



**Kioi & another v Gitau & another (Environment and Land Appeal
E079 of 2022) [2025] KEELC 3112 (KLR) (2 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3112 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E079 OF 2022**

**BM EBOSO, J
APRIL 2, 2025**

BETWEEN

MARY WAMBUI KIOI 1ST APPELLANT

MARTIN KIOI GITAU 2ND APPELLANT

AND

NANCY WANJA GITAU 1ST RESPONDENT

JANE NYAMBURA NGIGI 2ND RESPONDENT

*(Being an Appeal against the Judgment of Hon. J. Orwa, Senior Principal Magistrate,
delivered on 8th April 2022 in Kikuyu SPMC Civil Case No. 190 of 2015)*

JUDGMENT

Introduction

1. This appeal challenges the Judgment rendered by the Kikuyu Senior Principal Magistrate Court [Hon. J. Orwa, SPM] on 8/4/2022 in Kikuyu SPMC Civil Case No. 190 of 2015. The three key issues that fell for determination in the suit were: (i) Who, between the 2nd appellant on one part and the two respondents on the other part, were the legitimate owner(s) of land parcel number Karai/Lussigitti//T.710 [hereinafter referred to as “the suit land” or “the suit property”]; (ii) Whether the appellants satisfied the criteria for registration as adverse possessors of land; and (iii) Whether the appellants were trespassers on land parcel number Karai/Lussigitti/T.710. Invariably, these are the three key issues that fall for determination in this first appeal. Before I analyse and dispose the issues, I will briefly outline the background to the appeal and the parties’ respective submissions on the appeal.



Background

2. The suit in the trial court was initiated by the two respondents vide a plaint dated 23/7/2015. Mary Wambui Kioi [1st appellant] was named as the only defendant in the suit. Her spouse, Martin Kioi Gitau [2nd appellant], was subsequently joined in the suit as the 2nd defendant. The respondents sought an order decreeing eviction of the appellants from the suit land. They also sought costs of the suit.
3. The case of the respondents was that they were the legal owners of the suit land, having purchased it from the initial registered owner, one Mary Nduta Waihumbu. They contended that the appellants had illegally taken possession of the suit land and had started erecting a house on it. They further contended that the appellants were irregularly claiming ownership of the suit land and had declined to vacate the suit land despite intervention from the local Chief and the local Deputy County Commissioner.
4. During trial, the two respondents led evidence by Jane Nyambura Ngigi [PW1] and Mary Nduta Waihumbu [PW 2]. They closed their case at that point.
5. The 1st appellant filed a defence and counterclaim dated 16/3/2018 through M/s E N Mugu & Co Advocates. There was no indication of any amendment to the said pleadings subsequent to the joinder of the 2nd appellant as a party to the suit. It is nonetheless clear from their joint submissions in the trial court that they relied on the defence and counterclaim dated 16/3/2018 [see paragraph 2 of their written submissions in the trial court dated 7/3/2022]. They contested the respondents' claim. Their case was that the suit land was lawfully allocated to the 2nd appellant by the defunct Kiambu County Council in 1976 and "the allocation was formalized in 1992, 1994 and 1995". They contended that they had lived on the suit land peacefully since 1976.
6. By way of counterclaim, the appellants prayed for: (i) an order dismissing the respondents' case; (ii) an order decreeing cancellation of the respondents' title and issuance of a title to Martin Kioi Gitau; and (iii) an order awarding the appellants costs of the suit.
7. During trial, Mary Wambui Kioi testified as DW1. Martin Kioi Gitau testified as DW2. The appellants closed their case at that point.
8. The trial court subsequently rendered the impugned Judgment in which it found that: (i) the appellants had failed to establish their counterclaim against the respondents; and (ii) the respondents had established their case against the appellants on a balance of probabilities. The trial court decreed eviction of the appellants from the suit land and condemned them to pay costs of the suit.

