



Ndiritu v Kanugu (Sued as the administrator of the Estate of Gerald Kanugu – Deceased) & another (Environment & Land Case E029 of 2021) [2024] KEELC 5146 (KLR) (3 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5146 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E029 OF 2021**

**CK NZILI, J
JULY 3, 2024**

BETWEEN

ROSE MUMBI NDIRITU PLAINTIFF

AND

DAVID KINYUA KANUGU (SUED AS THE ADMINISTRATOR OF THE ESTATE OF GERALD KANUGU – DECEASED) 1ST DEFENDANT

GITOBU M'RINTARI MUTHERU 2ND DEFENDANT

JUDGMENT

1. The plaintiff took out an amended originating summons dated 31.1.2024, seeking to be declared entitled to L.R No's. Kibirichia/Ntumburi/3619 & 3620, held in the name of the 1st and 2nd defendant by virtue of adverse possession.
2. At the trial, Rose Mumbi Ndiritu adopted her affidavit dated 31.1.2024 as her evidence in chief. Her testimony was that the two parcels of land belong to the defendants as subdivisions of L.R No. Kibirichia/Ntumburi/1633, initially belonging to the late Gerald Kaungu as per copies of green card produced as P. Exh No's 2, 3, 4 & 5.
3. PW 1 told the court that on 28.9.1998, her late mother, Monicah Murima Kihagi, entered into a sale agreement with the late Gerald Kanugu to purchase 2 acres of L.R No. Kibirichia/Ntumburi/835, which later, after subdivisions, became L.R No. Kibirichia/Ntumburi/1633. She produced the sale agreement and green card as P. Exh No. 6 & 7.
4. 1 said that a supplementary agreement was eventually signed on 2.9.2000, produced as P. Exh No. 8. Further, PW 1 said that her mother passed on and was buried on the suit land. She produced the death certificate and photo of the graveyard as P. Exh No. 9 & 10. The plaintiff indicated that since 1998, her occupation on the land has been exclusive, peaceful, uninterrupted and notorious with extensive



- developments thereon, including fencing, cultivation, and construction of a permanent house as per the photographs and a scene visit report dated 4.4.2023 and the land surveyors report produced as P. Exh No. 11 & 12 respectively.
5. Regarding the replying affidavit, P.W 1 said that her permanent house was on the suit land and not parcel numbers 3619 & 3621, going by the reports alluded to above. PW 1 confirmed that her late mother had filed another suit before she passed on.
 6. The defendant testified as DW1 adopted his replying affidavit sworn on 14.7.2022 as his evidence in chief. His testimony was that he lives on L.R 3619 & 3621 as per the official search photographs produced as D. Exh No. 1, 2 & 3, respectively. Similarly, DW 1 said that the plaintiff was not in occupation of L.R No's. Kibirichia/Ntumburi/3619, 3620 & 3621 since 1998 as alleged, and if at all she was on any of the parcels, it amounted to trespass.
 7. DW 1 said that the effect of the orders sought would amount to eviction from his land where he lives with his entire family. DW 1 denied that his late father had allegedly sold to the plaintiff's late mother 2 acres of the suit land. Otherwise, the plaintiff would have sued to enforce the sale agreement.
 8. In cross-examination, DW 1 denied that he was privy to the sale agreements. Further, he admitted that no eviction had taken place against the plaintiff from the two parcels of land. DW 1 could not tell when the plaintiff entered the suit land. He said that he applied for letters of administration and the estate of his late father in 2019. He admitted that in the application for letters of administration, the 2nd defendant was listed as a beneficial owner of a portion he had sold to him, though he had never taken possession of the suit land.
 9. Gitobu M'Rintari Muthuru testified as DW 2 and adopted his replying affidavit dated 15.4.2024, as his evidence in chief. He told the court that he purchased L.R No. Kibirichia/Ntumburi/3620 from the late Gerald Kanugu, then the registered owner as per the certificate of official search. He produced the sale agreement and official search and former suit papers in Meru CMCC ELC No. 387/2015 as D. Exh No's. 4 & 5.
 10. DW 2 denied knowledge of the alleged sale of 2 acres of land to the plaintiff by the deceased; otherwise, any claim for the land based on a contract by the plaintiff was time-barred and brought by a plaintiff lacking letters of administration. DW 2 termed the plaintiff as a licensee of the land since she was unable to perform the terms and conditions of the sale agreement.
 11. Additionally, DW 2 testified that the plaintiff had failed to meet the ingredients of adverse possession. Moreover, DW 2 said that the fact that he had not visited the suit land for a long time did not mean that he had given up on his entitlements to the land; otherwise, his title deed was valid after the 1st defendant was issued with letters of grant. DW 2 acknowledged that he has never applied to the court for eviction orders against the plaintiff. At the close of the defense case, parties were directed to file written submissions by 15.6.2024 and it was only the defendants who filed.
 12. The defendants relied on submissions dated 14.6.2024. On whether the plaintiff has *locus standi*, it was submitted that the plaintiff lacked the requisite *locus standi* to institute the suit as it had not taken out letters of administration on her mother's estate.
 13. Regarding prove of adverse possession the defendants submitted that the plaintiffs do not meet the ingredients of adverse possession to be entitled to the claim against the defendant. Reliance was placed on *Law Society of Kenya vs Commissioner of Lands & others* (2000) eKLR, *Alfred Njau & others vs City Council of Nairobi* (1982) KAR 229, *Waweru vs Richu* C.A 122 of 2001, *Wanje vs Saikwa* 1984 KLR, *Benjamin Kamau Murima vs Gladys Njeri* Nairobi C.A No. 213/1996 unreported, *Mbica vs Gachubi*



