Wambugu v Mugi (Environment & Land Case 36 of 2015)
[2022] KEELC 4930 (KLR) (28 July 2022) (Judgment)

Neutral citation: [2022] KEELC 4930 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ENVIRONMENT & LAND CASE 36 OF 2015

L WAITHAKA, J

JULY 28, 2022

BETWEEN

LYDIA MBECA WAMBUGU ..... PLAINTIFF

AND

WILLIAM GITURI MUGI ..... DEFENDANT

JUDGMENT

1. The plaintiff herein, Lydia Mbeca Wambugu, took up the summons dated January 26, 2015 for determination of whether she has become entitled to plot No.49 Kangaita Market (hereinafter referred to as the suit property) by adverse possession and whether the Registrar should cancel the name in the Register of the suit property and replace it with her name.

2. The plaintiff's claim is premised on the grounds that she has been in occupation and possession of the suit property; that her occupation and possession of the suit property has been open, quiet and uninterrupted for over 12 years (since 1983); that the defendant is the registered owner of the suit property and that in 2010 the defendant wrote to her demanding that she vacates the suit property. Further, that in 2011 the defendant filed a case in court to wit Nyeri CMCC No.412 of 2011 seeking to evict her from the suit property.

3. On 28th October 2016, directions were taken to the effect that the Originating Summons be converted into a plaint; supporting affidavit to a statement and that documents annexed to the supporting affidavit to be the plaintiff's list of documents. Further directions were taken to the effect that the defendant's pleadings filed in Nyeri CMCC No.412 of 2011 be taken as the defendant's defence. The matter was then set down for hearing.

4. Vide Nyeri CMCC No.412 of 2012, the defendant had filed a suit in the lower court seeking to be declared the owner of the suit property; an order of eviction against the plaintiff herein and an order of permanent injunction to restrain the plaintiff herein from trespassing into the suit property, remaining

thereon or dealing with the suit property in any manner incompatible with his rights as the owner thereof.

5. The defendant had pleaded that he is registered owner of the suit property; that sometime in 1984 the plaintiff herein had proposed to buy the suit property and paid Kshs. 5,000/= as deposit; that the plaintiff failed to fulfil the conditions of sale leading to advertisement of the suit property by the County Council for sale on account of unpaid County Council dues; that he is the one who has been paying County Council dues and that on April 3, 2010 he issued the plaintiff with a notice to vacate the suit property which notice the plaintiff refused to heed despite having received refund of the deposit paid in respect of the suit property.

6. In response to the defendant's case, the plaintiff had filed a statement of defence contending that she had paid the whole of the purchase price, being Kshs.5000/= and taken possession of the suit property; that the defendant having sold his interest in the suit property to her, had no basis interfering with her possession of the suit property or paying rent and rates in respect of the suit property. The plaintiff further contended that she had acquired title to the suit property by adverse possession.

EVIDENCE

The Plaintiff's Case

7. During hearing, the plaintiff who testified as P.W.1, informed the court that she purchased the suit property from the defendant. She produced the agreements entered into between herself and the defendant over the suit property as Pexbt 1(a) and (b). The agreements were entered into on December 6, 1983 and March 6, 1984. She took possession and has been living therein since then. She has been paying rates to the County Council of Nyeri in the defendants' names. To attest to that fact, she produced receipts as Pexbt 3(a) to 3(d). On September 10, 1995, she paid Kshs. 250/- to Kangaita Plot Owners as attested by Pexbt 4.

8. The plaintiff informed the court that despite having met her part of the bargain, the defendant failed to transfer the suit property to her. She reported the matter to the village elders and the area chief. She denied the defendant's contention that he refunded the purchase price to her but stated that the defendant attempted to refund the money to her through the village headman but she rejected the offer because they did not have an agreement to that effect.

9. Maintaining that since she bought the property in 1983 she has been the one in use and occupation of the suit property, the plaintiff produced a search certificate showing that the defendant is the registered owner of the suit property as Pexbt 5 and urged the court to grant her the orders sought.

