



**Wainaina v Macharia ((Suing as the Administrator of the Estate of Macharia Kimani))  
(Environment & Land Case E013 of 2021) [2022] KEELC 2656 (KLR) (21 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2656 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE E013 OF 2021**

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

**BETWEEN**

**KIMANI WAINAINA ..... APPLICANT**

**AND**

**SIMON THUO MACHARIA ..... RESPONDENT**

**(SUING AS THE ADMINISTRATOR OF THE ESTATE OF MACHARIA  
KIMANI)**

**JUDGMENT**

1. The Applicant herein, Kimani Wainaina is a nephew to Macharia Kimani (deceased), who was the registered owner of LOC 3/Githumu/57, while the Defendant(Respondent) is the Administrator of the estate of Macharia Kimani (deceased).
2. Through an Originating Summons dated 6<sup>th</sup> May 2021, the Applicant sought for the following orders:
  - (a) That a declaration be made that the right or interest of Macharia Kimani (deceased) over land parcel No. Loc.3/Githumu/847, has been extinguished under the Limitations of Actions Act, on the ground that the Applicant has been with no force, no secrecy and/or persuasion in possession and occupation of the land Parcel Loc.3/Githumu/847, property for a period of over 12 years preceding presentation of this Originating Summons in Court.
  - (b) That orders be issued for the Applicant to be registered as the proprietor of the suit property.
  - (c) That the Respondent be ordered to execute transfer forms and avail all accompanying documents to the Applicant within 30 days of this judgement to facilitate and transfer the registration of the suit property in favour of Applicants. In default the Deputy Registrar of this Court to execute the transfer forms for the suit property on behalf of the Respondent.
  - (d) Costs of the suit be borne by the Respondent.



3. The Summons is not predicted on any grounds, but on the Supporting Affidavit of the Applicant sworn on 6<sup>th</sup> May 2021, and the annexures thereto. It is the Applicant's contention that Macharia Kimani(deceased) is his uncle and the registered proprietor of land parcel No.Loc.3/Githumu/847. That his grandfather transferred land parcel No.Loc.3/Githumu/847, to the late Macharia Kimani, being the eldest son, to hold it in trust for himself and Wainaina Kimani, the Applicant's father. That he had been in occupation of the suit land since 1977, and he had cultivated tea bushes on it. That his brother Paul Gachiengu, had also been in occupation of the suit land until his death in 1992.
4. Further that the late Macharia Kimani, who is the registered owner of the suit land was at all times aware of his occupation of the suit land and he never interfered, denied and/or disturbed him. That he had been in open and uninterrupted possession and occupation of the suit land for over 12 years. That the Respondent herein is aware that the Applicant has been using the suit land as of right with no force, secrecy and /or no interference for over 40 years since 1977. That there have been cases between the parties in Civil suit 100 of 2019 and Succession Cause No. 81 of 2004.
5. The Respondent opposed the suit vide the Replying Affidavit sworn on the 22<sup>nd</sup> July, 2021. He affirmed that he is the son of the Macharia Kimani (deceased,) who was the registered owner of the suit property. That the suit property belonged to his father Macharia Kimani (deceased), who gave a portion of the land to the Respondent's brother, and the remaining portion was registered as land parcel No. LOC 3/Githumu/847, which was given to the rest of his children.
6. It the Respondent's disposition that Wainaina Kimani (the Applicant's father) requested Macharia Kimani (deceased) to allow him to till a portions of the suit land measuring 1/3 as it had been left unutilised. That Macharia Kimani(deceased) allowed Wainaina Kimani his request, and allowed him a 1/3 of the suit land to cultivate. The Respondent further stated that when the deceased requested the Applicant's father to stop tilling the land, the Applicant's father went to Court claiming the portion of the suit property alleging that it was held in trust for him by his brother. That the Applicant's father filed a suit in 1989 seeking proprietary rights over the suit land on the ground of existence of a trust.
7. The Respondent further stated that the suit land is due for subdivision, subject to the mode of distribution contained in a Certificate of Confirmation of Grant dated 26<sup>th</sup> March 2019, issued by the Thika Magistrates Court. That the Applicant did not have uninterrupted use of the suit property as he has constantly tried asking him to vacate it, but he had refused and/or failed to do so. Lastly, the Respondent stated that the Originating Summons is based on imaginary evidence, is an afterthought and an abuse of the Court process and meant to confuse issues before this Court and should be dismissed.
8. The matter proceeded by way of viva voce evidence. The Plaintiff called two witnesses, while the Defendant called two witnesses.

