



**Kihumba v Mugo & 2 others (Environment & Land Case
001 of 2022) [2023] KEELC 19323 (KLR) (12 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19323 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT & LAND CASE 001 OF 2022**

**AK BOR, J
JULY 12, 2023**

BETWEEN

WILLIAM NDERITU KIHUMBA APPLICANT

AND

SOPHIA WANGECHI MUGO 1ST RESPONDENT

GEOFFREY WAMBUGU MUGO 2ND RESPONDENT

AGNES MUMBI MWANGI 3RD RESPONDENT

JUDGMENT

1. The Applicant filed the Originating Summons at the Nyeri Environment and Land Court (ELC) on 6/11/2016 seeking a declaration that the late Washington Mugo Kigo (the late Kigo) created a trust in his favour in respect of 11 acres comprised in the land known as Euaso Nyiro/Suguroi Block III/179. In the alternative, he sought a declaration that he had acquired 11 acres of the suit land through prescription. He also sought a declaration that the late Kigo's estate in relation to the suit property was administered subject to the pleaded trust and/or prescriptive rights in his favour to the extent of the 11 acres of the land. He sought an order for the transfer of 11 acres out of the suit land to his name and for the Respondents to execute documents to effectuate the transfer of 11 acres to his name failing which the Deputy Registrar of this court was to be authorised to execute the necessary documents and the Land Registrar be directed to dispense with the Respondents' documents.
2. The Applicant swore the replying affidavit in which he deponed that the late Kigo died intestate on 17/8/2008, leaving Euaso Nyiro/Suguroi Block III/179 as part of his estate. He produced a copy of the judgment issued in Nyeri High Court Succession Cause No. 250 of 2009 showing the Respondents as administrators of the estate of the late Kigo.
3. The Applicant averred that he entered into a verbal agreement with the late Kigo in 1981 vide which he was to develop the suit land measuring 42 acres by planting trees, pasture, clearing bushes and digging



- a dam. As consideration for those duties, he would be entitled to 8 acres while Mr. Kigo would retain 34 acres. He claimed that pursuant to that agreement he was put in exclusive possession of the whole land in 1981 and that the late Kigo demarcated the 8 acres on the ground on which he settled with his family that year.
4. That in 1996, the late Kigo visited the suit land and requested him to allow him to use his livestock as security for a loan from the Agricultural Finance Corporation (AFC) as consideration for a further 3 acres which he claimed he agreed to and the agreement was effected. According to him, the 3 acres were demarcated and he was put in exclusive possession bringing the land to 11 acres under the two agreements.
 5. He claimed that he fully discharged his duties under the agreements and in 2000 the late Kigo took him to the lands Registry in Nanyuki intending to have the 11 acres transferred to the Applicant but found that his family members had placed a caution on the land because he intended to sell the balance of 31 acres. He claimed that they agreed with the late Kigo that he would have the caution removed but unfortunately Kigo died on 17/8/2008 before the transfer was effected and left the Applicant in exclusive possession of the 11 acres.
 6. He stated that to date, he had exclusive possession of the 11 acres where he resides, farms and keeps livestock, and produced photographs to back this assertion up. In June 2018 when some strangers visited the suit land and disclosed that they were instructed to sell it by the Respondents, he learned that the land had been distributed according to the judgment. He urged the court to grant the orders he seeks because the Respondents were not ready to give effect to his entitlement to 11 acres of the land pursuant to the two agreements he entered into with the late Kigo.
 7. The 1st Respondent swore the replying affidavit in opposition to the suit. She is a widow and administrator of the estate of the late Kigo and had the authority of the co-administrators to swear the affidavit. She denied that the Applicant had demonstrated that he was deserving of the orders sought. She averred that the Applicant was not in occupation of the 11 acres as he claimed or that he had been on the land since 1981 and stated that the Applicant's occupation of the suit land was recent only after the death of her husband and that they only discovered it after the succession matter had been concluded.
 8. She deponed that her late husband had a brother named Jonson Njagi Kigo who owned a piece of land next to the suit land and that the Applicant lived on the land belonging to Johnson Kigo until the farmhouse was brought down and he was advised by Johnson Kigo to occupy the suit land while taking care of Johnson's land. She denied that the Applicant had ever worked for her husband who she claimed employed his own farmhands named Koech and Kimeli who took care of the land and reared livestock on it. She deponed that all the development on the suit land and the tanks were put up by her late husband.
 9. She deponed that when she got married to the late Kigo in 1981 they used to visit the land regularly but she never saw the Applicant or heard of him and that his affidavit was full of falsehoods. She denied that her late husband entered into any verbal agreements with the Applicant as he alleged. She stated that there were no trees planted on the suit land and the only ones which were there were indigenous trees, bushes and shrubs which were originally there because the area is semi-arid. She denied that the Applicant dug any dams or cleared bushes on the suit land. It was not true that her late husband demarcated 8 acres and on which the Applicant settled with his family. She clarified that only a small part containing the homestead was demarcated.



