



REPUBLIC OF KENYA



Kungu & 3 others v Waiganjo & 4 others (Environment & Land Case 358 & 364 of 2017 (Consolidated)) [2022] KEELC 1492 (KLR) (10 February 2022) (Judgment)

Paul Kagia Kungu v Bidan Kamau Waiganjo & 6 others [2022] eKLR

Neutral citation: [2022] KEELC 1492 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 358 & 364 OF 2017 (CONSOLIDATED)**

YM ANGIMA, J

FEBRUARY 10, 2022

BETWEEN

PAUL KAGIA KUNGU PLAINTIFF

AND

BIDAN KAMAU WAIGANJO 1ST DEFENDANT

PAUL KUNGU WAIGANJO 2ND DEFENDANT

JOHN MUREITHI WAIGANJO 3RD DEFENDANT

EUNICE WANJIRU WAINAINA 4TH DEFENDANT

**AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 364 OF 2017**

BETWEEN

GABRIEL WAIGANJO KUNGU 1ST DEFENDANT

CHRISTOPHER WAIGANJO KUNGU 2ND DEFENDANT

HANNAH WANJIKU WAIGANJO 3RD DEFENDANT

AND

PAUL KAGIA KUNGU PLAINTIFF



JUDGMENT

A. Introduction

1. This is a judgment with respect to two consolidated suits. The first is the Plaintiff's suit in Nyahururu ELC No. 358 of 2017 which sought to assert his property rights over the suit property. The second is Nyahururu ELC No. 364 of 2017 (O.S) whereby the Defendants sought a declaration of trust and alternative claim for adverse possession over the suit property. The two suits were consolidated and directions given to the effect that the Plaintiff's claim shall be treated as the main suit whereas the Defendants' originating summons shall be treated as the counter-claim.

B. The Plaintiff's Claim

2. By a plaint dated 20th April, 2017, the Plaintiff pleaded that he was the registered proprietor of Title No. Laikipia/Ndindika/294 (the suit property). He further pleaded that on 19th August, 2016, the Defendants had unlawfully buried the remains of their late father Stephen Waiganjo in the suit property with a view to defeating his interest therein. It was further pleaded that in violation of the Plaintiff's proprietary rights, the Defendants had also ploughed the suit property with a view to planting crops thereon.
3. As a result of the said matters the Plaintiff sought the following reliefs against the Defendants.
 - (a) A declaration that the Plaintiff is the sole proprietor of Land Reference No. Laikipia/Ndindika/294, that neither the Defendants nor the deceased father has an interest in it whatsoever and that the Defendants have actually trespassed the Plaintiff's land by ploughing it and interring their deceased father therein.
 - (b) An order directing the Defendants to exhume the remains of their deceased father Stephen Waiganjo Miring'u interred in the suit land failure to which the Plaintiff be at liberty to exhume the said remains at the cost of the Defendants.
 - (c) An order of permanent injunction, restraining the Defendants, their family members, representatives, employees, servants, agents and anyone else acting for, on behalf of, through or at the behest direction or instructions of the Defendants, from entering, occupying, cultivating, digging a grave into and/or interring the remains and/or body of anybody else into LR. No Laikipia/Ndindika/294 measuring approximately 3.0 ha.
 - (d) That an inquiry be made as to the amount of mesne profits which have accrued due to the Defendants' illegal cultivation of the suit land prior to the institution of the suit until the delivery of vacant possession to the Plaintiff and the Defendants be ordered to pay to the Plaintiff the resultant amount of mesne profits and/or general damages for trespass with interest at court's rate.
 - (e) Costs of this suit and interest thereon.

C. The Defendants' Defence

4. The record shows that by a joint statement of defence dated and filed on 8th June, 2017 of defence dated and filed on 8th June, 2017 the Defendants admitted that the Plaintiff was the registered proprietor of the suit property but pleaded that he was registered as such in trust for himself and other members of the larger family of Kungu Waiganjo (Waiganjo) which included the Defendants. The Defendants



pleaded that the body of the late Stephen Waiganjo (Stephen) was lawfully buried on the suit property as a member of the family of the late Waiganjo and not as a means of defeating the Plaintiff's interest in the suit property.

5. The Defendants further pleaded that Plaintiff's action was time- barred under the Limitation of Actions Act (Cap. 22) and that they had acquired prescriptive rights over the suit property by virtue of having been in occupation and use thereof for a period exceeding 12 years. The Defendants consequently prayed for dismissal of the Plaintiff's suit with costs.

