



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC NO. 222 OF 2018

(FORMERLY NAKURU HCC CASE NO: 86 OF 2010)

GEORGE MWANGI NDIRANGU ALIAS NJOGU NDIRANGU.....1ST APPLICANT
MICHAEL NDERITU NDIRANGU ALIAS NDERITU NDUNGU.....2ND APPLICANT
FREDRICK KARIUKI NDIRANGU ALIAS KARIUKI NDUNGU.....3RD APPLICANT
BEJAMIN MAINA NDIRANGU ALIAS MAINA NDUNGU.....4TH APPLICANT
NGURE NDIRANGU NJOGU ALIAS NGURE NDUNGU.....5TH APPLICANT
KAGEMA NDIRANGU NJOGU ALIAS KAGEMA NDUNGU.....6TH APPLICANT
KINARO NDIRANGU NJOGU ALIAS RINEWO NDUNGU.....7TH APPLICANT
PETER SHAU KURIA ALIAS CHAU KINIGA.....8TH APPLICANT
JOSEPH KINYANJUI KURIA ALIAS KARANJA KURIA.....9TH APPLICANT
JOSPHAT WAINAINA KURIA ALIAS CHEGE KURIA.....10TH APPLICANT

VERSUS

MUHU HOLDINGS LIMITED.....RESPONDENT

JUDGMENT

1. The applicants filed the Originating Summons dated 1/04/2010 in which they sought the following orders:

1. The applicants are entitled by adverse possession to seventy (70) acres or thereabout of all that parcel of land known as LR Number 5605 registered in the name of the Estate of Muhu Kangari (deceased) of which Muhu Holdings Limited is the estate's legal trustee, but currently occupied by the applicants.
2. The Applicants have been in occupation of the said seventy (70) acres or thereabouts of all that parcel of land known as LR Number 5605 without permission though with the knowledge of the registered owner for an uninterrupted period exceeding twelve (12) years.
3. The Applicants are entitled under Section 38(1) and (2) of the Limitation of Actions Act (Cap 22) Laws of Kenya to be registered as the absolute proprietor of the said seventy (70) acres or thereabouts of LR Number 5605.
4. The Respondent should transfer the said parcel of land to the Applicants.
5. In default of the Respondent failing to transfer the said land to the Applicants by signing all the requisite conveyance documents, the Deputy Registrar of this Honorable Court do execute all such documents as may be necessary for the

registration of the Applicants as proprietors of the above said land.

6. The Applicants should be granted any other relief that the court finds just and fit.

7. The Respondent do pay costs of this suit.

2. The grounds upon which the Originating Summons is brought is that the applicants have been in occupation of seventy acres or thereabouts of land parcel **LR Number 5605**. The land is registered in the name of Muhu Holdings Limited, the trustee of the estate of Muhu Kangari (deceased). Muhu Kangari (deceased) was registered as the owner by assignment dated **25/05/1962** and on **30/12/1995**, Muhu Holdings Limited was registered as the legal trustee of his estate.

3. On **20/06/1996**, the respondent filed **Nakuru High Court Civil Suit Number 341 of 1996** seeking to have the applicants herein evicted from the suit property which case was dismissed on **12/03/2007** for being statute barred. The respondent then commissioned a survey which was filed in court on **7/09/2007** and as per that survey, the portions indicated "**Part 1**" and "**Part II**" are seventy acres and they are occupied by the applicants. The applicants state that their occupation has been open, without force and uninterrupted for a period exceeding twelve (**12**) years and they therefore pray that the prayers sought in the Originating Summons be allowed and land parcel number **5605** be registered in their names.

4. Serah Mweru Muhu filed a replying affidavit in response to the originating summons, sworn on **27/01/2016** and filed on **29/01/2016** as the executrix of the will of James Muhu Kangari (deceased). She stated that James Muhu Kangari (deceased) was the owner of the suit property which measures approximately **583** acres through a leasehold interest of a period of ninety nine years from **1/11/1911** to **31/10/2010**.