### **Plaintiff's Case**

9. PW 1 Kimani Wainaina, adopted his witness statement dated 6<sup>th</sup> May, 2021 as part of his evidence in chief and produced the documents attached to his summons, the list of documents dated 6<sup>th</sup> May 2021, and the list of documents dated 7<sup>th</sup> December 2021 as P. Exhibits 1,2 and 3 respectively. He also testified that he knew Simon Thuo Macharia, and that he was his cousin. That the Defendant's father was registered as the owner of the suit land (land parcel No. LOC 3/Githumu/847), to hold it in trust for himself and his family. That the Defendant's father failed to give the Plaintiff's father his share, however they lived on the suit land. That he had grown tea bushes and lived on the suit property for 60 years. That he was given permission by his father to be on the suit land and he was now seeking his share of the suit land.



10. On Cross-examination, he testified that he had planted tea bushes on the suit land for the last 60 years. That Macharia Kimani (deceased) being the older brother, was registered as the sole proprietor of the suit land to hold it in trust for himself and his brother. That there was a case in Court in 1989, at Thika because his father had been told to move out of the suit land and he was not aware of any other case filed since then. That the late Macharia gave a share of the suit land to his son and had failed to give the Plaintiff his share. That the Court did not rule against them. That he had planted many tea bushes on the suit land but he had not utilised the entire land.
11. On re-examination, he stated that he lived on one side of the suit land. That his father also used to live on the suit land until his demise. That the suit land was for their grandfather but was registered in the name of Macharia (deceased), being the older son to hold it in trust for himself and the family. That he had lived on the suit land since he was born and he had planted tea bushes on it.
12. PW 2 Macharia Maina adopted his witness statement dated 5<sup>th</sup> July, 2021, as part of his evidence. He further testified that he knew the parties in the instant suit and that the suit land belonged to their fathers jointly. That the land initially belonged to Kimani (deceased) but was registered in the name of Macharia Kimani who was supposed to subdivide it into 2 portions. That Macharia Kimani (deceased) was registered as the owner of the suit land but he was supposed to hold the same in trust for himself and the family. That the Plaintiff had lived on the suit land for over 50 years.
13. On cross examination, PW 2 testified that the suit land was registered in the name of Macharia Kimani during land consolidation and demarcation. That the Plaintiff farms on the upper part of the suit land. That the suit land was yet to be officially sub divided. That the family had three portions of land, and the suit land had been left for the use of the grandmother of the parties herein and it was supposed to be shared between the Plaintiff's and the Defendant's families. That the Plaintiff had another parcel of land. That the Plaintiff father had filed a case in Court when he had been asked to vacate the suit land.
14. On re-examination, PW 2 testified that the family had three portions of land and Macharia Kimani got one portion while Wainaina Kimani got another portion. That the suit land was supposed to be shared between the said Macharia and Wainaina (both deceased) and therefore it should be shared between the Parties herein equally.

## **DEFENSE CASE**

15. DW 1 Simon Thuo Macharia, adopted his witness statement dated 2<sup>nd</sup> November 2021, as part of his evidence. He also produced the documents attached to his Replying Affidavit dated 22<sup>nd</sup> July 2021, as exhibits in support of his case. He also testified that he and the Plaintiff's herein were cousins. That this was not the only case in which the Plaintiff's family had sued their family and that the Plaintiff's family had sued again in 1992. That the suit land was purchased by Macharia Kimani (deceased) who was his father. That the family of Macharia Kimani utilises the suit land (land parcel No. LOC 3/ Githumu/847). That Kimani Wainaina had been given a small portion to farm by his father and he was supposed to move once his children were big enough. That the Plaintiff's family had their parcel of land.
16. On cross examination, he affirmed that the suit land was purchased by his father. That his father and Wainaina Kimani were brothers and his father was the elder one of the two. That the Plaintiff and his father entered the suit land in 1992, when in his father died. That there was a case filed in Court in 1989 where his father had been sued by his brother Wainaina Kimani and the matter has been ongoing since 1992. That the Plaintiff had planted tea bushes on a portion of the suit land which he was utilizing. That he had never evicted Kimani as he did not want to cause breach of peace. That the suit land was not ancestral land and he did not know if the land was to be registered in the name of the eldest son.



