



REPUBLIC OF KENYA



**Kathiri v Chege & another (Environment & Land Case E005 of 2022)
[2023] KEELC 20608 (KLR) (11 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20608 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E005 OF 2022**

CK NZILI, J

OCTOBER 11, 2023

BETWEEN

DELFINA KATHIRI PLAINTIFF

AND

SARAH WANGARI CHEGE 1ST DEFENDANT

MARY NKIROTE MUTHURI 2ND DEFENDANT

JUDGMENT

1. The plaintiff filed an originating summons dated 16.3.2021 seeking to be declared to have acquired two portions of land measuring 30 ft by 30 ft and 40 ft by 80ft out of L.R. No. Ntima/Igoki/576, as originally was, now a resultant subdivision known as L.R. No. Ntima/Igoki/5223 under adverse possession. The originating summons was accompanied by a supporting affidavit of Delfina Kathiri sworn on 15.3.2021. The plaintiff pleaded that the late M'Mugwika M'Baichu sold her the portion in 1975, paid Kshs.27,000/=, and has since developed the same where her homestead is situated. She attached copies of the green card, sale agreement acknowledgment receipts, and photographs as annexures marked D.K. "1 – 4", respectively.
2. The originating summons was opposed by a replying affidavit sworn by Sarah Wangari Chege on her own behalf, the 1st, and the 2nd defendant. They denied the claim. The 1st defendant averred that her late husband owned the suit land as L.R. No. Ntima/Igoki/4154, which on 19.6.1995 was subdivided into L.R. No. Ntima/Igoki/5222 and 5223 as per the attached green card marked S.W.C. "2".
3. The 1st defendant averred that she acquired LR NO. Ntima/Igoki/4514 through transmission. She denied that the plaintiff had been in occupation of the suit land. Further, the defendants averred that the plaintiff had sued the late M'Mugwika M'Baichu and her in Misc. Case No. 114 of 2004, who denied the alleged sale agreement since the land was never in his name but his late son Muthuri Gerald Mugwika which, therefore he could not have sold to anybody.



4. Additionally, the defendants averred that this suit was only filed after a claim for trespass was filed in Meru Chief Magistrates E.L.C. Case No. 138 of 2021. In a further affidavit sworn on 7.2.2023, the defendants pleaded that they were unaware of the alleged sale agreement, which they had occupied as L.R. No. Ntima/Igoki/4514 before the transmission as per a copy of the title deed attached as S.W.C. "2". They urged the court to dismiss the plaintiff's suit and issue a permanent injunction stopping the plaintiff from trespassing or unlawfully occupying L.R. No. Ntima/Igoki/5223, which legally belongs to them.
5. The plaintiff's evidence was that she bought the two portions of land from the late M'Mugwika M'Baichu in 1975, to educate her son Muthuri Gerald Mugwika, then a minor, paid Kshs.27,000/=, took vacant possession and had all along been occupying the suit land, where her homestead is situated. She produced the green card for L.R. No. Ntima/Igoki/516 as P. Exh No. (1) copy of the sale agreement as P. Exh No. (2), an acknowledgment receipt as P. Exh No. (3) and photographs showing developments on the suit land as P. Exh No. 4 (a) – (f).
6. In cross-examination, the plaintiff told the court that P. Exh No. (2) indicated the Parcel No. as L.R. No. Ntima/Igoki/516, was sold by the deceased and her son, Muthuri Gerald. Her evidence was that the sale agreement was explicit on the locality of the portions being sold to her, which she took possession of and has since effected permanent developments thereon since 1975. Her testimony was that she had never been evicted from the suit land since 1975, until when she was sued for trespass by the defendants in the lower court.
7. The defendants testified through Sarah Wangari Chege, who adopted her replying affidavits sworn on 31.3.2022 and 7.2.2023, as her evidence in chief. D.W. 1 produced the authority to plead signed by the 2nd defendant dated 31.3.2022 as D. Exh No. (1), green card for L.R No. Ntima/Igoki/4514 as D. Exh No. (2) replying affidavit by the late M'Mugwika M'Baichu sworn on 26.5.2004 as D. Exh No. (3), letter of grant dated 27.10.2020 as D. Exh No. (4), a copy of the title deed for L.R. No. Ntima/Igoki/5223 as D. Exh No. (5) and lastly, a copy of the judgment in Meru Chief Magistrates Court No. E138 of 2021, as D. Exh No. (6).
8. In cross-examination, D.W. 1 admitted that she became aware of the plaintiff in 2004 after she sued them in court on allegations that they were disposing of the suit land allegedly under her occupation. D.W. 1 told the court that after obtaining a grant in 2019, she established that the plaintiff had trespassed into her land, where she had erected permanent buildings. D.W. 1 stated that the late husband Muthuri Gerald married her in 1992 and that they established their matrimonial home in Nairobi, though they would occasionally visit the suit land where their rural homestead was situated, which was still in existence at the time of the testimony, but was currently occupied by her brother in law.
9. D.W. 1 refuted the contents of the sale agreement, which she was not privy to, for the land belonged to her late husband. She denied that her late father-in-law was holding the land in trust for her late husband, who had registered it in his name. Further, D.W. 1 denied that the green card had indicated that the seller was the valid owner of the land. Regarding the developments appearing in the photographs, D.W. 1 told the court that she could not confirm if the developments belonged to the plaintiff. D.W. 1 told the court that the land initially was registered as L.R. No. 516, and later on, as L.R. No. 4513, 4514, and thereafter, L.R. No.4514 was subdivided into L.R. No 5222 and 5233, the former now occupied by the plaintiff. She insisted that the houses belonging to the plaintiff on the suit land were erected in 2019 and not earlier. D.W. 1 similarly acknowledged that the lawsuit filed in 2004 was about ownership of the land, which, unfortunately, the plaintiff failed to prosecute. Regarding the eviction case, D.W. 1 stated that she sought eviction orders against the plaintiff since the land was then



