



**Kirima & another v M’ikiugu (Administrator of M’ikiugu Mburugu)
- Deceased & another (Environment & Land Case 29 of 2008)
[2022] KEELC 13472 (KLR) (12 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13472 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 29 OF 2008**

CK NZILI, J

OCTOBER 12, 2022

BETWEEN

VINCENT MBICHI KIRIMA 1ST PLAINTIFF

GEORGE KIMATHI 2ND PLAINTIFF

AND

**NGOJI M’IKIUGU (ADMINISTRATOR OF M’IKIUGU MBURUGU) -
DECEASED 1ST DEFENDANT**

JAMES NKONGE 2ND DEFENDANT

JUDGMENT

A. Pleadings

1. The plaintiff took out an amended originating summons dated September 16, 2017 seeking the court to declare that they are entitled to an adverse possession over three acres (hereinafter the suit land) out of LR No Abogeta/U-Kiringa/158 registered in the name of the defendant; an order that 1st defendant’s late father held the land in trust for them before he alienated the suit land to the 2nd defendant; declaration that the alleged alienation to the 2nd defendant was irregular void and of no consequence and lastly an order that the defendants do execute a transfer of the suit land in their favour in default the executive officer of the court to effect the transfers.
2. The amended originating summons was supported by an affidavit sworn on September 16, 2017, copy of the records, witness statement dated June 12, 2012 and a paginated bundle of record dated April 3, 2018.



3. The 1st defendant filed a replying and further affidavit sworn on April 9, 2008 and October 30, 2017, list of witness statements dated May 29, 2015 whereas the 2nd defendant filed a replying affidavit and a witness statement dated February 19, 2018.
4. The defendants denied the alleged long occupation of the suit land by the plaintiffs as well as the alleged trust. They averred that the plaintiffs land was LR No Abogeta/U-Kiringa/203 bordering the suit land whose boundary the plaintiffs allegedly destroyed leading to a Land Dispute Tribunal case. Further, the 1st defendant stated that he acquired the land through transmission following a succession case after his father passed on in 1960. He disputed the alleged developments on the land by the plaintiffs since he had all along resisted such interference of the land till intervention by the police, area chief and the land surveyor.
5. The 2nd defendant's defence was that he became the registered owner on July 24, 2013 after purchasing the suit land starting from 2008 after due diligence hence he was an innocent purchaser for value. He averred that he bought the suit land while living in the USA and upon visiting the suit land in 2013, the plaintiff became hostile and stopped attempts to mark the boundary by a land surveyor.
6. The 2nd defendant averred that at the time he bought the suit land there were no buildings, structures or occupation on the land by the plaintiffs as alleged or at all.

B. Testimony

7. The 1st plaintiff adopted his witness statement dated June 12, 2012, produced a copy of green card showing the suit land was initially registered in the name of Ikinga Mburugu and later transferred to Robert Ngoji M'Ikiugu and subsequently to James Nkonge. PW1 stated that he had lived on the suit land where his late father was also buried. PW 1 went on to say that after his father passed on in 2007 the 1st defendant came to the suit land with the area sub chief to subdivide the land which they objected to. He admitted that LR No 203 bordered LR No158 belonging to his late father but was certain that his developments and the graveyard of his late father was in LR No 158 but not LR No 203 even though there was no clear boundary between the two parcels.
8. Further PW1 admitted there was a tribunal case prior to this suit but denied that any land surveyor had come to establish the boundary between the two parcels.
9. As regards letters of administration, PW1 denied that he had taken out such grant over the estate of his late father nor had he faked an objection regarding the estate of the late Ikiugu Mburugu.
10. PW 1 admitted that they chased away the land surveyor who had attempted to subdivide the land accompanied by the area sub chief. PW 1 further said his brother lived LR No 203 but his house and family lived on LR No 158 for close to 44 years.
11. PW 2 adopted his witness statement dated June 12, 2012 and said his house and farm was on LR No 158. He denied the alleged boundary dispute between LR No's 158 and 203 though he could not tell the acreage of the latter. He also denied that his late father had cut down some trees and summoned at the chief's office. PW 2 said he was born and brought up in LR No 158 over 42 years ago, where his late father was also buried. He confirmed that his mother was still alive. He admitted he had not produced any photographs for the alleged developments or the survey maps. Further, PW 2 said LR No 158 was approximately 3 acres but could not tell the approximate acreage he was occupying or the one under use by his brother.