17. On re-examination, he testified that his father purchased the suit land in the 1960's and his mother was also deceased. That Kimani started utilizing the suit land through a Court Order and his father was not aware of the said Court Order. That the said Court Order was later vacated by Court, but Kimani refused to move out of the suit land. That they had on several occasions asked Kimani to vacate, but he used to cause chaos so they let him stay to maintain peace.
18. DW 2 Mungiri Kimani, adopted his witness statement dated 2<sup>nd</sup> November 2021, as his evidence in chief. He further testified that there had been cases filed over the suit land with the
19. first being filed in 1989. That the said suit was filed by Wainaina Kimani against Macharia Kimani, to stop an eviction. That the case proceeded exparte against Macharia Kimani and Orders were issued in favour of Wainaina Kimani. That with those Orders, Wainaina Kimani gained entry into the suit land. That the Orders were subsequently vacated, but the said Wainaina refused to vacate the suit land. That the suit land is about 2 acres and the Plaintiff occupies about ½ an acre. That the Plaintiff had another land (land parcel No. LOC 3/Mungaria/525), which belonged to Wainaina Kimani. That the suit land was bought by Macharia Kimani but he did not know when. That the suit land was initially plot No.57, but in 1987 it was subdivided into land parcels No. 847 and 848. That Macharia kept land parcel No. 847 and upon his demise, it was supposed to be shared between his children who do not include the Plaintiff.
20. On cross examination, DW 2 stated that the land was not ancestral land and it is Macharia Kimani who purchased it. That he had no documents to support his claim that Macharia Kimani purchased the suit land. That the suit land was not registered as trust land. That the Plaintiff's family entered the suit land in the 80's. That the Plaintiff had planted tea on a portion of the suit land. That the Plaintiff entered the suit property via Court order which Court order was later vacated. That the two families were referred to elders to adjudicate the case and they did not attend the elders sitting. That they had not evicted the Plaintiff because they wanted peace.
21. The parties therefore filed and exchange written submissions.
22. The Applicant filed his written submissions dated 8<sup>th</sup> March, 2022, through the Law Firm of Mumbi Muritu Advocates. In his submissions, the Applicant reiterated his case and urged the Court to find in his favour as he had established that he acquired the suit land by Adverse Possession against the Respondent. He further submitted that he has been in exclusive and uninterrupted occupation of the land as required by Section 17 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. Reliance was placed on the cases of *Josinter Atieno Ouma & Another vs. Joshua O. Omiti & another* 2018 eKLR and the Court of Appeal case of *Mwangi Githu vs. Livingstone Ndeete* (1980) eKLR, where the Courts found that for a claim for adverse possession to issue, an Applicant must demonstrate he has been in occupation for over 12 years and also that he has occupied the land openly, without force, secrecy or license (nec vi, nec clam, nec precario).
23. The Respondent on the other hand filed his submissions dated 5<sup>th</sup> April, 2022 through the Law Firm of Njeri Njuguna & Co Advocates. The Respondent challenged the Applicant's testimonies and submitted that the Applicant had failed to establish adverse possession on a balance of probabilities. He relied on a litany of cases inter alia the case of *Mbira v. Gachubi* (2002) I EALR 137, in which the Court discussed the issue of adverse possession and held 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.”

24. Further reliance was placed on the case of *Wambugu v, Njugunah* (1983) KLR 173, where the Court held on adverse and discontinuous possession. That the proper ways of assessing proof of adverse possession would 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 or she has been in possession for the requisite period of years.
25. The Respondent based on the above urged this Court to dismiss the Applicant’s case with costs.
26. The Court has carefully read and considered the pleadings, the evidence adduced, rival written 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 over parcel LOC No.3/Githumu/847
  - (ii) Who should bear the costs of the suit

**(i) Whether the Applicant has met the threshold for grant of orders for adverse possession over parcel LOC No.3/Githumu/847**

27. Adverse possession has been defined as a method of gaining legal title to real property by actual, open, hostile, and continuous possession of it to the exclusion of its true owner for the period prescribed by Law which is 12 years as per the *Limitation of Actions Act*, Cap 22 of the Laws of Kenya According to Halsbury’s Laws of England, 4th Edition Volume 28, paragraph 768.

