



**Waruingi & 9 others v Joreth Limited (Environment & Land Case
487 of 2012) [2022] KEELC 15144 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15144 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 487 OF 2012
OA ANGOTE, J
NOVEMBER 24, 2022**

BETWEEN

**DAVID MATHERI WARUINGI 1ST PLAINTIFF
STEPHEN NJUGUNA GITHURI 2ND PLAINTIFF
CHEN FA 3RD PLAINTIFF
ANTHONY NJOROGE KAMAU 4TH PLAINTIFF
DOUGLAS MUTHUI WANGUO 5TH PLAINTIFF
JAMES NDEGWA THUKU 6TH PLAINTIFF
PATRICK MASETTE KUUYA 7TH PLAINTIFF
MOSES MUIGA KAIGI 8TH PLAINTIFF
JOSEPH KARANJA MWAURA 9TH PLAINTIFF
RUTH MUTHONI NDUNGU 10TH PLAINTIFF**

AND

JORETH LIMITED DEFENDANT

*(L.R. NOS 13330/413, 407, 282, 133, 287, 95,41, 457, 436, 590, 22, 23, 97, 411,
449,243, 269, 277, 96, 412, 534, 205 AND 13330/531, 532, 533, 355, 356, 111)*

JUDGMENT

1. This suit was instituted vide Originating Summons dated August 8, 2012 in which the Plaintiffs, who claim to be entitled to be registered as proprietors of the suit premises, sought for the following orders:



- a. That David Matheri Waruingi, Stephen Njuguna Githuri, Chen Fa, Anthony Njoroge Kamau, Douglas Muthui Wanguo, James Ndegwa Thuku, Patrick Masette Kuuya, Moses Muiga Kaigi, Joseph Karanja Mwaura and Ruth Muthoni Ndungu, be declared to have acquired title by adverse possession to the suit property known as LR Nos 13330/413, 407, 282, 133, 287, 95,41, 457, 436, 590, 22, 23, 97, 411, 449,243, 269, 277, 96, 412, 534, 205 and 13330/531, 532, 533, 355, 356, 111, and a permanent injunction restraining the Defendant from interfering with the Plaintiffs possession and title to the suit property do issue.
 - b. That the registration of Joreth Limited as proprietor of LR Nos 13330/413, 407, 282, 133, 287, 95,41, 457, 436, 590, 22, 23, 97, 411, 449,243, 269, 277, 96, 412, 534, 205 and 13330/531, 532, 533, 355, 356, 111 and or any other persons deriving title from Joreth Limited be cancelled forthwith and the Chief Land Registrar do rectify the registers in respect of each title and issue title in the names of the Plaintiffs as the registered proprietors of the said properties as set out in the schedule in the supporting affidavit annexed hereto in place of the Defendant or anyone deriving title from the Defendant.
2. The application was based on the grounds on the face of it and the Supporting Affidavits sworn by the Plaintiffs, in which the Plaintiffs deponed that they have been in actual, open, physical and uninterrupted possession of the premises for a period in excess of 12 years thereby acquiring title by adverse possession.
 3. The Plaintiffs, through their respective affidavits, deponed that they were proprietors of shares/ plots measuring half an acre in Thome Farmers No 5 Limited as follows:
 - i. David Matheri Waruingi - Plot Nos 488, 518, 519 and 520, which he bought in 1993 and took possession of in 1992;
 - ii. Stephen Njuguna Githuri- Plot Nos 002 and 003, now known as LR No 13330/282 and 13330/283, bought in 1987, and took possession in 1993;
 - iii. Chen Fa and Chien-Kun-Ming- Plot No 98, now known as LR No 13330/95, bought and took possession in 1997;
 - iv. Anthony Njoroge Kamau- Plot No 174, now known as LR 13330/590, bought and took possession in 1996;
 - v. Douglas Muthui Wanguo- Plot No 423, now known as LR No 13330/287 bought and took possession in 1991;
 - vi. James Ndegwa Thuku- Plot No. 086, now known as LR No 13330/97, bought and took possession in 1979
 - vii. Patrick Masette Kuuya- Plot No 008 now known as LR No 13330/277, bought and took possession in 1990;
 - viii. Moses Muiga Kaigi- Plot No 215, now known as LR No 13330/22, bought and took possession in 1993;
 - ix. Joseph Karanja Mwaura- Plot No 587 and 506, now known as LR No 13330/436 and 13330/407, bought and took possession in 1992 and 1988 respectively
 - x. Ruth Muthoni Ndungu- Plot No 123, now known as LR No 13330/133 bought and took possession in 1994



