



REPUBLIC OF KENYA



KENYA LAW
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**Ngunjiri & another v Ndiangui & another (Environment & Land Case
177 of 2015) [2022] KEELC 3206 (KLR) (19 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3206 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 177 OF 2015**

**JO OLOLA, J
MAY 19, 2022**

BETWEEN

NEHEMIAH WACHIRA NGUNJIRI 1ST PLAINTIFF

JOHANA KIAMA NGUNJIRI 2ND PLAINTIFF

AND

ROBERT WAHOME NDIANGUI 1ST DEFENDANT

ZAKARIA RIMUGI KAMAU 2ND DEFENDANT

JUDGMENT

1. By an originating summons dated June 11, 2015 as amended on April 2, 2018, Nehemiah Wachira Ngunjiri and Johanna Kiama Ngunjiri (hereinafter “the applicants”) pray for the following:
 1. A declaration that the Applicants have acquired title by adverse possession in respect of the parcels of land L.R No. Ruguru/Gachika/1709, 1710, 1711, 1712, 1713, 1714 and 1715;
 2. In the alternative, a declaration that the 1st respondent holds the suit parcels of land in trust for the applicants and determination for the said trust;
 3. An order for the rectification of the register to the suit parcels of land by registering the same in the joint names of the applicants in place of the 1st respondent; and
 4. That the respondents do bear the costs of the suit.
2. The originating summons is supported by an affidavit jointly sworn by the applicants wherein they assert that the suit land was originally owned by their now deceased father before it was sold by public auction when the father was unable to pay a debt. They aver that despite the said sale in 1962, they continued to live in the land with their parents both of whom have since died.



3. The applicants aver that it was only in the year 1986 when the 2nd respondent turned up and started laying claim to the suit land. Sometime in 2015, some strangers went to the land and commenced construction. It was only ten that the applicants learnt that the land had on 22nd August, 2013 been transferred to the 1st respondent who then sub-divided the same into the 6 portions.
4. Robert Wahome Ndiang'ui (the 1st respondent) is opposed to the orders sought. In his replying affidavit sworn on June 30, 2015 the 1st respondent avers that he purchased L.R No. Ruguru/Gachika/179 from Zakaria Rimungi Kamau (the 2nd respondent) on August 21, 2013 and a title was issued in his name on September 19, 2013.
5. The 1st respondent avers that he thereafter proceeded to sub-divide the property into current titles being Ruguru/Gachika/1709; 1710; 1711; 1712; 1713; 1714 and 1715 and that he has already sold four of the sub-divisions.
6. The 1st respondent asserts that contrary to the applicants claim, the resultant suit properties are not in any way connected to L.R No. Ruguru/Gachika/279 or 29 and that therefore the applicant's case is misplaced. The 1st respondent further avers that the claim for adverse possession was in any event extinguished upon his purchase of the said property in 2013 and the subsequent sub-division thereof.

The Applicants' Case

7. The applicants called one witness who testified in support of their case at the trial.
8. PW1 – Nehemiah Wachira Ngunjiri is the 1st applicant and a farmer residing in Ruguru –Gachika. Relying on his written statement dated 5th January 2018, PW1 testified that the parcel of land known as L.R No. Ruguru/Gachika/179 originally belonged to his father the late Ngunjiri s/o Kiama.
9. PW1 told the court that sometime in 1962, one Wachira Wanjama sued his father claiming that PW1's father had not paid dowry for PW1's mother who was his aunt. Judgment was thereafter entered against PW1's father and he was ordered to pay the claimant 30 sheep or their monetary equivalent of Kshs.400/-. When the father failed to pay, his land was attached and auctioned to one Samuel Kamau who came to be registered as the proprietor thereof in 1970.
10. PW1 testified that the purchaser of the land tried to remove them from the land but they refused as they had nowhere else to go. PW1's father later passed away in the year 1978 and was buried on the land. When PW's mother also later died in the year 1985, she was equally buried on the land. In 2013, PW1 also buried his daughter on the land.
11. PW1 further told the court that after their parents' death, he remained on the land with his elder brother Johana Kiama Ngunjiri (the 2nd applicant) as their sisters got married and left home. They have continued to reside and cultivate the land ever since.
12. PW1 told the court that sometime in the year 1986, a stranger they later came to know as Zachariah Rimungi Kamau (the 2nd respondent) went to the land and declared that he was the new owner thereof. PW1 and his brother refused to vacate the land. In 2013 a signboard was placed in front of the land stating it was being sold in several ¼ acre portions. The applicants however uprooted the sign-post.
13. PW1 further told the court that in the year 2015 some strangers descended on the land and started digging a foundation for a building. The applicants tried to resist but they were unsuccessful. The strangers told them they had purchased the portion measuring about ¼ acre from the 1st respondent. The applicants have however retained the remaining portion of the original parcel of land to-date.