D. The Defendants' Counter Claim

6. The record shows that vide an originating summons dated 5th May, 2017 based upon Sections 7 and 38 of the Limitation of Actions Act, Order 37 Rule 7 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law, the Claimant sought the following reliefs:
 - (a) The declaration that the Defendant is registered as proprietor of Title No. Laikipia/Ndindika/294 measuring 3.0 hectares in trust of himself and the Plaintiffs in equal shares.
 - (b) An order for dissolution of the said trust and transfer of the Plaintiff's entitlement out of Title No. Laikipia/Ndindika/294 by the Defendant and in default, the honourable court's Deputy Registrar do execute all the necessary instruments to effect sub-division and transfer thereof in favour of the Plaintiffs.
 - (c) Alternatively and without prejudice to Prayer 1 above, there be a declaration that the 3rd Plaintiff is entitled to be registered as proprietor of three(3) acres out of Title No. Laikipia/Ndindika/294 by way of adverse possession
 - (d) Costs of the application be awarded to the Plaintiffs.
7. The said summons was supported by 3 affidavits sworn by the respective Applicants i.e. Gabriel Waiganjo Kungu, Christopher Waiganjo Kungu and Hannah Wanjiku Waiganjo. It was contended that the Plaintiff in the main suit had acquired the suit property from her mother Martha Wanjiku Kungu (Martha) subject to a trust created vide Nyahururu D.M.C Land Succession Cause No. 8 of 1979. It was further pleaded that they had occupied a portion of 3 acres out of the suit property for over 12 years without any interruption by the Plaintiff hence they had acquired adverse possession thereof under the law of Limitation of Actions. It was the Defendant's contention that during his lifetime, Waiganjo had declared that the suit property should benefit all his 3 wives.
8. By reason of the pre-trial directions given in the consolidated suits, the Defendants' claim for adverse possession was deemed to be disputed by the Plaintiff and the Plaintiff's claim was to be treated as the main suit whereas the Defendant's originating summons was to be treated as the counter-claim in the matter.

E. Summary Of Evidence At The Trial

(a) The Plaintiff's evidence

9. The Plaintiff testified at the trial as the sole witness. His evidence was that he acquired the suit property from Martha as a gift in 1989 and later on got registered as absolute proprietor. He stated that neither Martha nor himself ever held the suit property in trust for the larger family of Waiganjo. It was his evidence that even though Waiganjo had 3 wives, each wife had settled on her own distinct and separate parcel of land. He contended that Martha was awarded the suit property as her own in Land Succession Cause No 8. of 1979 since the other wives of Waiganjo had their own land elsewhere.



10. On the claim for adverse possession although the Plaintiff conceded that the family of Stephen was residing on a portion of the suit property, he claimed that they were occupying it by force. He further conceded that they had been on the suit property for more than 12 years and that they utilized more than 2 ½ acres of the suit property.

(b) The Defendants' evidence

11. The Defendants called 3 witnesses at the trial. The net effect of their evidence was that the suit property originally belonged to Waiganjo who had three (3) wives during his life time. It was their evidence that upon his demise, the Plaintiff's mother (Martha) was registered as a trustee for the extended family but that she secretly transferred the entire land to the Plaintiff without the consent of the other beneficiaries. The Defendants maintained that the verdict in DMS Land Succession Cause No. 8 of 1979 was to the effect that Martha was to be registered on behalf of the larger Waiganjo family.
12. At the trial, it emerged that the Defendants in the main suit are all children of Stephen and that they had been residing on a portion of the suit property for several decades. It also emerged that the 1st and 2nd claimants in the originating summons were not ordinarily resident on the suit property but it was the 3rd claimant, Hannah Waiganjo, and her children who were resident there. Hannah Waiganjo was the wife of Stephen.

F. DIRECTIONS ON SUBMISSIONS

13. Upon conclusion of the hearing, the parties were given timelines within which to file and exchange their submissions. The record shows that the Plaintiff filed his submissions on 27th October, 2021 whereas the Defendants' submissions were not on record by the time of preparation of the judgment.

G. THE ISSUES FOR DETERMINATION

14. The court has considered the pleadings, evidence and documents on record and is of the opinion that the following issues arise for determination in the suit and counter claim:
 - (a) Whether the Plaintiff was registered as proprietor of the suit property subject to a family trust.
 - (b) Whether the Plaintiff's suit is statute-barred under the Limitation of Actions Act.
 - (c) Whether the claimants in the originating summons have proved their claim for adverse possession.
 - (d) Whether the Plaintiff is entitled to the reliefs sought in the suit.
 - (e) Whether the Defendants are entitled to the reliefs sought in the originating summons.
 - (f) Who shall bear the costs of the suit and counter-claim.

H. ANALYSIS AND DETERMINATION

(a) Whether the Plaintiff was registered as proprietor of the suit property subject to a family trust

15. The court has considered the submissions and material on record on this issue. The court has carefully considered the decision of the Court in Nyahururu DMS' Land Succession Cause No. 8 of 1979 with regard to Plot. No 127. A perusal of the ruling as a whole indicates that the court upon hearing the concerned parties found as a matter of fact that Waiganjo had 3 wives. The court further found that Martha was the one in occupation thereof and that the other two wives had settled on their own plots elsewhere.



