



REPUBLIC OF KENYA



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**Gichuhi v Ndungu (Environment & Land Case 18 of 2021)  
[2022] KEELC 13417 (KLR) (6 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13417 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 18 OF 2021**

**JG KEMEI, J**

**OCTOBER 6, 2022**

**BETWEEN**

**SAMUEL GITHAKA GICHUHI ..... PLAINTIFF**

**AND**

**LUCY WANJIKU NDUNGU ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff moved the court vide the originating summons dated the April 27, 2021 seeking orders that;
  - a. A declaration that the plaintiff has been in possession of delineated 0.5 acre of land parcel No Kakuzi/kirimiri/block9/1165 since 1994, a period of over 12 years uninterrupted by defendant amounts to adverse possession of the suit premises.
  - b. A declaration that the plaintiff has acquired registrable interest of delineated 0.5 acre in land parcel No Kakuzi/kirimiri/block9/1165 by way of adverse possession.
  - c. Upon ascertaining prayers (a) and (b) above this honourable court be pleased to declare that the defendant's interest or anybody claiming under him to delineated 0.5 acre of land parcel Kakuzi/kirimiri/block9/1165 has become extinguished by operation of the law and that the plaintiff herein has become entitled to the said whole parcel of land through adverse possession.
  - d. The court be pleased to order that 0.5 acre delineated from land parcel Kakuzi/kirimiri/block9/1165 be registered in the name of Samuel Githaka Gichuhi.
  - e. The defendants do execute all the necessary documents to effectuate the transfer of 0.5 acres delineated from land parcel No Kakuzi/kirimiri/block9/1165 to the plaintiff and in default the deputy registrar of this honourable court be empowered to do so.
  - f. The costs hereof be paid by the respondent.



2. It was the plaintiff's case that he has been in open peaceful uninterrupted and exclusive occupation of a portion of 0.5 acres of parcel No Kakuzi/Kirimiri/Block 9/1165 (suit land) therefore has become entitled to the land through adverse possession.
3. The defendant denied the plaintiff's case and through a replying affidavit deponed on the November 8, 2021. She averred that she is the registered owner parcel Kakuzi/Kirimiri/Block 9/4363 which is the resultant subdivision of the original parcel No 1165, which was registered in the name of her deceased husband, namely, Nganga Thiongo.

#### **The evidence of the parties.**

4. At the hearing the plaintiff testified solely in support of his case. He relied on his supporting affidavit dated the April 27, 2021 where he stated that he initially purchased one acre from Nganga Thiongo vide an agreement of sale dated the June 23, 1994 and paid the full purchase price. Later it was agreed that the plaintiff surrenders 0.5 acre to Nganga and he retains 0.5 acres subject to an equivalent amount of the purchase price being refunded to the plaintiff by Nganga. That the refund was to be made by Nganga Thiongo's brother and the defendant. He stated that upon completion of the sale, he took possession of the land, carried out fruit farming, constructed a family home and has occupied the suit land with his family since 1994 to date. That the defendant lives on her 0.5 acres, the portion that he surrendered to Nganga with a fence separating them.
5. He testified that in 2011 he filed suit at the land dispute tribunal against the defendant claiming 0.5 acres of the land. The panel of elders determined the dispute and ordered that he is entitled to 0.5 acres. The parties were ordered to petition for succession of the estate of Nganga Thiongo so that his entitlement could be given to him.
6. The defendant testified and relied on her replying affidavit dated the November 8, 2021 as well as her witness statement of even date. She testified that she is the registered owner of the land having succeeded her late husband Nganga Thiongo who was the registered owner of parcel 1165. That upon acquiring title she subdivided the land into two portions to wit; parcels Nos 4363 and 4364. That she sold parcel 4364 and remained with parcel 4363 which she holds in trust for herself and her children.
7. In her further testimony she refuted the Plaintiffs claim that her husband sold land to the Plaintiff and that the Plaintiff has trespassed onto the land, an act which she has not tolerated or condoned given that there has been constant disputes over the possession of the land. She accused the Plaintiff of using force and intimidation to sustain his occupation on the land. She described the Plaintiffs entry into the land as forceful and intended to disinherit her large family of the suit land.
8. She conceded that the Plaintiff has not built on her portion of the land but on the portion between her parcel and Fredrick Mburu, a neighbour. That he has buried two children on the suit land. That in 2011 a dispute was filed at the LDT where the panel of elders directed them to petition for succession in the estate of Nganga Thiongo so that the one acre could be shared between the Plaintiff and herself. She informed the Court that the Plaintiff refused to give her money to commence the succession process and for that reason she declined to include him in the succession cause. She proceeded and obtained a grant for the whole one acre of land in her name.
9. As to whether the Plaintiff has acquired the suit through adverse possession, counsel for the Plaintiff relied on the case of *Peter Mbiru Michuki –Vs- Samuel Mugo Michuki (2014) eKLR* on the proposition that since 1994 the Plaintiff has been utilising and occupying 0.5 acres of the suit land openly exclusively and without force or secrecy and the Defendant has not taken any steps to interrupt possession either through physical eviction or filing suit for eviction. Counsel cited the case of *Mwangi*



