



**Kihiu v Ngugi & 3 others (Environment & Land Case 881 of 2013)
[2023] KEELC 20603 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20603 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 881 OF 2013
LC KOMINGOI, J
OCTOBER 5, 2023**

BETWEEN

MARY WAMBUI KIHU PLAINTIFF

AND

LUCY WANGUI NGUGI 1ST DEFENDANT

WANJIRU KAMAU WAWERU 2ND DEFENDANT

DAVID NDUNGU KAMAU 3RD DEFENDANT

COSTA MWANGI MUTHONI 4TH DEFENDANT

JUDGMENT

1. By a Plaint dated 4th July 2013, the Plaintiff claimed that her family had been in possession and occupation of property Dagoretti/ Thogoto/ T.430 (hereinafter referred to as the suit property) from the year 1982 up until sometime in 2002 when they moved to the United States of America for further studies. Upon return they found that the Defendants had trespassed and erected structures on the suit property without their consent and the Defendants have refused, resisted, failed and neglected to vacate the suit property despite several pleas and demands. She cited that the suit property had been subject to several legal proceedings and she had been declared the absolute owner. The Plaintiff thus sought:
 - i. An order of eviction against the Defendants, and / or their agents or anyone else claiming through them, from Title Number Dagoretti/ Thogoto/ T.430.
 - ii. An order compelling the Defendants to deliver vacant possession of Title Number Dagoretti/ Thogoto/ T.430 to the Plaintiff.
 - iii. Mesne profits to be paid to the Plaintiff by the Defendants.
 - iv. Costs of the suit and interest thereon.



- v. Any further relief as this Honourable Court may deem fit.
2. In the Statement of Defence dated 29th August 2014, the Defendants contended the Plaintiff's claims stating that they were in open, justified and legal occupation of the suit property having been allocated the same sometime in 1993 by the then Kikuyu Town Council and had been in uninterrupted occupation since then. The Defendants indicated that even though the suit property had been subject to other judicial decisions, the issue of ownership, acquisition and disposition and the procedures thereto had never been addressed. As such, the sought eviction orders should be dismissed.

Evidence Of The Plaintiffs.

3. At the hearing, the Plaintiff called two witnesses Mary Wambui and Stephen Gituku Muroko as Plaintiff Witness 1 and 2 respectively (hereinafter referred to as PW1 and PW2).
4. PW1 adopted her written statement dated 4th July 2013 as her evidence in chief and produced 18 documents which were marked as Plaintiff Exhibit 1 – 18.
5. She testified that the property originally belonged to her grandfather the late Fred Muroko Kaigai from 1976 as Karai/Gikambura/598. But in 1981, the late Fred relinquished part of the land to Kiambu County Council as an access road as evidenced by the mutation form dated 18th November 1980 marked as P. Exhibit 6. In 1982, the Kiambu County Council compensated him for the said land by giving him property registered as LR. No. Kinoo/ Thogoto/ T.431 as evidenced by minutes dated 8th February 1982 marked as P. Exhibit 15. However, due to technical and procedural errors by the Kiambu County Council Lands Registry, he was shown LR. No. Kinoo/ Thogoto/ T.430 which he occupied together with his family and later bequeathed it to PW1's father (Peter Kihui Muroko).
6. The Plaintiff's father then moved to the suit property with his family and resided thereon from 1982 until 1988 when he went to the United States of America where he resides to date. However, he left his wife and children residing on the suit property until 2002 when the entire family left for the United States of America. They left a tenant on the suit property but on returning to the country in 2003, they found that the tenant had vacated the suit property and it had been encroached on by the Defendants who stated that they had been allocated the suit property by the Kikuyu County Council in 1993.
7. On conducting a search at the Lands registry to find out the status of the suit property and why the Defendants were on it, they found out that the suit property was registered in the name of one Margaret Muthoni Kanake having been allocated the land by Kiambu County Council on 20th February 1996 as per the title deed and certificates of search adduced as P. Exhibit 6, 7 and 8. To avoid any conflict and eviction by the said Margaret, the Plaintiff's family agreed and sought to purchase the suit property. The suit property was thus sold to the Plaintiff for a consideration of Kshs. 300,000 as per the sale agreement dated 25th February 2010 produced as P. Exhibit 9 and issued with a Title Deed marked as P. Exhibit 2, upon which they asked the Defendants to vacate the suit property but they declined.
8. PW1 then lodged claim No. KW/LND/14/1/14/2011 at the Kikuyu Land Disputes Tribunal (P. Exhibit 10) where the Tribunal determined that the Plaintiff was the legal owner of the suit property. Aggrieved by the decision, the Defendants lodged a Judicial Review Case No. 75 of 2011 (P. Exhibit 11) seeking to quash the Tribunal's decision. This suit was dismissed though a determination that the Tribunal had jurisdiction to hear and determine the grievance. However, the Defendants still continued occupying the suit property despite being aware that they were illegally in occupation.
9. On cross examination, PW1 stated that she did not have evidence that her grandfather had given Kiambu County Council part of his land as access road but she had documents showing that the suit land was gifted to her father by her grandfather. She stated that when she came back from the USA she



