



**Kabai (Suing on her own behalf and on behalf of the Estate of Johnson Njigua Gachanja) v Ndirangu & another (Environment & Land Case 32 of 2019) [2023] KEELC 15996 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 15996 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 32 OF 2019  
JO OLOLA, J  
MARCH 9, 2023**

**BETWEEN**

**JANE MURINGO KABAI (SUING ON HER OWN BEHALF AND ON BEHALF OF THE ESTATE OF JOHNSON NJIGUA GACHANJA) ..... APPLICANT**

**AND**

**JERUSHA NGONYO NDIRANGU ..... 1<sup>ST</sup> RESPONDENT**

**IRENE WAMUYU MUTAHI ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Background**

1. By the Originating Summons dated November 12, 2019, Jane Muringo Kabai suing on her own behalf and on behalf of the Estate of Johnson Njigua Gachanja (the applicant) claims to be entitled in trust and/or adverse possession of the whole of land Parcel no Muhito/Thiha/812 and prays for the determination of issues framed as follows:
  - a Whether Jane Muringo Kabai and/or the Estate of Johnson Njigua Gachanja has been in continuous and adverse possession of parcel no Muhito/Thiha/812 from well before October 7, 2003 to-date;
  - b Whether the said occupation and utilization of land in (a) was continuous and exclusive and has spanned for over 12 years;
  - c Whether the applicant, (has) since 2003, respectively (sic) been tilling on the said land by themselves without let or hindrance from the respondents herein.



- d Whether the applicants have, by virtue of their continuous occupation and adverse possession acquired prescriptive rights over the said extent of land; entitling them to be declared owners of the said land;
  - e Whether the land registrar Nyeri, should be ordered to cancel the registration of the 2<sup>nd</sup> respondent as (the) owner of parcel no Muhito/Thiha/812 and in her place register the applicant herein as (the) owner of the said parcel; and
  - f Who should pay the costs of these summons?
2. The Originating Summons is supported by an Affidavit sworn by the said Jane Muringo Kabai wherein she asserts that she is the wife and administrator of the Estate of the late Johnson Njigua Gachanja. The applicant avers that the said land parcel no Muhito/Thiha/812 was initially registered in the names of David Ndirangu Muthigani (now deceased) and Jerusha Ngonyo Ndirangu (the 1<sup>st</sup> respondent) before being transferred to Irene Wamuyu Mutahi (the 2<sup>nd</sup> respondent) on September 2, 2016.
  3. The applicant further avers that the said David Ndirangu Muthigani died intestate on July 19, 2011 and that he was survived by his widow the 1<sup>st</sup> defendant and a daughter Mercy Njeri Ndirangu who are yet to take out letters of administration for his estate.
  4. The applicant avers that her husband Johnson Njigua Gachanja had entered into a sale agreement over the suit property with the 1<sup>st</sup> defendant's husband on October 7, 2003 and immediately took possession of the same. The applicant further asserts that they have since then been in a continuous, open and peaceful occupation of the suit property and have been undertaking farming activities thereon.
  5. Jerusha Ngonyo Ndirangu (the 1<sup>st</sup> respondent) is opposed to the applicant's claim. In her Replying Affidavit sworn and filed herein on February 7, 2020, the 1<sup>st</sup> respondent avers that prior to the death of her husband David Ndirangu Muthigani, they were jointly registered as the proprietors of the suit property and that upon his death she became the sole absolute owner thereof.
  6. The 1<sup>st</sup> respondent further avers that upon the death of her husband, she sold the suit property to the 2<sup>nd</sup> respondent who then got registered as the owner thereof in 2016. The 1<sup>st</sup> respondent further avers that since the sale, the 2<sup>nd</sup> respondent took over possession of the land and remains thereon to-date.
  7. The 1<sup>st</sup> respondent asserts that the suit land having been registered in her name jointly with the husband, it was not possible for the sale agreement to have been transacted over her interests without her knowledge.
  8. Irene Wamuyu Mutahi (the 2<sup>nd</sup> respondent) is equally opposed to the applicant's claim. In her Replying Affidavit sworn on March 15, 2021, the 2<sup>nd</sup> respondent asserts that it is true the suit property is registered in her name having been issued with a title on September 21, 2016.
  9. The 2<sup>nd</sup> respondent asserts that she has been in actual and exclusive possession of the land from September 16, 2016 when she bought the same from the 1<sup>st</sup> respondent at a consideration of kshs 600,000/-.

