



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

E.L.C NO. E008 OF 2021(0.S)

NAHASHON GICHOHI MUIGA.....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 herein sought for the following orders against the Respondent;

- 1. THAT the Plaintiff be declared to have become entitled to two (2) Acres out of land parcel Number LOC 13/GITUGI/422, registered under The Registered Land Act (Cap 300 Laws of Kenya) (now repealed) by having had adverse possession of the said land for over twelve (12) years.***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 two (2) acres of land parcel Number LOC 13/GITUGI/422 to the plaintiff***
- 4. THAT the costs of the Application be provided for***

The Application is premised on the Supporting Affidavit of the Applicant dated 3rd March, 2021. It is the Applicant's averment 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 him two (2) acres of land out of **LOC 13/GITUGI/422**, at an agreed price of **Kshs. 180,000/=** vide an agreement dated **22/1/2002**. That the Defendant's father being the only heir of the late **Kimingi Wariera** renegotiated the sale of the land and the sale was confirmed vide sale agreement dated **14th April 2007**. That the renegotiated purchase price was **Kshs. 300,000/=** which the Applicant paid to the Respondent's father.

Further, that he was given **vacant possession** by the Respondent's father and his family and he have been in **exclusive, open and continuous occupation** of the suit property for over 12 years without interruption. That the title of **Kimingi Wairera** (Deceased) was extinguished after **12 years** in respect of **two (2) acres** out of the suit land and that there was no good title to be inherited by the Respondent in respect to the two (2) acres.

In response to the Summons, the Respondent filed a Replying Affidavit dated **15th April 2021**, and deponed that he is the son of **Mwangi Kimingi** (now deceased) and the late **Kimingi Wariera** was his grandfather. That parcel No **LOC 13/GITUGI/422**, which is the suit land and land parcel No **LOC 13/GITUGI/424**, were both registered in the name of the late **Kimingi Wariera** on **2/7/1963**. 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 Murang'a**. That the family of the late **Mwangi Kimingi** has filed objection proceedings in **High Court Succession Cause No. 23 of 2012**. That Mwangi Kamingi as the sole administrator of the estate of the Late **Kamingi Wariera** died on **17th April 2009**, before the succession case was concluded and determined. That upon his demise in 2009, the Respondent herein was substituted in his place in the Succession Cause and was subsequently substituted as an administrator of the estate of the late **Kamingi Wariera**.

Further that the applicant has alleged that the Late Mwangi Kimingi sold to him a portion of **two (2)** acres out of parcel No **LOC**

13/GITUGI/422 on **22/1/2002**, but he has not produced the sale agreement in Court. That the Applicant has alleged that the sale agreement was renegotiated on **14th April 2007**, to **Kshs 300,000/=** and it was paid to the Respondent. That the Applicant was put in occupation of the suit land by the late **Mwangi Kimingi**, and therefore he was a licensee. That the Applicant has filed an Affidavit of **Protest in Murang'a High Court Succession Cause 23 of 2012**, against the proposed confirmation of grant. That under paragraphs 5 and 6 of the said **Affidavit of Protest**, the Applicant has sworn that after occupying the suit land from 2002, he was chased away in 2006. That the High Court directed the Applicant 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 **Murang'a Civil Case 358 of 2017**, by the Applicant and others who were claiming portions of parcels of land sold to them by the late **Mwangi Kimingi** that formed the estate of the late Wariera Kimingi. That **Civil Case 358 of 2017**, was withdrawn with cost to him. That the Kimingi Wariera was still the registered proprietor of the suit land, and the Applicant had nothing to claim from his estate. That the Applicant has never occupied or cultivated land parcel No. **LOC 13/GITUGI/422**. That the suit land had never been surveyed and/or subdivided. That the Applicant had been given a portion of the suit land to cultivate by the Late **Mwangi Kimingi** in 2001.

That Respondent further averred that his advocates have advised him 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. That the Applicant had no **legitimate** claim against him and the Applicant's case should be dismissed with costs and the Applicant should be ordered to vacate the suit land.

On **27th August 2021**, the Respondent filed a Further Replying Affidavit and deponed that the late **Mwangi Kimingi** died on **17th April 2009**. That the Applicant has alleged under Paragraph 4 of his Supporting Affidavit that he bought **two (2)** acres of land out of **LOC 13/GITUGI/422**, from the late **Mwangi Kimingi** at an agreed purchase price of **Kshs 180,000/=** through an agreement dated 22/1/2002, but has not produced the said agreement. That no explanation has been made for renegotiating the sale agreement. That the Applicant was/is not in adverse possession of the suit land, as he occupied the same with permission of **Mwangi Kimingi** (deceased). 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 **21st August, 2015**.

