



**Mwangi v Gakuya (Environment & Land Case 48 of 2019)
[2022] KEELC 3813 (KLR) (16 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3813 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 48 OF 2019**

JG KEMEI, J

JUNE 16, 2022

BETWEEN

JAMES KAMANDE MWANGI APPLICANT

AND

HARRISON MUHIA GAKUYA RESPONDENT

JUDGMENT

1. The applicant moved this court vide an originating summons brought against the respondent on the 6/3/2019 and sought title by adverse possession with respect to Kiambu/municipality/block5/528 (suit land).
2. In his supporting affidavit sworn on the 5/3/2019 the applicant deponed that the respondent is his old time friend who gifted him the suit land in the year 2000 whereupon he took possession and commenced developments in earnest and has occupied it for the past 16 years without any interruption. That the respondent gave him the original title in his name. That he financed the petition of the succession proceedings with respect to the respondent's mother, the previous registered owner of the suit land. He averred that he has sold half of the suit land to a third party. He urged the court to grant his prayers.
3. The respondent resisted the claim of the applicant vide his replying affidavit filed on the 25/3/2019. He disclosed that the applicant is his brother in law having married his sister and has known him for a long time. The respondent gave a long history of his relationship and the suit land as follows; in 2000 he allowed the applicant and members of his Church - the Christian Revival Group to utilize the land and the 2 bedroomed house for Church services and overnight prayers; in 2008 when the applicant had marital problems he offered to accommodate him in the 2 bedroomed house; in 2009 the applicant agreed to pay him rent of Kshs 5,000/- per month for the house; in 2010 he allowed the applicant to construct shops on the suit land on condition that he would continue paying rent for the 2 bedroomed



house but recoup his construction investment by renting out the shops for a period of 5 years. That he supervised the construction of the shops till completion in 2012.

4. The respondent explained that he gave the original title to the Applicant because he wanted to use it to secure a loan with his bankers, the Cooperative Bank Limited. That prior to that he had unsuccessfully sought loan from Kenya Commercial Bank using the same title to guarantee the loan. On request for the return of the title the Applicant refused. That in 2018 the Applicant stopped paying rent and he gave him a verbal notice to vacate which he refused leading to the written demand notice of the February 2019. That thereafter he sought help at the Rent Tribunal who served with an official demand for rent in 2019. He urged the Court to dismiss the claim of the Applicant as adverse possession has not accrued in his favour.
5. At the hearing the Applicant led evidence as the sole witness. He relied on his Supporting Affidavit as well as the list of documents marked as PEX No 1-13 in support of his claim. Whilst reiterating the contents of his Supporting Affidavit, the witness informed the Court that he took possession of the land in 1999 with the permission of the Respondent. That he was gifted the land by the Respondent in 2000 and he has occupied it uninterrupted for a period of over 20 years. That the land belonged to the Respondent's mother but was later transferred to the Respondent in 1997 and later registered in the name of the Respondent in 2017. He refuted that he purchased the land contrary to the contents of the letter dated the 26/2/2019 authored by his lawyer. Though he failed to produce an agreement for sale, he informed the Court that he sold half of the suit land to a third party. He refuted the Respondents claim that he applied for a land from the bank. He denied claims that he was a tenant of the respondent.
6. PW2 Japheth Mwaniki Gatuku testified and informed the court that he purchased half of the suit land from the respondent in 2007 vide an agreement of sale which he produced in court. That the Respondent has refused to transfer the portion to him leading to the suit filed in Kiambu where he has sued the respondent and his sister claiming the portion of land. In addition, he informed the Court that he found the Applicant on the suit land living in a 2 bedroomed house and he does not know the circumstances of how the applicant entered the suit land.
7. The respondent testified and informed the Court that he is the registered owner of the suit land. That the Applicant is his brother in law. That the land belonged to his mother before she transferred it to him in 1997. That the Applicant lives on the land since 1997 with his permission. Contrary to the Applicant's testimony he stated that he did not gift the land to the Applicant. That he voluntarily gave the original titles to the land to the Applicant for purposes of securing a loan but he has refused to hand it back. Insisting that there exists a verbal tenancy agreement between the Applicant, he informed the Court that he caused a demand to be sent to the Applicant asking him to vacate the premises.
8. The Applicant failed to file written submissions despite directions to do so having been taken on the 24/2/2022. The Respondent however filed his written submissions on the 4/4/2022. I have read and considered the said written submissions on record.
9. The key question for determination is whether the Applicant is entitled to title by way of adverse possession.
10. It is not in dispute that the Respondent is the registered owner of the suit land as seen in the title issued on the 5/4/2017. The land belonged to his mother having been so registered on the 11/7/1995. I have also seen on record the orders of the Court in CMCC No 142 of 2019 issued on the 29/1/2021 cancelling the title in the name of the Respondent and reverting the title to the name of the previous owner Jemimah Nyambura Gakuya. The parties have not addressed me on this and I will leave it there.



