



REPUBLIC OF KENYA



KENYA LAW
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**Ngundi v Ngundi (Environment & Land Case E60 of 2020)
[2022] KEELC 2349 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2349 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E60 OF 2020**

JG KEMEI, J

JUNE 30, 2022

BETWEEN

ANASTACIA NJERI NGUNDI PLAINTIFF

AND

JOHN KIMANI NGUNDI DEFENDANT

JUDGMENT

1. The Plaintiff and the Defendant are sister and brother being the children of the late Simon Ngundi Gachibu and Elizabeth Wanjiru Ngundi. Mzee Gachibu was married to two wives and owned parcel No Ngenda/Githunguchu/238 before subdividing it amongst his wives. Now it happened that the Plaintiff and the Defendant were the only children of Elizabeth Wanjiru Ngundi, one of the wives of Mzee Gachibu. In 1994 the late family patriarch subdivided the mother title and gave the Defendant parcel No. Ngenda/Githunguchu/1360 (suit land) and he became registered as owner on the 3/9/1994.
2. It is the Plaintiff's case that she has lived on the suit land for the past 64 years, since before the 1994 and according to the Defendant the Plaintiff has been in occupation of the land since 1989. The Plaintiff has urged title by way of adverse possession. She sought the following orders in the Originating Summons dated the 13/8/2020;
 - a. A declaration do issue that in accordance with Sections 7, 17, and 38 of the *Limitation of Actions Act* cap 22 Laws of Kenya, section 7 (d) of the *Land Act*, 2012 and section 28 (h) of the *Land Registration Act*, 2012 the Plaintiff having been in continuous, peaceful and uninterrupted possession of the land measuring 0.75 acres or thereabouts out of land parcel L.R No. ngenda/githunguchu/1360 for more than twelve (12) years is the sole owner of the said portion of 0.75 acres or thereabouts and any rights that the Defendant may have had or acquired in respect thereof be and are hereby extinguished forthwith.



- b. An order do issue requiring and directing the Land Registrar Thika Sub-county to register the Plaintiff Anastacia Njeri Ngundias legal proprietor of the said piece of land measuring 0.75 acres or thereabouts out of L.R No. Ngenda/githunguchu/1360 in place of John Kimani Ngundiand in place of any other person succeeding him.
 - c. The costs of this suit be borne by the Defendant.
3. The Defendant has denied the Plaintiff's claim and insists that he owns the land absolutely and that no adverse possession has crystalized as the parties have been litigating endlessly since 1995, one year after he became the registered owner of the land.
 4. The Plaintiff testified and relied on her Supporting Affidavit sworn on the 13/8/2020 and a Further Affidavit sworn on the 18/12/2020 as well as the documents marked as PEX No 1 and contained in the list of documents dated the 5/11/2021. She informed the Court that she has been on the land for the last 64 years, developed the land by constructing permanent and semi -permanent shops/houses; lives with her 4 children and grandchildren; farms avocados and plantains on a portion of 0.75 acres of the suit land without the consent of the Defendant. The suit filed in 1995 was dismissed just like the one of 1999. That they have been litigating since 1995 with the Defendant over the ownership of the land. The Defendant's cases filed in 2011, 2019 and 2020 were also dismissed.
 5. The Defendant also led his evidence and informed the Court that the Plaintiff is his sister, lives on the land since 1989 with her 4 children. He relied on his Replying affidavit sworn on the 19/11/2020, witness statement dated the 28/7/2021 and the documents marked as DEX No1 contained in the list of documents dated the 28/7/2021. (See copy of title issued on the 3/11/1994).
 6. The witness informed the Court that though her sister was not given any alternative land she wants her to vacate his land. He admitted that they have been litigating over the suit land since 1995. That he did not evict the Plaintiff because he is yet to get an order to do so. That he lives on another part of the land with his family where he has built a permanent house.
 7. Directions were taken at the close of the hearing of the case with respect to the filing of written submissions. Only the Defendant filed written submissions as at the time of writing the judgement.
 8. In his submissions the Defendant framed five issues for determination; whether the Plaintiff's occupation of the suit land has been open, continuous and uninterrupted; whether the various suits between them amount to interruption of occupation; whether adverse possession has been proven; whether the Plaintiff's prayers are merited and who bears costs.
 9. The Defendant submitted and placed reliance on the provisions of Section 7 and 38 (1) of the *Limitations of Actions Act*.
 10. On requirements to proof a claim in adverse possession, the Defendant quoted the decision of the Court in *Ndege Makori vs Rose Kebati & anor* (2022) ECLR where the Court quoting the case of *Mbira vs Gachubi* (2002) 1 EALR 137 stated as follows;

“..... 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.”



11. The Defendant also pointed the Court to the decision of the Court of in *Mtana Lewa v Kabindi Ngala Mwangandi* [2005] eKLR, where the Court held;

“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.”