learnt that Margaret Muthoni Kanake had been allocated the suit land although she could not state how the same had been acquired but the said Margaret confirmed that the people on the land were trespassers and would leave. She also confirmed that according to documents adduced as evidence the land initially belonged to Kiambu County Council.

10. She stated that the issue of property T.430 and T.431 was discovered by her father sometime in 1982 when he wanted to install electricity on the said land but he did not take any action. She also indicated that she neither had approved building plans for the improvements on the land, paid land rates nor utility bills although her mother and sister were on the land. She added that the suit property had a perimeter wall and the Defendants were on the other side of the land whereby they had put up semi-permanent structures.
11. On re-examination PW1 stated that the Kiambu County Council compensated her grandfather using public land because they could not compensate him using private land. On the issue of land rates she stated that the suit land was initially agricultural land as shown in the Title Deed and the land rates had just been introduced.
12. PW2 who is the Plaintiff's uncle and brother to Peter Kihui Muroko (Plaintiff's father) as well as one of the Administrators of the Estate of the late Fred Muroko adopted his witness statement dated 4th July 2014 as his evidence in chief and confirmed that the suit property was bequeathed to his brother Peter in 1982. He restated the history of the suit property adding that upon his father relinquishing part of his former property to the Kiambu County Council as an access road, meetings were held on 15th June 1976 and 29th June 1976 by the Kiambu County Council where it was agreed that the late Fred was to be compensated for the excised land with land LR No. Kinoo/Thogoto/T.431 measuring about 0.23Ha. The compensation and transfer was authorised by a letter dated 8th February 1982. Although the land allocated to the late Fred was Kinoo/Thogoto/T.431, on ground he was shown Kinoo/Thogoto/T.430 which he entered, occupied and bequeathed to Peter. He testified that the anomaly in plots allocation was noted in 1988 and when they sought to have it rectified, they were told to continue occupying the suit property it would be rectified.
13. He confirmed that Peter developed the suit property, installed water, electricity and constructed a permanent dwelling house and later moved to USA in 1988 leaving his family behind but they later joined him. And that when they came back to the country they found that the suit property was registered in the name of Margaret Kanake having been allocated in 1996. Following this development and to avoid eviction the Plaintiff purchased it from the said Margaret.
14. On cross examination he stated although he did not have the area map for the suit property he was present when it was shown to his father. And that there were several correspondences relating to rectification of the records to show they were in occupation of T.430 and not T.431 but the said correspondences were not in court. He added that the Defendants were in occupation of the Plaintiff's property but was not sure if their semi-permanent houses were on the suit property in 2010 when they purchased it. He also re-stated that the Plaintiff and her family have never been in occupation of land LR No. T.431 which on paper was the allocated to them.
15. The 3rd Defendant testified as DW1 and adopted his witness statement dated 23rd October 2014 as well as adduced three documents as evidence marked as Defendant's Exhibit 1 to 3 (herein after referred to as D. Exhibit 1 to 3). He stated that they had been residing on the suit property from 1993 when it was allocated to them by Kikuyu Town Council and no one had asked them to vacate the property prior to the filing of this suit. He indicated that the suit property was public land belonging to the County and they should be allowed to continue residing there.



