



**Theuri & another v Kinyua (Environment & Land Case
168 of 2014) [2023] KEELC 17238 (KLR) (8 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17238 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 168 OF 2014**

JO OLOLA, J

MAY 8, 2023

BETWEEN

MARY NYAWIRA THEURI 1ST PLAINTIFF

JOSEPH WAMBUGU THEURI 2ND PLAINTIFF

AND

JAMES MUHENA KINYUA DEFENDANT

JUDGMENT

1. By the Originating Summons dated July 16, 2014 as amended on June 4, 2015, Mary Nyawira Theuri and Joseph Wambugu Theuri (hereinafter “the Plaintiffs”) claim to be entitled to all that parcel of land known as Othaya/Kihugiru/1746 by way of adverse possession and urge the Court to determine the following questions:
 - (i) Whether the Plaintiffs have been in continuous, uninterrupted and peaceful occupation of land title No Othaya/Kihugiru/1746 for a period exceeding 12 years;
 - (ii) Whether the Plaintiffs are entitled to land title No Othaya/Kihugiru/1746 by way of adverse possession;
 - (iii) Whether the Plaintiffs are entitled to an order that they be registered as the owners of land title No Othaya/Kihugiru/1746 in place of the Defendant; and
 - (iv) Who should meet the costs of this suit?
2. The Originating Summons is supported by an Affidavit sworn by the 2nd Plaintiff wherein he avers that his mother (the 1st Plaintiff herein) together with himself and his other siblings have been in continuous, uninterrupted and peaceful occupation of the parcel of land known as Othaya/Kihugiru/1746 (the suit property) which is registered in the Defendant’s name since the year 1983.



3. The 2nd Plaintiff avers that throughout that period, the Defendant herein has failed, neglected or refused to evict them from the said parcel of land and as such he is now statutorily barred from recovering possession thereof.
4. But in his Replying Affidavit sworn and filed herein on August 19, 2014 James Muhena Kinyua (the Defendant) avers at the outset that the suit is misconceived and incompetent. The Defendant further avers that his father who was a brother to the 2nd Plaintiff's father have been litigating over the same parcel of land since the year 1990.
5. The Defendant asserts that the 2nd Plaintiff's father had been claiming that the Defendant's father held the original parcel of land Othaya/Kihugiru/149 from which the suit property was sub-divided, in trust for himself. It was only after the 2nd Plaintiff's father lost the case that the Defendant's father sub-divided the said Othaya/Kihugiru/149 into three portions being Othaya/Kihugiru/1746, 1747 and 1748 which he then transferred to his family.
6. The Defendant further avers that he was the one to whom the suit property was transferred in 1995 and in the year 2000, he sued the 2nd Plaintiff's father asking him to grant vacant possession of the land in Othaya DMCC No 4 of 2000. The Plaintiffs were then ordered to vacate the suit land but their father filed Nyeri HCCA No 58 of 2000 which Appeal was declared as abandoned by the Court on October 8, 2008.

The Plaintiffs' Case

7. At the trial herein the Plaintiffs called three (3) witnesses who gave oral evidence in support of their case.
8. PW1 – Joseph Wambugu Theuri is the 2nd Plaintiff, a teacher by profession and a resident of Nyandarua. He told the Court the 1st Plaintiff is his mother and that he had her authority to testify on her behalf.
9. Relying on his Statement dated April 14, 2022, PW1 reiterated most of the averments contained in his Affidavit filed in support of the Originating Summons. He told the Court the suit property was initially part of the larger parcel known as Othaya/Kihugiru/149 which parcel was illegally sub-divided by the Defendant's father into Parcel Nos 1746, 1747 and 1748.
10. PW1 testified that the said sub-division was challenged in HCCA No 72 of 1998 as being illegal and unlawful as the land was sub-divided while the matter was pending litigation. PW1 further told the Court that the only suit that existed between his father and the Defendant's father was Othaya DMCC No 4 of 2000. PW1's father challenged the proceedings in HCCA No 58 of 2000 but the same abated after his father died in 2002. Otherwise, PW1 told the Court the family had remained on the land since 1983 and had put up permanent buildings thereon.
11. On cross-examination PW1 told the Court he was aware of Nyeri HCCC No 48 of 1990 between his father on one side and his father's brother Moses Wambugu on the other in relation to L R No Othaya Kihugiru/149. The Court determined that the land be divided into two – 4 acres for PW1's father and 5 acres to the Defendant's father. The Defendant's father appealed and the earlier Judgment was set aside.
12. PW1 conceded that it was after the setting aside of the Judgment that Parcel No 149 was sub-divided into new portion Nos 1746, 1747 and 1748. He told the Court his father had opposed the sub-division but he did not have a Court order arising from his opposition. Thereafter the Defendant had filed Othaya SPMCC No 4 of 2000 seeking to have PW1's father evicted from Parcel No 1746. Those orders were granted.



