Gathu & another v Kiiru (Environment & Land Case E001 of 2021) [2022] KEELC 2908 (KLR) (23 June 2022) (Judgment)

Neutral citation: [2022] KEELC 2908 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT & LAND CASE E001 OF 2021

LN GACHERU, J

JUNE 23, 2022

BETWEEN

FRANCIS GICHUHI GATHU .... 1ST APPLICANT

SIMON KAMAU GATHU .... 2ND APPLICANT

AND

MARGARET MUTHONI KIIRU .... RESPONDENT

JUDGMENT

1. *Vide* Originating Summons dated April 7, 2021, the Applicants sought orders that:
    1. The honorable Court be pleased to make an order and declaration that the Applicants are entitled by operation of the doctrine of adverse possession to registration as owners and proprietors of 2.8(two decimal eight) acres out of land parcel number Maragwa/ Ridge/137
    2. The honorable Court do issue an order directing and authorizing the land Registrar, Murang'a to effect the sub-division and transfer of 2.8 Acres to the joint names of the Applicants out of land parcel number Maragwa/ Ridge/137
    3. The Court be at liberty to make any further orders as maybe necessary and expedient in the matter
    4. The respondent be ordered to pay the costs of the suit
2. The Originating Summons is premised on the joint supporting affidavit of Applicants herein sworn on the April 7, 2021. It is the Applicants disposition that in 198, their deceased father, Gathu Kamau, in whose estate they are suing on behalf of, bought land from Kiiru Wainaina Alias Thomas Kiiru Wainanina, measuring in total 2.8 acres. That the consideration was paid in full, but the vendor died before transfer could be effected. They deponed that their late father took vacant possession of the suit land and developed thereon and it is where they continue to exclusively occupy. Further they contended

that the Respondent took out letters of Administration over the estate of Kiiru Wainaina, and their share of the land was included.

3. The Originating Summons was contested and the Respondent filed a replying affidavit sworn on the May 5, 2021. She averred that she was not aware that the deceased had sold land as the area, Maragua Ridge was not demarcated as at the time of the alleged sell. She contrasted this and deponed that demarcation was done in 1975. It was her further response that the Applicants have never been in occupation of the suit property and that they only attempted to claim 2.8 acres by filing a Maragua Land Disputes Case, which was dismissed in Nyeri Land Disputes Appeal Cause No. 3 of 2005.

4. Further, the Respondent deponed that the suit is bad in law for being *res judicata*, the land dispute case, and that the same is also statutory barred under the *Limitation of Actions Act*. She concedes that the Applicants are utilizing 1 acre of the suit land, which they have planted nappier grass.

5. Parties had intimated an out of Court settlement, but the same hit a snug and the matter was set down for hearing on diverse dates.

Applicants' Case

6. PW1 Peter Gitau Ngugi,testified that he a registered practicing valuer and responsible for the valuation report filed in Court by the Applicants. That he inspected the suit property on June 7, 2021, and compiled the report he produced in Court as exhibit. He confirmed the land is 11.6 acres, registered in name of Kiiru Wainaina.

7. On cross-examination, he testified that he did not go to the land with a Surveyor, but was able to identify the land through trees planted thereon. He also told the Court that Valuers can also establish the size of land.

8. PW2 Simon Kamau Gathu, testified that he is the son of the deceased Gathu Kamau, and adopted his witness statement dated April 7, 2021, supporting affidavit of the even date and also produced the documents contained in the list of documents as exhibits.

9. On cross-examination, he testified that Maragua Ridge was a settlement scheme and titles were issued in 1994. It was his testimony that there was no beacons to separate the land, but at the time his father bought the land, a survey was done. When asked about Land Control Board consent, he told the Court that the same was issued before demarcation and it indicated it was a gift as the settlement board did not allow purchase. He also confirmed that they went before the Land tribunal, but they never got their claim, despite the tribunal finding the land was theirs.

