



**Karungu v Joreth Limited & another (Environment & Land Case
671 of 2009) [2023] KEELC 20813 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20813 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 671 OF 2009
LC KOMINGOI, J
OCTOBER 12, 2023**

BETWEEN

AGNES WAMBUI KARUNGU PLAINTIFF

AND

JORETH LIMITED 1ST DEFENDANT

**ELIZABETH WANJIRU NGOTHO (SUED AS THE ADMINISTRATOR AND
PERSONAL REPRESENTATIVE OF THE ESTATE OF MILLICENT WANJIRU
NGOTHO (DECEASED) 2ND DEFENDANT**

JUDGMENT

1. This Judgment seeks to determine the Originating Summons dated 30th December, 2009 and filed on 31st December, 2009. The Plaintiff claim is that she is entitled to be registered as the proprietor of L.R No. 13330/48 by virtue of being an adverse possessor. This is because she has had an actual, open and physical and uninterrupted possession of the property for over 23 years since 1986. She therefore calls upon this court to determine the following issues regarding her claim.
 - a. That Agnes Wambui Karungu be declared to have acquired title by adverse possession to the suit premises known as Plot No. 296 Thome Farmers No. 5 Limited and now known as L.R No. 13330/48.
 - b. That the registration of Millicent Wanjiru Ngoto as proprietors of L.R No. 13330/48 and or any other persons deriving title from Joreth Limited based on the land previously known as Plot 296 and now know as L.R. 13330/48 be cancelled forthwith and the land registrar do rectify the register to enter the name of the Plaintiff as registered proprietor of the said property in place of the 2nd Defendant or anyone deriving title from the Defendants.
 - c. The costs of these proceedings be borne by the Defendants.



2. The Originating Summons is supported by the Affidavit of Agnes Wambui Karungu Affidavit, further affidavit and Supplementary Affidavit sworn on 30th December,2009, 25th February,2010 and 27th February,2017 which were filed on 31st December,2009,25th February,2021 and 27th January, 2017 respectively. She depones that she bought Plot No.296 Thome Farmers No. 5 Limited at Thome Estate from Margaret Thitu Njenga through a sale agreement dated 11th April,1986 at a purchase price of Ksh.50,000/= Thome Farmers No. 5 Limited, a land buying company bought the land from the 1st Defendant and distributed it among its members after undertaking subdivisions. After paying the entire purchase price, she visited Thome Farmers No. 5 Limited offices together with Margaret Thitu Njenga so that a transfer of the property would be effected in her favour. She also paid the survey fee. A week after, she commenced construction of her one storey residential house on the plot. However, in August,2008, the 2nd Defendant hired goons to demolish the house. When she reported the matter at Kasarani Police Station, she found out that the 2nd Defendant had illegally acquired the title to the suit property. It is the Plaintiff's case that the 1st Defendant fraudulently transferred the Plot at a purchase price of Ksh.200,000/= yet the actual market value was Ksh. 4 million. She contends that the 1st Defendant did not have the capacity to dispose of the property because its title had already been extinguished by her exclusive adverse possession of the property for more than 23 years.
3. The Plaintiff asserts that by 2006, she had already occupied the suit property and even commenced construction in August,2008 after obtaining building approvals from Nairobi City Council. The 2nd Defendant's title for the suit property is subject to the provisions of *Limitation of Actions Act*. She denies ever trespassing over the suit property. Documents in support of the Plaintiff's case filed before this court included her Replying Affidavit sworn on 2nd April,2007 filed on 3rd April,2007 in respect of Nairobi HCCC No. 1321 of 2006.

The 1st Defendant's case

4. On 26th January,2016, Robertson Nderitu, the 1st Defendant Manager filed a Replying Affidavit sworn on 25th January,2016 denying the Plaintiff allegations in response to the Originating Summons. He alleges that the disputed property belonged to the 1st Defendant and has never vested upon Margaret Thitu Njenga or Thome Farmers No. 5 to enable them pass its interest to the Plaintiff. He explains that the 1st Defendant became the registered owner of L.R.13330 on 19th December,2000. L.R.13330 title was an amalgamation and consolidation of its title L.R.4920/3 and 4921/3 held since 1950s. Therefore, L.R. 13330 title, a resultant subdivision of L.R.13330 has never been registered in Thome farmers No.5 Limited name or any other person besides the 1st Defendant. In addition, Thome Farmers No.5 Limited and the 1st Defendant are not related in any way whether by partnership, joint venture or even shares. For these reasons, Thome Farmers No.5 Limited Share certificate and acknowledgment receipts for fee, survey and payments have no effect on the 1st Defendant nor do they entitle the Plaintiff, the Defendants land or share.
5. It is the 1st Defendant's case that in 1992, it filed a suit against twenty four (24) persons including Thome No. 5 Limited in HCCC No. 6206 of 1992 for trespassing on L.R. 13330. According to a consent order dated 27th June 2000, the Defendants were required to pay Ksh.200,000/= to Joreth Limited (1st defendant) upon which transfer of plots could be effected upon them. The Plaintiff never complied with the said consent order. He maintains that the 1st Defendant rightfully sold and transferred the suit property to the 2nd Defendant after advertising and accepting its bids for sale. Therefore, the Plaintiff claims that she acquired interest over the property through adverse possession ought to be disregarded because the 1st Defendant occupied it for 30 years until the year 2000 when it



