



Waitherero v Wangari & 2 others (Environment and Land Case Civil Suit 52 of 2022) [2022] KEELC 15593 (KLR) (20 December 2022) (Judgment)

Neutral citation: [2022] KEELC 15593 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT AND LAND CASE CIVIL SUIT 52 OF 2022
AK BOR, J
DECEMBER 20, 2022**

BETWEEN

MARY WAITHERERO PLAINTIFF

AND

JEDIDA WANGARI 1ST DEFENDANT

JOHN MUNDIA 2ND DEFENDANT

MUNYI MUNDIA 3RD DEFENDANT

JUDGMENT

1. The plaintiff initially filed Nanyuki Chief Magistrates Court Case Number 44 of 2014 claiming that she was the registered owner of the land known as Euasonyiro/ Suguroi Block 1/1075 (“the suit property”) and that the Defendants had illegally trespassed and encroached on the suit property claiming to have purchased it. She sought a permanent injunction to restrain the defendants from trespassing onto her land.
2. Upon being served with the claim, the defendants entered appearance and filed a counterclaim dated 15/5/2014 in which they averred that sometime in 2000 they entered into sale agreements with Kamuki Wageki Housing Company vide which this entity sold 2 acres out of the suit property to the 1st defendant and 4 acres to the parents of the 2nd and 3rd defendants. They averred that the sale was done with the authority and for the benefit of the Plaintiff’s husband known as Lawrence Kinyua Mwai as the registered proprietor at the time and that he received the sale proceeds. They stated that pursuant to that sale they were put in possession of 6 acres of the suit property by the registered owner. They added that they had been in exclusive, uninterrupted and open possession of 6 acres of the suit property. They sought a declaration that they had variously acquired 6 acres of the suit property by adverse possession and that they should therefore be registered as the proprietors of 6 acres of the suit property in place of the plaintiff.



3. The plaintiff filed a defence to the counterclaim in which she disputed the averments in the counterclaim. She averred that the defendants lacked capacity to enforce any rights over the suit property because they were not parties to any agreement over the suit property with either her or her husband. She also denied that her husband was a member of Kamuki Wageki Housing Company Limited. Further, she denied the allegation that the defendants had been on the suit property from 2000 or that they had been on the land for 15 years as they claimed.
4. An application was made to transfer the suit to the Environment and Land Court (ELC) and a consent was recorded by the parties on 16/7/2014 to transfer the suit to the Nyeri ELC for hearing and disposal.
5. The trial proceeded before Lady Justice Lucy Waithaka of Nyeri ELC on 25/7/2017. The plaintiff testified and stated that she filed the case when trespassers invaded the suit property which she owns. The land was given to her by her husband Lawrence Kinyua Mwai and a title was issued in her name on 25/2/2011. She produced a copy of the title and a copy of the green card. Her husband was a member of Gatarakwa Farmers Company Limited and was issued an allocation certificate by this company in 1987, a copy of which she produced.
6. She did not know the 1st defendant and was emphatic that she had never sold the suit property to anybody. Similarly, her husband never sold the land to the defendants even though the defendants claimed they purchased it from him in 2000. She denied that the defendants lived on the suit property but conceded that they farmed on it and had leased out the suit property to other people.
7. On cross-examination, she stated that she had not utilised the land because the defendants had trespassed on it. Her husband had never used the land since it was allocated to him. She clarified that her son James Mwai went to Nanyuki High School. She did not recognise the person appearing in photographs of the suit property taken by the defendants. She could not tell when the crops shown on the photographs were planted but vehemently denied that those crops would suffice to prove that the defendants had been on the land for 15 years.
8. She stated that sometime in December the defendants invaded her land and started cultivating it claiming to have bought the land. Despite demand being issued they refused to move out of the land. She sought a permanent injunction to restrain the defendants or their agents from trespassing onto her land.
9. Lawrence Kinyua Mwai testified. He relied on his affidavit filed on 16/5/2014 in which he denied knowledge of the defendants or that he entered into any transactions over the suit property with them. He averred that he never received any purchase price in cash or in form of school fees from the defendants. He stated that he never authorised any agent to sell his land. He gave his children's names and denied that they were educated with money from the defendants. He denied that the defendants had built any structure on the suit property or that they had been cultivating the land exclusively for the period they claimed.
10. He bought the suit property from Gatarakwa Farmers Company Limited. The land was registered and a title deed was issued to him on 16/7/1997. The suit property was vacant when it was allocated to him. He decided to transfer it to the plaintiff, who is his first wife. He did not know the defendants or their parents. He denied selling the land to the defendants. He was emphatic that he had never been a director of Kamuki Wageki Housing Company nor did he instruct any agent to sell the suit property. He stated that he had never been summoned to appear before the Chief regarding the dispute over the suit property.
11. He confirmed that James Mwai was his son and that he studied at Nanyuki High school. He was categorical that he never sold the suit property to the defendants in 2000 to pay James school fees while



pointing out that by 2000 James Mwai had finished school and was already working. He was categorical that none of his children schooled in Njonjo High School. He disputed that the defendants had been on the suit property for 15 years.

