



REPUBLIC OF KENYA



**Njeri v Kagwe (Environment & Land Case 256 of 2014)
[2023] KEELC 457 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 457 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 256 OF 2014**

JO OLOLA, J

FEBRUARY 2, 2023

BETWEEN

GEORGE NDIRITU NJERI PLAINTIFF

AND

PATRICK NJOROGE KAGWE DEFENDANT

JUDGMENT

1. This suit was initially filed as Nyeri HCCC No 2011 before being transferred to this Court on December 1, 2014. By the Originating Summons dated May 23, 2011, George Ndiritu Njeri (the Plaintiff) prays for orders as follows:
 1. That the Plaintiff, George Ndiritu Njeri has been in exclusive and uninterrupted possession of LR No Nyeri/Ngarengiro/423 for more than twelve (12) years and as such he has acquired title to the land by adverse possession;
 2. That the registration of the Defendant Patrick Njoroge Kagwe as the absolute proprietor of LR No Nyeri/Ngarengiro/423 be cancelled and the Plaintiff George Ndiritu Njeri be registered as the absolute proprietor in place thereof; and
 3. That (the) costs be provided for).
2. The Originating Summons is supported by an Affidavit sworn by the Plaintiff and is premised on the grounds that:
 - (a) The Defendant is the registered owner of the suit land;
 - (b) The Plaintiff has been in uninterrupted occupation and use of the land since the year 1989; and
 - (c) It is thus now 22 years of uninterrupted possession of the suit land by the Plaintiff.



3. Peter Njoroge Kagwe (the Defendant) is opposed to the grant of the orders sought. In a Replying Affidavit sworn and filed on his behalf by his Attorney Peter Muchoki Locke Kagwe on July 11, 2011, the Defendant avers that the Originating Summons is incompetent, misconceived and an abuse of the Court process.
4. The Defendant further avers that the suit land was allocated to him after the Settlement Fund Trustees (SFT) repossessed it from the Plaintiff's father. It is the Defendant's case that before he obtained title to the land on December 2, 1998, the land remained Government property and neither the Plaintiff nor the Plaintiff's parents could claim the same by way of adverse possession.
5. The Defendant asserts that right from the time the land was repossessed from the Plaintiff's father and allocated to the Defendant, the Plaintiff's mother has been trying unsuccessfully to have the SFT's decision reversed. In that respect the Plaintiff's mother pursued the issue until January, 2009 before the Kieni West Land Disputes Tribunal where the Plaintiff appeared as his mother's witness.
6. The Defendant avers that it is only after the Plaintiff realized that his mother's claim had no chances of success that he decided to try his luck by filing this suit.

The Plaintiff's Case

7. At the trial herein the Plaintiff (PW1) testified as the sole witness in his case. Relying on his statement dated June 6, 2021, PW1 told the Court that he resides on LR No Nyeri Ngarengiro/423 (the suit property) wherein he does farming.
8. PW1 testified that in the year 1989 when he finished Form Four, his father Julius Wachira Mathenge directed him to live in the suit land. By then his father had moved to Meru after separating with PW1's mother – Esther Njeri Wachira. By then the suit land had a semi-permanent dwelling house that had been put up by PW1's father. PW1 told the Court he then fenced the land, bought livestock and planted trees and crops with the assistance of his parents.
9. PW1 testified that his father had told him the land was his though he did not give him a title. Sometime in 1992, PW1's mother informed him that she was in the process of having the title issued. Later in the year 1999, his mother informed him that a stranger had obtained a title for the land and that she would take legal proceedings to have the title cancelled.
10. PW1 testified that he was not aware of the nature of the proceedings his mother took but he continued to develop the land with his wife and children. Sometime in August 2020, PW1's mother informed him that he was required at Mweiga District Officer's office where she had taken the dispute. PW1 left the mother to pursue the dispute. In the year 2011 however he decided to pursue the matter on his own.
11. PW1 told the Court the Defendant had gone to the land in 1998 and showed him his title documents. PW1 refused to vacate as he had extensively developed the land.
12. On cross-examination, PW1 testified that he was aware the allocation of the land to his father was cancelled by the SFT on June 27, 1986. He came to hear the land was thereafter allocated to the Defendant in 1998. He was also aware there was a case between his mother and the Defendant over the same land. He admitted having been a witness in the case which proceeded to the High Court in 2011.

The Defence Case

13. The Defendant equally testified as the sole witness in his case. Testifying through his father and the donee of a Power of Attorney Peter Muchoki Locke Kagwe (DW1), he told the Court he applied to the Director of Land Adjudication and Settlement on January 25, 1996 to be allocated a piece of



land within Nyeri District. The application was successful and by a letter dated June 27, 1996 he was allocated this suit property. He accepted the offer by a letter dated July 31, 1996 and paid the necessary charges. He was eventually issued with a title deed on December 2, 1998.

14. DW1 told the Court that the allottee was shown the land then by the District Land Adjudication Officer. The land was vacant and the allottee took possession and started developing the same. The Defendant came to learn later that the land had initially been allocated to the Plaintiff's father but was repossessed after he failed to take occupation of the same.
15. DW1 further testified that the Plaintiff entered the land as the son of the original allottee. The Plaintiff's mother took the Defendant to the Land Disputes Tribunal where the Plaintiff was a witness. DW1 told the Court that the Plaintiff's family moved out of the land after his father's allocation was revoked and that the Plaintiff was now trying to illegally enter the same by claiming adverse possession of the land.
16. On cross-examination, DW1 told the Court the Defendant lives abroad and has been out there for 14 years. DW1 had never been on the land which is occupied by the Plaintiff. DW1 conceded that the Plaintiff has built on the land and also rears livestock thereon.

