



**Karari v Njuguna (Environment and Land Miscellaneous Application  
69 of 2019) [2022] KEELC 3860 (KLR) (21 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3860 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 69 OF 2019**

**JG KEMEI, J**

**JULY 21, 2022**

**BETWEEN**

**RAPHAEL WAHOGO KARARI ..... PLAINTIFF**

**AND**

**MURIGI NJUGUNA ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff filed the originating summons under section 38 of the [Limitation of Actions Act](#) and under order 37 rule 7 of the [Civil Procedure Rules](#) seeking the following orders;
  - a. That the plaintiff be declared to have become entitled to land parcel number Ngenda/Kirai/T59 registered under the [Land Registration Act](#) by having had adverse possession- of the said land for over 12 years.
  - b. That the defendant's title to the said land be declared extinguished and or invalid null and void and the plaintiff be registered as proprietor of the suit land.
  - c. That the defendant does execute all the necessary documents to effect the transfer of the said land and in default the Deputy Registrar do execute the necessary documents to transfer on behalf of the defendant.
  - d. Costs of the application be provided for.
2. The application is supported by the affidavit of the plaintiff deponed on the December 20, 2019. The deponent stated that he purchased the suit land in July 1971 from Ngigi Njuguna, deceased and previous owner of the suit land.
3. That he immediately took possession of the suit land and developed it by planting maize, bananas and other crops in an open exclusive continuous and uninterrupted manner since July 1971.



4. He annexed a copy of the agreement of sale together with the English translation. He admitted that no land control board consent was sought and obtained and therefore the transaction became void after 6 months.
5. That the defendant inherited the suit land from the previous owner/seller of the land subject to an overriding interest in the nature of adverse possession in his favour. That the defendant's interest has been long extinguished by the doctrine of adverse possession.
6. The plaintiff's claim is denied by the defendant through his replying affidavit sworn on the April 21, 2020 in which he deponed that; he is the registered owner of the land and has annexed a copy of the green card in support; that the property was transmitted to him from his late brother Ngigi Gachuguma vide the confirmation of grant issued on the September 10, 2012; that his late brother held the land in trust for his family until his demise; that though the plaintiff cultivated the land with the permission of his family, he has neglected to till the land and the current crops growing on the land is as a result of cross pollination from other farms; That the plaintiff has only developed interest in the property because he heard the defendant was selling the land; the plaintiff has relied on letters whose authenticity is in doubt as witnesses have all died and therefore the same cannot be corroborated; and that the plaintiff has taken no steps to perfect his title 50 years later and his indolence's should disentitle him to the land; the Plaintiff having been aware of the death of his brother took no action to participate in the succession of his estate in pursuance of his alleged claim.
7. At the hearing of the case the plaintiff called three witnesses in support of his case. Raphael Wahogo Karari, the plaintiff took the stand and testified as PW1. He relied on his supporting affidavit sworn on the December 20, 2019 as his evidence in chief. Additionally, he produced the documents listed on page 5 of his trial bundle and marked as PEX No 1-6 in support of his claim before court.
8. He led evidence and reiterated the averments in the supporting affidavit already captured in the preceding paragraphs in this judgement that; he purchased the suit land from the defendants brother Ngigi Njuguna in July 1971, paid , took possession and developed and has been in occupation since todate; that in his opinion since no land control board consent was obtained within 6 months as contemplated under the *Land Control Act*, the transaction became void at the expiry of 6 months and his continued occupation of the land became adverse against the registered owner. That his occupation was exclusive, open continuous and uninterrupted todate; that the title of the defendant has been extinguished by his occupation spanning over 12 years.
9. In cross, the witness stated that he purchased the land from Ngigi Njuguna who failed to transfer the land to him. He informed the court that the land was inherited by Ngigi Njuguna from his father and that he had no knowledge whether the said Ngigi held the land in trust for his family. That at the time of purchase he believed he had authority to sell since he was the registered owner of the land. That one of the brothers of the vendor, namely Chege Njuguna was a witness to the agreement of sale and the receipt of the purchase price and that even the defendant did not raise any objection to the transaction.
10. Further that Ngigi Njuguna later relocated from Mangu area where they lived to another place and when he tried to look for him he was informed by his relatives that he had passed on around the year 2000. That he also learned from land brokers that the defendant wanted to sell the land.
11. He informed the court that he has developed the land by planting Napier grass, maize and beans over the years and that he has not constructed any house on the suit land. In response to a question by the defendant's lawyer with respect to the succession cause in the estate of the late Ngigi Njuguna, the witness stated that he was not aware of the same and only learned from the land brokers and on carrying out a search discovered that the land was now registered in the name of the defendant and lodged a



