



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

E.L.C NO. E004 OF 2021

MERCY MUTHONI GITHINJI (Suing as the legal representatives of

ANDREW GITHINJI NDUATI- DECEASED.....APPLICANT

-VERSUS-

CECILIA WANJA WAWERU (Suing as the legal representatives of

ZAVERIO WAWERU MWITARI- Deceased.....RESPONDENT

JUDGMENT

By Originating Summons dated **4th March 2021**, the Applicant herein sought for orders; -

1. THAT the Plaintiff having been in continuous, uninterrupted occupation and possession of the two (2) acres out of the suit land parcel number **MARAGWA RIDGE SETTLEMENT SCHEME- PLOT 121**, for a period in excess of 12 years have acquired the title thereto by adverse possession.

2. THAT the Land Registrar, Murang'a be ordered and directed to delete the name of the Respondent and register the name of the Plaintiff in the place thereof.

3. THAT the Deputy Registrar of this Honourable Court do execute all documents necessary to effect transfer.

4. THAT the costs of this suit be borne by the Defendant

5. THAT such further and other orders be made as this Honourable Court deems fit.

The Application is not based on any grounds, but by the Supporting Affidavit of the Applicant dated **4th March, 2021**. It is the Applicant's averments that she is the Legal Representative of the Estate of **ANDREW GITHINJI NDUATI**, while the Respondent is the Legal Representative of the Estate of **ZAVERIO WAWERU MWITARI**. That the suit property comprises of **30 Acres** out of which **2 acres** was sold to **ANDREW GITHINJI NDUATI**, in **1994**, but the vendor died before transfer could be effected. Further, that the Applicant has been in occupation of the suit property for over **12 years** and has developed thereon. That the Respondent has not interfered with her occupation and use of the property for the period she has lived there.

In response to the Summons, the Respondent filed two Replying Affidavits, one sworn herself and the other by **John Gichuhi Waweru**. The Respondent deponed that the Applicant instituted two other suits touching on the subject matter which suits have not been determined. That the alleged sale agreement was void for want of **Land Control Board Consent**. That the Applicant's husband never paid the entire purchase price and also being a purchaser, she cannot claim adverse possession.

John Gichuhi Waweru, filed the other Replying Affidavit and averred that he is the son of **Zaverio Waweru**, reiterating the contents of the Respondent's Affidavit. He added that the Applicant has not enjoyed **quiet and peaceful occupation** of the land, as he has attempted on several occasions to evict her. That the Applicant only occupies **½ acre** of the alleged suit property on which she has constructed a house.

The matter was canvassed by way of *viva voce* evidence wherein each party gave evidence and each called one witness in support of their case.

PW1 MERCY MUTHONI GITHINJI, adopted her Affidavits and the Annexures thereto and witness statement as her evidence and urged

this Court to allow her claim. On cross examination, she stated that she was claiming **two acres**, which was sold and shown to them by **Zaverio Waweru** now deceased. That despite there being no fence, the boundaries are marked by plantation. That she built a house in the year **2000**, and has planted **mango trees** and **Napier grass** thereon. That despite having another property, she lives on the suit land. It was her further testimony that there was no **Land Control Board's consent**, as the vendor died before the transfer could be done. Further, that she filed the instant suit after the High Court asked her if she had the said **Land Control Board Consent** to transfer of land.

PW2 JAMES KAMWERE KARAI adopted his witness statement dated **8th June 2021**, as evidence in chief. On cross examination, he acknowledged that the Applicant has another land in **Thorome** area, which is **three** kilometers away from the suit land on which she has put up a permanent and semi- permanent house and has planted mangoes. That the Applicant's son lives on the suit property, while the Applicant lives in **Thorome** area. Further, that the house on the suit property was constructed over **10 years** and he saw the Applicant's son build it. On re-examination, he affirmed his testimony, save to add that the final deposit was made to the Respondent.

DW1 CECILIA WANJA WAWERU, adopted her Replying Affidavit and Annexures thereto as evidence in chief. She added that the Applicant does not live or cultivate on the suit property. That she attempted to evict the Applicant from the suit property, but she refused to move out and the matter was reported to the area chief. On cross examination, she stated that she was aware of the sale agreement, but her husband died before the entire consideration could be paid. However, she testified that she was paid the balance as per **P.Exh 9**. Further, that she lives on the suit land but has a home in **Mugoiri**. On re-exam, she testified that the photographs she was shown are of her house. That the Applicant's house was built in **2017**, but her house is in a different are and far from the Applicant's.