consolidated and subdivided L.R.13330 and which forms the suit property. Further HCCC No.6206 of 1992 instituted in 1992 was concluded in 2002.

6. According to the 2nd Defendant, the Plaintiff is not entitled to the orders sought because she has not demonstrated how she will suffer irreparable loss because she illegally entered the property and commenced construction without the 1st Defendant's consent. Her cause of action can only lie against Thome Farmers No.5 Limited with whom they had a contractual relationship and not the 1st Defendant. She is also guilty of laches because the property has already been transferred to the 2nd Defendant by 1st Defendant.

The 2nd Defendant's case

7. In response to the Originating Summons, the 2nd Defendant, Millicent Wanjiru Ngotho filed Replying Affidavits sworn on 18th January,2010 and 29th January,2010 and filed on the same dates respectively. She asserts that she is the sole proprietor of L.R. 13330/48 legally acquired from the 1st Defendant for value consideration of Ksh.1,600,000/= which was later raised to Ksh.1,800,000/=. The property had been advertised for sale by the 1st Defendant in the newspaper. When she physically visited the plot and found it was vacant, she made a decision to purchase. After lodging a duly executed transfer on 13th July,2007 before Nairobi Department of Lands, she was later informed on 13th October,2009 that her title was ready for collection. She asserts that the Plaintiff did not acquire the property through adverse possession neither has any court declared her to be the registered owner. In any case, this Originating Summons does not confer any rights upon her.
8. She maintains that the suit property was not only vacant when she purchased it but she was not aware of the Plaintiff's occupation. After the Plaintiff commenced construction in 17th December,2009, she was summoned by the area chief who ordered her to remove construction materials from the site. It is the 2nd Defendant's case that she is not aware if the Plaintiff entered into any sale agreement with third parties on 1986 for the reasons that she was not party to the said contracts. Further, the Plaintiff cannot lay claim over the suit property under the doctrine of adverse possession for 23 uninterrupted years on the basis that the share transfer was done by a different company. The Plaintiffs illegal temporary structures were also demolished by Nairobi City Council and not the 2nd Defendant.
9. Following the demise of Millicent Wanjiru Ngotho on 7/05/2017, during the pendency of this suit, she was substituted with Elizabeth Njeri Ngotho through a Notice of Motion dated 5th September,2019 which was filed on 9th September,2019. This was after Elizabeth Njeri Ngotho was issued with letters of Administration Ad Litem on 8th July,2019 in Nairobi High Court Succession Cause No. 798 of 2019.
10. On 24th June,2015, the 2nd Defendant filed a Notice of Indemnity against the 1st Defendant based on the following grounds should the court rule in favor of the Plaintiff.
 1. That on 7th April,2006, the 1st Defendant cause to be run in the Daily Nation an advertisement indicting several various plots within L.R.13330 were for sale.
 2. That through a sale agreement dated 4th April,2007, the 2nd Defendant, purchased the L.R.No.13330/48 for Ksh.1,600,000/=.
 3. That the 2nd Defendant paid the entire purchase price and executed the instrument of transfer.
 4. That in the year, 2009, the 2nd Defendant was issued with certificate of title for L.R. No.13330/48.



5. That as a result of the said transaction, the 2nd Defendant is now registered proprietor of the property subject of these proceedings.

Evidence of the Plaintiffs.