- caution on the register. That his claim is anchored on a purchaser's right cum adverse possession and he is not seeking to defraud any one, least of all the defendant. That the defendant has never occupied the land.
12. Joseph Ndungu Mungai took the stand as PW2 and relied on his witness statement dated the February 15, 2021 in which he introduced himself as a retired police officer and currently a business man. That he hails from Mangu Location and he knows the Plaintiff for the last 60 years and that he is the owner of the suit land as the land is about 300 meters from his own home and that the plaintiff has been cultivating maize, beans, bananas and nappier grass on the suit land. That he does not know the defendant and has never seen him on the land.
  13. In cross, he informed the court that the plaintiff entered the land in 1971 when he was about 15 years old. That he does not know the circumstances on how the plaintiff entered the suit land.
  14. Raphael Kioi Wangoto took the stand as PW3 and just like PW2 relied on his witness statement dated the February 15, 2021 as his evidence in chief and informed the court that he did not know how the plaintiff entered the suit land.
  15. With that the plaintiff closed his case.
  16. The defendant called two witnesses in support of his defence. Murigi Njuguna led evidence as DW1 and relied on his replying affidavit sworn on the April 21, 2020 as well as the witness statement dated the October 12, 2021 where he stated as follows; he is the registered owner of the suit land the same having been transmitted to him vide certificate of confirmation of grant issued on the September 10, 2012 in the estate of his later brother Ngigi Njuguna Gachuguma; that the late Ngigi Njuguna held the title in trust on his behalf; that the plaintiff owns an adjacent land and his cultivation of the land was with the permission of his family who lived elsewhere. That notwithstanding the permission of his family, the plaintiff has neglected the land and abandoned it defeating the purposes for which he was allowed and the crops currently on the land are as a result of cross pollination from other farms; the plaintiff's interest in the land was aroused by his intention to sell the same since he had found a buyer;
  17. The witness further opined that the sale agreement was a forgery since his own brother Chege Njuguna was illiterate and could not have appended his signature on the agreement and that in any event the alleged witnesses to the agreement are long dead and therefore there is no one to corroborate the said letters. The witness further faulted the plaintiff for taking no action since 1971 to perfect his title and that his indolence disentitles him from any right in the land. He termed the plaintiff's claim as a fiddle gamble which will not see the light of day in court.
  18. In cross, the witness admitted that he does not live on the land. That it is the plaintiff who lives on the land though he is now the registered owner of the land. That he has taken no steps to remove him.
  19. PW2 – Margaret Wamboi Ngigi testified and informed the court that the suit land forms part of the family property held by her husband in trust for the family. That she was married to Ngigi Njuguna who passed away on November 2, 2001. That upon succession the suit land was transmitted to the defendant. That she believes the sale agreement is a forgery as her husband and Chege Njuguna were illiterate and could not have signed the agreement but thumb printed it. In addition, she stated that the defendant gave permission to the plaintiff to cultivate the suit land as the defendant and his family lived on a separate property.
  20. At the close of the hearing the parties elected to file written submissions which I have read and considered.



21. Having read and considered the pleadings the evidence adduced at the hearing the written submissions and all the material placed before me I find the key issue for determination is whether the plaintiff has succeeded in establishing title by way of adverse possession. Secondly if yes what orders should the court grant and who meets the costs of the suit?
22. The essence of adverse possession under the *Limitation of Actions Act*, cap 22 laws of Kenya, is that the registered proprietor of land is prohibited from bringing an action to recover land after 12 years from the date when the cause of action accrued. Upon the expiry of that period the proprietor's title to the land is extinguished by operation of the law and any person who has been in occupation of the land peacefully, openly and as of right for the prescribed period is entitled to bring an action in the High Court to be declared the owner of the land.
23. The legal framework is found in section 7, 13 and 38 which I have espoused herebelow for purposes of emphasis as follows;
24. Section 7 of the *Limitation of Actions Act*:-
- “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.”
25. Section 13 of *Limitation of Actions Act*:-
- “(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 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 afresh 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), the land in reversion is taken to be adverse possession of the land.”
26. Section 38 of the *Limitation of Actions Act*:-
- “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.”
27. The rationale of the doctrine is well captured in the case of *Adnam v Earl of Sandwich* (1877) 2 QB 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.”

28. The legal justification for this doctrine was espoused in the case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR as follows;

“... Many learned expositions are found on books attempting to show how the doctrine of adverse possession is usually justified. The books generally say that adverse possession is founded on the fact that with the injustices of men, as with the convulsions and disasters of nature, the longer they remain unrepaired, the greater become the obstacles to repairing them, arising from the after growths which would have to be torn up or broken through. According to this theorem, it is necessary to the security of rightful possessors, that they should not be molested by charges of wrongful acquisition, when by the lapse of time witnesses must have perished or been lost sight of, or their memories must have irreparably faded, and documents mislaid or lost or destroyed, and the real character of the transaction can no longer be cleared up.”

29. The same thread is to be found in the case of *Yardley v Holland* [1875] L R 20 Eq 428 at p 442 as thus;

“... There may, indeed, be cases in which that protection which the statute extends is hardly reconcilable with strict morality. Nevertheless, the law is established upon principles of the soundest public policy, to which, for the common good, private rights and interest must in all cases yield; and it is unquestionably the policy of the law that it is better in all cases that rights, the assertion of which has been neglected for a long period of years, should be disregarded, than that a course of transactions honestly conducted should be set at nought by permitting a captious chicanery to prevail against the good faith with which they have been conducted.”