*Gitbu –Vs- Livingstone Ndeete (1980) eKLR* which stated that time ceases to run under the *Limitation of Actions Act* either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. That the Land Dispute Tribunal was filed by the Plaintiff and no suit was filed by the Defendant to assert title. That the Plaintiff has never been evicted from the land since 1994 even though the Defendant was aware of the Plaintiff's occupation throughout the period and she never asserted title to the land.

10. The Defendant on the other hand submitted and gave the background of the case and stated that the suit land was originally registered in the name of Nganga Thiongo her husband and upon his demise she acquired it through transmission whereupon she subdivided it into two portions and sold one and retained the current parcel 4363. That the Plaintiff entered the suit land without her consent and or authorization.
11. As to whether the Defendant's title has been extinguished by way of adverse possession, she cited the case of *William Kipnyor Rotich Vs Paul Kiprof Karoney (2020) KLR* where the Court stated;

' Be as it may the claim of adverse possession is a doctrine of law that dispossesses a legal owner of land by operation of law. It is therefore a doctrine that has stringent ingredients which must be proved for a party to dispossess another of their rightly acquired land.'
12. It was her submission that the Plaintiff has not laid any evidence before the Court to prove his claim that he has been in occupation of the suit land since 1994 yet he has made allegations that he has been in peaceful open and continuous possession of the land. That neither has he called witnesses to corroborate his claim nor provide evidence of economic utilisation of the land. In support of her arguments she relied on the case of *Joseph Macharia Kairu and Kenneth Kimani Muiruri (2021) eKLR* which quoted the case of *Gabriel Mbui Vs Mukindia Maranya (1993) eKLR* where the Court held as follows;

' The adverse possession character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for 12 years or more. In addition, there must be facts showing a clear intention to hold adversely and under a claim of right. Defacto use and defacto occupation must be shown.'
13. In addition, she added that she and her husband allowed the Plaintiff to take 0.5 acres of the suit property after the agreement of June 23, 1994 failed to materialise, however Land Control Board consent was not obtained as her husband died one year later. Relying on Section 6(1) and 8(1) of the *Land Control Act* she argued that the failure to obtain consent voided the contract of the parties and as such the same cannot be relied on to obtain title under adverse possession.
14. On possession, the Defendant submitted that the Plaintiff's occupation of the land was interrupted in 2011 by the dispute in the Tribunal. In addition, she argued that there were two other suits that interrupted time from running that is to say Criminal Case No 426 of 2017 - Kandara and CMCC Case No 355 of 2017 at Murang'a. It was her further submission that from 2011 when the case at the LDT was determined to the year 2021 when the Plaintiff filed suit, time has not matured to found a claim for adverse possession.
15. Having read and considered the pleadings, the witness statements, evidence tendered at the hearing, and the authorities cited by the parties, the issues for determination in my considered view are;
  - a. Whether the Plaintiff is entitled to the orders sought