13. PW1 further told the Court that his father then preferred Nyeri HCCA No 58 of 2000 but he passed away two months thereafter. PW1's mother then applied to be substituted in his stead. The Appeal was abandoned.
14. PW2 – Zablon Gangu Theuri is a Safety Officer with Mastermind Tobacco Company and a brother to the 2nd Plaintiff (PW1). Relying on his Statement equally dated April 14, 2022, PW2 reiterated the testimony of his brother (PW1).
15. On cross-examination PW2 told the Court they had wooden structures on the suit land and that there had been disputes relating to the same land since 1990. He told the Court his father had also inherited Othaya/Kiandemi/833.
16. PW3 – James Magua Theuri is a Police Officer and a brother to the 2nd Plaintiff. Replying on his Witness Statement equally dated April 14, 2022, PW3 similarly reiterated the Statements made by PW1 in his evidence-in-chief.
17. On cross-examination, PW3 conceded that the orders granted in the year 2000 were the subject of an Appeal. He was however unaware if his father had filed an Appeal. PW3 was also not aware if there was a case filed to stop the burial of his father on the land.

The Defence Case

18. On his part, the Defendant was the sole witness in his case. Testifying as DW1, he told the Court he is a farmer in Gitundu Sub-Location, Othaya.
19. DW1 told the Court that the 1st Plaintiff is the wife to his paternal uncle. DW1's father and the 1st Plaintiff's father Ejidio Theuri Wambugu were brothers. The 2nd Plaintiff is a son to the 1st Plaintiff.
20. DW1 testified that his grandfather had given his two sons land. While DW1's father was given Othaya/Kihugiru/149, the 2nd Plaintiff's father was given Othaya/Kiandemi/833. During their lifetime, DW1's father had allowed the 2nd Plaintiff's father to occupy part of his land. However, the 2nd Plaintiff's father insisted on getting half of the land and lodged a caution on the title.
21. DW1 further told the Court the 2nd Plaintiff's father filed a claim in the High Court at Nyeri but the same was dismissed with costs and the caution removed. DW1's father then sub-divided the land into 3 portions which he then transferred to his 3 sons.
22. Thereafter DW1 filed a case at Othaya Law Courts to evict the 2nd Plaintiff's family from the land. They were given 3 months to vacate. The 2nd Plaintiff's father appealed the decision and got an order of stay. Thereafter he died and the 1st Plaintiff took over the case but the Appeal was dismissed.
23. On cross-examination, DW1 told the Court his uncle's case against his father had been dismissed with costs. It was then that the land was sub-divided with DW1 being given the suit property by his father. DW1 told the Court he had not evicted the Plaintiffs from the land as he was waiting for the cases to be completed.

Analysis and Determination

24. I have carefully perused and considered the pleadings filed by the Parties herein, the testimonies of their witnesses as well as the evidence adduced before the Court. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the Parties herein.



