



**King'ara v Gutu & another (Environment & Land Case 2003 of 2007)
[2023] KEELC 20523 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20523 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 2003 OF 2007**

**LN MBUGUA, J
OCTOBER 5, 2023**

BETWEEN

MICHAEL NJAU KING'ARA PLAINTIFF

AND

JORAM KAMAU GUTU 1ST DEFENDANT

**KIAMBU COUNTY COUNCIL (COUNTY GOVERNMENT OF
KIAMBU) 2ND DEFENDANT**

JUDGMENT

1. This suit was filed by way of an Originating Summons dated 18.9.2006 where the plaintiff was suing as the personal representative and the beneficiary of the estate of the late King'ara Kanyingi where he was claiming entitlement to land parcel No. LR Kiambaa/Thimbigua/ 2057 (the suit parcel) by way of adverse possession.
2. A memorandum of appearance was filed on 1.11.2006 for both defendants by the firm of Ngaii Gikonyo advocates who proceeded to file a Replying affidavit on 23.11.2006 in opposition to the Originating summons. The same was sworn by the 1st defendant who contended that he owns the suit parcel No. 2027 having exchanged the same with parcel LR/Kiganjo/Mundoro/1438 with the 2nd defendant, that is the Kiambu County Council. Years later, the said firm of advocates filed an application dated 26.3.2018 to cease acting for the 2nd defendant and the same was allowed. The 2nd defendant did not participate in the trial.
3. The plaintiff apparently passed on on 5.7.2013 and vide an application dated 14.2.2014 and allowed by the court on 28.2.2014, he was substituted with Peter Kamau Kingara and Margaret Wanjiku. The 1st defendant too passed on on 18.2.2010 and was substituted by Julius Githegi Kamau and Lucy Ngonyo Lattrell vide the application dated 7.7.2011.



4. During the trial, the court visited the scene with the consent of the parties herein. The same was conducted on 21.9.2022 in the presence of counsels for the plaintiff and 1st defendant as well as one Peter Kamau, the plaintiff.
5. The case of the plaintiff was advanced by one Stephen Ndung'u Njuguna who identified himself as a cousin to Kamau Kingara. He adopted his witness statement dated 20.3.2015 as his evidence. He averred that the family of King'ara gave permission for the excision of a public road through their land parcel No. 281. In exchange the Kingara family was given land which had been reserved for a public cattle dip, the same being plot no. 1202 adjustment to parcel 281. That the said exchange occurred in 1974, and the family of Kingara took possession of parcel 1202 which they started utilizing.
6. That soon after the exchange, members of the public started using the public thoroughfare as a foot path to access a village known as 'Kwa Hai.' That in 1985 the Kiambu County Council upgraded the footpath to a marram road with a bridge.
7. In cross examination, PW1 stated that parcel 1202 was designated as a community cattle dip in year 1952 -1955 during the period of demarcation. That some time in 1974 is when the County Council of Kiambu wanted some part of Kingara's parcel 281 to create an access road. That it was announced in a public baraza that people of 'Kwa Hai' village would access their village through parcel 281. They are not aware as to how parcel 1202 came to be sub divided as the surveyors have never come to the land to divide the same.
8. PW1 emphasized that 1st defendant has never lived or utilized that land.
9. The court conducted a scene visit on 21.9.2021 and observed that parcel 2058 borders parcel 281 and also borders a public road on the down side. There are no boundary markings between the 2 parcels. On the down part side, that is beyond the public road there is parcel 2057 which touches a river and it also borders parcel 281 with no marked boundary. The court also observed several homestead in parcel 281 of which there is the public road traversing that land (parcel 281).
10. The court also observed that there is a marram road off-shooting from the public road cutting across the lower part of parcel 281 on both sides running to an easterly direction, of which, there is a river crossing underneath the marram road and there is a bridge with 2 culverts. The court observed that there were people presumed to be members of the public using the said marram road and even a lorry passed on the said road during the site visit.
11. The defence case was advanced by Lucy Ngonyo Lattrell who introduced herself as a daughter of Joram Kamau Gutu the original 1st defendant. She gave her evidence before the commencement of the plaintiff's case because she was travelling outside the country. She adopted her witness statement dated 20.4.2015 as her evidence. She also produced the documents in her bundle filed on 4.10.2012 as their exhibits.
12. Her evidence is that her late father owned parcel Kiganjo/Mundoro/1438 which he gave to the County Council of Kiambu for purposes of extension of Makutano trading centre. That in exchange, her father was given the parcels No. Kiambaa/Muchatha/T.409 and T.37, as well as Kiambaa/Thimbigua/ 2057 (the suit land).
13. She further stated that parcel no. Kiambaa /Thindigua/1257 was a subdivision of parcel no. Kiambaa/Thindigua/1202 which belonged to the City Council of Kiambu.
14. She stated that the family of Kingara (the plaintiff) had lodged a caution against the suit parcel 2057, but this was later removed by the Land Registrar.



