



REPUBLIC OF KENYA



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Njenga & 2 others (All suing as the legal representatives of the Estate of Joseph Njenga Waweru (Deceased)) v Kagure & another (Being sued as the legal representative of Estate of Stephen Waweru Njenga) (Environment & Land Case 47 of 2019) [2022] KEELC 15479 (KLR) (20 December 2022) (Judgment)

Neutral citation: [2022] KEELC 15479 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 47 OF 2019**

JG KEMEI, J

DECEMBER 20, 2022

BETWEEN

**ESTHER NJERI NJENGA 1ST PLAINTIFF
FRANCIS KUIBITA NJENGA 2ND PLAINTIFF
KAMAU NJENGA 3RD PLAINTIFF
ALL SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF JOSEPH
NJENGA WAWERU (DECEASED)**

AND

**MARTIN KUNGU KAGURE 1ST DEFENDANT
JENNIFER NGENDO WAWERU 2ND DEFENDANT
BEING SUED AS THE LEGAL REPRESENTATIVE OF ESTATE OF STEPHEN
WAWERU NJENGA**

JUDGMENT

1. The subject matter of this suit is land parcel No Githunguri/Kimathi/607 (suit land) measuring 2.8 acres or 6.9188 (approx. 7 acres). Its register was opened on the 14/11/1958 and registered in the name of Waweru Ngamau on even date. The land was a resultant subdivision of parcel Githunguri/Kimathi/112. As the case progresses it will become clear that the suit land and its owners and successors have not known peace since it was bequeathed to Joseph Njenga Waweru, deceased by his late father Waweru Ngamau on 1/2/1967.
2. The Plaintiffs are the widow and sons of the late Joseph Njenga Waweru (Njenga), all being the legal representatives of the estate of Njenga.



3. It is alleged that Njenga sold a portion of 3/7 acres to Augustine Wambugu Munene (Munene) on 14/2/1967 leaving him with 4 /7 acres. Later, on 7/6/1972 the said Munene sold the said 3 acres to Martin Kungu Kaguri (Kungu), the 1st Defendant for the price of Kshs 6,080/-. Both sales allegedly were under circumstances disputed by the Plaintiffs.
4. The 2nd Defendant is the daughter in law and sister in law of the 1st and 2nd & 3rd Plaintiffs respectively, being the wife of Stephen Waweru Njenga (Stephen). Stephen was the son of the 1st Plaintiff and the late Njenga and the elder sibling of the 2nd and 3rd Plaintiff.
5. It is averred by the Plaintiffs that Stephen bought back the 3/7 acres from Kungu vide an agreement of sale dated the 23/6/2004 at the consideration of Kshs 1.2 Million as a trustee of Njenga who had been diagnosed as mentally ill since 1956 thus had no capacity to transact on account of the mental sickness/ ailment. That Kungu died before transferring the 3/7 portion of the land to Stephen pursuant to the said agreement for sale.
6. It is borne of the record that Kungu died on 13/1/2005; Njenga died on 6/7/2009 and Stephen died on the 18/11/2011.

The Plaintiffs Case

7. The Plaintiffs brought the suit vide the originating summons dated the 5/3/2019 and filed on the 6/3/2019 for orders that;
 - a. That there be a declaration that the agreement for sale executed on the 23/6/2004 between Kungu and Njenga alias Njenga Waweru Ibongo deceased (physically executed by Stephen , deceased as his trustee) in respect to the suit land situate in Githunguri Kiambu by which Kungu sold to Njenga his 3/7 acres of the suit land which was subsequently followed by continuous and exclusive possession by Njenga and his beneficiaries and successors in title vested the said portion of 3/7 acres unto the said Njenga absolutely.
 - b. Further and in the alternative there be a declaration that the said Njenga having been in sole and continuous possession of the entire suit property on his own and through his wife and children with effect to 1/2/1967 to date and to the total exclusion of Munene and his successor in title known as Kungu who have never demonstrated any interest to own or occupy the suit property having carried out extensive developments thereon has acquired an overriding and equitable interest in the suit property that now warrants him to be registered as the sole owner of the suit property absolutely.
 - c. Consequently, an order be made directing the Deputy Registrar to sign transfer documents in respect to the suit land in order to facilitate the transfer of 3/7 acres of the suit land currently held by Kungu to the Plaintiffs to hold and distribute to all the other beneficiaries of the estate of Njenga and or hold the same jointly as the Court may direct.
 - d. A permanent injunction do issue restraining the Defendants by themselves their servants and or agents from alienating interfering or dealing in any way with any of the portions of the suit land other than in the manner this Court may direct.
 - e. The costs of the originating summons be borne by the Defendants.