- b. Who meets the costs of the suit?
16. The background of the case is that sometime in 1990s the Government decided to settle some of the people who were squatting at Kakuzi Company land. The squatters were required to pay Kshs 15,000/- each for the land. Some of the squatters were settled at Kirimiri area. Nganga Thiongo and Fredrick Mburu agreed to purchase the land and thereafter share it equally. It fell on Mburu to pay and recover the money from Nganga later. However, Nganga was unable to pay his share of the purchase price. By then Nganga had sold the land to the Plaintiff in 1994 in anticipation of receiving 1.9 acres as his share. As it would turn out he only got one acre. Seeing that it was the only land he had the Plaintiff was prevailed upon to release/surrender 0.5 acres to Nganga and his family subject to commensurate refunds. The Plaintiff claims that he obliged, took possession of 0.5 acres and settled his family on it. Nganga passed away in 1995.
17. Upon his demise his wife the Defendant obtained letters of grant of administration and the whole land measuring one acre was transmitted to her in 2017 upon succession of the estate of her husband Nganga Thiongo.
18. The Plaintiff claims title by way of adverse possession on the ground that he has occupied the land peacefully openly and exclusively for the statutory period of 12 years.
19. The Defendant on the other hand denies the Plaintiff's claim on the grounds that title by adverse possession has not been proven; adverse was interrupted by the dispute at the Land Dispute Tribunal as well by two other cases filed in Murang'a and Kandara with respect to the suit land. Interalia, that even if time was to be calculated it would only be from 2011 after the Land Dispute Tribunal suit, and fore which time has not matured to found a claim for adverse possession.
20. What is adverse possession? Simply put it is a legal doctrine that states that a person can acquire legal ownership of someone else's property. In order to do so, they need to acquire possession or reside on that property for a period of 12 years. The doctrine is not new. In the case of *Bejoy Chundra Vs Kally Prosonno (1878) 4 Cal 1327* the late Mr Justice Markby, as he then was, defined adverse possession as follows;
- ' By adverse possession I understand to be meant possession by a person holding the land on his own behalf (or on behalf) of some person other than the true owner, the true owner having a right to immediate possession.'
21. The doctrine of adverse possession is one of the ways in which one may acquire land in Kenya. In the main the legal provisions underpinning the doctrine of adverse possession are found in The Limitations of Actions Act and in specific Sections 7, 13, 18 and 38 of the said Act.
22. To be successful in a claim for adverse possession one must proof that he has been in exclusive possession of the land openly and as of right and without any interruption for a period of 12 years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition. Further the claimant must show that he is using the land as of right and that he has the necessary animus possidendi to use the land to the exclusion of the owner.
23. In the case of *Ruth Wangari Kanyagia Vs Josephine Muthoni Kinayanjui (2017) eKLR* while restating the common law doctrine of adverse possession the Court stated that;
- ' It is a well settled principle that a party claiming adverse possession must prove that his possession is nec vi, nec clam, nec precario that is peaceful open and continues. The possession must be adequate in continuity in publicity and in extent to show that their



possession is adverse to the true owner. It must start with a wrong full dispossession of the rightful owner and be actual visible exclusive hostile and continued over the statutory period.'