15. In cross examination, DW1 stated that her father used to grow nappier grass on the suit property but the same would be harvested by the plaintiff. That she never visited the suit property when her father was alive. She does not know the exact beacons of the said land because whenever she went with a surveyor to the land, she was chased away by the family of the plaintiff.
16. She avers that as at the time of her testimony, there was maize crop on the suit land belonging to the plaintiff. There is also a marram road cutting through parcel 281.
17. In re-examination, she stated that parcel 2057 previously belonged to Kiambu County Council and so does parcel 2058 and that even the latter parcel is occupied by the plaintiff. She reiterated that she was not able to place beacons on the suit land as she was chased away by a son of Kingara. She averred that she had lived in Germany for the last 14 years.
18. The submissions of the plaintiff are dated 1.5.2023 where they have reproduced the evidence tendered in court. The submissions of the 1st defendant are dated 16.6.2023 where they frame the following issues for determination; Whether the defendant is the rightful owner of parcel L.R Kiambaa Thimbigua/2057 and whether the plaintiff has acquired the said parcel of land by way of adverse possession.
19. It was submitted that the 1st defendant is the rightful owner of the suit property in tandem with the provisions of Section 26 of the [Land Registration Act](#).
20. On the claim of adverse possession, it was submitted that the family of the plaintiff has never been in occupation of the suit land and that the 1st defendant had made tremendous efforts to stop the criminal activities of trespass by the plaintiff. To this end, reference was made to the case of Mtana Lewa vs. Kahindi Ngala Mwangandi (2015) eKLR and Mbira v. Gachuhi [2002] EALR.

Determination

21. I have considered the pleadings, the evidence and the rival submissions. I note that no counterclaim was lodged by the 1st defendant. As such, the issue falling for determination is whether plaintiff's claim of adverse possession is merited.
22. The 1st defendant has re-stated the correct position of the law as set out in Mtana Lewa –v- Kahindi Ngala Mwangandi (supra) that:

“ Adverse Possession is essentially a situation where a person takes Possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya 12 years.”

Also see Paul Mwangi Gachuru vs. Kamande Nguku (2017) and Mbira v Gachuhi (2002) EALR.

23. There appears to be a general agreement that the suit land was initially owned by the 2nd defendant. Dw1 has given an account of how their father's land parcel 1431 was exchanged with parcel 2057 amongst 2 other parcels and also clarified that parcel 2057 was a subdivision of parcel 1202 still belonging to the 2nd defendant. The plaintiff's side have also given an account of how their family ceded a portion of parcel 281 to be used as a public access road and in exchange, they were to be given parcel 1202 belonging to the 2nd defendant which is next to their land parcel 281.



24. This therefore appears to be a case where the 2nd defendant was exchanging its land parcel 1202, allegedly subdivided into 2057 and 2058 with two different people. This court had an opportunity of visiting the scene and observed that there is evidence of a road with even a bridge which was being used by members of the public and the same cuts across parcel 281, the land of the plaintiffs. However, the alleged exchange of that public road land with the suit parcel does not appear to have been effectuated into registration. There is no documentation at all of the alleged exchange.
25. On the other hand, there is no evidence that the 1st defendant ever ceded their land 1438 to the 2nd defendant. However, there is clear evidence that the suit property 2057 was transferred to the 1st defendant and registered in his name on 24.7.1987.
26. The evidence of DW1 is that before her father's death, she had never set foot on the suit property and that when she attempted to do so, she was barred by the family of the plaintiff. As at the time of her testimony, she stated that there was maize on the suit property belonging to the plaintiff. When the court visited the suit land, it observed that the entire land allegedly identified as 1202 had no demarcated boundaries with parcel 281. Indeed for parcel 2058 (upper part of 1202) appeared to be inside parcel 281 where there are homes of the family of the plaintiff. Parcel 2057, the lower side of 1202 extends to the river from a public road and there was cultivation of nappier grass and arrowroots. In view of the fact that Dw1 has stated that they have never been able to use the suit land, then I am inclined to believe the claim of Pw1 that the family of the plaintiff is the one which uses that land. This far, it is apparent that the plaintiffs family are the ones in occupation of the suit land.
27. Dw1 has admitted that the family of the plaintiff had lodged a caution on the suit title which is in tandem with her certificate of search showing that a caution was lodged on 31.10.1995 by the original plaintiff. It follows that the plaintiffs family had all along demonstrated the element of "Animus Possidendi" which was defined to mean "an intention for the time being to possess the land to the exclusion of all other persons, including the owner with the paper title" by Sir Robert Megarry and Sir William Wade (The Law of Real Property, 6th Ed).
28. In the case of *Kasuve vs. Mwaani Investments Limited & 4 others* [2004] 1KLR the Court expressed that:

"In order to be entitled to land by adverse possession, the claimant must prove that she has been in exclusive possession of land openly and as of right and without interruption for 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.
29. This is a situation where the occupation of the suit land by the family of the plaintiff has met all the elements mentioned in the cited authorities such that the family of the 1st defendant do not even know the extent of the suit land on the ground. Considering that the initial 1st defendant acquired his title on 24.7.1987, then I find that the 12 years statutory period had matured for the family of the plaintiff to be entitled to the suit land through the doctrine of Adverse Possession.
30. To this end, the claim of the plaintiff is hereby allowed in the following terms;
 1. It is hereby declared that the family of the plaintiff is entitled to the suit land L.R. No. Kiambaa/Thimbigua/2057 by way of adverse possession.
 2. An order is hereby issued for the cancellation of the suit land L.R.No. Kiambaa/Thimbigua/2057 in the name of the 1st defendant.



3. An order is hereby issued for the suit land L.R.NO. Kiambaa/Thimbigua/2057 to be registered in the name of the ESTATE of KINGARA KANYINGI.
4. Each party is directed to bear their own costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF OCTOBER, 2023
THROUGH MICROSOFT TEAMS.**

LUCY N. MBUGUA

JUDGE