The Applicant on **5th October 2021**, filed a Further Affidavit dated **4th October 2021**, and deponed that the Respondent being the administrator of the estates of both **Kiminki Wariera** and **Mwangi Kimingi** should be made to ratify their acts during their lifetime and cannot be legally allowed to dissociate himself from their acts. That the Replying Affidavits filed by the Respondent are a sham and are marred with misrepresentation of facts. That **Civil Suit 358 of 2017**, was filed within 60 days in line with the directions of the Succession Court, but she withdrew the said suit for being incurably defective as the Respondent herein had been sued in his personal capacity as opposed to being sued in his capacity as administrator of the estates.

Further, that **Civil Suit 358 of 2017**, was also flawed for misjoinder. That the Respondent's response to the claim is a mere denial and should be struck out with costs.

The matter proceeded by way of viva voce evidence wherein the parties gave evidence as below; -

PLAINTIFF'S CASE

PW1 NAHASHON GICHOHI MUIGA, adopted his witness statement and his list of documents both dated **22nd October 2021**, and filed as his evidence in chief. He also produced the list of documents as Plaintiff Exhibit 1. He urged this Court to allow his claim.

On cross examination, he testified that the suit land was sold to him by the late **Mwangi Kimingi**, who was the father of the Respondent herein. That he entered the land in the year **2006**, and the Respondent prevented him from using the land. That he has been cultivating the suit land from **2006**, and he did not stop using the land even after the Respondent began to harass him.

Further, that he filed an Affidavit of **Protest** in the Succession Cause. That in the said Affidavit of Protest, he stated that he got vacant possession from **Mwangi Kimingi** and he stopped using the land in 2006. That he stopped using the land for a while and later continued using the said land and he is currently in occupation of the same. That the Affidavit in the Succession Cause had an error to the extent that it stated that he stopped using the land in 2006.

DEFENCE CASE

DW1 EDWIN ONESMUS WANJAU, adopted his Replying Affidavit and Annexures thereto dated **15th April 2021**, as evidence in chief. In addition, he adopted his witness statement dated **9/11/2021** as part of his evidence in chief.

He also testified that the Applicant has never cultivated the land as he had chased him from the said land. That the Applicant had never reported him to the Police and there was no existing criminal case. He urged the Court to dismiss the Originating summons.

On cross examination, he told the Court that he had seen the Applicant's exhibits and he had also seen the sale agreement. That he did not know much about the said sale agreement. That the Applicant has never cultivated or utilized the suit land. That the Applicant told the Court untruth with regards to his utilization of the land. That he was the administrator of the estate of the Late **Kiminki Wairera**, and **Mwangi Kimingi**, and he did not know why the Applicant is seeking his father's land. That he knew **Nahashon** as his village mate.

After close of the hearing, the parties filed and exchanged their written submissions which the Court has duly considered.

The Applicant through the **Law Firm of Nganga Ngigi & Co Advocates**, filed his 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. He relied on the

case of *Murunga Kabangi & 2 Others vs. Hannah Wairimu Gitau & another (2019) eKLR* where the Court held; -

“In order to be entitled to land by adverse possession, the claimant must prove that she has been in exclusive possession of land openly and as of right and without interruption for 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.”

He also submitted that he had demonstrated that his 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 submissions that **succession** does not affect **adverse possession** and therefore time for **adverse possession** was not discontinued when a **Succession Cause** was filed. Finally, he submitted that the Respondent was estopped in law from denying the actions of the Late **Mwangi Kimingi** and **Kimmingi 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 submitted that the Applicant had not proved his case on a balance of probabilities because the Applicant had never occupied the suit land, and when he had attempted to occupy the said land, the Respondent chased him away and he therefore ceased possession and occupation of the said land. That the alleged Vendor in the sale agreement was not the registered owner of the property he sold, as it was registered in the name of **Kimmingi Wairera**.

It was the Respondent’s further submission that the Applicant completely stopped using the suit land in **2006**, and he did not thereafter go back to occupy it. That the Applicant did not lead any evidence to show that he went back to the land or was in actual occupation of the same. That adverse possession had not been proved as the Applicant failed to demonstrate possession and utilization of the suit land. The Respondent in support of his case relied on the case of *Isiah Mutea M’ Itunga vs. Francis Kairethia & Another (2018) eKLR* and the case of *Martin Mugo Migwi vs. Njeru M’uthi and 2 Others (2020) eKLR, where the Court held;*

“It is trite law that an Applicant’s possession must not be interrupted in any way because whenever interruption occurs, then the limitation period stops to run under the Limitation of Actions Act (Cap 22).”