10. In cross examination, the plaintiff stated that before the suit property was allocated to the defendant, it belonged to the County Government of Nyeri; that he does not know whether or not the defendant has title to the suit property; that she reported her dispute with the defendant to the members of Provincial Administration (headman, chief, D.O) and to the County Secretary. She admitted that she had never made any payment for dispute resolution to the Council.

11. The plaintiff stated that on April 6, 2010, the defendant through the village headman attempted to refund to her the Kshs.5000/= she had paid in respect of the suit property. She rejected the money and gave it back to the headman the following day. The court heard that the defendant had cheated her that the 5000/- was to be taken to the County Council. When she took the money to the County Council, she was informed that she should return the money to the owner. She handed the money back to the headman as advised. She stated that she would make payments to the Council but would not insist on

being given receipts. Later, she was advised to be retaining the receipts. She was unaware that at one point the Council intended to sell the suit property for none payment of rates.

12. She admitted that the defendant had been paying for some of the rates. The defendant advised her to stop paying the rates. She was unaware that the defendant never intended to transfer the suit property to her. She is not aware that the suit property is a commercial plot. She has not developed the suit property because when she brought materials, the defendant started causing problems.

13. In re-examination, the plaintiff stated that the Kshs. 5000/= brought to her by the headman was brought without explanation. She was told to take it to the county offices but she returned the money.

14. The statement of Peter Njaramba Kihara was admitted in evidence. The statement is to the effect that he was present when the agreement between the plaintiff and the defendant was made on December 6, 1983 and that he is aware that the plaintiff fulfilled her part of the bargain but the defendant refused to transfer the land to her.

The Defendant's Case

15. The defendant who testified as D.W.1, informed the court that he knows the plaintiff. He entered into an agreement for sale of the suit property to the plaintiff but has not effected transfer to her. After they entered into the agreement for sale of the suit property, he persuaded the plaintiff to accompany him to the offices of the County Council so that he could transfer the plot to her but she did nothing. Because the Council had advertised the suit property for sale over unpaid rates, he paid the rates which as at 2006 amounted to Kshs.11,000/= and revoked the sale. He refunded the purchase price, Kshs.5,000/= to the plaintiff in presence of the Area Assistant Chief among other people. A week later, he received a demand notice from the plaintiff's lawyer. The Assistant Chief also called him and told him that the plaintiff had returned the money to her to pass to him. He never took the money. The defendant produced receipts showing that he was paying rates in respect of the suit property as Dexbt 1(a) and (b); demand letter dated April 16, 2010 as Dexbt 2 and his letter dated April 23, 2010 as Dexbt 3. He maintained that the suit property is a commercial plot and that the plaintiff has not developed it.

16. In cross examination, he admitted that since he sold the suit property to the plaintiff, the plaintiff has been in occupation; That he has not filed any documents showing that the Council advertised for repossession of the suit property; That the plaintiff comes from the neigbourhood; that he does not know whether or not the plaintiff is literate; That when he attempted to refund the purchase price to the plaintiff, he was not taking advantage of her. He acknowledged that the plaintiff paid him Kshs. 5000/- and continued utilizing the plot. He paid the arrears of Kshs.11,000/=. Although the value of the plot had increased, there was a balance between what he paid to the Council and what she paid him; That by the time he paid the first rates in 2009, the plaintiff had been in occupation for 26 years. He got bothered when the plot was advertised for sale because he was told that the registered owner would pay legal fees. He had no documents capable of proving that fact. He admitted that his payment of the rates was not a justification for revoking the agreement between the plaintiff and him.

17. Claiming that the plaintiff was never interested in the suit property, the defendant stated that he never refused to take the plaintiff to the Council and that he could not transfer the plot to her because there were arrears.

18. In re-examination, he stated that the plaintiff was supposed to get transfer money to enable him transfer the plot to her but she never raised the money. As a result, he continued getting demand notices and threats from the County Council of the plot being sold by the Council and being saddled with legal fees. Terming the conduct of the plaintiff unacceptable, he stated that he had to salvage the plot.