25. By this Originating Summons, the two Plaintiffs essentially urge the Court to declare that they have acquired all that parcel of land known as Othaya/Kihugiru/1746 by way of adverse possession. On that account, they further urge the Court to cancel the title in the name of the Defendant and to instead order that the two of them be registered as the proprietors of the land.
26. In support of their claim, the Plaintiffs who are a mother and her son, aver that their family has been in continuous, uninterrupted and peaceful occupation of the suit property since the year 1983 and that as such, having failed to evict them from the land for a period in excess of 12 years, the Defendant is now statutorily barred from recovering possession of the land.
27. On his part, the Defendant denies the Plaintiff's claim and asserts that this suit is misconceived and incompetent. The Defendant avers that his family and that of the Plaintiffs have been litigating over this same parcel of land since the year 1990.
28. It is Defendant's case that the Plaintiffs' family have over the years been claiming that the Defendant's father had been holding the suit property in trust for their family and that it was only after the claim based on trust was defeated that the Plaintiffs now resorted to claiming the land under the doctrine of adverse possession. The Defendant asserts that the Plaintiffs' family were long ordered to vacate the suit land and that instead of filing other suits, they should comply with the Court orders and grant vacant possession of the same.
29. From the material placed before me, the dispute concerning this property has been in the Courts for a considerable period of time. Initially before its sub-division, the property now known as Othaya/Kihugiru/1746 was part of a larger parcel of land then known as Othaya/Kihugiru/149 that was registered in the name of the Defendant's father Moses Kinyua Wambugu on September 24, 1958.
30. It was also apparent that while the title for land parcel No 149 was in the name of Moses Kinyua Wambugu, at some point in time his brother Ejidio Theuri Wambugu started residing on a portion of the land. From a copy of the Green Card for the said property produced in evidence as Dexh 1, sometime on January 5, 1983, the said Ejidio Theuri Wambugu lodged a caution on his brother's title claiming interest as an "adverse possessor." The said Ejidio Theuri Wambugu was the husband of the 1st Plaintiff and the father of the 2nd Plaintiff herein.
31. Again from the evidence adduced herein, it was apparent that at some point in time, Moses became uncomfortable with his brother's continued stay on the land. Asserting that his brother had his own parcel of land being L.R No. Othaya/Kiandemi/833, Moses instituted Nyeri PMCC No 48 of 1990 against his brother Ejidio. In his Plaint dated March 17, 1990, Moses sought a declaration that Ejidio was a trespasser on L R No Othaya/Kihugiru/149 and sought for his eviction as well as the removal of the caution that Ejidio had lodged in the year 1983.
32. In response to the said claim by his brother, Ejidio filed a written Statement of Defence denying the averments made by Moses. In addition, Ejidio filed a Counter Claim asserting that he was entitled to a portion of L R No Othaya/Kihugiru/149 on the basis of trust and adverse possession.
33. As it turned out, that suit was referred to arbitration. After hearing the suit, the Panel of Elders held in favour of Ejidio and an award was accordingly filed in the Magistrates' Court for adoption. Aggrieved and dissatisfied with the Award however, Moses filed Nyeri HCCA No 44 of 1992. In a Judgment rendered by P K Tunoi J (as he then was) on February 5, 1993, the Appeal by Moses was allowed and both the Ruling and the orders of the Senior Resident Magistrate that had adopted the award were quashed.