5. She further stated that there were squatters on the suit property who included the applicants and sometime in the year **1996**, she filed **HCC no. 341 of 1996** seeking for an order of eviction against them. In their statement of defence and counterclaim in that suit, the applicants herein averred that they were entitled to **30** acres of the suit property as opposed to their current claim of **70** acres. The suit was heard and judgment delivered on **12/03/2007**. Pursuant to that judgment, her late son Joseph Kangari Muhu held meetings with the applicants where he was informed that the applicants were a group of ten families with each family occupying **3** acres each which makes it **30** acres for all the applicants. She indicated that she is willing to transfer **30** acres to the applicants. Upon expiry of the lease, she applied to the Commissioner of Lands for renewal which matter is pending in court in **High Court Constitutional Petition No. 413 of 2012** where the applicants in this matter are interested parties.

6. She stated further that she is advised by her advocates on record that the present suit is an abuse of the court process and that the applicants have no other claim other than thirty (**30**) acres from **LR No. 5605**. She also stated that Joseph Kangari Muhu (deceased) had the property surveyed and divided into three portions where it was agreed that the applicants would occupy the portion measuring **30** acres.

7. On **03/12/2020** the respondent filed another replying affidavit sworn by **Waithera Muhu** on **01/12/2020**. She deposed that she is a director of the respondent and the daughter of James Muhu Kangari (deceased) the registered proprietor of **LR No. 5605**; that at the time James Muhu Kangari (deceased) was alive, there were squatters living on the suit property; that James Muhu Kangari (deceased) had developed the land and that upon his death her mother Sera Mweru Muhu, the executrix of his estate, took over and made more improvements. The rest of her replying affidavit reiterated the contents of the replying affidavit sworn by Serah Mweru Muhu on **27/01/2016** and filed on **29/01/2016**.

8. On **18/12/2020** the 1st Applicant, George Mwangi Ndirangu filed a supplementary Affidavit sworn on **17/12/2020** and deposed that the applicants occupy an area measuring approximately **70** acres. That they occupy and cultivate approximately three acres each while they farm and graze on other portions outside of where they are settled. That this is the position as per the sketch plan prepared at the request of the respondent by surveyor Wahome Werugia which was attached to his affidavit in support of the Notice of Motion dated **18/11/2014** and marked "**GMN 4**". That the intention of the respondent was to evict them from the suit property; that upon subdivision, **LR 5605/2** is occupied by the squatters who are seeking entitlement to the said portion of land.

9. He also deposed that the applicants are settled in the vicinity of the portion of land marked as "**SMM 3**" annexed to the respondent's affidavit which is **LR 5604/4**; that it has a steep and rocky terrain which is unsuitable for the applicants to use. He also deposed that their claim over the suit property is genuine as their parents lived on it and that they took possession of various portions and set up their homes. He deposed further that the court in its judgment in **HCC No. 34 of 1996** found that the defendants had proved adverse possession but they had not moved the court in the proper manner.

The evidence of the Applicants

10. The 1st Applicant testified on **4/10/2021** and adopted his supporting affidavit sworn on **1/04/2010** and supplementary affidavit sworn on **17/12/2020** as his evidence in chief. He produced the documents contained in the applicants list of documents dated **19/03/2021** as **PExh. 1-PEXh. 21** as per the sequence in that list and the coloured sketch dated **28/01/2017** was produced as **PEXh. 22**.

11. On cross-examination, he confirmed that there was another suit between them and the respondent which was **High Court Civil case Number 341 of 1996** where the defendant was seeking that they vacate the suit property. He further confirmed that they filed a statement of Defence and Counterclaim where they stated that they occupied approximately **70** acres but in the judgment they were awarded **30** acres. He also confirmed that as per the amended defence and counterclaim, they sought for **30** acres and that was before the surveyors had visited the land.

12. He admitted that they were yet to be given the **30** acres and that he would be satisfied if they were awarded the **30** acres. He also conceded that since judgment in that matter was delivered, they still live in the old portion that they had lived in. He was referred to the Survey for **LR No. 5605/3 & 4** appearing at **page 117** of the applicants bundle and he stated that it shows the portion of the suit property that they are using. He reiterated that after judgment was delivered, they did not take up more land and that he represents all the plaintiffs and he

would be satisfied if they are given **30** acres.