Appeal

9. Aggrieved by the findings and orders of the trial court, the appellants brought this appeal advancing the following five grounds-;
 1. The Learned Magistrate erred gravely by failing to address and consider the undisputed evidence that the 2nd appellant was allocated the suit property KARAI/LUSSIGIT/T.710 in 1976, took possession and occupation of the property to date.
 2. The Learned Magistrate erred gravely by failing to consider the appellants first laid claim in 2015 basing it on a title deed allegedly acquired in 1985 a period of 39 years.
 3. The learned Magistrate failed to consider that the possession and the occupation was open and as of right without interference from 1976 to 2015 without interference or claim from the respondents or anyone else.



4. The Learned Magistrate in the impugned Judgment took into account matters that were not canvassed in the evidence such as payment of sums demanded by Kiambu County Council and failed to give due consideration for ballot paper produced by the appellants in their list of documents and various affidavits.
 5. The Learned Magistrate erred gravely therefore by dismissing the counterclaim by the appellants and failing to consider the photographs produced by the appellants indicating old structures and trees which could not have been planted in 2015 when the alleged plot owner allegedly sold the suit property to the respondents.
10. The appellants prayed for orders that: (i) the Judgment and orders of the trial court be set aside; (ii) the counterclaim by the appellants be upheld; and (iii) costs of the appeal be awarded to the appellants.

Appellants' Submissions

11. The appeal was canvassed through written submissions dated 30/8/2024, filed by M/s E.N Mugu & Co Advocates. Counsel for the appellants submitted that, in their counterclaim, the appellants pleaded adverse possession. Counsel added that during cross-examination, PW2 agreed that there was an old house on the suit property as well as trees. Counsel argued that the trees could not have been planted in 2015.
12. Counsel further argued that PW2 failed to explain why she had not taken action to evict the appellants between 1985 when she obtained her title and 2015 when she caused the 1st appellant to be summoned by the local Chief. Counsel faulted the trial court on its analysis of the issue of adverse possession, contending that the analysis was inadequate, if not in error. Citing Section 7 of the Limitation of Actions Act, counsel submitted that PW2 having acquired her title in 1985, she should have sought eviction of the appellants then, adding that PW2's cause of action accrued in 1985.
13. Counsel for the appellants faulted the trial court for finding that the appellants were not in possession of the suit land "notwithstanding the house built by the appellants and the trees and crops planted on the suit property". Counsel argued that PW2 had never been in occupation and possession of the suit land. Lastly, counsel submitted that the requirement that occupation of land by an adverse possessor must be without the consent of the registered owner does not mean that the adverse possessor must acknowledge the land belongs to the registered proprietor.

Respondents' Submissions

14. The respondents opposed the appeal through written submissions dated 24/9/2024, filed by M/s Njau Ngigi & Co Advocates. Counsel for the respondents submitted that the respondents tendered evidence showing that they were the registered proprietors of the suit land, having purchased the suit land in March 2015 from Mary Nduta Waihumbu who was the previous registered proprietor of the land. Counsel added that the respondents tendered evidence demonstrating that prior to purchasing the suit land, they obtained an official search which revealed that Mary Nduta Waihumbu was the registered proprietor of the suit land and that the suit land had been charged to Nderi Farmers' Co-operative Society in May 1996 to secure a loan advanced to her. Counsel added that the respondents tendered evidence indicating that part of the purchase price was used to clear the loan in order to obtain a discharge of the title.
15. Counsel added that when the appellants entered the suit land and started erecting a house on it, the respondents issued a demand letter dated 2/6/2015 to them and when they failed to heed the demand, the respondents sought assistance from the local Administration.