The 1st Defendant's case

8. Vide the leave of the Court obtained on the 20/8/2019 the 1st Defendant was served by substituted service. The summons were served on the 11/5/2021 vide an advertisement in the Daily Nation of even



date. However unknown to the Plaintiffs the said Kungu died aged 80 years old on the 13/1/2005 as seen in the 2nd Defendant's Replying Affidavit sworn on the 31/12/2019 and filed on the 8/1/2021. See the annexed death certificate dated the 24/3/2005.

9. On the 7/9/2021 Peter Hwa Kungu and Esther Wanjiru Nganga were appointed personal representatives of the estate of Kungu. The legal representatives were substituted in the suit on 10/2/2022. Despite service of summons upon the representatives of Kungu on the 1/4/2022 they failed to file their defence on time and only filed a Replying Affidavit on the 4/10/2022 way after the matter had been heard and concluded on the 4/5/2022. The record shows that it was filed without the leave of the Court.

The 2nd Defendant's case

10. Vide a Replying Affidavit sworn on the 11/6/2019 by the 2nd Defendant and filed on the 12/6/2019, the 1st Defendant deponed that she is the wife of Stephen who passed away on the 18/11/2011 and that she is the legal administrator of estate of Stephen. That her family has constructed on a portion of the suit land and she annexed a copy of the title for the suit land registered in the names of Njenga and Kungu on the 9/6/1972 in the proportion of 4 and 3 acres respectively. That Stephen purchased 3 acres from Kungu vide an agreement dated the 23/6/2004. That Kungu passed away before transferring the land to Stephen and that her family is in occupation of the portion of 3 acres purchased from Kungu. That following the death of Njenga on the 6/7/2009 the Plaintiffs petitioned for succession of his estate vide Succ cause No 100 of 2012 -Githunguri Law Courts which succession is yet to be concluded. She was of the opinion that a claim for adverse possession is not available to the Plaintiffs on grounds that the land belonged to their husband and father respectively

The evidence

11. With leave of the Court the evidence of PW1 – Esther Njeri Nganga was taken de bene esse on the 3/3/2021. The witness testified and relied fully on her supporting affidavit sworn on the 5/3/2019 in which she deponed that she is the widow and administratrix of the estate of Njenga with authority to so depone for the co-Plaintiffs who are also co-administrators. That Njenga was a co-owner of the suit land holding 4/7 acres and Kungu holding 3/7 acres respectively. That Njenga was a known mental infirm who was diagnosed in 1956 and who was represented by Stephen his elder son in Court and in the execution of documents during his lifetime. That Njenga left behind 14 dependants.
12. Whilst giving the litigation history of the land, PW1 informed the Court that Njenga through Stephen sued Munene and Kungu in HCCC No 2586 of 1981 where he sought to nullify the transfer of 3/7 acres of land dated the 14/2/1967 on grounds that Njenga was suffering from a mental disorder and hence incapable of understanding the transaction; Munene was aware of the mental disorder suffered by Njenga given that he was a neighbour and that the said deed was executed under duress and or undue influence; the transfer deed has not been verified in compliance with Section 110 of the Registered Land Act; transfer was without consideration and therefore tainted with fraud as it came after the short interval between the gift of the land to Njenga and execution of the transfer. That the transfer from Munene to Kungu was also impugned on the same grounds as both knew that Njenga was suffering from a chronic mental illness and had no capacity to transfer the land. Interalia that the transfer was fraudulent and null and void for want of land control board consent.
13. The witness stated that the suit was dismissed on the 8/6/1984 due to non-attendance, reinstated on the 11/3/1991 and finally dismissed again for the same reasons on the 8/6/1994.