### **The applicant's case**

10. The Originating Summons proceeded by way of *viva voce* evidence. At the trial herein the applicant (PW1) testified as the sole witness in her case wherein she reiterated the contents of the Supporting Affidavit of her application as well as her Further Affidavit as captured in the background herein.



11. On cross-examination, PW1 conceded that the suit property was owned equally by the 1<sup>st</sup> defendant and her deceased husband. She further conceded that the name of the 1<sup>st</sup> defendant did not feature in the sale agreement executed by her equally deceased husband and the 1<sup>st</sup> defendant's husband dated January 7, 2003.
12. PW1 told the court she had fenced the land but someone else had now planted maize and beans thereon. She told the court the planting of beans began when the matter was already before the court.
13. PW1 testified that she had not build her house on the suit property. She had been seeing someone go there, cultivate beans and then disappear. PW1 conceded that the agreements did not show which parcel of land was being sold.

#### **The 1<sup>st</sup> respondent's case**

14. The 1<sup>st</sup> respondent (DW1) equally testified as the sole witness in her case reiterating the contents of her Replying Affidavit as captured in the background hereinabove.
15. On cross-examination DW1 told the court she had sold the land to the 2<sup>nd</sup> respondent and that it was the 2<sup>nd</sup> respondent who was currently utilizing the land. She denied having sold the land alongside her husband to the applicant.
16. DW1 told the court her husband and the applicant's husband were friends and that they would go drinking together. She had heard that her husband was selling some land to the applicant's husband around the year 2006. That was the land where the applicant's husband built their house. She told the court her husband never talked to her about the sale and she took no action because her husband would not have listened to her.

#### **The 2<sup>nd</sup> respondent's case**

17. The 2<sup>nd</sup> respondent (DW2) equally reiterated the averments contained in her Replying Affidavit at the trial.
18. On cross-examination, DW2 told the court the land was vacant when she bought it and that it had been fenced with a barbed wire and blue-gum trees. She had now planted trees and maize on the land.

#### **Analysis and determination**

19. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses as well as the evidence adduced at the trial herein. I have similarly perused and considered the submissions and authorities placed before the court by the learned advocates representing the Parties herein.
20. By the Originating Summons herein dated November 12, 2019 the plaintiff asserts that she is entitled in trust and/or adverse possession to the whole of that parcel of land known as Muhito/Thiha/812 and that having so acquired the land the land registrar Nyeri should be ordered to cancel the registration of the 2<sup>nd</sup> respondent as the proprietor thereof and replace her name with that of the applicant.
21. The doctrine of adverse possession is well captured 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 after 12 years from the date on which the right accrued. Section 13 of the Act on the other hand provides thus:

“ 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 actions 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;
- 3 ...”

22. As was stated in *Wambugu vs Njuguna* (1983) KLR 172:

“In order to acquire by the statute of limitations title to land which has a known owner, that 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 holders 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.”

23. Considering the same issue in *Mtana Lewa vs Kabindi Ngala Mwagandi* (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 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.”

24. In the matter before me, the applicant herein brings this claim as the wife and administrator of the estate of the late Johnson Njigua Gachanja. According to the applicant, her deceased husband had by an agreement dated October 7, 2003 purchased the suit property from the 1<sup>st</sup> respondent’s husband one David Ndirangu Muthigani. It was the applicant’s case that immediately upon the said purchase, she did together with her husband and family take immediate possession thereof and they had since then been in a continuous, open and peaceful occupation thereon to-date.

25. The said sale agreement referred to by the applicant is in three hand-written segments. In the first segment dated January 7, 2003, the 1<sup>st</sup> respondent’s husband David Ndirangu Muthigani acknowledges receipt of a sum of kshs 40,000/- from the applicant’s husband Johnson Njigua Gachanja for an undisclosed parcel of land whose consideration is given at kshs 100,000/-.