14. On cross-examination, PW1 conceded that they filed this case in 2015, some 29 years after they learnt in 1986 that the respondent was laying claim to the land. PW1 told the court that his father Ngunjiri Kiama was the first to be registered as the owner of the land during demarcation in 1957.
15. On being shown the Green Card however, PW1 conceded that the land was registered in the name of Samuel K. Kamau in 1970 and that the name Ngunjiri s/o Kiama appeared in the card after 1970 and had been cancelled out. PW1 further told the Court the land was registered in the name of one Zacharia Rimungi on March 25, 1986 before it was transferred to the 1st respondent on August 22, 2013.

The Respondents' Case

16. The 2nd respondent neither entered appearance nor filed a response to the claim. The 1st respondent called one witness in support of his case at the trial.
17. DW1 – Robert Wahome Ndiang’ui is the 1st respondent and a retired teacher doing business in Nyeri town. Relying on his replying affidavit sworn on 30th June, 2015, DW1 testified that he had purchased the suit property in August, 2013 from one Zacharia Rimungi Kamau. Before the purchase, DW1 told the court he conducted a search and established that the land was registered in the vendor’s name although the vendor told him the original title was missing.
18. DW1 further told the court the vendor had published in Kenya Gazette a notice indicating that the title to the suit property was missing and he was issued with a new title. Having established the ownership, DW1 purchased the land and proceeded to sub-divide the same into seven (7) portions.
19. DW1 told the court he was in occupation of the land and that the applicants were not utilizing the land in any way. DW1 had since sold some of the sub-divisions of the suit land to one Rachel Wangeci Gacumu.
20. On cross-examination, DW1 testified that at the time he had bought the land in 2013, the seller was not staying on the land. The seller had bought it from his brother Samuel Kioko Kamau who had bought the land at an auction.
21. DW1 testified that when he entered the land and sub-divided it, there was no coffee plantation on the land. He told the court he was unaware that the 2nd applicant had died recently and that he was buried on the suit land. He was also unaware if the graves of the applicants’ parents were on the land.
22. DW1 conceded that all the titles to the 7 sub-divisions were still in his name stating the buyers had not completed making payments.

Analysis and Determination

23. I have carefully perused and considered the pleadings filed herein, the testimonies of the two witnesses who testified herein as well as the evidence adduced at the trial. I have similarly perused and considered the rival submissions placed before me by the Learned Advocates acting for the parties herein.
24. The applicants herein pray for a declaration that they have acquired titles to the subject property by way of adverse possession. In the alternative, they pray that a declaration be made that the 1st respondent holds title to the suit property in trust for themselves. The applicants ultimately urge the court to determine the trust and to order a rectification of the register to reflect their names as the proprietors of the suit land.



25. The doctrine or adverse possession in Kenya is captured under section 7 of the *Limitation of Actions Act*, (Cap. 22 of the Laws of Kenya) in these terms:
- “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.”
26. Section 13 of the said Cap. 22 further provides that:
- “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 the 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 possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.”
27. Under sections 37 and 38 of the said Cap. 22 of the Laws of Kenya, it is stipulated that if the land is registered under one of the registration Acts, then the title is not extinguished but is held in trust for the person in adverse possession until he shall have obtained and registered an order of this Court vesting the land upon himself.
28. As the Court of Appeal stated in *Kasuve -vs- Mwaani Investments Limited & 4 others* 1KLR 184:
- “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.”
29. Accordingly, the key test in a claim such as this is whether the owner of the land had been dispossessed of the same or whether he had himself discontinued possession of the suit property.
30. In the matter before me, the applicants contend that the suit land measuring some 1.6 acres was originally owned by their father the late Ngunjiri Kiama who passed away in 1978. The applicants told the court that the property was sold by auction sometime in 1962 after their father failed to pay debt of 30 goats (or the then equivalent of Kshs.400/-) that he had been decreed by a Court to pay.
31. The applicants told the court that despite the sale by auction, the family successfully resisted any attempts to remove them from the land and they remained in exclusive and uninterrupted possession thereof. The applicants told the court that sometime in 1986, the 2nd respondent went to the land and demanded that they vacate the same on the basis that he was the new proprietor thereof.
32. The applicants told the court they refused once again to vacate the land as they had nowhere else to go. subsequently in the year 2013, the 1st respondent appeared on the scene and again asked them to vacate. When they declined to do so, the 1st respondent placed a sign-post at the edge of the land stating that the same was being sold in ¼ acre portions. In 2015, some people claiming interest as purchasers to the land started digging and constructing a foundation for a building on a portion of the land thereby prompting the institution of this suit.
33. As it turned out, the 2nd respondent neither filed a response to the claim nor did he take part in these proceedings. It was however clear from the testimony of the 1st respondent that prior to August 21, 2013 when the suit property was transferred to the 1st respondent, the title thereto was in the name of



the 2nd respondent. A perusal of a copy of the Green Card produced by the applicants reveals that the 2nd respondent was registered as the proprietor of the land on March 25, 1986.