14. PW1 stated that on the 23/6/2004 Kungu sold the 3/7 portion of land to Stephen her son as trustee of Njenga at the consideration of Kshs 1.2 Million. That neither Munene nor Kungu took possession of the land which is been under their family possession and control since 1967 and believes that their only aim was to make profit from the sale of the land given that they have never shown any interest to occupy the same. She stated that she has constructed houses and carries out farming activities on the suit land.
15. It was the evidence of PW1 that Stephen executed the agreement of sale dated the 23/6/2004 for and on behalf of Njenga because; Stephen was aware that Njenga was suffering from a mental illness; Njenga and his family occupied the land exclusively; consent under Section 103 of the RLA was not necessary as the land was registered jointly in the name of Kungu and Njenga; Njenga paid the purchase price in the sum of Kshs 1.2 Million from the proceeds of his farming activities as Stephen had no financial capacity to raise the sum; it is customary under the Kikuyu customs for the eldest son to represent his father and siblings more so given that Njenga suffered from a mental illness.
16. Further she added that the balance of the purchase price was fully paid to Kungu thus extinguishing the interest held by Kungu in the portion of 3/7 acres. That she and her family have been in occupation of the land for over 50 years and neither Kungu nor Munene have interfered with her exclusive possession and occupation. That she is now sickly and has suffered a lot because of the land case. That the 2nd Defendant Ngendo is picking the coffee on the land. She stated that both Kungu and Stephen are dead and urged the Court to grant her prayers sought in the originating summons.
17. With that the Plaintiffs closed their case.
18. On the 4/5/2022 when the case came up for hearing the counsel for the Plaintiffs informed the Court that the 1st Defendant had been served with the hearing notice as shown in the Affidavit of Service dated the 28/4/2022. Ms Kiarie holding Mr Ndungu's brief for the 2nd Defendant confirmed to the Court that Mr Ndungu was ready to proceed with one witness. The Court proceeded to slot the hearing for 10.00 am the same day. Come 10.30 am, a Mr Ongato holding brief for Mr Ndungu informed the Court that Mr Ndungu was not ready to proceed and sought an adjournment. The Court after hearing all the parties was not satisfied that the adjournment was merited and directed the parties to proceed with the hearing. Mr Ongato thereafter left the matter for the Court stating that he had no witness/ instructions to proceed with the hearing. The 2nd Defendant having failed to proceed with the hearing the Court directed the parties to file written submissions and the Defendants' case deemed closed.
19. With leave of the Court the parties filed written submissions. The firm of Lawrence Mbaabu & Co Advocates filed on behalf of the Plaintiffs and the firm of Ndungu Mwaura & Co Advocates filed on behalf of the 2nd Defendant. The 1st Defendant failed to file any written submissions.
20. As to whether Stephen entered into the agreement for sale dated the 23/6/2004 in his capacity as the next of kin and friend of Njenga, counsel submitted that Njenga was diagnosed with a mental illness as early as 1956 as can be gleaned from the evidence adduced by Dr Mohammed Azani Fazal before Justice H G Platt on the 21/2/1983 in the HCCC No 2586 of 1981; Stephen instituted the suit on behalf of his mentally ill father as the next friend; Stephen managed the affairs of Njenga, his father given his mental condition and therefore the agreement of sale entered in 2004 was not in his own individual capacity but on behalf of Njenga; the fact that Stephen was the next friend of Njenga was not disputed by the Defendants; that under Rule 8 (1) of Order 32 of the Civil Procedure Rules. Stephen did not retire as is required in which event the rules required the next friend to procure a fit person as a replacement; the money used for the purchase of the 3 acres came from the proceeds of tea and coffee that PW1 and Njenga had planted on the suit land, evidence which was not rebutted by any of the Defendants; that a presumption of trust has arisen and the land should be ordered to revert to Njenga



in whose trust Stephen held; that since Njenga was the co-owner of the land there was no need for his consent as he was acquiring the share of the co-owner.