16. On cross examination he stated that he did not have an allotment letter to evidence that the suit land was given to them as squatters by Kikuyu Town Council. He confirmed that a case was filed at the high Court which held that the land belonged to the Plaintiff. He stated that they had water and electricity utility bills for the suit property but had not adduced it as evidence in court.
17. On re-examination he stated that they were not given any documents by Kikuyu Town Council when they were allotted the land in 1993 and had never been asked to evict prior to this suit. He went on to state that they lived on the suit land as squatters and hence had not paid land rent for it.
18. At the close of the oral testimonies, parties tendered final written submissions.

The Plaintiff's Submissions.

19. The Plaintiff's submissions are dated 22nd June 2022, counsel summarised the pleadings and evidence and outlined the following as issues for determination:
 - i. Whether the Plaintiff had demonstrated to the court to the required standard of balance of probabilities on her occupation and ownership of the suit land Title No. Dagoretti/Thogoto/T. 430;
 - ii. Whether the Plaintiff is entitled to the relief sought in the Plaintiff.
20. Counsel submitted that the Plaintiff had produced a Title Deed issued to her in 2010 making her the rightful indefeasible owner of the suit property in line with Section 24(a) and 26(1) of the Land Registration Act as echoed in *Emmanuel Ngala Anzaya vs Elkana Epiche Aura* [2020] eKLR. And as such, the Defendants had not proved how they were entitled to the suit property.
21. On the issue of whether she was entitled to reliefs sought, counsel submitted that the Plaintiff was entitled to vacant possession of the suit property and mesne profits as per Section 2 of the *Civil Procedure Act*.

The Defendant's Submissions

22. The Defendants Submissions are dated 30th September 2022. They raise the following issues for determination:
 - i. Whether the suit property is public or private land;
 - ii. Whether the Defendants have interests and or rights in the suit property as squatters and if the said interests or rights are protected under the doctrine of adverse possession;
 - iii. Whether the Plaintiff has demonstrated that she is the registered owner of the suit property and if the same was acquired lawfully or legally;
 - iv. Whether the Plaintiff is entitled to the relief sought in her plaint.
23. On whether the suit property was private or public land, Counsel submitted that as at 1993 when the Defendants were settled there by the Kikuyu Town Council, the suit land was public land held in trust by Kiambu County Council for Native Community Trust since 1958. As such it was not available for alienation. Therefore, it is not clear how the said Margaret Kanake an official at the Ministry of Lands was allocated the Suit property in 1996 without due process being followed as per Section 9 of the *Land Act* and Section 26(1) of the Land Registration Act. Counsel indicated that the Defendants had produced correspondence dated 2nd and 9th October 2012 between their then advocate and the then Minister for Lands and Settlement Hon. James Orengo and investigations were to be undertaken. And



that since the suit property was public land, then Margaret could not/ did not transfer good title to the Plaintiff citing: *Presbyterian Foundation v Bernard Ole Mereu & 4 others* [2020] eKLR, *Munyu Maina vs Hiram Gathiba Maina* [2013] eKLR; *Timothy Ingosi & 87 others vs Kenya Forestry Services & 2 Others* (2015) eKLR.

24. On the issue of the rights of the Defendants on the suit property, counsel submitted that it was on record that the land given to the Plaintiff's family as compensation was T.431 and not T.430. Therefore, the Plaintiff and her family were also in occupation of the wrong piece of land which explains why the Defendants were allotted the suit property which according to records belonged to no one up until 1996 when it was transferred to one Margaret Kanake. To this end, the Defendants were entitled to the suit property under the doctrine of adverse possession as per Section 7, 13, 17 and 38(1) and (2) of the *Limitations of Actions Act* and Section 28(h) of the *Land Registration Act* for having been in occupation from the year 1993 to 2011 when the Plaintiff filed proceedings at the Land Disputes Tribunal citing *Wilson Njoroge Kamau vs Nganga Muceru Kamau* [2020] eKLR and *Peter Okoth vs Ambrose Ochido Andajo & Benedict Odhiambo Oketch* [2021] eKLR.
25. In conclusion, counsel submitted that the Plaintiff had not proved her case as provided by Section 107 and 108 of the *Evidence Act* and it should be dismissed.

