



**Mwangi (Suing as The Administrator of The Estate of Joseph Mwangi Gathiari) v  
Mwangi (Sued as The administrator of The Estate of Susan Njeri Mwangi) (Environment  
& Land Case E022 of 2021) [2022] KEELC 2480 (KLR) (21 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2480 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE E022 OF 2021**

**LN GACHERU, J  
JULY 21, 2022**

**BETWEEN**

**PETER KIBUGI MWANGI (SUING AS THE ADMINISTRATOR OF THE  
ESTATE OF JOSEPH MWANGI GATHIARI) ..... APPLICANT**

**AND**

**NAHASHON CHEGE MWANGI (SUED AS THE ADMINISTRATOR OF THE  
ESTATE OF SUSAN NJERI MWANGI) ..... RESPONDENT**

**JUDGMENT**

1. By an Originating Summons dated 15<sup>th</sup> July 2021, the Applicant herein moved this Court for determination of the foregoing issues
  - a. That the Honorable Court do make a declaration that the Applicant has acquired by way of adverse possession an absolute title to a portion of land measuring 0.9 acres out of land title number Loc.18/ Gachocho/4070
  - b. That an order be issued directing the Respondent to execute all documents and take all steps necessary to effect transfer to the Applicant of the portion of land measuring 0.9 acres out of Loc.18/ Gachocho/4070 free from all encumbrances in default whereof the said documents be executed by the Deputy Registrar of this Honorable Court.
  - c. That the costs of this suit be granted to the Applicant
2. The Originating Summons is premised on three Grounds stated thereon and on the Supporting Affidavit of the Applicant and the annexures thereto.
3. It is the Applicant's case that he is the Administrator of the Estate of Joseph Mwangi Gathiari hereinafter referred to as "Joseph" who was his father while the Respondent is the Administrator of



the Estate of Susan Njeri Mwangi hereinafter referred to as “Susan”. He contends that the said Susan sold land to Joseph being one acre out of the suit property vide a sale agreement entered into on the 18<sup>th</sup> November 1994, for a consideration of Kshs. 70,000/= which was duly paid. Further that the said Joseph took immediate possession of the land and extensively developed thereon, by planting bananas, mango trees among others. Additionally, that subject to the purchase, his family has been in open, continuous and uninterrupted occupation of the said portion of land.

4. It is the Applicant’s claim that Joseph instituted a suit against Susan for removal of Caution lodged over the suit property, but which suit was dismissed for misjoinder. That despite the Respondent’s mother having conceded to selling land, the Respondent has encroached into his portion and has caused destructions thereon. Contemporaneously, the Applicant sought injunctive orders but the same were compromised by consent dated 12<sup>th</sup> October, 2021.
5. The Respondent opposed the suit vide the Replying Affidavit sworn on the 8<sup>th</sup> October, 2021. He depones that the suit land was registered in the name of his deceased mother and has been in occupation thereon since her death. That the Applicant has never been in occupation as alleged.
6. The matter proceeded for hearing via viva voce evidence.

#### **Plaintiff’s Case**

7. PW1 Peter Kibugi Mwangi adopted his witness statement dated 12<sup>th</sup> November, 2021 and produced the documents contained thereon in his list of documents as Exhibits. He reiterated that his deceased father bought the suit land and their family has been in occupation thereon since 18<sup>th</sup> November 1994, to date. It was his testimony that his father died in the year 2014 and the Respondent moved into the suit land to cause destruction thereon.
8. On cross-examination, he testified that the Respondent and his brothers gained entry into the suit land on the 28<sup>th</sup> February 2021, and caused destruction on the suit land including cutting down trees. It was his further testimony that he has never gone back to the suit land since filing of the suit and no one has been using the land. He was put to task on his knowledge of a demand letter addressed to the Respondent by his father, and he testified that the letter was on malicious damage and not trespass.
9. On re-examination, he told this Court that he last harvested crops from the suit land on 28<sup>th</sup> February 2021, but had prior to that been using the land exclusively.
10. PW2 John Mwangi Thiongo, adopted his witness statement dated 12<sup>th</sup> November 2021, as evidence in chief. He further testified that he was known to the deceased persons and confirmed that Joseph bought land from Susan for a consideration of Kshs.70,000/=. That Susan and Joseph obtained consent from Land Control Board, but his son objected to it and even so the said Joseph continued to occupy the suit land.
11. On cross-examination, he told the Court that the Applicant had been using the suit land up until February 2021, when the Respondent entered into the suit property and continue to utilize it.