16. Counsel added that the respondents produced a letter dated 3/6/2019 from the Kiambu County Executive Committee Member for Lands, Housing, Physical Planning, Municipal Administration & Urban Development confirming that Mary Nduta Waihumbu was the lawful allottee of land parcel number Karai/Lussigitti/T. 710 while Martin Kioi Gitau was the lawful allottee of parcel number Karai/Lussigitti/T.704. Counsel submitted that Mary Nduta Waihumbu testified as PW2.
17. On the appellant's contention that the 2nd appellant was an allottee of the suit land, counsel submitted that in the exhibit produced under the head "PLOTS WITH DOUBLE ALLOCATION", the 1st appellant was captured as the claimant of the suit land. Counsel argued that this was a contradiction by the appellants whose case was that the 2nd appellant was the allottee of the suit land. Counsel further argued that whereas the appellants had contended that they had lived on the suit land since 1976, during cross examination, they informed the court that the temporary structures on the suit land were built by their sons.
18. On the veracity and/or authenticity of the appellants' allotment letter and ballot, counsel submitted that the appellants had failed to explain why they processed a title relating to parcel number Karai/Lussigitti/T.704 but never bothered to process a title relating to the suit land if indeed they held a bona fide allotment letter relating to the land. Counsel submitted that on their part, the respondents called the original allottee who tendered a confirmation from the allocating entity [the County Government of Kiambu] that she was the lawful allottee of the suit land and that the 2nd appellant was the lawful allottee of an abutting parcel Karai/Lussigitti/T.704
19. On the appellants' allegation that there was fraud orchestrated by the Kiambu Land Registry Officials and the respondents, counsel submitted that the appellants neither pleaded nor proved fraud, adding that no evidence of criminal justice process was tendered to support the allegation of fraud.
20. On the contention that the respondents' title was extinguished under Section 7 of the *Limitation of Actions Act*, counsel submitted that the cause of action accrued in 2015 when the appellants occupied the suit land, adding that the suit in the lower court was initiated in the same year. Citing the framework in Sections 24, 25 and 26 of the *Land Registration Act*, counsel submitted that as registered proprietors of the suit land, the respondents' title could only be defeated by operation of the law.
21. Counsel disputed the appellant's contention that they pleaded adverse possession in their counterclaim, emphasizing that they did not. Counsel urged the court to reject the appeal.

Analysis and Determination

22. The court has read and considered the original record of the trial court, the record filed in this appeal, the grounds of appeal, and the parties' respective submissions. The court has also considered the relevant legal frameworks and jurisprudence. The appellants itemized five grounds of appeal. They did not, however, frame specific issues that fall for determination in the appeal. Similarly, the respondents did not frame specific issues that fall for determination in the appeal.
23. Taking into account the pleadings in the trial court, the grounds of appeal, and the parties' respective submissions, the following are the three key issues that fall for determination in this first appeal: (i) Who, between the 2nd appellant on one part and the two respondents on the other part, is/are the legitimate owner(s) of land parcel number Karai/Lussigitti/T. 710 [the suit land], (ii) Whether the appellants satisfied the criteria for registration as adverse possessors of land; and (iii) Whether the appellants are trespassers on the suit land. I will analyse the three issues sequentially. Before I do that, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.



24. This is a first appeal. The task of a first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Keshar Shiani* (2013) eKLR as follows:

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”

25. The principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”

26. Who between the 2nd appellant on one part and the two respondents on the other part, is/are the legitimate owner(s) of land parcel number Karai/Lussigitti/T.710? The respondents went to the trial court waving a land registration effected on 11/11/1985. The exhibited extract of the land register shows that the register relating to the suit land was opened on 11/11/1985 in the name of the County Council of Kiambu. On 25/11/1985, the County Council of Kiambu transferred the suit land to Mary Nduta Waihumbu. On the same day, Mary Nduta Waihumbu was issued with a title relating to the suit land. On 22/5/1996, Mary Nduta Waihumbu charged the title to Nderi Farmers’ Co-operative Society to secure a loan of Kshs 28,000. On 13/3/2015, the title was discharged. Mary Nduta Waihumbu held the land for almost 30 years from 1985 to 2015. On 9/4/2015, she transferred the suit land to Nancy Wanja Gitau and Jane Nyambura Ngigi. On the same day, the duo were issued with a title.