In the second segment, he acknowledges receipt of kshs 80,000/- for a parcel described as measuring 50 x 100. The final payment is however acknowledged vide an agreement dated July 13, 2007 which describes the land to be measuring 0.101 Ha being plot no Muhito/Thiha/812 (the suit property).

26. While the applicant told the court that they took possession of the suit property pursuant to the said agreements, it was difficult to see how the execution of the agreements solely with the 1<sup>st</sup> respondent's husband would have entitled them to possession thereof. At paragraph 3 of her Supporting Affidavit, the applicant herself avers that at all material times to this suit, the suit property was registered in the joint names of the said David Ndirangu Muthigani and the 1<sup>st</sup> respondent herein.
27. During her cross-examination at the trial herein, the applicant conceded that the suit property was owned equally by the 1<sup>st</sup> respondent and her husband. She further conceded that the 1<sup>st</sup> respondent was not a party to the agreement executed between her husband and that of the 1<sup>st</sup> respondent.
28. Even more important, while the basis of her claim was that she had been in occupation and possession of the suit property since the year 2003, it was clear that that was not the case. Testifying during cross-examination herein, the applicant told the court that before his death in 2015, her husband had tried in vain to have the 1<sup>st</sup> respondent to transfer the land to his name.
29. The applicant further conceded that she was not in occupation and/or possession of the land as someone else had been planting maize and beans thereon. If indeed the applicant was in an open and continuous occupation of the land, it was difficult to see how a third party whose identity she claimed not to know was the one now utilizing the land. If she had been in possession of the land, she did not explain how she had been dispossessed of the same.
30. On the other hand, the 1<sup>st</sup> respondent told the Court that before she sold the land to the 2<sup>nd</sup> respondent, she had been utilizing the same by cultivating nappier grass and maize. After she sold the land, it was her case that the 2<sup>nd</sup> respondent took exclusive possession thereof. That position was indeed confirmed by the 2<sup>nd</sup> respondent in her testimony.
31. In the circumstances herein, I was not persuaded that this was a case wherein the title holder had been dispossessed or had discontinued her possession of the land. On the contrary, it was apparent that this was one case wherein the 1<sup>st</sup> respondent had resisted any attempts to have her relinquish her title and/or surrender possession of the land to the applicant.
32. As was stated in *Gabriel Mbui vs Mukindia Maranya* (1993) eKLR:

“... the intruder resisting suit or claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period. Time does not begin to run unless there is some person in adverse possession of the land. It does not run merely because the land is vacant. Adverse possession rests on de facto use and occupation by an entrant. The rule that his entry must be followed by possession and appropriation to his use is founded on the reason that a right of action cannot accrue unless there is somebody against whom it is enforceable. Possession is a matter of fact, depending on all the particular circumstances of the case and the type of conduct which indicates possession varies with the type of land. That there must be actual possession (which requires some sufficient degree of physical occupation for the requisite period) has been well-established in a series of cases ...”
33. In the premises herein, all the requisite ingredients for a claim of adverse possession to succeed have not been fulfilled by the applicant and it goes without saying that she has not acquired any prescriptive



rights over the suit land. She has neither fulfilled the requirements on the statute of limitation nor proved unpermissive, continuous, open and uninterrupted occupation of the land.

34. It follows that the applicant's claim to be declared the proprietor of the suit land was without basis. All her questions as raised on the Originating Summons dated November 12, 2019 are hereby answered in the negative. Accordingly the said Originating Summons is dismissed with costs to the respondents.

**JUDGMENT DATED, DELIVERED AND SIGNED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 9<sup>TH</sup> DAY OF MARCH, 2023.**

**In the presence of:**

**Ms Kimani holding brief for Kabira Kioni for the applicant**

**Ms Maina holding brief for Mr Kamwenji for 1<sup>st</sup> respondent and**

**Mr Kimunya for 2<sup>nd</sup> respondent**

**Court assistant - Kendi**

**J O OLOLA**

**JUDGE**

