



REPUBLIC OF KENYA



**Munyiri v Gitau & 6 others (Environment & Land Case E021 of 2021)  
[2023] KEELC 20706 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20706 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE E021 OF 2021**

**JG KEMEI, J**

**OCTOBER 12, 2023**

**BETWEEN**

**NICODEMUS GICHUHI MUNYIRI ..... PLAINTIFF**

**AND**

**NGIGI GITAU ..... 1<sup>ST</sup> DEFENDANT**

**STEPHEN GITAU NGIGI ..... 2<sup>ND</sup> DEFENDANT**

**KARANJA NGIGI ..... 3<sup>RD</sup> DEFENDANT**

**AGNES MUMBI CHEGE ..... 4<sup>TH</sup> DEFENDANT**

**JULIANA WANGARI CHEGE ..... 5<sup>TH</sup> DEFENDANT**

**MAGDALINE NYAMBURA CHEGE ..... 6<sup>TH</sup> DEFENDANT**

**NAOMI NJERI CHEGE ..... 7<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff moved the Court by way of Originating Summons dated 31/5/2021 seeking the Court to determine the following questions:-
  - a. Whether the Plaintiff's occupation and possession of land parcel No Ngenda/Gatukuyu/T.341 since 1972, a period of over 12 years uninterrupted by Defendant amounts to adverse possession of the suit premises.
  - b. Whether or not the Plaintiff has acquired registrable interest in the whole of land parcel No Ngenda/Gatukuyu/T.341 measuring 0.104Ha. by way of adverse possession.
  - c. Upon ascertaining prayers (a) and (b) above this Honourable Court be pleased to declare that the Defendant's interest or anybody claiming under him to land parcel Ngenda/Gatukuyu/



T.341 has become extinguished by operation of the law and that the Plaintiff herein has become entitled to the said whole parcel of land through adverse possession.

- d. The Court be pleased to order that the whole of land parcel Ngenda/Gatukuyu/T.341 be registered in the name of Nicodemus Gichuhi Munyiri.
  - e. The Defendants do execute all the necessary documents to effectuate the transfer of all that parcel of land known as Ngenda/Gatukuyu/T.341 to the Plaintiff and in default the Deputy Registrar of this Honourable Court be empowered to do so.
  - f. The cost hereof be provided for by the Respondent.
2. The Originating Summons are based on the grounds annexed thereto and the Supporting Affidavit of Nichodemus Gichuhi Munyiri sworn on 31/5/2021.
  3. In the main the Plaintiff's suit is anchored on adverse possession that is to say that he and his family has been in occupation of the land since 1972 to date without any interruption from the Defendants.
  4. Despite service of Summons upon the Defendants, they failed to enter appearance and file response to the Plaintiff's claim consequent to which the suit of the Plaintiff proceeded for hearing by way of formal proof.
  5. The evidence of the Plaintiff was led by PW1 – Nichodemus G. Munyiri. He relied on his Supporting Affidavit dated 25/1/2022 and 31/5/2021. In support of his claim he produced documents marked as PEX No 1 on pages 6 – 22 and 30-55 of his trial bundle filed on 1/3/2022.
  6. In his evidence he stated that he occupied the land since 1972. That his father purchased the land in 1972, paid the full purchase price, took possession and commenced cultivation upto 1993 when he passed away. That upon his death he continued in the possession to date.
  7. He stated that he and his family live on their own land next to the suit land.
  8. In his witness statement the Plaintiff stated that his father Munyiri Kibene bought the land in 1972 from Karanja Kabui from whom the Defendant benefited from his estate. The Plaintiff's father paid the purchase price in instalments, took possession and has resided on the land since then. That the Defendants were aware of the sale agreement and that explains why their step mother even demanded for more money at some point. That the Plaintiff has been in possession of the land for 48 years as time started running when his father completed the payment of the purchase price to the Defendant's father.
  9. That the Defendants' rights to the land have long been extinguished and the Court was urged to grant the Plaintiff's prayers.
  10. The Court has read and considered the written submissions of the Plaintiff filed on 27/6/2023.

### **Analysis and determination**

11. The key issue for determination is whether the Plaintiff is entitled to the orders sought.
12. The Plaintiff's case is that his father Munyiri Kibene bought the suit land from the Defendants' father in 1972 and paid through instalments, took possession and started cultivating the land. That the sale was well in the knowledge of the Defendants.
13. That upon the death of the Defendants' father Githu Nganga the Defendants petitioned for Succession behind his father's back and got the title registered in their names. That his father died in 1993 before the transfer was concluded. That upon the death of his father he and his family continued occupation



of the land without any interruptions from the Defendants. That in 1996 he placed a caution on the land and the Defendants' step mother Wambui w/o Gitau demanded more money for the land as she threatened to sell the land to prospective buyers at a higher price. This prompted the 1<sup>st</sup> Defendant to file a suit seeking removal of the caution vide Misc. Application No 9 of 2019 where the Court dismissed the suit for being unmeritorious.

