



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NUMBER 141 OF 2012

ANNUNCIATA WAITHERA KIBUE.....1ST PLAINTIFF

SUSAN NJERI KIBUE.....2ND PLAINTIFF

PAUL KIMARI KIBUE.....3RD PLAINTIFF

VERSUS

PETER CHEGE KIARIE.....1ST DEFENDANT

GRACE WANJIKU MBUGUA.....2ND DEFENDANT

TENI LIMITED.....3RD DEFENDANT

CONSOLIDATED WITH

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

ELC CASE NO. 91 OF 2013 (OS)

IN THE MATTER OF AN APPLICATION UNDER SECTION

38 OF THE LIMITATIONS OF ACTIONS ACT

AND

IN THE MATTER OF L.R NO. 5989/14

AND

IN THE MATTER OF AN APPLICATION BY TENI LIMITED

THAT IT HAS BECOME ENTITLED BY ADVERSE POSSESSION

TO L.R NO. 5989/14 REGISTERED UNDER THE REGISTRATION

OF TITLES ACT TO BE PROPRIETOR OF THE LAND IN THE PLACE OF JAMES

ARAM KIBUE (DECEASED) NOW REGISTERED AS THE PROPRIETOR OF THE LAND

BETWEEN

TENI LIMITED.....APPLICANTS

VERSUS

ANNUNCIATA WAITHERA KIBUE.....1ST RESPONDENT

SUSAN NJERI KIBUE.....2ND RESPONDENT

PAUL KIMARI KIBUE.....3RD RESPONDENT

JUDGMENT

Introduction and litigation history

1. On 2nd August 2016, Justice S. Okong'o delivered a ruling consolidating two suits that had been initially filed by the parties herein. The first suit was **Nairobi ELC No. 141 of 2012 Annunciata Waithera Kibue & 2 Others vs Peter Chege Kiarie & Another** which the Plaintiff sought for the following reliefs: -

- i) A declaration that the Plaintiffs are entitled to exclusive and unimpeded right of possession and occupation of all that piece of land known as L.R No. 5989/14 (the suit property).*
- ii) A declaration that the defendants whether by themselves, their servants or agents are wrongfully in occupation of the encroached portion of the suit property and are accordingly trespassers on the same.*
- iii) A permanent injunction restraining the defendants whether by themselves, their servants, agents or anybody else or entity claiming under or through them from remaining on or continuing with occupation of the encroached portion of the suit property.*
- iv) Vacant possession of the encroached portion of the suit property from the defendants, their servants or agents and an order for eviction, demolition and removal of all structures thereon erected by the defendants.*
- v) General damages and mense profits for trespass.*
- vi) Exemplary damages for trespass.*
- vii) Cost of this suit together with interest thereon at such rates and for such period of time as this Honourable court may deem fit to grant.*
- viii) Any such other or further relief that this Honourable court may deem appropriate and just to grant in the circumstances of this case.*

2. The second suit is **Nairobi ELC No. 91 of 2013 (OS) Teni Limited vs Annunicata Waithera Kibue & 2 Others** in which the Plaintiffs (now defendants) sought for a determination on the following questions:-

- i) Whether James Aram Kibue (deceased) continues to be registered as proprietor of a portion of 1.5 acres of that parcel of land known as LR number 5989/14 under the Applicant's occupation and to hold the same as trustee for TENI LIMITED.*
- ii) If the answer in (i) above is in the affirmative whether TENI LIMITED is entitled to claim to be registered as proprietor of portion of 1.5 acres of that parcel of land known as L.R number 5989/14 under the Applicant's occupation under the said trust.*
- iii) In the alternative to 1 and 2 above, whether TENI LIMITED is entitled, by the doctrine of adverse possession, to be registered as the proprietor of a portion of 1.5 acres of that parcel of land known as LR number 5989/14 under the Applicant's occupation, which is registered under the Registration of Titles Act in the place James Aram Kibue (Deceased) now registered as proprietor of the Land.*
- iv) Whether TENI LIMITED is entitled to the costs of this application.*

3. After consolidation, the suit finally proceeded for hearing on 21st October 2021 and 19th November 2021 with **Nairobi ELC No. 141 of 2012 Annunciata Waithera Kibue & 2 Others vs Peter Chege Kiarie & Another** being the lead file. During the hearing of the suit, **Susan Njeri Kibue** testified as **PW1** and was the sole Plaintiff's witness while **John Njugna Kiarie** testified as **DW1** and was equally the only Defendant's witness. Upon close of the hearing, parties were directed to file their written submissions. Both parties complied and filed their respective written submissions which the court has had the opportunity to peruse and consider.

