



Gitau (Suing as the Legal Representative of the Estate of the Late John Kamau Gitau) v Mwangi & another (Environment & Land Case E004 of 2021) [2022] KEELC 3070 (KLR) (25 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3070 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE E004 OF 2021**

**FO NYAGAKA, J
MAY 25, 2022**

BETWEEN

GEORGE GITAU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE JOHN KAMAU GITAU) PLAINTIFF

AND

APPOLOS KENNEDY MWANGI 1ST DEFENDANT

HORAN MUNA MWANGI 2ND DEFENDANT

JUDGMENT

Introduction

1. By way of Originating Summons dated 28/04/2021, the Plaintiff asked this Court to determine the following questions in reference to title deed No. Waitaluk/Kapkoi Block 9/gutongoria/385 initially Waitaluk/Kapkoi Block 9/Gutongoria/4 (hereinafter known as the “suit land”).
 - (1) Whether the Defendants are the registered owner of the suit land.
 - (2) Whether the 1st Defendant sold the land measuring 20 acres out of the title deed comprising in the suit land.
 - (3) Whether the deceased John Kamau Gitau took vacant possession of the suit land and whether he had been staying on the suit land since 2008 without any interference from anybody including the Defendants.
 - (4) Whether the deceased and his family have been in actual possession of the suit land for over 12 years and whether the suit land herein had been obtained by adverse possession.



- (5) Whether the Defendants should be compelled to transfer the 20 acres the subject matter of this case to the deceased's name failure of which the Registrar of this Court to sign the relevant transfer documents on their behalf.
 - (6) Whether the County Land Registrar, Trans-Nzoia County should be ordered to rectify/amend the Register of the parcels and have the deceased's name registered as the owner of 20 acres out of title deed Waitaluk/Kapkoi Block 9/Gutongoria/385.
 - (7) Who to pay the costs of this suit?
2. As is clear, the suit was commenced by way of Originating Summons. However, before it could proceed to hearing, directions were taken and by them, it was deemed as having been commenced by way of Plaintiff. From then onwards, the Applicant became the Plaintiff and the Respondents, Defendants. The Supporting Affidavit was deemed as the Plaintiff's witness statement and the Annexures thereto as his documents. The suit was fixed for formal proof by way of viva voce evidence.
 3. At the end of the pleadings, the Plaintiff urged this court to issue the following orders in his favour:
 - a) A declaration that the deceased John Kamau Gitau by the time of his death had acquired the 20 acres forming part of land title deed No. Waitaluk/Kapkoi Block 9/Gutongoria/385 initially title deed No. Waitaluk/Kapkoi Block 9/Gutongoria/4 by adverse possession.
 - b) An order directing the County Land Registrar, Trans-Nzoia County to amend the Register of the parcels and have the 20 acres forming part of land title deed No. Waitaluk/Kapkoi Block 9/Gutongoria/385 registered in the name of John Kamau Gitau.
 - c) An order directing the Defendants to sign the relevant Transfer Documents to have the 20 acres the subject of the suit be transferred into the deceased's name or in the alternative the Deputy Registrar of this Court to sign on behalf of the Defendants.
 - d) That costs of this suit be paid by the Defendants.
 4. The Originating Summons was supported by the Affidavit of one George Gitau sworn on 28/04/2019. It was brought under Order 37 Rule 6 (1), 7 (1) and 8 of the Civil Procedure Rules and Sections 37 and 38 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya.
 5. In the Supporting Affidavit sworn by one George Gitau on 28/04/2021, the deponent stated that he was the biological son of the late John Kamau Gitau who died intestate on 23/01/2017. He annexed to it a copy of the Grant of Letters of Administration issued to him on the 7/10/2019 by the High Court in Kitale High Court Succession Cause No. 37 of 2018. He marked it as annexure GG-1.
 6. He then stated that his late father entered into an agreement with the 1st Defendant on 29/01/1994 for the purchase of 50 acres of land situate in Ndemi Settlement Scheme. The parcel of land was part of Plot No. 2 Olkalau which measured approximately 120 acres. He annexed a copy of the agreement and marked it as GG-2. He deponed further that the 1st Defendant did not give vacant possession of the parcel of land and it necessitated him giving a demand notice for the same. He attached to the Affidavit a copy of the Demand Notice dated 22/01/2003 given through the firm of Juma Kiplenge & Associates and marked it at GG-3.
 7. His further deposition was that thereafter, specifically on 05/06/1997, the 1st Defendant and the deceased entered into an agreement in which the 1st Defendant was to either refund the buyer the purchase price or get him an alternative parcel of land. He annexed to the Affidavit and marked GG-4 a copy of the said agreement. His statement on oath was that after the 1st Defendant failed to refund



the money, both parties entered into a fresh agreement on 27/06/2003 by which the 1st Defendant agreed to exchange the initial land parcel agreed upon with 20 acres of land in Gutongoria Farm being part of the vendor's land comprised of parcel Number Waitaluk/Kapkoi Block 9/Gutongoria/9, which he stated further that later, after subdivision, became Waitaluk/Kapkoi Block 9/Gutongoria/385. He annexed to the Affidavit and marked as GG-5 a copy of the agreement made on 27/06/2003.

