



REPUBLIC OF KENYA



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Njogu & another v Muriuki & 2 others (Environment and Land Case E043 of 2022) [2024] KEELC 4971 (KLR) (1 July 2024) (Judgment)

Neutral citation: [2024] KEELC 4971 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND CASE E043 OF 2022**

JM MUTUNGI, J

JULY 1, 2024

BETWEEN

JOHN CHIGOYA NJOGU 1ST APPLICANT

ROSE WAIRIMU CHIGOYA 2ND APPLICANT

AND

AGNES WANJIRU MURIUKI 1ST RESPONDENT

JOHN MURIUKI MIGWI 2ND RESPONDENT

PAUL MAINA MURIUKI 3RD RESPONDENT

JUDGMENT

1. The Applicants commenced this suit by way of Originating Summons dated 14th December 2022, and sought the following orders:-
 - a. That the Applicants have been and continue to be in open, peaceful, exclusive, and continuous occupation and possession of land parcels Mwerua/kithumbu/1851 and Mwerua/kithumbu/1852 (resultant portions after subdivision of L.R Mwerua/kithumbu/257) since the year 1957, a period in excess of twelve years.
 - b. That the Respondents have never interfered or interrupted in any manner with the Applicants' possession and occupation of the suit lands from the time the Applicants took possession.
 - c. That the Applicants have extensively developed the suit lands.
 - d. That initially, the land was land parcel Mwerua/kithumbu/257 which was registered jointly in the names of the late James Fredrick Muriuki and Agnes Wanjiru Muriuki who subdivided the land to give rise to land parcels Nos. Mwerua/kithumbu/1851 and Mwerua/kithumbu/1852



and they caused the resultant portions to be transferred to the 2nd and 3rd Respondents respectively.

- e. That the 2nd and 3rd Respondents' rights over Land parcels Nos. Mwerua/kithumbu/1851 and Mwerua/kithumbu/1852 have been extinguished by operation of the law.
 - f. That it is fair and just in the circumstances of this case that the orders sought be granted.
2. The summons were predicated upon the annexed affidavit sworn by the 1st Applicant on 14th December 2022. He deponed that the original land parcel, identified as Land Parcel No. Mwerua/kithumbu/257 and measuring 2.0 Ha, was subdivided, resulting in the creation of parcels No. Mwerua/kithumbu/1851 and land parcel No. Mwerua/kithumbu/1852. The resultant titles were subsequently transferred to the 2nd and 3rd Respondents. He further deponed that he and his family have been in continuous and uninterrupted possession of land parcel No. Mwerua/kithumbu/257 (now subdivided into land parcels Mwerua/Kithumbu/1851 & 1852) since 1957. The Applicant explained that he and his three adult sons have their homes and reside on the suit land and that that they have buried their relatives on the land.
 3. The Applicants further filed a supplementary Affidavit, sworn on 26th March 2024 where he deponed that he had constructed a permanent house and effected other developments on the suit land as depicted on the photographs annexed to the Supplementary Affidavit. He further deponed that the land was originally transferred from his brother, Wakibicho Muriuki to one James Fredrick Muriuki and the 1st Respondent in 1993, who sold the land to the 2nd Respondent who later subdivided the land into parcels Mwerua/Kithumbu/1851 and 1852 and transferred parcel 1852 to the 3rd Respondent. The Applicants maintained they remained in possession and occupation and were utilizing the suit land without any interruption aimed at removing a restriction on the property.
 4. As efforts to trace the Defendants/Respondents for service were not successful the Applicants applied and the Court granted them leave to serve the Respondents by way of substituted service. The Respondents were duly served by way of advertisement in the Daily Nation Newspaper on 3rd July 2023. The Respondents did not appear and/or, file any response to the Originating Summons. The Court on 4/10/2023 gave directions that the matter proceeds as an undefended suit by way of formal proof.
 5. The suit was heard on 12th March 2024 when the 1st Plaintiff testified. The Plaintiff reiterated the averments contained in the Supporting Affidavit and the Supplementary Affidavit. He explained that suit land being land parcel Mwerua/Kithumbu/257 was first registered in the name of their eldest brother Wakibicho Njogu with the intent he was to hold the land in trust for the family.
 6. The 1st Plaintiff explained that since 1957 he and his family have resided on the suit land which he stated his brother had secretly transferred in 1993 to the 1st Respondent jointly with James Fredrick Muriuki before it was transferred to John Muriuki Migwi on 29/6/2011 who later subdivided the land into parcels 1851 and 1852 to the 3rd Respondent. The Plaintiff however stated they all the time remained on the suit land where he and his sons have residential homes and have all the while openly possessed and utilized the land without any interruption.
 7. The Applicants filed their written submissions dated 26th March 2024 and submitted that the Applicants have occupied and resided on the land for a period in excess of twelve years without the permission of the owners of the land. In their written submissions, they relied on the Case of *Mate Gitabi -vs- Jane Kaburu Muga & Others* (Nyeri Civil Appeal No. 43 of 2015 (unreported)).



Analysis and Determination

8. I have considered the Originating Summons, the Supporting and Supplementary Affidavit, the evidence adduced and the submissions filed on behalf of the Applicants and the issues that arise for determination are as follows: -

1. Whether the Plaintiff has acquired the suit property by way of adverse possession?
2. Whether the Plaintiff should be registered as the owner thereof in place of the Respondent.

9. The doctrine of adverse possession in Kenya is embodied in Section 7 and Section 13 of the [Limitation of Actions Act, CAP 22](#) Laws of Kenya, which provides as follows:

Section 7:

“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 undersections 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.

Section 38 of the [Act](#) provides for the procedure to be followed by a person claiming adverse possession.

