



**Wachira & another v Nderi (Environment & Land Case 212 of 2014)  
[2022] KEELC 15265 (KLR) (9 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15265 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 212 OF 2014**

**JO OLOLA, J**

**DECEMBER 9, 2022**

**BETWEEN**

**SIMON WANJOHI WACHIRA ..... 1<sup>ST</sup> PLAINTIFF**

**AGNES WANJIKU WACHIRA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**FRANCIS GITHAE NDERI ..... DEFENDANT**

**JUDGMENT**

**Background**

1. By the plaint dated October 14, 2014 as filed herein on October 15, 2014, Simon Wanjohi Wachira and Agnes Wanjiku Wachira (the plaintiff's) pray for orders:
  - (a) That the defendant who is illegally occupying and utilizing part of the plaintiffs land Tetu/Mutuanini/310 should vacate or be evicted from there;
  - (b) The defendant do remove his fence, food crops and any other property he has in this land;
  - (c) The defendants do pay the costs of this suit; and
  - (d) Any other or further relief this honourable court may deem fit to grant.
2. Those prayers arise from the plaintiffs contention that they are the registered proprietors of the said LR No Tetu/Muthuaini/310 measuring approximately 8.61 Ha while the defendant is the registered proprietor of the neighbouring LR No Tetu/Muthuaini/654 measuring approximately 2.83 Ha. The plaintiffs accused the defendant of encroaching upon their land and proceedings to occupy a portion measuring on half of an acre and hence the prayers sought herein.



3. Francis Githae Nderi (the defendant) is however opposed to the grant of the orders sought. In his defence and counterclaim dated November 20, 2014 as filed herein on November 25, 2014, the defendant denies the plaintiffs' accusations and asserts that since demarcation of the land, the said one half of an acre has always been in his use and occupation.
4. The defendant avers that the matter has been handled at the clan level and by the Land Registrar Nyeri and that the verdict has always been in his favour.
5. By way of his counterclaim, the defendant asserts that even if the portion of land complained of was the plaintiffs' their titles thereto had long been extinguished through prescriptive rights of adverse possession as the defendant has occupied and used the land since the year 1958. Accordingly, the defendant prays for orders:
  - (a) That a declaration do issue that the defendant has obtained, by adverse possession all the portion of land measuring by area over ½ acre, on the lower side of the plaintiffs' land Tetu/Muthuaini/310 and the same be transferred to him;
  - (b) That the Land Registrar Nyeri and/or the Lands Office be ordered to place appropriate braces to reflect the true ground occupation and rectify their records appropriately with the production of old titles dispensed with; and
  - (c) Costs of this suit and counter-claim plus interest.

#### **The Plaintiffs' Case**

6. In support of their case, the plaintiffs called a total of 4 witnesses who testified therein.
7. PW1 – Simon Wanjohi Wachira is the 1<sup>st</sup> plaintiff herein and a resident of Mukaro in Nyeri County. He told the court the 2<sup>nd</sup> plaintiff is his mother while the defendant herein is his paternal uncle and a neighbor. PW1 further told the court that their parcel of land is Tetu/Muthuaini/654.
8. PW1 testified that the dispute herein concerns a portion of land measuring ½ an acre which is occupied by the defendant. PW1's father had reported the matter to the clan and the matter was later escalated to the Land Registrar in 1976 but no action was taken. PW1 testified that by the time his father died in 1985, the case remained unresolved. The plaintiffs' family then went back to the Land Registrar who visited the land with a surveyor and determined that the portion of land in dispute belonged to the plaintiffs.
9. PW1 told the court that the matter then went to the High Court where a ruling was delivered on February 21, 2014 dismissing the originating summons that had been filed.
10. On cross-examination PW1 told the court he was born in 1950 and that he was aged 8-9 years during the period of demarcation. He told the court his father was Wachira Nderi while his maternal grandmother Veronica Wanjiru was a co-wife to the defendant's mother Wangechi Nderi. PW1 further told the court their family had been in occupation of the disputed portion of land since the demarcation and that he was registered together with his mother as the proprietors of the land in trust for the rest of the family after they filed a succession cause following his father's demise.
11. PW2 – David Ngata is a deputy surveyor, Nyeri County. His duties include carrying out surveys in the County. PW2 told the court the Registry Index Map for the area indicates that the defendant's plot No 654 borders the plaintiffs' plot No 310 on the Western side. He further told the court that according to his map the disputed portion of land is part of plot No 310 but he did not know the acreage.



