86. That he bought the land at Kshs 17,625/- which he paid in full. Immediately he took possession and constructed a home for his family which they reside in todate. That the family of the 1<sup>st</sup> Respondent was then in the process of pursuing the succession of the estate of their mother which on conclusion parcel Kiambu/munyu/86 was subdivided into three portions 1462, 1462 and 1464 among the three sons of the deceased original owner.
3. The Applicant averred that the 1<sup>st</sup> Respondent proceeded to subdivide his portion of his inheritance being 1462 into two parcels; being Kiambu/munyu/1645 And Kiambu/munyu/1646. That parcel Kiambu/munyu/1645 was sold to third party while the 1<sup>st</sup> Respondent and his sons retained parcel Kiambu/munyu/1646 in which the claim of the Applicant in form of one acre is premised. That he lives on one acre situate on parcel Kiambu/munyu/1646.
4. It is the averment of the Applicant that he has been in possession of the suit land since 1986 uninterrupted peacefully openly and without force for a period in excess of 12 years. He urged the Court to hold that the title of the Respondents has been extinguished by way of adverse possession and declare him the owner of one acre of land.
5. The Respondents have opposed the Applicant's case vide Replying Affidavit sworn on 13/10/2020. The 1<sup>st</sup> Respondent admits selling the land to the Applicant but argues that the agreement was vitiated by among other things lack of locus to enter into the sale agreement since the land was registered in the name of his late mother at the time. That he informed the Applicant of his desire to refund the money and asked for time to do so. That the Applicant refused and with the help of the local administration took possession of a part of the land and constructed a house. That requests to have him vacate have fallen on deaf ears and that one time he suggested that he accepts 0.25 acres for the money paid, a suggestion that was rejected too. That he has 42 members of his family who reside and depend on the suit land.
6. In his Further Affidavit sworn on the 7/4/2021, the Applicant stated that the land measuring about 10 acres belonged to the 1<sup>st</sup> Respondent's mother one Margaret Wambui Njoroge whose estate was inherited by the 1<sup>st</sup> Respondent and his two brothers with each getting more or less equal shares as per their agreement dated the 14/5/84 – see RNG4. That the estate of their mother was succeeded vide P & A Succession Cause No 331 of 2001, Thika. The Applicant stated that the 1<sup>st</sup> Respondent and his siblings have been selling their portions to third parties and enclosed some of the agreements in support. To suffice, the Applicant states that the 1<sup>st</sup> Respondent sold the land to him with the consent of his deceased wife and witnessed by his two brothers namely Njuguna Njoroge and James Kinga Njoroge. He reiterated his evidence that he has been in occupation of the land without any interruption from the Respondents.
7. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed their Supplementary Affidavit sworn on the 24/5/2021 and stated that they were listed as beneficiaries in the Succession Cause No 331 of 2001 alongside their father, the 1<sup>st</sup> Respondent. They faulted the claim of the Applicant on account that the there was no Land Control Board consent to the transaction. In their opinion the Applicant's remedy lies in refunds from



their father, the 1<sup>st</sup> Respondent, under Section 7 of the *Land Control Act*. The Court was urged to dismiss the case of the Applicant and order his immediate eviction from the land.

8. On the 8/2/2021 the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in their further Replying Affidavit stated that the suit land is ancestral land acquired through succession of their grandmother's estate and the Applicant's claim is unfounded. They refuted that the Applicant occupies one acre and in their own opinion they state that he only occupies ½ acre. That their family occupy two acres which they hold in trust for the rest of the family members.

