



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. E005 OF 2021(0S)

NJERI KIMANI (*Suing in her capacity as the administratrix*)

of the estate of NASSER KIMANI
NJOROGE (Deceased).....APPLICANT

-VERSUS-

EDWIN ONESMUS WANJAU (*Suing in her capacity as the administrator of the estates of*)

KIMINGI WARIERA (Deceased) and of MWANGI KIMINGI (Deceased)..... RESPONDENT

JUDGMENT

By Originating Summons dated 3rd March 2021, the Applicant sought for the following orders against the Respondent;

1. ***THAT*** the Plaintiff be declared to have become entitled to one (1) Acre out of land Parcel Number LOC 13/GITUGI/424, registered under The Registered Land Act (Cap 300 Laws of Kenya) (now repealed) by having had adverse possession of the said land for over twelve (12) years.
2. ***THAT*** the Defendant's title to the said land be declared extinguished and or invalid, null and void and the Plaintiff be registered as proprietor of the suit land.
3. ***THAT*** the Defendant do execute the necessary documents to effect the transfer of the said one (1) acre from land Parcel Number LOC 13/GITUGI/424, to the plaintiff
4. ***THAT*** the costs of the Application be provided for

The Originating Summons is supported by the Supporting Affidavit of the Applicant dated 3rd March, 2021, who is the widow of **NASSER KIMANI NJOROGE (deceased)**, and the administratrix of his Estate. That the Defendant is a son of the late **Mwangi Kimingi** who had filed a **Succession Cause No. 230 of 2002 – Murang'a** in respect of the estate of his father the late **KIMINGI WAIRERA**. That the Defendant's father (Mwangi Kimingi) died before finalization of the said **Succession Cause** and the Defendant was substituted in his place after obtaining Limited Grant of letters of Administration *Ad Litem*. That prior to his death, the Defendant's father sold to the late **Nasser Kimani Njoroge**, a portion of one (1) acre out of land parcel No. **LOC 13/GITUGI/424**, vide a sale agreement dated **1st February 1999**.

Further, that the late **Nasser Kimani Njoroge**, was given vacant possession by the Defendant's father and his family and he has been in **exclusive, open** and **continuous** occupation of the suit property for over **12 years**, without interruption. That it was a term of the sale agreement that the Defendant's father would file a Succession Cause in his father's estate and on determination, have the same transferred.

In response to the Summons, the Respondent filed A Replying Affidavit dated **15th April 2021**. And deponed that land parcel No **LOC 13/GITUGI/424**, which is the suit land and land parcel No **LOC 13/GITUGI/422**, were both registered in the name of the **late Kimingi Wariera** on **2nd July, 1963**. That both parcels of land form part of the estate of the deceased in **Succession Cause 23 of 2012**, which is still pending determination in High Court at Maringa. That after filing of the Succession Cause, for the estate of the late Kimingi Wariera, the late Nasser Kimani Njoroge together with others on **28th August 2001**, filed a caveat in the said Succession Cause. That the late **Mwangi Kimingi** was the sole administrator of the estate of the Late **Kimingi Wariera** and he died on **17th April 2009**, before the succession case was concluded and determined. That upon his demise in 2009, the Respondent herein substituted his place in the succession cause and was subsequently appointed as an administrator of the estate of the late Kimingi Wariera.

Further, the Applicant alleged that the Late Mwangi Kimingi sold to him a portion of one **(1) acre** out of parcel No **LOC 13/GITUGI/424**,

but he has not established when the balance of the purchase price was cleared. That the late Nasser was put in occupation of the suit land by the late Mwangi Kimingi and therefore he was a licensee. That the late Nasser Njoroge had filed an affidavit of protest in **Murang'a High Court Succession Cause No.23 of 2012**, against the proposed Confirmation of Grant. That the High Court directed him and others to file their claims before the ELC within **60 days** against the estate of the deceased. That the said Succession Cause was stayed pending the determination of the ELC Case. That on 6/12/2017, he was sued in his capacity as administrator in Muranga Civil Case 358 of 2017 by the Late **Nasser Njoroge** and others who were claiming portions of land parcel **No LOC 13/GITUGI/424**, allegedly sold to them by the late Mwangi Kimingi. That he is advised by his advocates, which advise he believes to be true that the contested Succession Cause and the subsequent civil cases have interfered with and interrupted the Applicant's claim for adverse possession of the suit land.