19. D.W.2 Lucy Wairuri Maina, informed the court that she was the Assistant Chief Kagaita; That the parties to this case are known to her; That they reside in her area of jurisdiction. She stated that the parties appeared before her regarding a land dispute, on April 6, 2010. The parties had entered into a land transaction. The land had not been transferred to the plaintiff because she had not been paying the rates. The rates had accrued to Kshs.11,000/=. The defendant refunded Kshs.5000/= to the plaintiff being the money she had paid. She received the money and acknowledged receipt. One week later, the plaintiff brought the money back. She called the defendant who refused to take the money. The money was left in the chief's office. The plaintiff had not complained about being refunded the money. She denied the contention that the defendant and she took advantage of the plaintiff because she was illiterate. She stated that they communicated in Kikuyu and she gave the plaintiff time to ask any questions. She took ten (10) days to refund the money. She called other administrators to confirm return of the money.

20. In cross examination she stated that when the money was returned, she summoned both the plaintiff and the defendant. The money was returned and rejected in her presence. When she summoned the parties to her office, she had given them the option of coming with witnesses. The plaintiff came alone but the defendant had witnesses. The money was handed over to the plaintiff in her presence. She had not carried any document showing the handing over of the money.

21. D.W.3 Josphat Mbuthia Gachura, informed the court that he was present in the meeting at the Assistant Chief's office on April 6, 2010 together with the two parties. The Kshs.5000/= was handed over to the plaintiff by the Assistant Chief in his presence and in the presence of the defendant; that he did not visit the Assistant Chief's Office on April 3, 2010; that he is not the one who took the letter to the Assistant Chief. He stated that he was not present when the plaintiff returned the Kshs.5000/= to the Assistant Chief. The dispute is about refund of Kshs.5000/= the plaintiff had paid to the defendant but the plaintiff had failed to pay transfer fees to the Council. The plaintiff has been occupying and utilizing the plot.

22. In re-examination, he stated that the plaintiff refused to pay transfer fees. The demand notice for rates was being sent to the defendant who was the registered owner of the plot.

Analysis and Determination

23. At close of hearing parties filed submissions. From the pleadings, the evidence adduced in support thereof and the submissions, I find the issues for determination to be: -

    i. Whether the contract entered between the plaintiff and the defendant was validly rescinded;

    ii. Whether the plaintiff has made up a case for being granted the orders sought;

    iii. What orders should the court make?

24. On whether the contract entered between the plaintiff and the defendant was validly rescinded; it is noteworthy that whereas in his pleadings in the suit he instituted in the lower court the defendant had pleaded that the defendant had not fully paid the purchase price, the evidence adduced in this case shows that the agreed purchase price was Kshs.5,000/= and was fully paid by the plaintiff to the defendant. The defendant despite having received the full purchaser price, failed to transfer the suit proper to the plaintiff.

25. According to the agreement signed between the plaintiff and the defendant, Pexbt 2(b), The defendant was supposed to pay money owed to the County Council of Nyeri (I take that to mean that accrued rent and land rates for the period before the sale of the plot to the plaintiff-that is the period before

March 10, 1984). The plaintiff was to pay transfer fees. My interpretation of the agreement is that the defendant was to pay the accrued rent and rates at completion of the sale transaction. If he had done that and transferred the land to the plaintiff as contemplated in the sale agreement, the issue of accrued rent and rates would have been addressed to the plaintiff. He created the situation by failing to facilitate transfer of the plot to the plaintiff. Whilst the defendant claimed that the plaintiff failed to provide transfer fee, he led no evidence capable of proving that fact.

26. There is evidence that the plaintiff was paying land rent and rates in the name of the defendant, Pexbt 3(a) to 3(d). The receipts are for the period up to 2000. There is also evidence of payment of land rent and rates by the defendant, Dexbt 1(a)-(f).

27. Concerning the circumstances that led to payment of rates by the defendant, the defendant explained that the plaintiff had failed to pay the land rates and rent. As a result, the plot was advertised for auction. He was also threatened with legal fees. As pointed out herein above, no evidence of those allegations was tendered. Claiming that the plaintiff was in breach of the contract executed between them the defendant informed the court that he rescinded the contract and returned the purchase price to the plaintiff, through the area administrator. The plaintiff acknowledged having received the money but explained that she had been cheated that the money was to be taken to the County Council which she did. At the Council, she was advised to return the money to the defendant. The evidence adduced in this case shows that the plaintiff promptly returned the money to the defendant through the area administrator but the defendant declined it. The money is held at the Chief's office. The question arising from the above set of facts is whether the contract between the plaintiff and the defendant was validly rescinded?