#### **Respondent’s Case**

12. DW1 Nahashon Chege Mwangi, relied on his Replying Affidavit dated 9<sup>th</sup> September, 2021 and produced his documents in the bundle of documents dated 8<sup>th</sup> November 2021, as D. Exhibits. He added that they issued Joseph with a demand letter in 2017, asking him to vacate the suit property. He confirmed that he moved into the suit property in February, 2021.



13. On cross-examination, he told the Court that Joseph entered into the suit land in 1994, after his mother sold to him the suit land. He testified that he placed a caution on the suit property, but denied ever cutting down trees and instead placed blame on his brother Karanja. It was his testimony that the trees were planted by his mother in 1988, and that despite his mother wanting to sell the land to Joseph, he objected and he was thus not aware how Joseph entered into the suit property.
14. DW2 Nahashon Mwangi Karanja, adopted his witness statement dated 25<sup>th</sup> November 2021, as evidence in chief and further stated that he was the one who effected service of the Demand Letter on Joseph and which letter required the said Joseph to vacate the suit land.
15. On cross-examination, he testified that he saw Joseph utilize the land, but he did not know when he gained entry.
16. At the close of the hearing, the parties were directed to file and serve their Written Submissions.
17. The Applicant filed his submissions dated 27<sup>th</sup> April 2022, and reiterated his case by giving a history of the suit property and the existing wrangles surrounding it. It is the Applicant's submissions that the Respondent's testimony corroborated his evidence that they have been in occupation of the suit property since 1994. He further submitted that they have been in exclusive occupation of the land as required by Section 17 of the Law of Limitation of Actions Act. He invited this Court to find that he has become adverse to the land by dint of occupation for a period of over 12 years. He relied on the cases of *Kasuve vs Mwaani Investments Limited & 4 Others* (2004) eKLR and *Samuel Kihamba vs Mary Mbaisi* (2015) Eklr, where the Court found that for a claim of adverse possession to issue, an applicant must demonstrate he has been in occupation for over 12 years and that the claimant has occupied the land openly, without force, secrecy or license.
18. The Respondent filed his submissions dated 11<sup>th</sup> May 2022, and challenged the Applicant's testimonies. He submitted that for a claim of adverse possession to issue, possession ought not to be interrupted as was held by the Court in the case of *Ruth Wangari Kanyagia vs Josephine Muthoni Kinyanjui* (2017) eKLR. He submitted that the act of the Respondent taking occupation interrupted the Applicant's possession, and as such, the Applicant's claim for adverse possession cannot issue.

### **Analysis and Determination**

19. It is evident from the pleadings that the suit land is registered in the name of Susan Njeri Mwangi. What is also clear from the evidence is that the Applicant's father entered into the suit property in 1994, through a sale agreement. Additionally, that the Applicant's possession was interrupted in 2021, an assumption drawn from the testimonies of both parties.
20. The Court has carefully read and considered the pleadings, the evidence adduced, submissions, authorities cited and the relevant provisions of the law and finds that the issues for determination are
  - i. Whether the Applicant has met the threshold for grant of orders for adverse possession
  - ii. Whether the Applicant is entitled to 0.9 Acres to be excised out of parcel Number Loc. 18/ Gachocho/4070
  - iii. Who should bear the costs of the suit



**(i) Whether the Applicant has met the threshold for grant of orders for adverse possession.**

21. The demised land is registered in the name of Susan Njeri Mwangi, having been issued with title on the 10<sup>th</sup> July 1995. The effects of such registration were espoused in Section 27(a) of *Registered Land Act*, Cap 300 (Repealed) and which are now stated in Section 24(a) of the *Land Registration Act* as follows; -

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.”

22. Additionally, section 25(1) of the said *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 2 of the *Land Registration Act* as not requiring noting in the register.

23. 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;

24. The Applicant wishes to defeat title on the basis of prescriptive rights as allowed above. It is the Applicant’s 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 rests with the Applicant.

25. The Law on Adverse possession is set out under the *Limitation of Actions Act*. A look at section 7 of the said Act shows that there is 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 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 Again, Section 38 of the said 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.”

26. 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.”

27. This right is adverse to land and does not automatically accrue unless the person in whose this right has accrued takes action.
28. 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 Kabindi 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.