## **B. The hearing**

9. At the hearing the case of the Applicant was led by three witnesses. PW1 – Robert Njoroge Gatu relied on his witness statement dated the 21/2/2020 as his evidence in chief and produced documents marked as PEX 1-8 in support of his case. He stated that he purchased one acre from the 1<sup>st</sup> Defendant in 1986, took possession and developed it by constructing a house which he resides with his family todate. That the one acre was to be excised from plot Kiambu/munyu/86 registered in the name of the 1<sup>st</sup> Respondents' mother namely Margaret Wambui Njoroge who had passed away in 1982. That the 1<sup>st</sup> Respondent sold his entitlement as a beneficiary in the estate of his mother. That the land was already in control of the 1<sup>st</sup> Respondent who sold portions to other third parties as well. That he understood that the family was undertaking succession of the estate and the land would be transferred to him upon conclusion but the 1<sup>st</sup> Respondent has been adamant to do so.
10. He stated that the land control board consent was not obtained because the Respondents have been uncooperative. That he has been in occupation since 1986 and over the years has developed the land by fencing, installing a borehole and other improvements. That the perimeter wall covers ¾ of an acre – homestead. That in 2020 the 1<sup>st</sup> Respondent brought quarry waste to the land but he quickly filed a complaint with the Police to protect his interest in the land.
11. That he paid the sum of Kshs 17,625/- in one lumpsum in 1986. That he entered the land as a purchaser. That the portion he purchased in 1986 falls within parcel Kiambu/munyu/1646 registered in the names of the Respondents.
12. PW2 – Kamau Njoroge testified as PW2 relied on his witness statement dated the 6/5/2022 as evidence in chief. He stated that the Plaintiff has developed the land and recently extended the house and constructed a perimeter wall.
13. PW2 – George Ngigi Gitau stated that he knows the 1<sup>st</sup> Respondent since 1969 as a neighbor and a friend. That he also knows the Applicant and that he has lived in Munyu since 1968.
14. DW1 – Kamau Njoroge Kimani testified and relied on his witness statement dated the 13/10/20 as his evidence in chief and also produced documents marked as DEX No. 1 - 4. He stated that he and the co-Respondents (his sons) are the registered owners of the suit land since 2010 having been declared joint beneficiaries of 3.33 acres out of the estate of the late Margaret Wambui Noroge (grandmother) vide the confirmation of grant issued on the 29/8/2002. That in 1986, he sold the land to the Applicant though it was still in the name of their mother. That her mother died in 1982. That the Applicant has been on the land for a period in excess of 12 years. That the total land was 10 acres but was subdivided among the three sons in the family. He stated that parcel Kiambu/munyu/1646 slightly measures three acres. That he lives on the land with his family. That upon successful succession of the estate he and his two sons (the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents) were awarded 3.3 acres of land. That since the distribution of the family land to the beneficiaries, he included, he has not removed the Applicant from the suit land. That the Applicant had been on the land even before he got title in 2010.



15. DW2 – Simon Gitau Kamau relied on his witness statement dated the 8/2/2021 and supplementary affidavit dated the 20/5/21 in evidence in chief and produced documents marled as DEX No 5-14 in support of his defence. That parcel Kiambu/munyu/1646 measures 3.3 acres. They live on the land as a family. That the Applicant occupies  $\frac{1}{3}$  of the portion of the land; the 1<sup>st</sup> Respondent lives on  $\frac{1}{3}$  of the land and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and others occupy  $\frac{2}{3}$  of the land. That the land was distributed to them in 2002. That apart from the Applicant there is another third party who was sold land and is also in occupation. That the Applicant lives on a portion of one acre of land where he has constructed a house and other improvements thereon. That the Applicant lived on the land even before the succession of the estate of their grandmother was concluded. That a third party who facilitated the succession cause was sold  $\frac{1}{4}$  acre of the land by the family. That they were included as co- beneficiaries of the estate to safeguard and protect the land from being sold by his father.

### C. Written submissions

16. At the close of the hearing the parties elected to file written submissions by close of business of 29/8/23. By the time of writing this Judgement none of the parties had filed written submissions. The Court will determine the suit based on the materials placed before it.

### D. Analysis and determination

17. The key issue for determination is whether the Applicant has proven to title by way of adverse possession.
18. The suit land originates from parcel Kiambu/munyu/86 measuring about 10 acres. The land was registered in the name of the 1<sup>st</sup> Respondent’s mother Margaret Wambui Njoroge and upon her death in 1982 the land remained in the hands of her 3 sons.
19. The Respondents led evidence that upon conclusion of the succession of the estate of their mother and grandmother 3.33 acres was distributed to them in 2002 and in 2010 obtained title in their names.
20. The starting point is the legal framework that supports the acquisition of title through the doctrine of adverse possession. Section 7 of the *Limitation of Actions Act* Cap 22 states as follows:-

“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.”

Section 13(1) of the *Limitation of Actions Act* states;

“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.”

Section 38 (1) of the *Limitation of Actions Act* states;

“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.”