10. She was emphatic that while her late husband was alive the Applicant never occupied the suit land and they learnt of his occupation after the succession proceedings were concluded. The Applicant informed them that he was occupying the land temporarily after being allowed to do so by Johnson Njagi Kigo.
11. She confirmed that the title over the suit land was issued to her late husband in 1987 which he used to secure a loan from the Agricultural Finance Corporation (AFC) in 1996. She relied on the search showing that a charge in favour of AFC to secure Kshs. 200,000/= was registered against the suit land on 21/2/2007. She stressed that it was false for the Applicant to allege that he was given a further 3 acres out of the suit land in 1996 as a consideration of his security for that loan.
12. Regarding the caution, she stated that that was placed on 4/9/2008 after the death of her husband because they had a family dispute. She urged that had her late husband wanted to transfer land to the Applicant, he would have done so during the 27 years before he died and added that the succession proceedings went on for more than 7 years and that the Applicant could have joined the case.
13. The suit was transferred from the Nyeri ELC to the Nanyuki ELC for hearing and disposal in January 2022. The hearing proceeded on 21/2/2022 when the Applicant adopted the evidence in his supporting affidavit filed on 6/11/2018. On cross examination, he stated that he entered the land in 1981. There were no witnesses to the unwritten agreement. He planted trees like eucalyptus, grevillea, cedar, cypress and other trees which died. He told the court that he planted the trees as his own and not for the late Kigo.
14. He explained that the late Kigo gave him 4 acres for his money, which he deducted from his salary when he went to Nairobi. Further, that he was working for Mr. Kigo who was paying him a salary. Initially he used to burn charcoal which the late Kigo took. He claimed that the late Kigo used to pay him Kshs. 7,500/= because he had hired him as his employee. That his salary was not enough and he used to burn charcoal which Mr. Kigo carried. He could not recall when he finished paying for the land.
15. He reiterated that before Kigo died in 2008, there was a caution registered against the suit land. He knew Johnson Njagi Kigo who was Kigo's brother and who had land adjacent to his. He was categorical that he was not staying on Njagi's land but that he was staying on Kigo's land. He added that Kimeli, Koech and Wambugu were staying on Njagi's land. He conceded that the photographs he produced had nothing to prove that they were taken on the suit land. He also conceded that the farmhouse shown in the photographs was built by the late Kigo. He knew from the court judgment that the court distributed the land owned by the late Kigo.
16. On re-examination, he stated that he lived in the house shown in the photos and that he had planted trees on the place he was shown and fenced the land. He stated that initially he was given 4 acres and then Kigo carried away the charcoal and hired him and that is how the acres got to 11 because Kigo was not paying for the charcoal he took. He reiterated that the late Kigo was to pay him Kshs. 7,500/= but he never paid him, and that he went and stayed in Nairobi and only paid him a salary for 3 months. He claimed that they agreed that 8 acres would be given to him as the salary and that the late Kigo was left with Kshs. 300,000/=.
17. The 1st Respondent gave evidence and adopted the affidavit she swore on 19/2/2019. She produced a copy of the search done on 13/2/2019. On cross-examination by the Applicant, she stated that she did not know the Applicant. She was in Nyeri in 1981 and she was married to Kigo. She insisted that she used to go to the suit land and that the dam on land was built by Kigo in 2007 before he died. The dam was at the bottom of the shamba near the river.
18. The money which the late Kigo used to build the dam was the loan of Kshs. 200,000/= which he took from AFC Nyeri. She told the court that her husband left Nairobi in 2007 and went to build the dam.