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

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

II. Whether the Plaintiff is entitled to two (2) Acres to be excised out of land parcel Number LOC 13/GITUGI/422?

III. Who should bear the cost of the suit?

From the pleadings on record and the documents produced, it is not in doubt the **Kimmingi Wariera** is deceased and **Mwangi Kimingi** was the sole administrator of his estate. Further, it is not in doubt that the said **Mwangi Kimingi** died on **17th April 2009**, and subsequently the Respondent herein became the administrator of the estates of both **Kimmingi Wariera** and **Mwangi Kimingi**. It is also on this background that the Respondent has been sued. It is also in doubt that the suit land forms part of the estate of the late **Kimmingi Wariera** as the succession matter had not been concluded when **Mwangi Kimingi** died in 2009.

It is trite that a claim for adverse possession is attached to land and not to the 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 for 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.

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. And Section 13 of the same Act provides **adverse possession** is 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 elaborated 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 whose this right has accrued takes action. Section 38 of the Act gives authority to the claimant to apply to Court for orders of adverse possession. The Court in **Malindi App No. 56 of 2014 Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR** 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 determining whether the Applicant’s rights accrued, the Court will seek to answer the following;

- 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?**

On the issue of possession, the Applicant contends that he gained entry into the suit land after being given **vacant possession** by the late **Mwangi Kimingi**. He contends further that vide a sale agreement dated **22nd January 2002**, between him and the Respondent’s father (**now deceased**), he purchased the **two (2) acres** of land out of **LOC 13/GITUGI/422**. Further that the said sale agreement was renegotiated by the parties and on **14th April 2007**, a Supplementary sale agreement was executed by the parties that raised the consideration from **Kshs. 180,000/=** to **Kshs. 300,000/=**. A perusal of the said Supplementary sale agreement indicates that the Purchase price was paid in full to the Vendor and acknowledged.

The Applicant avers that he took occupation of the suit property in 2006, and the Respondent prevented him from using the land. That even after the Respondent prevented him from using the land, he did not stop using it and he has been cultivating the same. The Respondent on the other hand objected the said allegations of the Applicant and alleged that the Applicant attempted to enter the land in 2006, but he chased him away and the Applicant has never returned since.

The Applicant seems to confirm to a certain extent the allegations of the Respondent that he vacated the suit property. He told the court that **“I stopped using the land for a while and later continued using the land”**. The Onus of proving possession and occupation and possession rests with the Applicant and especially where the same is contested. It is trite that for a claim of **adverse possession** to issue, the Applicant must demonstrate that the occupation was **open, continuous, without secrecy** and with the **knowledge** of the proprietor.

To ascertain the foregoing ingredients, the Applicant ought to lead evidence in the form of photographs or any other relevant documents to demonstrate occupation and buttress his claim.

In the instant case, the Applicant has testified that he initially gained entry into the suit land in 2006, but was evicted by the Respondent. He

testified further that after eviction he regained entry, and has remained in occupation therein to date. In support of his claim, the Applicant did not produce any evidence and/or call any witnesses to corroborate his testimony. However, this Court notes that the purported eviction took place in 2006, and takes cue of the Supplementary Agreement dated 14th April 2007. Based on the foregoing, it would not be difficult to conclude that parties agreed and the agreement culminated into new terms which were documented in the aforementioned Supplementary Agreement and it is on that premise that the Applicant regained entry into the land. It is ridiculous for the Respondent to allege that the Applicant did not regain entry into the impugned land yet on **14th April 2007**, there was a supplementary sale agreement executed by the Late **Mwangi Kimingi** and the Applicant over the same land. To this end, this Court has no reason to doubt that the Applicant has been in open and continuous use of two (2) acres of land out of LOC 13/GITUGI/422.

It will be appreciated that the Applicant acquired possession of the land through a sale agreement dated **14th April 2007**. It is trite that for a claim for adverse possession to suffice, the claimant must demonstrate that possession 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.”

It is clear from the above analysis that 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. Further, 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 thenceforth, by occupation for twelve years, was entitled to become registered as proprietor of it.

In the instant case, the Applicant became adverse to the land after payment of the Purchase price in full as shown in the supplementary agreement date **14th April 2007**. For purposes of computing time for a claim of adverse possession to issue, this court will be guided by the Supplementary Agreement which acknowledges full payment of the purchase price on **14th April 2007**.