DW2 JOHN GICHUHI WAWERU, adopted his Replying Affidavit and the Annexures thereto as evidence in chief, save to add that the Applicant's son farms on the suit property. On cross-exam, he testified that he was aware that his mother received the balance for the sale of land. Further, that the Applicant occupies and utilizes $\frac{1}{2}$ **acre** of the suit land. He also testified that he attempted to evict the Applicant he and involved the area chief, but he was not successful.

At the close of *viva voce* hearing, parties filed and exchanged their written submissions which this Court has read and considered; -

It is the Applicant's submissions that her family has been in possession of the **2 acres** of land with the knowledge of the Respondent and were put in possession of the land by the husband of the Respondent who is now deceased. Reliance was placed on the case of **Francis Gicharu Kariri vs. Peter Njoroge Mairu (2005) eKLR**.

That the construction on the said land was done way back and that there is no evidence by the Respondent that the Applicant was evicted. The Applicant further submitted that they became adverse to the land after payment of the last installment as held by the Court in case of **Public Trustee vs Wanduru (1984) KLR 314**. The Applicant also brought up an issue of **constructive trust**, when submitting on the issue of lack of consent and asked the Court to be guided by the case of **Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri (2014) eKLR**.

The Respondent on her part submitted that the Applicant failed to file an extract of a **Green Card** as required by **Order 37** of the **Civil Procedure Rules**. That the requirement is mandatory as was found by the Court in **S.K. Koech vs W Gitonga(2016) eKLR** and **Peter Okoth vs. Ambrose Ochoda & Another(2021) eKLR**. The Respondent further submitted that the Applicant is a vexatious litigant by dint of the High Court case and that the Court should be guided by **Nakuru Machinery Services & Another vs Eco Bank Limited (2017) eKLR**, in dismissing the suit. Further that the Applicant's claim is based on a sale agreement and as provided by law, a purchaser cannot become adverse to land as was held in **Peter Okoth vs Peter Ochido(2021) eKLR**, It was her further submissions that the sale agreement was an illegality for lack of **Land Control Board consent**. That based on the Applicant's testimony, her son lives on the suit property and thus he cannot claim through his mother.

The Court has considered the pleadings, annexures thereto, submissions and authorities cited by the parties and finds as follows; -

What appears from the record is that the suit property is registered under the **Settlement Fund Trustee**. However, from the pleadings and testimonies of parties, there is uncontroverted evidence that the land was issued to the late **Zaverio Waweru Mwitari**, though no evidence has been availed to this Court. Nonetheless, it is trite that a claim for **adverse possession** is attached to land and not title.

The Applicant has brought the case in her capacity as the Personal Representative of the Estate of **Andrew Githinji Nduati** and has sued the Respondent in her capacity as the wife of **Zaverio Waweru Mwitari**. The issues for determination by this Court are;

- i. Whether the Applicant has met the threshold for the grant of orders for adverse possession.**
- ii. Whether the Applicant is entitled to 2 acres out of the MARAGWA RIDGE SETTLEMENT SCHEME- PLOT 121.**
- iii. Who should bear costs.**

i. Whether the Applicant has met the threshold for the grant of orders for adverse possession

It is the Applicant's case that she has been in continuous uninterrupted occupation and possession of the suit property for a period in excess of **12 years**. The burden of proving such allegation of adverse possession lies with the Applicant.

The doctrine of adverse possession is enshrined under the **Limitation of Actions Act**. Section 7 of the said 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.

Similarly Section 13 provides

“(1) A right of action to recover land does not accrue, unless the land is in the 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”.

This right does not automatically accrue, unless the person in who’s this right has accrued takes action.

Section 38 of the Act gives authority to the claimant to apply to Court for orders of Adverse Possession. The **Court in Malindi in Civil Appeal No. 56 of 2014:- Mtana Lewa Vs Kahindi Ngala Mwangandi [2015] eKLR** 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.