28. The law on rescission of contract was succinctly captured in the case of *Gurder Singh Birdi & another vs.Abubakar Madhbuti* (1997) e KLR where it was stated:-

> " The following is what *Halsbury's Law of England* 4th Edition Volume 9 paragraph 481 says on the point;
>
> Time not generally of the essence"
>
> The modern law, in the case of contracts of all types may be summarized as follows. Time will not be considered to be of the essence unless: (1) the parties expressly stipulate that conditions as to time must be strictly complied with; or (2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence; or (3) a party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence."
>
> In the present case there being no evidence of an express stipulation making time of the essence and the nature of the subject matter or the surrounding circumstances not showing that time should be considered of the essence, the respondent ought, if he felt subjected by the appellants to unreasonable delay, to have given it notice making time of the essence.
>
> It is trite that the element of notice I have referred to in a situation where time has not been made the essence of contract is especially important in that no court of law will allow one party suddenly to turn to the other and say: "time has elapsed, the agreement has been cancelled and the deposit has been forfeited."

29. In applying the principles enunciated in the cited case to the circumstances of this case, firstly, the evidence adduced shows that the plaintiff had fully fulfilled her part of her bargain. She paid the full purchase price as attested by Pexbt 3(b) and was paying land rent and rates for the property in the name of the defendant. For reasons known only to the defendant, I say this because in his pleadings the

defendant claimed that the plaintiff had failed to complete the purchase price, a position he diverted from and claimed that she had refused to pay for transfer, I find that explanation and excuse not capable of forming the basis of the purported rescission. There was no written notice given to the plaintiff as required by law before the purported rescission. Being of the view that it is the defendant who was in breach of the obligation of transfer, I find and hold that he had no right to rescind the contract which had fully been performed by the plaintiff. Having sold the suit property to the plaintiff, the defendant had no legal obligation to continue paying land rent and rates in respect thereof. His payment of the land rent and rates was but a mere excuse to deprive the plaintiff of the suit property. This court being a court of law and equity would not allow him to have his case and still retain it. For the foregoing reasons, I find and hold that the contract entered between the plaintiff and the defendant was not validly/legally rescinded.

30. On whether the plaintiff has made a case for being granted the orders sought, I note that the plaintiff premised a case on adverse possession. In the case of *Stephen Mwangi Gatunge v Edwin Onesmus Wanjau (Suing in her capacity as the administrator of the estates of Kimingi Wariera (Deceased) and of Mwangi Kimingi (Deceased)* [2022] eKLR it was stated:-

> " The principle of adverse possession is well settled under *Limitation of Actions Act*. Section 7 of the said Act places a bar on actions to recover land after 12 years from the date on which the right accrued. Further section 13 of the same Act, provides that adverse possession is 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.
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> (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."
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> Finally, Section 38 of the Act provides that:
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> > "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."
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> 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:
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> > "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."

This right to be adverse to land does not automatically accrue unless the person in whose 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. Set the findings of the Court in Malindi App No. 56 of 2014 *Mtana Lewa v Kahindi Ngala Mwagandi* [2015] eKLR where it 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 v. 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..."

The Applicant's mode of entry was as a result of a sale agreement which means it was a permissive one. It is trite that claim of adverse possession to suffice, the claimant must demonstrate that the same was non-permissive and non-consensual and without license. (See *Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others* [2018]) eKLR, where the Court enumerated the required elements to prove adverse possession as follows:

> "Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12years as espoused in the Latin maxim, *nec vi nec clam nec precario*."

The Applicant's occupation having been permissive, it will follow that a claim for adverse may not issue. However, Courts have found that such claim can be sustained after payment of the last installment. The Court in Nairobi Appeal No. 73 of 1982 *Public Trustee v Wanduru Ndegwa* [1984] eKLR found that 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 installment 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. From the copy of translation, of the sale agreement, the Applicant made a final payment on the September 5, 2006.