On **27th August 2021**, the Respondent filed a further Replying Affidavit and, deponed that on **23rd January 2001**, the late **Mwangi Kimingi** received some money from the Late **Nasser Kimani Njoroge**, being payment made in furtherance of the sale agreement dated **1st February 1999**. That if there was a sale as alleged by the Applicant, the late **Mwangi Kimingi** put the Applicant in occupation pending Confirmation of Grant. That the Applicant and her late husband were not in adverse possession as they occupied the suit land with the permission of the Late Mwangi Kimingi. That the period for adverse possession if any was discontinued by the Summons for Confirmation of Grant filed and the affidavit of protest filed by the Applicant's late husband on 17/8/2014.

The matter proceeded for hearing and the parties gave evidence as below; -

PLAINTIFF'S CASE

PW1 NJERI KIMANI adopted her witness statement dated **22nd October 2021** as her evidence in chief. She also adopted her list of documents dated **22nd October 2021** and produced the documents as exhibits and urged the Court to allow her claim. On cross exam, she testified that the suit land belonged to **Kiminki Wairera** who was now deceased. That the land was sold to her late husband by **Mwangi Kimingi**, and she did not know what year it was sold. That she could not remember when she entered the suit land, but she entered after the land was purchased by her husband. That **Mwangi Kimingi** allowed them to possess the land. That **Mwangi Kimingi** later died and by the time he died, he had not brought a surveyor to survey the suit land. That she did not know about the Succession Cause for Mwangi Kimingi's estate. That her husband had sued **Onesmus Njau**, but the case was later withdrawn. That later they brought the instant case to this Court. That she did not know when her husband finished paying for the portion that he bought from Mwangi Kimingi.

DEFENCE CASE

DW1 EDWIN ONESMUS WANJAU adopted his Replying Affidavit and Annexures thereto dated **5th April 2021**, as evidence in chief. In addition, he adopted his witness statement dated **9th November, 2012** as part of his evidence. He also testified that he did not know Njeri and urged the Court to dismiss the Originating Summons.

On cross examination, he told the Court that his late father was called **Mwangi Kimingi Wairera** and he was the administrator of his estate. That he was issued a Grant to that effect on **17th June 2011**. That his grandfather was called **Kiminki Wairera** and he was in Court because his father died. That he did not know Njeri and she was not using the suit land as alleged. That the suit land was registered in the name of his grandfather. That Njeri had refused to move out of the suit land and she had utilized it since 1999. That his grandfather died in 1971. That Njeri's husband had bought the alleged land from his grandfather. That his grandfather had told him that he sold the land to **Nasser** who was the husband to Njeri.

On re-examination he testified that Njeri uses the land and she had refused to move out. That there was no evidence that Kimingi had sold the land to Nasser as there was no sale agreement.

The parties thereafter filed and exchanged their written submissions which the Court has duly considered.

The Applicant through the **Law Firm of Nganga Ngigi & Co Advocates**, filed her written submissions dated **21st December 2021**, and submitted that the law is clear that it matters not how one came into occupation of the land, provided that one can prove to have been in exclusive possession for **12 years**, either after dispossessing the owner or by discontinuation of possession by the owner. She relied on the case of **Murunga Kabangi & 2 Others vs. Hannah Wairimu Gitau & another (2019) eKLR**. She further submitted that the Plaintiff had demonstrated that her family had been in possession of the suit land for over **12 years** after taking over from the owner of the land.

It was the Applicant's further submissions that succession does not affect adverse possession and therefore time for adverse possession was not discontinued when a Succession Cause was filed. Finally, she submitted that the Respondent was estopped in law from denying the actions of the Late **Mwangi Kimingi** and **Kiminki Wairera**, which were performed during their lifetime.

The Respondent through the Law Firm of **S. K. Njuguna & Co. Advocates**, filed his written submissions dated **27th January 2022**, and Respondent submitted that the Applicant had not proved her case on a balance of probability because, she had failed to demonstrate the date of occupation in her pleadings, the occupation was consensual, and there was no evidence of the actual extent of the portion of land the Plaintiff Occupies, there was breach of Sections **45 (1)** and **(2)** of the **Succession Act**, and no suit was filed by the Applicant within the timelines granted by the High Court.