24. The sale agreement entered into between the Plaintiff and Nganga Thiongo is a good place to start the analysis. It is the Plaintiff's case that he purchased the land from Nganga, paid the full purchase price, was put in possession in 1994 which possession he still enjoys today. The Defendant contends that Nganga Thiongo never sold the land to the Plaintiff and has tried to explain that the Plaintiff entered the land forcefully which action has not been condoned or tolerated.
25. I have perused the agreement of sale dated the June 23, 1994 where Nganga sold a portion of one acre of land parcel 597 which land he owned in common and in equal shares with Fredrick Mburu. Nganga was selling one acre of his entitlement, the whole land having been 3 acres. It was a term of the agreement that the Plaintiff would be put in possession immediately and this documentary evidence agrees with the Plaintiff's evidence that he was put in possession immediately on execution of the agreement of sale, a position that explains the genesis of the Plaintiff's occupation. The record also shows that there was another agreement on the August 17, 1994 between the family of Nganga and the Plaintiff to reduce the land acquired by the Plaintiff to 0.5 acres to allow Nganga and his family to have some land as they were landless. This has not been controverted by the Defendant. The agreement was executed by both Nganga and the Plaintiff in the presence of among others including Josephat Macharia Gatuthe who testified in the land dispute tribunal in 2011 and confirmed that indeed the parties entered into a purchase agreement for one acre and later reduced to 0.5 acres. I must say that the sale agreement was not vigorously challenged by the Defendant save to deny that Nganga never sold the land to the Plaintiff.
26. I find that indeed the agreement of sale was in writing, executed by the parties and witnessed by witnesses and therefore complied with the provisions of section 3(3) of the Law on Contract Act. The Plaintiff therefore was put in possession following a purchaser's right. There is no evidence that the entry was not with permission of Nganga but so far from the record and the evidence adduced by the parties I am satisfied that the entry was in pursuance to a transaction in which the Plaintiff had acquired a right to land in exchange for payment.
27. Having established possession, when did time start running? This is a pertinent question given that mere possession is not adequate to create a legal and equitable interest in land on account of adverse possession. In the case of *Public Trustee – Vs- Wanduru (1984) KLR 314* Mr Justice Madan (as he then was) while handling a similar matter stated as follows;

' Adverse possession should be calculated from the date of payment of the purchase price to the full span of 12 years if the purchaser takes possession of the property because from this date, the true owner is disposed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run.'
28. In this case viva voce evidence led in the LDT/23/011/7 read together with the agreement of sale on record shows that the Plaintiff was put in possession of the land in 1994 initially occupying a full one acre as purchased. In the same year he relinquished half of the land to accommodate Nganga and his family on 0.5 acres on condition that they (Nganga's family) would refund him the amount of half an acre. Applying the principle set out in The Public Trustee case above, time therefore started running in 1994 and for the full span of 12 years adverse accrued to the Plaintiff in the year 2006. What that means therefore is that all the while the estate of Nganga held the title in trust for the Plaintiff. It is true



that once trust has crystallised time does not run against it, in other words the benefit arising from trust will not be defeated by limitation of time. The Defendant therefore acquired title by transmission that was encumbered with a trust over 0.5 acres in favour of the Plaintiff.