Nairobi HCCC No. 286 of 1997, *Wilson Kazungu Katana & 101 others vs Salim Abdalla Bakshwein & another* (2015) eKLR and *Christopher Mutiembu Machimbo & 3 others vs County Surveyor Trans-Nzoia & 4 others* (2022) eKLR.

14. A party seeking to be declared owner of land by virtue of adverse possession has to prove five elements as set out in *Richard Wefwafwa vs Ben Munyifwa Songoi* (2020) eKLR, namely:
 - i. On what date he came into possession
 - ii. The nature of his possession.
 - iii. If the possession was known to the other party.
 - iv. For how long the possession has been.
 - v. If the possession is open and undisturbed for the requisite 12 years.
15. The claimant must adduce evidence to show the above elements and discharge the burden of proof as held in *Gichinga Kibutha vs Caroline Nduku* (2018) eKLR, regardless of whether the defendant has made a presence in court.
16. Adverse possession essentially occurs when an intruder enters a land and asserts rights over it, and the person having title fails or neglects to take action for 12 years to assert his right or drive out the intruder from the land. See *Mtana Lewa vs Kabindi Ngala Mwangandi* (2015) eKLR.
17. In order to acquire land by adverse possession the claimant must prove dispossession by the valid owner in a manner inconsistent with the rights or purposes of the enjoyment of the soil by the holder of the title. See *Wambugu vs Njuguna* (1983) KLR 172, *Samuel Kihamba vs Mary Mbaisi* (2015) eKLR and *Mbui vs Maranya* (1993) eKLR.
18. In *Kariuki (Legal Representative of Eustace Karuri Githenge vs Joreth Ltd & others)* (Civil Appeal E391 of 2020) (2024) KECA 420 (KLR) (26th April 2024 (Judgment)), the court held intermittent visits and lack of developments on the suit land save for crop farming by a caretaker showed that the elements of adverse possession were not proved.
19. Time for adverse possession out of an aborted sale agreement begins to run after the last installment of the considerations is cleared. See *Wanduru vs Public Trustee*.
20. In *Samuel Miki Waweru vs Jane Njeru Richu* Civil Appeal No. 122 of 2001, the court cited *Jandu vs Kirpal* (1975) E. A 225 that possession does not become adverse before the end of the period for which permission to occupy has been granted effective entry. In *Wambugu vs. Njuguna* (supra), the court observed that the appellant must have an effective right to make entry and to recover possession of land in order for the statute to begin running and that he cannot have that effective right if the person in occupation is there under a contract or other valid permission or license, which has not terminated.
21. Applying the preceding vital elements and principles to the present suit, the plaintiff has indicated that her late mother made entry into the land out of sale agreements dated 26.9.1998 and 28.9.1998. Consent from the land control board was to be sought and obtained by 28.2.2001. The completion date was 30.3.2001. After the expiry of six months, the sale agreement became void under Sections 6 and 7 of the *Land Control* Board Act. Vacant possession took place before the sale agreement dated 28.9.1998 as per clause number 4 thereof.
22. So time for adverse possession began to run in late 2001 after the parties failed to seek and acquire a land control board consent. Going by the sale agreement dated 10.1.2013, vacant possession was to take place in August 2013. The land sold had no developments on it as per clause numbers 4 & 5 thereof.



Oral evidence by the plaintiff, coupled with the land surveyor and the scene visit reports, clearly shows that the plaintiff has been on the land undertaking acts that are inconsistent with the purpose for which the initial owner and the subsequent owner intended to use the soil.

23. Adverse possession goes with the land. Time in adverse possession was not affected by the change of ownership of the land. As of the death of the initial owner, the resultant subdivision on 15.10.2004, the issuance of a certificate of confirmation of grant on 18.3.2019 and the subsequent registration of the titles in favor of the 1st & 2nd defendants on 11.3.2021 and 20.1.2021 the plaintiff had already been in adverse possession of the land for more than 15 years, without interruption.
24. There was no evidence tendered to show that any of the owners alluded to above made an effective entry to assert their rights or eject the plaintiff from the suit lands.
25. The upshot is that the plaintiff has proved the ingredients of adverse possession and as a result of this, declared as the owner of 1.6 acres of L.R No. Kibirichia/Ntumburi/3619 & 3620. The defendants shall sign consent and transfer to excise the portions alluded above within two months in default, of which the deputy registrar of the court shall do so. Costs to the plaintiff.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 3RD DAY OF JULY, 2024

In presence of

C.A Kananu/Mukami

Plaintiff

Kaimenyi for the defendants

John Muhtomi for the plaintiff

HON. C K NZILI

JUDGE