in her name. She confirmed that other than D. Exh No. (3) the Misc. Application and the response by the plaintiff were not before the court, including the outcome. D.W. 1 testified that as of 2004, the plaintiff was in occupation the land. D.W. 1, in the re-examination, clarified that the plaintiff was only occupying a portion of her land but could not tell the exact part under her use, which the plaintiff had been trying to force her out of.

10. After the testimony's close, parties were directed to put in written submissions by 10.8.2023. By written submissions dated 25.7.2023, the plaintiff submitted that the defendants, in their replying affidavit sworn on 31.3.2022 and 7.2.2023, had admitted that she was occupying L.R. No. Ntima/Igoki/5223, a subdivision of L.R. No. Ntima/Igoki/516 and not L.R. No. 576. On the ingredients of adverse possession, the plaintiff submitted that she had been in actual, open, exclusive, and hostile possession of the land.
11. As to the defense advanced by the defendants that she did not occupy the whole of L.R. No.5223 and that she pleaded L.R. No.516, yet there had been a suit for eviction orders, the plaintiff submitted that she had indicated a definite and indefinable land as per her pleadings, and that sale agreement had mentioned the sizes and the locality. Reliance was placed on Gerald Muindi Baruthi vs Willys Gatuku Mukobwa & another C.A No. 98 of 1998 & Peter Njau Kairu vs Stephen Ndungu Njenga & another C.A 57 of 1997 and Evans Mudoga Matebwa vs Peter Asingira Ondiri Vihiga E.L.C. 7 of 2021.
12. On the succession cause, the plaintiff submitted that the defendants became successors to the seller recently, and as per P. Exh No. (1), the late M'Mugwika M'Baichu had put her into possession in 1975, and the original owner, the late Muthuri Gerald, had never attempted to evict her from the land, which the defendants have confirmed in their pleadings and testimony. Therefore, the plaintiff submitted that her claim over the land has been consistent, going by the pleadings in the suit filed in 2004, even before the defendants became the registered owners. Reliance was placed on Peter Thuo Kairu vs. Kuria Gacheru (1998) eKLR, on the proposition that an adverse possession claim could be against both the predecessors and the successors of title in land, and in this case, since 1975, the registered owner never evicted her up to the time the successors in the title came on board and till she filed the suit while still in occupation to date.
13. On the computation of time, the plaintiff urged the court to rely on Public Trustee vs Wanduru Ndegwa (1984) eKLR, which stated that time had started to run from the date of the final payment. Similarly, on continued occupation without secrecy, violence, or permission, the plaintiff relied on Mati Gitahi vs. Jane Kaburu Muga & others Nyeri C. A 43 of 2015, and therefore, in this instance, the plaintiff submitted that she had occupied the land adverse to the estate of Muthuri Mugwika (deceased), from the time she came into possession under the deceased father's permission and to the defendants when they succeeded the deceased as owners of the land and that by the time eviction orders were issued, the defendant's rights had become extinguished, since she had been on the land for over 12 years by then. Reliance was placed on N.R.B. C.A No. 24 of 1979 relying on Gatimu Kinguru vs. Muya Gathangi H.C.C. No. 176 of 1973. The plaintiff submitted that the suit for eviction by the defendants came too late in the day since her rights to the land had already matured and those of the true owner(s) extinguished.
14. By written submissions, the 1st and 2nd defendants, dated 9.8.2023, isolated two issues for the court's determination. On whether the plaintiff has any adverse claim on L.R. No. Ntima/Igoki/5223, the defendants submitted that the suit lacked legal basis and was vexatious and frivolous since they inherited the land from the late Muthuri Gerald Mugwika, which under Article 40 (1) (a) & (b) of the Constitution as read together with Section 26 of the Land Registration Act 2012 was unimpeachable.