12. On cross-examination, he confirmed that he had never utilised the suit land since he purchased it. He did not have daughters called Grace and Margaret Kinyua. He was not aware of the claim by the 2nd and 3rd defendants' that their father paid school fees for his children through postal money orders. He averred that the money orders which the defendants' relied on did not bear his children's names. He contended that the defendants had trespassed on the suit property without his permission or that of his wife and urged that they should be evicted from the suit property.
13. James Mwai Kinyua gave evidence and confirmed that the Plaintiff was his mother. He resided on the suit property. Sometime in mid-December 2013 the defendants approached him claiming to have bought the suit property and started erecting a fence and semi-permanent structures on the land. He reported the matter to the Officer Commanding the Ngobit Police Station. He did not receive much help from the police. The defendants continued to invade the suit property as they threatened to use force and crude weapons to drive him out of the land. He incurred heavy loses and damage to his crops while the defendants threatened to slash him with pangas.
14. He joined Nanyuki High School in 1996 and left in 1999. He produced his school leaving certificate to confirm this fact. He stated that sometime in 2017 he visited the suit property and was assaulted by one of the sons of the 1st defendant. he reported the assault and the 1st defendant was arrested. He produced the charge sheets in respect of Criminal Case No. 287 of 2017. The police advised him to file a civil suit against the defendants to restrain them from cultivating the suit property.
15. He stated that the defendants were cultivating the land but that they had never built any structure on the land. They had never lived on the land. He was out of country when the defendants entered the land in 2014. The 1st defendant owned land 5 kilometres away from the suit property where she resided. He did not know where the other defendants lived. He was categorical that his father paid his school fees from his business proceeds and not from the proceeds of sale of the suit property as the defendants contended. He had erected a house and some structures for his workers on the suit land.
16. The 1st defendant gave evidence. She stated that sometime in 2000, she and the mother of the 2nd and 3rd defendants bought a portion of Euasonyiro/Suguroi/Block 1/1075 from land agents known as Kamuki Wangechi Housing Company. The land was in the name of Lawrence Kinyua Mwai. She bought 2 acres while the mother of the 2nd and 3rd defendants bought 4 acres out of the suit land. The purchase of the 6 acres was done on the understanding that the agents had bought the suit land from Lawrence Kinyua Mwai and that he would transfer the land to them directly. She stated that the land sold to them was demarcated on the ground and they were put into exclusive possession of their respective entitlement. They were made to understand that the sale proceeds were required by the owner to educate his three children Margaret Kinyua, Grace Kinyua and James Mwai Kinyua who were in various secondary schools.
17. She stated that Lawrence Mwai used to present the demands for school fees for his children to them and the agents and would acknowledge receipt of the purchase price they paid from the agents and that this was evident from the copies of acknowledgment and money orders of the respective schools which she tendered in evidence. That when the land agent had received the full purchase price due from them, they were put into possession of the land sold to them into 2000. However, Lawrence Mwai reneged on his promise for a speedy transfer of the land to them within that year and instead went missing.



18. In a twist of events, one of the sons of the original owner known as James Mwai went to the land on 7/12/2013 with the police and they arrested her son Peter Njugi and the 2nd and 3rd defendants for alleged trespass on the suit property. They spent three days in police cells and were later released without any charges being preferred against them. Various crops were damaged by the police and Lawrence's son. They learned then that the suit property had been transferred to the Plaintiff. They reported the matter to the local administration who advised that the status quo was to be maintained.
19. She maintained that it was apparent that they had been in exclusive and uninterrupted possession and use of the land for about 15 years and that the plaintiff had never occupied the land nor had they ever seen her.
20. The proceedings show that she produced copies of the registration certificate for Kamuki Wageki Housing Company, the abstract of title for the suit property, an application for the purchase of a plot from Kamuki Wageki Housing Company and a letter on the notepaper of Kamuki referring to an agreement dated 11/2/2000 over the suit property indicating that the company would pay school fees for the children of Lawrence Mwai. She also produced illegible acknowledgements by Lawrence Mwai of payments received, copies of money orders, receipts for payment of purchase price by the 1st defendant and an agreement for sale of part of the suit land to the 1st defendant.
21. The court was unable to discern the contents of the illegible documents which the 1st defendant tendered in evidence before Lady Justice Waithaka. She also produced a letter from the Assistant County Commissioner dated 6/2/2014 addressed to Lawrence Mwai referring to the Defendants' claim over the land while recommending the maintenance of the status quo where the defendants would continue using the suit land until the dispute was resolved.
22. The 1st defendant stated that she purchased an acre of the suit property from Lawrence Kinyua and his wife and that she started cultivating the land in 2000 and built a structure on it. She contended that the plaintiff's third witness started cultivating the suit property during the tenancy of the suit. She confirmed that the structure shown in the photographs belonged to the 3rd defendant. She did not visit the suit property after the plaintiff's son evicted them from the land.
23. On cross-examination, she stated that Lucy Murugi, who later died, purchased the four acres from Lawrence Kinyua for the 2nd and 3rd defendants who were cultivating the land. She did not have any documents to show that she and Lucy purchased the land from Lawrence Kinyua. She confirmed that she had a different parcel of land about 5 kilometers away where she had built a permanent house and resided. She confirmed that her son was arrested over the suit land.
24. The 2nd and 3rd defendants were not in court on that day. When the 1st defendant finished giving evidence, the court declined to grant an adjournment to allow them to attend court on another day. The defendants closed their case at that point. The court gave directions for the filing of submissions. The Plaintiff filed her submissions on 24/5/2019.
25. She submitted that she was registered as the owner of the suit property on 25/2/2011. That when Lawrence Kinyua Mwai transferred the land to her in February 2011, the defendants had not taken any legal action against him to claim any rights or interests over the suit land. She submitted that at the time of filing suit, she had been registered as the owner of the land for only three years and hence the claim for adverse possession could not arise.
26. She maintained that the defendants were trespassers while pointing out that they did not obtain Land Control Board consent for the transaction. Additionally, that the Defendants failed to produce any written agreement that they entered into with Lawrence Mwai or the Plaintiff for the sale of the suit