11. PW1, Agnes Wambui Karungu, while adopting her witness statement dated 25th June 2018 urged the court to declare her the owner of the suit property on the basis that when she bought the plot, she was informed that Thome No.5 was selling it. She explained that her decision to purchase the plot from Margaret Njenga was made after she met Thome No.5 Directors who informed her Margaret was selling the plot. She also was shown the plot when she undertook a site visit. She produced a sale agreement dated 11/4/1986 between herself and Margaret Njenga for purchase of Plot 296 in Thome Farmers No.5. The agreement was witnessed by David Mukui Kangu it was her testimony that Thome No.5 Farmers Limited issued her with share certificate. Transfer of the suit was also effected upon her at the offices of Thome Farmers No.5 Limited. Afterwards, she was informed to obtain possession of the suit property. PW1 produced receipts for payment for survey amounting to Ksh.21,000/= and a ballot card issued by Thome No.5 Farmers to confirm that she owner plot 296. She told court that in 1986, she fenced the property with a barbed wire and put up semi-permanent houses for her workers. She also undertook cultivation until 2009 when Mr. Mbogo informed her that someone was claiming her plot. Construction of her two-bedroomed house started in December,2009. Before completion, the 2nd Defendant obtained orders stopping further construction while the structures were demolished. When the 1st Defendant beat up her workers, she instituted this suit. She informed court that she reported the matter to Kasarani police station. The court was told that orders were issued that status quo be maintained the suit property until this suit is heard. It was her testimony that ever since she occupied the suit property for 23 years, nobody had questioned her occupation.
12. PW1 further stated that to date, she is in possession and occupation the suit property for 24 years and that the 1st Defendant has never interfered with. She stated that she did not have any claim against Thome Farmers No.5. while informing the court that she was not party to HCCC No.6206 of 1992 and that consent judgment issued in the matter never resolved the outstanding dispute. In addition, she was not aware of any advertisement seeking to sell the suit property because the notice was not served upon her. During this time, she was already in occupation of the property. When she was referred to the sale agreement dated 5/11/2006 between the 1st and 2nd Defendant whose purchase price was Ksh.1.6 million, she noted that the transfer instrument was dated 4/4/2007. This meant that transfer was effected even before the purchase of the property was done.
13. PW1 reiterated during cross examination that she purchased the suit property from Margaret Njenga. The property was initially owned by Thome Farmers No. 5 Limited. After conducting due diligence, she decided to purchase the property. She maintained that by 1986, she was in occupation of the property after being shown its beacons. PW1 also stated that structures for her workers were done after obtaining approvals from the city council. She insisted that she paid for approval of her building plans, but the application was blocked by the 2nd Defendant who worked at the city council then. In addition, the 2nd Defendant sent goons to demolish her house. Through her own admission, PW1 testified that she was not party in HCCC No.6206 of 1992 neither was she aware of it or the consent judgment. Further, no dispute existed between her and Thome Farmers No.5 Limited over the suit property. She stated that she was not party to the 1st and 2nd Defendant transaction. PW1 admitted that she did not pay the rates because she it did have the title.
14. During re-examination, she maintained that she did not need approval to put up temporary structures on the suit property. She further explained that's the 2nd Defendant destroyed her structures at night



without any court orders. This was in spite of the fact that Nairobi city council did not have any objection with the structures. She maintained the position that considering she was not aware that a lawsuit was instituted in 1992, she was not bound by the consent order.

15. PW2, Edward Mbogo stated that he resided on his house located in Thome Farmers Limited No. 5 which he constructed in 1997. The house is located 250 meters from the suit property. He explained that he knew the Plaintiff in 1996 through his friend Chege. He would also see her and her two workers Mbogo and Mwangi on the suit property. The Plaintiff property had temporary mabati structures and was fenced with barbered wire. Later on, she put up permanent structures and started cultivating. Despite stating that city council approval is not required when putting up a fence and iron sheet house, he added that the Plaintiff showed him some receipts from the city council granting her approval to commence construction.
16. When he was cross-examined, he swore that he bought his plot from Thome Farmers No.5 Limited and that since 1987, all the plots in that area had been beaconed. He admitted that he was familiar with Joreth Limited, he did not know whether it knew who was on the suit property. He stated that he would occasionally see the Plaintiff on the suit property where her two workers resided. He was however not able to explain how the Plaintiff bought the property. He maintained that building approvals from city council were only required when constructing permanent structures and not when erecting temporary structures and/or a fence. In addition, approvals could only be granted if a person had a title deed and paid rates. According to PW1 testimony, he did not have a title deed for his plot, where he resided since 1987 because it was never issued by the 1st Defendant despite seeking for it. Through his own admission, he confirmed that the 2nd Defendant was granted conditional approval to commence construction on the plot. She was also issued with a title deed on 14/3/2005. He further acknowledged that the 2nd Defendant paid rates to Nairobi City Council. The court was informed that City Council would issue a 7 day demolition notice to property owners, if it discovered construction was done without its approval. He admitted that even though the Plaintiff house was demolished, he did not know whether she was served with a demolition notice.
17. PW3, Patrick Magu Mwangi, stated that he resided on Thome Farmers No.5 Plot 290 since 1998 and that he knew the Plaintiff in 1995 when she bought her plot and started construction. Considering the area was sparsely populated, he would occasionally see the Plaintiff on her plot which was located about 30-40 meters from his plot. In 1995, the Plaintiff fenced the plot with barbered wire and even put up iron sheet structures although they were later demolished. The court was informed that the plot was not vacant because she undertook cultivation in 2006 and also put up more structures.
18. When PW3 was cross examined, he reiterated that he completed construction of his house in 1998 which he commenced when he moved in to his plot in 1995. It was his testimony that his plot was not among those advertised for sale by the 1st Defendant. He stated that he obtained the Plaintiff's contact from a young man who lived on the property. Although it was normal for people not to reside on their land, he confessed that he never knew if any person resided on the Plaintiff's property throughout. When he was referred to the photographic evidence produced by the Plaintiff in support of her case, it was his evidence they were an actual illustration of the structures put up by the Plaintiff on the property. However, he stated the Plaintiff was not a member of their residential association. The court was informed that before any construction can be undertaken, it was mandatory to obtain building approvals. PW3 explained that when he purchased his property from Gichuki & Wanjiku, his title deed was issued by Joreth Limited. Gichuki & Wanjiku were issued with share certificate by Thome Farmers No.5 Limited. He stated that he did not have any document to prove the Plaintiff owned a plot or who sold it to her.