“No right to recover land accrues unless the land is in the possession of some person in whose favour the period of limitation can run. What constitutes such possession is a question of fact and degree. Time begins to run when the true owner ceases to be in possession of his land.”

28. The Court of Appeal in the case of *Wilson Kazungu Katana & 101 others v. Salim Abdalla Bakshwein & another* [2015] eKLR sought to define what constitutes adverse possession. The Court stated as follows:-

“From all these provisions, what amounts to adverse possession? First, 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 concept of adverse possession has been the subject of many discourses and decisions of this Court. Suffice to mention but two, *Kasuve v Mwaani Investments Limited & 4 others* [2004] 1KLR 184 and *Wanje v saikwa* (2) (supra). In the first decision, the Court was emphatic that in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of twelve years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition. In the Wanje case, the Court went further and took the view that in order to acquire by statute of limitations a 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 and that what constitutes



dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use. Further, the Court opined that a person who occupies another's persons land with that person's consent, cannot be said to be in adverse possession as in reality he has not dispossessed the owner of the land and the possession is not illegal.

29. The right to adverse possession however, does not automatically accrue unless the person in whose name 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. See *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR, where the Court of Appeal held:
30. 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.
31. 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...”
32. Therefore, to determine whether the Applicants' rights accrued the Court will seek to answer the following
  - i. How did the Applicants take possession of the suit property?
  - ii. When did they take possession and occupation of the suit property?
  - iii. What was the nature of his possession and occupation?
  - iv. How long have the Applicants been in possession?
33. The first issue for determination is whether the Applicant has met the threshold for grant of Orders of Adverse Possession?
34. It is not in doubt that the suit land is registered in the name of the late Macharia Kimani (deceased). That the Respondent herein is a son to the Late Macharia Kimani and an administrator of his estate. Further it is not in doubt the Applicant and Respondent herein are first cousins, as their fathers now deceased were brothers.
35. It is the Applicant's case that he has been in continuous uninterrupted occupation and possession of the suit property for a period in excess of 12 years. The burden of leading the Court to ascertaining this lies with the Applicant. The Applicant further states that the suit property was actually ancestral land with the Respondent's father holding it in trust for himself and his siblings. In the instant suit, the burden of proof squarely lies on the Applicant to demonstrate that he has met the requirements for the grant of an order of adverse possession. See *Gabriel Mbui v Mukindia Maranya* [1993] eKLR where the Court stated as follows;

“The burden of proving title by adverse possession rests upon the person asserting it. This is to say the burden of proof is upon the person setting up and seeking to prove title by



adverse possession (*Mamuji v Dar* [1935] 2 EA CA 111, *Bwana v Ibrahim* (1948) 15 EACA 7; and Forbes, JA, in *Abdulkarim and another v Member for Lands and Mines and another* 1 [1958] EA 436). He proves it on the usual standard of proof in civil cases namely, on a balance of probability. What does he prove? He proves three adequacies: continuity, publicity, and extent. For to prove title by adverse possession, it is not sufficient to show that some acts of adverse possession have been committed: the possession must be adequate in continuity, in publicity and in extent, to show that it is adverse to the rightful, paper title owner.”