27. There was no evidence tendered to suggest that the land register and the titles exhibited by the respondents were fictitious or that the two documents did not exist in the relevant Land Registry. In my view, the above evidence triggered the operation of the legal frameworks in Section 24, 25 and 26 of the [Land Registration Act](#). Put differently, the respondents having demonstrated that they were the registered proprietors of the suit land, it was the duty of the appellants to impeach the successive titles and the successive registrations by satisfying the threshold spelt out under Section 26 of the [Land Registration Act](#). The appellants did not discharge that burden.

28. Besides demonstrating that they were the registered proprietors of the suit land, the respondents led evidence by Mary Nduta Waihumbu who testified that she was allotted the suit land by the County Council of Kiambu in early 1980s, adding that she was issued with a title relating to the suit land in November 1985. She testified that she was in possession of the suit land until March 2015 when she sold and transferred the land to the respondents. She added that the appellants owned and lived on an abutting parcel, Karai/Lussigitti/T.704. She further testified that she used to cultivate the suit land prior to selling it to the respondents.

29. Among the documents the respondents relied on was a letter dated 3/6/2019 from the Kiambu County Deputy Director – Lands Survey & Geoinformatics. The letter was addressed to the respondents’ advocates. The text of the said letter reads as follows:

“RE; Original Allottee Of Land Parcel No. Karai/Lusigetti/T.704 AND T.710

The above subject matter refers



Your letter dated 28th May 2019 on the above subject Ref No. NN/CIV/130/15 is hereby acknowledged.

This office maintains a register of the plot owners and our records indicate that plot No. Karai/Lusigetti/T.704 is registered in the names of Mr. Martin Kio Gitau of Id Card No. 1187031/64 and Plot No. Karai Lusigetti/T.710 is registered in the name of M/s Mary Nduta Waihumbu of Id Card No. 2306768/65 as per our inventory details maintained in this office.”

30. On their part, the appellants contended that the suit land belonged to the 2nd appellant. They relied on a letter dated 20/11/1992 which reads as follows:

“The District Technical Committee has recommended that you be formally allocated with ¼ acre Plot No Karai/Lussigitti/T.710. You will pay Kshs. 1,000 to the Council and Kshs. 500 to the Commissioner of Lands”

31. There was, however, no evidence that the appellants accepted the alleged allotment by paying the requisite Kshs. 1000 to the Council and Kshs 500 to the Commissioner of Lands. Secondly, there was no explanation why the suit land, which was already registered in the name of the Mary Nduta Waihumbu, was being allocated to the 2nd appellant in 1992. Thirdly, the appellants did not address the trial court on the validity of the allocation of 1992 in the face of an existing title in favour of Mary Nduta Waihumba. Fourthly, the 2nd appellant did not lead evidence on why he did not process a title for more than two decades, if indeed he believed that he held a legitimate letter of allotment.
32. Above all, under Section 26 of the *Land Registration Act*, the appellants were required to plead and prove one of the elements that would vitiate a registered title, namely, fraud or misrepresentation or illegality or want of procedure or corrupt scheme. They neither pleaded nor proved any of the above elements.
33. It does emerge from the original record of the trial court that, upon joining the case as a party to the case, the 2nd appellant did not bother to initiate amendments to the existing pleadings to plead his claim. He did not bother to join Mary Nduta Waihumbu and the County Government of Kiambu as defendants in the counterclaim. Put differently, the 2nd appellant did not appreciate the importance of pleadings in a dispute of this nature.
34. The Supreme Court of Kenya emphasized the centrality of pleadings in *Raila Amollo Odinga & another Vs IEBC & 2 others (2017) eKLR* as follows:

In the absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party.

35. Last on the first issue, there is common ground that the suit land is a subdivision within a scheme that belonged to the County Council of Kiambu. The County Council of Kiambu was the allocating authority. The Council was succeeded by the County Government of Kiambu at the advent of devolution. The exhibited land register reveals that the land was surveyed and first registered in the name of the Council. The register indicates that the Council subsequently transferred the land



to Mary Nduta Waihumbu. If the appellants had genuine doubts about the authenticity of the successive registrations and titles, the starting point would have been to seek clarification from the County Government of Kiambu. If dissatisfied with the response of the County Government, the appellant would be entitled to sue the County Government alongside the original allottee and all the successive registered proprietors. From the record, there is no evidence to suggest that the appellants sought any clarification from the County Government. In their counterclaim, they left out the County Government and Mary Nduta Waihumbu. I do not think they could impeach the successive registrations and titles in the absence of the two previous registered proprietors.