19. PW3 reiterated during re-examination was that the Plaintiff was his neighbor and that she informed him she owned the Plot. In addition, he obtained the Plaintiffs contact from the young man who resided on the plot.

Evidence of the Defendants

20. DW1 David Karanja Nderitu a Manager with the 1st defendant adopted his witness statement dated 5th July 2021 as part of the evidence in chief and the bundle of documents dated 26th January 2016 produced as exhibits in this case. It was his evidence that the suit property had not been transferred to Thome Farmers No. 5 Ltd as there was no sale agreement.

21. It was his testimony that the cheques paid to DN Ndegwa were not in favour of Joreth Ltd (the 1st Defendant).

Further that by the virtue of the consent in HCCC 6206/1992, the 1st Defendant could only issue title deeds to those who had paid Kshs.200,000/= He told the court that the suit property was sold prior to 2006 and that there was no evidence of presence of the plaintiff on the suit property prior to 2006.

When cross-examined by the plaintiffs counsel, he told the court that the discrepancies in the transfer dated 5th November 2006 to the 2nd defendant, the sale agreement were not meant to defeat the plaintiffs claim. He stated that it was a typographical error.

22. DW2, Elizabeth Njeri Ngotho, stated that she is the daughter of the late Millicent Wanjiru Ngotho who passed away in 7/5/2019. She produced Grant of letters of administration issued on 7/5/2019. She confirmed that she was issued with letter of administration to represent the estate of the deceased in this suit. She stated that her late mother purchased L.R. No.13330/48 from the Joreth Limited for a consideration of Ksh. 1.6 million through a sale agreement dated 4/4/2007. Her decision to purchase was attributed to a daily nation newspaper advertisement dated 7/4/2006 by Joreth Limited who sought to sell the property. She produced payment receipts to prove that the entire purchase price was paid to M/S Kimani Kahiro Advocates who drew the Agreement for transmission to the 1st Defendant. A duly executed transfer instrument drawn by Njeri Kariuki Advocates was registered on 13/07/2009 authorizing transfer of the property from the 1st Defendant to the 2nd Defendant. On 13/7/2009, her mother was issued with a certificate of title. The court was told that when Millicent Wanjiru Ngotho bought the property, the Plaintiff was not in occupation. It was DW2's evidence that her mother was not able to develop the suit property because the Plaintiff put up a perimeter wall. Her prayer to the court is that the Plaintiff's claim ought be dismissed with costs. Should the court rule in favor of the Plaintiff, then the 1st Defendant should be ordered to compensate the 2nd Defendant by refunding Ksh.32 million, being the current market value of the suit property as indicated in the valuation report.

23. Upon being cross-examined, DW2 reiterated that the mother bought the suit property after seeing a newspaper advertisement publicizing it for sale. DW2 informed court that she was not aware if the property had been sold neither was she familiar with its history. It was her evidence that the property was vacant when Millicent Wanjiru Ngotho bought it. DW2 would not recall when her late mother visited the suit property neither did she know whether PW3 was the Plaintiff's neighbours. It was her evidence that her possession of the suit property was obtained after paying the entire purchase price. Bearing in mind that her mother fulfilled purchasers' obligations, this suit ought not to have been instituted because nothing prevented her from obtaining possession. DW2 told court that she was not aware if her mother instituted a suit before the Magistrate's court against the Plaintiff with respect to the suit property. She admitted that although the sale agreement was executed on 4/4/2007, duly executed transfer instrument approving transfer of the property from the 1st Defendant to the 2nd Defendant was dated 5/11/2006. This was in spite of the fact that the sale agreement normally precedes