12. PW 3 a neighbor of the plaintiffs adopted his witness statement dated June 12, 2012 and confirmed that the plaintiffs had been on the disputed land for twenty years with a permanent homestead, had a farm and their late father was also buried therein.
13. PW3 confirmed that the plaintiff's late father had al some land in the vicinity whose number he could not tell but was certain it was not the same land they were occupying and made several developments therein. He however clarified that the plaintiffs' mother was alive and utilizing her late husband's land neighbouring the one under dispute.
14. PW 4 told the court that the plaintiffs lived on the land belonging to Kirima Migwi but denied that defendants were her neighbours. She could not however tell the parcel no.
15. PW 5 the mother of the plaintiffs told the court her children were born in her homestead since 1951. She denied that the defendants were her neighbours. She could not however tell if her late husband had a tittle deed to their land but was certain that a boundary was shown to them during the Adjudication process where she erected beacons. PW 5 was emphatic that she could not recall the parcel no. she lived in.
16. DW 1 adopted his replying affidavit sworn on April 1, 2008, a witness statement dated May 29, 2015 and a further statement at pages 22 and 34 of the paginated bundle as his evidence in chief.
17. As a legal administrator of the estate of his late father, he said he became a registered owner LR No 158 which was on a different locality from where he lived. Further, DW 1 said the plaintiffs trespassed into their land, erected buildings therein after tampering with the then existing boundary hence the reason he went with a land surveyor to fix it after his plaintiff's father passed on. He said it was his uncle who had been using the suit land though he had not planted coffee trees or made any developments therein from the time their father passed on in 1960.
18. DW 1 said he sold the suit land to the 2nd defendant before he disclosed to him that there were people living on the land since there was no pending case at the time the sale agreement was made on May 4, 2007. DW1 insisted the suit land had only traditional trees: that a boundary dispute arose in 2006 but was certain that at the time he filed succession proceedings, the plaintiffs were living on their own parcel of land.
19. DW 2 adopted his witness statement dated May 29, 2015. As a neighbor of the plaintiffs, he denied that the plaintiffs had erected any buildings or undertook any farming activities on LR No 158 since they were all born and brought up in their late father's parcel of land. He was emphatic that LR No 158 was being taken care of by his father and lacked any coffee or banana plants nor did it have any barbed wire fence as alleged or at all. DW2 confirmed that he had made a report at the assistant chief and chief's office in 2006 after the plaintiffs allegedly removed the fence. However, he said that when the land surveyor attempted to restore the boundary, the plaintiffs chased them away. DW2 admitted being present when the land was sold which the plaintiffs knew about. He said a dispute arose when the purchaser was being handed over vacant possession and during the fixing of the boundary.
20. DW2 denied that there were any houses belonging to the plaintiffs on the suit land except a semi structure belonging to the plaintiff's mother at the edge of the suit land.
21. He maintained the land had only traditional trees and a water spring under use by members of public.
22. DW 3 adopted his witness statement dated May 29, 2015 as his evidence in chief and confirmed the suit land had no coffee, banana plants or buildings thereon. In his view the land was under the care and lease by one Mwirichia and not the plaintiffs. He said his work as a caretaker was to ensure that no intruder used the land since it was registered in the name of M'Ikiugu Mburunga. He said the boundary to the