31. In applying the principles enunciated in the cases cited above to the circumstances of this case where it is not in dispute that the plaintiff had been in uninterrupted, peaceful and quiet use of the suit property for over 26 years since the last instalment was made and before the defendant purported to rescind the agreement, I would have no difficulty in finding that the plaintiff had long acquired title to the suit property by adverse possession. However, there is a question of law arising from a reading of Section 37 as read with 38 of the *Limitations of Actions Act*, Cap 22 Laws of Kenya, to wit whether land not registered under the registration regimes specified in Section 37, like the subject matter of this suit can be the subject matter of a claim for adverse possession.

32. In answering that question, I adopt the decision in the case of *Francis Kangogo Cheboi v. Vincent Kiprono Kaino & 4 Others* (2013) e KLR where it was observed: -

> " Suits seeking land by way of adverse possession are provided for under Section 38 of the *Limitation of Actions Act*, (CAP 22) Laws of Kenya. Section 37 provides that the Act applies to land registered under the *Government Land Act*, the *Registration of Titles Act*, the *Land Titles Act*, or the *Registered Land Act* (all statutes now repealed by the *Land Registration Act*, Act No.3 of 2012). The suit land is registered under the *Registered Land Act* but the repeal of the statute is immaterial for our purposes.
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> 17. Under Section 38(1) of the *Limitation of Actions Act*, CAP 22, where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, 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.....
>
> 19. It will be seen from the above, that the *Limitation of Actions Act*, does not apply inter alia to land vested in the County Council (except for land vested in it be Section 120(8) of the Registered Land Act which was repealed in 1972). It follows therefore that one cannot claim the reliefs provided for in the *Limitation of Actions Act*, including the relief of adverse possession, for land vested in County Councils. The suit land as we have seen is vested in the Elgeyo Marakwet County Council and there is no question that this entity is a County Council as its name suggests. The plaintiff cannot therefore claim the suit land by way of adverse possession."

33. In the case of *Ravji Karsan Sangani v. Peter Gakunu* (2019) e KLR it was stated: -

> " Under Section 37 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya adverse possession would only apply where the land is registered. Section 37(a) provides:-
>
> 37. This Act applies to land registered under the *Government Lands Act*, the *Land Titles Act*, or the *Registered land Act*, in the same manner and to the same extent as it applies to land not so registered, except that -
>
> (a) Where, if the land were not so registered, the title of the person registered as proprietor would be extinguished. Such title is not extinguished but is held by the person who, by virtue of this Act,

> has acquired title against any person registered as proprietor, but without prejudice to the estate or interest of any other person interested in the land whose estate or interest is not extinguished by this Act.....”
>
> It is registration of title that confers rights of ownership to a proprietor of land. A letter of allotment does not confer rights of ownership but is merely a conditional offer of the land to the allottee subject to the allottee satisfying the terms and conditions of the allotment. The allotment can be revoked and/or cancelled before the title to the land is processed and issued in the name of the allottee. It is only after one has adhered to the requirements set out in the Letter of Allotment and is subsequently registered and issued with title that one acquires an absolute and indefeasible proprietary interest in the land. In my view, adverse possession can only run against the title of a registered proprietor and in the instant case the Defendant was first registered as proprietor of the suit land on January 16, 1990. Time could only run from that date...”.

34. The search certificate produced by the plaintiff (Pexbt 5) showing that the defendant is the registered owner (read allottee) of the suit property is not the kind of title required for purposes of founding a claim for adverse possession. Nevertheless, the evidence is relevant for purposes of an order directing the defendant to transfer the plot or even the County Government to transfer the land as that appears to be the essence of the plaintiff's case.

35. The upshot of the foregoing is that the plaintiff has made a case of being declared the lawful owner of the suit property. To give effect to this determination, I direct that the registration of the defendant as the owner of plot No.49 in the records held by the County Government of Nyeri be cancelled and substituted with that of the plaintiff and/or the administrator of her estate.

36. As the plaintiff has succeeded in her case against the defendant, I award her the costs of the suit.

37. Orders Accordingly.

DATED AND SIGNED AT ITEN THIS 16TH DAY OF JUNE, 2022

L. N. WAITHAKA

JUDGE

Read, signed and delivered at Nyeri this 28th day of July, 2022.

J. O Olola

JUDGE