- a transfer. DW2 stated that even though she was not aware of the Court of Appeal ruling relating to suit property, her mother might be aware of the same.
24. When she was re-examined, she admitted that she did not reside on the suit property neither did she know any neighbour by name. She maintained that her mother conducted due diligence before purchasing the suit property. Even though DW2 affirmed that she did not know if there existed any dispute between the Plaintiff and the 1st Defendant relating to the suit property, she acknowledged that court orders were issued stopping any construction on the property. She reiterated that duly executed transfer instrument drawn by Njeri, Kariuki Advocate was received on 13/7/2009.
 25. DW3, Jane Wanja Mburu, a registered valuer stated that she was instructed by Millicent Ngotho to advise on the market value of L.R. No.13330/48 Thome 5 Estate. After conducting a search, she found out that Millicent Wanjiru Ngotho was the registered owner of the property. She produced a valuation report dated 7/3/2019 which she prepared and which indicated that L.R. No.13330/48 was valued at Ksh.32,000,000/=.
 26. DW4, Njeri Kariuki, an advocate of the High court of Kenya admitted that she acted for Joreth Limited during the registration and transfer of L.R No.13330/48 to Millicent Wanjiru Ngotho. Through her own admission, it was her evidence that she drew the Transfer document for the suit property dated 5/11/2006. Millicent Wanjiru Ngotho was issued with title deed after the transfer was registered on 13/7/2009. The court was informed that Mr. Kahiro drew the sale agreement dated 4/4/2007. The Purchase price of the property which was Ksh.1.8 million inclusive of stamp duty. She stated that there was a typical error on the dates of the transfer instrument in that it ought to have been indicted as the year 2007 instead of 2006.
 27. During cross examination, she denied ever defrauding the Plaintiff of the property. When she was referred to consent judgment in HCCC No. 6206 of 1992, she stated that it stipulated that the Defendants were required to pay a purchase price of Ksh.200,000/= to Joreth Limited to facilitate transfer of plots to them. She further informed court that she drew transfer instruments for the Defendants who paid the mandatory purchase price. She informed court that she was familiar with HCCC No. 6206 of 1992 even though she never represented any party in the suit. She further stated that the Plaintiff was not a party in the suit, hence did not know whether she was bound by the terms of the consent judgement.
 28. During re-examination, she reaffirmed that she drew the transfer instrument which was erroneously dated as 2006 instead of 2007. Further, the Plaintiff never paid Ksh.200,000/= as directed in the consent judgment of HCCC No. 6206 of 1992. DW4 swore that the suit property was vacant at the time she drew the transfer instrument.
 29. At the close of the oral testimonies parties tendered final written submissions.

The Plaintiff's submissions

30. The Plaintiff counsel in submission dated 19th October, 2022 filed on the same date insists that the Plaintiff possessed and occupied the suit land without the Defendants permission. Therefore, she has not satisfied the legal requirement for her claim of adverse possession as was outlined by the Court of Appeal in Benjamin Kamua Murima & Others v Gladys Njeri (unreported). In addition, David Karanja witness statement of 5th July, 2021 confirmed that the Plaintiff illegally entered the suit property and put up structures in 1986 without the 1st Defendant consent and permission. During this time, the 1st Defendant was the registered proprietor of the property. According to PW2 and PW3 testimony, it confirmed that they were not only Plaintiffs neighbors but also knew her and were fully aware that she occupied the property since 1986. This evidence was never disproven by the Defendants. It is also



submitted that the Plaintiff photographic evidence taken on 2007 produced in court also demonstrated that she fenced the property and constructed temporary houses therein.

31. According to the Plaintiff counsel submission, the 1st Defendant title over the suit property was extinguished around 1998 after expiry of 12 years from 1986 when the Plaintiff occupied the property. Therefore, no valid title can be passed to the 2nd Defendant because as at 2007, when she transacted the suit property with the 1st Defendant, the Plaintiff had already occupied it for 21 years.