- suit land was destroyed by the plaintiffs hence the reason a land surveyor was brought up to fix it but was denied entry by the plaintiffs.
23. DW3 denied that the sale was made in haste to defeat the interest of the plaintiffs. Further, DW 3 said efforts by the purchaser to take vacant possession were thwarted by the plaintiff. DW 3 said the semi-permanent structure at the edge was erected between 2006-2007 but the rest of the boundary on the other sides was known.
 24. DW 4 adopted his affidavit and witness statement dated February 19, 1998 as his evidence in chief and produced a copy of the title deed for LR No Abogeta/U-Kiringa /158 as D exh (1), a search certificate as D exh (2), land control board application form as D exh (3), transfer form as D exh (4), official search for LR No Abogeta/U-Kiringa/203 as D exh (5) and a map for the area as D exh No (6). He said he came to know the plaintiffs after he was served with summons to enter appearance. He also said he visited the suit land in 2013 which had no farming activities or buildings on it except natural vegetation. He testified that he sent his brother to look for some land to buy which he identified and bought but has not been able to utilize it since 2013 after he was told there was a boundary dispute before court.
 25. DW 5 said he did not know the history of the suit land before he bought it and solely relied on what his brother told him that it was vacant.
 26. DW 5 testified that the plaintiffs were not utilizing the land as alleged otherwise he would have noticed such developments at the time he visited and purchased the land. DW 5 clarified that the started purchasing the land in 2008 but cleared the purchase price in 2013.
 27. DW 6 adopted his witness statement dated February 19, 2018 and admitted he witnessed the sale agreement together with M Mwirichia Mageria. He confirmed that there were no coffee, banana plants and structures on the land which was barren at the time since the plaintiffs land was elsewhere.
 28. DW 6 clarified that the seller took them through the boundaries of the land save that the middle one between LR No's 203 and 158 was not clear hence the reason they agreed a land surveyor would visit the land and identify the beacons. He was emphatic that at the time of the sale, no one was utilizing the land and that if there were any recent developments thereon he would have noted the since he occasionally passed by before and after the sale.
 29. Further, DW (6) said that when they went to the suit land with the land surveyor to fix the boundary, the plaintiffs denied them entry yet there was no pending suit or dispute at the time.
 30. The plaintiffs have submitted their five witnesses and particularly PW 5 confirmed entry into the suit land in 1951 together with her deceased husband following which they have possessed, occupied and developed the land in open, continuous, uninterrupted and notorious manner. This was also confirmed by PW 4 who is a neighbor.
 31. Reliance was placed on *Wilson K Chepyegon vs Kimosop Chepyegon (2012) eKLR*, *Celina Muthoni Kithinji vs Safiya Binti Swaleh & 8 others (2018) eKLR*, *Mtana Lewa vs Kabidi Ngala Mwangandi (2005) eKLR*.

C. Written Submissions

32. The 1st defendant submitted that the plaintiffs admitted that their deceased father was the registered owner of LR No 203 bordering the suit land. However, the plaintiffs were unable to produce any evidence on occupation, utilization or developments on LR No 158, if at all they were on the suit land, including the interment of the late father in 2007.



33. The 1st defendant submitted that PW 1 admitted the existence of a land tribunal case prior to the filing of this suit and that after the cutting of trees on the suit land a complaint lodged with the District officer.
34. Similarly, the 1st defendant submitted that PW 1 admitted the existence of a boundary dispute between the two parcels which attempts to fix or settle by the chief and the land surveyor were thwarted by the plaintiffs.
35. As regards the alleged developments on the suit land by the PW 2, the 1st defendant submitted it remained mere statements for lack of photographs or other expert evidence by way of a land surveyor's report to ascertain the extent of entry and the alleged developments on the suit land.
36. The 1st defendant submitted that PW 1 and PW 2 contradicted each other as to the existence of a boundary dispute, the extent of occupation of each of them on the suit land vis a vis that of PW 3 on where exactly the homestead of their deceased father was, and the graveyard.
37. Further, the 1st defendant submitted that PW 4 was clear that the plaintiffs and their mother lived on LR No 203 which facts were confirmed by PW 5, who said she was the one who marked the boundary of her husband's land.
38. In addition, the 1st defendant submitted that one could not possibly mark land which was not hers during the demarcation stage and the land she put a demarcation mark on, could only be where she lived with her late husband and settled her children - the plaintiffs - since acquisition namely LR No 203.
39. It was submitted that all the plaintiffs' witnesses identified the suit land LR No 158 but were unable in cross examination to state which parcel of land they occupied as between the two parcels.
40. The 1st defendant submitted that his evidence unlike that of the plaintiffs was consistent as to ownership of the land and which was clarified by PW 3, 4 & 5 that his land had no developments which facts were not challenged at all including the destruction and the attempts to fix the boundary between the two parcels of land.
41. Reliance was placed on *David Munene Wamwati & 4 others vs Registered Trustees of Anglican Church of Kenya & another Nyeri Court of Appeal Civil Appeal No 36 of 2015* and [*Joseph Kithinji M'Eringo & another vs Christine N Mbiti Nairobi Court of Appeal Civil Appeal No 83 of 2016*](#) on the salient features of adverse possession which the plaintiffs had failed to establish.
42. The 2nd defendant has submitted that the key elements of adverse possession as set out in *Gabriel Mbui vs Mukindia Maranya (1993) eKLR* have not been met given a consistent thread in the testimony was that there has been a long running dispute over the boundary on one side.
43. The 2nd defendant further submitted that, the burden of proof under Section 107 of the *Evidence Act* was on the plaintiffs to prove the developments on the land through oral and documentary evidence, in absence of which the claim ought to fail as regards dispossession, discontinuance and adverse works to those of the registered owner.
44. The 2nd defendant submitted his brother undertook due diligence before the sale, found no occupants on the land and therefore was an innocent purchaser for value whose rights were protected under section 27 & 28 of the Land Registration.