Analysis and Determination

26. 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 the registered owner of the suit property.
 - ii. Is the entitled to the reliefs sought?
 - iii. Have the defendants been on the suit property since 1993.
 - iv. Who should bear costs of this suit?
27. DW1 and DW2 testified and gave history together with evidence of how they became occupants of the suit property in 1982 stating that at all times they were the only occupants on the property until 2002 when they left the country and moved to the USA. It was until 2003 when they moved back that they discovered that the Defendants had encroached on the suit property.
28. The Defendants contested the Plaintiff's claim saying that they had been residing on the suit property as squatters from 1993 when it was allocated to them by Kikuyu County Council although they did not have evidence to show for this although under the doctrine of adverse possession the suit property rightfully belonged to them.
29. There is no contention that the Defendants are on the suit property. However, from the foregoing it is clear that the contention is on from when. To determine this, the court ought to cross the hurdle of whether this claim has been proved on a balance of probability as per Section 107 and 108 of the *Evidence Act* which stipulate:
- 107.
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.



108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
30. The Court of Appeal in *James Muniu Mucheru v National Bank of Kenya Limited* [2019] eKLR said, “Indeed, it is settled law that in civil cases the standard of proof is on a balance of probability. This is in effect to say that the courts will make a finding based on which party’s version of the story is more believable...” As such, which version of this story is more believable? That the Defendants have been on the suit property from 1993 as they allege or from 2003 after the Plaintiff’s family moved to USA?
31. The Court of Appeal in the above case *James Muniu Mucheru v National Bank of Kenya Limited* (supra) went on to state, “In that regard, before a trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities, the court must be satisfied that the plaintiff has adduced some credible and believable evidence which can stand in the absence of rebuttal evidence by the defendant. The plaintiff must adduce evidence, which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities proves the claim...”
32. Is it therefore possible or believable that the Defendants would have been on the suit property from 1993 while the Plaintiff’s family was also occupying the property and the Plaintiff did not raise alarm? This court is satisfied that it is highly unlikely that the Defendants would have been occupying the suit property for all that time from 1993. Therefore, time calculation for adverse possession starts to run from 2003 when the Plaintiff found the Defendant’s on the suit property until 2011 when she filed a claim at the Kikuyu Land Dispute Tribunal which was within the 12 years limitation period. In that regard, the suit was not time barred as per Section 7 of the *Limitation of Actions Act* which provides:
- 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.
33. The Plaintiff testified that when her grandfather relinquished part of his property to Kikuyu County Council as an access road he was compensated with property Dagoretti/ Thogoto/T.431. However, on ground he was shown the location of the suit property which they settled on. They only discovered that it was Dagoretti/ Thogoto/ T.430 in 1982 when her father was connecting electricity.
34. Upon learning that people had encroached on the suit property, she undertook due diligence as well as carried out a search at the Lands office where she discovered that the suit property was registered in the name of Margaret Muthoni Kanake from 1996 as shown by Copy of the Green Card and Search Certificate adduced and marked P. Exhibit 3 and 4 respectively. Following this discovery, they deemed it fit to purchase the suit property from the said Margaret Kanake which was done in 2010 as evidence by the sale agreement marked as P. Exhibit 9 and the suit property was consequently registered in her name as per the Title Deed marked as P. Exhibit 2 and copy of search certificate marked as P. Exhibit 5.
35. The Plaintiff went on to state that she had asked the Defendants to vacate the suit property which lawfully belonged to her fruitlessly despite decisions that found that the suit property indeed belonged to her.
36. The court has looked at the two cases as produced in evidence and in case KW/LND/14/1/14/2011 filed at the Kikuyu Land Dispute Tribunal the Tribunal’s award dated 24th June 2011 was:



1. The Kikuyu Land Tribunal confirm that the Dagoretti/Thogoto/T.430 (0.50) acres belong to Mary Wambui Kihiu.
 2. She got all the legal document to prove that this plot belong (sic) to her with no doubt.
 3. The seven objectors should follow up with the area Councillor / Town Council of Kikuyu to show them where to go.
37. Following this award, the Defendants sought orders of Certiorari and Prohibition against the award of the Tribunal on lack of jurisdiction and on grounds that the Applicants had been residing on LR No. Dagoretti/Thogoto/T.430 since 1993 in ELC JR No. 75 of 2011. In its judgement dated 26th July 2012, the court found (page 15 of the judgement):

“... The 1st Respondent in my view was simply asserting her exclusive rights to occupy the suit land being its registered owner while the applicants were resisting her claim on grounds that they also had the right to occupy the same not as proprietors thereof but as licensees of the area Councillor. They clearly did not have the authority or consent of its registered owner the 1st Respondent to occupy the said land.