In the case of **Public Trustee vs. Wanduru [1984] KLR 314**, the Court of Appeal relying on an English case of **Bridges vs. Mees (1957) 1 Ch. 475**, that was cited with approval in **Mwangi Githu vs. Livingstone Ndete and others, CA Non. 24 of 1979** held that a purchaser in possession of land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run as against the vendor.

That principle was further articulated by this Court in **Jaswantkumarba Benesingh Jethwa v Postal Corporation of Kenya [2015] eKLR** where the Court explained that:

“It is however necessary to distinguish between a purchaser in possession under an agreement of sale pending completion and a purchaser in possession, who has paid the whole of the purchase price, pending registration of transfer so far as it relates to when the time starts running for purposes of adverse possession. This distinction was clearly brought out in Wambugu v Njuguna (supra). There, it was held that where a claimant is in exclusive possession under a contract of sale pending completion, he is in possession with leave and licence of the vendor and possession can only be adverse once the contract is repudiated or rescinded (see also Mungania v Imanyara (supra)).

It was further held that where a claimant is in exclusive possession under a contract of sale, the claimant’s possession is deemed to have become adverse to that of the owner after payment of the last instalment of the purchase price. Where, however, the purchaser is put in possession after paying the full purchase price, his possession becomes adverse to that of the vendor when he took possession for that is the time when vendor’s possession was discontinued (Public Trustee v Wanduru, (supra)). [Emphasis]

The upshot of the foregoing is that time for purposes of computing the period the Applicant has been **adverse** to a portion of **LOC 13/GITUGI/422**, started running from **14th April 2007**. It follows therefore that as at the time of filing the instant suit on **9th March 2021**, the Applicant had been adverse to the suit land for about 14 years.

To this end, this Court find and hold that the Applicant has met the threshold for the grant of orders of adverse possession.

2. Whether the Plaintiff is entitled to one (1) Acre to be excised out of land parcel Number LOC 13/GITUGI/422?

What flows from the pleadings is the land is not surveyed. However, the agreement expressly stated that the Applicant was entitled to **two acres** to be excised from parcel of land No. LOC 13/GITUGI/422. This has already established that the Applicant has been in **open, continuous and uninterrupted possession and occupation** for over 12 years. From the attached extract of Green Card, it is evident that the land is registered under the name of **Kimingi Wairera**. What this Court appreciates is that the land can easily be identified.

For a claim of adverse possession to issue, it is important that the land be clearly identified as was held by the Court in **Wilson Kazungu Katana & 101 Others vs. Salim Abdalla Bakshwein & Another [2015] eKLR** this Court observed: -

“The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of Githu vs. Ndele [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their

respective possession from the larger suit premises that they sought to have decreed to them.”[Emphasis added]

The Court in the foregoing case found that the requirement of identification was crystalized by the mandatory provisions of **Order 37 Rule 7** of the **Civil Procedure Rules**, which requires that an application for adverse possession should be accompanied by a title deed extract. The Applicant has attached a copy of a title deed extract as required by law. The title shows that the land is registered in the name of **Kimingi Wairera** measuring **8.0 acres** identified as **Fort Hall Loc. 13 Gitugi/ 422**. This Court has not had the benefit of being able to identify the exact occupation of the Applicant out of the entire parcel **Fort Hall Loc. 13 Gitugi/422**, but what is not in dispute is that the Applicant is occupying part of the land which is two acres. It would not be difficult for this Court to conclude that the Applicant and the Respondent are aware of the Applicant’s confines and or borderlines, the larger portion notwithstanding.

In totality, this Court finds and holds, that the Applicant has on a balance of probability demonstrated that he is entitled to **two (2) acres** piece of land to be excised from **Fort Hall Loc. 13 Gitugi/ 422**.

3. Who should bear costs

It is trite that costs shall follow the events, that the successful party be awarded costs. It is not in doubt that the Applicant is the successful party and this Court finds no reason not to exercise its discretion in his favour.

Consequently, having considered the available evidence and the written submissions, the Court finds that the Applicant herein has proved his case on the required standard of balance of probabilities. For the above reasons, the Court enters judgment in favour of the Applicant against the Respondent as prayed in Originating Summons dated **3rd March 2014** in terms of prayers No. **(a) (b) (c) & (d)**.

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 for Njoroge Ngigi for the Applicant

Mr S. K Njuguna for the Respondent

Kuiyaki - Court Assistant

L. GACHERU

JUDGE