The 1st Defendant's submissions

32. Through submission dated 22nd February,2023 filed on 18th April,2023, the 1st Defendant argues that the Plaintiff must prove she met all the ingredients for a claim for adverse possession as was held in *Kweyu v Omuto* (1990) KLR 709 before she can be granted the orders sought. The Plaintiff is condemned for failing to provide available factual evidence before court demonstrating that she had an exclusive open possession of the property for twelve years without any interruption. The decision of *Gabriel Mbui v Mukindia Manyara* (1993) eKLR is quoted to support these arguments. It is argued that the Plaintiff admitted during cross examination that she never resided on the suit property. Even though she alleged that she would occasionally attend to it from time to time and also planted trees, she never provided any evidence to support the purported activities. Her testament that a caretaker lived on mabati house purportedly constructed property between 1986 to 2019 was also not collaborated. Clarke L.J decision in *Mayor of Burgesses of London Borough of Lambeth v Blackburn* (2001) EWCA Civ 912 and Justice Mbugua decision in *Charles Ngaruni v Zipporah Kathengu & Others* (2011) eKLR are put forward to further advance the argument that the Plaintiff has not proved she was in actual, open and notorious possession of the suit property.
33. On whether the Plaintiff was in adverse possession of the suit premised for over 12 years, the 1st Defendant submits that DW1 testimony disclosed that as at 1986, it was impossible for the Plaintiff to have been in occupation of the suit land without delineation of boundaries for the reason that subdivision had not yet been finalized. In addition, the 1st Defendant instituted HCC. No.6206 of 1992 against Thome Farmers No. 5 for trespassing on its property. Court findings in *Gabriel Mbui v Mukindia Maranya*(supra) and *Peter Njau Kairu v Stephen Ndungu Njenga* (C.A 57 of 1997) are cited to argue that the Plaintiff did not provide any factual evidence to prove continuous occupation of the property. According to the 1st Defendant submission, computation of time period for purposes of determining the Plaintiff's claim for adverse possession can only be considered from 2002 when consent judgement was entered. This means that time duration from 2002 to 2013 when the Plaintiff filed her claim does not constitute 12 years.
34. The 1st Defendant insists that it legally and lawfully sold the suit property to the 2nd Defendant. Section 26 of the *Land Registration Act* is cited to argue that the 1st Defendant title cannot be challenged except on grounds of fraud and misrepresentation. The Plaintiff's allegation that the 1st Defendant title was fraudulently acquired must therefore be dismissed because no evidence was provided to disentitle the 2nd Defendant indefeasible right to the suit property. The Plaintiff is also condemned for failure to plead and prove on a balance of probabilities her allegation that the 1st Defendant title was illegally obtained as held in *John Getao v Simon Mokare*(2017)eKLR and *Urmilla Shah v Barclays Bank of Kenya* (1979) KLR 76.

The 2nd Defendant's submissions

35. On 2nd February,2023, submissions in support of the 2nd Defendant case dated 4th November,2022 were filed raising the following issues for determination.



- a. Whether the Plaintiff has acquired the title to Plot No.296 Thome Farmers No. 5 Limited and now known as L.R No.13330/48 by way of adverse possession?
 - b. Whether registration Millicent Wanjiru Ngotho as proprietor of L.R No.13330/48 on the land previously known as Plot No.296 Thome Farmers No. 5 Limited and now known as L.R No.13330/48 should be cancelled forthwith, and the land registrar ordered to rectify the register to enter the name of the Plaintiff as registered proprietor in her place?
 - c. Whether the 1st Defendant should indemnify the 2nd Defendant for the suit property, at the current market value should the court enter judgment in favor of the Plaintiff as prayer in the originating summons.
36. The court is beseeched to be guided by the provisions of Section 2, 13 and 38 of the Limitation of Actions Act and Court of Appeal decision in Ruth Wangari Kanyagia v Josephine Muthoni Kinyajui (2017) eKLR and Mtana Lewa v Kahindi Ngala Mwangandi (2015 eKLR in making a determination whether the Plaintiff has satisfied all the ingredients for a claim of adverse possession before judgment can be entered in her favor. The conditions include open and peaceful continuous uninterrupted occupation of the suit premises for a period of not less than 12 years. It is contended that PW1 testimony affirmed that she bought the suit premises from Margaret Thitu Njenja in 1986. Upon paying the entire purchase price, she obtained possession of the suit premises and constructed a semi-permanent house for her caretaker in 2007. Even though she commenced construction of her alleged dwelling house in 2008, it was stooped due to lack of funds. When she was cross-examined, she admitted that she was not aware of any dispute relating to the suit property between the 1st Defendant and Thome 5 Limited. Further, her photographic evidence produced in court indicating that structures constructed in 2007 were taken after the 2nd Defendant had already been embarked on purchasing the suit property. The 2nd Defendant counsel maintains that the Plaintiff has not adduced any evidence to prove she was in open and peaceful occupation of the suit property. This is because the photographic evidence did not show the entire coverage of the suit land location. Notwithstanding the fact that the Plaintiff never resided on the suit property, her workers were never called as witnesses to attest and confirm their resided there. In addition, PW2 and PW3 testimony never showed whether they saw the Plaintiff workers on the suit premises. Local administration such as chief and sub-chief were also never invited to offer their objective evidence about Plaintiff occupation of the suit premises.
37. It is argued that DW1 testimony indicated that he did not know how the suit property title was passed to the Plaintiff from Margaret Thitu Njenja or Thome Farmers No.5. He also admitted that L.R.13330 where the suit property was hived from belonged to the 1st Defendant. Margaret Thitu Njenja nor Thome Limited were also never called as witnesses to attest if the Plaintiff purchased the property. According to the consent order recorded in 2002, after institution of a lawsuit in 1992, Plot 296 (L.R. 13330/48) which the trespassers agreed to purchase was not part of the suit premises. Based on the foregoing the court is implored to disregard the Plaintiff assertions that her claim for adverse possession of the suit land commenced on 1986.
38. The 2nd Defendant submits that the Plaintiffs actions have made it impossible for the 2nd Defendant to construct his family home on the suit premises yet he was issued with certificate of title in 13th July,2009. This is because the Plaintiff is in occupation of the property. The court is implored to direct that the 2nd Defendant be compensated the value of the suit property at the current market price should it rule in favor of the Plaintiff. This is because she lost her investment yet she fully paid the entire purchase price.
39. On the issue of who should bear the cost of this suit, the 2nd Defendant submits that the 1st Defendant should be condemned to pay the cost if judgment is entered in favor of the Plaintiff.