34. As if to corroborate the applicants' version of the events, the 1st respondent admitted in cross-examination that he was aware the 2nd respondent was not staying on the land and that the 2nd respondent had purchased the land from the 2nd respondent's brother Samuel Kioko Kamau who had in turn bought the land in an auction and was registered as the proprietor of the land in 1970.
35. The 1st respondent did not produce in court a copy of the sale agreement pursuant to which he bought the land from the 2nd respondent nor did he produce a copy of the sale agreement through which the 2nd respondent is said to have bought the land from his brother Samuel.
36. While he asserted that he purchased the land and proceeded to sub-divide the same into ¼ acre portions for sale, I did not find either in his sworn replying affidavit or his testimony before the court where the 1st respondent stated that he was put in possession of the land by the 2nd respondent.
37. I say so because the applicants have as part of their evidence in court exhibited photographs of their dwelling home said to be erected on the land. In response to an application dated 2 September 9, 2015 to which the photographs were first annexed, the 1st respondent responded as follows at paragraphs 7, 9 and 10 of his replying affidavit sworn on October 10, 2015:
 7. That I have not authorized anybody to do any constructions on my land and none is going on currently;
 9. That I further maintain that Ruguru/Gachuka/179 was transferred to me on or around the September 19, 2013 by one Zakaria Rimungi Kamau (2nd respondent herein) and therefore any action on adverse possession is not maintainable in law. (Annexed herewith and marked "R2" is a copy of the transfer and consent); and
 10. That there is no evidence that the claimants have been on the land for the period claimed and the annexed photographs are irrelevant to the issue at hand."
38. I did not however, with respect, think that the photographs were completely irrelevant. While the 1st Respondent purported in his testimony before the Court that he could hardly tell what the photographs were about, a keen look thereof reveals that they are indeed dwelling structures which the applicants maintained they had built on the suit land many years back.
39. From the totality of the circumstances herein and the material placed before me, I was persuaded that the Applicants had been on the land for a long period of time and that the respondents were aware of their presence and refusal to vacate the land. That they had some old relationship with the land can be discerned from the fact that their father's name appeared in the Green Card in the 1970s.
40. Having failed to evict the applicants from the land after purchasing the same through the public auction, the original purchaser Samuel Kioko Kamau purported to transfer the same to his brother the 2nd respondent in 1986. When the 2nd Respondent failed to persuade the applicants to vacate the land, he too transferred the title to the 1st respondent who purported to sub-divide the same for sale in order to defeat the applicant's interest on the land. That much is clear from the 1st respondent's replying affidavit sworn on June 30, 2015 in response to the originating summons. At Paragraphs 7 and 8 thereof the 1st respondent avers as follows:
 7. That in any event, upon buying the said property in the year 2013, and upon my subsequent sub-division, their (the Applicant's) claim on adverse possession was extinguished; and



8. That I am informed by my advocates on record, which information I verily believe to be true, that in any event, the applicants can only claim from the previous owner which is overtaken by events as he no longer holds title and the land does not exist.
41. I was however unprepared to accept that proposition. It was apparent to me that by the year 1986 when the 2nd respondent purported to acquire the suit property, the applicants had been in open, exclusive and uninterrupted possession of the suit property for a long period of time. It was further clear that even after the 2nd respondent's said registration as proprietor in the year 1986, he had failed to take possession of the land from the applicants whose possession was clearly adverse to the 2nd respondent's.
42. That being the case the subsequent purported transfer to the 1st respondent in the year 2013 could not defeat the applicant's claim which had already crystallised at the time of the transfer. Neither can the purported sub-division of the original parcel of land invalidate the applicant's claim as the purchaser of land takes the land subject to the limitation law. Where the vendors title has been extinguished by adverse possession, he has no title to pass and the purchaser equally has not title to purchase.
43. It follows that I was persuaded that there is merit in the originating summons dated June 11, 2015 as amended on April 2, 2018. Accordingly I allow the same in terms or prayers 1 and 3 thereof.
44. Each Party shall bear their own costs.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 19TH DAY OF MAY, 2022.

In the presence of:

Mr. C. M. King'ori for the Plaintiffs

No appearance for the Defendants

Court assistant - Kendi

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J. O. OLOLA

JUDGE