16. The court also appeared to have accepted that it was Waiganjo's wish that the suit property should be given to Martha upon his demise. Accordingly, the court ruled that the suit property should be registered in the name of Martha who was the Plaintiff's mother. There was no indication that Martha was to hold it in trust for any of the family members of Waiganjo since the court was satisfied that the other 2 wives had been taken care of. The court is, therefore, unable to accept the Defendant's claim that the suit property was subject to any family trust since there is no evidence on record to demonstrate the alleged trust. The suit property was given to Martha absolutely and there is no indication on record to demonstrate that any of the family members challenged the court's decision either by way of appeal or review.

(b) Whether the Plaintiff's suit is statute-barred under the law of Limitation of Actions Act

17. This issue was raised by the Defendants in their joint statement of defence. Whereas the Defendants contended that the Plaintiff had lost his right to recover the suit property by reason of effluxion of time, the Plaintiff contended that he had made various attempts to remove the Defendants from the suit property without success. He submitted that he had even issued demand letters but the Defendants had refused to vacate the suit property.

18. Section 7 of the Limitation of Actions Act (Cap. 22) stipulates that:

“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.”

19. The Plaintiff's evidence on record is that he acquired the suit property in 1983 as a gift from Martha. The record further shows that the consent of the Land Control Board for the transaction was granted in 1984 while the suit property was still in the name of Settlement Fund Trustees. It is evident from the record that in exercise of his proprietary rights the Plaintiff filed Nyahururu SPMCC No. 229 of 1991 – Paul Kagia v Stephen Waiganjo seeking the eviction of Stephen (the Defendants' father in ELC No. 358 of 2017) from the suit property. Earlier on, he had filed Nyahururu SRMCC of 79 of 1989 – Paul Kagia Kungu v Hannah Wanjiku Waiganjo to vindicate his property rights.

20. It would appear to the court that the Plaintiff's right of action accrued at the earliest in 1983 and at the latest in 1989. The record shows that SRMCC No. 79 of 1989 was concluded by adoption of the Elders' Award on or about 18th June, 1991 whereas SRMCC No 229 of 1991 was concluded on 12th March, 1992. The latter suit was found to have been res judicata by the trial court hence it was dismissed.

21. The court is thus of the opinion that by the time the Plaintiff filed the plaint dated 20th April, 2017, he was already statute-barred under Section 7 of the Limitation of Actions Act since his right of action accrued in either 1989 or 1991. Even if the Plaintiff were to reckon that a new cause of action for recovery of the suit property accrued in 1992 after dismissal of his suit in SPMCC No.229 of 1991 then the 12 year period for recovery must have lapsed on or about 11th March, 2004. The court, therefore, finds and holds that the Plaintiff's suit is time-barred under the law.

22. The court is of the opinion that there is another reason why the Plaintiff's suit ought to fail. The material on record shows that vide Nyahururu SRMCC No. 79 of 1989, the Plaintiff sued the mother of the Defendants (Hannah Waiganjo) seeking her eviction from the suit property. He did not succeed in obtaining an eviction order. In 1991 he then filed SPMCC No. 229 of 1991 against Stephen, the father of the Defendants seeking his eviction from the suit property. The suit was ultimately struck out as res judicata on 12th March, 1992. So, if SRMCC No. 229 of 1991 for recovery of the suit property



was res judicata then afortiori the instant suit for recovery of the suit property is an abuse of the court process.

(c) Whether the claimants in the originating summons have proved their claim for adverse possession

23. The court has considered the material and submissions on record on this issue. Whereas the Defendants contended that they had proved adverse possession of at least 3 acres out of the suit property, the Plaintiff contended otherwise. It was the Defendants' evidence that they were brought up on the suit property but the Plaintiff disputed this and claimed that they had never occupied or cultivated the suit property prior to the filing of the suit and originating summons for adverse possession. During his evidence at the trial, however, the Plaintiff conceded that the Defendants were in possession of a portion of the suit property but claimed that they were in occupation by force.
24. The elements of adverse possession were restated in the following cases: *Wambugu v Njuguna* [1983] KLR 172; *Githu v Ndeete* [1984] KLR 776; and *Kasuve v Mwaani Investments Ltd and 4 Others* [2004] 1KLR 184. In the case of *Kasuve v Mwaani Investment Ltd* (supra) the elements of adverse possession were summarized as follows:

“...and in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, *Wanja v Sakwa No. 2* [1984] KLR 284. A title by adverse possession can be acquired under the Limitation of Actions Act for part of the land...”
25. The court is satisfied from the evidence on record that Stephen and his family members have been in occupation of the suit property for several decades. The court is satisfied that the Defendants in the suit and the 3rd Plaintiff in the originating summons (*Hannah Waiganjo*) have all along resided on a portion of the suit property. In fact, the Plaintiff conceded during cross examination that they were cultivating more than 2 ½ acres of the suit property.
26. The court is further satisfied that the occupation by Hannah and her children was adverse at least with effect from 1989 or 1991 when the Plaintiff filed the previous suits for recovery of the suit property. The action of filing the suits clearly indicated that whatever permission or licence which may have been granted earlier was terminated. Accordingly, the Defendants' continued occupation after conclusion of those suits constituted adverse possession. As indicated before, the limitation period began to run at the latest in March 1992 when SRMCC No 229 of 1991 was concluded. It would, therefore, follow that the statutory period of 12 years expired by March, 2004.
27. Although the Plaintiff claimed that the Defendants were occupying and cultivating the suit property by force, there is no credible evidence on record to demonstrate that their entry or occupation was through force. On the contrary, the evidence on record shows that Stephen was invited by the late *Waiganjo* into the suit property during his life time. The mere fact that the Plaintiff later on acquired ownership of the suit property and asked the Defendants to leave could not constitute forcible occupation although it may constitute trespass.
28. It is evident from the material on record that not all the claimants in the originating summons were actually in occupation of the suit property. The material on record shows that the 1st and 2nd claimants were working and residing elsewhere and that it was only the 3rd Claimant and her children who were in occupation of the suit property. It would, therefore, follow that the 1st and 2nd Claimants have not demonstrated their claim for adverse possession. However, the court is satisfied from the material on



record that the 3rd claimant in the counter-claim, Hannah Waiganjo, has proved her claim for adverse possession to 3 acres of the suit property. Accordingly, the court shall make appropriate orders in favour of her estate. The record shows that she died during the pendency of the suit and that Bedan Kamau Waiganjo was joined in the suit as her personal representative.

(e) Whether the Plaintiff is entitled to the reliefs sought in the suit

29. The reliefs sought by the Plaintiff were based on the ground that he was the registered proprietor of the suit property hence entitled to enjoy all the rights of a proprietor guaranteed by the law. Although the Plaintiff is the registered proprietor of the suit property, the court has already found that his claim for recovery of the portion occupied by the Defendants is statute-barred. The court has also found that the 3rd Plaintiff in the originating summons has already acquired adverse possession of a portion of 3 acres of the suit property. She has been occupying for over 12 years. In the premises, the Plaintiff is not entitled to the reliefs sought in the suit.

(e) Whether the Defendants are entitled to the reliefs sought in the counter-claim

30. The court has found that the 3rd Plaintiff in the originating summons has demonstrated her claim for adverse possession of a portion of 3 acres of the suit property. However, the court has found that the claim for declaration of trust has not been established. In the premises, the court is of the opinion that the 3rd Plaintiff in the originating summons is entitled to the declaration of adverse possession only and not a declaration of trust.

(f) Who shall bear the costs of the suit and counter-claim

31. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court has, however, noted that all the parties herein are relatives by virtue of being related to the late Waiganjo. Accordingly, the court is of the opinion that the appropriate order to make is that each party shall bear his own costs.

I. Conclusion and Disposal

32. The upshot of the foregoing is that the court finds that the Plaintiff is not entitled to the reliefs sought in the plaint or any one of them. The court has also found that only the 3rd Plaintiff in the counter claim is entitled to some of the reliefs sought but not all of them. Accordingly, the court makes the following orders for disposal of the suit and counter-claim:

- (a) The Plaintiff's suit be and is hereby dismissed in its entirety.
- (b) The prayer in the counter-claim for a declaration of trust over Title No. Laikipia/Ndindika/294 be and is hereby declined.
- (c) A declaration be and is hereby made that the 3rd Plaintiff in the originating summons dated 5th May, 2017, has become entitled to be registered as proprietor of 3 acres out of Title No. Laikipia/Ndindika/294 on account of adverse possession.
- (d) The 1st and 2nd Plaintiffs' counter-claim for adverse possession over the suit property be and is hereby declined.



- (e) That the Land Registrar, Laikipia County shall cause the 3rd Plaintiff in the originating summons to be registered as proprietor of a portion of 3 acres out of the suit property.
- (f) That the Deputy Registrar of the court is hereby authorized to execute all the necessary forms, instruments and documents on behalf of the Plaintiff to facilitate transfer of the 3 acres to the 3rd Plaintiff in the originating summons.
- (g) Each party shall bear his own costs of the suit and counter-claim.

JUDGMENT DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 10TH DAY OF FEBRUARY, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of

No appearance for the Plaintiff

Ms. Eunice Ndegwa for the Defendants

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Y. M. ANGIMA

JUDGE

