



Njuguna & 6 others v Chuchu & 6 others (Environment & Land Case 1195 of 2015 & 598 of 2012 (Consolidated)) [2022] KEELC 14497 (KLR) (27 October 2022) (Judgment)

Neutral citation: [2022] KEELC 14497 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1195 OF 2015 & 598 OF 2012 (CONSOLIDATED)
EK WABWOTO, J
OCTOBER 27, 2022

BETWEEN

ISAAK GIBSON KAMANDE NJUGUNA 1ST PLAINTIFF
RAPHAEL KARIUKI MUTURI 2ND PLAINTIFF
JOSEPH MWANGI GITHAIGA 3RD PLAINTIFF

AND

JOHN KIMANI CHUCHU 1ST DEFENDANT
SAMUEL MWANGI CHUCHU 2ND DEFENDANT
JOSEPH GITAU CHUCHU 3RD DEFENDANT
PETER NJUGUNA CHUCHU 4TH DEFENDANT

AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 598 OF 2012

BETWEEN

TERESIAH WAMAITHA WAWERU 1ST PLAINTIFF
HANNAH NGINA NDIRANGU 2ND PLAINTIFF
FELISTA WANGARI NDUNGU’U 3RD PLAINTIFF
YUNIS WAMBUI CHUCHU 4TH PLAINTIFF

AND

RAPHAEL KARIUKI 1ST DEFENDANT
JOSEPH MWANGI GITHAIGA 2ND DEFENDANT



JUDGMENT

1. This suit relates to a dispute on ownership of property known as L.R. No. 9363/84 between the Plaintiffs and the Defendants herein in the consolidated suits.
2. The Plaintiffs commenced the proceedings in ELC No. 1195 of 2015 by way of a plaint dated October 7, 2015 which was later amended vide leave of this court granted on March 11, 2021. In the amended plaint the Plaintiff's sought the following prayers as against the Defendants: -
 - a. A declaration that the Plaintiffs T/A Mimi na Wewe is the rightful owner of parcel L.R. No. 9363/84. a1) A declaration that the doctrine of Adverse possession has taken effect in favour of the Plaintiff.
 - b. Alternatively, a refund of the monies paid to the Defendant for the purchase of L.R. No. 9363/84 as its current value.
 - c. General damages.
 - d. Costs of the suit.
 - e. Interest.
3. In suit ELC No. 1195 of 2015, the Defendants filed an amended statement of defence dated October 4, 2021 and a raised a counterclaim against the Plaintiffs.
4. In the counterclaim, the defendants sought for the following orders:
 - a. That the Plaintiffs suit against them be dismissed with costs.
 - b. The court be pleased to grant an order that the Plaintiffs be permanently prohibited from trespassing, invading or in any other way interfering with the rights of the Beneficiaries of the Estate of Chuchu Murungaru (Deceased) to occupy, own and use the parcel of land known as Land Reference Number 9363/84 and that the Plaintiffs be compelled by an order of the Honourable court to remove all structures erected on the said land.
5. In ELC No. 598 of 2012, the Plaintiffs therein sought the following reliefs against the Defendants in their plaint dated September 17, 2012: -
 - a. A mandatory injunction to compel the Defendants to deliver and release the original certificate of title for the piece or parcel of land known as L.R. No. 9363/84 to the Plaintiffs.
 - b. In the alternative an order that the Registrar of the High Court be empowered to execute all documents and papers necessary for the effectual transfer of L.R. No. 9363/84 to the Plaintiffs.
 - c. General damages.
 - d. Costs of the suit.
 - e. Interest on (c) and (d) above at court rates.
 - f. Any other or further relief that this Honourable court may deem fit to grant.