To determine whether the Applicant’s rights accrued the Court will seek to answer the following;

- a. How did the Applicant take possession of the suit property?
- b. When did she take possession and occupation of the suit property?
- c. What was the nature of her possession and occupation?
- d. How long has the Applicant been in possession?

The Applicant contends that they gained entry into the suit land vide a **sale agreement** between her husband and the Respondent’s husband. It is trite that for a claim for adverse possession to suffice, the claimant must demonstrate that the entry of possession of the said land was non-permissive and non-consensual and without license. (*See the case of Mombasa Teachers Co-operative Savings & Credit Society Limited Vs Robert Muhambi Katana & 15 others [2018] eKLR*), where the Court held:

“**non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12years as espoused in the Latin maxim, nec vi nec clam nec precario**”).

Therefore, a claim based on a sale agreement cannot issue since the vendor’s consent and permission is obtained before one can gain ingress into the land.

In the **Peter Okoth Case, supra** as quoted by the Respondent, the Court observed that a claim for adverse possession cannot accrue on a sale agreement. However, such right will accrue upon payment of the final installment. This Court agrees with the sentiments of the Court in the above findings.

Further the Court of Appeal in *Civil Appeal Nairobi App No. 73 of 1982;- Public Trustee Vs Wanduru Ndegwa [1984] eKLR*, found that **Limitation of Action** begun running from the date of final payment.

The vendor died before land could be transferred, and there was no steps taken by the Estate to transfer land to the Purchaser or his estate. The Court of Appeal in *Nyeri Civil Appeal No. 22 of 2013; - Peter Mbiri Michuki v Samuel Mugo Michuki [2014] eKLR* held:

It is our considered view that when the appellant entered into a sale agreement with the plaintiff in 1964 and received the purchase price for the suit property, the appellant became a trustee holding the suit property in favour of the plaintiff. The plaintiff having paid the purchase price and took possession acquired an equitable beneficial interest in the suit property. Section 18 (4) of the Limitation of Actions Act applies in the instant case and the right to recover the suit property was not extinguished by death of the plaintiff. The plaintiff having been in possession of the suit property, Section 13 (1) of the Limitation of Actions Act applies as it provides that a right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run.

While the Applicant’s entry into the land was **permissive**, a claim for **adverse possession** accrued after the payment of the last installment as

held by the Court of Appeal in the above holding.

According to the testimonies of **PW1** and **DW1**, the Applicant made final payment for the purchase of the land in **1996**. As is evident from **“MMG4”** there was an agreement that the Applicant was to complete payment of the purchase price by August of 1996. DW1 told the Court **“I have seen exh No. 9. The date is 10th August, 1996 that is when I was paid the balance”**.

Therefore, it means that the final installment was made in 1996. Time in **adverse possession** begins to run when there is someone in adverse of the land and it matters not that title has not been issued. And also, it matters not that the suit land was under allotment. The fact that the vendor passed off as the registered allottee and had beneficial interest on the land capable of being registered and it appears that the land had been surveyed and delineated and that is the reason that the acreage is given. (*See Nairobi Civil Appeal No. 121 of 2006;- Benson Mukuwa Wachira Vs Assumption Sisters of Nairobi Registered Trustees [2016] eKLR*) where the court held;

“As Equity looks on that as done which ought to be done, it is legally plausible to assert that where, as here, a trespassing claimant (the respondent) was in continuous and uninterrupted possession and control of land belonging to a person (the appellant) who, as here, had an allotment letter to such land which was surveyed and delineated and had a title number and was registered under the RTA, such trespassing claimant, for all intents and purposes, must be deemed to have been in adverse possession to the title of the owner notwithstanding that such title was in the form of allotment letter in the beginning and notwithstanding that formal title is issued either after the 12 year period of adverse possession or after time in adverse possession had started to run”

The Agreement in issue herein is for **1994**, and this Court cannot make an inference that **adverse possession** accrued at the signing of the agreement. The Court of Appeal in *Kisumu App No. 82 of 2014 Wilfred Kegonye Babu v Henry Mose Onuko [2019] eKLR* quoted the case of *Wambugu v. Njuguna [1983] KLR 172*, where it was held:

“where the claimant is a purchaser under a contract of sale of land, it would be unfair to allow time to run in favour of a purchaser pending completion when it is clear that he was only allowed to continue to stay because of the pending purchase because had it not been for the pending purchase, the vendors would have evicted him. The possession can therefore only become adverse once the contract is repudiated”

“Where a claimant pleads the right to land under an agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is: the claimant’s possession is deemed to have been adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least twelve years after such payment”.