4. The Plaintiffs deponed that since they took possession of their respective plots, they have planted crops on the land such as maize, beans, napier grass, trees and other crops and occupied the houses they have built on the plots, without interference by the Defendant or anybody else, for periods exceeding twelve years.
5. They deponed that the occupation of the suit properties has been open, uninterrupted and without interference and that the mother title from which their plots derive title is in the Defendant's name.
6. It was the deposition of the 1st, 2nd and 9th Plaintiffs that on June 18, 2012, they each received a flier purportedly issued by the Defendant, telling them to pay Kshs 4 million for each of the plots, to which they responded vide letters dated June 18, 2012 and that they saw their plots advertised for sale by the Defendant in the Daily Nation of July 16, 2012.
7. They urged that the Defendant is aware of their occupation and development of the plots and that rather than taking out proceedings to repossess the plots or to evict them, they have decided to sell their property by public auction.
8. The Defendant opposed the Plaintiffs' claim vide several Replying Affidavits dated October 26, 2012, sworn in response to the Affidavits by the 1st, 2nd, 5th and 7th Plaintiffs. The Defendant's Director deponed that they are the registered owner of all that piece of land known as LR No 13330, having been so registered on December 19, 2000 and that the title was as a result of an amalgamation or consolidation of the Defendant's two titles, LR No 4920/3 and 4921/3 which were held by the Defendant since the early 1950s.
9. It is the Defendant's case that the suit properties are a sub-division of LR No 13330 which has never been registered in the name of Thome Farmers No 5 Limited and that Thome Farmers 5 Ltd does not own shares in the Defendant Company thus shares bought by the Applicants in Thome Farmers 5 Ltd have no bearing on the Defendant.
10. It was the deposition of the Defendant's Director that the Plaintiffs could not have been in open, physical and uninterrupted occupation of the suit premises without interference as the Defendant has been in continuous occupation of the suit properties; that the Defendant has over the last thirty years engaged in the consolidation and sub-division of LR No 13330, part of which forms the suit properties and that the applicants were not in occupation of the land during exercise of amalgamation which ended in 2000.
11. The Defendant argued that in 1992, it filed a suit, HCCC No 6206 of 1992 against several persons who had trespassed onto LR No 13330, which was determined in 2002 by a consent order and that because of the said suit, the Plaintiffs have not been in open, physical and uninterrupted occupation of the suit properties for over twelve years, having been interrupted by the Defendant's suit.
12. The Applicant's claim, they contend, should not be against the Defendant but against the persons who sold them the suit premises or Thome Farmers No 5 Limited and that the Plaintiffs have failed to annex an official search results as required by law.
13. All the Plaintiffs filed Supplementary Affidavits sworn on November 6, 2013. They respectively deponed that the Defendant, through Civil Suit 6206 of 1992, had sought to evict some of the plot owners of LR No 13330 and that Thome Farmers No 5 Ltd was enjoined in the suit and filed a Defence and Counterclaim.



14. The Plaintiffs deponed that the subdivision of LR No 13330 into subplots was not undertaken by the Defendant but by Thome Farmers No 5 Ltd through the firm of Kamwere and Associates. The suit proceeded by way of oral evidence.

The Plaintiffs' evidence

15. Eight of the Plaintiffs gave oral testimony in support of the facts deponed in their suit. Each Plaintiff gave a brief history of the acquisition of their respective property. Their testimony was to the effect that each Plaintiff has acquired ownership of their respective properties through adverse possession, as they have been possession of the land for more than the statutory period of twelve years.
16. The Plaintiffs stated that there is a connection between the Defendant and Thome Farmers No 5 Ltd, having engaged in a land transaction over the suit land. The 1st Plaintiff produced a letter dated February 26, 1993 by AK Magugu (deceased) who was the Director of Joreth Limited, which showed that there was a transaction with Thome farmers Limited, which was ongoing at that time.
17. The 7th Plaintiff reiterated that AK Magugu, who was then the Defendant's Chairman, wrote a letter to Thome Farmers No 5 Ltd on February 26, 1993 annexing a resolution by the Defendant to sell LR No 4920/3/2 and LR 4921/3/1 to Thome Farmers No 5 Ltd
18. The Plaintiffs in concert denied knowledge of HCCC No 6206 of 1992 and asserted that they were not sued by the Defendant over ownership of the suit land. The 2nd Plaintiff testified that he was not party to HCCC No 6206 of 1992; that Thome Farmers no 5 Ltd were enjoined in that suit and that they bought the land from Joreth, took possession of the land, subdivided it and allotted it to their members including the Plaintiffs.
19. It was the testimony of the 2nd, 7th, 8th and 9th Plaintiffs that they were shown the beacons of their respective land by Thome Farmers No 5 Ltd Surveyor, Kamwere & Associates and that it was not true that the Defendant completed subdividing the land in 2000, rather, it was done between 1975 and 1980. He attached correspondences about the subdivision.