11. It is commonly agreed that the applicant and the respondent are related by marriage, the applicant having married the respondent's sister.
12. It is also commonly agreed that the applicant entered the suit land in 2000 first as part of the Church and took possession for purposes of Church activities but later occupied the 2 bedroomed house when his marriage hit the rocks leading to divorce.
13. The applicant's case is that he has occupied the suit land for over 20 years uninterrupted and therefore has established title by adverse possession. The Respondent insists that the applicant occupied the suit land with his permission and therefore no adverse possession would accrue in such circumstances.
14. I will highlight the key sections of the *Limitations of Actions Act* cap 22 and the Registration of Land Act No 6 of 2012 that anchors adverse possession.

“Section 7 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”

Further in section 13

- “(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”.

Section 17 goes on to state;

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished”

Finally, Section 38(1) and (2) 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.



- (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

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.

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.”

15. 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.”

16. For adverse possession to be established, 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. This point is further emphasized in the case of [Kimani Ruchire –v – Swift Rutherford & Co. Ltd.](#) (1980) KLR 10 at page 16 letter B, 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). So, the Applicant must show that the company 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 purposes or any endeavours to interrupt it by way of recurrent consideration”.one must show that they are in long exclusive, uninterrupted possession, possession is hostile to the rights of the registered owner and the registered owner is aware; possession has as much publicity as not to be missed by the registered owner.”

17. It is the law that permission or licence of the registered owner of the land negates the doctrine of adverse possession. This was the holding in [Samuel Miki Waweru v Jane Njeri Richu](#), Civil Appeal No. 122 of 2001, (UR), where the court held that it is trite law that a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, in the case of *Jandu v Kirpal* [1975] EA 225 it was found that possession does not become adverse before the end of the period for which permission to occupy has been granted. In the case of *Wambugu -v- Njuguna*, (1983) KLR 172 the court held where the claimant is in exclusive possession of the land with leave and license of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined.
18. In this case it was commonly agreed by both parties that the applicant was in occupation with the permission of the respondent. According to the applicant the respondent gifted the land to him



and according to the respondent it was with his permission. I have seen the demand letter from the respondent seeking the vacation of the land by the applicant dated the 25/1/2019. This letter read together with the notice to terminate tenancy dated the 26/2/2019 shows that the determination of the permit with which the applicant occupied the land is being determined. If that be so, then time started running from 2019 when the respondent sought to determine the license and permission in favour of the applicant. Time could also run from the year 2017 when the respondent became the registered owner of the land. These two periods taken together are inadequate to establish an interest by way of adverse possession.

19. Having carefully evaluated the pleadings the evidence and the written sub missions and all the material placed before me, I have reached the inevitable conclusion that the applicants claim is not proved.
20. Final orders and disposal;
 - a. The originating summons dated the 5/3/2019 has no merit. It is dismissed.
 - b. Parties being related, I order each to meet their costs of the suit.
21. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 16TH DAY OF JUNE 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Thuo holding brief for Kimani for Applicant

Harrison Muhia Gakuya – Respondent

Court Assistant – Phyllis Mwangi