land. She relied on the Law of Contract Act, the Land Control Act and the Land Registration Act and argued that any transaction which contravened those statutes was invalid.

27. The plaintiff relied on section 107 of the Evidence Act and submitted that the defendants failed to discharge the burden of proving that they had a written sale agreement with Kamuki Wagechi Housing Company, which in any event was not a party to these proceedings. She added that the defendants had failed to prove that Lawrence Kinyua Mwai entered into any agreement with them. She pointed out that the receipt which the defendants relied on was for Njonjo High School yet James Mwai went to Nanyuki High School.
28. The plaintiff pointed out that the 2nd and 3rd defendants did not produce grant of letters of administration authorising them to pursue the assets of their late mother and contended that they lacked legal standing and that their counterclaim was therefore incompetent. She urged that the 1st defendant failed to prove her counterclaim for adverse possession of the land and that it must therefore fail.
29. When the matter came up in court on 15/7/2021, the court granted the defendants 14 days to file and serve their submissions. They did not file submissions. The file was transferred to the Nanyuki ELC on 9/11/2021.
30. The issue for determination is whether the court should grant a permanent injunction to restrain the defendants from dealing with the suit property or declare that the defendants have acquired rights over the suit property through adverse possession as pleaded in the counterclaim.
31. It is not in dispute that the plaintiff is registered as proprietor of the suit property measuring approximately 7.53 hectares. A title deed over the suit property was issued to the plaintiff on 25/2/2011 after her husband Lawrence Mwai, transferred the land to her.
32. The defendants' claim is that they purchased six acres out of the suit property from Lawrence Mwai in 2000 through an agent known as Kamuki Wageki Housing Company. It was the 1st defendant's evidence that the purchase price was to be applied to pay school fees for the children of Lawrence Mwai. The exhibits evidencing payment of the purchase price and the agreements which the 1st defendant produced are illegible.
33. The contention by the defendants that the sale proceeds which they paid to the land agent were applied towards payment of school fees for Lawrence Mwai's children was controverted by the plaintiff who proved that her children bore different names and that they did not attend the schools which the defendants referred to in their evidence.
34. The plaintiff's son testified and produced a copy of his school leaving certificate confirming that he completed his high school education at the Nanyuki High School in 1999. This proves that whatever money the Defendants may have paid to Kamuki Wageki Housing Company in 2000 could not have paid school fees for James Mwai.
35. No evidence was adduced to prove that the defendants entered into any agreement with the plaintiff or Lawrence Mwai for the sale of portions of the suit land. A witness from Kamuki Wageki Housing Company should have been called to give evidence of the sale transactions which the defendants claim that they entered into with Lawrence Mwai. There is no evidence of the plaintiff or Lawrence Mwai having transacted with Kamuki Wageki Housing Company over the suit land. If indeed there was such transaction, then the defendants ought to have enforced the agreement and sought subdivision of the suit property for purposes of excision of the six acres and its transfer to their names as purchasers.



36. It is imperative for a person seeking to enforce rights as an adverse possessor of land to prove that he has been on the land for a minimum of twelve years after entering the land without force and without secrecy. The defendants failed to prove that they had been on the suit property peacefully and for an uninterrupted period of 12 years before their occupation of the land was disrupted by the plaintiff's son in 2014. They failed to prove that their occupation of the land started in 2000. Had they been on the suit land for more than 12 years, they would have filed a claim for adverse possession once they attained the prescribed statutory period.
37. The defendants failed to prove their claim for adverse possession.
38. The plaintiff has proved her claim on a balance of probabilities. A permanent injunction is issued to restrain the defendants from trespassing onto the suit property. The plaintiff is awarded the costs of the suit.

Delivered virtually at Nanyuki this 20th day of December 2022.

KOSSY BOR

JUDGE

In the presence of:

Mr. J. Okemwa holding brief for Mr. J. Abwuor for the Plaintiff

Mr. Charles for the Defendants

Ms. Stella Gakii- Court Assistant