The Plaintiffs case in ELC No. 1195 of 2015

6. IsaaK Gibson Kamande Njuguna testified on March 15, 2022 on behalf of the Plaintiffs in the matter. During his testimony he stated that he entered into an agreement with the Defendants on January 12, 1999 to buy property known as L.R. No. 9363/84. The Land was about 3 ½ acres which he was buying from the Defendants.
7. He further stated that the agreement involved all defendants even though the title was registered in the names of Chuchu Murungaru. He paid a deposit of Kshs 40,000/- on February 24, 1999, later paid Kshs 127,000/- and another sum of Kshs 70,000/- was paid on March 16, 1999. The balance of Kshs 80,000/- was to be paid later.
8. It was also his testimony that he entered into another agreement with the parties on March 20, 1999 where it was agreed that after completion of the balance of Kshs 80,000/- he was to be given the title. This was done on May 20, 1999 and he was given the title which he has had in his custody since then.
9. He also stated that he has since constructed a permanent house in the said property after taking possession in 1999. It was also his testimony that his late wife was buried in the said property together with his eldest son and grandson.
10. In respect to ELC Case No. 598 of 2012, he stated that, he had been sued by Teresia Waweru, Hannah Ngira Ndirangu and Felista Ndungu who are the sisters to Mwangi and Njuguna claiming to be beneficiaries to the suit property. It was also his testimony that the sisters wanted him to return the title of the property yet he had been in possession of the suit property since 1999. He further stated that the case was filed on September 21, 2012 which was about 13 years when the cause of action arose.
11. On cross-examination by Mr. Nderitu Advocate for Defendants in ELC No. 1195 of 2015, he stated that he paid Kshs 320,000/- as purchase price and he did not have any pending balance since a sum of Kshs 83,000/- was paid on May 20, 1999 as per the receipt issued by G. K. Gatere Advocates. He also stated that he never defaulted on any payment.
12. On further cross examination, he stated that the administrators had authority over the land and that the said property is still registered in the names of Chuchu Murungaru.
13. Upon cross-examination by Mr. Kibera Advocate, he stated that he had read the agreement before signing it and was aware of its implications. He further stated that he never confirmed if the sisters had any stake in the property.
14. On re-examination, he reiterated that he was given the original title after payment of the purchase prices which is in his custody and that he started developing the property in the year 1999 when he took possession.

The case of the Defendants in ELC No. 1195 of 2015

15. Samwel Mwangi Chuchu, the 2nd Defendant testified on behalf of the Defence in the matter. He made reference to his witness statement dated 24th Aril 2017 which was adopted as part of his evidence in chief.
16. He stated that, together with his siblings, they entered into an agreement with the 1st Plaintiff to sell the suit property at Kshs 320,000/- upon which a balance of Kshs 80,000/- remains outstanding to date.



17. It was his testimony that the sale agreement was done by them as administrators of Murungaru Chuchu which position changed after succession. He stated that they never gave the title to the 1st Plaintiff since the same was left at their Advocates office.
18. He also testified that the land was undeveloped and they even got orders stopping any construction on the suit property. It was also his testimony that no subdivision was authorized.
19. He further stated that the Defendants are ready to refund the money that was paid as purchase price.
20. Upon cross-examination by Mr. Kimamo Advocate, he stated that the land was sold to the 1st Plaintiff and they both signed the agreement. They later got letters of administration on June 22, 1998 and that his sisters had not been informed on the transaction. He also confirmed receiving a sum of Kshs 240,000/- and the balance of Kshs 80,000/- was never paid.
21. On cross-examination by Mr. Kibera Advocate, he stated that they never agreed as a family to sell the land and their sisters never knew of the said transaction.
22. On re-examination, he stated that the sale agreement did not refer to the succession case. He further reiterated that he received Kshs 240,000/- and a balance of Kshs 80,000/- remain outstanding.

The case of the Plaintiffs in ELC No. 598 of 2012

23. Felistus Wangari Ndungu testified on behalf of the Plaintiffs in ELC No. 598 of 2012. During the hearing of the suit on March 15, 2022, she relied on her witness statement and bundle of documents both dated May 18, 2018 which were adopted as part of her evidence in chief.
24. She stated that the land belonged to their father and that they were entitled to the said property. She further stated that her main prayer in the case was to get the original title of the said property.
25. On cross-examination by Mr. Kimamo Advocate, she stated that Samuel Mwangi and Peter Njuguna were her brothers. She also stated that she last visited the suit property 3 years ago since she had not initially known the exact physical location of the same.
26. She further stated that her brothers sold the land without their knowledge and that she had not sued them because they did not have the original copy of the title.