14. The suit of the Plaintiff against the Defendants is not defended. That notwithstanding the Plaintiff bears the sole burden to prove his case on a balance of probabilities, however undefended. In the case of *Gichinga Kibutha v Caroline Nduku* (2018) eKLR the Court held as follows:-

“It is not automatic that instances where the evidence is not controverted the Claimant shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”

15. What is adverse possession? In the case of *Bejoy Chundra v Kally Prosonno* (1878) 4 Cal 1327 the late Mr. Justice Markby, as he then was, defined adverse possession as follows;

“By adverse possession I understand to be meant possession by a person holding the land on his own behalf (or on behalf) of some person other than the true owner, the true owner having a right to immediate possession.”

16. For one to succeed in proving title by adverse possession he must prove the following:-

“To be successful in a claim for adverse possession one must prove that he has been in exclusive possession of the land openly and as of right and without any interruption for a period of 12 years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition. Further the claimant must show that he is using the land as of right and that he has the necessary animus possidendi to use the land to the exclusion of the owner.”

17. In this case it is not in dispute that the Plaintiff's father purchased land in 1972 from the Defendants' father, paid in instalments, took possession and cultivated till his demise in 1993. After his demise the Plaintiff continued occupation to date.

18. In the case of *Public Trustee v Wanduru* (1984) KLR 314 the Court stated as follows:-

“Adverse possession should be calculated from the date of payment of the purchase price to the full span of 12 years if the purchaser takes possession of the property because from this date, the true owner is disposed of possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run.”

19. Going by the *dicta* in the *Public Trustee Case*, the Court finds that adverse possession began running in favour of the Plaintiff's father from 1976 and for 12 years adversely crystallized in the year 1988. By the time of the death of Kibene in 1993, the right to adverse possession had fully accrued in his favour.

20. The act of the Plaintiff of filing a caution in 1996 was an act of asserting title to the land in whose favour title by way of adverse possession had crystallized. The Plaintiff led unchallenged evidence that he entered the land in 1972 with his father and he too occupied the land peacefully and without any interruption for the full period of the 12 years.

21. Even if it is assumed that his possession commenced in 1993 after the death of his father then adverse crystallized in his favour in 2005.



22. Whichever way one looks at it, the Plaintiff has never relinquished possession, nor been dispossessed of possession of the land in 1993, 2005 or upto the time of filing suit in 2021. His evidence that he has occupied the land peacefully openly without interruption and exclusively was not challenged in evidence. His evidence was therefore taken as credible in the absence of any challenge.
23. Did the suit Misc. No 9 of 2019 interrupt adverse from running? The suit was filed by 1<sup>st</sup> Defendant seeking removal of caution. The answer is No By the time of filing this suit in 2019, adverse had accrued to the Plaintiff for a period of 43 years from 1976 and 26 years from 1993 that is to say 1988 and 2015 respectively. The suit in my view was a little too late as can be seen that adversity had accrued and crystalized in favour of the Plaintiff.
24. Consequently the title of the Defendants was extinguished by the operation of law and they held the title in trust for the Plaintiff, adverse possession having accrued and crystalized in his favour.
25. In the end the Plaintiff has proved his case and I enter Judgment in his favour in the following terms:-
  - a. It is hereby declared that the Plaintiff has acquired title in form of 0.10Ha in parcel No Ngenda/Gatukuyu/T.341 by way of adverse possession having occupied the suit premises for a period of over 12 years.
  - b. It is hereby declared that the interest of the Defendants or anyone claiming under them parcel No Ngenda/Gatukuyu/T.341 has become extinguished by operation of law.
  - c. It is hereby ordered that the suit land be registered in the name of Nicodemus Gichuhi Munyiri forthwith.
  - d. The Defendants are ordered to execute all the necessary documents to effectuate the transfer of all that parcel of land No Ngenda/Gatukuyu/T. 341 to the Plaintiff in default the Deputy Registrar of this Court is ordered to execute all the said documents.
  - e. In the interest of justice the production of the original titles be and is hereby dispensed with.
  - f. The suit was not defended I make no orders as to costs.
26. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 12<sup>TH</sup> DAY OF OCTOBER, 2023 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;

Waithira Mwangi for Plaintiff

1<sup>st</sup> – 7<sup>th</sup> Defendants – Absent