The Defendant's Evidence

20. DW1, David Karanja Nderitu, relied on his witness statement. He stated that the mother title produced by the Plaintiffs was dated April 20, 2000 and that the Plaintiffs failed to attach copies of the titles they alluded to when they filed this suit.
21. DW1 stated that the Defendant wanted to claim its property in HCCC No 6206/1992 and identified 23 individuals; that they also enjoined Thome Farmers No 5 Ltd in the suit, who represented its shareholders. DW1 produced a consent order dated June 13, 2003, in which the Defendants in HCCC No 6206 of 1992 were to pay a consideration of Kshs 200,000 each for issuance of titles.
22. According to DW1, the consent order was to affect all the shareholders of Thome Farmers No 5 Ltd although it was addressed to the 23 Defendants in that suit; that the advertisement for the auction of the suit land was done because the Plaintiffs had defaulted on the payment of Kshs 200,000 and that the consent had only six Defendants who agreed to pay the Kshs 200,000.
23. It was the evidence of DW1 that there were only 23 people in occupation of the suit land in 1992; that he did not know some of the Plaintiffs and that he could not ascertain the date when the Plaintiffs took occupation of the suit property.



Submissions

24. The Plaintiffs' advocate submitted that their evidence was not rebutted by the Defendant, who acquiesced to their occupation of the land. He submitted that none of the Plaintiffs were parties to HCCC No 6206 of 1992 and that contrary to the Defendant's assertion, the subdivision of over 500 plots had been demarcated by 1975.
25. It was submitted that the consent order was only between 6 out of the 23 Defendants and that the suit was not finally determined. Counsel submitted that Thome Farmers No 5 Limited was not enjoined in the suit in a representative capacity and did not carry along the Plaintiffs herein into the suit.
26. Consequently, it was submitted, the filing of HCCC No 6206 of 1992 did not stop time from running for purposes of adverse possession and that they have no dispute with Thome Farmers Limited who granted them possession of their respective plots. The Plaintiffs' counsel relied on numerous authorities which I have considered.
27. The Defendant's counsel submitted that the Plaintiffs did no lead any factual evidence before this court to prove the pillars of adverse possession as set out in *Wambugu vs Njuguna (1983) KLR* , *Mtana Lewa vs Kabindu Ngala Mwangandi (2005) eKLR* and *Mbira vs Gachubi (2002) IEALR*.
28. It was submitted that the 2nd, 6th, 7th and 9th Plaintiffs cannot be said to have been in open and notorious use of the land as at 1991 because the Defendant would have taken action against them in Civil Suit No 6206 of 1992.
29. It was their submission that the Plaintiffs failed to provide evidence such as building permits and approvals, architectural drawings, electrical and sewer connections to prove that they developed the suit premises and have been in occupation for over 12 years.
30. It was submitted by counsel that time stopped running from the moment the Defendant filed Civil Suit No 6206 of 1992 to assert its rights against the identifiable trespassers and against Thome Farmers No 5 Ltd which represented all its shareholders, including the Plaintiffs.
31. It was the argument of the Defendant's advocate that by virtue of the 1992 civil suit through which the Defendant asserted its rights to the suit premises, the doctrine of lis pendens took effect and that time stopped running. They relied on *Re Estate of Solomon Muchiri Macharia [2016] eKLR*, among other authorities which I have considered.

Analysis and Determination

32. I have considered the pleadings filed by the parties, their oral testimony, documents and submissions. The issue for determination before this court is whether the Plaintiffs have acquired title to the suit property through adverse possession.
33. The Plaintiff's case is that on diverse dates between 1979 and 1997, they bought plots on the suit land, LR Nos 13330, from Thome Farmers No 5 Limited, which had bought the land from the Defendant herein.
34. It is the Plaintiffs' case that they entered into possession of their respective plots soon after; that they have cultivated crops and constructed homes and developments on their respective plots and that they have peacefully occupied their respective plots with their families for more than 12 years.
35. The Defendant has opposed the Plaintiff's suit and argued that it is the registered owner of all that piece of land known as Land Reference No 13330, having been so registered on December 19, 2000.