8. The Deponent stated further that after the exchange of the parcels of land, the deceased and his family took vacant possession of the 20 acres in Gutongoria Farm and have been occupying the land peacefully, openly and quietly and using the said land up to this date, notwithstanding the purchaser's death in 2017. He swore further that efforts had been made to transfer the 20 acres of land to the deceased but the 1st Defendant did not do so. Instead, the 1st Defendant had the whole land registered in the joint names of his brother and himself.
9. He then swore that the Defendants were fully aware of the ownership of the 20 acres by the family of the deceased. He exemplified that fact by stating that it was the reason why the Kenya Electricity Transmission Company (KETRACO) paid the widow of the deceased a sum of Kenya Shillings 1,667,267.00 as compensation for way leave when it laid power cables over part of the 20 acres the family occupies. He annexed to the affidavit and marked as GG-6 a copy of the expected compensation. He then stated that the family of the deceased does not owe the Defendants any sums or at all. He deponed further that the interests of justice demanded that the 20 acres of land be transferred to the Plaintiff.
10. The Defendant neither entered appearance nor filed any response. Therefore, the matter proceeded for formal proof. On the 24/01/2022, the matter proceeded for hearing. One witness testified. The Plaintiff himself, one George Gitau, did so as PW1. He adopted his supporting affidavit dated 28/04/2021 and filed on 29/04/2021 as his evidence-in-chief. He stated that he brought the suit on behalf of the estate of his late father, one John Kamau Gitau, deceased. His evidence was that he took out Letters of Administration in Kitale High Court Succession Cause No. 37 of 2018. He produced the Certificate of Grant of Letters dated 07/10/20119 as P. Exhibit 1.
11. He testified that before his father died, he had bought a farm in Ol Kalau from one Kenneth Apollo Mwangi through an agreement they entered into on 29/01/1994. It was approximately fifty (50) acres. His further testimony was that the father never took possession of the parcel of land because the parents of the vendor objected to it. He produced as P. Exhibit 2 the agreement he referred to.
12. During the hearing, it turned out that the Plaintiff did not carry originals of the documents to Court. Thus, he was stood down to 03/03/2022 when he continued with his testimony. It was his evidence that after the taking of possession of the Ol Kalau parcel of land failed, the vendor decided to exchange it with another one in Trans-Nzoia County. This turned out to be the 20 acres of part of land parcel number Waitaluk/Kapkoi Block 9/Gutongorio/385. He testified that the registration of the current parcel as above was due to the subdivision of the land parcel No. Waitaluk/Kapkoi Block 9/Gutongorio/4 to the new parcel title. His evidence was that in addition to the sum of Kenya Shillings Two Million Six Hundred and Twenty-Five Thousand (Kshs. 2,625,000/=) Only that his late father had paid, on the agreement, for the parcel of land in Ol Kalau, the exchange of the suit land was to be done at an extra sum on Kenya Shillings Seven Hundred Thousand (Kshs. 700,000/=) only, making a total of Kenya Shillings Three Million Three Hundred and Twenty-Five Thousand (Kshs. 3,325,000/=) only.
13. He testified that the deceased father entered into a subsequent agreement in regard to the exchange of the parcels of land. It was dated 27/06/2003. He produced it as P. Exhibit 7. He then produced as P. Exhibit 3 the Green Card of the parcel of land in issue. His evidence was that the initial agreement was



lost and he reported the issue to the police station. He was issued with an abstract which he produced as P. Exhibit 4 (b). He testified further that the deceased father and the vendor signed a further agreement on 05/07/1997 to show their intention of exchange of the parcels of land. He produced it as P. Exhibit 5.