- After that he fell ill and hardly went to the land. Mrs. Mugo stated that she went to the dam in 2007 with her children but did not see the Applicant on the land. She only saw Kimeli and Koech, who constructed the dam.
19. She maintained that Mr. Kigo planted the trees on the suit land and that he got them from the Forest department. She clarified that in 1981 when the Applicant claims to have gone to Maralal to buy cows, she was working and was already married to Kigo. She first went to the land in 1982 with her children who were young. She found one house and the second one was built when she was there. There were three houses on the land, one for goats, one for workers and the third one was where they would sleep. She reiterated that the houses on the land were built by the late Kigo.
 20. On re-examination, she explained that the loan of Kshs. 200,000/= reflected in the search is what built the dam. She was emphatic that the Applicant had never been employed on the land and that he was not using the suit land.
 21. Upon conclusion of the hearing, the court directed parties to file submissions. The Applicant filed submissions and identified the issues for determination. These are, whether a trust was created in respect of 11 acres, whether a claim for adverse possession had been established and lastly, whether the estate was administered subject to the trust and prescriptive rights. He submitted that by the very act of the deceased demarcating the parcel of land and putting him in exclusive possession for an extended period of time, a trust was created in his favour with respect to 11 acres of land. He urged that the late Mugo intended to transfer the land to him but was unable to do so because of the caution.
 22. He submitted that he had been in exclusive possession of 11 acres of the land, had built on it and was cultivating it as could be seen from the photos which he produced in court. He emphasised that a trust was created due to the special circumstances of the case. He relied on *Philicery Nduku Mumo v Nzuki Makau* (2002) eKLR on the point that trust was a question of fact to be proved by evidence and that an applicant had to put evidence before the court in support of the fact.
 23. Further, the Applicant submitted that he had acquired title to 11 acres of the suit land through adverse possession since he went to the land in 1981. He claimed to have been in open and continuous occupation since 1981 for over 12 years which fact was known to the late Kigo. He relied on *Sisto Wambugu v Kamau Njuguna* (1983) eKLR where it was stated that in order to acquire land which has a known owner, through the statute of limitations, the owner must have lost his rights to the land by being dispossessed of it or by his possession being discontinued. He also relied on *Murunga Kabangi & 2 others v Hannah Wairimu Gitau & Another* [2019] eKLR where the court stated that it did not matter that the owner had died and the disputed land was transferred to his legal representatives, that nevertheless adverse possession had set in and was not disturbed by the death.
 24. The Respondents submitted that the Applicant needed to prove the existence of a trust, which he failed to do. They pointed out the contradictions between the Applicant's pleadings and the evidence he gave in court. For instance, he claimed that one of the terms of the agreement was that he would plant trees, clear bushes and dig a dam on the land, but he stated in court that he never planted any trees for the late Kigo. Further, he told the court that initially he was given 4 acres and the remainder was to be deducted from his salary of Kshs. 7,500 which he earned as an employee of the late Kigo but could not remember when he finished paying for the land. The Respondent submitted that the Applicant had failed to prove the existence of a trust and had given different versions of the story to the court on how he came to be on the suit land.
 25. The Respondents also referred to the Applicant's claim that he was given 3 acres in 1986 after he guaranteed the loan with AFC, while pointing out that the loan of Kshs. 200,000/= which the late Kigo took was the one reflected in the encumbrance section. The Respondents also pointed out that