“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.(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this [Act](#).”

10. The doctrine of adverse possession has been explained and applied in numerous cases in Kenya with the essential elements being laid down by various Courts.

The Court of Appeal in the Case of, [Mtana Lewa Vs Kabindi Ngala Mwangandi](#) [2015] eKLR, gave a definition of what the doctrine of adverse possession entails and the circumstances that gives rise to it. The Court stated thus:-

“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.”

11. The Court of Appeal in the case of *Ruth Wangari Kanyagia –vs- Josephine Muthoni Kinyanjui* (2017) eKLR while acknowledging that adverse possession is a common law principle reiterated the same by citing the India Supreme Court decision in the case of *Kamataka Board of Wakf –vs- Government of India & Others* [2004] 10 SCC 779 where the Court stated as follows: -

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won’t affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continues. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

12. The Court of Appeal in the Case of *Wambugu v Njuguna* (1983) KLR 173 elaborately considered what constitute adverse possession and has been cited and relied on in numerous cases. The requirements for adverse possession have also been set out in the Case of *Mbira –v- Gachuhi* (2002) IEALR 137 in which the Court held that:

“..... 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 statutory prescribed period without interruption....”

13. A person claiming under the doctrine of adverse possession must demonstrate actual occupation or possession of another’s land, without the consent of that other, and in such a way that the occupation or possession is open, peaceful and continuous for a period of 12 years and above. The Court of Appeal in the case of *Kweyu Versus Omutut* (1990) eKLR observed as follows as to what constitutes adverse possession:

“By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor. (Colour of title is that which is a title in appearance, but in reality). Adverse possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford Colour, and, second such possession under it as will be adverse to the right of a true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms (“claim or colour of title”) mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land or the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the



world, and the entry must be followed by the possession and appropriation of the premises to the occupant's use done publicly and notoriously.”

14. In the present case, the 1st Applicant asserted that he assumed control of the disputed land back in 1957, a period predating the official issuance of the title to his brother, Wakibicho Njogu, on January 26, 1961. The land title's abstract reveals that the 1st Applicant filed a caution on 25th August 1992, identifying himself as a licensee. This caution was subsequently lifted on 12th January 1993. Following the removal of the caution, the land was sold to James Fredrick Muriuki and Agnes Wanjiru Muriuki, who were then issued the title. The filing of the caution by the 1st Applicant in 1992 unequivocally indicated Applicant had a vested interest in the disputed land at that time, if not earlier. The evidence by the 1st Applicant that he and his family have continuously possessed and utilised the suit land has not been controverted by any other evidence.
15. The Applicants vide the photographs exhibited in the Supplementary Affidavit clearly showed they have constructed permanent homes on the suit property. The Applicants engage in farming activities on the suit land as is evident from the exhibited photographs. There are mature bananas, trees and a fish pond which can clearly be seen in the photographs and there are various houses within the land. The 1st Applicant in his evidence stated that the Respondents have never been to the land in dispute and have never utilised the land for any purpose. The evidence by the 1st Respondent was not challenged and the Court in the absence of any other evidence to rebut the same is obliged to accept the evidence tendered as correct and truthful.
16. I have carefully evaluated the evidence adduced by the Applicants and I am satisfied that the Applicants have indeed been in possession of the suit property from 24/5/1993 when the 1st Applicant's brother, Wakibicho Njogu, sold and transferred the land to James Fredrick Muriuki and Agnes Wanjiru Muriuki. The Applicants have homes on the suit property and are in active use of the suit property. There is no evidence that the purchasers of the land from their brother ever took vacant possession of the suit land and/or that there was ever a case brought against the Applicants for their eviction. The Applicants have homes on the suit land and utilise the land openly. It is my determination that the Applicants possession of the suit land has been open and uninterrupted and has been hostile against the interest of the registered owner. The possession has been adverse to the interest of the true owner and that as against James Fredrick Muriuki and Agnes Wanjiru Muriuki who were registered as owners on 24/5/1993 their title to the land was extinguished on 24/5/2005 by virtue of the doctrine of adverse possession in favour of the Applicants. The Applicants after the expiry of the statutory period of 12 years had become entitled to be registered as the owners of the suit land. The Applicants rights to be registered owners had crystallized such that after 24/5/2005 the registered owners of the suit land held the suit land subject to the Applicants overriding interest as adverse possessors. The registered owners therefore had no title in the property that they could pass to the 3rd Respondent on 29/6/2011 when the property was purportedly transferred to him.
17. In consequence therefore I hold and find that the Applicants acquired title to land parcel Mwerua/Kithumbu/257 by way of adverse possession and the title held by James Fredrick Muriuki and Agnes Wanjiru Muriuki was extinguished by operation of the law. In the premises I find that the Applicants have proved their case on balance of probabilities and I enter Judgment in their favour and make the following final orders:-
 1. That the Applicants, John Chigoya Njogu and Rose Wairimu Chigoya are declared to have acquired title to land parcel No. Mwerua/Kithumbu/1851 and 1852 (resultant subdivisions of land parcel Mwerua/Kithumbu/257 by virtue of adverse possession.



2. The Land Registrar Kirinyaga is ordered to cancel the registration of John Muriuki Migwi and Paul Maina Muriuki as the owners of land parcels Mwerua/Kithumbu/1851 and 1852 respectively and in place thereof to register John Chigoya Njogu and Rose Wairimu Chigoya as joint owners of the properties.
3. The Deputy Registrar of the Court is hereby authorised to execute such documents as may be necessary and appropriate to give effect to the Judgment.
4. There will be no order for costs of the suit.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 1ST DAY OF JULY 2024.

J. M. MUTUNGI

ELC - JUDGE