36. The doctrine of adverse possession in Kenya is embodied in Section 7 of the *Limitation of Actions Act* which provides as follows:

' An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.'

37. The *Limitation of Actions Act* makes further provision for adverse possession at Section 38 as follows:

(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

(3) A proprietor of land who has acquired a right to an easement under section 32 of this Act may apply to the High Court for an order vesting the easement in him, and may register any order so obtained in the register of the land or lease affected by the easement and in the register of the land or lease for whose benefit it has been acquired, and the easement comes into being upon such registration being made, but not before.

(4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.'

38. The Court of Appeal in *Mtana Lewa vs Kahindi Ngala Mwangandi* [2015] eKLR summed up what adverse possession entails:

' Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.'

39. The requirements for adverse possession were set out in *Mbira vs Gachuhi* (2002) IEALR 137 in which the court held as follows:

' A person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption.'



40. In *Haro Yonda Juaje vs Sadaka Dzenge Mbauro & another [2014] eKLR*, this court outlined the elements that a claimant must prove on a balance of probability to succeed in a claim of adverse possession:
- i. That he has made physical entry on the land and is in actual possession or occupancy of the land for the statutory period.
 - ii. The occupation of the land by the claimant must be non-permissive.
 - iii. The occupation by the claimant must be with the clear intention of excluding the owner from the property (*animus possidendi*)
 - iv. The acts done by the claimants are inconsistent with the owner's enjoyment of the soil for the purpose which he intended to use it.
 - v. Possession by the person seeking to prove title by adverse possession must be visible, open and notorious.
 - vi. Possession must be continuous, uninterrupted and unbroken for the required statutory period.
41. It is not disputed that the Plaintiffs in this suit are in occupation of the suit land. According to the Defendant's witness, he is not aware the exact date that the Plaintiffs took occupation of their respective plots within the suit property.
42. According to the 1st Plaintiff, in 1993, he purchased four shares in Thome Farmers No 5 Limited which entitled him to four plots, that is 488,518,519 and 520 measuring half an acre each. It was his deposition that he took possession of the land immediately, cultivated the same and put up a home.
43. The 1st Plaintiff exhibited three share certificate dated February 8, 1993 and one dated February 26, 1990, together with receipts for the payments he made to Thome Farmers No 5 Limited. The 1st Plaintiff also produced in evidence the agreement dated September 29, 1992 for the three shares that he purchased. The 1st Plaintiff also produced in evidence the title that was issued in favour of the Defendant on December 19, 2000 for LR No 13330.
44. The 2nd Plaintiff's evidence shows that he purchased two shares from Thome Farmers Limited in 1987 and was allocated plot numbers 13330/282 and 13330/283. It is his evidence that he took possession of the land in 1987. Evidence of the purchased shares and receipts showing the payments he made to Thome in 1987 were produced. The 2nd Plaintiff also produced in evidence a photograph of the house that he has put up on the suit property.
45. The 4th Plaintiff purchased one share from Thome Farmers No 5 Limited in 1997 and was allocated plot number LR 13330/95. The share certificate from Thome Farmers Limited has been annexed on his Affidavit. According to the Plaintiff, he took possession of the land in the same year.
46. The evidence before me shows that the 4th Plaintiff purchased one share from Thome in 1996 for plot number 174, which is now LR No 13330/590; the 5th Plaintiff purchased his share on March 15, 1991 and was allocated plot number 423 which upon survey became LR N0 13330/287 while the 6th Plaintiff purchased one share in 1979. Upon survey, his land became 13330/97.
47. The evidence before me shows that the 7th Plaintiff purchased a share from Thome Farmers No 5 Limited on October 8, 1990. The land he was allocated was surveyed as 13330/227; the 8th Plaintiff