29. Was the possession adverse? It is trite that not all possessions are adverse. I have already discussed some elements of it. For possession to be adverse the adverse possessor must demonstrate that he has dispossessed the owner of the land and or that the owner has relinquished the possession of the land. In this case the Plaintiff led unchallenged evidence that upon taking possession, he constructed a permanent house fenced the land and cultivated fruit farming – mangoes and avocados. That he lives on the land with his family. Evidence was led and admitted by the Defendant that the Plaintiff has buried two sons on the land. In addition, she protested the said burial and forcefully removed the fence that had been constructed by the Plaintiff leading to the preference of criminal charges against her in Kandara. Adverse possession is something to be observed on the land and not the title. It binds the land and a claimant must prove possession as a fact bearing in mind all these activities. I am satisfied that this forms the animus possidendi that is to say the Plaintiff's intention to use the land as of right and in contrast with that of the owner's title. It is also clear that Nganga and his family was dispossessed and the Defendant failed to show evidence of the steps she has taken to assert and wrestle the title from the Plaintiff. It is admitted by the Defendant that she and the Plaintiff live on different parts of the land thus each occupy exclusive portions independent of each other.
30. That brings me to the next issue for discussion which is whether the running of time was interrupted. It is trite that time is interrupted in adverse possession in circumstances where the title owner files suit to assert title; the title owner retakes the physical possession of the land; the adverse possessor relinquishes possession.
31. It is the Defendant's case that time was interrupted by the LDT case, the criminal case at Kandara and the civil case at Murang'a. I have perused the LDT proceedings and I am satisfied that they were brought by the Plaintiff to assert title and not the Defendant. He who alleges must prove. The Defendant save from making the averments failed to produce the proceedings with respect to the criminal case, suffice to say that she was charged because she removed the fence of the Plaintiff as she was protesting the burial of the Plaintiff's son on the suit land. The Murang'a case was filed by the Plaintiff seeking orders to prevent the Defendant's interference with the burial of his son on the suit land. There is therefore no evidence that time was interrupted by any of the cases in any event adverse accrued and crystallised in 2006 meaning that by the time these cases are being commenced in Court adverse was firmly founded and established.
32. The Defendant has argued that since she became registered as owner in 2016 adverse is yet to mature. I have already found that title became encumbered with trust in favour of the Plaintiff as early as 2006. The key issue is that the Defendant being the wife of Nganga had knowledge that the Plaintiff was occupying the land and she was the only person who could have asserted title as the legal administrator of the estate but she did not. In her evidence she stated that she refused to transfer the land to the Plaintiff because he did not cooperate in giving her money to meet the succession expenses. In other words had the Plaintiff cooperated he was going to get title for his 0.5 acres of the land. In the overall, I find that she slept on her rights as time for adverse possession ran uninterrupted. On this point I rely on the case of *Gachuma Gacheru – Vs- Maina Kabuchwa [2016] eKLR*, where the Court quoting *Maweu –Vs- Liu Ranching & Farming Cooperative Society [1985] eKLR* held that:

' Lastly, on argument by the respondent that time in adverse possession can only begin to run once title is issued, we disagree and set out the sentiments of the Court in, *Maweu V Liu Ranching & Farming Cooperative Society, [1985] eKLR*: 'What logic is there in saying



that this concept of the absolute and indefeasible title may only be lost, after twelve years of suffering adverse possession from the time of registration, but not for shorter periods because the adverse possession commenced during the time of the owner's predecessor. How is it lost at all?

Adverse possession is a fact to be observed upon the land. It is not to be seen in a title, even under Cap 300. Any man who buys land without knowing who is in possession of it risks his title, just as he does, if he fails to inspect his land for twelve years after he had acquired it. If such title can be lost at all, its absolute and indefeasible nature obviously refers to other matters than adverse possession.

The Plaintiff Society of course relies upon the decision of the earlier Court, but no argument on the point of principle was pressed that I could see, with great respect to learned counsel. Certainly he was unable to advance any cogent argument from the reasoning in Alibhai's case, or otherwise why absolute and indefeasible title interfered with the operation of the Limitation of Actions Act (cap 22).

There is nothing in the concept of an overriding interest which is new to the law; it is merely an acknowledgement of existing common law. No title which passed to a new owner before registration was provided for, curtailed the period of limitation. The reason lies in the public policy which underlies the Limitation of Actions Act (cap 22): namely, that a long period of possession should not be disturbed by the negligent owner or owners in succession.'

33. Before I pen off I have observed that the Plaintiff's claim is premised on parcel 1165 which parcel was originally registered in the name of Nganga Thiongo on the May 15, 1995. It became registered in the name of the Defendant in 2017 whereupon she subdivided it into 2 portions; parcel 4363 and 4364. She led evidence that she has sold parcel 4364 and according to the title on record she holds parcel 4363, which parcel a portion of 0.5 acres claimed by the Plaintiff is situate. The state of affairs has been commonly acknowledged by both parties although it was upon the Plaintiff to amend his pleadings to read parcel 4363. There being no dispute I shall proceed to determine the case based on the evidence adduced, the written submissions and all the materials before me.
34. In the end I find that the Plaintiff has succeeded in proving his case and I enter Judgement in favour of the Plaintiff in terms of a-f.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 6TH DAY OF OCTOBER, 2022 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Maina HB Waithira Mwangi for Plaintiff

Defendant – present in person

Court Assistant – Phyllis Mwangi