15. The defendants submitted that the originating summons before the court did not meet the threshold set out under Order 37 Rule 7 of the Civil Procedure Rules, since the plaintiff averred she bought the land from someone else and not the owner as per the green card at the time, her occupation of the land amounted to trespass or an attempt to grab the land from the defendants.
16. The defendants submitted that the originating summons was filed as an afterthought, given Meru CMCC ELC No. E138 of 2021, there was an interruption, even when letters of administration were sought and obtained in 2019. Reliance was placed on *Muhiddin Mohamed Muhiddin vs. Jackson Muthama & 168 others* (2014) eKLR citing with approval *Chemjor Chepkuto vs. Chepkonga Magobe & 20 others Nakuru C.A No. 44 of 2007* and *Marpis Investment Co. (K) Ltd vs Kenya Railway Corporation* (2005) 2 K.L.R. 40.
17. The defendants submitted that the plaintiff was trying to rely on an unenforceable agreement dated 16.8.1991 for unspecified land measuring 30 ft by 30 ft and 40 ft by 80 ft to be hived from L.R. No. Ntima/Igoki/516, yet the defendants acquired it through transmission from the late Muthuri Gerald Mugwika. Relying on *Samuel Kihamba vs. Mary Mbaisi* (2015) eKLR, the defendants urged the court to find the ingredients of adverse possession, namely dispossession and discontinuance of possession, unmet by the plaintiff. On costs, the defendants urged the court, guided by Section 27 of the Civil Procedure Act and *Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & another* (2016) eKLR, that they should be given costs after the originating summons is dismissed due to the overwhelming evidence that the suit land legally belongs to them.
18. The court has carefully gone through the pleadings, evidence tendered and the written submissions. The issues calling for my determination are:
 - i. Whether the plaintiff has proved adverse possession against the defendants.
 - ii. If the plaintiff is entitled to the reliefs sought.
 - iii. What is the order of costs?
19. Adverse possession arises when the true owner loses his land after he has been disposed of and discontinued from control by an intruder in terms of Sections 9, 13, and 17 of the Limitation of Actions Act as read together with Order 37 of the Civil Procedure Rules. Possession and discontinuance of possession must be open, exclusive, with no force, secrecy, continuous, with no persuasion, and for a statutory period of 12 years. See *Wanje vs Saikwa* (1984) KLR 284 and *Samuel Kihamba vs Mary Mbaisi* (supra).
20. Similarly, to found and establish adverse possession, the claimant must prove and demonstrate that he has occupied the land without the license or permission of the land owner, as of right, and intending to own the land. See *Kasuve vs Mwaani Investment Ltd and others* (2004) KLR 184, *Wanyoike Gathure vs. Beverly* (1965) E.A 514 *Mwinyi Hamisi Ali vs A.G. & another Civil Appeal No. 125 of 1997*.
21. Regarding what amounts to possession, the court in *Peter Mbiri Michuki vs. Samuel Mugo Michuki* (2014) eKLR, observed that possession may not be actual or physical, but could be constructive through a licensee; some aspects of it including the construction of a house, occasional visits and stays on the land.
22. In *Munge vs Munge Civil Appeal Application 36 of 2020 (2023) KECA 75 (K.L.R.)* 3rd February 2023 (ruling), the court cited with approval *Samuel Miki Waweru vs Jane Njeri Richu* (2007) eKLR, that a claim for adverse possession could not succeed if the person claiming the land was in possession with the permission of the true owner under an agreement for sale or lease or otherwise.