36. The Applicant claims that his grandfather transferred land parcel No.3/Githumu/847, to the late Macharia Kimani, being the eldest son, to hold it in trust for himself and Wainaina Kimani the Applicant’s father. That he had been in occupation of the suit land since 1977, and he had cultivated tea bushes on it. The evidence of the Applicant is corroborated by pictorial evidence and receipts to show that he had indeed tea on the suit land.
37. The Court notes that the evidence produced by the Applicant was not contested and /or objected to and therefore it has no reason to doubt it. The Applicant evidence was further corroborated by the statement of PW 2 an elderly man of 80 years, who testified that the Applicant has indeed occupied and cultivated the suit land for over 50 years, without any interruption from the Defendant herein or the registered owner of the suit land when he was alive.
38. The Respondent on the other hand stated that the suit land was purchased by this father the late Macharia Kimani and that the said Macharia had allowed the Applicant to till a small portion of his land, until his children were grown enough. That they had on several times attempted to evict the Applicant, but he had caused chaos and they had resolved to let him stay to maintain peace and quiet. The Respondent’s evidence was corroborated by DW 2 who confirmed the averments of the Respondent.
39. As above stated Sections 107, 108 and 109 of the *Evidence Act*, Cap 80 Laws of Kenya establish principle in law that he who alleges must prove. The Court notes that while DW 1 and DW 2 allege that the Late Macharia Kimani purchased the suit land, they have not led any evidence to support their claim. Further, this Court has not perused any evidence to show that the late Macharia Kimani allowed the Plaintiff herein to use the suit land or that the Defendant had attempted with no avail to evict the Applicant. This Court is a Court of record, and in the absence of evidence it is difficult to believe the allegations of DW 1 and DW 2.
40. In addition, the Court notes that both parties have referred to a case that was filed by the Applicant’s father over the suit land in 1989. While evidence led with regard to the same is scanty, the existence of the same cannot be wished away as it has been admitted by both parties herein. Did the filing of said suit stop time from running? It is trite law that time stops running the moment a suit is filed by the title owner. Once time begins to run for purposes of limitation, it will continue to do so unless the true owner brings an action to recover the disputed land. The action must be brought to recover the disputed land. The true owner must seek to retake possession or specifically raise the claimant’s right to possession.
41. In the instant suit, the said suit was allegedly filed by the Applicant’s father after the Respondent’s father who was the registered owner of the suit land attempted to evict him. That the Applicant’s father got orders in his favour, but the same were vacated by Court and the matter referred to elders in 1992 for adjudication. Nothing has been mentioned about the outcome of the said matter, save for the Respondent’s admittance that the case was abandoned after it was referred to the elders.



42. This Court is of the view that the said suit, though filed did not stop time from running, as the same was not filed by the registered owner of the suit land to assert his ownership. Further the said suit was not filed against or the Applicant herein.
43. Having stated the above, the question that begs the answer is whether the Applicant herein has established a case for adverse possession against the Respondent.
44. It is trite that adverse possession accrues on land and not title. That Applicant alleges he has been in open and uninterrupted possession of the suit land since 1977. The Respondent on the other hand alleges that the Applicant has been in possession of the suit land since 1992, and that they had tried to evict him to no avail. That when eviction failed, they allowed him to continue occupying for to maintain peace.
45. It is evident from the above analysis of evidence, that the Applicant has been in possession of the suit land for over 12 years and the year when he gained access though material is not one that this Court should go into depths to investigate. Was the said possession open and uninterrupted?
46. The Court answers this question in the affirmative. It is evident that the Respondent has at all times material to this suit been aware of the possession of the Applicant. In fact, both DW 1 and DW 2 have confirmed in their statements that indeed the Applicant was in possession of the suit land since 1992 and he had cultivated tea bushes.
47. Was the said possession interrupted? The answer is no. While the Respondent has alleged he attempted to evict the Applicant from the suit land, he has not substantiated his claim and this Court finds it difficult to believe him and find in his favour.
48. Based on the above, this Court finds and holds that the Applicant has met the required burden of proof to warrant the grant of Orders of acquisition of ownership by adverse possession by over a portion of land parcel No. LOC. 3/Githumu/847, which he is cultivating.

**(ii) Who should bear costs**

49. It is trite that costs shall follow the events, and that the successful party be awarded costs. The Applicant herein is the successful party and this Court finds no reasons not to exercise its discretion in his favor.
50. The upshot of the foregoing is that the Court finds and holds that the Applicant herein has proved his case on the required standard of balance of probabilities on his claim for the adverse possession against the Respondent. Consequently, the Court finds and holds that the Originating Summons dated 6<sup>th</sup> May 2021, is merited and the same is allowed entirely in terms of prayer (a), (b), (c) and (d)
51. It is so ordered.

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

**L. GACHERU**

**JUDGE**

**Delivered virtually in the presence of;**

Joel Njonjo - Court Assistant

M/s Muritu for Plaintiff/Applicant

M/s Njuguna for Defendant/Respondent



**L. GACHERU**

**JUDGE**

**21/7/2022**