The Plaintiffs case

4. In their plaint dated 12th March 2012, the Plaintiffs stated that they were at all material times the beneficial owners of the parcel of land known as L.R No. 5989/14 situated in Nairobi off Kiambu road, by virtue of being administrators and beneficiaries of the estate of the late **James Aram Njau Kibue** the registered owner of the said parcel of land.

5. It was further stated that the Defendants were at all material times in possession and use of the parcel of land known as L.R No. 5898/10 which was left to them by the late **Joseph Kiarie Mbugua** whose property is adjacent to L.R No. 5989/14.

6. The Plaintiffs averred that the Defendants had encroached and trespassed on the suit property measuring approximately 0.3606 Hectares by erecting a building and a perimeter wall on their adjacent parcel of land No. 5898/10. They added that they had on several occasions raised the issue of trespass and encroachment with the defendants both on their own and through their lawyers but the defendants were still committing the said act, alleging that the late Joseph Kiarie Mbugua had acquired the suit property from the late James Aram Njau Kibue.

7. It was also the Plaintiffs case that owing to the actions of the Defendants, they had suffered loss and damage thus necessitating the filling of this suit.

The Defendants case

8. The Defendants filed an amended statement of defence dated 17th March 2017 in which they denied any knowledge of the Plaintiffs being the beneficial owners of the suit property. It was the Defendants case that from the year 1992 to date, they had been in continuous and uninterrupted possession of a portion of 1.5 acres out of L.R No. 5989/14 as beneficiaries of their interest in a limited liability company known as **Teni Limited**. According to the Defendants, the company got into an arrangement to buy the said property, entered into possession, developed and remained in possession in a manner adverse to the Plaintiffs' interest from 1992 to date and as such they had not trespassed and or encroached on the suit property as alleged.

9. It was also the Defendants case that having been in exclusive occupation of the suit property since 1992, the Plaintiffs were barred from bringing any action for recovery of land since the period of 12 years had lapsed.

10. The Defendants case was also based on the Originating Summons dated 18th January 2013 in which they sought *inter alia* orders of adverse possession in respect to the suit property. The contents of the Originating summons together with its supporting affidavit that had been sworn by **John Njuguna Kiarie** was also similar to what was raised in their statement of defence. The Defendants urged the court to dismiss the Plaintiffs claim.

The Plaintiffs' Evidence

11. Hearing of the suit commenced before me on 21st October 2021. **Dr. Susan Njeri Kibue**, the daughter and one of the administrators of the estate of the late James Aram Njau Kibue testified as **PW1**. During her testimony, she adopted her witness statement dated 14th March 2012. She stated that she was an Architect by profession and also a lecturer at Jomo Kenyatta University of Agriculture and Technology (JKUAT).

12. She proceeded to state that the case was about the encroachment of the suit property L.R No. 5989/14. The land belonged to her father and is located along Kiambu Road in Ridgeways area before Runda gate. The property is adjacent to a shell petrol station occupied by the Defendants who purchased it in 2015 from Vivo Kenya.

13. It was also her testimony that on or about the year 2014, the 2nd Defendant, **Grace Wanjiku Mbugua** had visited her together with her mother requesting them to sell the land to them.

14. According to her testimony, the encroachment had started in the year 2004 and had persisted to date. She averred that they had tried to evict the Defendants and had even written several demand letters but all was in vain. She came to court seeking for the court's intervention in evicting the Defendants and damages for the encroachment. She produced several documents in support of the case, including the title deed, surveyors report, demand letter, receipts for payment of rates among others.