10. On re-exam, he testified that they moved into the land immediately after purchase in 1979/80, but they have not build on the suit land, save for cultivating crops which they have been doing so since then without any interruption.

11. PW3 Franciss Gachuhi Gathu, testified that he is a brother of PW2, and he relied on his witness statement of April 7, 2021, and Supporting Affidavit of even date as evidence in chief. There was no cross-examination.

Respondent's Case

12. DW1 Margaret Muthoni Kiiru, relied on her witness statement dated June 10, 2021, and the replying affidavit of even date and produced the documents listed in the list of documents as D. Exhibits.

13. She further told the Court on cross-exam that she confirmed the Applicants were utilizing the land, but she could not remember when they entered therein. That PW2 had planted maize on the suit land, and

she admitted that her husband sold the land, but she neither saw the sale agreement, consent nor know the land was sold to Gathu. On re-examination, she insisted that she was never told by her husband about the sell, and also that she never included the Applicants in the Succession Cause.

14. DW2 Josephat Wanderi, adopted his witness statement dated June 10, 2021, as evidence in chief. On cross-exam, he reiterated that he was not related to either parties of the suit and that he moved to Maragwa Ridge in 1962, when he was 8 years. He further testified that he did not know that Mr. Kiiru sold land and if he did, he would not know. He confirmed that the Applicants have been utilizing part of the suit land since 1979/80, but only ½ acre. He also confirmed his testimony on re-exam.

15. At the close of *viva voce* evidence, parties were directed to file and exchange their Written Submissions.

16. The applicants filed their undated submissions on the February 11, 2022. They reproduced the testimonies of the parties and raised three issues for determination by this Court. The Applicants further submitted that the Valuation report was enough evidence that the land could be identified, and that the parties had sought time to confirm acreage, which they did through the report.

17. On the Land Disputes Tribunals case, the applicants submitted that the Respondent did not provide any evidence showing the claim was on prescriptive rights. The Applicants also submitted that they had on a balance of probabilities proved their case against the Respondent and urged this Court to allow their claim in the originating summons as prayed. Reliance was placed on a litany of cases enumerated in their submissions.

18. The respondent filed her written submissions dated April 26, 2022. She submitted that her deceased husband acquired title to the land in 1995, and at the time of the purported sale, there was no title to pass. The Respondent faulted the Applicants' documents and submitted that there was no land capable of transfer as at the time of sale. The respondent largely submitted on the contents of the LCB consent form and submitted that they contradict the Applicants' from testimony. The respondent also submitted that any claim can only arise from 1995, when registration occurred. Further that if at all the applicants were ever in occupation, their occupation was interrupted by the filing of LDT Case No. 60 of 2004. She faulted the applicants for not adducing evidence to show when they got back to the suit land after their occupation, was disrupted by the LDT case.

19. It was the Respondent's submissions that the instant suit is *res judicata* LDT Case No. 60 of 2004. Additionally, she challenged the relevance of the valuation report as it was not prepared by a Surveyor, who could tell the acreage. The Respondent in submitting that the Applicants have not proved their claim invited this Court to her findings in her submissions and relied on a number of cases.

20. It is evident from the pleadings that the land is still registered in the name of Kiiru Wainaina and no sub-division has been done thereon. What flows from the pleadings and evidence also is that the Applicants have been in occupation of the suit land for a time that has not been ascertained. From the scanty evidence, this Court notes that the 2nd applicant instituted a Land Dispute case against the Respondent, and whose award was in favor of the Applicants. The Respondent herein filed an Appeal being Maragua LDT No. 3 of 2005, whose status this Court is not well guided on.

21. The Court has carefully read and considered the pleadings, the evidence adduced, submissions, authorities cited and the relevant provisions of law and finds that the issues for determination are:

    a. Whether this suit is *Res Judicata*

    b. Whether the Applicants have met the threshold for grant of orders for adverse possession?

c. Whether the Applicants are entitled to 2.08 Acres to be excised out of land parcel Number Maragwa/ Ridge/137?

d. Who should bear the cost of the suit?

i. Whether this suit is Res Judicata

22. The Respondent has laid a claim on ***res judicata***, though she has not clearly advanced her allegations, but shifted the burden to the Applicants during submissions.