- purchased one share on December 7, 1993 and was allocated land by Thome Farmers No 5 Limited which became 13330/22 upon survey.
48. The 9th Plaintiff purchased two shares from the same company on October 23, 1992 and December 5, 1988. The initial plot numbers for the two shares were 587 and 506 which became LR No 13330/436 and 407. Plaintiff number 10 purchased his share on December 1, 1993 and his share became number.
 49. The Plaintiffs produced photographic evidence to show the nature of their occupation, as well as the share certificates from Thome Farmers No 5 Ltd, the entity that sold to them the plots. The Defendant's witness, DW1 admitted that indeed, the Defendant did enter into a sale agreement with Thome Farmers No 5 Limited for the sale of the suit land, which sale fell through. The sale transaction between the Defendant and Thome Farmers No 5 Limited led to the filing of a suit by Thome Farmers No 5 Limited in 1996.
 50. The evidence before this court shows that on June 18, 2012, each of the Plaintiffs received a flier issued by the Defendant, telling them to pay Kshs 4 million for each of the plots, to which they responded vide letters dated June 18, 2012 declining to pay the said amount. It was after this response that they saw their plots advertised for sale by the Defendant in the Daily Nation of July 16, 2012. The said advert and the letters were produced in evidence.
 51. This court, on the basis of the documents annexed on the Plaintiffs' affidavit, is satisfied that the Plaintiffs bought their respective plots between 1988 and 1997. The court is also satisfied with the evidence produced which shows that the Plaintiffs took possession of their respective plots, cultivated and put up houses on their respective plots immediately they purchased them.
 52. This explains the reason why the Defendant, rather belatedly, informed the Plaintiffs to pay Kshs 4,000,000 for each plot notwithstanding that there was no agreement between the Plaintiffs and the Defendant
 53. The Defendant asserted that time stopped running when it filed HCCC No 6206 of 1992 in which it sought to assert its ownership of the suit land against the 23 persons which it had identified as trespassers.
 54. It is true that time which has begun to run under the *Limitation of Actions Act* is stopped 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.
 55. The old rule was that a mere formal entry was sufficient to vest possession in the true owner and to prevent time from running against him, he must either make a peaceable and effective entry or sue for the recovery of the land. (see *Githu vs Ndeete [1984] KLR 776* at page 780).
 56. The Plaintiffs testified that they were not part of the 1992 suit. Indeed, none of the Plaintiffs herein was listed as a Defendant in Civil Case No 6206 of 1992. Although the filing of a suit against a trespasser interrupts time from running in a claim for adverse possession, the suit must be as against a trespasser. That is not what happened in this case.
 57. As the Plaintiffs were not parties to the 1992 suit, or the consent that ensued therefrom, the time of which the Plaintiffs had been in occupation was not interrupted. On the assertion that Thome Farmers No 5 Ltd was enjoined to the suit, and that it represented its shareholders, and that such shareholders were bound by the consent order that allegedly concluded the suit, it is trite that a consent order or consent judgment has a contractual effect, and is only binding upon the persons that are party to the consent. The Defendant's argument that the Plaintiffs herein were bound by the suit and consent must consequently fail.



58. It is evident that the Plaintiffs have been on the suit land for longer than the statutory period of twelve years. By way of documentary evidence and testimonies, the Plaintiffs have proved non-permissive or non-consensual actual, open, notorious, exclusive and adverse use of their respective plots for the statutory prescribed period without interruption.
59. For those reasons, I allow the Plaintiffs' Originating Summons dated August 8, 2012 as follows:
- a. That David Matheri Waruingi, Stephen Njuguna Githuri, Chen Fa, Anthony Njoroge Kamau, Douglas Muthui Wanguo, James Ndegwa Thuku, Patrick Masette Kuuya, Moses Muiga Kaigi, Joseph Karanja Mwaura and Ruth Muthoni Ndungu, be and are hereby declared to have acquired title by adverse possession to the suit property known as LR Nos 13330/413, 407, 282, 133, 287, 95, 41, 457, 436, 590, 22, 23, 97, 411, 449,243, 269, 277, 96, 412, 534, 205 and 13330/531, 532, 533, 355, 356, 111.
 - b. A permanent injunction restraining the Defendant from interfering with the Plaintiffs' possession and title to the suit properties do issue.
 - c. That the registration of Joreth Limited as proprietor of LR Nos 13330/413, 407, 282, 133, 287, 95,41, 457, 436, 590, 22, 23, 97, 411, 449,243, 269, 277, 96, 412, 534, 205 and 13330/531, 532, 533, 355, 356, 111 and or any other persons deriving title from Joreth Limited be and is hereby cancelled forthwith.
 - d. The Chief Land Registrar do rectify the registers in respect of each title and issue titles in the names of each of the Plaintiffs as the registered proprietors of their respective plots enumerated in order (a) above.
 - e. The Defendant to pay the costs of the suit.

Dated, signed and delivered virtually in Nairobi this 24th day of November, 2022.

O. A. Angote

Judge

In the presence of;

Mr. Kingara for Plaintiff

Ms Njuani holding brief for Koech for Defendant

Court Assistant - June