14. His further evidence was that since the exchange of the parcels of land, the deceased's family, including the Plaintiff have lived on the 20 acres of the suit land for over 12 years in a quiet and uninterrupted manner. He testified that the deceased's family had built houses on the suit land. He produced photographs of the houses and marked them as P. Exhibit 8 (a) and (b).
15. His further testimony was that the two Defendants had already registered themselves as the owners of the parcel of land, title No. Waitaluk/Kapkoii Block 9/Gutongorio/385. His evidence was that the two were brothers, being the children of the vendor of the parcel. He also adduced evidence that his deceased father was compelled to add the sum of Sixty Thousand Shilling (Kshs. 60,000/=) Only to the purchase price because he delayed in completing the purchase price. His evidence then was that the total sum the deceased father paid was Three Million Four Hundred and Eighty Five Thousand Shillings (Kshs. 3,485,000/=) Only. Lastly, he adduced evidence that having resided on the land from the time of exchange, even other persons knew and recognized that the parcel belonged to the deceased. He produced evidence of electricity transmission lines the Kenya Transmission Company laid through the parcel of land and paid the family compensation for the use (under the wayleaves process). He produced photographs of the transmission lines and the evidence of the payment of compensation as P. Exhibit 10 and 11 (a) and (b) respectively. He then prayed for the Originating Summons to be allowed as was presented and the Plaintiff be declared as owner of the 20 acres by way of adverse possession. He also prayed for the costs of the suit. That marked the close of the Plaintiff's case in the instant suit together with that of the Defendants. The Plaintiff filed his submissions on the 11/04/2022.

Determination

16. I have carefully considered the pleadings herein, the evidence on record - both oral and documentary - the submissions on record, the case law and the statutes cited as well. I find the following to be the issues for determination:
 - (a) Whether the Plaintiff proved acquisition of the suit land by way of adverse possession.
 - (b) What Orders to issue and who to bear costs of the Claim.
17. I begin the determination of this case with the analysis of the first issue along on two perspectives - the law on adverse possession and the facts of the instant case.

(a) Whether the Plaintiff proved acquisition of the suit land by way of adverse possession

18. In a claim for Adverse Possession, the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya lays down the elements that a litigant is supposed to prove in order to be successful. The starting point in the law of evidence is that he who asserts a certain set of fact has to prove them in order to succeed, unless the law under which he brings his claim removes from them such a burden. In simple terms, the onus lies on the person who asserts to prove the issue. Section 107(1) of the Evidence, Chapter 80 of the Laws of Kenya provides that "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." It therefore means that in a claim for adverse possession, it is the Applicant who ought to show that he/she has fulfilled the conditions set out under the *Limitation of Actions Act*, as will be explained in paragraph 26 below.



19. One thing that should not escape anyone's mind is that adverse possession is one of the methods of acquiring ownership of land which the *Land Act*, Act No. 6 of 2012 provides for. Section 7 of the Act lists that among others such as allocation, prescription and compulsory acquisition, to name a few. However, the genesis of such a process is what ordinarily causes many to find such a method abhorrent so to say. It starts from the point of illegality and ends in legality. The point here is that the person claiming adverse possession is not the rightful owner at the beginning. He only takes advantage of the fact that the owner has not acted to redeem possession for a period of time, which is prescribed to be twelve (12) years of continuous open use and occupation, without the owner's permission. For that to be reversed, the permission to remain on the land may be express or implied.

20. To be clear on the concept of adverse possession, I restate the holding in the case of *Wambugu vs Njuguna* (1983) KLR page 172 where the Court of Appeal held:

“...adverse possession contemplates two concepts: possession and discontinuance of Possession. It further held that the proper way of assessing proof of Adverse Possession would 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 or she has been in Possession for the requisite number of years.”

21. The rationale and historical background of this process was given in Indian case of *State of Haryana vs Mukesh Kumar & Ors* on 30 September, 2011 where Justice Bhandari of the Supreme Court stated as follows:-

“29. A very informative and erudite Article was published in *Neveda Law Journal Spring 2007* with the title 'Making Sense out of Nonsense: A Response to Adverse Possession by Governmental Entities'. The Article was written by Andrew Dickal. Historical background of adverse possession was discussed in that article.

Historical background

30. The concept of adverse possession was born in England around 1275 and was initially created to allow a person to claim right of "seisin" from his ancestry.

Many felt that the original law that relied on "seisin" was difficult to establish, and around 1623 a statute of limitations was put into place that allowed for a person in possession of property for twenty years or more to acquire title to that property. This early English doctrine was designed to prevent legal disputes over property rights that were time consuming and costly.

The doctrine was also created to prevent the waste of land by forcing owners to monitor their property or suffer the consequence of losing title.

31. The concept of adverse possession was subsequently adopted in the United States. The doctrine was especially important in early American periods to cure the growing number of title disputes.