12. On cross-examination PW2 told the court he was unaware that during land demarcation in the area in 1954 the boundaries of some parcels of land within the area were altered.
13. PW3 – Chrysogon Wangondu Nduhiu is a farmer in Ruringu. He told the court he knows and is related to the parties in this case and that the 1<sup>st</sup> plaintiff is a step brother to the defendant. PW3 further told the court that plot Nos 310 and 654 share a common boundary.
14. PW3 testified that the dispute started way back in 1976 and that he had once helped the 1<sup>st</sup> plaintiff's father to write a letter to the Land Registrar on October 7, 1976 over the dispute.
15. On cross-examination, PW3 conceded that he was not an elder of the Nderi clan. He told the court there was no time when the defendant's wife – Consolata Nderi ever cultivated the land.
16. PW4 – Ignatius Gitonga Gitari is a farmer and a relative of the parties. He told the court he was about 21 years old when land demarcation was done in the area in 1958-1959. He was involved in helping the surveyor to clear the land and straighten the ropes during the demarcation exercise.
17. PW4 testified that he could recall that the plaintiffs land plot No 310 went across the road up to the river while that of the defendant terminated at the road. He further told the court it was the defendant who was presently using the disputed portion.
18. On cross-examination, PW4 told the court the surveyors had been sent to the land by the government and that he was not one of the staff sent by the government. He testified that the portion on the lower side of the road towards River Kanoga was the one in dispute. The land on the upper side of the road is the one that belonged to the defendant. He conceded that all other parcels of land reached upto the river and that it was only the defendant's parcel which ended at the road.

### **The Defence Case**

19. The defence called 2 witnesses in support of their case at the trial.
20. DW1 – Peterson Douglas Gutu is a retired Land Registrar now engaged in farming. He told the court a boundary dispute had been filed by one Wachira when he was the Land Registrar Nyeri and that he had gone to the ground and prepared a report on the same.
21. On cross-examination, DW1 told the court he had retired in 2007 when serving at Igembe. He told the court he was unaware why the defendant called him as a witness from retirement and that all the documents pertaining to the land were at the Land Registrar's office in Nyeri. DW1 testified that the portion in dispute was half an acre.
22. DW1 further testified that the dispute concerned a claim of land and that the same was not a boundary dispute. He further told the court he was unaware if one of the parties went to court after his report and/or that his decision was set aside. He conceded that there was a brace in plot No 310 and that that meant that the land continues across the road. That was however not the case herein.
23. DW2 – Mary Wambui Githae Nderi is the wife to the original defendant. She told the court her husband Francis Githae Nderi passed away after the case started and she was substituted in his stead. She told the court she was in the company of her husband when he wrote his statement that was filed in court on November 25, 2014.
24. DW2 testified that she was there when the 1<sup>st</sup> plaintiff's father initially complained against her husband. The matter went to the elders 3 times and all the time the elders decided the dispute in favour of DW2's



husband. DW2 testified that after the decision by the elders in 1985, they planted a boundary as ordered by the elders and the 1<sup>st</sup> plaintiff's father Bernard Wachira never thereafter claimed the land.

25. DW2 testified that the land had always been used by her husband's family. She was married in 1966 and had been in sole occupation of the land to-date. She further told the court the two Plaintiffs only started claiming the land after the death of Benard Wachira. They came with a Surveyor to the land forcing DW2 and her husband to lodge a caution at the Land Registry.
26. In cross-examination, DW2 told the court she was married in December, 1965 and that the land had been given to her mother-in-law in 1958. DW2 conceded there had been many disputes concerning the land. The elders dealt with the land in 1985 while the Land Registrar had come around 2006. She told the court there were two braces on their land which her husband had sub-divided before his death.

### **Analysis And Determination**

27. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the written submissions and authorities placed before me by the learned advocates acting for the parties herein.
28. Simon Wanjohi Wachira and his mother Agnes Wanjiku Wachira (the plaintiffs) instituted this suit on October 15, 2014 against Francis Githae Nderi (the original defendant) seeking orders that he should vacate or be evicted from a portion of land known as Tetu/Muthuaini/310. The two plaintiffs also urged the court to direct the said defendant to remove his fence, food crops and any other property he has on the portion of land said to be measuring one half of an acre.
29. Those prayers arise from the plaintiffs contention that they are the registered proprietors of the said parcel of land measuring approximately 8.61 Ha in total. The plaintiffs accused the defendant who was their neighbor and proprietor of an adjacent parcel of land known as Tetu/Muthuaini/654 of trespassing into and encroaching onto their portion of land and refusing despite many demands made to vacate the same.
30. In his statement of defence and counter-claim filed herein on November 25, 2014, Francis Githae Nderi did not deny that the plaintiffs are presently the registered proprietors of the said LR No Tetu/Muthuaini/310. It was however his case that since the year 1958 when land consolidation and demarcation was done in the area, it was him who had occupied and utilized the said portion of land measuring one-half of an acre.
31. By way of his counter-claim, the defendant contended that even if the portion of land claimed by the plaintiffs previously belonged to them, their title to the same had long been extinguished through prescriptive rights of adverse possession. Accordingly, the defendant sought a declaration that he had obtained the said portion of land by adverse possession and an order directing the Land Registrar Nyeri to rectify their records appropriately to reflect the position on the ground.
32. As fate would have it, Francis Githae Nderi passed away on March 28, 2018. Following an application made herein by his wife Mary Wambui Githae who had been issued with a limited grant of letters of administration for his estate on August 30, 2018, the said Mary Wambui Githae was substituted as the defendant herein on March 6, 2019.
33. From the material placed before me, it was apparent that the dispute herein has been outstanding for a long period of time. The parties have tried to resolve the same through clan elders and the office of the Land Registrar Nyeri in vain. While the plaintiffs did not clearly state when the defendant trespassed onto and encroached on the disputed portion of the land, they have produced a copy of proceedings and a ruling made by the then Nyeri District Land Registrar - PD Gutu dated March 2, 2006.