By application of the foregoing, time begun running from **1996** when the Applicant made payment of the last installment.

As to the nature of possession and occupation, the same must be **continuous, open, and honest**, with the proprietor’s knowledge. To determine the nature of possession, this court is guided by the decision in *Kisumu Civil Appeal no. 27 of 2013;- Samuel Kihamba v Mary Mbaisi [2015] eKLR*, where 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”

The Applicant contended that she has been in **open, uninterrupted, continuous occupation** of the land with the knowledge of the Respondent. To buttress this claim, the Applicant averred in paragraph 9 of her Supporting Affidavit that she has planted **300 Mango trees** and **Napier grass** on the part of **2 acres** of land that she attains from the suit land.

That she carries out **dairy farming** and has **built permanent houses** thereon. The Respondent attached photographs showing that there is a structure on the suit property and also **mango trees**. What is not in dispute is that there is a house and some mango trees on the suit property. While DW1 testified that the same belonged to her, PW1 claimed ownership. DW2 testified that the Applicant’s son lives on the suit property and admits to existence of dairy farming as there are cows thereon. While this Court finds that there is push and pull in terms of ownership, it also appreciates the evidence of DW2 which corroborates that of PW1, that she does farming on the suit property. Even if the Applicant is not living on the suit property, it matters not since her son is living thereon. She is the administrator of the Estate of **Andrew Githinji Nduati**.

Though it would be difficult to tell from the photographs whether the house was permanent or semi-permanent, the act of putting up a home demonstrates that the person who took possession had the intention of disinheriting the registered proprietor. The construction of the house would not have been done or constructed secretly without the Respondent’s knowledge. The Respondent testified that she does not live far from the suit property and it follows therefore that access to the land would be easy. In *Malindi Civil Case No 17 of 2016;- Chevron (K) Ltd Vs Harrison Charo Wa Shutu [2016] eKLR*, the Court held:

“We are equally satisfied from the evidence that, by building structures on the suit premises without obtaining permission from the appellant, as described earlier in this judgment, the respondent manifested animus possidendi, a clear mind and intention of dealing with the suit premises as if it was exclusively his and in a manner that was in clear conflict with the appellant’s rights. The appellant was, as such dispossessed of the suit premises by those acts. The respondent’s acts were *nec*

vi. nec clam, nec precario (that is, neither by force, nor secretly and without permission)."

Attached to the Applicant's documents are letters from the Chief of **Maragua Ridge Location**, on allegation of felony, which DW2 testified that he had no intentions of committing felony. The Chief's letter was written due to the fact that the Applicant had complained, but there is none by the Respondent, which shows that she had attempted to evict the Applicant herein.

In the letter dated 27th July 2017, by the Respondent addressed to the area Chief, the Respondent contended that there was a pending suit in Court and they should await the outcome. (See **Eldoret ELC No. 168 of 2012 Kiptanui A. Chuma v Kibor A. Kolil [2014] eKLR**)

The suit which is referred to is a **2013, Succession Cause**, in which the Applicant had put in an application for revocation of grant. It is trite that the filing of a suit asserting rights on land stops time from running. There is no evidence that the filing of the Succession Cause was for eviction of the Applicant from the suit property or was meant to assert rights over the land.

As stated above, **adverse possession** accrues on **land** and **not title**, and so unless the Respondent took such a step to evict or remove the Applicant from the land, the mere act of taking steps on title as opposed to land does not stop time from running.

There being no suit that stopped time from running, the Applicant's time is computed from **1996** which means she became adverse to the suit land in **2008**. The **Succession Cause** was filed in **2013**, and time had already accrued. Also there is no trace of evidence that the Respondent took any step to assert ownership. See **Eldoret Civil Appeal No. 212 of 2012:- Isaac Cypriano Shingore Vs Kipketer Togom [2016] eKLR where the Court held;**

"By the time the respondent filed the originating summons in November 2006, he had been in possession of the property for about 24 years. Even by the time the appellant became registered as proprietor by transmission on 28th April 2000, the appellant had been in occupation of the property for about 18 years. No attempts were made by the appellant over all those years to assert title. There is no merit in the argument by the appellant that the objection proceedings in the succession cause by the respondent and the complaint by the respondent before the Land Disputes Tribunal had the effect of interrupting the respondent's possession of the property. We are unable to appreciate how steps taken by the respondent to assert his claim to the property can be construed as steps by the appellant to assert his right to ownership of the property.