The Court has carefully read and considered the pleadings by the parties, the evidence adduced, submissions, authorities cited and the relevant provisions of law and finds that the issues for determination are;

I. Whether the Plaintiffs has met the threshold for grant of orders for adverse possession?

II. Who should bear the cost of the suit?

From the pleadings on record and the documents produced, it is evident that **Nasser Kimani Njoroge**, is deceased and the Applicant has filed the instant suit in her capacity as an administratrix to his estate. It is also not in doubt the **Kimingi Wariera** is deceased and **Mwangi Kimingi** was the sole administrator of the estate as his only heir. Further, it is not in doubt that the said **Mwangi Kimingi** died on **17th April 2009**, and subsequently the Respondent herein became the administrator in the estates of both **Kimingi Wariera** and **Mwangi Kimingi**. It is on this background that the Respondent has been sued. Lastly it is not in doubt that the suit land forms part of the estate of the late **Kimingi Wariera**, as the succession matter had not been completed when **Mwangi Kimingi** died in **2009**.

It is trite that a claim for adverse possession is attached to land and not title. This Court having laid the basis for the instant suit, it will then proceed to delve into the issues outlined above.

(i) Whether the Applicant has met the threshold for the grant of orders of adverse possession

It is the Applicant's case that she has been in continuous uninterrupted occupation and possession of the suit property for a period in excess of 12 years. The burden of leading the Court to ascertaining this fact lies with the Applicant herein.

Claims under adverse possession are set out in several provisions of the **Limitation of Actions Act**. Section 7 of the said Act places a bar on actions to recover land after **12 years**, from the date on which the right accrued. Section 13 of the same Act provides that **adverse possession** as the exception to this limitation:

“ (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.”

Finally, **Section 38 of the Act** provides that:

“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.”

The principles to be considered in a case of adverse possession were more elaborately set out in the case of **Wambugu vs 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.”

This right to be **adverse** to land does not automatically accrue, unless the person in who's this right has accrued takes action. **Section 38 of the Act (Cap 22)** gives authority to the claimant to apply to Court for orders of adverse possession. In the case of **Mtana Lewa v Kahindi Ngala Mwagandi [2015] eKLR** the Court 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.

Further, in the case **Mbira v. Gachuhi (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...”

In order to determine whether the Applicant’s rights have accrued, the Court will seek to answer the following Questions;

- i. *How did the Applicant take possession of the suit property?*
- ii. *When did she take possession and occupation of the suit property?*
- iii. *What was the nature of her possession and occupation?*
- iv. *How long has the Applicant been in possession?*

The land in question herein is registered in the name **Kimingi Wariera** (now deceased). It is not in dispute that the estate of the said **Kimingi Wariera** is yet to be distributed and a **Succession Cause No. 23 of 2012**, is still pending before the **High Court of Murang’a**. Further, it is not in doubt that **Mwangi Kimingi** (deceased) was the sole administrator of the estate of **Kimingi Wariera**, and he sold the suit land to the late **Nasser Kimani Njoroge**, pending conclusion of the **Succession** matter. The Court has perused some of the pleadings filed in the **Succession Cause** that have been produced as exhibits herein. The Court notes that the Applicant has filed a **Protest** in the **Succession Cause**, to protect her right to the suit land, which she allegedly acquired via a sale agreement. What begs an answer is whether a **Succession Cause** stops time from running in adverse possession?

It trite that the filing of a suit asserting rights over land stops time from running in adverse possession. A **Succession Cause** is initiated for the purpose of distributing the property of the deceased owner, to the persons entitled. Those entitled are determined on the basis of whether the person died testate or intestate. Adverse possession on the other hand is about occupation of land belonging to another, and asserting a right to be given title to it on the basis of the prolonged occupation of the said property.

In the instant case, there was no evidence that the filing of the **Succession Cause** was for eviction of the Applicant herein from the suit property or was meant to assert rights over the land. Adverse possession accrues to land and not title, and unless the Respondent took steps to evict the Applicant from the suit land, which he did not the mere act of claiming ownership on title does not stop time from running. In **Eldoret Civil Appeal No. 212 of 2012 Isaac Cypriano Shingore v Kipketer Togom [2016] eKLR** the Court held:

“By the time the respondent filed the originating summons in November 2006, he had been in possession of the property for about 24 years. Even by the time the appellant became registered as proprietor by transmission on 28th April 2000, the appellant had been in occupation of the property for about 18 years. No attempts were made by the appellant over all those years to assert title. There is no merit in the argument by the appellant that the objection proceedings in the succession cause by the respondent and the complaint by the respondent before the Land Disputes Tribunal had the effect of interrupting the respondent’s possession of the property. We are unable to appreciate how steps taken by the respondent to assert his claim to the property can be construed as steps by the appellant to assert his right to ownership of the property.