Submissions by the Plaintiffs in ELC No. 1195 of 2015

27. The Plaintiffs filed their written submissions dated April 22, 2022 through the firm of Githinji Kimamo & Co. Advocates. Counsel submitted on the following three thematic areas: -
 - i. Limitation of actions.
 - ii. Doctrine of constructive trust.
 - iii. Adverse possession.
28. On limitation of actions, Counsel submitted that the Plaintiffs bought the land in January 1999 and took possession the same year. The sisters filed their suit on September 21, 2012. The same was filed



without leave of the court since it was filed 13 years later. Counsel referred to Section 7 of the limitation of Actions Act which provides as follows: -

“An action may be brought by any person to recover land after the end of twelve years from the date on which the right of action occurred to him or, if it first occurred to some person through who he claims, to that person.”

29. Reliance was also made to the case of Edward Mwonge Lengusuranga –Vs- James Lanaiyara & Another (2019) eKLR where the court held that in respect to section 7 of the limitation of Actions Act, time started running when the purchaser was put into possession of the suit property.
30. On the Doctrine of constructive trust, Counsel submitted that the brothers sold the land to the purchasers, gave them possession and the title deed upon payment of the purchase price. The title deed and copy of the letter of administration were given pending confirmation of grant by the administrators who would then transfer the land to the purchasers. The purchasers waited and held onto the land and title deed for 13 years as they made developments on the same. Counsel argued that the purchasers became owners of the land in equity and the administrators of the estate were their trustees in equity which trust was breached by conferring the suit property to third parties who were not party of the agreement but were aware of the said agreement. It was submitted that on this basis, the court therefore ought to invoke the equitable doctrine of constructive trust in these proceedings in favour of the Plaintiffs as it would be unconscionable for the brothers and sisters to unjustly enrich themselves to the detriment of the purchasers. Reliance was placed on the case of Willy Kimutai Kitilit –vs- Michael Kibet Court of Appeal No. 51 of 2015 and Macharia Mwangi Maina & 87 others –Vs- Davidson Mwangi Kagiri (2014) eKLR.
31. On the doctrine of adverse possession, counsel referred to the Court of Appeal case of Chevron (K) Limited –Vs- Harrision Charo was Shutu (2016) eKLR and submitted that in the event the sale agreement is found to be illegal, null and void, the purchasers have satisfied the requisite conditions under doctrine of adverse possession to be vested with the legal title over the suit land. The purchasers proved in evidence of their continuous, uninterrupted vacant occupation, quiet possession and use over the suit land for a period of more than 12 years.

Submissions for Defendants in ELC No. 1195 of 2015

32. The Defendant's filed their submissions dated May 27, 2022 through the firm of Macharia Nderitu & Co. Advocates. Counsel outlined the following issues for determination by the court: -
 - a. Whether the Plaintiffs acquired any rights over the suit property under the Agreement for sale dated January 12, 1999.
 - b. Whether the Defendants acted fraudulently.
 - c. Whether the Plaintiffs have any ascertainable ownership rights over the suit property.
 - d. Whether the Plaintiffs are entitled to damages sought.
 - e. Whether the Defendants counterclaim is barred by the limitation of Actions Act.
 - f. Whether the Defendants are entitled to the prayers sought in their defence and counterclaim dated October 4, 2021.
33. It was submitted that the clause 6 of the agreement dated January 12, 1999 provided that the agreement was subject to the provisions of CAP 160 of the Laws of Kenya. Hence by virtue of the agreement, the Defendants and Plaintiffs were bound by the courts decision over the suit property made during the



confirmation of grant. The Defendants did not acquire any ownership rights over the suit property under the agreement for sale capable of being transferred to the Plaintiffs and hence the agreement for sale became void by operation of law. Reference was made to the case of *Rosemary Wanjiku Mungai -Vs- Annunciata Waitihira Kibue*.

34. On whether the Defendants acted fraudulently, Counsel submitted that the Defendants failure to perform their obligation under the agreement was as a result of frustration of the agreement by operation of the law. Once the confirmation of grant was issued, the Defendants were rendered incapable of transferring any ownership rights to the suit property and as such no evidence of fraud had been placed before this court by the Plaintiffs.
35. It was also submitted that the doctrine of adverse could not be inferred herein in favour of the Plaintiff since the Plaintiffs had not produced any evidence showing that they indeed took possession and occupied the property for over 12 years. Reference was made to the case of *Gabriel Mbui -Vs- Mukindia Maranya* (1993) eKLR.
36. On construction trust, Counsel argued that the same was not pleaded in the plaint and further that the same cannot be inferred and applied in a legally unenforceable contract. Counsel cited the case of *Shiren Anastancia Nyayieka -vs- Sammy Nyarangi & Another* (2020) eKLR in support of this position.