The American version mirrored the English law, which is illustrated by most States adopting a twenty-year statute of limitations for adverse possession claims. As America has developed to the present date, property rights have become increasingly more important and land has become limited. As a result, the time period to acquire land by adverse possession has been reduced in some States to as little as five years, while in others, it has remained as long as forty



years. The United States has also changed the traditional doctrine by preventing the use of adverse possession against property held by a governmental entity.

32. During the colonial period, prior to the enactment of the Bill of Rights, property was frequently taken by states from private land owners without compensation.

Initially, undeveloped tracts of land were the most common type of property acquired by the government, as they were sought for the installation of public road.

Under the colonial system it was thought that benefits from the road would, in a newly opened country, always exceed the value of unimproved land.

33. The doctrine of adverse possession arose in an era where lands were vast particularly in the United States of America and documentation sparse in order to give quietus to the title of the possessor and prevent fanciful claims from erupting. The concept of adverse possession exists to cure potential or actual defects in real estate titles by putting a statute of limitation on possible litigation over ownership and possession. A landowner could be secure in title to his land; otherwise, long-lost heirs of any former owner, possessor or lien holder of centuries past could come forward with a legal claim on the property. Since independence of our country we have witnessed registered documents of title and more proper, if not perfect, entries of title in the government records. The situation having changed, the statute calls for a change.”

22. This Court will not dwell much on the history and basis of adverse possession. Rather it will proceed now to examine the legal regime of the application of doctrine. Through it, a person other than the proprietor of a parcel of land acquires title to the land without voluntary surrender of ownership by the proprietor. This is limited to private land. Where land is public, the law provides to the contrary.

23. In regard to the period in issue, Section 7 of the [Limitation of Actions Act](#), Chapter 22 of the Laws of Kenya lays down the legal basis. It states as follows:

“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 on him, or if it first accrued to some person through whom he claims, to that person.”

24. Section 13 of the Limitations of Actions Act further provides:

“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 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.”

25. Section 17 of the Act then provides that a person who does not bring a suit for recovery of his land before the end of the period prescribed by the Act loses his rights over the land: they are extinguished. Courts have examined these provisions. Thus, in the case of *Benjamin Kamau Murima & Others vs Gladys Njeri* CA No. 213 of 1996 the Court of Appeal stated:

“The combined effect to 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 a proprietor of land



in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of the land.”

26. The same Court (of Appeal) then expressed the issues a Claimant in a suit for Adverse Possession must prove. In the case of *Kasuve v Mwaani Investments Limited & 4 Others* 1 KLR 184, the Court stated that;

“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 without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

27. Again, in the recent Court of Appeal case of *Mtana Lewa v Kabindi Nala Mwangandi* [2015] eKLR the court summed up adverse possession as:

“... 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...”

28. Therefore, for a Claimant to be successful in a suit for adverse possession, he has to prove four elements. They are that, one, he ought to be in actual and not constructive possession of the land. Two, the possession must be open and not secret or be such that everyone who can know about the occupation or possession is clear about the fact that the Claimant is in possession. Three, no other person should also be laying claim to the land except his as against the owner, and four, the period ought to be a minimum of twelve (12) continuous or uninterrupted years. The interruption entails non-departure from the land, and there should be no legal claim filed for recovery of the land from the adverse possessor within that period of time.

29. In the persuasive authority of *Ibrahim Wachira Karaguri v Mary Mwihaki Simon & another* [2020] eKLR the case of Benjamin Kamau Murima & Others vs Gladys Njeri CA No. 213 of 1996 (supra) was cited. In the latter case it was held that they who must succeed in adverse possession have:

“... to prove that they have used this land which they claim as of right: nec vi, 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”

30. Earlier on, the case of *Francis Gicharu Kariri - vs- Peter Njoroge Mairu*, Civil Appeal No. 293 of 2002 (Nairobi) the Court of Appeal approved the decision of the High Court decision of *Kimani Ruchire -vs - Swift Rutherford & Co. Ltd.* (1980) KLR 10 where Kneller J, held that:

“The Plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion)”.