23 The elements of *Res Judicata* are laid out in Section 7 of the *Civil Procedure Act*. These elements were enlisted in The *Independent Electoral and Boundaries Commission v s Maina Kiai & 5 others*, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR), where the Court of Appeal held that:

> "Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;
>
> a) The suit or issue was directly and substantially in issue in the former suit.
>
> b) That former suit was between the same parties or parties under whom they or any of them claim.
>
> c) Those parties were litigating under the same title.
>
> d) The issue was heard and finally determined in the former suit.
>
> e) The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

24. The Respondent claims the instant suit is *res judicata*, the Maragua LDT No. 3 of 2005. Save for a letter addressed to the Parties herein by the Provincial Commissioner, Central Province dated January 12, 2005, there is no document that indicates the matter was ever concluded.

25. The burden of showing to this Court that the instant suit is res judicata lies with the Respondent who has alleged. Even so, this Court has perused some grounds of Appeal filed before Land Disputes Appeals Committee and note that while the subject matter is the same, the claim for adverse possession was not determined by the Tribunal. If any, the said Tribunal did not have the jurisdiction. This Court does not have to belabor on this issue of *res judicata* as the Respondent has not laid sufficient basis for determination. To this end, this Court finds and holds that the instant suit is not res judicata and proceeds to determine it.

ii. Whether the Applicants have met the threshold for grant of orders for adverse possession

26. The demised land is registered in the name of Kiiru Wainaina measuring 4.7 hectares having been issued with title on the August 8, 1995. The effects of such registration are espoused in Section 27 of the *Registered Land Act* Cap 300(now repealed) and which are captured in Section 24(a) of the *Land Registration Act*.

> "24. Subject to this Act
>
> (a) The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto."

27. Additionally, section 28 of repealed Act now Section 25(1) of the *Land Registration Act* provides that such a registered owner's rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the Act. The rights of a registered owner are however subject to overriding interests declared by section 30 of Cap 300 (repealed) and now Section 28 of the *Land Registration Act*, as not requiring noting in the register.

Section 28 of the *Land Registration Act* provides that:

> Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—
>
> (a) ....
>
> (b) ......
>
> (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;

28. The applicants wish to defeat title on the basis of prescriptive rights as allowed above. It is the Applicants case that they have been in continuous, uninterrupted occupation and possession of the suit property for a period in excess of 12 years. The burden of leading the Court to ascertaining this lies with the applicants.

29. The Law on doctrine of adverse possession is set out under the *Limitation of Actions Act*. Section 7 places a bar on actions to recover land after 12 years, from the date on which the right accrued. Section 13 provides that adverse possession as the exception to this limitation:

(1) 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 this 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.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land."**

Finally, Section 38 of the Act provides that:

> "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."

30. The principle of adverse possession was more elaborately set out in the case of *Wambugu vs Njuguna* [1983] KLR 172, where the Court held that:

> In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it."
>
> And that:
>
> "The proper way of assessing proof of adverse possession would then 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 has been in possession of the requisite number of years."

31. This right is adverse to land and does not automatically accrue unless the person in who's this right has accrued takes action. Section 38 of the Act gives authority to the claimant to apply to Court for orders of adverse possession. In the case of *MtanaLewa Vs Kahindi Ngala Mwagandi* [2015] eKLR, the Court held;

> 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.

Further, in the case *Mbira vs Gachuhi* (2002) 1 EALR 137:the Court 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 statutorily prescribed period without interruption…"

32. Therefore, to determine whether the Applicants' rights accrued, the Court will seek to answer the following

    i. How did the Applicants take possession of the suit property?

    ii. When did they take possession and occupation of the suit property?

    iii. What was the nature of her possession and occupation?

    iv. How long have the Applicants been in possession?