As the Court held in Githu Vs. Ndeete [1984]KLR 776 "Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land; see Cheshire's Modern Law of Real Property, 11th edition at p 894").

Having analysed as above, this Court finds and holds that the Applicant has met the threshold for the grant of orders of having acquired ownership of 2 acres out of **Maragua Ridge Settlement Scheme – Plot 121**, by virtue of adverse possession.

ii. Whether the Applicant is entitled to 2 acres out of the MARAGWA RIDGE SETTLEMENT SCHEME- PLOT 121

The Applicant contended that she is entitled to **2 acres** of the suit property, which has been disputed by **DW1** and **DW2**. **DW2** testified that the Applicant is entitled to $\frac{1}{2}$ an acre. There is no basis upon which the Respondent drew this conclusion. What would have guided the Court would be a report by the surveyor to show that the house, plantation and dairy farming are all done on $\frac{1}{2}$ acre piece of land. By dint of the finding above that a purchaser becomes adverse to land upon payment of the last installment, this Court finds that the Applicant is entitled to **two acres** as pleaded.

The prayer that the **Land Registrar** be directed to delete the name of the Respondent in the title document cannot be sustained. The Applicant is only entitled to **two acres** out of the entire parcel of land. Having found so, it follows then that the Applicant's share of **two acres** is to be hived from the suit land **Maragua Ridge Settlement Scheme Plot 121**.

Order 37 Rule 7(2), of the Civil Procedure Act, makes it a requirement that summons be accompanied by an extract of title. Attached to the Applicant's summons is a **Certificate of Search**. The legal effect of this search is provided for under section 35 of the **Land Registration Act**, which provides:

(1) Every document purporting to be signed by a Registrar shall, in all proceedings, be presumed to have been so signed unless the contrary is proved.

(2) Every copy of or extract from a document certified by the Registrar to be a true copy or extract shall, in all proceedings, be received as prima facie evidence of the contents of the document

While some courts including in the cases referenced by the Respondent have found that failure to attach an extract of title rendered the suit incurably defective, the Court of Appeal in **Nyeri Civil Appeal No. 265 of 2005; - Johnson Kinyua Vs Simon Gitura Rumuri [2011] eKLR**, held that a Certificate of Search can suffice, under the order. There being a Certificate of Search whose authenticity has not been challenged, the Court is so guided by the findings of the Court of Appeal.

iii. Who should bear costs of this suit?

It is trite that costs shall follow the events, and that the successful party is ordinarily awarded costs. It is not in doubt that the Applicant herein is the successful litigant and this Court has no reason not to exercise its discretion in her favour.

Having carefully considered the available evidence, the Court finds that the Plaintiff/Applicant has proved her case against the Respondent

herein on the required standard of balance of probabilities. Consequently, the Court enters Judgment in favour of the Applicant against the Respondent in the following terms; -

- a. That the Applicant has proved her claim for adverse possession**
- b. That the Applicant is entitled to ownership of 2 acres to be excised from MARAGWA RIDGE SETTLEMENT SCHEME-PLOT 121, having acquired the same by dint of adverse possession.**
- c. That Land Registrar Murang'a be and is hereby directed to issue title in the name of the Applicant for a portion of 2 acres upon the conclusion of the requisite process of demarcation and survey.**
- d. The Deputy Registrar of the Honourable Court do execute all documents necessary to effect the said transfer.**
- e. The Applicant is entitled to costs of this suit to be borne by the Respondent.**

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 8TH DAY OF FEBRUARY, 2022

L. GACHERU

JUDGE

Delivered online

In the presence of;

M/s Waititu H/B for M/s Kimani for the Plaintiff/Applicant

Mr Wandaka for the Respondent

Kuiyaki - Court Assistant

L. GACHERU

JUDGE