13. In re-examination, he stated that at the time of the institution of **HCC 341 of 1996**, there was no acreage as the survey was yet to be done. That they are now claiming seventy (**70**) acres after the survey was done. He stated that they have not added any more land as they stay on the land identified by the surveyor which is seventy acres. He also stated that the **30** acres was mentioned by the Respondent who has never given the applicants the said portion of land. The Applicants then closed their case.

The evidence of the Defendant

14. Lucy Waithira Muhu testified on the same date as the managing director of Muhu Holdings Limited and a shareholder. She adopted Serah Muhu's affidavit sworn on **27/01/2016**, her replying affidavit sworn on **01/12/2020** and her witness statement as her evidence in chief. She produced all documents in the Respondent's list of documents dated **30/09/2021** as **DExh. 1 - DExh 10** in the sequence in which they are listed.

15. Her evidence is that the suit property is **LR 5605** which was a leasehold that expired in **2009/2010** and renewed in the year **2019** for **99** years; that the acreage was reduced by **60** acres; that **30** acres was for the squatters in court; that the other **30** acres, which is now known as **LR 5605/2**, was reserved for the squatters who were not in court but who are in occupation; that **LR 5605/3** was renewed for Muhu Holdings; that **LR 5605/4** was given to the applicants in this case and that **LR No. 5605** does not exist anymore; that her late brother negotiated with the applicants but they refused the offer of **30** acres and requested for seventy (**70**) acres; that the applicants were not given title deeds to the **30** acres and that they cannot do anything with the land that the Applicants occupy as they are using it.

16. On cross-examination, she stated that the Applicants occupied **LR No. 5605/4** which is about **30** acres and that it was her brother who had negotiated with them. She acknowledged that she is not aware of any other squatters in the suit property apart from the Applicants herein and that after reading the judgment in **HCC 341 of 1996**, the Applicants are entitled to a portion of the suit property. She confirmed that the portion they occupy is no longer part of the main parcel of land and the reduction in the acreage is based on the judgment in the case of the renewal of the Lease.

17. On re-examination, she stated that the National Land Commission commissioners suggested that they take into consideration the squatters and that they were to go and get letters of allotment from the NLC. She also stated that the offer of **30** acres was declined by the Applicants who insisted on **70** acres and yet they only occupy **30** acres. The respondent then closed its case.

Submissions

18. The Applicants filed their submissions on **24/11/2021** and the Respondent filed its submissions on **16/12/2021**.

Analysis and Determination

19. The only issue for determination is whether the applicants should be granted the orders sought which are as set out at the beginning of this judgment. It is not in dispute that **LR No. 5605** was owned by Muhu Holdings Limited who were registered as owners on **30/12/1995**. It is also not in dispute that the applicants have been in occupation of a portion of the suit property for a period of over twelve (**12**) years. What is in dispute is the acreage that the applicants are in possession of.

20. The respondent admits that the applicants are in occupation of the suit property which it insists is **30** acres which they are willing to give the applicants as it has subdivided the suit property with one portion measuring **30** acres. The respondent's claim is said to be based on the Statement of Defence and Counterclaim filed by the applicants herein in **HCC No. 341 of 1996** where the applicants sought for **30** acres.

21. **Section 7** of the **Limitation of Actions Act, (Cap 22)** provides as follows:

An action may not be brought by any person to recover land after the end of 12 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.

22. **Section 13** of the **Limitation of Actions Act** also provides that:

A right of action to recover land does not accrue unless the land is in the possession of some person in whose favor 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 the 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.

23. **Section 38(1)** and **(2)** provides that:

(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 or lease in place of the person then registered as proprietor of the land.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

24. The Court of Appeal in the case of **Benjamin Kamau Muma & Others vs Gladys Njeri, CA No. 213 of 1996** held that;

“The combined effect of the relevant provisions of Sections 7, 13 and 17 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of Adverse Possession of that land...”

25. The court went further to set out what parties must prove when seeking for orders of adverse possession as follows:

“...to prove that they have used this land which they claim as of right: nec vim, nec clam, nec precario (no force, no secrecy, no evasion). So the Plaintiff must show that the defendant 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 purpose or by any endeavors to interrupt it or by any recurrent consideration’.