12. That from the exhibits tendered in Court, there is enough evidence to show that Gatundu case No. 92 of 1995 by the Plaintiff was dismissed on 13/6/1997, Gatundu No 81 of 1999 was dismissed for being Res judicata same for Thika Case No 216 of 2011 by the Defendant and recently in 2019 and 2020 the parties’ applications in Gatundu were also dismissed. That the said litigation is a clear indication of interrupted occupation of the suit land. The Defendant urged that the Plaintiff has not discharged the burden of proving her claim to the required standard and thus the suit ought to be dismissed with costs.
13. On whether the Plaintiff had occupied the suit land for a period in excess of 12 years, whilst relying on the decision of the Court in *Gabriel Mbui vs Mukindia Maranya* (1993) eKLR the Defendant submitted that the occupation of the land by the Plaintiff was permitted by the Defendant in consideration of sibling affection/love and the same does not amount to adverse possession. That the Plaintiff did not show at what point her occupation ceased from being permissive. That this is a case where there was an arrangement between a sister and brother on the use of a portion of the land and which arrangement cannot be termed as exclusive possession of the land.
14. The Defendant submitted that the parties have been litigating in Court since 1995 and enlisted the various cases between them. He argued that the continuous litigation interrupted the period of limitation from running. That the very fact of filing suit against the Defendant shows that he did not neglect to act to assert his title against the Plaintiff.
15. Further that the Plaintiff has not provided any evidence to satisfy the Court that possession was adverse to the title of the Defendant. In conclusion he urged the Court to dismiss the Plaintiff’s suit.
16. Having read and considered the pleadings the evidence adduced during the hearing and the written submissions the issue for determination is whether the Plaintiff has established title by way of adverse possession.
17. The law pertaining to adverse possession is now settled. Section 7 of the *Limitations of Actions Act* states 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”

Section 38(1) states;

“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

18. The combined effect of the sections above is to extinguish the title of the proprietor of the land in favour of the adverse possessor at the expiry of 12 years in adverse possession of the suit land.



19. Section 28(h) of the *Land Registration Act*, 2012 recognizes overriding interest on land such of which are rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription. Under Section 7 of the said Act prescription is one of the ways of acquisition of land.
20. Under Section 7 (d) of the *Land Act*, 2012 prescription is one of the methods of acquiring land. The *Limitation of Actions Act* however does not define what constitutes adverse possession. Nevertheless, there is a plethora of case law on what adverse possession is. The Court of Appeal in the case of *Mtana Lewa vs Kabindi Ngala Mwagandi* [2015] e KLR, defined the concept as follows;
- “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.”
21. Earlier on the same Court in the case of *Wambugu -v-Njuguna* (1983) KLR 173, held that;
- “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.”
22. Additionally, in the appellate Court in the case of *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another* [2015] eKLR highlighted the requirements for proving adverse possession as thus;
- “First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.”
23. The Court of appeal in the cases of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR and *Kigorwe & another v Idua* [2022] KECA 70 (KLR) has affirmed the law and requirements for adverse possession was reiterated in the case of *Mbira -v- Gachuhi*, (2002) IEALR 137 where it was 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....”
24. Additionally, in the case of *Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others* [2018] eKLR reiterated that a party relying on adverse possession bears the burden of demonstrating that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period.



25. The rationale of adverse possession is well captured in the case of *Adnam v Earl of Sandwich* (1877) 2QB 485 as follows;

“The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties.”

26. In this case it is commonly agreed that the Plaintiff and the Defendant are siblings. It is also commonly agreed that the Plaintiff has settled on the land for a long period of time. According to the Plaintiff she was born on the land never married and been in occupation for a period of 64 years. That she lived in her late mother’s house before she died. The Defendant acknowledges that she has been in occupation since 1989.

27. The Plaintiff’s case is that the title of the Defendant has been extinguished over a portion of the suit land measuring approx. 0.75 acres by way of adverse possession. The Plaintiff bears the legal burden to prove her claim on a balance of probabilities as outlined under Section 107 of the *Evidence Act* which states as follows;

- (1) 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.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

28. Is the occupation adverse to the title of the Defendant? The Defendant thinks otherwise. He has argued that he allowed the Plaintiff to occupy the land on account of love between sister and brother and therefore occupation does not amount to adversity in title. That she has been on the land with his permission. On the other he claims that time was interrupted by the various cases that they have been filing against each other in Court.

29. In answer to the above question I shall analyse the cases referred to by the parties.

30. It is common ground that the parties are not strangers having litigated since 1995 and where they have tried to outwit each other in the corridors of justice over the subject suit land. The first suit between these parties is Gatundu RMCC No 92 of 1995 by the Plaintiff against the Defendant seeking a declaration of ownership of the portion of the suit land. Her case was hinged on the Defendant’s registration as the owner of the land in trust for her. Their father was alive at the said time and indeed testified as a witness. The Court found that the Plaintiff had failed to prove her case and proceeded to dismiss it on 13/6/1997.