21. Section 28 of the [Land Registration Act](#) recognizes rights acquired or in the process of being acquired by virtue of any written law relating to limitation of actions or by prescription. These rights include that of adverse possession which is one of the overriding interests that need not be noted on the register though they subsist and affect the title.
22. The rationale of adverse possession is well captured in the case of *Adnam Vs. Earl of Sandwich* (1877) 2QB 485 as follows;

“The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties.”
23. For adverse possession to be established, the parcel of land must be registered in the name of a person other than the Applicant. The Applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner. Lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner. This point is further emphasized in the case of [Kimani Ruchire Vs. Swift Rutherford & Co. Ltd.](#) (1980) KLR 10 at page 16 letter B, where Kneller J. held that:

“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, no secrecy, no persuasion). So, the Applicant must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it by way of recurrent consideration”.one must show that they are in long exclusive, uninterrupted possession, possession is hostile to the rights of the registered owner and the registered owner is aware; possession has as much publicity as not to be missed by the registered owner.”
24. It is the law that permission or licence of the registered owner of the land negates the doctrine of adverse possession. This was the holding in [Samuel Miki Waweru Vs. Jane Njeri Richu](#), Civil Appeal No. 122 of 2001, (UR), where the Court held that 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. Further, in the case of *Jandu Vs. Kirpal* [1975] EA 225 it was found that possession does not become adverse before the end of the period for which permission to occupy has been granted. In the case of *Wambugu Vs. Njuguna*, (1983) KLR 172 the Court held that where the claimant is in exclusive possession of the land with leave and license of the Appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined.
25. It is not disputed that the Applicant and the 1<sup>st</sup> Respondent entered into a sale agreement for the sale and purchase of one acre out of his inheritance expected from parcel Kiambu/munyu/86. It is the Applicants case that he paid the purchase price in full in 1986 but the 1<sup>st</sup> Respondent stated that he was paid something small in the sum of Kshs 10,000/- The Court has perused the agreement of sale dated the 18/12/1986 and finds that the full purchase price was acknowledged by the 1<sup>st</sup> Respondent



in the presence of witnesses. The Court would like to agree with the Applicant that the full purchase price was paid.

26. In the case of *The Public Trustee In the case of Civil Appeal No. 73 of 1982 Between Public Trustee and Wanduru Ndegwa* eKLR, the Court stated as follows:

“The position of a vendor and a purchaser of registered land is this. The vendor as the registered owner retains the legal estate and becomes the trustee of it for the purchaser when the purchaser pays a deposit for it. The vendor retains a lien on the property for the balance of the purchase money which disappears when it is paid and the purchaser then becomes the sole beneficial owner and the vendor becomes a bare trustee for the purchaser. If the vendor trustee allows the purchaser cestui qui trust to remain in possession the latter is in adverse possession because the vendor as the absent registered owner always retains the legal estate and this prima facie entitles him to resume possession from the purchaser in possession.”

27. The limitation period will begin to run from the date of the payment of the purchase price in full or last instalment of it. See Harman J in *Bridges Vs. Mees*, [1957] I Ch 475; and Simpson J (as he then was) in *Hosea Vs. Njiru Ors*, [1974] EA 526 (K).
28. In this case the Applicant paid the full purchase price in 1986 therefore he becomes a person in whom the period of limitation runs from 1986 and by 1998 adverse possession had crystallized in favour of the Applicant.
29. The 1<sup>st</sup> Respondent has alluded to alleged wrangles between the Applicant and the Respondents and in his view the occupation of the Applicant was not peaceful hence cannot find a right in title premised on adverse possession. He has exhibited an Occurrence Book number to show that he reported the matter to the police because the Applicant refused him to build on the suit land. The law is clear on how adverse can be broken or interrupted. First the title holder must eject the adverse possessor out of the land; secondly the adverse possessor relinquishes possession and hands over the land to the title holder and thirdly the title holder files suit to advert title of the land. None of the actions suggested by the 1<sup>st</sup> Respondent fit into the three accepted methods. The Court finds that the adverse possession was never interrupted.
30. The 1<sup>st</sup> Respondent has argued that the Applicant is not entitled to adverse possession because the land did not belong to him and that he had no locus to dispose the land and put the Applicant in possession in 1986 because the succession of the mother’s estate was not complete. It is not in dispute that the land the Applicant is seeking title by way of adverse possession is the land that he has occupied since 1986. It is the portion of land that was awarded to the Respondents in the confirmation of grant issued in their favour in 2002. Therefore since 2002 the Respondents did not take any action to recover the land from the Applicant despite being declared as the beneficial owners. Even if the Court was to take the period to run from 2002 then adverse accrued in favour of the Applicant in 2014.
31. The Court finds that the Respondents took no action to eject the Applicant before 1998, after 1998, before 2014 or any other time to date. All this time adverse possession continued to accrue in favour of the Applicant unhindered.
32. In the case of *Public Trustee Vs. Kamau Wanduru*, (1984) KLR 314 at 324, the Court stated that in adverse possession, the title of a registered proprietor is not extinguished but is held by him in trust for the person who, by virtue of the *Limitation of Actions Act*, has acquired title against the proprietor.
33. Going by the above decision therefore the Court finds that the estate of Margaret Wamboi Njoroge held the title in trust for the Applicant for whom adverse possession had accrued in 1998. Upon