45. Further, it was submitted that the fact that the plaintiffs were claiming the sale and the transfer to the 2nd defendant was illegal means that they never used the land since the purchase was done in 2007 whilst the claim was filed in March 2008 a period of over 10 months.
46. Lastly, it was submitted that given the evidence of PW 5 on the common boundary, it was apparent the plaintiffs never utilized the portion as alleged and that under Sections 18-20 of the [Land Registration Act](#), the jurisdictions to determine boundaries rested with the Land Registrar.

D. Issues for Determination

47. Upon reading the pleadings, list of exhibits, submissions by the parties, the issues that arise for determination are as follows: -
 - i. If the plaintiffs have pleaded and proved the ingredients of adverse possession.
 - ii. If the sale and transfer of the suit land to the 2nd defendant was subject to the rights of the plaintiffs on issue (1) above.
 - iii. If the 2nd defendant was an innocent purchaser for value.
 - iv. If the plaintiffs are entitled to the prayers sought.
 - v. If the plaintiffs have proved customary trust.

E. Determination

48. The Court of Appeal in *David Munene Wamwati & 4 others & 4 others vs Registered Trustees of the Anglican Church of Kenya & another* (Nyeri Civil Appeal NO 36 of 2016 (unreported), captured and exposed the morality and justice of adverse possession as the law that permits a trespasser to morph, by mere advance of time, into the owner of the land he entered into, without permission of the owner and at absolutely no consideration, thereby defeating an owner, a registered one at that, who in all likelihood invested funds on the purchase of the land.
49. In *Mate Gitabi vs Jane Kaburu Muga & others* (2015) eKLR & *Mtana Lewa vs Ngala Mwangandi* (2015) eKLR, the court held that a party seeking adverse possession must prove and demonstrate open occupation, without secrecy, without force and without licence or permission of the land owner with the intention to have the land and with an apparent dispossession of the land from the land owners.
50. The court went on to state acts inimical to and in total repudiation of the owner's rights must be demonstrated and the quite obvious ones include entry, occupation, fencing, putting up of structures, non-interruptions, testimonies of dispossession, exhibited photos, hostile take over, failure to take any action to rebuff and or repulse such acts for so long a period of time.
51. In *Joseph Kithinji M'Eringo* (supra), the court cited with approval [Halsbury's Laws of English 3rd Edition Vol 24 page 252](#) that fencing off was the best evidence of possession of surface land but the cultivation of the surface without fencing off was equally sufficient to prove possession.
52. The court held that the rights of an adverse possessor were equitable rights binding on the land and therefore for a party purchasing the land with the presence of an adverse possessor, the land was already burdened with such presence, who the seller should have evicted before 12 years elapsed.
53. Applying the foregoing binding decisions, the plaintiffs by an amended originating summons dated September 16, 2017 pleaded they had been in occupation of three acres out of LR No Abogeta/U-Kiringa/158 since birth, up to adulthood and that in the alternative that the 1st defendant's deceased