26. The Court of Appeal in the case of **Mtana Lewa –v- Kahindi Ngala Mwangandi (2015) eKLR** also held:

“Adverse Possession is essentially a situation where a person takes Possession of land, asserts rights over it and the person having title to it omits or neglects to take an action against such person in assertion of his title for a certain period, in Kenya 12 years.”

27. In this suit the applicants have to prove that they have been in occupation of the suit property in a peaceful, open and continuous manner. They must also prove that they have been in continuous possession of the suit property for over twelve years which possession must also be established to have been open and notorious to the knowledge of the respondent. As noted before, it is not disputed that the applicants have been in occupation of the suit property for a period of over twelve years but it not clear when exactly the occupation begun.

28. As per the evidence of both parties, the suit property was subdivided into several portions and deed plans were prepared to that effect. The applicants allege that they are in occupation of **LR 5605/3** while the respondent alleges that the applicants are in occupation of **LR 5605/4**.

29. In the case of **Gabriel Mbui v Mukindia Maranya [1993] eKLR** Kuloba J held that:

“The land, or portion of the land, adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. For this purpose, that which can be ascertained is certain; that which is definitive is positive. It must at least be so plotted that if not certain it can be made certain. The absence of a plot or title number need not present any difficulty; nor should it be a bar to establishing a claim of adverse possession (Madan, J (as he then was) in *Kinguru v Gathangi* op cit, at p 260). On the other hand, however, the adverse occupation of a disputed portion of a large piece of land under one title, for twelve years does not, in law, constitute adverse occupation of the rest of the land to which adverse acts do not extend during the statutorily prescribed time (Harris, J, in *Matheri v Kanji* [1976] K L R 140 at 141).”

30. The Court of Appeal in the case of **John Kiplangat Barbaret & 8 others v Isaiah Kiplangat Arap Cheluget [2017] eKLR** also held as follows:

“20. A person claiming to have become entitled by adverse possession to land registered under any of the Acts referred to in Section 37 of the Limitation of Actions Act, is entitled to apply to the High Court for an order to be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land if he can show that:

- (1) he has, as a trespasser, been in adverse possession to the title of the registered proprietor for a period of not less than 12 years; and**
- (2) he has had continuous and exclusive possession of the suit land adversely to the title of the registered proprietor; and**
- (3) during the period of adverse possession the registered proprietor knew of the act of trespass on the suit land by the plaintiff; and**
- (4) that he was not on the suit land with the consent of the registered proprietor; and**
- (5) that the registered proprietor has never during the 12 year period asserted his title to the suit land; and**
- (6) that the 12 year period of adverse possession has never been interrupted or broken; and**
- (7) that the plaintiff has been in exclusive possession of the parcel of land he claims and where such parcel of land is only a portion of a bigger parcel comprised in a title of the registered proprietor, that he can point out the physical boundaries of the portion he is in possession of; and**
- (8) that as was held in the case of Mwangi Githu vs. Livingstone Ndeete [1984] KLR 776, the plaintiff would be entitled to only the portion he (the plaintiff) is in exclusive possession of. (Emphasis mine)**

21. In this appeal, the appellants did not adduce evidence to show the portions they occupy adversely to the title of the respondent and did not appear to have marked any boundaries. The Originating Summons shows that the appellants number about 500; no evidence was led as to where each one or each family resides, or the boundaries thereof. In short, there is no evidence of where any family or appellant resides or of what is claimed or by whom. It is conceded that the appellants are not in possession of the entire land belonging to the respondent which was registered in the respondent's name on 11.9.1980 and measures 2003.5 hectares. It was not established by evidence the dates on which each appellant or each family among the appellants moved to the portions they allege they are in possession of or whether they have been in continuous and uninterrupted and exclusive possession of such portions. It is plain to see that the appellants failed to adduce evidence to prove the ingredients necessary to establish a claim for adverse possession...”

31. The following was stated in the applicants' submissions:

“The truth of the matter is that the applicants had their homes on approximately 3 acres of land each but cultivated and grazed their livestock on a much larger portion.”