confirmation of grant the land that was distributed to the Respondents was encumbered with trust in favour of the Applicant for which they have continued to hold to the extent of 1 acre.

34. Is the one acre identifiable? It is trite that the acreage of the land being claimed must be specifically ascertained. The burden of proof is on the person claiming adverse possession. In the case of *Gerishon Muindi Baruthi Vs. Willays Gatinku Mukobwa & Another* C.A No. 98 of 1998 the Court held that the Plaintiff/ claimant has a duty also to proof that the land he was claiming was definite and identifiable. It was held thus:

“Exclusive possession of a portion of parcel of land which is definite would entitle the Appellant to establish his claim on ground of adverse possession provided the period of 12 years has run.”

35. In this case the Respondents have argued that the Applicant only occupies  $\frac{3}{4}$  of an acre where he has built his own house. However according to the exhibit on page 41 produced by the Applicant, the area stated to be occupied by the Applicant is one acre. The evidence of DW2 in my view supports the case of the Applicant. He stated that the land is 3.3 acres and the Applicant occupies  $\frac{1}{3}$  of it which is one acre.

36. The Court finds that the area occupied by the Applicant is ascertainable, identifiable and is in the knowledge of the Respondents.

37. It is not in dispute that the Applicant has fenced off the land, constructed a house and made other developments consistent with an owner of the land. One of the key requirement in finding for adverse possession is possession must be with the intention to exclude the owner from the property also known as the *animus possidendi*. In the case of *Chevron (K) Ltd Vs. Harrison Charo Wa Shutu* [2016] eKLR the Court said;

“.... by building structures on the suit premises without obtaining permission from the Appellant, as described earlier in this Judgment, the Respondent manifested *animus possidendi*, a clear mind and intention of dealing with the suit premises as if it was exclusively his and in a manner that was in clear conflict with the Appellant's rights. That the Appellant was such dispossessed of the suit premises by those acts. The Respondent's acts were *nec vi, nec clam, nec precario* (that is, neither by force, nor secretly and without permission.”

38. In this case the Applicant has satisfied the Court as to the *animus possidendi* in the manner in which he has occupied and developed the land. Evidence was led by the 1<sup>st</sup> Respondent that the Applicant stopped him when he wanted to construct a house on the part occupied by the Applicant. The Court finds that the actions of the Applicant are consistent with a person who is asserting title to the land by way of adverse possession.

#### **D. Costs**

39. Costs shall follow the event.

#### **D. Final orders for disposal**

40. In the end the Plaintiff has proven his claim and the Court enters Judgement in his favour in the following terms;



- a. It is hereby declared that the Applicant has acquired title by adverse possession of 1 acre out of Parcel Kiambu/munyu/1646 having been in open peaceful continuous occupation of the suit land for a period exceeding 12 years.
- b. That the rights of the Respondents have been extinguished over the portion of one acre out of Parcel Kiambu/munyu/1646 under Section 38 of the *Limitation of Actions Act*.
- c. The Respondents be and are hereby ordered to execute all the documents necessary to effectuate the registration of the Applicant as proprietor of the one (1) acre out of Parcel Kiambu/munyu/1646 within 15 days and in default the Deputy Registrar of this Court be and is hereby ordered to do so.
- d. The Applicant shall have the costs of the suit.

41. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 18<sup>TH</sup> DAY OF OCTOBER, 2023 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Ms. Wamboi for Applicant/Plaintiff

Ms. Odhiambo HB Mbuthia for 1<sup>st</sup> Respondent

Muiruri for 2<sup>nd</sup> & 3<sup>rd</sup> Respondents

Court Assistants – Phyllis/Lilian

