



Ngari & another (Sued as the Legal Administrators and Beneficiaries of the Estate of the Late Philip Ngari Wairagu) v Mukururo & another (Environment and Land Appeal 1 of 2022) [2025] KEELC 3595 (KLR) (8 May 2025) (Judgment)

Neutral citation: [2025] KEELC 3595 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL 1 OF 2022**

JO OLOLA, J

MAY 8, 2025

BETWEEN

JOHN NJAI NGARI 1ST APPELLANT

MUTHEE NGARI 2ND APPELLANT

**SUED AS THE LEGAL ADMINISTRATORS AND BENEFICIARIES OF THE
ESTATE OF THE LATE PHILIP NGARI WAIRAGU**

AND

WANGUI MUKURURO 1ST RESPONDENT

MOSES MWANGI THIONG'O 2ND RESPONDENT

*(An Appeal arising from the Judgment of the Hon. M.N. Munyendo, P.M.
delivered on 8th December, 2021 in Othaya ELC Case No. E002 of 2021)*

JUDGMENT

Background.

1. This is an Appeal arising from the Judgment of the Hon. M.N. Munyendo, P.M. delivered on 8th December, 2021 in Othaya ELC Case No. E002 of 2021.
2. By an undated Plaint filed on 28th April, 2021, in the said Court, Wangui Mukururo and Moses Mwangi Thiong'o, (the Respondents herein) had sought the following: -
 - a. Title Number Chinga/Gathera/S-54 to be removed and /or set aside from the schedule of assets of the estate of Philip Ngari Wairagu (deceased) as filed under the Succession Cause No. 54 of 2019 – Othaya;



- b. An Order that Title Number Chinga/ Gathera/S-54 be registered in the name of Wangui Mukururo as the administrator on behalf of the beneficiaries of the Estate of Mukururo Kihato (deceased);
 - c. In the alternative, the title number Chinga/Gathera/S-54 to be registered in the name of Wangui Mukururo as the administrator and on behalf of the beneficiaries of the Estate of Mukururo Kihato (deceased) as property acquired through adverse possession;
 - d. Cost of the suit; and
 - e. Interest on (c) above at Court rates.
3. The basis of those prayers was the Respondent's contention that Mukururo Kihato had purchased the suit property way back in 1962 and that it was his family that was the rightful heirs of the suit land.
 4. On his part, John Njai Ngari and Muthee Ngari (the Appellants) asserted that their father Philip Ngari Wairagu had lawfully obtained title to the suit property. It was their case that they were only willing to give the Respondents an equal share as the children of the owner as an appreciation of looking after their land.
 5. Having heard the dispute and in her judgment delivered on 8th December 2021 aforesaid, the Learned Trial Magistrate was persuaded that the Respondents had proved their case and ordered as follows:
 1. Title Number Chinga/Gathera/S-54 to be removed from the schedule of assets of the Estate of Philip Ngari Wairagu (deceased) as filed under the Succession Cause No. 54 of 2019 Othaya;
 2. That John Njai Ngari shall transfer to Wangui Mukururo the property Title Number Chinga/ Gathera/S-54, at her expense within 30 days from the date hereof, failing which the Court Administrator of this Court shall execute, on behalf of the said John Njai the necessary transfer documents.
 3. Due to the nature of the dispute, there are no orders to costs.**
 6. Aggrieved by the said determination, the Appellants moved to this court vide a Memorandum of Appeal dated 7th January, 2022 but filed herein on 19th April, 2023 urging this court to set aside the entire judgment on some nine (9) grounds listed thereon as follows:
 1. That the Honourable Learned Magistrate erred in law and in fact in not considering the relevant factors in a suit of adverse possession;
 2. That the Honourable Learned Magistrate erred in law and in fact in considering extraneous matters that were not relevant to the matter at hand thus coming to a wrong conclusion;
 3. That the Honourable Learned Magistrate erred in law and in fact by the basing (of) the Judgment on matters that were not pleaded or proven;
 4. That the Honourable Learned Magistrate erred in law and fact by misdirecting itself on the nature of the Appellants' interest in the estate of the deceased;
 5. That the Honourable Learned Magistrate erred in law and fact (and) failed to appreciate the law of adverse possession;
 6. That the Judgment was against the weight of evidence;**
 7. That the Honourable Learned Magistrate erred in Law and fact failed in abdicating her role (sic) to adjudicate on the matters at hand and proceeding to deliver a Judgment that is per incuriam;



8. That the Learned Magistrate erred in law and (in) fact in applying the wrong principles of judicial discretion; and
9. That the Honourable Learned Magistrate erred in law in failing to critically analyse the evidence presented and the submissions filed by the Appellants and thereby misconstrued the guiding principles of succession.
10. As the first appellate court, the duty of this court is to re-evaluate the evidence that was adduced before the Lower Court and to arrive at its own conclusion bearing in mind that this court did not have the opportunity of seeing and hearing the witnesses first hand [See *Selle & Another –vs- Associated Motor Boat Co. Ltd. & Others* (1968) EA 123].

Analysis and Determination.

11. I have accordingly carefully perused and considered the Record of Appeal. I have similarly perused and considered the submissions and authorities placed before the court by the Leaned Advocates representing the parties.
12. By their suit as fled, the Respondents asserted that they had acquired the suit property under the doctrine of adverse possession. It was the Respondents case that as far back as 1962, one Mukururo Kihato through whom they claim the land had purchased some 3 ½ acres of land from one Jeremiah Kibe. It was the Respondent’s case that following the said purchase, the said Mukururo Kihato took possession of the land, fenced it, planted trees thereon and built dwelling houses for his parents.
13. It was further the Respondent’s case that two years later in the year 1964, the same Mukururo Kihato (now deceased) did purchase a neighbouring property measuring 1 acre from one Philip Ngari Wairagu and proceeded to build his “thingira” thereon. The Respondents told the court Mukururo Kihato lived on the land with his entire family until his demise on 3rd December, 1996 and that their efforts to get the land transferred to themselves had been thwarted by the Appellant.
14. Having considered the issues before her and in her Judgment rendered on 8th December 2021 aforesaid, the Learned Trial Magistrate came to the conclusion that the Respondents had successfully proved their claim of adverse possession. The basis of that conclusion can be discerned from paragraphs 23 to 25 of the Judgment (pages 30 to 31 of the Record) wherein the Learned Trial Magistrate observed as follows:

“23. This being a claim of adverse possession, the Plaintiffs must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by them or those under whom they claim for the statutory prescribed period of twelve years without interruption.

24. The Plaintiffs claim that they moved to the land from way back in 1962. Though there is nothing to show that they bought the land, I am persuaded that they have had actual, open and exclusive possession of the land from the said year. The court had the benefit of visiting the suit property and its finding was that it is indeed true that the family of Mukururo Kihato has been living on the land for over 50 years. This is demonstrated by the age of the houses on the property. I saw several graves of the Mukururo Kihato and his loved ones whose remains are interred at various portions within the property. The tea plantation is well apportioned amongst the two households belonging to the family of Mukururo Kihato.



25. I must also state that the said Phillip Ngari Wairagu has slept on his rights, he has never lived on the suit property and was well aware that the Plaintiffs were settled on the land. During his lifetime, he never took any legal action to evict the Plaintiffs or at the very least file a burial dispute whenever the Plaintiffs had interred their loved ones on the property. I find that the Plaintiffs have proved their case on a balance of probability.”

15. As the Court of Appeal stated in *Mtana Lewa –vs- Kahindi 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 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.”

16. According to the Respondents who are the widow and grandson of the late Mukururo Kihato, the deceased purchased portions of the land in 1962 and 1964 from different persons. That would imply that their initial entry into the property was permitted by the previous owners, among them, the Appellants’ father. While the Respondents did not adduce much evidence to support their contention that Mukururo Kihato had purchased the land in a Kikuyu Customary tradition, there was no doubt that they had been in possession of the suit land exclusively and openly for a considerable period of time.

17. At Paragraph 15 of the impugned Judgement, the court noted that a visit to the Locus in quo revealed that the Respondents had occupied the entire suit property and that they have built houses which appeared to have been there for a considerable period of time. The court further observed that there were several graves in which various members of the Respondents’ family had been buried and that there was a tea plantation sub-divided into portions to cater for the Mukururo Kihato’s family.

18. There was no dispute that the suit property was registered in the name of the Appellants’ father Philip Ngari Wairagu on 8th January, 1985. According to the Appellant, his father who passed on in the year 2007 did not during his lifetime sell the land to either the Respondents or to anyone else. He told the court that his father did not transfer the land to the 1st Respondent and that he had severally tried to evict the 1st Respondent from the land in vain.

19. That being the case, there was no dispute that the Respondents had occupied the suit land exclusively and with the knowledge of the Appellant’s family for along period of time. It was indeed telling that the Appellant pleaded and told the court that their family was agreeable to ceding 1 acre of the suit property to the 1st Respondent for the reason that she had taken care of the same for a considerable period of time.

20. From the foregoing, it was clear to me that even if the initial entry of the Respondents into the suit land was permissive, that permission had ceased before the time the Appellant’s father passed away in the year 2007. In support of their contention that the Respondents had not had an uninterrupted occupation of the suit property, the Appellant produced a letter written by his father dated 26th June, 2005 addressed to the Area Chief Gathera in relation to the land. There was however no evidence adduced to demonstrate that the letter had reached the Respondents. Even if it did the same would not have amounted to much.



21. As the Court of Appeal observed in *Benson Mukura Wachira –vs- 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 suit against a trespasser does interrupt and stop the time from running.”

22. Arising from the foregoing, I was not persuaded that the Learned Trial Magistrate had erred either in law and/or in fact in arriving at the conclusion that the Respondents had acquired the suit property under the doctrine of adverse possession.

23. Accordingly, I find and hold that there was no merit in this Appeal. The same is dismissed with no order as to costs.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT MOMBASA THIS 8TH DAY OF MAY, 2025

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J.O. OLOLA

JUDGE

In the presence of:

- a) Ms. Firdaus Court Assistant.
- b) Mr. Duncan Mindo Advocate for the Appellant
- c) Mr. Moses Thiongo the 2nd Respondent in Person