23. In *Wambugu vs. Njuguna* (1983) KLR 172, the court held that the proper way of assessing proof of adverse possession was whether or not the title holder had been disposed of his possession for the statutory period of 12 years and whether or not the claimant had proved that he had been in possession of the land for the requisite number of years.
24. The right to be adverse to land does not automatically accrue unless the person claiming it takes action under Sections 7, 13, 17 and 38 of the Limitations of Actions Act, as read together with Section 28 (h) of the Land Registration Act and Order 37 Rule 7 of the Civil Procedure Rules. In *Mtana Lewa vs Kahindi Ngala Mwangandi* (2015) eKLR, the court held that adverse possession occurs when a person takes possession of land and asserts rights over it and the true owner omits or neglects to carry action against such an intruder for 12 years. In the case of *Wilson Kazungu Katana & 101 others vs Salim Abdalla Bakshwein & another* (2015) eKLR, the court observed that for one to succeed in adverse possession, the land must be registered in the name of a person other than the applicant, the occupation must be in open and exclusive possession, in a manner inconsistent to the purpose which the true owner intended to use the land.
25. In *Jandu vs Kirpal* (1975) E.A 225, the court held that when occupation as a result of a license or permission in the form of a sale agreement, such possession would only become adverse after the termination of the period for which permission to occupy was granted or after the last payment of the balance of the purchase price. See *Hosea vs. Njiru & others* (1974) E.A 526 and *Public Trustee vs Wanduru Ndegwa* (supra). Further, in *Mbui vs Maranya* (1993) eKLR, the court held that the adverse character of the possession must be established as a matter of fact and could not be assumed as a matter of law together with facts showing a clear intention to hold the land adversely and under a claim of right.
26. On the question of interruption of possession, in *Isaac Cypriano Shingore vs Kipketer Togom* (2016) eKLR, the court observed that by the time the respondent filed the originating summons, he had been in possession for over 12 years with no attempts made to assert title by the appellant and hence, objections during succession proceedings had no effect of interrupting adversity. The court cited with approval *Githu vs Ndeete* (1984) KLR 776, that assertion of right occurred when the true owner took legal proceedings or made an effective entry into the land. Further, in *Benson Mukuwa Wachira vs Assumption Sisters of Nairobi Registered Trustee* (2016) eKLR, the court cited with approval *Amos Weru Murigu vs Martha Wangari Kambi & another*, HCC No. 33 of 2002 that it was not enough for the true owner to write a demand notice for the intruder to vacate his land or issue a notice through the area chief and that for interruptions to occur, there must be eviction or ejection of the intruder.
27. On the exact land claimed in adversity, the court in *Wilson Kazungu Katana* (supra), held that the identity of the land in possession of an adverse possessor was an essential and integral part of the process of proving adverse possession. The court cited *Githu vs Ndeete* (supra), that the burden was on the claimants to discharge by proving and specifically identifying or even describing the portions, sizes, and locations of those in their respective possession, from the larger suit premises that they sought to have the court decree to them.
28. Having reviewed the legal framework governing adverse possession, has the plaintiff proved his claim to be entitled to the reliefs sought? The plaintiff claims entry to the suit land occurred out of a sale agreement made on 16.8.1991, after which she took vacant possession on 22.6.1975 and has made developments thereon, without interruptions and with the knowledge of the true owner. The plaintiff produced a copy of the green card for L.R. No. Ntima/Igoki/516 as P. exh No. (1), sale agreement as P. Exh No. (2), acknowledgment receipt as P. Exh No. (3) photographs showing developments therein as P. Exh No. (4). The plaintiff testified that she cleared the purchase price balance as per P. Exh No.



