



Ngugi v Njoroge (Sued as the Legal Representatives of the Estate of Njoroge Wakuna alias Njoroge Mukuwa, Deceased) (Environmental and Land Originating Summons E005 of 2022) [2023] KEELC 20394 (KLR) (5 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20394 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E005 OF 2022
LN GACHERU, J
OCTOBER 5, 2023**

BETWEEN

TERESIA WANJIRU NGUGI APPLICANT

AND

GEORGE KAMANDE NJOROGE (SUED AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF NJOROGE WAKUNA ALIAS NJOROGE MUKUWA, DECEASED) RESPONDENT

JUDGMENT

1. The Applicant herein – Teresia Wanjiru Ngugi, moved this Court by way of Originating Summons dated 3rd March 2022, and filed on 4th April 2022, for the following orders; -
 1. A declaration that the title of the land parcel number LOC. 5/ Githunguri/314, has been extinguished by the Plaintiff adverse possession thereof for a period of more than Twelve (12) years in terms of the [Limitation of Actions Act](#)
 2. That the Plaintiff has become entitled by adverse possession to the land parcel comprised in title Number LOC. 5/ Githunguri/314, in Githunguri Location in Kandara Sub-County within Murang'a County and registered under the [Land Act](#) in the names Njoroge Wakuna (Deceased).
 3. An order that the District Land Registrar Murang'a, to register the Applicant as absolute proprietor of the parcel of land measuring 0.7 Acres and known as LOC. 5/Githunguri/314, in place of Njoroge Wakuna(Deceased)
 4. That the District Land Registrar Murang'a, be directed that the order herein shall be instrument of transfer of ownership of the land parcel reference Number LOC. 5/ Githunguri/314 to the Applicant



5. That the costs of this suit be provided for.
2. The Originating Summons is supported by the grounds set out therein and the Affidavit in support sworn by Teresia Wanjiru Ngugi, the Applicants case that she has been in occupation of the suit property since 1992, and she has buried her family members on the said suit property with no objection. That the suit land was allocated to her father in law in 1958, where he established their ancestral home. She deponed that she has been in occupation of the suit land for a period of more than 12 years, that she become adverse to the Respondent's title.
3. The Respondent- George Kamande Njoroge, filed his Replying Affidavit in response to the Originating Summons, wherein he refuted the Applicant's case. He deponed that Njoroge Wakuna is not the registered proprietor of the suit land. It is his case that the Applicant is in the suit property by dint of a tenancy agreement and that in 2006, the Applicant refused to pay the rent necessitating a suit for eviction. He objects to signing of the documents to the citation attached to the Summons and maintains that the documents were forged. He denies knowledge of the Applicant's father-in-law and her husband.
4. The Applicant filed a Further Affidavit in response to the Respondent's Response to the Originating Summons. She disputes entering into a tenancy agreement with the Respondent, but confirms that the deceased attempted to have her evicted, but the suit was dismissed. She maintains that the Respondent participated in the citation proceedings and cannot now claim otherwise,
5. The matter was set down for hearing and the both parties gave their testimonies without calling other independent witness.

Plaintiff's Case

6. PW1- Teresia Wanjiru Ngugi, the Applicant adopted her witness statement dated 30th September 2022, as her evidence in chief and relied on the documents contained in the List of Documents even dated to support her case. She testified that she has lived on the suit property since 1962, and the attempts to evict her were futile. It was her testimony that she has never entered into any tenancy agreement and that she is not aware of the alleged agreement.
7. On cross-exam, she testified that the parties herein have been to several offices over the suit property. She added that the land belonged to her father-in- law and was part of their inheritance upon his death.
8. PW2 – Henry Theri Kariuki, testified that he is the area chief, and confirmed that the Applicant lives on the suit property. He also testified on cross-exam, that despite not being the Chief then, he is aware of the dispute surrounding the suit property.

Defence Case

9. DW1 – George Kamande Njoroge, the Respondent adopted his witness Statement dated 31st October, 2022, as exam in chief, and produced the documents contained in his pleadings in support of his case. He maintained that the Applicant acquired possession of the suit property by dint of a lease. That they engaged the services of a broker to file their succession proceedings.
10. On cross-examination, he confirmed that they have been disputing over the suit property, but he did not have evidence to show that they have been disputing. It was his testimony that the Applicant is on the suit land and even though the father filed a suit against Esther Wanjiru, whom he insists is the Applicant, they have never evicted the Applicant. He added that Ngugi Kamau was a tenant on the suit land since 1962, but he did not adduce any evidence in support. He was taken to task on the lease



agreement. He confirmed in re-exam, that the Applicant lives on the suit land which she entered into in 1962.