31. Unyielding, the Plaintiff filed a second suit Gatundu Case No. 81 of 1999 describing herself as the legal representative of the estate of Ngundi Gichimu (their late father) . The Defendant raised a Preliminary objection on grounds of res judicata in light of the dismissal of Gatundu Case No. 92 of 1995. The Court upheld the Preliminary Objection and dismissed the suit with costs on 26/10/2000.

32. Not one to be left behind, the Defendant took his turn in CMCC No 216 of 2011 at Thika and sued the Plaintiff seeking a permanent injunction against the Plaintiff and an order for immediate vacation of the suit land. The basis of his Application was the previous decisions in the Gatundu RMCC No 92 of 1995 that essentially affirmed that he was the owner of the suit land. The Court held that the



issues in the application are res judicata and to pursue eviction, the Defendant ought to have filed an application in the Gatundu Case No. 92 of 1995. The Court dismissed that application with no order as to costs on 19/6/2016.

33. In 2019 the Defendant again filed an application in CMCC No 92 of 1995 at Gatundu seeking to enforce the judgement but the same was dismissed on grounds that the judgment delivered on 13/6/1997 seeking to be enforced had expired and thus time barred.
34. In the case of *Gabriel Mbui V Mukindia Maranya* (1993) eKLR the Court held that adverse possession may be interrupted by; physical entry upon the land by any person claiming the land in opposition to the person in actual possession with the intention of causing interruption; by institution of legal proceedings by the rightful owner to assert his right to the land; or by any acknowledgment made by the person in possession to any person claiming to be the rightful proprietor that such claim is admitted or otherwise recognized.
35. From the above chronology of the disputes surrounding this case, it is clear that the suit land was registered in the name of the Defendant in 1994.
36. It is the Defendant's case that adverse was interrupted by the cases enumerated above. It is trite that the rights of the parties were determined in finality in the case of CMCC No 92 of 1995. The Court dismissed the claim of the Plaintiff. Effectively the Defendant was declared as the rightful owner of the land. It is noteworthy to note that the cases filed in 1995 and 1999 were by the Plaintiff and not the Defendant. The Defendant filed suit in 2011, 14 years later after the dismissal of the suit in 1997. It is therefore true that the Defendant took no steps for a period of 14 years to assert title as against the Plaintiff. This could have been through evicting the Defendant in accordance with the law. In the meantime time is continuously running in favour of the Plaintiff who is on the land. The Defendant being the rightful owner therefore slept on his rights and only work up 14 years later. Even then his suit was dismissed and time continued to run unabated.
37. Effectively the right of adverse possession crystalized in 2009 and by the time of filing the suit in 2011 adverse possession had accrued in favour of the Plaintiff. The suit of 2011 therefore did nothing to oust or dent the right of the Plaintiff to land by way of adverse possession.
38. In the said Gabriel Mbui case, the Court stated that the stranger must show how and when his possession ceased to be permissive and became adverse.
39. The Plaintiff has stated that she occupied the land with the permission of her father but when the land was registered in the name of the Defendant that permission ceased. The Defendant would want to have the Court to believe that the Plaintiff who is his sister occupied the land with his permission; on account of love between siblings and that the permission has not ceased. If that were so then the Defendant should not have defended the case in 1995 nor filed his own case in 2011. From the protracted litigation spanning 25 years there is no love lost between the Plaintiff and the Defendant. If there was any scintilla of love the Defendant would have given the sister land as early as 1994 when he was gifted by his father and she did not have to fight tooth and nail as she has to get her rights.
40. In the end I find that on a balance of probabilities that the Plaintiff has proved her case. Costs follow the event and in this case the Plaintiff is entitled to the costs of the suit.
41. Final orders and disposal;
 - a. A declaration do issue that the Plaintiff is entitled to be registered as owner of land measuring 0.75 acres or thereabouts out of land parcel L.R No. Ngenda/githunguchu/1360 currently registered in the name of the Defendant.



- b. The Land Registrar Thika Sub-County be and is hereby ordered to register the Plaintiff Anastacia Njeri Ngundi as owner of the land measuring 0.75 acres or thereabouts out of land parcel L.R No. Ngenda/githunguchu/1360. Each party to meet the costs of their subdivisions.
- c. The subdivision of the said parcel should in as much as is practicable comply with the current occupation of the parties on the ground.
- d. The Defendant is ordered to execute all the documents necessary to effectuate the above orders in default the Deputy Registrar of this Court be and is hereby authorized to so execute the same.
- e. The costs of this suit shall be borne by the Defendant.

42. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 30TH DAY OF JUNE 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Gikonyo holding brief for Mbugua for Plaintiff

Ms. Mugo holding brief for Karanja Kangiri for Defendant

Court Assistant – Phyllis Mwangi