40. I have considered the pleadings the evidence on record the written submissions and the authorities cited. The issues for determination are;
- i. Whether the plaintiff is entitled to be registered as the proprietor of the suit property by dint of adverse possession.
 - ii. What was the effect of the Transfer of the suit property to the 2nd Defendant?
 - iii. Did the absence of any encumbrances against the register justify the sale of the suit property to the 2nd and 3rd defendants?
 - iv. Who should bear costs of this suit?

41. The Law regarding the doctrine of adverse possession in Kenya is Section 7 and 13(1) of the Limitations of Actions Act, CAP 22 which states as follows

“

“7. Actions to recover land

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.

13. Right of action not to accrue or continue unless adverse possession

(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 takes adverse possession of the land.”

42. For the claim to succeed, Section 9(1) provides that a person must have been in possession of the land, and has while entitled to the land been dispossessed or discontinued his possession, the right of action accrues on the date of the dispossession or discontinuance. Section 37 (1)(a) provides as follows as to when the rights of land proprietor are extinguished in favour of the adverse possessor.

“where, if the land were not so registered, the title of the person registered as proprietor would be extinguished, such title is not extinguished but is held by the person registered as proprietor for the time being in trust for the person who, by virtue of this Act, has acquired title against any person registered as proprietor, but without prejudice to the estate or interest of any other person interested in the land whose estate or interest is not extinguished by this Act;”

43. The Court of Appeal in *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR held that an adverse possessor must satisfy the following conditions before they claim can be allowed

- “40. A person who claims adverse possession must inter alia show:
- (a) on what date he came into possession.
 - (b) what was the nature of his possession?



- (c) whether the fact of his possession was known to the other party.
- (d) for how long his possession has continued and
- (e) that the possession was open and undisturbed for the requisite 12 years.”

44. Further, the Court of Appeal in *Samuel Kihamba v Mary Mbaisi* [2015] eKLR also held as follows with regards to a claim for adverse possessor

“Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, *nec vi, nec clam, nec precario*. The additional requirement is that of *animus possidendi*, or intention to have the land.”

45. The Plaintiff claim for the disputed property is founded on ground that she purchased it for value consideration from Margaret Thitu Njenja at a purchase price of Ksh.50,000/= through a sale agreement dated 11/4/1986. During the hearing, she produced the sale agreement and payment receipts to prove her case. The Agreement stipulated that the entire purchase price was paid. Documents filed in support of the Plaintiff case include a letter dated 11/04/1986 which she wrote to Thome Farmers Company Limited informing them to transfer the property to her because she had not only purchased it but had also paid the entire purchase price. Payment receipts for transfer and survey amounting to Ksh.1,000/= were also filed in court. The Plaintiff pleaded and attested that she went to Thome Farmers Company Limited together with Margaret Thitu Njenga where transfer of the suit property was effected upon her. Subsequently, she was granted possession of the property. In 1986, she fenced it with a barbed wire and also constructed temporary mabati structures for her two workers who resided there.

46. The Plaintiff is obligated to not only plead her case, but she must also provide factual evidence as was held in *Gabriel Mbui v Mukindia Maranya*(1993) eKLR, where the learned judge stated as follows

“As stated by Gicheru, J A, in *Kweyu’s* case, *op cit*, in deciding the issue of adverse possession, the primary function of a Court is to draw legal inferences from proved facts, which inferences are matters of law. Accordingly, while possession is a matter of fact, any proposition reached from that fact that the given possession is or is not an adverse one is a legal conclusion drawn from the findings on the given facts. The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right. *De facto* use, and *de facto* occupation must be shown.”

47. It appears to the court that the plaintiff’s occupation of the suit property was undertaken openly and publicly and that it was never interrupted for over 23 years from 1986 to the date of filing this suit in 2010.