- no caution had been registered against the land by 2000 when the Applicant claims to have visited the lands office with the late Kigo with the intention of transferring 11 acres to the plaintiff.
26. The Respondents submitted that the Applicant had failed to establish a claim for adverse possession and that he had failed to demonstrate the acts constituting adverse possession such as adequate possession, in continuity, in publicity, to an extent to show it is adverse to the owner. Further, that it was actual, visible, exclusive, open and notorious. The Respondents relied on *Richard Wefwafwa Songoi v Ben Munyifwa Songoi*, (2020) eKLR where the court gave the prerequisites for adverse possession, which include the date he came into possession, the nature of his possession, whether the fact of his possession was known to the owner, how long the possession continued and that the possession was open and undisturbed for the requisite 12 years.
 27. The Respondents submitted that if the Applicant were in occupation of the suit land then he was on it with the permission of the owner based on his claim that he was an employee of the late Kigo, a fact which the Respondents disputed. They pointed out that the Applicant only went to the land after the conclusion of the succession case and that is when the family learnt that the Applicant had moved from the property of the brother of the late Kigo which is adjacent to the suit land into the old farmhouse on the suit land after the house he used to live in on Johnson's land was demolished.
 28. The Respondents argued that the Applicant had never been in possession of the suit land and that his occupation started in 2016 and he had not developed the suit land in any way. They pointed out that the developments seen on the photos exhibited in court were undertaken by the late Kigo during his lifetime. They urged out that occupation was a fact which touched on the size of the land occupied, the period of occupation and the nature of occupation. They concluded that it was not possible to deduce these important indicators of adverse possession from the convoluted and contradictory evidence tendered by the Applicant.
 29. The Respondents submitted that since the claim for trust and adverse possession were not proved, it follows therefore that the estate of the late Mugo was not administered subject to the trust and prescriptive rights as claimed by the Applicant. In any event, they added that on 25/11/2016 the suit land was distributed to Joseph Kigo Mugo, Gladys Kabiri, Ibrahim Macharia, Geoffrey Mugo, Agnes Mwangi, Prisca Muthoni and the other half was to be registered in the 1st Respondent's name. the Respondents contended that the Applicant should have sued all the beneficiaries and that the Applicant was seeking orders against persons who were not parties to this suit.
 30. The issues for determination are whether the Applicant has proved his claim to 11 acres of the suit land through a trust or through prescription, and whether the court should grant the orders he seeks in the suit. The Applicant's claim on the one hand is that he bought the suit land from the late Kigo through two unwritten agreements and that the late Kigo had employed him and put him in possession of the land. He claimed that he was to be paid a salary of Kshs. 7500/= which presumably was payable monthly, and that that was part of the consideration for the land. He did not lead any evidence to support those claims. On the other hand, the Applicant claimed that he had been on the suit land since 1981 and that he had acquired 11 acres of the suit land through adverse possession.
 31. The Applicant did not prove that he moved into the land in 1981 or that he had been on the land prior to 2016 when the Respondents claim that the house on Johnson's land which the Applicant was living in was demolished, and that was why he moved into the old farmhouse on the suit land. The Applicant did not lead evidence to prove the demarcation of the 11 acres that he claims to have acquired during the late Kigo's lifetime. There is no evidence to show that a caution had been registered against the suit land which would have stopped Kigo from transferring the 11 acres to the Applicant while he was alive.



32. The Applicant failed to prove his claim on a balance of probabilities. The suit is dismissed with costs to the Respondents.

DELIVERED VIRTUALLY AT NANYUKI THIS 12TH DAY OF JULY 2023.

K. BOR

JUDGE

IN THE PRESENCE OF:

MR. WILLIAM KIHUMBA- THE APPLICANT

MR. ROBERT KIMUNYA FOR THE RESPONDENT

MS. STELLA GAKII – COURT ASSISTANT