21. As to whether the 1st Defendant's interest in the suit land has been extinguished by the Plaintiffs' adverse possession, counsel submitted that the suit land was owned by Kungu and Njenga in the proportion of 3 acres and 4 acres respectively. PW1 stated under oath that the suit land has not been subdivided on the ground and measures 7 acres and occupied by the Plaintiffs including the 2nd Defendant who have been in continuous uninterrupted and peaceful occupation of the land since 1967 to date when the property was gifted to Njenga by his late father Ngamau Waweru. That she and her family have been in occupation of the suit land for over 50 years and that after the execution of the agreement in 2004 the Plaintiffs have continued to occupy the land for over 15 years without any interference from any quarter least of alone the 1st Defendant.
22. In adverting a right under adverse possession counsel submitted and relied on several decided Court cases; Gabriel Mbui Vs Mukinda Maranya (1993) eKLR; Titus Mutuku Kasuve Vs Mawaani Investments Limited & 4 others (2004) eKLR; Joseph Gachumi Kiritu Vs Lawrence Munyamba Kabura (CA -unreported); Patrick Mugu Mwangi Kimunyu Vs Joreth Limited (2015) eKLR; Mtana Lewa Vs Kahindi Ngala Mwangandi (2015) eKLR; Public Trustee Vs Wanduru Ndegwa (1984) eKLR.
23. In conclusion counsel urged the Court to grant the orders sought.
24. The 2nd Defendant submitted that the land measures 7 acres and the same has never been subdivided between the families of Kungu and Njenga. That she is a protester in the succession cause with respect to the estate of Njenga that is pending in Kiambu law Courts and that the only asset of the estate is 4 acres. That the boundary of the 3 and 4 acres is not known until a surveyor is called to determine the same. Lastly that the Plaintiffs cannot seek title by adverse possession on land that they already own.
25. Having considered the pleadings, the evidence adduced on record, the written submissions and all the material placed before the Court I find the issues that commend themselves for determination are;
 - a. Whether Stephen was a trustee of Njenga in the agreement dated the 23/6/2004.
 - b. Whether the claim of adverse possession is merited.
 - c. Costs of the suit
26. It is the Plaintiff's case that Stephen executed the agreement of sale in trust for their husband and father Njenga and not on his account. This position was not refuted by 1st the Defendant. The Plaintiffs pointed the Court to the case filed by Njenga through his son as his next friend in accordance with Order 32 Rule 1 of the Civil Procedure Rules which provides as follows;
 - “(1) Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor.”
27. Rule 8 of the said order provides as follows;
 - “(1) Unless otherwise ordered by the Court, a next friend shall not retire without first procuring a fit person to be put in his place and giving security for the costs already incurred.
 - (2) The application for the appointment of a new next friend shall be supported by an affidavit showing the fitness of the person proposed and also that he has no interest adverse to that of the minor.”



28. I have seen the proceedings in HCCC No 2286 of 1981 in which Njenga filed the suit through his next friend Stephen on account of his mental health. There is no dispute that Njenga was a known mental infirm going by the evidence adduced by his doctor in the suit. Evidence was led that the suit was dismissed in 1994. There is no evidence that Stephen retired as a next of friend or whether Njenga recovered fully from the mental illness. The Plaintiffs failed to provide evidence to show that they approached the Court under the *Mental Health Act* to declare Njenga *Cosmos mentis* and whether Stephen was appointed a guardian and manager of Njenga's assets. In the absence of such evidence I find that the Court cannot reach a finding that Stephen entered into the agreement of sale in 2004 in trust for Njenga. Secondly there is no evidence led to show that Stephen was not a man of means and that he was financially unable to raise the sum of Kshs 1.2 Million. In any event the Plaintiffs did not lead evidence to show that the proceeds came from farming of tea and coffee by the 1st Plaintiff and Njenga. Least of all the agreement of sale does not show that he executed the same in trust or as a nominee of Njenga.
29. On the second issue, unchallenged evidence led by PW1 is that she and her family which includes the 2nd Defendant have been in occupation of the land since 1967 and that none of the purchasers being Munene and or Kungu took over possession of the 3 acres. The 2nd Defendant also submitted that she and her family including the Plaintiffs live on the land.- I have perused the agreement of sale of 23/6/2004 between Kungu and Stephen and under para 9 (d) that the purchaser is in possession of the said parcel of land sold. I find that the Plaintiffs have been in possession.
30. Was the possession adverse and to whom? The legal provisions for adverse possession are anchored under Sections 7, 13, 16, 17 & 38 of the *Limitation of Actions Act*. Adverse possession is one of the methods of acquiring land under Section 7(d) of the *Land Act*.
31. In the case of *Mtana Lewa Vs Kahindi Ngala Mwangandi* [2015] eKLR, the Court defined adverse possession as follows;
- “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 licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”
32. Section 91(5) & (6) *Land Registration Act* provides as follows in respect of common tenancy;
- “(5) If any land, lease or charge is owned in common, each tenant shall be entitled to an undivided share in the whole and on the death of a tenant, the deceased's share shall be treated as part of their estate.
- (6) No tenant in common shall deal with their undivided share in favour of any person other than another tenant in common, except with the consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld.”
33. It is evident that for dealings over land held under common tenancy, a tenant cannot deal over such land without the consent of the rest of the tenants as was held in the case of *Evans Onguso & 2 others v Peter Mbuga & 4 others* [2020] eKLR. That position in my view would then apply for a claimant



under adverse possession to prove their case as against all the tenants as opposed to one tenant. See the case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR where inter alia it was held that the land, or portion of the land, adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. For this purpose, that which can be ascertained is certain; that which is definitive is positive. It must at least be so plotted that if not certain it can be made certain.