- father held the three acres of the suit land in trust for them hence the alienation thereof to the 2nd defendant was illegal and inconsequential.
54. It is trite law that a party seeking adverse possession must establish the date of the entry into the subject land in order for time to start running. See *Wilson Chepyegon (supra)*.
 55. Other than stating that the plaintiffs have been in possession since birth and all their adulthood, the plaintiffs did not plead when they were born and or their exact age at the time they filed the suit. None of the plaintiffs produced their identity cards or specified when they were born. This was important since at birth they had no legal capacity to found a claim on adverse possession and would definitely have been occupying or living at their parents homestead .
 56. At the same time, it was important to state when they acquired the age of majority, moved into the suit land, for the computation of time to start.
 57. The defendants have pleaded that they the reported the deceased to the area chief and the District Officer regarding the cutting of trees as well as the interference with the boundary.
 58. In *Joseph Gachima Kiritu vs Lawrence Munyambu Kabura (1996) eKLR*, the Court of Appeal held that time which began to run under the Act was stopped either when the owner asserted his rights or when his right was admitted by the adverse possessor.
 59. The court went on to state that assertion of rights occurred when the owner took legal proceedings or made an effective entry into the land and that the old rule was that a mere formal entry was sufficient to vest possession in the true owner and to prevent time from running. See *Public Trustee vs Wanduru Ndegwa (1984) eKLR*, *Daniel Kimani Ruchine & others vs Swift Rutherford Co Ltd & another (1977) eKLR*.
 60. The plaintiffs in their testimony admitted the existence of the land tribunal case as well as the boundary dispute prior to the filing of this suit. The two acts were clear manifestations of assertion of ownership rights by the registered owner. See *Kuria Kiarie & 2 others vs Sammy Magera (2018) eKLR*.
 61. Coming to the other ingredients of adverse possession, the plaintiffs admitted that LR No 158 borders their deceased father's LR No 203. The plaintiffs failed to produce any survey maps and Land Registrar's reports showing the clear boundary between the two parcels of land and more so, the exact locality of their houses and developments in the two parcels of land. The identification of land in possession is an important and an integral part of the process of proving adverse possession. See *Githu vs Ndete (1984) KLR 776* *Wilson Kazungu Katana & 101 others vs Salim Abdalla Bakshwein & another (2015) eKLR*.
 62. PW 4 & PW 5 were emphatic that the plaintiffs were the children of the deceased whose land LR No 203 was a distance land from LR No 158.
 63. The plaintiffs were not very clear on the exact locality of their homestead's vis a vis the suit land. PW 5 said the plaintiffs were born and brought up in the land belonging to her deceased husband. The 2nd defendant produced a search, copy of a title deed and a map which clearly indicates the two parcels of land are distinct and with a clear boundary, which the plaintiffs allegedly destroyed and needed to be re-fixed by the land survey. Unfortunately, the plaintiffs were the ones who refused to let the boundary be re-fixed.
 64. The plaintiffs admitted in their testimony that indeed the defendants came with the area chief and the land surveyor to re-establish the boundary. The very fact that the defendants wanted to re-establish the boundary means that they made a peaceful entry into their land, were asserting their rights. More