- (2) on 28.2.1992 P. Exh No. (1) indicates that the register for L.R. No. Ntima/Igoki/516 was opened on 8.1.1970 in the name of Muthuri Mugwika and was closed for subdivision on 23.11.1991, leading to Parcels No. 4513 and 4514.
29. In the replying affidavit sworn by the 1st defendant on 31.3.2022, she confirmed that her late husband was the owner of L.R. No. Ntima/Igoki/4514, later on to be subdivided into L.R. No. Ntima/Igoki/5222 and 5223 as per copies of green cards produced as D. exh No. (2).
30. In paragraphs 7 and 8, the 1st defendant admitted the relationship between L.R. No. 516 and the current parcels of land under the defendant's name, whose subdivision occurred on 19.6.1995. Annexure marked S.W. C "1" to the replying affidavit, the green card for L.R No. Ntima/Igoki/4514, indicated that it was a subdivision of LR No. 516 in the name of Muthuri Mugwika but subdivided into L.R. No's.5222 & 5223 after it was closed on 19.6.1995. These facts were also confirmed in the further affidavit sworn by the 1st defendant on 7.2.2023. D. Exh No. 5 indicates that D.W. 1 came to own L.R. No. Ntima/Igoki/5223 with effect from 28.10.2020.
31. Going by D. Exh No. "3" sworn on 26.5.2004, the late M'Mugwika M'Baichu never raised the issues of forgeries of signatures to the sale agreement.
32. At the time, the plaintiff had sought the land because of occupation and beneficial interest in D. Exh No. (6). The defendants and the trial court confirmed the plaintiff's land occupation. At the time, the defendants filed D. Exh No. (6), they already knew there was a pending suit Meru Chief Magistrates Court Misc. Application No. 114 of 2004, where the plaintiff was seeking the land on account of a sale agreement. The defendants did not deny all these facts during their pleadings and testimony.
33. Going by the evidence tendered, it is apparent that the plaintiff's entry into the suit land occurred during the lifetime of the true owner, who knew about her entry, possession, and occupation but did not make an effective entry or evict her before his demise. When 1st defendant became the registered owner in 2020, the plaintiff's rights had crystallized, hence why she filed the suit in 2004. The defendants knew about the assertion of rights of the intruder in 2004 and took no action for 17 years until the filing of an eviction suit in 2021. The rights of the plaintiff on the land as an intruder remained uninterrupted until the judgment entered against her on 23.1.2023, during the pendency of this suit.
34. To my mind, the filing of the suit by the defendants came too late in the day and did not interrupt time from running against the plaintiff. Additionally, the plaintiff pleaded and testified that she undertook acts inconsistent with the purpose for which the defendants intended to use their land. The defendants have not denied that the plaintiff exclusively possesses a defined part of the suit land. The photographs produced by the plaintiff indicate permanent buildings on the suit land.
35. The test of adverse possession is whether the two concepts of dispossession and discontinuance of possession of the true owner have occurred. In this suit, the plaintiff has averred that she was the one who has been using the land since 1975 with the knowledge of not only the current registered owner but also the predecessor in title. The defendants have not denied knowledge of this; they confirmed in their previous pleadings that the plaintiff had trespassed on the land. D. Exh No. (6) was specific on which land the plaintiff has been occupying.
36. In my view based on the facts, evidence, and the law, the plaintiff has satisfied the ingredients of adverse possession. See M'Rutere vs Kathurima (2023) KECA (1057) KLR 22.9.2023 (Judgment). The registration of the land of the defendants did not defeat the accrued interests in favor of the plaintiff. The lower court decree could also not defeat the plaintiff's claim since this court had already issued temporary orders by a ruling dated 7.12.2022.



37. I, therefore, allow the plaintiff's claim. The defendants shall subdivide the land and transfer to the plaintiff a portion under her occupation measuring 30ft by 30ft and 40ft by 80ft in L.R Ntima/Igoki/5223 within 2 months from the date hereof. In default, the Deputy Registrar of this court shall execute the transfer documents. Costs to the plaintiff.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 11TH DAY OF OCTOBER 2023

In presence of

C.A Kananu Plaintiff

Kyule for defendant

Gichunge for plaintiff

HON. CK NZILI

ELC JUDGE