36. The totality of the above evidence is that, whereas the respondents proved that they purchased the suit land from a registered proprietor and they were the current registered proprietors of the suit land, the appellants did not bother to put in place pleadings and evidence that would impeach the successive registrations and the successive titles. The result is that, on a balance of probabilities, the respondents proved ownership of the suit land while the appellants failed to prove the 2nd appellant's claim of ownership of the suit land.
37. Did the appellants meet the criteria for registration as adverse possessors of land? I have made observations on the appellant's pleadings in the trial court. Both in the trial court and in this court, counsel for the appellants focused on adverse possession and contended that the appellants had acquired title to the suit land through adverse possession. Counsel emphasized in his submissions that the appellants pleaded adverse possession in the counterclaim. I have perused both parties' respective pleadings. The defence and counterclaim dated 16/3/2018 which the appellants relied on during trial, did not make a claim of adverse possession. Similarly, it did not plead limitation under the *Limitation of Actions Act*. It did not contain a prayer for an order of adverse possession. The focus on adverse possession was introduced during submissions in the trial court and it was pursued in this court through submissions.
38. The purpose of pleadings is to inform the opponent the claim that he is required to respond to and the evidence that he is expected to tender in answer to the claim during trial. Having failed to plead adverse possession and tender evidence on it, the appellants have no basis to fault the trial court on this issue. The contention that the trial court erred or misdirected itself in failing to find that the appellants had proved adverse possession cannot hold because the appellants did not plead adverse possession.
39. Even if the court were to imply a plea of adverse possession in the appellant's pleadings dated 16/3/2018, I do not think the appellants tendered evidence establishing the essential elements of adverse possession. There was common ground that land parcel number Karai/Lussigitti/T.704 is owned by the 2nd appellant and abuts the suit land. Asked a question on when the makeshift structures exhibited as evidence of occupation of the suit land by the appellants were built, the response of the appellants was that the makeshift structures were erected by persons other than themselves. The appellants did not lead evidence on when those other persons erected the structures. They did not lead evidence on when the alleged trees were planted on the suit land. Through counsel, they have argued before this court that "the trees could not have been planted in 2015". The burden to establish the essential elements of adverse possession is on the party alleging adverse possession. It was therefore the duty of the appellants to lead evidence on when the alleged trees were planted as opposed to inviting the court to rely on conjectures such as - "the trees could not have been planted in 2015"
40. In a claim of adverse possession, evidence relating to the precise time when specific developments that manifest adverse possession are put in place is critical. If it is trees that have been planted on land as a manifestation of adverse possession, the claimant has an obligation to lead evidence on the precise date when the trees were planted. If it is a house that was built on the land as a manifestation of adverse



possession, the claimant must lead evidence on the precise date when the house was built and when it was occupied. The above important evidence was not tendered.

41. For the above reasons, it is the finding of the court that the appellants neither pleaded nor proved adverse possession.
42. Are the appellants trespassers on land parcel number Karai/Lussigitti/T.710? In light of the court's findings on the first and second issues, it follows that the respondents are the lawful owners of the suit land. It also follows that presence of the appellants on the suit land is trespass. That is the finding of the court on the last issue.
43. On costs, no special circumstances have been demonstrated to warrant a departure from the general principle in Section 27 of the *Civil Procedure Act* that costs follow the event. Consequently, the appellants will bear costs of this appeal.
44. For the above reasons, this appeal lacks merit. The appeal is rejected and dismissed. The appellants shall bear costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 2ND DAY OF APRIL 2025

B M EBOSO [MR]

JUDGE

In the Presence of:

Mr. E N Mugu for the Appellants

Mr. Ngigi for the Respondent

Mr Tupet – Court Assistant