29. Further, in the case *Mbira v. Gachubi* (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...”

30. Therefore, to determine whether the Applicant’s rights have accrued, the Court will seek to answer the following
- i. How did the Applicant 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?
31. 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 Applicant's claim emanates from a purported sale Agreement, which this Court has read and concludes the entry was permissive.
32. However, every rule has an exception and the Court in Nairobi App No. 73 of 1982:- *Public Trustee VS Wanduru Ndegwa* [1984] eKLR found that in cases of sale agreement Limitation of action begun running from the date of final payment.
33. Further in the case *Hosea VS 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 the said land.
34. The Respondent has refuted the purported sale and testified that he objected to the sale, and even placed a caution on the suit property. This is corroborated by the attached copy of Judgment that shows Joseph moved Court for removal of caution.
35. The Applicant produced a copy of the sale agreement of 18<sup>th</sup> April 1994, which shows that one Susan Njeri Mwangi, sold 1 acre of land to Joseph Mwangi Gathiari, for a consideration paid at the signing of the agreement. This Court notes and appreciates that the subject matter of the sale agreement was Loc.18/gachocho/ 853, while presently the Applicant is laying claim on Loc.18/gachocho/4070.
36. According to the Applicant's statement of 12<sup>th</sup> November 2021, the foregoing land was sub-divided giving rise to the suit property. This Court perused a copy of a map showing that there was sub-division and although it is not clear from which property sub-division arose from, there are two parcels referenced to in the aforementioned statement being parcel 4069 and 4070. The Respondent did not dispute the details of the agreement and it is right to conclude that there was a sell between the vendor and the purchaser therein. This is a claim for adverse possession and it is trite that such a claim accrues on land and not title, and it matters not that title had not been issued.
37. The Applicant contended that they gained ingress into the suit land after the impugned sell in 1994. DW1 told the Court that Joseph entered into the suit land in 1994, and even though at some point he testified that he was not aware when Joseph took possession. DW2 told the Court that he knew the vendor and purchaser and confirmed that the purchaser was utilizing the suit land though he did not know when he gained entry. Their testimonies corroborated that of the Applicant that they took immediate occupation and possession of the suit land after the sell. For purposes of adverse possession in respect of the one (1) acre, time started running from 1994, after payment of the consideration. This is so because from the tone of the agreement, it is evident that Kshs. 70,000/= was the full and final payment of the suit property.
38. The Applicant testified that his family has been in open and continuous occupation of the suit land. Based on the testimonies of parties, it is apparent that the Applicant's occupation of the land is well known and as a matter of fact, both DW1 & DW2 confirmed that the Applicant's family was utilizing the land. PW1 also testified that they have been in occupation of the land and at some point, the Respondent's family invaded their land and caused destructions thereon, resulting in the filing of the suit property.



39. The Respondent contends that the Applicant have not been in a continuous occupation since, the same was interrupted in 2021, when they took possession. Further, the Respondent submitted and led evidence that in 2017, he issued Joseph with a demand letter, asking him to vacate from the suit property. This was confirmed by DW2 who testified that he delivered the demand letter to Joseph. What can stop time from running is the filing of a suit to assert rights. See the case of *Peter Kamau Njau VS Emmanuel Charo Tinga* [2016] Eklr, where 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. In the case of *Githu vs Ndeete* {1984} KLR 776, the Court found that issuance of notice was not a step to stop time from running. Similarly, the Court of Appeal in *Presbyterian Church of East Africa (Uthiru Church) & Another vs Kihoro & 3 Others* {2022}, Civil Appeal No.303 of 2018 found that the trial Court erred when it held that the demand letter amounted to interruption of time.

41. The suit referenced to in the pleadings is Civil Case No. 530 of 1995, which this Court has established that the Applicant's father herein moved the Court for removal of caution, which suit was dismissed for misjoinder. The Respondent never filed any suit as a means of asserting rights and the mere fact of issuing a demand letter was not a mechanism for asserting rights. PW1 and PW2 testified that the Respondent's family invaded the land in 2021. It is evident the Applicant's family continued to live on the suit land, the demand letter notwithstanding.

42. There is no evidence that their occupation was interrupted up until February, 2021. By the time the Respondent invaded the suit land, the Applicant had been in occupation for close to 27 years. Therefore, this Court has established that there is nothing that stopped time from running within the 12 years of the Applicant's occupation and possession. Even so, as at February 2021, the Applicant had become adverse to title and is therefore entitled to it.

43. For purposes of computing time, this Court finds that time started running from 1994 and the 2021 interruption notwithstanding, the Applicant' is entitled to the suit property. To this end this Court finds and holds that the Applicants have met the threshold for the grant of orders of adverse possession.