As the Court held in Githu Vs. Ndeete [1984]KLR 776 “Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land; see Cheshire’s Modern Law of Real Property, 11th edition at p 894”.

On the issue of possession, the Applicant contends that she and her husband gained entry into the suit land vide a sale agreement dated **1st February 1999**, between her husband and the Respondent’s father (now deceased). It is trite that for a claim for adverse possession to suffice, the claimant must demonstrate that the same was non-permissive and non-consensual and without license. (See **Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others [2018] eKLR**, where the Court enumerated the required elements to prove adverse possession as follows:

“Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12years as espoused in the Latin maxim, nec vi nec clam nec precario.”

From the above analysis, a claim based on a sale agreement cannot issue, since the vendor’s consent and permission is obtained before one can gain ingress into the land.

Every rule however has an exception and the Court in **Nairobi Appeal No. 73 of 1982; Public Trustee v Wanduru Ndegwa [1984] eKLR**, found that Limitation of action begun running from the date of final payment. In the case **Hosea v Njiru & Others [1974] EA 526, Simpson J, following Bridges v Mees [1957] 2 All ER 577**, held that once payment of the last instalment of the purchase price had been effected, the purchaser’s possession became adverse to the vendor and that he henceforth, by occupation for twelve years, was entitled to become registered as proprietor of it.

In the instant case, the Applicant avers that she took possession of **one acre** of land on parcel **No. LOC 13/GITUGI/424**, in **1999**, after her husband purchased the same from the late **Mwangi Kimingi**. In support of her claim, the Applicant produced a sale agreement dated **1st February 1999**. A perusal of the said sale agreement shows that the Late **Nasser Kimani Njoroge**, together with one **Joseph Chege Mukunyi**, were the purchasers. It is also evident that they were purchasing **two acres** of land to be excised from parcel **No. LOC 13/GITUGI/424**, for a consideration of **Kshs 200,000/=**. The said agreements indicates that the purchasers paid the vendor **Ksh. 50,000/=** and the balance of **Ksh. 150,000/=** was to be paid in installments of **Kshs. 50,000/=** each after every three months till payment in full. No evidence was produced by the Applicant to confirm payment of the instalments as agreed.

In her testimony PW 1, averred that the land was sold to her husband by **Kimingi Wariera** and she did not know in which year. She further testified that she did not know the year when her late husband and herself occupied the suit land, but it was about the time the land was purchased. That the Late Mwangi Kimmingi allowed them to occupy the said land and she did not know when her late husband finished paying the purchase price.

The Respondent on the other hand, testified that the Applicant had occupied the land since 1999, and she had refused to move out. He also testified further that his grandfather never sold the said land to the Late **Nasser Kimani Njoroge**. However, this Court has perused an acknowledgment of payment dated **23rd February 2001**, wherein the late **Mwangi Kimmingi** acknowledged receipt of a further Kshs. **130,000/=** from the purchasers, more specifically being **Nasser Kimani Njoroge** and **Joseph Chege Mukunyi**, being part payment of the purchase price.

Therefore, it is evident that the **Mwangi Kimmingi** (now deceased) sold two acres of land to be excised from parcel **No. LOC 13/GITUGI/424** to **Nasser Kimani Njoroge** (now deceased) and **Joseph Chege Mukunyi**. Further it is evident from the Applicant's statement that the purchasers were to share equally the two acres of land and it is the one acre belonging to **Nasser Kimani Njoroge** (now deceased), that the Applicant now seeks. This Court has not perused any evidence as to payment of the balance of **Kshs. 20,000/=** outstanding from the purchase price. The burden of proving that the same was paid lies entirely with the Applicant. The purpose for establishing the exact date of the last installment is for computation of time to establish when the Applicant became adverse to title.