Submissions for the Plaintiffs in ELC Case No. 598 of 2012

37. They filed their submissions dated June 9, 2022 through the firm of Kibera & Associates. Counsel outline two issues for determination by the court: -
 - a. Whether the sale of the suit property to the purchasers was valid and enforceable either in law or in equity.
 - b. Whether the doctrine of adverse possession is applicable herein.
38. Counsel submitted that the suit property is registered in the name of the deceased Chuchu Marungaru who died on September 30, 1998 and at the time of the agreement dated January 12, 1999 the letters of administration had not been taken out and nobody had a right to interfere with the suit property in any manner whatsoever.
39. Counsel argued that clause 6 of the agreement expressly stated that agreement is subject to the provisions of CAP 160 of the Laws of Kenya. Counsel cited the case of *Zacharia Wambugu Gathimu & Another -vs- John Ndungu Maina* (2019) eKLR.
40. On the issues of the alleged fraud, Counsel submitted that no fraud has been proved by the purchasers.
41. On the doctrine of adverse possession, Counsel argued that the Purchasers had not satisfied the requisite conditions under the doctrine of adverse possession to be vested with the legal title over the suit property. That there was no continuous, uninterrupted, occupation, quiet possession and use of the suit property by the purchasers.

Analysis and Determination.

42. Having considered the pleadings of the parties, the evidence adduced and the respective parties' submissions, the court is of the view that the issues for determination in this case are as follows: -
 - i. Whether the sale agreement dated January 12, 1999 is valid and enforceable?
 - ii. Whether the particulars of fraud have been proved herein?



- iii. Whether constructive trust can be interfered herein?
 - iv. Whether the Plaintiffs have acquired any interest to the suit property by way of adverse possession.
 - v. What are the appropriate remedies that can issue herein
43. From the evidence that was tendered herein, it is not dispute that the agreement dated January 12, 1999 was entered into after the death of Chuchu Murungaru. It was the case of the children of the deceased hereafter (referred to as the brothers and sisters) that clause 6 of the agreement dated January 12, 1999 provided that the agreement was subject to the provisions of CAP 160 of the Laws of Kenya. Hence by virtue of the agreement, the Defendants and Plaintiffs were bound by the courts decision over the suit property made during the confirmation of grant. The Defendants did not acquire any ownership rights over the suit property under the agreement for sale capable of being transferred to the Plaintiffs and hence the agreement for sale became void by operation of law.
44. Section 45 of the *Law of Succession Act* provides as follows: -
- 1. Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
 - 2. Any person who contravenes the provisions of this section shall—
 - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.
45. In the case of *Bahola Mkalindi vs. Michael Seth Kseme & 2 others* [2012] eKLR the court held that; “The *Law of Succession Act*, Cap. 160 is concerned with the administration of the estate of deceased persons. The estate of a deceased person has been defined by the Act as property which the deceased person was legally competent to freely dispose of during his lifetime, and in respect of which his interest has not been terminated by his death”.
46. Section 55 of the *Law of Succession Act* stipulates that:-
- “No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property unless and until the grant has been confirmed as provided by section 71.”
47. Consequently, and in the premises, I come to the conclusion that the said agreement was not valid and neither could it be enforced by the parties.
48. The Plaintiffs in ELC No. 1195 of 2015 pleaded and particularized fraud against the Defendants in their plaint.
49. A party alleging fraud must specifically plead the particulars of fraud and specifically lead evidence to prove the allegations of fraud. There are steps that must be taken to prove fraud. In the case of



Vijay Morjaria vs Nansign Madbusihn Darbar & Another (2000) eKLR, the court of Appeal stated as follows”-

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts”.

The same procedure goes for allegations of misrepresentation and illegally as outlined under Order 2 rule 4 of the *Civil Procedure Rules*. As regards the standard of proof, the court of Appeal in the case of *Kinyanjui Kamau vs George Kamau* (2015) eKLR expressed itself as follows:-

“It is trite law that any allegations of fraud must be pleaded and strictly proved. (See *Ndolo vs Ndolo* (2008) 2 KLR (G & F) 742 wherein the court stated that:-

“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

“In cases where fraud is alleged, it is not enough to simply infer fraud from the facts”.