11. Parties filed and exchanged their written submissions. The Applicant filed her submissions through the Law Firm of Charles Mbugua & Co. Advocates, and raised two issues. On whether she is entitled to the orders sought, she laid the legal basis for claim for adverse possession and sought reliance on the case of Richard Wefwafwa Songoi vs Ben Munyifwa {2020}, eKLR, wherein the Court enumerated the principles for establishing a case for adverse possession.
12. It was her submissions that she has established her claim and that there was no adequate evidence to support the allegation of tenancy agreement. She relied on a litany of cases to support her submissions that she is entitled to the suit land by dint of adverse possession.
13. The Respondent filed his submissions through the Law Firm of Mbuvo Mutuku & Co. Advocates, and raised two issues.
14. In submitting that the Applicant has not met the threshold for grant of the orders sought, he submitted that the Applicant's entry was permissive. He relied on a number of cases to support his submissions that the Applicant failed to demonstrate that she was in open, continuous and uninterrupted occupation of the suit property.
15. It was the Respondent's further submissions that the Applicant refused to vacate from the suit property and has been engaged in wanton destruction of the suit property. He maintained that the Applicant is not entitled to the Orders on the premise that she failed to honour a tenancy agreement and is using the claim for adverse possession to gain interest on the suit property.
16. Before delving into determining the claim for adverse possession, this Court must first determine whether the Respondent has locus. The Respondent expressed himself that he lacks the capacity to be sued as he is not the owner of the suit land. Entertaining the suit against the Respondent if he lacks the locus may be a triviality. This was the position of the Court of Appeal in the case of Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama [2014] eKLR, where the Court observed; -

Applying the above test to this case, we have come to the conclusion that the order consolidating the two petitions was illegal as the respondent's petition having been filed without locus standi was a nullity ab initio.
17. Therefore, this Court must determine the Respondent's locus to be sued. It is undisputed that the suit land belonged to Njoroge Wakuna. As a matter of evidence, this Court has perused a copy of a title deed that was issued to the said Njoroge Wakuna, a copy of the Certificate of Official Search produced by the Respondent and thus the suit land belonged to the deceased.
18. It is trite law the property of a deceased person shall vest on his/ her Personal Representative who are appointed through a Grant whether full or limited one. This Court has perused a copy of a Grant which shows that the Respondent was appointed an administrator of the Estate of Njoroge Wakuna and a Grant issued on 15th September, 2021. There is a copy of a Certificate of Official Search attached to the Respondent's pleadings which shows that the land devolved to him. The Respondent therefore has the essential locus to be sued.
19. It is common evidence that the Applicant has been in occupation of the suit property. There is a copy of a title deed which informs this Court that Njoroge Wakuna was the original owner of the suit property. As per the Certificate of Official Search that was produced by the Respondent, the suit land is currently registered in the name of the Respondent.



20. The Applicant claims that the suit property was allocated to her father-in-law, and which land her husband inherited. It was her statement that her husband was settled on the suit property in 1962, and upon their marriage in 1958, they established a matrimonial home in 1962, where she lives up to date. It was her case that she has buried a number of her family members on the suit property, and has significantly developed the suit property.
21. The Respondent on the other hand agreed that the Applicant is in occupation of the suit property, but he attributed the occupation to a tenancy agreement. It is not clear to this Court why the Respondent opted to produce what he termed as tenancy agreement written in Kikuyu dialect without having a translation on the same. The Applicant is seeking to defeat the Respondent's title by dint of adverse possession.
22. The registration of the land in the name of the Respondent by dint of transmission conferred on him indefeasible rights and which right this Court must protect. However, the provisions of Section 28 of the [Land Registration Act](#), provides for overriding interest. The Section provides:

Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

- (a)
- (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
-

23. The Applicant wants to defeat the Respondent's title by operation of [Limitation of Actions Act](#). Additionally, it is important to at this stage to point out that a claim for adverse possession is attached to land and not to the title, and it matters not in whose name the title was registered in, unless if it was owned by the Government. This position was held in the case of Maweu VS Liu Ranching & Farming Cooperative Society [1985] eKLR, as quoted in Civil Appeal No 164 of 2011:- Gachuma Gacheru VS Maina Kabuchwa [2016] eKLR, where the Court held that:

Adverse possession is a fact to be observed upon the land. It is not to be seen in a title”

24. With the above provisions in mind, and having perused the pleadings and the annexures thereto, analyzed the evidence adduced, and having considered the rival written submissions and the authorities cited, the Court finds the issues for determination are; -
 - i. Whether the Applicant's claim for adverse possession can issue?
 - ii. Who should bear costs of the suit?

I. Whether Applicant's Claim For Adverse Possession Can Issue?

25. The Law on adverse possession is well set out under the [Limitation of Actions Act](#). Section 7 of the Act 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.