The Applicant stated that she was aware that the entire amount was paid to **Mwangi Kimmingi** (deceased), but she did not know when the same was paid. The Applicant's averment were not supported by any evidence and/or corroborated by any witnesses. The Respondent in his evidence did not lead any evidence to the contrary nor did he rebut the evidence of the Applicant. This Court is guided by the sentiments of the Court of Appeal in **Joseph Gachumi Kiritu v Lawrence Munyambu Kabura [1996] eKLR** where it was stated that;

“It is not possible for one to determine, in the absence of evidence as to the exact date of last instalment paid by the respondent and possibly the amount thereof, the exact date when possession of land by the respondent become adverse. It is a matter for the respondent (plaintiff) to prove and he did not prove it. It transpires therefore that the respondent did not properly or at all prove that he was in adverse possession of suit land for a minimum of twelve years”

The Applicant's claim is that **Nasser Kimani Njoroge** (deceased) became adverse to the impugned land from **1999**. However, this Court has herein above established that a claim for adverse possession cannot issue on sale agreement, unless it is established that the last instalment was paid in 1999, which is not the case herein. Therefore, for purposes of computing time for or a claim of **adverse possession**, the same could not start running in 1999. This Court has perused an acknowledgment for receipt of funds dated **23rd February 2001**, indicating an instalment of **Kshs. 130,000/=** was paid to the Vendor being part payment of the purchase price of the impugned land. The evidence on record indicates that the consideration for the sale agreement was **Kshs. 200,000/=**. However, on computing the monies paid to the vendor, the Court could only account for **Kshs. 180,000/=**. Further, the spirit of the aforementioned acknowledgment is indicative of an outstanding balance. This Court cannot therefore conclude that the payment confirmed as acknowledgment agreement was the final instalment and hence time for adverse possession did not begin to run on **23rd Feb 2001**.

Having established the above, the question that begs the answer then becomes when if at all time for adverse possession began to ran.

It is trite that a purchaser of land under a contract of sale who is in possession of the land with the permission of the vendor pending completion cannot lay a claim of adverse possession of such land at any time during the period of validity of the contract unless and until the contract of sale has first been repudiated or rescinded by parties in which case adverse possession starts from date of the termination of the contract.

In the case of **Samuel Miki v. Jane Njeri Richu CA No. 122 of 2001** cited with approval by the Court of Appeal in **Christopher Kioi & another v Winnie Mukolwe & 4 others [2018] eKLR** it was stated that

“A purchaser of land under a contract of sale who is in possession of land with the permission of the vendor can only lay claim to the land after the period of validity of the contract, unless and until the contract has been repudiated, in which case adverse possession starts from the date of termination of the contract”

It is not in doubt that the applicant was in possession of the suit land with the permission of the vendor. The said permission was anchored on payment of the purchase price and completion of the sale agreement. This Court has perused a death certificate which indicates that the vendor **Mwangi Kimmingi** died on **17th April 2009**. At the time of his death, the Sale Agreement dated **1st February 1999** had not been completed. The fact that the Vendor died before completion did not renege on the Applicant's duty to complete the Contract.

Occupation can either be by disposition or by adverse possession and the two cannot coexist. This Court has found that the Applicant has failed to prove that she paid the last instalment for permission to terminate and time for adverse possession to begin running. Time is the heart in a claim for adverse possession and the Court must calculate it very precisely and accurately before it can grant such orders.

There being no evidence as to payment of the last installment, it follows therefore that there is a valid contract between parties whose validity will terminate after last payment or when contract is repudiated, which is not the case. The Court in **Wambugu v. Njuguna [1983] KLR 172** held:

“where the claimant is a purchaser under a contract of sale of land, it would be unfair to allow time to run in favour of a purchaser pending completion when it is clear that he was only allowed to continue to stay because of the pending purchase, because had it not been for the pending purchase, the vendors would have evicted him. The possession can therefore only

become adverse once the contract is repudiated”

To this end, the Court finds and holds that the Applicant has failed on a balance of probability to meet the threshold for the grant of orders of ownership of the suit property by virtue of **adverse possession**.

2. Who should bear costs

It is trite that costs should follow the **events**, and that the successful party is always awarded costs. The Respondent herein is the successful party and this Court finds no reasons not to exercise its discretion in his favour and award costs of this Originating Summons to the Respondent. It so held.

Consequently, the Court finds that the Applicant herein has not proved her claim as contained in the Originating Summons dated **3rd March 2021**, on the required standard of balance of probabilities. For the above reasons, the said claim is dismissed entirely with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 24TH DAY OF FEBRUARY, 2022.

L. GACHERU

JUDGE

Delivered online

In the presence of;

M/s Wainaina H/B Mr Nganga Ngigi for the Applicant/Plaintiff

Mr. S.K. Njuguna for the Respondent/Defendant

Kuiyaki - Court Assistant

L. GACHERU

JUDGE