34. Some two years later in 1995, Moses proceeded to apply for the sub-division of the said L R No Othaya/Kihugiru/149 into three portions. It is that sub-division that yielded land parcel Nos. Othaya/Kihugiru/1746, 1747 and 1748 which Moses proceeded to transfer into the names of his three sons. Accordingly on July 10, 1995 and in spite of the presence of Ejidio on a portion thereof, L R No Othaya/Kihugiru/1746 (the suit property) was registered in the name of the Defendant and he was issued with a title deed therefor.
35. Subsequently, in the year 2000, the Defendant filed Othaya DMCC No 4 of 2000 seeking eviction orders against his uncle Ejidio. Having heard the dispute between the Parties and in a Judgment delivered on May 30, 2000, the Court concluded as follows:
- “I am satisfied that there is no suit pending between the two brothers and the sub-division and transfer which was effected in 1995 was done properly and the applicant herein, James Muhena is in lawful possession of the parcel of land Othaya/Kihugiru/1746 and Ejidio Theuri is a trespasser who James Muhena has rights to evict. In future Ejidio Theuri would have to regard the present Applicant as a Party to a suit in all dealings with his land.
- The Court is satisfied that the Applicant is entitled to all orders he has applied in this case subject to Appeal and time needed for preparation to vacate the land and costs.”
36. Having so concluded, the Court granted Ejidio some 30 days to vacate the land. He did not however do so. Instead by a Memorandum of Appeal dated June 29, 2000, Ejidio filed Nyeri HCCA No 58 of 2000 seeking to have the Judgment set aside. As fate would have it, Ejidio passed away on February 28, 2001 before the Appeal was heard.
37. Subsequently and by an application dated March 14, 2002 filed in Court on May 12, 2004 the 1st Plaintiff herein as the widow and personal representative of Ejidio Theuri Wambugu sought to be substituted in the Appeal to enable her prosecute the same. While the Plaintiffs obtained orders of stay of execution of the decree pending the Appeal, it was apparent that the Appeal was never pursued to conclusion.
38. At Paragraphs 8 and 9 of his Further Affidavit filed in support of the Amended Originating Summons and filed herein on April 25, 2017, the 2nd Plaintiff avers that his father died in the year 2001 and that he believes as per the advice of his Advocates that the Appeal abated one year after his father’s death. On that basis, it was the Plaintiff’s case that the decree issued pursuant to the Judgment of May 30, 2000 had remained unexecuted for a period in excess of 12 years and that the Defendant was now statute – barred from recovering the suit property from themselves.
39. That position did not however appear to me to be factually and legally correct. The Plaintiffs having obtained a stay of execution upon their filing of the Appeal, the Defendant could not proceed to execute his Judgment. It was pertinent that the orders remained in force as at May 12, 2004 when the 1st Plaintiff sought to be substituted in the Appeal to pursue the same instead of the now deceased Ejidio Theuri and that as stated by the Defendant, the Appeal was only on October 8, 2008 marked by the Court as “abandoned.”
40. That being the case, it cannot be said by any stretch of imagination that as at the time the Plaintiffs instituted this suit against the Defendant in July, 2014, the Judgment in favour of the Defendant had remained unexecuted for a period in excess of 12 years. And having instituted this suit, I did not think it was open for the Defendant to purport to evict the Plaintiffs during the pendency of this suit on account of the Judgment delivered on May 30, 2000.



41. As it were, the issues of trust and adverse possession had been raised by Ejidio Theuri Wambugu (deceased) in his pleadings before the trial Court at Othaya. That Court had found as a matter of fact that both Ejidio and the Defendant's father had been given different parcels of land by their father and that there was no basis upon which Ejidio continued his stay on the suit property.
42. Having looked at the issues herein, I was left in no doubt that the issues herein were the same ones that were directly in issue between the 1st Plaintiff's husband and the Defendant in Othaya DMCC No 4 of 2000. The Plaintiffs' occupation of the suit land was the direct result of their being wife and son respectively of the deceased and I was in no doubt that they had no claim of their own arising from a separate entry onto the suit property save for their relationship with Ejidio Theuri.
43. Under Section 7 of the *Civil Procedure Act*, it was apparent that this matter was res judicata and that the Court was prohibited by law from entertaining the same.
44. While they assert that they have been in continuous, uninterrupted possession of the land since the 1980s and that hence they had acquired title to the land through adverse possession, it was evident that since the year 1990, the Defendant and his predecessor in title have challenged their occupation of the land via active Court cases and that the Plaintiffs have only maintained their occupation on the land due to the prolonged period of litigation between the Parties.
45. Arising from the foregoing, I was not persuaded that the Plaintiffs have proved to the required standard that they have acquired any rights to the suit property as purported herein and the questions raised in the Originating Summons are answered in the negative.
46. Accordingly this suit is dismissed with costs to the Defendant.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 8TH DAY OF MAY, 2023.

In the presence of

Ms Hellen Njoki for the Plaintiffs

Mr Kebuka Wachira for the Defendants

Court assistant - Kendi

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J O LOLA

JUDGE