Section 13 on the other hand provides;



- (1) A right of action to recover land does not accrue unless the land is in 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
 - (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
 - (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land”.
26. Section 17 extinguishes the rights of a registered owner where there is a successful claim for adverse possession. Section 38 on the other hand provides;
- (1) Where a person claims to have become entitled by adverse possession to land registered under any of the acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land.”
27. The principle of adverse possession was more elaborately set out in the case of *Wambugu vs Njuguna* [1983] KLR 172, where the Court held that:
- In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.”
- And that:
- The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.”
28. This right is adverse to land, and does not automatically accrue unless the person in who’s this right has accrued takes action. Section 38 of Cap 22 gives authority to the claimant to apply to Court for orders of adverse possession. The ingredients to be observed have been laid out in a number of cases. In the case of *Mtana Lewa v KahindiNgalaMwagandi* [2015] eKLR, the Court held:
- Adverse possession is essentially a situation where a person takes possession of land and 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, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”



29. Further, in the case *Mbira v. Gachuhi* (2002) 1 EALR 137:the court stated as follows;
- a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption...”
30. Similarly, in *Kisumu Civil Appeal No. 27 of 2013 Samuel Kihamba v Mary Mbaisi* [2015] eKLR, the Court held:
- 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”
31. Therefore, to determine whether the Applicant meets the threshold set out in the foregoing cases, the Court will seek to answer the following;
- i. How did the Applicant take possession of the suit property?
 - ii. When did they take possession and occupation of the suit property?
 - iii. What was the nature of her possession and occupation?
 - iv. How long have the Applicants been in possession?
32. Therefore, the Applicant herein must show that her ingress into the suit land was not permissive. Any entry into land by consent of the owner automatically becomes permissive, and it does not matter whether the owner has taken long to visit the property or failed to take it back at the soonest. The Court in *Mombasa Teachers Co-operativge Savings & Credit Society Limited vs Robert Muhambi Katana & 5 Others* {2018} EKLR, observed that a claim for adverse possession cannot pass where the entry was permissive.
33. In the present case, while the Applicant seems to suggest that her entry was non-permissive, the Respondent holds otherwise. The Respondent produced a copy of a tenancy agreement which he suggests was entered into between his father, the registered proprietor, and the Applicant. The Applicant however refutes the existence of the said agreement and puts the Respondent to strict proof of the contents therein.
34. While the Applicant has the legal burden within the provisions of Section 107 of the *Evidence Act* to adduce evidence, the evidentiary burden sometimes shifts depending on what is adduced in Court. The law of evidential burden is captured under Sections 109 and 112 of the *Evidence Act* which provides:
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 the fact shall lie on any particular person.
 112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.



35. The shifting of evidential burden was explained in the case of *Mbuthia Macharia v Annah Mutua Ndwiga & another* [2017] eKLR where the Court expressed itself as follows:

(16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”

36. Thus, the Respondent was duty bound to explain to the satisfaction of this Court on the contents of the alleged tenancy agreement. When put to task by the Applicant’s Advocate to elaborate on the tenancy agreement, the Respondent seemed uncertain. While he confirms that Mr. Ngugi gained entry into the suit land in 1962, he testifies later that the tenancy was entered into in 2006. It is therefore not clear for this Court as to the reason why a tenancy agreement was entered into during the pendency of occupation.

37. The Applicant maintained that she never entered into any tenancy agreement. The Respondent had a duty to sufficiently guide this Court on the contents of the agreement. This agreement is written in Kikuyu language, but it appears to have been executed by the parties therein on a date that remains unknown.

38. The Respondent in a bid to support his claim for existence of a tenancy Agreement, informed this Court that there was a case between his father and the Applicant for eviction. The Applicant in her Further Affidavit confirmed that the Respondent’s father had attempted to evict her, but the case was dismissed. There was no copy of the pleadings that was placed before this Court to enable this Court to determine whether the suit for eviction was on account of unpaid rent or trespass.

39. With no evidence to suggest that the Applicant entered into the suit property with permission, this Court finds and holds that the Applicant’s entry was non-permissive.

40. On when the Applicant gained entry into the suit land there is common evidence that the Applicant’s family have been on the suit land since 1962. The Applicant alleged that they gained entry into the suit land and established a matrimonial home on the suit property. To support her claim, she produced some copies of photographs which shows a house has been set up. While there was nothing to show that indeed this was her home, the Respondent did not object to the production of the photographs and this Court has no reason to doubt the authenticity of the photographs. Justice Kuloba J, as he then was, in *Nairobi Civ No. 283 of 1990 Gabriel Mbui v Mukindia Maranya* [1993] eKLR held:

Time does not begin to run unless there is some person in adverse possession of the land. It does not run merely because the land is vacant..... The rule that his entry must be followed by possession and appropriation to his use is founded on the reason that a right of action cannot accrue unless there is somebody against whom it is enforceable”

41. It is evident to this Court that the Applicant has been in occupation of the suit land. To assert their possession, the Applicant buried her kin on the suit property which PW2 confirmed and thus supporting the photograph produced by the Applicant. This Court tends to ponder on the idea of how a tenant could be allowed to bury her kin on a property that did not belong to her. While the Applicant seem to suggest in her pleadings that she gained entry into the suit land in 1992, it was her testimony at the hearing that she has been utilizing the suit property since 1962.