33. It is trite that for a claim for adverse possession to suffice, the claimant must demonstrate that the same was non-permissive and non-consensual and without license. It is clear from the above analysis that a claim based on a sale agreement cannot issue since the vendor's consent and permission is obtained before one can gain ingress into the land. The applicants' claim emanates from a purported sale Agreement which this Court has read and concludes the entry was permissive.

34. However, every rule has an exception and the Court in Nairobi App No. 73 of 1982 *Public Trustee v s Wanduru Ndegwa* [1984] eKLR, found that in cases of sale agreement, Limitation of action begun running from the date of final payment. In the case *Hosea v Njiru & Others* [1974] EA 526, Simpson J, following *Bridges v Mees* [1957] 2 All ER 577, held that once payment of the last instalment of the purchase price had been effected, the purchaser's possession became adverse to the vendor and that he thenceforth, by occupation for twelve years, was entitled to become registered as proprietor of it.

35. The Respon dent has refuted the purported sale and testified that her husband never informed her about the sale. The applicants produced a copy of the sale agreement of July 1979,which shows one Kiiru Wainaina sold 2 acres of land to Gathu Kamau for a consideration paid at the signing of the agreement. Additionally, there are three translations between the aforementioned parties for 0.8 acres which consideration was payable on installments with the last installment being made on June 1, 1981.

36. The Respondent did not dispute the details of the agreements, and it is right to conclude that there was a sell between the Vendor and the purchaser therein. The Respondent submitted that it was not possible that a sell could occur while there was no title that had been issued. This is a claim for adverse possession** and it is trite that such a claim accrues on land and not title, therefore it matters not that title had not been issued.

37. The applicants contended that they gained ingress into the suit land after the impugned sell in 1980. DW1 told the Court that she knew Gathu Kamau and confirmed that he was living on the suit property. From the evidence, the said Gathu Kamau died in 2005. It was her testimony that "I don't remember when he started to utilize the land. It was around 179/80" DW2 also told the Court on cross-examination that "From 1979/80, the family of Gathu has been utilizing a small portion of this 137" Their testimonies corroborated that of the Applicants that the Applicants took immediate occupation and possession of the land after the sell.

38. For purposes of adverse possession in respect of the 2 acres time started running from 1979, after payment of the consideration, for the 0.8 acres, time started running from payment of the last installment being 1st June, 1985.

39. The Applicants testified that they have been in open and continuous occupation of the suit land. Based on the testimonies of parties, it is apparent that the Applicants' occupation of the land is well known and as a matter of fact, both DW1 & DW2 confirmed that the Applicants are utilizing the land. PW2 testified that they have been in occupation of the land and at some point the Respondent's family invaded their land, but they took them to Court. The Respondent contends that the filing of LTD No. 60 of 2004, stopped time from running. What can stop time from running is the filing of a suit to assert rights. In Malindi CoA Civil Appeal No. 29 of 2016 *Peter Kamau Njau v Emmanuel Charo Tinga* [2016] eKLR, the Court held

> in order to stop time which has started running, it must be demonstrated that the owner of land took positive steps to assert his right by, for instance taking out legal proceedings against the person on the land or by making an effective entry into the land.

40. The suit referenced to in the pleadings is LTD No. 60 of 2004, which this Court has established that the 2nd Applicant herein moved the Tribunal. The Respondent never filed any suit, save for an Appeal which was prompted by the determination of the tribunal. PW2 testified that the Respondent's family invaded the land, but it is evident that the Applicants continued to live on the land the invasion notwithstanding, the entry as found above must be effective. There is no evidence that their occupation was interrupted. In that case therefore, this Court has established that there is nothing that stopped time from running. For purposes of computing time, this Court finds that time started running from

1979 and 1981 over 2 acres and 0.8 acres respectively. To this end this Court finds and holds that the Applicants have met the threshold for the grant of orders of adverse possession.

iii. Whether the Applicants are entitled to 2.08 Acres to be excised out of land parcel Number Maragwa/ Ridge/137?

