



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ngugi v Mwangi & another (Environment & Land Case 9 of 2020)
[2022] KEELC 15371 (KLR) (8 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15371 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 9 OF 2020
LN GACHERU, J
DECEMBER 8, 2022**

BETWEEN

JOHN KAMANDE NGUGI APPLICANT

AND

PETER KARANJA MWANGI 1ST RESPONDENT

JOSEPH KAMANDE MWANGI 2ND RESPONDENT

JUDGMENT

1. The Applicant moved this Court *vide* Originating Summons dated May 12, 2020, and filed on June 9, 2020, against the Respondents for orders:
 1. That the Applicant has by way of adverse possession acquired land title of One Acre out of land parcel No Loc 7/Ichagaki/645, and that the One Acre out of the suit land be registered in the name of John Kamande Ngugi.
 2. That the Land Registrar Murang'a be ordered to transfer One Acre out of land title no Loc 7/Ichagaki/645, to the Applicant
 3. That the Deputy Registrar of this Court do sign application for Land Control Board, transfer, documents and any other applications and documents necessary to facilitate transfer of One Acre out of land parcel Loc 7/Ichagaki/645, to the Applicant
 4. That the Respondents do pay the costs of this suit.
2. The Originating Summons is premised on the grounds stated on the face of it and the Supporting Affidavit sworn by the Applicant. The Applicant contends that he bought One Acre of land from Njeri Karanja, the registered proprietor of the suit land and he took immediate possession of the same and he has occupied the same since 1979.



3. It is the Applicant's case that he has been in continuous and uninterrupted occupation of the suit land for a period of more than 12 years. Further, he contends that he filed a suit against the Respondents in 1998, at the Maragua Land Disputes Tribunal which was ruled in his favor and which pronouncement was affirmed on Appeal at the Nyeri Provincial Appeals Committee. The Applicant's claim against the Respondents is for issuance of his One Acre portion to be excised from Loc.7/Ichagaki/645, which the Applicant contends has been subjected to a succession process.
4. In response to the Summons, the Respondents filed a joint Replying Affidavit wherein they at first claimed they were not beneficiaries of Njeri Karanja and thus they lacked the locus of being sued. Subsequently, the Respondents filed a Supplementary Replying Affidavit objecting to the Applicant's claim over the suit land. It is the Respondents' case that their deceased grandmother never entered into any sale agreement with the Applicant and the agreements filed in Court are falsified since their grandmother was elderly and could not transact. It is their admission that they are in occupation of the suit land and the Applicant occupies 0.1 acres portion of the land. Additionally, the Respondents deponed that the Applicant's occupation was premised on a lease agreement with their deceased grandmother. That the Applicant has not had peaceful occupation of the suit property since there have been suits in Court. Parties filed their respective witnesses' statement reiterating their case.
5. The matter proceeded for hearing via *viva Voce* evidence.

Applicant's Case

6. PW1 John Kamande Ngugi reiterated the contents of his Summons. He added that the Respondents were present when he purchased the land and are aware of the transaction. He contended that he has lived on the suit land for over 42 years and has never been charged with forgery. That the 1st Respondent was not barred from constructing his house and he confirms purchasing the suit land. Further that he bought the suit land in 1999, and before the purchase, the land had been leased to Muiruri and that the 2nd Respondent witnessed the transaction.

Respondent's Case

7. DWI Peter Karanja Mwangi adopted his witness statement dated September 14, 2021, as evidence in chief and produced the documents contained in the List of Documents in support of their case. He added that he did not sign the sale agreement.
8. On cross-exam, he confirmed that the Applicant built a permanent house on the suit property in 1988, and has never been evicted to date. It was his further testimony that the Applicant is the owner of the suit land save that he did not have a title deed as he is not a relative. He told the Court that he never signed any agreement and that there have been fights over the suit property.
9. The 2nd Respondent opted not to testify, but relied on the testimony of the 1st Respondent in support of their case.
10. The Applicant filed his submissions on the September 23, 2022, wherein he submitted that he acquired prescriptive rights over the suit property. He maintained that he has never been charged with forgery and that the allegations that the sale was false is unfounded since the family of Njeri Karanja was involved in the transaction.
11. The Respondents also filed their written submissions on the July 13, 2022, and raised six issues for determination.



12. They reiterated their testimonies and poked holes on the Applicant's testimony. It is their submissions that the Applicant failed to lead evidence on the authenticity of the documents or the exact occupation on the suit land. Further that with the filing of several suits, the Applicant did not enjoy a quiet and peaceful occupation of the suit land. The Respondents also submitted that the Applicant's occupation resulted from permission and a claim for adverse possession cannot arise. Reliance was placed on the case of *Wambugu vs Njuguna*, (1983) KLR 172, where the Court opined that entry should not be permissive.
13. The Respondents further submitted that the Summons is defective for want of a title extract as well as the fact that the Respondents are not the administrators of the estate of Njeri Karanja . In the end they submitted that the Applicant has not established a case for the grant of orders of adverse possession. Reliance was placed on the case of *Kasavu vs Mwaani Investments Ltd and 4 Others*, (2004) KLR 184, where the Court held that to be entitled to adverse possession, a claimant must prove that he has been in exclusive possession of land for uninterrupted period of 12 years.
14. Undisputedly, the land was as at February 18, 2020, registered in the name of Njeri Karanja , who acquired ownership on February 3, 1966, and which land measures 4.05ha. It is also clear that the Respondents are grandchildren of the said Njeri Karanja . What is not clear is whether succession over the deceased estate was completed or not. The Respondents contended that they are not the beneficiaries of the estate and thus do not have locus of being sued. Before delving into the determination of the prayers sought, it is imperative to determine the issue of locus as submitted by the Respondents.
15. The issue of locus was the basis of the ruling of this Court of June 17, 2021. This Court in paragraph 19 held

From the pleadings and based on the documents placed on record, it appears therefore that the Applicant has a claim over the suit land. Also the Respondents have a share out of the suit property among other beneficiaries. What this Court is not sure is who is in occupation of the portion claimed by the Applicant, this will require examination of the facts and evidence. If the Respondents are in occupation, it matters not who is the administrator as was settled in the Court of Appeal in Mombasa Civ App No 48 of 2018;- *Peter Kim Baker & 2 others v Sidi Katana Bongo & another* [2019] eKLR, where the learned judges opined that the appellants did not need letters of administration to defend their right to occupation.”
16. From the tune of the above ruling, as long as it would be established that the Respondents are in occupation of the suit property, letters of administration were not compulsory. As per the 1st Respondent's witness statement dated September 14, 2021, which was adopted as evidence in chief, the 1st Respondent contend that he is in occupation of the suit land. His testimony was adopted by the 2nd Respondent. It follows therefore that the Respondents have the locus of being sued and this argument must therefore fail.
17. Having found that the Respondents have locus, the issue for determination by this Court are
 - i. Whether the Applicant is entitled to the prayers sought
 - ii. Who should bear costs



i. Whether the Applicant is entitled to the prayers sought

18 The law on adverse possession is provided for under the [Limitation of Actions Act](#). Section 7 of the Act provides

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. Section 13 “(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land”.

19. Section 17 of the said Act extinguishes the rights of a registered owner where there is a successful claim for adverse possession. Section 38 of the same Act on the other hand provides;

(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.”

20. The principle of adverse possession was more elaborately set out in the case of [Wambugu vs Njuguna](#) [1983] KLR 172, where the Court held that:

In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.”

And that:

“The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.”

21. This right is adverse to land and does not automatically accrue unless the person in who’s this right has accrued takes action. Section 38 of the Act gives authority to the claimant to apply to Court for



orders of adverse possession. In the case of *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR the Court held:

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.

22. Further, in the case *Mbira v Gachubi* (2002) 1 EALR 137:the court stated 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 statutorily prescribed period without interruption...”

23. Similarly, in Kisumu Civil Appeal No 27 of 2013 *Samuel Kihamba v Mary Mbaisi* [2015] eKLR, the court held:

“Strictly, for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land”

24. In order to determine whether the Applicant right had accrued, the Court will observe the following:-

- i. How did the Applicants take possession of the suit property?
- ii. When did he take possession and occupation of the suit property?
- iii. What was the nature of his possession and occupation?
- iv. How long has the Applicant been in possession?

25. The suit property belonged to Njeri Karanja , who allegedly sold some land to the Applicant. The Applicant thus acquired the suit property through a sale agreement and going as above, the same was permissive and cannot be sustained.

26. However, there is an exception, as was held by the Court in Application Nairobi App No 73 of 1982;- *Public Trustee v Wanduru Ndegwa* [1984] eKLR. Where it held that in cases of sale agreement Limitation of action begun running from the date of final payment. Further in the case of *Hosea v Njiru & Others* [1974], EA 526, Simpson J, following *Bridges v Mees* [1957] 2 All ER 577, held that once payment of the last instalment of the purchase price had been effected, the purchaser’s possession became adverse to the vendor and that he thenceforth, by occupation for twelve years, was entitled to become registered as proprietor of it.

27. The Respondents objected to the sale agreement despite signing the same and alleged that their signatures were forged. It is their submissions that they never knew about any transaction until the demise of the deceased registered owner. This is notwithstanding the testimony of DW1. This Court finds that Respondents are being economical with the truth. The Applicant led evidence to the effect



that he has set up a home on the suit property and there is no way this could have happened under their watch. Also the Respondents did not undertake the relevant steps to prosecute the case of forgery; and thus this is just but an afterthought in a bid to frustrate the suit herein. The sale agreement was duly entered into and is thus binding.

28. This Court has perused the multiple agreements and notes that the last installment was paid on January 4, 1981. Even though the entire sum does not make up the consideration, there is an implied impression that the same was paid up since the Applicant continued to live and develop thereon. The agreement does not indicate that the same was on the basis of a licence, but sale and transfer. It is safe to conclude that a claim for adverse possession can issue.

29. It is the Applicant's claim that he gained access of the suit land after the purchase in 1981, when he begun construction. DW1 testified that the Applicant built a permanent house in 1988 and that "he is the owner, but he is not our relative. He has no title deed over the suit land" It is evident that the Respondents acknowledge that the Applicant is the owner of the suit land, but they have a problem of his ownership because he is not a relative. It is not easy to tell from the annexed photographs and developments therein when the Applicant gained entry into the suit property.

30. Based on the above testimony, it could either be 1981 or 1988. Justice Kuloba J, as he then was, in Nairobi Civil No. 283 of 1990;- *Gabriel Mbui v Mukindia Maranya* [1993] eKLR held:

"Time does not begin to run unless there is some person in adverse possession of the land. It does not run merely because the land is vacant..... The rule that his entry must be followed by possession and appropriation to his use is founded on the reason that a right of action cannot accrue unless there is somebody against whom it is enforceable"

31. The Applicant claim is that he took possession of the land after purchase and the Respondents contend that the Applicant built a permanent house in 1988. The Applicant's testimony that he was put in occupation of the land immediately after the purchase is not controverted. This Court appreciates the Applicant's act of entering into and putting up a permanent house was meant to dispossess the owner of the land. For purposes of computing time, it is right to conclude that time started running in 1981, when the final instalment was made.

32. The Respondents contend that the Applicant's occupation was not peaceful and uninterrupted, since there were multiple cases. This Court has perused the cases produced by the Respondents as exhibits and notes the one case involving the Applicant was Nyeri Succ No. 742 of 2011, which was an application to bar the Applicant from interring his wife on the suit land. As to whether this stopped time from running can be answered by the case of Malindi CoA Civil Appeal No. 29 of 201;- *Peter Kamau Njau Vs Emmanuel Charo Tinga* [2016] eKLR, where the Court held;

33. in order to stop time which has started running, it must be demonstrated that the owner of land took positive steps to assert his right by, for instance taking out legal proceedings against the person on the land or by making an effective entry into the land.

35. Further in *Kipketer Togom v Isaac Cipriano Shingore* [2012] e KLR, the Court held:

The Respondent must assert his right to title by physically entering onto the property and evicting and ejecting the trespasser from the suit property. Alternatively, the Respondent should have proceeded to institute legal proceedings in a court of law against the trespasser, asserting his rights against the trespasser with prayers for his eviction and ejection from the property. Then only is there interruption to occupation and possession and then only does time stop running."



35. Evidentially, the Respondents moved Court to stop a burial and there was no suit that was filed to evict the Applicant. Taking cue from the two cases hereinabove, nothing stopped time from running. There is no evidence that the Applicant's occupation and possession was ever stopped and/or interrupted. The Applicant built a permanent house on the suit property and as per the attached photographs, the Applicant is doing some farming thereon. Such activities were carried out openly and within the knowledge of the Respondents. There was therefore a clear intention by the Applicant to dispossess, the registered proprietor of the use and occupation of the land. The Court in the case of *Gabriel Mbui v Mukindia Maranya* supra rightly held:

“The adverse 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 twelve or more years. In addition there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown”

36. Additionally, and as per the entries in the Certificate of Official Search, there was registered a restriction in 1988, which was a conditional restriction. This Court has not been apprised of the facts in Civil Appeal No 35 of 1978, whose determination was meant to be the precursor and to this end, this Court finds and holds that the Applicant has established the relevant principles for the grant of an order of Adverse Possession.

37. The Respondents contend that the Applicant's failure to attach a title deed extract renders the suit defective and incompetent. Order 37 Rule 7 of the *Civil Procedure Rules*, requires of an Applicant to attach an extract of a Certified Copy of title. The essence of the title is to point out with the certainty the ownership and title of land. In *Wilson Kazungu Katana & 101 Others vs Salim Abdalla Bakshwein & Another* [2015] eKLR the Court observed:-

The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of *Gitbu vs. Ndele* [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them.”[Emphasis added]

38. The Court in the foregoing case found that the requirement of identification was crystalized by the mandatory provisions of Order 37 Rule 7. The requirements couched herein carry a mandatory requirement and the Applicant was as a matter of law required to comply. There was no excuse as to the non-compliance. However, in the interest of justice, this Court shall invoke the provisions of Article 159(2)(d) of *the Constitution* as well as Section 19 of the *Environment and Land Court Act*. There is no dispute that the land belonged to Njeri Karanja and as per the annexed Certificate of title attached to the Respondents' pleadings, the land can be identified. The land is Loc.7 Ichagaki/645, measuring 4.05Ha, registered in the name of Njeri Karanja . It follows therefore that the Applicant is entitled to One Acre to be excised from the foregoing parcel of land.

ii. Who should bear costs of this suit?

39. It is trite that costs shall follow the events, and that the successful party be awarded costs. It is not in doubt that the Applicant is the successful party and this Court has no reason not to exercise its discretion in his favour. Therefore, the Court finds that the Applicant herein has proved his case on the required standard of prove on the balance of probabilities. For the above reasons the Court enters



Judgment for the Applicant against the Respondents herein, jointly and severally in the following terms.

- a. That the Applicant has proved his claim for adverse possession
- b. That the Applicant is entitled to 1 acre to be excised from Loc.7/ Ichagaki/645.
- c. That the Land Registrar Murang'a, be and is hereby directed to issue title in the name of the Applicant for a portion of 1 acres, from Loc.7/Ichagaki/645 upon the conclusion of the requisite process of demarcation and survey.
- d. The Applicant is awarded costs of the suit.

40. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 8TH DAY OF DECEMBER, 2022.

L. GACHERU

JUDGE

Delivered virtually;

In the presence of;

Absent - Applicant

1st Respondent - Present in person

2nd Respondent - Absent

Joel Njonjo - Court Assistant

L. GACHERU

JUDGE

8/12/2022