42. What this Court discerns from the testimonies of the parties herein is that the Applicant has been living on the suit land since 1962. It is in 1992, that the Applicant's husband died and she continued to live thereon. It is thus right to conclude that time started running from 1962, when the Applicant and her family started utilizing the suit property.

43. The nature of her occupation might have started as a peaceful one, but along the way dispute arose between the parties. PW2 confirmed to this Court that the Applicant and the Respondent's father were engaged in a protracted dispute over the suit land. To sum up their dispute, it is evident to this Court that the Applicant and the Respondent's father moved the tribunal in 2007. The action of moving Court by the Respondent's father amounted to asserting his right. The Court in *Kipketer Togom v Isaac Cipriano Shingore* [2012] e KLR rightly held:

The Respondent must assert his right to title by physically entering onto the property and evicting and ejecting the trespasser from the suit property. Alternatively, the Respondent should have proceeded to institute legal proceedings in a court of law against the trespasser asserting his rights against the trespasser with prayers for his eviction and ejection from the property. Then only is there interruption to occupation and possession and then only does time stop running.”

44. As already stated above, the Applicant gained entry into the suit land in 1962. The implication of this is that by the time the Respondent's father moved to Court, the Applicant had been in occupation of the suit property for over twelve years. Adverse possession had already accrued, and the suit could not aid the Applicant. Even so, there is nothing that was placed before this Court to established whether the suit was determined to its logical end or not. No order was placed before this Court. Additionally, if there were any orders issued, it is the findings of this Court that the statutory twelve-year period for execution of orders touching on land have lapsed.

45. PW2 testified that the Applicant has been in occupation of the suit land and that gave the impression that the Applicant's occupation was known. The Respondent deponed in his pleadings that the Applicant is not in occupation of the suit land, and that she does not utilize the same. However, it was his testimony during trial that the Applicant is in occupation of the suit land. There was no evidence that the Applicant has ever moved out of the suit land. The fact that the Applicant was not barred from interring the remains of her grandson on the suit property intimates that she had actual occupation and use of the suit property. There was no evidence that the Respondent has ever utilized the suit land at any point.

46. The Respondent did not object to the fact that the structures evident in the photographs belonged to the Applicant. This Court finds that the action of putting up structures and utilizing the same without the objection of the Respondent demonstrates intentions to openly use the suit land. The Court relies in the case of *Loise Nduta Itotia v Aziza Said Hamisi* [2020] eKLR, where the majority held:

My analysis of the evidence points, to the open existence of structures and developments on the disputed property, all of which the respondent claims belonged to her. Since, the appellant did not claim ownership of the structures or provide any explanation of how the structures came into existence, it can be concluded that the structures belonged to the respondent.”



The Court further held;

More importantly however, even after the structures were found to be in existence, nothing in the evidence is suggestive of any steps having been taken or effort made by the appellant to take up physical occupation or to utilize the land.”

47. Taking cue from the above pronouncement, this Court finds and holds that the Applicant has been in actual, open, notorious, exclusive and adverse use of the suit property at the exclusion of the Respondent.
48. As established hereinabove the Applicant has been in occupation of the suit property since 1962. The period of occupation of the land up to 2007 was 45 Years, and this is period beyond the statutory limit for adverse possession. If time was to be computed from 1962, up until time of filing this suit the period would be 60 years. The impetus of this is that the Applicant has on a balance of probability and to the satisfaction of this Court established the ingredients of adverse possession.

II. Who Should Pay Costs For The Suit?

49. Section 27 of the *Civil Procedure Act* requires that costs to follow event but the Court have the discretion to rule otherwise. (See Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others [2013] eKLR). The Applicant is a successful party, and this Court has no reason to exercise its discretion in her favour.
50. Having now carefully considered the available evidence, the Court finds that the Applicant herein has established her case on the required standard of balance of probability. For the above reasons, Judgement is entered for the Applicant against the Respondent in terms of Prayers No. (1), (2), (3) & (4) of the Originating Summons dated 3rd March 2022. The Applicant is also entitled to costs of this Originating Summons.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 5TH DAY OF OCTOBER 2023.

L. GACHERU

JUDGE