30. An Applicant seeking title by way of adverse possession must prove that they have used this land which they claim as of right. *Nec vi, nec clam, nec precario* (no force, secrecy or persuasion) ... show that the owner had knowledge of possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavors to interrupt it or by way of recurrent consideration. See the decision in the Court of Appeal in *Francis Gichebu Karini v Peter Njoroge Mairu* (Civil Appeal No 293 of 2002 (NRB) UR) - approved the High Court decision in *Kimani Ruchine v Swift Rutherford & Co Ltd* [1980] KLR 10.
31. In the case of *Wambugu v Njuguna* [1983] KLR 172 the Court of Appeal stated that in order to acquire land by virtue of the statute of limitation, the claimant must show that the owner has lost his right to the land upon being dispossessed or by the owner discontinuing possession by his volition. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community, of the exercise of dominion over the land.
32. In this case it is not in dispute that the suit land was registered in the name of Ngigi Njuguna on the December 31, 1958 and a certificate of title issued on the November 9, 1966. Evidence was led by DW2 that Ngigi died in 2001- and his estate was succeeded by the defendant vide a grant issued in 2012. It is in evidence that the defendant became registered owner of the suit land on the May 10, 2019 and a title issued on even date.



33. Evidence was led by the plaintiff that he purchased the land from Ngigi Njuguna in 1971 and produced a copy of sale agreement in Kikuyu with its attendant English transaction. According to the sale agreement, the plaintiff purchased the land for the sum of Kshs 3500/- out of which Kshs 2000/- was paid leaving a balance of Kshs 1500/-. The agreement dated July 6, 1971 was in writing and was witnessed by two witnesses. Other letters dated the 29/11/1971 and 21/12/1971 concerned the receipt of the purchase price in installments which letters were in writing and witnessed by witnesses.
34. The defendant has sought to impeach the agreement together with the acknowledgement of the purchase price on the grounds that the same was a forgery and also that one of the witnesses Chege Njuguna was an illiterate who could only thumb print and not sign. The defendant failed to tender evidence capable of impeaching the agreement.
35. Section 3 (3) of the Law of Contract Act states as follows;
- “No suit shall be brought upon a contract for the disposition of an interest in land unless:-
- (a) The contract upon which the suit is found-
- (i) Is in writing
- (ii) Is signed by all the parties thereto; and
- (b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”
36. I find that the agreement produced by the plaintiff is in conformity with the law and that the defendant has failed to impeach the same.
37. Was the occupation of the plaintiff permissible? It is the law that a claim in adverse possession is destroyed by the consent and or permission of the registered owner of the land. There exists no adversity if the land claimant is in occupation with the consent of the owner of the land.
38. In this case the defendant and his witness admitted that the plaintiff was in occupation of the land but with the consent of the defendant. That the plaintiff was given permission to tend the land to preserve its fertility and also because the defendant’s family lived far away and detailed the plaintiff to look after the land. I find this proposition unsupported in the face of a written agreement in support of a sale.
39. In the case of Mwangi & another v Mwangi [1986] KLR 328, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights. Adverse possession is thus more about the equitable interest of a party in possession than a substantive declaration as to the legal right or validity of ownership.
40. From the record the plaintiff entered the suit property pursuant to a sale agreement in 1971 as a purchaser for value. In the case of Public Trustee v Wanduru, [1984] KLR 314 at 319 Madan, JA stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run. Time started running in favour of the plaintiff from 1971/2 and for the full span of 12 years and by the 1983/4 title by adverse possession had matured and accrued in favour of the Plaintiff.
41. The court was informed in evidence that Ngigi Njuguna died in the year 2001. By 1983 Ngigi was alive and took no steps to remove the plaintiff during his lifetime. It therefore means that the plaintiff’s



occupation of the land dispossessed the paper owner who continued to hold the title in the suit land in trust for the plaintiff/adverse possessor.

42. The Defendant therefore acquired title from the estate of Ngigi Njuguna that was encumbered with a trust in favour of the plaintiff.
43. In the end I am satisfied that the plaintiff has succeeded in proving title in adverse possession and I proceed to make judgement in his favour as follows;
  - a. The plaintiff be and is hereby declared to have become entitled to land parcel number Ngenda/Kirai/T.59 by way of adverse possession.
  - b. That the defendant's title to the said land be and is hereby declared extinguished and the plaintiff be registered as proprietor of the suit land.
  - c. That the defendant is hereby ordered to execute all the necessary documents to effect the transfer of the said land to the plaintiff and in default the Hon Deputy Registrar of this court be and is hereby ordered to execute the necessary documents to effectuate the above orders.
  - d. Costs of the suit shall be in favour of the plaintiff.
44. It is so ordered.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 21<sup>ST</sup> DAY OF JULY 2022 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Njoka for the plaintiff.

Gitonga for the defendant.

Court Assistant – Phyllis Mwangi.

