



**Mwangi & 4 others v Kinyua (Environment & Land Case  
29 of 2019) [2022] KEELC 3042 (KLR) (13 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3042 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT & LAND CASE 29 OF 2019**

**EC CHERONO, J**

**MAY 13, 2022**

**BETWEEN**

**ZAKAYO MWANGI ..... 1<sup>ST</sup> APPLICANT**  
**MARY WANJIKU ..... 2<sup>ND</sup> APPLICANT**  
**NANCY WANJIRU ..... 3<sup>RD</sup> APPLICANT**  
**CATHERINE NYAKIO ..... 4<sup>TH</sup> APPLICANT**  
**PETER KARIUKI ..... 5<sup>TH</sup> APPLICANT**

**AND**

**JANE WAINOI KINYUA ..... RESPONDENT**

**JUDGMENT**

1. The five Applicants herein have moved this Honourable court vide an Originating Summons dated 26<sup>th</sup> July, 2019 for a declaration that they have become entitled by adverse possession to land parcel number Mutira/Kaguyu/5671 Measuring approximately 0.62 Hectares. The Applicants therefore seek to be registered as the sole proprietors of the said parcel of land and also want the land Registrar Kirinyaga County to register them as the absolute proprietor of the same.
2. The applicants filed this suit contemporaneously with a Notice of Motion under certificate of urgency dated the same day seeking a temporary injunction restraining the respondent from evicting them, selling, transferring and dealing with the suit land in any manner pending the hearing and determination of the application and the main suit.
3. The Respondent through the Firm of M/S C.S Macharia & Company & Advocates filed a Replying Affidavit in response thereto. Pursuant to the leave of this court granted on 18/6/2020, the Applicants filed a supplementary Affidavit on 24/6/2020 and annexed numerous documents in support of the



claim herein. After the parties complied with Order 11 of the Civil Procedure Rules, this case was certified ripe for hearing and the same was set down for hearing.

### **Applicants' Summary of Facts**

4. The first witness called by the Applicants/plaintiffs was Zakayo Mwangi Karenya, the 1<sup>st</sup> Applicant who stated that he lives on the suit land parcel No. Mutira/Kaguyu/5671. He stated that the land is registered in the name of Jane Inoi Kinyua, the Respondent herein and that He has lived on the said land for more than 20 years. He further stated that the suit land was originally registered in the name of Zakayo Muriithi Munge who had subdivided the same into four portions and gave them their respective portions where they constructed and have been living since then to-date. He said that they were shown their portions of land by their grand-father in the year 2000 before his demise. He further said that in the year 2019, he found his house and properties had been demolished. He said that the original registered owner Zakayo Muriithi Munge (deceased) was his paternal grandfather.
5. On cross-examination, the 1<sup>st</sup> Applicant stated that one Lucy Kariko had filed a succession cause No. 349/2012 (Kerugoya) and on 19/6/2015, the succession court delivered it judgment whereby the suit land parcel Number Mutira/Kaguyu/305 was subdivided into three equal portions. She admitted that from the said judgment, the court gave Lucy Kariko 1/3 of an acre, Jane Wainoi Kinyua (Respondent) also 1/3 of an acre while the remaining 1/3 portion was given to Jane Karuku and Margaret Karima who were the two widows to Joseph Kamenya Muriithi to share on behalf of their late Husband. He said that he was aggrieved by the said decision and he appealed to the court of appeal at Nyeri being CA No. 2 of 2016.
6. The second witness called by the Applicants was Catherine Nyakio Kamenya (PW2) who lives in Katwe within Kirinyaga County. She stated that Jane Wainoi Kinyua, the Respondent/defendant herein is her step-mother while the 1<sup>st</sup> plaintiff/Applicant is her grand father. As regards the suit property, she stated that it belongs to her grand father who gave them in the year 2000 and that she has lived in the land for more than 20 years. She said that they had developed a portion of the the suit land by constructing and planting tea and other crops but they are not living on the land now. She stated that they are not aware of a succession cause in which the suit property was in issue.
7. On cross-examination, the witness admitted that her father was known as Joseph Kamenya and was married to two wives. She was shown a copy of judgment in succession cause No. 349/2012 (Kerugoya) where the suit property which belonged to her grand- father was ordered to be shared amongst his three children including her father who had two wives.
8. The 3<sup>rd</sup> witness was Mary Wanjiku who is the 2<sup>nd</sup> Applicant/plaintiff herein. She stated that the Respondent is the wife of one Charles Kinyua (deceased) who was brother to her father. She said that her grand father was Zakayo Muriithi Munge while Zakayo Mwangi is her brother. She further stated that her grand father was blessed with three children namely, Joseph Kamenya, Charles Kinyua and Lucy Kariko. She said that they have lived on the suit land for more than 20 years and have done extensive developments thereon.
9. The 4<sup>th</sup> witness was Nancy Wanjiru who stated that her father is Joseph Kamenya and her mother is Jane Wainoi. She said that the Respondent's husband is one Charles Kinyua (deceased). Her Father Joseph Kamenya (deceased) and the Respondent's Husband Charles Kinyua (deceased) are brothers. Her grand father was Zakayo Muriithi who showed them their portions of land where they have developed and have lived for more than 20 years. She stated that their grand father sub-divided the original suit land into four portions and shared amongst Lucy Kariko, Jane Wainoi Kinyua, Margaret Karima



and Jane Karugu. She stated that their interest is a quarter acre in a portion which was given to the respondent.