32. It is not clear from the claimants' own evidence the exact portions of the suit property that they occupy and their size. In the Originating Summons, the applicants allege that the seventy (70) acres they occupy is indicated as “**part I**” and **Part “II**” of the sketch plan marked as “**GMN 4**”. The said sketch plan does not indicate the exact location where each of the applicants resides, where the farming and grazing is done and boundaries if any. When the colored survey map produced as **PExh. 22** is compared to the sketch map, it is evident that the applicants are in occupation of portions of **LR 5605/3** and **LR 5605/4** while they allege that they are in exclusive occupation of **LR 5605/3**. Other than the allegations by the applicants, there was no evidence adduced to show that the portions of land they claim to occupy aggregate to seventy (70) acres in size.

33. It is my view that the court can only make a determination based on the evidence adduced by the parties and the applicants herein have not proved the exact portion of land they occupy and its acreage for the court to grant the orders sought. No evidence was led for each of the specific applicants to show that they occupied a specific amount of land and the casual approach to the issue of the size of land occupied under adverse possession denies the applicants orders that they would have obtained with ease. In conclusion, it is my opinion that the applicants have failed to prove their claim of adverse possession.

34. However, I note that there is said to have been amicable discussions between the applicants and the respondent and as a result of those discussions the respondent is willing to avail to the applicants **30** acres out of the suit land. In their submissions the applicants dismiss the offer of **30** acres and state that their claim is for ownership by adverse possession and that it is therefore immaterial that the respondent may belatedly wish to gift the applicants. They do not even raise that as an alternative argument but a total dismissal of the offer of **30** acres and this court having dismissed the adverse possession claim on the grounds set out herein above, adopting their argument would dispossess them of all they could ever have salvaged in this case. In any event, **paragraph 8** of the applicant's supplementary affidavit sworn by the 1st applicant on **13/7/2017** seems to acknowledge that there were some engagements however rudimentary and filled with distrust they were, between the respondent's agent and the applicants. The summary dismissal of the said engagements by the applicants was possibly in view of their expectations that an adverse possession claim would wholly succeed in this suit, which claim has now totally failed. That the suit property used to be referred to as **LR 5605** and that it was a leasehold that expired in **2009/2010** and was renewed in the year **2019** for **99** years is not in dispute; so is the fact that that the acreage was reduced by **60** acres upon renewal of the lease, and that **30** acres now comprised in **LR 5605/4** was reserved for the squatters in court and some other **30** acres, which is now known as **LR 5605/2**, was reserved for the squatters who were not in court but who are in occupation; it is the case that the lease for **LR 5605/3** is what was renewed for **Muhu Holdings Ltd** and that **LR No. 5605** does not exist anymore; **DW1's** evidence that her late brother negotiated with the applicants and that the applicants refused the offer of **30** acres and requested for seventy (70) acres is not controverted.

35. The principles of governance in **Article 10** of the **Constitution of Kenya** include equity. It would also be a drawback to the constitutional ethos on promotion of alternative dispute resolution espoused by **Article 159 (2)** if this court were to shut its eyes to the attempts at an amicable settlement which partially bore fruit in that **30** acres were offered to the applicants with **30** more being reserved for the squatters on the ground who have not yet commenced proceedings. In this court's view, the respondent should be commended for their offer but should also be made to honour its commitment to release all the **60** acres to the squatters as expressed by **DW1** in her evidence, and this court takes that position on the basis that two groups of squatters occupy each portion of **30** acres.

36. Consequently, this court orders as follows:

- a. The applicant's claim for entitlement to 70 acres by virtue of adverse possession is dismissed.**
- b. The applicants are hereby awarded 30 acres of land being comprised in LR 5605/4 for distribution amongst themselves.**
- c. The respondent shall transfer all that land parcel known as LR No 5605/4 to the applicants for the purpose of distribution amongst themselves.**
- d. Each party shall bear their own costs of the suit.**

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 15TH DAY OF FEBRUARY, 2022

MWANGI NJOROGE

JUDGE, ELC, NAKURU