34. As it turned out, the said PD Gutu testified for the defence at the trial herein as DW1. At page 2 of the said report, DW1 captures the history of the dispute as narrated by one Joseph Munyeki who was appearing for the side now represented by the plaintiffs herein as follows:

“Witness of Applicant

Joseph Munyeki states:-

I am the son of the late Benard Wachira Nderi. We came to this land Kiambura in 1959 in Tetu/Muthuaini/310. When we came we were farming on this farm and my grandmother and the other grandmother of my mother. In 1969 in April and the portion in claim was taken by the defendant. In April, 1969 one grandmother told us that the portion was taken by the defendant. She sent me and my brother Wanjohi to uproot the boundary which was erected on the portion of the land. We met with my father who was not staying here and we informed him all that we were told by our grandmother. He requested us to go back home and my mother (grand) told him all what happened and he said that he will report the matter to clan elders.

He reported the matter to clan elders and to District Officer Tetu. The District Officer gave him the letter to take to Lands Office. After informing the Land Registrar, the Land Registrar told the District Officer that there were so many cases of the same nature. He was put on the waiting list until the availability of time or chance, which never materialized until the time of death in 1986. In 1986 we talked with my brother about the dispute and we agreed that I see the secretary to the clan Mr John Kingori Nderi who helped much to refer us back to clan elders ...”

35. That the dispute is several decades old was confirmed by the 1<sup>st</sup> plaintiff himself and his witnesses. Testifying as PW1, the 1<sup>st</sup> plaintiff told the court that prior to his father’s death in 1985, his father had reported the matter to the clan and that the matter was later escalated to the Land Registrar in 1976 but no action was taken. That position was further supported by Chrysogon Wangonde Nduhiu (PW3) who told the court that the dispute started way back in 1976 and that he had once helped the 1<sup>st</sup> plaintiff’s father to write a complaint to the Land Registrar over the dispute. A copy of the letter dated October 7, 1976 was produced by the plaintiffs as an exhibit at the trial.
36. Arising from the foregoing it was evident that since the year 1969, the plaintiffs and their predecessor in title had been aware of the defendant’s occupation and use of the disputed portion of land. While indeed the plaintiffs’ predecessor in title had written to the Land Registrar in 1976 and reported the matter to clan elders, the plaintiff and/or their predecessors in title never took out any other proceedings to assert their right in court and regain occupation of the disputed portion of the land.
37. As it were, section 7 of the Limitation of Actions Act 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.”
38. From the material placed before me, it was apparent that the defendant had been in occupation of the disputed portion of land at least since April, 1969. That would be some 45 years before the plaintiffs instituted this present suit in October, 2014. While the plaintiffs contended in their submissions herein that the period of occupation was disrupted when their predecessor in title instituted proceedings



before the clan elders and the Land Registrar, I was not persuaded that those actions could be construed to have such an effect.

39. As was stated in *Mtana Lewa v Kabindi Ngala Mwangandi* (2015) eKLR:

“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, 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.”

40. In the matter herein, the defendant had taken possession of the land some four (4) decades earlier, had fenced the same, cleared it and cultivated crops thereon over the years. I was unable to find a reason to infer that the filing of the claim before the elders as well as the Land Registrar had the effect of stopping time from running. As the Court of Appeal stated in *Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees* (2016) eKLR:

“...as regards assertion of title, it is not enough for a proprietor of land to merely write to the trespasser (to vacate). A letter by the proprietor, even if it be through an advocate or the Chief of the area does not amount to assertion of title in law and cannot therefore interrupt the passage of time for the purpose of computing the period of adverse possession. For there to be interruption, the proprietor must evict or eject the trespasser but because eviction is not always possible without breach of peace, institution of a suit against a trespasser does interrupt and stop the time from running.”

41. In the matter before me, the plaintiffs never took any plausible steps to assert their rights over the suit property for a period of 45 years. In the circumstances herein I am persuaded that there was no merit in the plaintiffs’ claim. On the other hand I was persuaded that the defendant has on a balance of probability established that her case meets the threshold for the grant of the orders of adverse possession.

42. Accordingly the court makes the following orders:

- (a) The plaintiffs’ suit is hereby dismissed in its entirety;
- (b) A declaration is hereby made that the defendant has obtained, by adverse possession all that portion of land measuring by area ½ acre, on the lower side of the plaintiffs’ parcel of land being LR No Tetu/Muthuaini/310 and the same is hereby transferred to her;
- (c) The Land Registrar Nyeri is hereby ordered to place appropriate braces to reflect the true ground occupation and rectify their records appropriately with the production of old titles dispensed with;
- (d) Each party shall bear their own costs.

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 9<sup>TH</sup> DAY OF DECEMBER, 2022.**

In the presence of:

Mr Kebuka Wachira for the plaintiffs



Ms Miriti holding brief for Karweru for the defendant

Court Assistant - Kendi

**JO Olola**

**JUDGE**