Analysis And Determination

17. I have carefully perused and considered the pleadings herein, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the written submissions and authorities placed before me by the Learned Advocates representing the Parties herein.
18. By this suit, the Plaintiff herein urges the Court to determine that he has been in exclusive and uninterrupted possession of the suit property – LR No Nyeri/Ngarengiro/423 for more than 12 years and that by dint of such occupation and possession, he has acquired title to the land through adverse possession. On the basis of such proposition, the Plaintiff desires the Court to cancel the registration of the Defendant as the proprietor of the land and to cause himself as the Plaintiff to be registered as the proprietor of the suit land.
19. It was the Plaintiff's case that upon finishing school at Form Four in the year 1989, his father instructed him to take possession of the land and that he did so and developed the land with the help of his parents. The Plaintiff told the Court that sometime in 1998, the Defendant who is the registered proprietor of the land went to him and urged him to vacate the land. He however refused to do so and has remained on the land to-date.
20. The Defendant however denies that the Plaintiff had lived on the land for the said period and/or that the Plaintiff has become entitled to the land under the doctrine of adverse possession. Testifying through his father and the donee of the Power of Attorney from himself, the Defendant told the Court that he applied to be allocated the land and that the same was allocated to him by the Director Land Adjudication and Settlement on June 27, 1996.
21. It was the Defendant's case that after complying with all the requirements pertaining to the allocation, he was issued with a title deed for the suit land on December 2, 1998. The Defendant told the Court that he visited the land at the time of allocation and that the same was vacant. He accused the Plaintiff of trying to illegally, re-enter the land after his family moved out after the allocation of the land to the Plaintiff's father was cancelled by the Settlement Fund Trustees (SFT).



22. The doctrine of adverse possession is well settled under the *Limitation of Actions Act* (Cap 22 of the Laws of Kenya). Section 7 of the said Act places a bar on actions to recover land as follows:

“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.”

23. Section 13 of the said *Act* on the other hand provides that:

(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 take 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) ...”

24. Finally, Section 38 of the said *Limitation of Actions Act* provides as hereinunder:

“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.”

25. As was stated in *Wambugu v Njuguna (1983) KLR 172*:

“In order to acquire by the Statute of Limitations title to land which has an owner, the 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 for which he intended to use it ...

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 for the requisite number of years ...”

26. Considering the elements that constitute adverse possession in *Mtana Lewa v Kabindi Ngala Mwamgandi (2015) eKLR*, the Court of Appeal observed 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, 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 nor 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.”

27. In the matter before me, it was not in dispute that the suit property was initially allocated to the Plaintiff's father one Julius Wachira Mathenge by the SFT in the year 1983. Subsequently by a Letter dated June 27, 1996 the Director of Land Adjudication and Settlement wrote to the Plaintiff's father cancelling the allocation on the grounds that the Plaintiff's father had failed or neglected to comply with the SFT's conditions for the allocation.
28. From a perusal of the said letter, it was apparent that by the time of the said cancellation, the Plaintiff's father and/or sections of his family had moved in and taken possession of the land. The cancellation letter thus advised the Plaintiff's father as hereunder:

“Further I hereby Cancelany Letter of Allotment issued to you in respect of the said Plot and demand that you vacate and hand over immediately the possession of the said Plot on the service of this notice to Settlement Fund Trustees through its agent, the District Land Adjudication and Settlement Officer of PO Box 365, Nyeri.

Failure to comply with this notice will render you liable for prosecution for trespass on Settlement Fund Trustees property at your own risk as to costs and other consequences thereof.”
29. While the Defendant told the Court that at the time of the allocation of the property to himself in the year 1996 the same was vacant, there was no evidence placed before the Court to demonstrate that the Plaintiff's family vacated the land as demanded voluntarily and/or that the same was repossessed by the SFT as alleged by the Defendant.
30. If indeed the land was vacant in 1996, the Defendant did not explain to this Court how the Plaintiff re-entered the land and developed the same as he acknowledged in his testimony before the Court. What was clear was that as at the time the Defendant was registered as the proprietor of the suit land on December 2, 1998, the Plaintiff was in occupation of the land and has remained in possession thereof to-date.
31. While the Defendant asserted that the Plaintiff's occupation of the land was not peaceful and that the institution of the case by the Plaintiff's mother before the Kieni West Land Disputes Tribunal in the year 2010 had disrupted the running of time for adverse possession, I was not persuaded that that was the case.
32. As it were the Plaintiff filed these proceedings in May, 2011. That would be some 13 years after the Defendant was registered as proprietor of the suit property. The Defendant's title to the land thus stood extinguished at the expiry of 12 years as provided under Section 17 of *Limitation of Actions Act*.
33. It follows that I am persuaded that the Plaintiff has proved his case for adverse possession of the suit land and that he is entitled to be registered as the proprietor thereof. Accordingly I hereby grant Prayers 1 and 2 as sought in the Originating Summons.
34. Each Party shall bear their own costs.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 2ND DAY OF FEBRUARY, 2023.

In the presence of:

Mr Kebuka Wachira for the Defendant



Mr C M King'ori for the Plaintiff

Court assistant - Kendip

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J O Olola

JUDGE