50. In the instant case, Issak Gibson Kamande Njuguna who testified as PW1 stated that the property was never transferred to the Plaintiffs for the reasons that the confirmation of grant included the sisters as beneficiaries to the property. From the testimony that was adduced, the Plaintiff’s witness presented sufficient evidence to the effect that the Defendants sold the suit property to the Plaintiff and further received the purchase price despite the fact that they knew very well that they did not have authority to transfer the same neither could they pass the title since the same was still registered in the names of the deceased. The Defendants witness equally admitted receiving the purchase price knowing very well they could not transfer the property which was not registered in their names. In the circumstances, it is the finding of this court that the Plaintiffs have proved the particulars of fraud as pleaded in their plaint as against the Defendants.
51. On the issue of constructive trust, the same was not pleaded by the Plaintiffs but was extensively submitted by Counsel for the Plaintiffs in their submissions.
52. Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. As was stated by Lord Reid in *Steadman – vs- Steadman* (1976) AC 536, 540,

“If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable”. [Emphasis added]
53. It therefore follows that for a constructive trust to be applied, there must have been a valid and enforceable agreement as between the parties in the first instance. Being guided by the above authority and having held that the agreement dated January 12, 1999 was not valid and enforceable, it is the



finding of this court that constructive trust cannot be invoked herein owing to the fact that the agreement of the parties dated January 12, 1999 was not valid.

54. On the issue of adverse possession, I wish to refer to the case of *Celina Muthoni Kitinji v Safiya Binti Swaleh & 8 others* [2018] eKLR, the Court explained the conditions to be met for one to prove an entitlement in adverse possession. The court proceeded to quote various authorities which explain the entitlement and I wish to borrow fully from the decision and capture it as hereunder;

“The requirements for Adverse Possession in Kenya has also been set out in the case of *Mbira –v- Gachubi* (2002) IEALR 137 in which the court held that:

.....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 statutory prescribed period without interruption....”

55. In the case of *Mtana Lewa –v- Kabindi Ngala Mwangandi-* COA Malindi(2015) eKLR it was held that:

“Adverse Possession is essentially a situation where a person takes Possession of land, 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 12 years.”

Also see *Paul Mwangi Gachuru vs. Kamande Nguku* (2017) eKLR cited by the plaintiff.

56. It was the evidence of the PW1 that he took possession of the suit property in 1999 and has been in the suit property ever since to the extent of developing the same and even buried his late wife and eldest son. As to the nature of possession and occupation, the same must be continuous, open, and honest, with the proprietor’s knowledge. For one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, *nec vi, nec clam, nec precario*. The additional requirement is that of *animus possidendi*, or intention to have the land.
57. In light of the above, I am persuaded that the Plaintiffs have established the ingredients of a claim of adverse possession and that they merit judgment in their favour.
58. The Plaintiffs sought various remedies and considering the evidence adduced, they have succeeded in proving their claim of adverse possession against the Defendants. On the issue of costs, Section 27 of the *Civil Procedure Act* gives the court the discretion to grant costs. Ordinarily, courts usually follow the event, unless special circumstances are presented. In the instant case, I will direct that each party to bear own costs of the suit.
59. In conclusion, the suit in Nairobi ELC No. 1195 Of 2015 and Nairobi Elc No. 598 of 2012 are disposed as follows:
- a. A declaration that the Plaintiffs in ELC No. 1195 of 2015 have acquired ownership of L.R. No. 9363/84 through adverse possession.
 - b. A declaration that the Plaintiffs in ELC No. 1195 of 2015 are the rightful owners of Parcel No. L.R. No. 9363/84.
 - c. The Plaintiffs claim in Nairobi ELC No. 598 of 2012 is dismissed.



- d. The Defendants counterclaim in ELC No. 1195 of 2015 dated October 4, 2021 is dismissed.
- e. Each party to bear own costs.

Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF OCTOBER 2022.

E.K. WABWOTO

JUDGE

In the presence of:-

Mr. Kimamo for the Plaintiffs in ELC No. 1195 of 2015.

Mr. Nderitu for the Defendants in ELC No. 1195 of 2015.

Mr. Kibera Maina for the Plaintiffs in ELC No. 598 of 2012

Caroline Nafuna- Court Assistant.

E.K. WABWOTO

JUDGE