15. Upon cross examination by the Defendants' counsel she stated that she did not know the arrangement that existed between Defendants and Shell Limited. She also stated that she did not know when the Defendants entered into the land and neither was she aware when the structures in that property had been constructed. On the surveyor's report, she conceded that the report went beyond their initial instructions since it showed that the survey had been undertaken extending on another property. She conceded that the Defendants had been occupying the property since the year 1992 and she was not aware of any attempts by her late father in evicting them from the property.

16. In re examination by her Advocate, she stated that her father died in the year 1996 before he had signed the sale agreement and that the Defendants could not claim adverse possession if indeed they had purchased the property.

The Defendants' evidence

17. **John Njuguna Kiarie** testified as **DW1**. He was the equally the only defence witness. He adopted his witness statement dated 12th July 2019 as part of his sworn evidence-in-chief. He stated that he was the son to the late Joseph Kiarie Mbugua who died in December 2006.

18. He stated that he was also a director of **Teni Limited** which had his late father as the other director. He also averred that **Teni Limited** had entered into a transaction to purchase 1.5 acres of the suit property from James Aram Kibue which transaction was not completed since the sale agreement was only signed by his father.

19. **DW1** added that **Teni Limited** did develop the property and even erected a perimeter wall. He reiterated that they have been in the property ever since and neither had they been removed from the nor threatened by any action of eviction.

20. On cross examination he stated that there was permission to use the land from the Plaintiffs and the permission could have been granted in the year 2006. He also added that the permission could have been granted from the year 1992 when they took occupation of the property. He also stated that there was no hostility towards the occupation of the same.

21. In re-examination, he clarified that the first threat to their eviction came through the letter dated 28th February 2011 which was from Wainyoke Advocates on behalf of the Plaintiffs. The said letter came after the lapse of a 12 year period. He also clarified that the shell petrol station was on L.R No. 5989/10 and not L.R No. 5989/14.

Plaintiffs submissions

22. The Plaintiffs filed their written submissions dated 31st March 2022 through the firm of **Wanyoike and Macharia Advocates**. Counsel for the plaintiffs identified the following as the key issues falling for determination:

- (i) *Whether the Defendants have encroached and trespassed on L.R No. 5989/14;*
- (ii) *Whether the Plaintiffs are entitled to mense profits and damages for trespass; and*
- (iii) *Whether Teni Limited claim for adverse possession is merited.*

23. On whether the Defendants had encroached and trespassed on the suit land, Counsel submitted that the sale transaction never materialized and as such they had no right to continue to occupy 0.892 acres of L.R No. 5998 /14 neither could Teni Limited claim to be entitled to 1.5 acres of 5989/14 by way of adverse possession. In support of this position, Counsel relied on the cases of **Ali Lekolela Montet v Rigogo Chonjo Farmers Co. Ltd [2020] eKLR and John Kiragu Kimani v Rural Electrification Authority [2018] eKLR.**

24. On whether the Plaintiffs are entitled to mense profits and damages, Counsel submitted that the Defendants were notified of the encroachment and required to vacate but they never vacated and as such they were entitled to compensation for damages and mesne profits. Counsel went further and quantified mesne profit for Ksh 18,000,000/= (250,000 x 12 x 6) and damages of Ksh 50,000,000= for trespass. To buttress this position, counsel referred to the Court of Appeal cases of **Mistry Valji v Janendra Raichad and 2 Others [2016] eKLR, Christine Nyachana Oanda v Catholic Diocese of Homabay Registered Trustee [2020] eKLR and Attorney General v Halal Meat Products Limited [2016] eKLR.**

25. On whether or not there was adverse possession, Counsel submitted that the principles of adverse possession had not been satisfied by the Defendants. It was argued that, as late as the year 2006, the Defendants were negotiating with the Plaintiff and requesting for transfer of 1.5 acres out of L.R No. 5989/14 and further that vide a letter dated 3rd April 2006, the Defendant's advocates had equally written a letter indicating that Defendants entry into the disputed land was by permission and hence they were deemed as mere licensees.

26. It was also submitted that the Plaintiff had asserted their rights over the suit property by filing Nairobi ELC No. 141 of 2012 before the Defendants filed their originating summons and hence the adverse possession claim had failed.