It is therefore my finding that the dispute for adjudication before the Tribunal was founded on the 1st Respondent’s claim that the applicants had occupied land in respect of which she was the registered owner without her authority and consent which amounted to trespass to land. It is therefore my conclusion that the dispute squarely fell under the jurisdiction of the Kikuyu Land Dispute Tribunal by virtue of Section 3(1) (c) of the Act...

The award finally delivered by the Tribunal as reproduced here above clearly shows that the Tribunal merely confirmed the fact that the 1st Respondent was the registered proprietor of the suit land and that the applicants had no lawful rights to the suit land meaning that they were trespassers and they were advised to look for alternative settlement...

n the result, I find no merit in ... and it is hereby dismissed ...”

38. The Defendants also contested acquisition of the suit property by the Plaintiff from the said Margaret Kanake on grounds that the suit property was public land which if it was allocated to any of the parties, ought to have followed laid out legal procedures.
39. This court notes that the highlighted decisions here above determined the issue of ownership of the suit property LR No. Dagoretti/Thogoto/T.430 and found that it belongs to the Plaintiff. The decisions have neither been appealed nor set aside and as such are not an issue for re-litigation. I echo the sentiments of the High Court in *Kennedy Mokuu Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende* [2022] eKLR which held:

“... A Decision of the court must be respected as fundamental to any civilised and just judicial system. Judicial determinations must be final, binding and conclusive. There is injustice if a party is required to litigate afresh matters which have already been determined by the court.

A Decision of the court, unless set aside or quashed in a manner provided for by the law, must be accepted as incontrovertibly correct. These principles would be ‘substantially undermined’ if the Court were to revisit them every time a party is dissatisfied with an Order and goes back to the same Court particularly when there is a change of a Judicial Officer in the Court station...”



40. From the foregoing, I find that the Plaintiff has demonstrated that she is the registered owner of the suit property.
41. Consequently, it is clear that the Defendants continue to occupy the suit property illegally without the Plaintiff's consent.
42. In their statement of defence the defendants stated that they were in open, justified and legal occupation of the suit property having been allocated the same by Kikuyu Town Council. It is their claim that they have been in uninterrupted occupation since then.
43. The Defendants did not however raise a claim of adverse possession in the statement of defence. They only pray that the suit be dismissed with costs and "their occupation be validated and/or regularised. In my view this does not amount to a counter claim.
44. Nothing could have been easier than for the defendants to raise a counter claim for adverse possession.

"It is now a well settled principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in their pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded".

This was the holding in *IEBC & another vs. Stephen Mutinda Mule & 30 Others* (2014) (EKLR) which was cited with approval by L.Njuguna J, in *Salesio Njeru & another and Boniface Nyakundi* (2022) KECH 13963 KLR; Civil Appeal Number E021 of 2021.

45. The failure by the defendants to counter claim for adverse possession is fatal notwithstanding their claim that they have been on the land since 1993.
46. The upshot of the matter is that the plaintiff is entitled to the reliefs sought except for the prayer for mesne profits as the court was not guided on the quantum of the same.
47. The plaintiff also stated in her testimony that before she bought the suit property from Margaret Kanake, Margaret acknowledged that they were people living on the land but they would leave.
48. I consider the circumstances under which the defendants claim they entered the suit property; that they were allocated by the Kikuyu Town Council.

I decline to award mesne profits.

49. In conclusion I find that the plaintiff has proved her case as against the defendants on a balance of probabilities and I enter judgement in her favour as follows:
 - a. That an order is hereby issued compelling the defendants to vacate the suit property. Dagoretti/Thogoto/T.430 within Ninety (90) days from the date of this judgement. In default the plaintiff do use lawful means to evict the defendants.
 - b. That the costs of the suit shall be borne by the Defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 5TH DAY OF OCTOBER 2023.

L. KOMINGOI
JUDGE.