- importantly the failure by the plaintiffs to allow the land surveyor to establish the extent of the trespass, if any and the manner of occupation weakened the plaintiffs claim on adverse possession.
65. Incidentally the plaintiffs failed to back up their claim with any photographic evidence or documentary evidence to help the court answer Questions No (vii) in the amended originating summons that their homes, coffee plantations, indigenous mature trees, banana plantation and cattle shed fell under LR No 158 and not on LR No 203 as per the defendants' pleadings and testimony before this court.
 66. In my considered view it was not enough to assert the plaintiffs were in occupation and possession of suit land in an adverse manner without clarifying the nature, extent and character thereof.
 67. In *Wilson Njoroge (supra)*, the court held that a party should demonstrate animus possidendi in developing the suit land by either planting, tending tea bushes and growing crops as though it was of right, without any interruptions, with the knowledge of the registered owner and without his challenge to possession.
 68. The onus was on the plaintiffs to prove all the above facts since whether possession is adverse or not is a matter of legal conclusion to be drawn from the findings of facts as held in *Kweyu vs Omuto Court of Appeal Civil Appeal No 8 of 1990*.
 69. The plaintiffs were unable to state with exactitude how much of LR No 158 was under their occupation and which the defendants have neglected or omitted to act against them for a period of 12 years. It was not enough to state three acres without a scientific report to that effect See *Mtana Lewa (supra)*.
 70. The fact that the defendants took action to assert, report and seek the re-establishment of the boundary between the two parcels of land means there was no peaceful occupation or hostile take over with neglect by the registered owner(s).
 71. The plaintiffs pleaded the concept of trust in the alternative to adverse possession. The nature of trust was not specified or proved. In *Alice Wairimu Macharia vs Kirigo Philip Macharia (2019) eKLR* the court held that a trust can never be implied by the court unless there was an intention to create one in the first instance. In *Peter Ndungu Njenga vs Sophia Watiri Ndungu (2000) ekLR* the court held it was only in absolute necessity cases that a court may presume trust so as to give effect to the intention of the parties.
 72. The onus to establish a trust was with the party relying on the existence of a trust to prove it through evidence as held in *Juletabi Africa Adventure Ltd & another vs Christopher Michael Lockley (2017) eKLR*.
 73. The nature of the trust and how it is applicable in this suit was never brought up through evidence by the plaintiffs and to the required standard as held in *Isack Kiebia M'Inanga vs Isaaya Theuri M'Lintari & another (2015) eKLR*. It was therefore not enough for the plaintiffs to plead trust but fail to tender evidence in its support.
 74. As regards the 2nd defendant, whereas the transmission of land and the subsequent transfer to a third party does not defeat the equitable rights of an adverse possessor as held in *Mwangi & another vs Mwangi (1986) KLR 328*, the 2nd defendant testified that he undertook due diligence before the transaction and found no semblance of occupation or possession by the plaintiffs in the manner and nature as pleaded in the amended originating summons.
 75. The plaintiffs have been unable to shake the evidence by the defendants that there have been no developments on LR No 158, and if any, the same falls under their late father's LR No 203.



76. The onus was on the plaintiffs under Section 107 of the *Evidence Act* to prove all the elements of adverse possession and more importantly prove the irregularities, illegalities and voidability of the land transfer between the 1st and 2nd defendants.
77. The 2nd defendant pleaded and testified that he was a bonafide purchase for value without notice with rights protected under Sections 25 & 26 of the *Land Registration Act*.
78. DW4 produced D exh 1 - 6 in support of his defence. The plaintiffs have submitted that the transfer occurred during the pendency of this suit so as to defeat their claim.
79. In *Lawrence P Mukiri Mungai Attorney Francis Muroki Mwaura vs AG & 4 others (2017) eKLR* the conduct of the party who had deliberately failed to enter into a sale agreement and pay stamp duty for the transfer or keep a copy of the transfer form raised more questions than answers and portrayed him as negligent in business transactions incapable of being described as a bonafide purchase.
80. In this suit, the onus was on the plaintiffs to plead and prove the illegalities and irregularities in the manner the 2nd defendant obtained the title deed.
81. The 2nd defendant has proved a title deed for the land he purchased was procedurally obtained, in good faith, with no knowledge of occupation by anyone after he undertook due diligence and for some consideration. There was evidence tendered that the 2nd defendant was party to any proved illegality or irregularity. I find his defence bonafide as held in *Katende vs Harindar & Co Ltd (2008) 2 EA 173*.
82. For the foregoing reasons I find that the plaintiffs have failed to prove their claim to the required standards. The same is dismissed with costs to the defendant.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 12TH DAY OF OCTOBER, 2022

In presence of:

Gikunda Anampiu for plaintiffs

Karanja for 2nd defendant

Atieno for 1st defendant

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE

