



Ndung'u & 2 others (Suing as the legal representatives and administrators of the Estate of the Late Peter Ndung'u Muhoro) v Muhoro & another (Environment & Land Case 118 of 2018 & 11B of 2023 (Consolidated)) [2024] KEELC 5416 (KLR) (9 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5416 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 118 OF 2018 & 11B OF 2023 (CONSOLIDATED)**

BM EBOSO, J

JULY 9, 2024

**SUING AS THE LEGAL REPRESENTATIVES AND ADMINISTRATORS
OF THE ESTATE OF THE LATE PETER NDUNG'U MUHORO**

BETWEEN

JANE WANJIRU NDUNG'U 1ST APPLICANT

LAWRENCE MUHORO NDUNG'U 2ND APPLICANT

**SUING AS THE LEGAL REPRESENTATIVES AND ADMINISTRATORS OF
THE ESTATE OF THE LATE PETER NDUNG'U MUHORO**

AND

JOSEPH NJOROGE MUHORO RESPONDENT

**AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 11B OF 2023**

BETWEEN

JOSEPH NJOROGE MUHORO PLAINTIFF

AND

PETER NDUNG'U MUHORO DEFENDANT



JUDGMENT

Introduction

1. This Judgment relates to two consolidated cases. The first case is what now exists as Thika ELC Land Case No 11B of 2023. The case was originally filed by Joseph Njoroge Kamau in Gatundu Principal Magistrate Court as Gatundu PMC Civil Case No 117 of 2017. It was subsequently transferred to Thika Environment and Land Court. On transfer to Thika Environment and Land Court, the case file was collapsed into the file relating to Thika ELC Case No 118 of 2018 (O.S) but was not given a Thika ELC case file number. On 9/2/2023, this Court [Eboso J] directed the Thika ELC Registry to assign the file a Thika Environment and Land Court case number. Consequently, the file relating to Gatundu PMC Civil Case No 117 of 2017 was registered as Thika ELC Case No 11B of 2023.
2. The second case to which this Judgment relates is Thika ELC Case No 118 of 2018 [O.S]. The case was filed by Peter Ndungu Muhoro who is now deceased. Upon his demise, he was substituted with his widow and son, who are the two administrators of his estate.
3. Perusal of the two files reveals that on 8/10/2019, Gacheru J allowed transfer of Gatundu PMC Civil Case No. 117 of 2017 to Thika Environment and Land Court. Although the transfer was effected at that time, formal registration of the Gatundu Principal Magistrate file at Thika ELC Registry did not happen until 9/2/2023. The formal order consolidating the two cases was made on the same day, 9/2/2023, by Eboso J on the mutual request of the parties to the case. Trial proceedings relating to the two consolidated cases were taken in the file relating to Thika ELC Case No 118 of 2018 [O.S].
4. The late Peter Ndung'u Muhoro and Joseph Njoroge Muhoro were brothers. The dispute in the two consolidated cases relates to land parcel number Ndarugu/Gachege/T.124 [referred to in this Judgment as “the suit property” or “the suit land”], measuring approximately 0.24 acres and registered in the name of Joseph Njoroge Muhoro. Although the suit land was and is still registered in the name of Joseph Njoroge Muhoro, the original physical title was held by the late Peter Ndungu Muhoro and is now held by the administrators of his estate. One of the key issues to be determined in this Judgment is whether the late Peter Ndungu Muhoro acquired title to the land under the doctrine of adverse possession. Before the issue is disposed, I will briefly outline the parties' respective cases. For convenience and clarity, I will refer to the late Peter Ndungu Muhoro simply as “Peter” or “the deceased”. Joseph Njoroge Muhoro will be referred to as “Joseph”. The estate of Peter Ndungu Muhoro will be referred to simply as “the estate”. The two administrators of the estate of the late Peter Ndungu Muhoro will be jointly referred to as “the plaintiff”.

Joseph's Case

5. As observed in the introductory part of this Judgment, Joseph is the plaintiff in Thika ELC Case No 11B of 2023 which was formerly Gatundu PMC Civil Case No 117 of 2017. He initiated the suit at Gatundu PMC vide a plaint dated 11/7/2017. An amended plaint was filed in the same court on 3/10/2017. During trial, he testified as DW1 and closed his case.
6. Joseph's Case is that he is the registered proprietor of the suit property. He contends that, “sometimes back”, he gave the original title deed relating to the suit land to his late elder brother, Peter, to keep it for him. Subsequently, when he wanted the title deed back, Peter refused to give it back to him. He denied Peter's contention that he sold the suit land to Peter and that the original title was given to Peter in pursuance of a sale.



7. Joseph seeks the following verbatim reliefs against Peter's estate:
 - a. A permanent order directed to the defendant to release the original title deed for the suit property Ndarugu/Gachege/T.124 to the plaintiff and desist using the suit parcel.
 - b. Costs of the suit.
 - c. Any other order this Honourable Court may deem fit to grant.

Case of Peter's Estate

8. Upon being served with the plaint in Gatundu PMC No. 117 of 2017, Peter filed a defence dated 7/8/2017 in which he averred that his brother, Joseph, sold to him the suit property at a consideration of Kshs.55,000 which he paid to him in full. He added that in pursuance of the sale, Joseph gave him both the original title deed and vacant possession of the suit land in 2001. It was his case that he had enjoyed "quiet, open, undisturbed and uninterrupted possession" of the suit land from 2001 to 2017 – a period of 17 years. Peter contended that, by dint of his possession of the land for 17 years, he acquired title to the land by adverse possession. He averred in the defence that he intended to initiate a separate suit in the appropriate court for orders of adverse possession under the Limitations of Actions Act.
9. True to it, Peter subsequently filed Thika ELC Case No 118 of 2018 [O.S] seeking adverse possession orders. Upon his demise, his estate effected substitution and amended the originating summons to reflect the administrators of the estate as the plaintiffs.
10. The case of the estate is that prior to his death, Peter acquired title to the suit property through adverse possession. The estate contests Joseph's allegation that the original title, which the estate is holding, was given to the late Peter for safe-keeping. The case of the estate is that Peter gained exclusive possession of the original title and the physical land as a purchaser and subsequently became an adverse possessor owing to Joseph's failure to formally transfer the land to Peter.

Evidence of the Estate of the Late Peter

11. Jane Wanjiru Ndung'u testified as PW1. She adopted her supporting affidavit and her witness statement, both signed on 31/8/2022, as part of her sworn evidence-in-chief. She stated that she was the widow of Peter Ndungu Muhoro (deceased) and one of the administrators of his estate. She added that Joseph was a brother to Peter. It was PW1's testimony that they took possession and started cultivating the suit land in the year 2001. They stopped cultivating the land in 2018 when Joseph became violent. PW1 testified that Peter bought the suit land from Joseph at a price of Kshs 55,000 pursuant to an oral agreement. She further testified that an initial sum of Kshs 50,000 was paid to Joseph, adding that subsequently, a sum of Kshs 5000 was paid to Joseph through the two siblings' mother.
12. During cross-examination, PW1 stated that there was no dwelling house on the suit land and that her deposition in her affidavit to the effect that Peter's family had lived on the suit property was a typing error. PW1 further stated that they utilized the suit land from 2001 to 2018 because they purchased it from Joseph. She added that Joseph refused to transfer the suit property to Peter.
13. During re-examination, PW1 stated that they were in possession of the original title to the suit property which they obtained by virtue of their purchase of the suit property. She added that they peacefully utilized the suit property until 2017 when a dispute over the suit property arose between the two siblings. She added that Joseph reported the dispute to the Area Chief who advised them to file a suit in court.



14. PW1 produced the following three documents: (i) copy of the land register relating to Ndarugu/Gachege/T. 124; (ii) copy of an official search certificate relating to Ndarugu/Gachege/T.124; and (iii) copy of a grant of letters of administration ad litem relating to the estate of Peter.

Evidence of Joseph

15. Joseph Njoroge Muhoro testified as DW1. He adopted his witness statement dated 8/9/2022 and his affidavits sworn on 5/12/2017 and 23/5/2018 as part of his sworn evidence-in-chief. DW1 stated that Peter was his brother. He added that in 2001, he allowed Peter to enter the suit property, cultivate it, and take care of it because he (DW1) resided in Nairobi, away from the suit property, while Peter lived near it. He testified that he gave Peter the original title to the suit property for safe-keeping prior to the year 2001. DW1 contended that he never sold the suit property to Peter.
16. During cross-examination, DW1 stated that he gave Peter the original title to the suit property the same year it was issued. He added that he gave it to Peter because they had a close relationship and that he did not have a house of his own where he could keep it. He added that he also used to till the suit land, even though he had allowed Peter to utilize the land. He testified that he differed with Peter when he requested him to stop tilling the suit land. He stated that when he asked for the original title deed to the suit land, Peter refused to give it to him, prompting him to report the dispute to the Area Chief. He denied receiving purchase price money from Peter.
17. In re-examination, DW1 stated that both he and Peter utilized the suit land from 2001 to 2017 with his knowledge and permission.
18. DW1 produced the following exhibits: (i) copy of the green card; (ii) photos of exhibits; (iii) copy of the sale agreement; and (iv) witness statements in Gatundu CC 117/2017.

Submissions by the Estate of Peter

19. The applicants filed written submissions dated 9/3/2023 through M/s N. Kiagayu & Company Advocates. Counsel submitted that the fact that the deceased had occupied the suit property from the year 2000 was not disputed. Counsel contended that efforts to remove the deceased's family from the suit property were only made in 2017 when Gatundu PMC 117 of 2017 was filed. Counsel added that the deceased's family had already been in continuous, open, peaceful, and uninterrupted occupation of the suit property for 17 years.
20. Counsel further submitted that the deceased's family had exclusive occupation of the suit property. Counsel argued that Joseph did not prove his claim that he simultaneously cultivated the suit property. Counsel urged the Court to find that occupation of the suit property was coupled with the surrender of the title deed. Counsel further urged the Court to find that Peter had acquired the suit land through adverse possession and that the Court directs that a title be issued in the name of the administrators of Peter's estate.

Submissions by Joseph

21. Joseph filed written submissions dated 23/10/2023 through Kimani Kahete & Company Advocates. His counsel submitted that Joseph gave the deceased the original title deed to the suit property for safekeeping based on the trust that they shared as siblings. Counsel further submitted that Peter's estate had not proved that Peter had been in actual possession of the suit property from the year 2001. Counsel contended that the estate admitted that Joseph had interrupted their occupation of the suit property in 2009 hence vitiating their claim of adverse possession. Counsel argued that a person alleging acquisition of title through adverse possession ought to show by unequivocal evidence



that his or her possession was not permissible but was open and with the knowledge of the owner. Counsel relied on the decision in the case of *Githu vs Ndeete* [1994] KLR to support his submission. Counsel contended that Joseph utilized the suit property while allowing his brother to similarly utilize it. Counsel faulted the plaintiff for their allegation that Peter had never been removed from the suit land, adding that Peter had never been in full occupation of the land. Counsel further faulted the plaintiff for failing to controvert Joseph's evidence to the effect that the deceased had entered the suit property with the knowledge and permission of Joseph.

22. Counsel submitted that the plaintiff failed to provide proof that the deceased and his family resided on the suit property. Counsel added that in the absence of proof of occupation, the Plaintiff's claim for adverse possession ought to fail. Counsel relied on Sections 107 (1), 108, and 109 of the *Evidence Act* and the decisions in the cases of *Miki Waweru vs Jane Njeru Richu: Civil Appeal No. 122 of 2001* and *Gabriel Mbui vs Mukindia Maranya* [1993] eKLR.

Analysis and Determination

23. The court has considered the parties' pleadings, evidence and submissions. Parties did not agree on a common concise statement of issues to be determined by the court in the two consolidated suits. Taking into account the parties' parallel pleadings, evidence and submissions, the following are the issues that fall for determination in the two consolidated suits: (i) Whether the late Peter Ndungu Muhoro acquired title to land parcel number Ndarugu/Gachege/T.124 through adverse possession; (ii) Whether the estate of the late Peter Ndungu Muhoro is entitled to orders of adverse possession; and (iii) Whether Joseph Njoroge Muhoro is entitled to the reliefs sought in the amended plaint. The three issues are intertwined. Consequently, they will be analyzed and disposed simultaneously.

24. The common law doctrine of adverse possession has been codified under Sections 7 and 17 of the *Limitation of Actions Act*. Section 7 of the Act provides thus:

“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.”

25. Section 17 of the Act provides thus:

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”

26. The procedural framework on actualization of title by an adverse possessor is contained in Section 38(1) of the *Limitation of Actions Act* which provides as follows;

“Registration of title to land or easement acquired under Act

- 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 or lease in place of the person then registered as proprietor of the land.”



27. The Court of Appeal in Kisumu Civ App. No. 110 of 2016 Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] eKLR stated that a person claiming adverse possession must establish the following:

- “(a) On what date he came into possession.
- (b) What was the nature of his possession?
- (c) Whether the fact of his possession was known to the other party.
- (d) For how long his possession has continued and
- (e) That the possession was open and undisturbed for the requisite 12 years.”

28. To determine the nature of possession, this Court is guided by the decision in Kisumu Civil Appeal No. 27 of 2013 Samuel Kihamba v Mary Mbaisi [2015] eKLR, where 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.”

29. The Court of Appeal in Mtana Lewa vs Kahindi Ngala Mwangandi [2015] eKLR held that the law on adverse possession was neither arbitrary nor an unconstitutional limitation of the right to property. In that case, Makhandia, JA. summarized the doctrine 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 or 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. This doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act*, which is in these terms:-

“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.”

30. In the case of Mate Gitabi vs Jane Kabubu Muga Alias Jane Kaburu Muga & 3 Others [2017] eKLR, this Court stated as follows:

“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 secrecy, without force, 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 maxim nec vi, nec clam, nec precario. See also ... Kasuve vs Mwaani Investments Limited & 4 Others [2004] 1KLR where this Court stated as follows:



‘In order to be entitled to land by adverse possession, the claimant must prove that she has been in exclusive possession of land openly and as of right and without interruption for 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.’”

31. In *Titus Kigaro Munyi V Peter Mburu Kimani Civil Appeal No. 28 of 2014*, the Court of Appeal held that computation of time starts from when there is actual or constructive knowledge by the registered proprietor.
32. In the dispute in the two consolidated cases, there is common ground that the suit land was registered in the name of Joseph in 2001. There is also common ground that Joseph gave to Peter the original title deed relating to the land and allowed him to use it. What is in contest are the circumstances under which Peter was given the original title and allowed to utilize the land.
33. Peter’s estate contends that Peter purchased the land from his sibling, Joseph, through an oral agreement and paid him full purchase price of Kshs 55,000. The estate further contends that it was on the basis of the purchase that Joseph surrendered to Peter both the original title and the physical land. The estate adds that, owing to Joseph’s failure to formally convey the land to Peter, coupled with Peter’s uninterrupted occupation of the land for over 12 years, Peter became an adverse possessor.
34. On his part, Joseph contends that Peter utilized the land as his licensee, adding that he gave Peter the original title for safe-keeping and not as a purchaser. Neither of the rival claimants led corroborative evidence by independent witnesses. It is therefore the word of the estate of Peter against the word of Joseph.
35. In his evidence during cross-examination, Joseph stated that he was born in 1965. This means that in the year 2001, when he gave Peter the original title deed, he was 36 years old. Indeed, he had acquired the suit land through purchase from the previous proprietor, Joseph Ngugi Mwangi. If he needed safe-keeping services for the original title deed, banks were available. He did not, however, explain why he did not utilize the safe-keeping services that were available in the banks. The court finds it improbable that at age 36, Joseph was able to save money, keep the money safely, and buy land but he was not capable of keeping a title deed safely. The court also finds it improbable that Joseph only became capable of safely keeping a title deed in 2017, at age 52.
36. Was Peter a licensee? Occupation and/or utilization of the suit land by Peter from 2001 to 2017 was admitted by Joseph. He, however, contended that Peter occupied the land as his licensee. Under Section 109 of the *Evidence Act*, it was the evidential burden of Joseph to prove the existence of a licence so as to rebut Peter’s contention that he was an adverse possessor. Other than merely stating that Peter was a licensee, Joseph did not discharge the burden.
37. The court has considered Joseph’s general contention that he used to co-till or co-utilize the land with Peter. He did not tender evidence to support the allegation of the alleged co-tilling or co-utilization of land that is located in Gatundu. The evidence that he placed before the court indicates that he lived in Zimmerman where he worked as a mechanic.
38. The totality of the evidence that is before the court is that, Peter had exclusive and uninterrupted possession of the suit land from the year 2001 up to July 2017 when Joseph filed Gatundu PMC Civil Case No 117 of 2017. There is also evidence that initially, Peter entered the land as a purchaser and in pursuance of an oral purchase agreement. His initial occupation was coupled with surrender of the original title to him. In the absence of a consent under the Land Control Board within the prescribed timelines of six months, the oral transaction became void for all purposes. Peter became an adverse



possessor upon expiry of six months. By the time Joseph filed Gatundu PMC Civil Case No 117 of 2017, his [Joseph's] title in the land stood extinguished under the doctrine of adverse possession.

39. For the above reasons, it is the finding of this court that the late Peter Ndungu Muhoro acquired title to land parcel number Ndarugu/Gachege/T.124 under the doctrine of adverse possession. Secondly, it is the finding of the court that the estate of Peter Ndungu Muhoro is entitled to the orders sought in the amended originating summons. Lastly, it is the finding of the court that Joseph Njoroge Muhoro is not entitled to the reliefs sought in the amended plaint.
40. On costs, the two siblings authored this dispute through the casual manner in which they elected to transact. Had they formalized their transaction, this dispute would not have arisen. For this reason, parties will bear their respective costs of the suit.
41. In the end, Thika ELC Case No 118 of 2018 [O.S] and Thika ELC Case No 11B of 2023 [formerly Gatundu Principal Magistrate Court Civil Case No. 117 of 2017] are disposed as follows:
 - a. Thika ELC Case No 11B of 2023 [formerly Gatundu Principal Magistrate Court Civil Case No. 117 of 2017], filed by Joseph Njoroge Muhoro, is dismissed for lack of merit.
 - b. Thika ELC Case No. 118 of 2018 [O.S], filed by the late Peter Ndungu Muhoro succeeds and Judgment is entered in favour of the estate of the late Peter Ndungu Muhoro in the following terms:
 - (i) The estate of the late Peter Ndungu Muhoro is entitled to land parcel number Ndarugu/ Gachege/ T.124 measuring approximately 0.24 of an acre, under the doctrine of adverse possession.
 - (ii) The said land is hereby vested in the names of the administrators of the said estate of Peter Ndungu Muhoro to hold it as Trustees of the estate.
 - (iii) The relevant Land Registrar is decreed to register the administrators of the said estate as the trustee proprietors of the said land, Ndarugu/Gachege/T.124.
 - (iv) Parties shall bear their respective costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 9TH DAY OF JULY 2024

B M EBOSO

JUDGE

In the Presence of:

Ms Njeri Kiagayu for the Plaintiff in Thika ELC Case No 118 of 2018 (O.S)

Ms Thuo holding brief for Mr Kimani for the Defendant in Thika ELC Case No 118 of 2018 (O.S)

Court Assistant: Melita