48. It is on record that the plaintiff erected a structure and fenced all-round the suit property. I agree with the plaintiffs’ counsel submission that her intention was to possess the suit property to the exclusion of the registered proprietor stating from the 1st defendant to the 2nd defendant.



I find that the open and continuous occupation by the plaintiff has not been broken since 1986.

49. It is the 1st defendant's case that if filed a suit; HCCC 6206 of 1992 against what it called trespassers on the said Mother title.

What came out clearly in evidence was that the plaintiff was not a party to the suit. The same was not determined on merit. Further the consent order recorded in that suit on 27th June 2000 was between the plaintiff therein and the 1st, 9th, 15th, 16, 17th and 23rd defendants. The same could not be binding on the plaintiff as she was not a party to that suit.

50. I agree with the plaintiff's counsel submissions that the filing of that suit did not interrupt the adverse possession by the plaintiff of the suit property. In his witness statement DW1 David Karanja, admits the plaintiff's occupation of the suit. His predecessor, Robert Nderitu also admitted the plaintiff was on the land without consent of the 1st defendant.

51. Before this court is a duly executed transfer instrument dated 5/11/2006 authorizing transfer of the suit property from the 1st Defendant to the 2nd Defendant. It should be noted that the transfer was effected even before the sale agreement was executed. The transfer instrument was drawn by Njeri Kariuki Advocate. When the court summoned Njeri Kariuki to explain the disparities on the dates, she stated on oath that there was a typical error on the dates of transfer instrument as it ought to have been dated 2007 and instead of 2006. She also admitted during the hearing that she drew the transfer instrument. Further, she informed court she notified the 2nd Defendant in a letter dated 13/10/2009, that her suit property title was ready for collection.

52. I agree with the plaintiff's submissions that the change of ownership by the transfer of the suit property from the 1st Defendant to the 2nd Defendant by the transfer dated 5th November 2006, 21 years after the plaintiff had taken possession did not affect the plaintiff's claim.

In the case of *Githu Vs. Ndeete* (1964) KLR 776 the Court of Appeal stated thus;

“ 1) The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession.

2) Assertion occurs when the owner takes legal proceedings or makes an effective entry into the land and giving notice to quit cannot be effective assertion of right for the purposes of stopping the running of time under the *Limitation of Actions Act*.”

53. Similarly in the case of *James Obande Wasui Vs. Jeremiah Ochwada Musumba* (2002)eKLR the court held that as an occupier's right, adverse possession runs with the land irrespective of change in proprietorship.

54. Under Section 28 of the *Land Registration Act*, as at the time of transfer of the suit property to the 2nd Defendant the same was subject to an overriding interest in the form of rights of adverse possession in favour of the plaintiff. Section 28 provides that;

- (a) deleted by Act No. 28 of 2016, s. 11(a);
- (b) trusts including customary trusts;
- (c) rights of way, rights of water and profits subsisting at the time of first registration under this Act; (d) natural rights of light, air, water and support;



- (e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
 - (f) deleted by Act No. 28 of 2016, s. 11(b);
 - (g) charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;
 - (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
55. From the foregoing, I find that the absence of the encumbrances on the register did not justify the transfer of the suit property to the 2nd defendant.
56. In the case of *Munyu Maina Vs. Hiram Gathiha Maina* (2013) eKLR the Court of Appeal stated thus;
- “We state that when a registered proprietors root to title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free of any encumbrances including any interests which need not be noted on the register.
- It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellants testimony”.
57. In conclusion I find that the Plaintiff has proved her case as against the Defendants on a balance of probabilities. I find that she is entitled to be registered as the proprietor of the suit property by virtue of adverse possession.
58. Accordingly, I make the following orders;
- a. That Agnes Wambui Karungu (the plaintiff) is hereby declared to have acquired title by adverse possession of the suit property known as Plot No.296 Thome Farmers No.5 Limited and now known as LR. NO.13330/48.
 - b. That the Chief Land Registrar is hereby directed to cancel the registration of Millicent Wanjiru Ngotho as proprietor of LR. NO.13330/48 and or any other person deriving title from the 2nd Defendant and to rectify the register by entering the name of the plaintiff as registered proprietor of the suit property LR.NO.13330/48 within Ninety (90) days from the date of this judgement.
 - c. That 1st defendant do refund to the 2nd defendant the value of the suit property as per the valuation report.
 - d. That costs of this suit be borne by the Defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 12TH DAY OF OCTOBER 2023.

L. KOMINGOI

JUDGE.

IN THE PRESENCE OF:

Mr. Kingara for the Plaintiff.



Mr. Banji for Mrs. Koech for the 1st Defendant.

N/A for the 2nd Defendant.

Court Assistant - Mutisya