41. This Court has no reason to doubt the veracity of the Applicants' evidence, and the action of planting nappier grass and crops as per the annexed photographs shows their intentions of taking possession of the property. Undoubtedly, the same could not have been undertaken without the knowledge of the owner. If their occupation was abrasive the Respondent ought to have moved the Court for eviction orders, but she continued to allow them to utilize the said land since 1979. The Respondent on the other hand testified that the Applicants are utilizing 1 acre of the suit land. To buttress their claim, the Applicants instructed PW1 to prepare a Valuation report whose production was not objected it to. The Respondent submitted on the contents of the report and objected on the basis that the valuer could not determine the acreage occupied by respective parties. While that is true it is appreciated that the Respondent were by law required to demonstrate their allegation that the Applicants occupy 1 acre. In fact DW2 testified the Applicants occupied ½ an acre. The Respondent did not provide any cogent evidence to refute the Applicants allegation of complete utilization of 2.08 acres.

42. What flows from the pleadings is that the land is not surveyed. However, the agreements expressly states that the Applicants' father was entitled to 2.8 acres to be excised from land parcel No. Maragua/ Ridge/ 137. From the attached Certificate of Official Search, it is evident that the land is registered under the name of the Kiiru Wainaina, and this Court appreciates that the said land can easily be identified.

43. For a claim of adverse possession to issue, it is important that land is clearly identified as was held by the Court in *Wilson Kazungu Katana & 101 Others vs. Salim Abdalla Bakshwein & Another*[2015] eKLR that;-

> "The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of *Githu vs. Ndele* [1984] KLR 776.The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them."[Emphasis added]

44. The Court in the foregoing case found that the requirements of identification was crystalized by the mandatory provisions of Order 37 Rule 7 of the *Civil Procedure Rules* which requires that and application for adverse possession be accompanied with a title deed extract. The search certificate shows that the land measuring 4.7Ha is identified as maragua/ ridge/ 137. This Court has not enjoyed the benefit of being able to identify the exact occupation of the Applicants out of the entire parcel Maragua/ Ridge/137, but what is not in dispute is that the Applicants are occupying part of the land which is one and half acres. It would not be difficult for this Court to conclude that the Respondent is aware of the Applicants' confines and or borderlines, the larger portion notwithstanding.

45. In totality, thus Court finds and holds that the applicants have on a balance of probability demonstrated that the estate of their deceased father is entitled 2.08 acre piece of land to be excised from Maragua/ Ridge/ 137.

46. The Applicants moved the Court as administrators of the Estate of Gathu Kamau, on a limited grant. It is not clear whether the estate has been determined and Administrators duly appointed. This Court cannot therefore issue orders that will be adverse to the estate. It is therefore on that basis, that this

Court finds and holds that the Applicants can only in the said land hold in trust on behalf of the estate of Gathu Kamau.

iv. Who should bear costs

47. It is trite that costs shall follow the events, and that the successful party be awarded costs. The Applicants herein are the successful party and this Court has no reasons not to exercise its discretion in their favour. To this end, this Court finds and holds as follows:

    a. That the Applicants have proved their claim for adverse possession.

    b. That the Applicants are entitled to 2.08 acres to be excised from Maragua/ Ridge/137, to hold it in trust for the estate of Gathu Kamau.

    c. That Land Registrar Murang'a be and is hereby directed to issue title in the name of the Applicants to hold in trust for the Estate of Gathu Kamaufor a portion of 2.08 acres upon the conclusion of the requisite process of demarcation and survey.

    d. The Applicants are awarded costs of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 23RD DAY OF JUNE,2022.

L.GACHERU

JUDGE

Delivered virtually in the presence of;

Joel Njonjo Court Assistant

Applicants – Absent

Respondent – Absent

L.GACHERU

JUDGE

23/6/2022