10. The 5<sup>th</sup> and last witness was Peter Kariuki Kamenya who is also the 5<sup>th</sup> Applicant/plaintiff who stated that Jane Wainoi Kinyua is his mother and the wife to his uncle Charles Kinyua. He said that the suit property L.R Mutira/Kaguyu/305 was registered in their Grand father's name one Zakayo Muriithi munge who had shown each family their respective portions. He said that Jane Wainoi took one quarter acre on top of one acre she had been given.

### **Defendant's/respondent's Summary of Facts**

11. The Defendant/Respondent alone testified and stated that Plaintiffs/Applicants are the children of her brother-in-law, one Joseph Kamenya. She further stated that her Husband is one Charles Kinyua. She was referred to her Replying Affidavit sworn on 16/10/2019 which she adopted in its entirety. She also produced annexures to her Replying Affidavit as D-Exhibits D-Exhibits No. 1, 2, 3, 4, 5, 6, 7, & 8 respectively.

### **Legal Analysis and Decision**

12. I have considered the Originating Motion, the supporting affidavit, the supplementary Affidavit and the annexures thereto produced as Exhibits. I have also considered the response by way of a Replying Affidavit as well as the annexures and the rival submissions.

13. The applicants' claim is for a declaration that they have acquired the Respondent's suit land parcel Number Mutira/Kaguyu/5671 by way of adverse possession and an order directing the Land Registrar, Kirinyaga County to register them as proprietors of the same. A claim for Adverse possession is based on Section 7, 13 38, & 137 of the Limitation of Actions Act Cap. 22 Laws of Kenya. Several decisions by the superior courts have set out the guidelines which a claimant must establish before being declared to have acquired land by Averse possession. In the case of Mistry Valji v Janendra Raichand & 2 others (2016) e KLR, the Court of Appeal held as follows-;

“ 1) Adverse possession is not available to a party who is on the registered owner's land with his consent or where the entry and occupation was lawful and based on some agreement. In other words, where the title of the owner is admitted, there can be no claim for adverse possession.

- ii) The occupation of the land must be nec vi nec clam nec precario
- iii) The adverse possessor must prove that through his occupation, the true owner has been dispossessed or his possession discontinued.
- iv) It is equally established that adverse possession does not arise merely by occupation and use.
- v) The filing of a suit for recovery of land or any other recognized assertion of title to the land by owner stops time from running for purposes of Section 38 of cap.22”

14. The 1<sup>st</sup> Applicant in his Affidavit in support of this motion at paragraph 2 admitted that in the year 2000, he was invited by his grandfather, one Zakayo Muriithi Munge(deceased) who was also the registered owner of the suit land and showed them where to construct. The Deponent further stated that since they were shown the suit land, they took possession and did extensive development on the land. One of the ingredients for adverse possession to crystallize is that the possession must be non-



permissive, that is without permission from the true owner of the land occupied. In this case, the Applicants have admitted that they were given possession of the suit land by the original owner. That admission by the Applicants clearly dis-entitles them to the ownership of the suit land by adverse possession as their possession is not adverse.

15. The Applicants have also produced a certificate of official search to the original land parcel Number Mutira/Kaguyu/305 which was closed on partition and new numbers 5671-5673 were issued to the beneficiaries including the Respondent herein in succession cause No.349 of 2012(Kerugoya). A copy of the Judgment in the said succession cause was also produced as an exhibit by the Applicants. From a copy of the impugned judgment, it is clear that the Respondent was given one of the partitions being L.R Number Mutira/Kaguyu/5671 as a beneficiary. The Applicants did not appeal against the said judgment or apply for revocation/annulment of the grant. The Applicants' claim in my view is frivolous and scandalous.

### **Conclusion and Decision**

16. For all the reasons given hereinabove, I find the Applicants claim for adverse possession lacking merit and the same is hereby dismissed with costs. It is so ordered.

**JUDGMENT READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS  
13<sup>TH</sup> MAY, 2022.**

.....

**HON. E.C. CHERONO**

**ELC JUDGE**

In the presence of;

1. Ms Makazi for the Applicants
2. Mr. Macharia Wambui holding brief for C.S Macharia for the Respondent
3. Kabuta- C/A.