31. Thus, turning to the facts in the instant case, the Plaintiff who was the only witness who gave evidence testified as PW1. He stated his late father, one, John Kamau Gitau, entered into an agreement for the



- purchase of 50 acres being part of Plot No. 2 Ol Kalau which measured approximately 120 acres. He did so with the 1st Defendant on 29/01/1994. The parcel of land was situate in Ndemi Settlement Scheme. He produced as P. Exhibit 2 a copy of the agreement.
32. He testified further that after the transaction, the 1st Defendant did not give vacant possession of the parcel of land. This necessitated the Plaintiff's father to instruct a lawyer to issue a demand letter to the 1st Defendant giving him the option of refunding the purchase price or getting for him another parcel of land. The vendor decided to exchange the 50 acres with another parcel of land in the now Trans-Nzoia County. This was the 20 acres of part of land parcel number Waitaluk/Kapkoi Block 9/Gutongorio/4. He testified after the entire parcel of land was subdivided, it gave rise to two parcels; one of which was land parcel No. Waitaluk/Kapkoi Block 9/Gutongorio/385. It was this parcel the two Defendants registered themselves jointly as proprietors, and of which the 20 acres was part. He produced the green card of the parcel of land in issue as P. Exhibit 3. It showed that the title to the parcel which measured approximately 18.79 Ha was issued on 29/08/2017 to Apollos Kennedy Mwangi and Horan Muna Mwangi; a subdivision of land parcel No. Waitaluk/Kapkoi Block 9/Gutongorio/4. He testified that purchase price of the initial parcel of land was Kenya Shillings Two Million Six Hundred and Twenty-Five Thousand (Kshs. 2,625,000/=) Only. His late father had paid the vendor the sum.
33. His evidence was that in exchange of the new parcel of land the vendor agreed with the Plaintiff's late father that he pay an additional Kenya Shillings Seven Hundred Thousand (Kshs. 700,000/=) Only, making a total of Kenya Shillings Three Million Three Hundred and Twenty-Five Thousand (Kshs. 3,325,000/=) Only. His father delayed but added Kenya Shillings Sixty Thousand (Kshs. 60,000/=) Only as compensation. It gave a total sum of Three Million Four Hundred and Eighty Five Thousand Shillings (Kshs. 3,485,000/=) Only.
34. He testified that parties entered into a handwritten agreement titled "Further Agreement between Apollos K. Mwangi & Mr. John Kamau" on 05/07/1997 to show their intention of exchange of the parcels of land. He produced it as P. Exhibit 5. He stated further that they entered into a subsequent agreement dated 27/06/2003, which he produced it as P. Exhibit 7. This was final agreement. His further evidence was that after exchanging the parcels of land, the deceased's family, including the Plaintiff started living on and using the 20 acres of the suit land. He stated that they had built thereon and have been in quiet and uninterrupted occupation for over 12 years. He stated that even other persons knew and recognized that the parcel belonged to the deceased and his family. He produced photographs of the houses the deceased's family had built on the land and marked them as P. Exhibit 8 (a) and (b). He produced photographs of the transmission lines laid on the parcel of land by the Kenya Transmission Company and the evidence of the payment of compensation to the widow of their father as P. Exhibit 10 and 11 (a) and (b) respectively. His last oral evidence was that the two Defendants were brothers; the children of the Vendor one, Naomi W. Appollos, who was indicated as such in the initial agreement of the parcel in question. (I say so because as it stands, the suit property is in the names of the Defendants).
35. Having considered the evidence above and the law, I find that the Plaintiff proved that indeed the family of the deceased John Mwangi not only dispossessed him and/or his family of the 20 acres of part of the land comprising of Waitaluk/Kapkoi Block 9/Gutongorio/385 but also discontinued their possession of the suit land for over 12 years as prescribed by statute. The principle of *nec vi, nec clam, nec precario* has been proved by the Plaintiff herein. He is in adverse possession of the portion measuring 20 acres or thereabouts.



Disposition

36. The upshot is that the Plaintiff having proved that the estate of John Kamau Gitau is in adverse possession of the 20 acres as against the registered owners, I enter judgment in his favour as against the Defendants as follows:

a. A declaration be and is hereby issued that the Plaintiff has acquired by way of adverse possession twenty (20) acres out all that parcel of land known as Waitaluk/Kapkoi Block 9/Gutongoria/385 and is entitled to be declared the owner of the twenty 20 acres.

b. A declaration be and is hereby issued that the County Land Registrar, Trans-Nzoia County to amend the Register of the parcels and have the 20 acres forming part of land title deed No. Waitaluk/Kapkoi Block 9/Gutongoria/385 registered in the name of the Estate of John Kamau Gitau.

c. A declaration be and is hereby issued that the Defendants to sign the relevant Transfer Documents to have the 20 acres, the subject of the suit transferred into the deceased's estate's name within 30 days of this judgment failure to which, the Deputy Registrar of this Court shall sign on behalf of the Defendants.

d. The costs of this suit be paid by the Defendants.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 25TH DAY OF MAY, 2022.

DR.IUR FRED NYAGAK

JUDGE, ELC, KITALE.