The Defendants' submissions

27. The Defendants filed written submissions dated 25th February 2022 through the firm of **Judy Thongori & Co Advocates**. Counsel for the Defendants outlined five issues for determination by the Court. These included;

- i) Whether the Defendants have proven their case for adverse possession, whether a permitted entry can result in adverse possession,*
- ii) Whether the letters dated 24th October 2001 and 28th February 2011 amount to interruption of possession,*
- iii) Whether the Plaintiffs have proven that the Defendants trespassed on the suit property; and*
- iv) Whether the Plaintiffs are entitled to damages and mense profits.*

28. On whether or not the Defendants had proved their case for adverse possession, Counsel submitted that the Defendants had met all the requirements as was set out under the law and the various cases that they had cited and hence they were entitled to said order of adverse possession.

29. On whether or not a permitted entry can result in adverse possession, it was argued that even though the Defendants entered the land on the promise to sale, the sale did not materialize and hence the possession thereafter became adverse. It was also submitted that the Plaintiffs clearly believed that the Defendants were trespassers on the land and had no permission to be on it and hence therefore the Plaintiff could not plead trespassers and at the same time plead that the Defendants were mere licensees.

30. On whether the letters dated 24th October 2001 and 28th February 2011 amount to interruption of possession, it was submitted that the letters from Kamau Kuria and Kiraitu Advocates, was merely for a fact finding mission by the Plaintiffs who wanted to know if the sale had been completed and if it was yet to be completed, they wanted to be informed on what was required to complete the same. On the other letter from Wanyoike & Macharia Advocates, Counsel submitted that the same was served upon the Defendants after the lapse of a 12 year period and hence it could not in any way have been considered to have interrupted the continuous possession and occupation of the Defendants to

the property.

31. The Defendants also submitted that the claim of adverse possession having crystalized, then the Plaintiffs claim that the Defendants had trespassed on the land could not hold. Counsel added that the Plaintiff had been on the land for over 20 years by the time the suit for trespass was filed.

32. Finally, on the issue of compensation for damages and mense profits. Counsel argued that the Defendants had an adverse title to that of the Plaintiff and had in fact disposed the Plaintiffs of the land hence the said claim could not lie. It was further submitted that the Plaintiffs had not made any attempts to prove why they were entitled to the damages sought.

33. Counsel for the Defendants concluded their submission by pointing out that the Plaintiffs had attempted to misled the court in their submissions that the caveat placed by Joseph Kiarie Mbugua was viewed as a response to the threat to eviction which was not true since it was merely meant to protect their interest to the land. The court was requested to dismiss the Plaintiffs suit and allow their claim for adverse possession.

Issues, Analysis and Determination

34. I have considered the parties' pleadings, evidence and submissions. I have also considered the relevant legal framework and jurisprudence. Taking into account the parties' pleadings, evidence and submissions, in my view, the following are the key issues falling for determination in this suit:-

i) Whether the Defendants have encroached and trespassed on L.R No. 5989/14?

ii) Whether the Defendants have proven their case for adverse possession?

iii) Whether the Plaintiff are entitled to damages and mense profits?

iv) What orders should issue as to costs?

Issue No. I

Whether the Defendants have encroached and trespassed on L.R No. 5989/14

35. Counsel for the Plaintiffs submitted that the Plaintiffs were the beneficial owners of L.R No. 5989/14 and hence the Defendants had no right being in occupation to the said land. The issue was rebutted by Counsel for the Defendants who submitted that basing on the fact that they had proved their claim for adverse possession, they could not be said to have trespassed on the land and further that the Plaintiff are estopped from claiming that they were trespassers to the said land.

36. **Section 3 (1) of the Trespass Act, Cap 294** provides that:

"Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."

In the case of ***Entick vs Carrington (1765)*** as quoted in the case of ***Maina Kabuchwa v Gachuma Gacheru [2018] eKLR***, Lord Camden CJ had this to say: -

"Our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave".

37. In the case of ***Maina Kabuchwa v Gachuma Gacheru (Supra)***, the Learned Judge defined trespass ***"as the act of unauthorized and unjustifiable entry upon the land in another's possession. The wrong of trespass is actionable regardless of the extent of the incursion and without any necessary showing of injury or damage to the claimant."***

38. In the instant case, the Joseph Kiarie Mbugua entered the land pursuant to a sale agreement dated 19th June 1992 even though it was not completed. The entry to the land was premeditated on the basis of that sale agreement. Had there not been such an agreement, the late Joseph Kiarie Mbugua would not have moved to the land.