34. Similarly in the case of *Ruga Gituku v Charles Gachau Wachira & 10 Others* [2017] eKLR the Court dismissed a Plaintiff's claim for adverse possession over land that was under common tenancy with 11 other individuals (the Defendants) for failure to prove any acts of ouster of his co-tenants and the fact that he was initially a caretaker and later tenant on the suit land. The Court cited with approval the Court of Appeal case of *Ahmed Abudulkarim & another Vs Member for lands and Mines & Another* (1958) EA436 at 441 where it was held that as between tenants in common, there must be some overt act amounting to ouster before possession of a co-tenant becomes hostile.
35. In allowing an application seeking accounting of proceeds over land held in common in undivided shares, the Court in the case of *Rishard Abdulrehman Khator & another v Idha Marie Ahmed & 2 others* [2022] eKLR was of the following view;

“We must remember that the proprietorship here is of undivided shares. Bar any agreement by the proprietors regarding the use of the premises, or any portions of it, it means that no party has an exclusive right to the use of any portion of the premises. The share of the parties is virtual and not actual on the ground. Ordinarily such premises are either used by all the proprietors by mutual agreement, or is let out and the rent received apportioned in accordance with the shares of the parties. Challenges can of course arise where the premises is in the hands of one party who does not wish to disclose the income that is being received. Where ownership is joint or is in common, unless the land is partitioned, it may be near impossible to say that one person has encroached onto the share of another and I am not sure how one would be enjoined from the other's share. I also do not see how one may be said to be in forcible detainer of the land. Where there are challenges on proprietorship touching on undivided shares, the best avenue is for the parties to apply to have the land partitioned (if this is possible and it may only be possible if the land is large), or the land sold and the proceeds shared, so that the conflict is resolved. I may not have heard the suit but I think the judge was persuaded from the evidence that the respondent had assumed exclusive use of the premises. That probably was the respondent's case because he made a counterclaim for adverse possession for the whole of the land. That is why the judge ordered the respondent to account to the applicants to the extent of 2/3rds of the income that he has been receiving. She would not have ordered otherwise if she had not found as much. Thus, it is not so much about demarcating the land on the ground, which by the way will alter the status of the premises from undivided shares to individual ownership of the subdivisions, but is a matter of the respondent tabling accounts of the income that he has been receiving from the premises so that it is shared pro rata according to the shares of the proprietors. That was the order of the Court and the respondent needs to comply with it bar any further order that may come from the Court of Appeal.”

36. In this case there is no dispute that Kungu held 3/7 shares of the land and Njenga owned 4/7. It is not disputed that the shares held by the two owners are undivided. Going by the decisions cited above I find that the Plaintiffs claim for adverse possession fails on that account.



37. The other reason why a claim in adverse possession should fail is because the Plaintiffs have pleaded fraud on the part of Kungu in the manner in which he acquired the land. It was the case of the Plaintiffs that Njenga was a known mental health infirm incapable of transferring the 3/7 share of the land to Kungu least of all months from the date that Njenga was bequeath the land by his late father.
38. It is trite that a claim impugning title destroys adverse possession. An adverse possessor must acknowledge the title of the paper owner as that is the title that he has come to Court to seek. In the persuasive case of *Munyao Sila J, in Wellington Lusweti Barasa & 75 others v Lands Limited & another* [2014] eKLR the Court held;
- ‘Apart from the claim for adverse possession, the Amended Originating Summons has also sought an order sought to declare the transfer of the suit land to the 2nd Defendant as null and void. I am afraid that this prayer cannot be reconciled with the main prayer for adverse possession. If I am to declare the transfer as null and void, then automatically, the Plaintiffs cannot assert title against the 2nd Defendant for adverse possession, for the 2nd Defendant will not have a title which the Plaintiffs can then assert adverse possession against. A party cannot plead adverse possession and at the same time assert cancellation of the same title by way of fraud. The two orders cannot be made in the same suit, for to sustain a claim for adverse possession, there must be a title, to which the party claims possession that is adverse to that of the title holder.
39. In the upshot the claim of the Plaintiffs fails. It is dismissed
40. The costs shall be in favour of the 2nd Defendant.
41. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 20TH DAY OF DECEMBER, 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ndinda HB Mbaabu for 1st, 2nd and 3rd Plaintiffs

1st Defendant – Absent

Ms. Kiarie HB Ndungu Mwaura for 2nd Defendant

Court Assistant – Phyllis / Kevin