**(ii) Whether the Applicant is entitled to 0.9 Acres to be excised out of parcel Number Loc. 18/ Gachocho/4070**

44. The Applicant maintained that his father acquired possession and developed the suit land extensively by planting trees, bananas and mango trees. DW1 told the Court that the trees were planted by his mother but what is not in dispute is that the Applicant's family was utilizing the property and it would be right to conclude that they were responsible for the development thereon. This Court has no reason to doubt the veracity of the Applicant's evidence, as the action of planting trees, nappier grass and crops as per the annexed photographs shows their intentions of taking possession of the property.

45. Undoubtedly, the Applicant's occupation and possession could not have been undertaken without the knowledge of the owner. If their occupation was abusive, the Respondent ought to have moved the Court for eviction orders, but continued to allow them to utilize the land since 1994. To buttress his claim, the Applicant instructed a valuer to prepare a report whose production was not objected to. According to the valuation report, the Applicant's family were utilizing 0.9 acres of the suit property. The Respondent did not provide any cogent evidence to refute the Applicant's allegation of complete utilization of 0.9 acres.



46. What flows from the pleadings is that the land is not surveyed. However, the agreements expressly state that the Applicant's father was entitled to 1 acre to be excised from the land parcel No. Loc.18/ Gachochi/853. From the attached Certificate of Official Search, it is evident that the land is registered under the name of the Susan Njeri Mwangi. Even though the land referenced to in the pleadings and the certificate of official search is Loc.18/ Gachochi/4070. PW1 in his statement testified that there was a sub-division of Loc.18/ Gachochi/853, which gave rise to other properties including the suit property, where the Applicant's share lies. There was no reason to doubt the Applicant's testimony that the suit land emanated from the sub-division, as this was also contained in the valuation report.
47. The Applicant in his statement gave evidence as to their occupation of 0.9 acres as opposed to 1 acre contained in the agreement. The Respondent did not controvert this evidence, and this was corroborated in the valuation report to the extent that the Applicant occupied 0.9 acres. According to the Valuation Report, which DW1 agreed with, it indicates that the boundaries could be identified. It follows therefore that the land and boundaries of the land can easily be identified.
48. For a claim of adverse possession to issue, it is important that land is clearly identified as was held by the Court in the case of *Wilson Kazungu Katana & 101 Others VS Salim Abdalla Baksbwein & Another* [2015] eKLR where the Court observed:-
- “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]
49. The Court in the foregoing case found that the requirement of identification was crystalized by the mandatory provisions of Order 37 Rule 7 of the *Civil Procedure Rules*, which requires that an application for adverse possession be accompanied by a title deed extract.
50. The search certificate shows that the land measuring 0.364ha identified as Loc.18/gachochi/4070. This Court has not enjoyed the benefit of being able to identify the exact occupation of the Applicant out of the entire parcel Loc.18/gachochi/4070, but what is not in dispute is that the Applicant was occupying part of the land which is 0.9 acre. It would not be difficult for this Court to conclude that the Respondent is aware of the Applicant's confines and or borderlines, the larger portion notwithstanding.
51. In totality, this Court finds and holds that the Applicant has on a balance of probability demonstrated that the estate of their deceased father is entitled 0.9 acre piece of land to be excised from Loc.18/ gachochi/4070.
52. The Applicant moved the Court as an Administrator of the Estate of Joseph Mwangi Gathiari, 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 this basis that the Court finds and holds that the Applicants can only hold trust of the land on behalf of the estate of Joseph Mwangi Gathiari.



**(iii) Who should bear costs?**

53. It is trite that costs shall follow the events, and that the successful party be awarded costs. It is not in doubt that the Applicant herein is the successful party and this Court has no reason not to exercise its discretion in his favor.
54. To this end, this Court finds and holds that the Applicant has proved his case on the required standard and finds in his favour as follows:-
- a. That the Applicants has proved his claim for adverse possession.
  - b. That the Applicant is entitled to 0.9 acres to be excised from Loc.18. Gachocho/4070.
  - c. That Land Registrar Murang'a be and is hereby directed to issue title in the name of the Applicant to hold in trust for the Estate of Joseph Mwangi Gathiari for a portion of 0.9 acres upon the conclusion of the requisite process of demarcation and survey.
  - d. The Applicant is awarded costs of the suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 21<sup>ST</sup> DAY OF JULY, 2022**

**L. GACHERU**

**JUDGE**

21/7/2022

Delivered online in the presence of; -

Joel Njonjo – Court Assistant

Mr. Mwaniki for Applicant

M/s Kimani for Respondent

L. GACHERU

JUDGE

21/7/2022