39. A person who enters a property vide a sale agreement cannot be said to have trespassed into the same land. As such the Plaintiffs cannot now say that the Defendants were trespassers to the suit property and their claim against the defendant on account of trespass fails.

Issue No. ii

Whether the Defendants have proven their case for adverse possession.

40. In ***Celina Muthoni Kithinji v Safiya Binti Swaleh & 8 others [2018] eKLR***, the Court explained the conditions to be met for one to prove an entitlement in adverse possession. The court proceeded to quote various authorities which explain the entitlement and I wish to borrow fully from the decision and capture it as hereunder;

“The requirements for Adverse Possession in Kenya has also been set out in the case of Mbira –v- Gachuhi (2002) IEALR 137 in which the court held that:

.....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 statutory prescribed period without interruption....”

41. In the case of **Mtana Lewa –v- Kahindi Ngala Mwangandi- COA MALINDI (2015) eKLR** it was held that:

“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 action against such person in assertion of his title for a certain period, in Kenya 12 years.”

Also see **Paul Mwangi Gachuru vs. Kamande Nguku (2017) eKLR** cited by the plaintiff.

42. A perusal of the record reveals that James Aram Njau Kibue is the registered owner of the suit property. The Defendants case is that they entered in to a contract for the sale of 1.5 acres of the suit land on 19th June 1992 even though the same was never finalized. It was agreed that Teni Limited would pay Ksh. 1,500,000 as purchase price and that Ksh 1,300,000 had been already been paid to the vendor. The special conditions of the agreement also provided that Teni Limited was to take possession of the said property and proceed to develop the same. Subsequent to the same, it was the Defendants evidence that they took possession in the same year and proceeded to develop. As earlier stated in this judgment, the initial entry unto the suit land was as per the agreement hence there was consent from the vendor. However, the agreement was not finalized as the vendor never executed the same. In the case of ***Paul Mwangi Gachuru vs. Kamande Nguku (supra)***, ***“the evidence on record shows that though the entry was permissive in the beginning, the agreement became void after the six months statutory period...”***. Thus, for purposes of computation of time, the suit was filed in the year 2012 when the Teni Limited had been in the suit property for over the requisite period of 12 years. Once the 1992 agreement was not finalized it became void and hence the Defendants uninterrupted, continuous possession and occupation of the suit property made them to become adverse possessors after the initial 12 years which was in the year 2002.

43. It was the evidence of the Defendants that their family had been in continuous and uninterrupted possession of 1.5 acres of the suit land since 1992. As to the nature of possession and occupation, the same must be **continuous, open, and honest**, with the proprietor’s knowledge. For one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, *nec vi, nec clam, nec precario*. The additional requirement is that of *animus possidendi*, or intention to have the land.

44. In light of the above, I am persuaded that the Defendants have established the ingredients of a claim of adverse possession and that they merit judgment in their favour.

Issue No. iv

What orders should issue as to costs?

45. On the issue of costs, **Section 27 of the Civil Procedure Act** gives the Court the discretion to grant costs. Ordinarily, costs usually follow the event, unless special circumstances are presented to Court. In the instant case I make an order that each party to bear their own costs of the suit.

Final orders

46. In the end, the Court makes the following disposal orders:

i) A declaration is hereby made to the effect that Teni Limited has acquired ownership of 1.5 acres of that parcel of land known as L.R. No. 5989/14 through adverse possession.

ii) An order is hereby issued for the TENI Limited be registered as proprietor of of the 1.5 acres of land known as L.R No. 5989/14.

iii) The legal representative of the estate of JAMES ARAM NJAU KIBUE are hereby authorized to sign all requisite documents to facilitate the aforementioned registration, in default, the same will be executed by the Deputy Registrar of the court.

iv) Each party to bear their own costs of the suit.

Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF ARIL 2022.

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Ng'ang'a for the Plaintiffs.

Ms. Judy Thongori S.C and Ms. Ndirangu for the Defendants.

Court Assistant; Caroline Nafuna.