



Gachoka & another v Njuguna (Environment and Land Case Civil Suit 49 of 2017) [2022] KEELC 2501 (KLR) (7 July 2022) (Judgment)

Neutral citation: [2022] KEELC 2501 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND CASE CIVIL SUIT 49 OF 2017**

LA OMOLLO, J

JULY 7, 2022

BETWEEN

SAMUEL KINYANJUI GACHOKA 1ST PLAINTIFF

JACKSON KIMANI KAGUKU 2ND PLAINTIFF

AND

JOSEPH NGIGI NJUGUNA DEFENDANT

JUDGMENT

Introduction

1. The Plaintiffs vide the Complaint dated 10th February, 2017 averred that they are personal representatives of the registered owner of land parcel Nakuru/Rare/Kiriri/574. The said parcel measures approximately 2.0 Ha and the title deed was issued on 12th January, 1983.
2. They aver that the deceased allowed the Defendant to be the caretaker of the suit property but the Defendant, instead, converted the land for his own use. After the death of the deceased, the Defendant refused to vacate the land even after issuance of a Notice to vacate.
3. They further aver that the Defendant's actions amount to trespass and as a result they have suffered loss and seek eviction orders against the Defendant to give vacant possession.
4. The Plaintiffs pray for judgement against the Defendant and seeks the following orders:
 - a. A declaration that the Plaintiffs be declared the legal and beneficial owners of land known as LR Nakuru/Rare/Kiriri/574. (sic)
 - b. An eviction order against the Defendant/his servants/agents for the land known as LR Nakuru/Rare/Kiriri/574.
 - c. Costs of this suit.



5. The Defendant filed his statement of Defence and Counter Claim dated 6th February 2018 on 7th February, 2018. He avers that he was invited together with his wife by Joseph Gachoka Kaguku (Deceased) to live on land parcel No. Nakuru/Rare/Kiriri/574 and cultivate it.
6. He also avers that they have been in possession of the suit property for a period of over thirty years and then denied all the other contents in the Plaint.
7. In the counterclaim he avers that his wife had been gifted one acre of land by the deceased and has been in occupation since.
8. He also avers that the Plaintiffs have been claiming ownership of the suit property inclusive of the Defendant's one acre.
9. He further avers that in the month of March 2016, the Plaintiffs together with the Chief, District Officer hired goons and invaded the said land and brought down trees, crops and other properties amounting to Kshs. 1,711,600/=.
10. He therefore seeks judgement against the Plaintiffs for:
 - a. A declaration that the Defendant is entitled to be registered as the proprietors of the suit land on behalf of his wife and the Plaintiff executes the relevant documents to facilitate the transfer thereof.
 - b. A permanent injunction order restraining the Plaintiffs, their servants' agents and all who claim through them from trespassing and/or interfering in any way with the Defendant's one (1) portion of land.
 - c. An order for payment of damages as assessed by the court and interest therein at court rates.
 - d. Any other relief as the court may deem just.

Plaintiffs Evidence.

11. At the hearing, Samuel Kinyanjui Gachoka, testified as PW1. He adopted his witness statement dated 10th February, 2017 as his evidence.
12. It was his testimony that land parcel No. Nakuru/Rare/ Kiriri/ 574 belonged to his late father Joseph Gachoka Kaguku. He produced the title deed as Exhibit P1 and testified that the land is approximately five acres.
13. It was his evidence that the title deed was issued on 12th January, 1983 and that his father died on 20th February, 2013. He testified that his father was not in occupation of the land but it had a tenant who is the Defendant.
14. He testified further that the Defendant was paying Kshs. 6,000/= for use of three acres and that he was not sure when he took possession as he had not been born.
15. He also testified that his father would visit the suit property once or twice a year. After the death of his father, he sought letters of Administration and the same were granted. He produced them as Exhibit P2.
16. It was his evidence that upon the death of his father, they decided that the rent of Kshs. 6,000/= was too little and therefore increased it to Kshs. 10,000/=.



17. He testified further that his mother and his uncle Jackson wrote a letter to the defendant and when they went to deliver it to him, he was away and so they slipped it under his door.
18. PW1 went on to testify that by June 2014, the Defendant was still on the parcel of land and that in 2015, his uncle Jackson was summoned by the District Officer Njoro to explain why he wanted to evict the Defendant and also explain the issue of ownership.
19. He went on to testify that his uncle went to the District Officer and explained to him that he is the brother to the deceased and one of the Administrators of his Estate. He testified that at that meeting, no agreement was reached and when his uncle went to the suit land in 2016, he found that the Defendant was still in occupation.
20. It was his further evidence that in March, 2016, his uncle went to the suit land and started tilling it and met the daughter of the Defendant whom he requested to remove what was on the parcel but she did not.
21. He testified that subsequently, they went to a lawyer who wrote the letter dated 18th January, 2017 asking the Defendant to stop using the land and vacate it. The letter was produced as Exhibit P3.
22. He also testified that the Defendant refused to vacate the land claiming that the deceased had gifted him one acre. He added that the Defendant is tilling three acres and uses the rest of the land to graze cattle. He produced photographs as Exhibits P4(a), (b) and (c).
23. He produced his late father's death certificate as Exhibit P5 and testified that no one joined the succession cause as an objector and that the Defendant has not paid any rents since his father died.
24. He then prayed for eviction orders against the Defendant, costs of the suit, a declaration that they are the beneficial owners of the suit parcel and rents for the period that the Defendants have been in occupation.
25. On cross examination, PW1 confirmed that his father had informed them that there were some tenants on the suit property but that he didn't know if there was a Tenancy or Lease agreement.
26. He also confirmed that he did not have anything to show that the Defendant was paying Kshs. 6,000 as rent and that he has never visited the suit parcel of land.
27. He further confirmed that by 1986 he had not been born so he doesn't know what took place that year. He admitted that his father had told him about the tenancy and the tenants.
28. He also confirmed that his mother had written a letter to the Defendant increasing the rent but that he did not have the said letter. He admitted that he was not aware that his uncle Jackson had destroyed the Defendant's crops.
29. PW1 admitted that that the succession cause was filed in Gatundu Law Courts while the Defendant lives in Lari and that he didn't know whether the Defendant was aware of it.
30. He also admitted that the Chief's letter used during succession was from the Chief in Gatundu who wouldn't know what was happening in Lari.
31. He confirmed the Plaintiff has no prayer for mesne profits.
32. On re-examination, he reiterated that his father had told him that the Defendant was paying Kshs. 6,000/= as rent and that he didn't know when the Defendant occupied the parcel. He also stated that no one has been to their home to make their claim against the suit land.



33. Evans Mwaura Mbugua testified as PW2. It was his evidence that he knows the suit land adding that it borders his parcel of land No. Nakuru/Rare/Kiriri/575.
34. It was his evidence that he knows Joseph Gachoka (deceased) as he used to work with him at the lands office.
35. He stated that he knows that the Defendant occupied the suit property but he does not remember from which date.
36. It was his evidence that he was at home when he heard a lot of noise coming from Ngigi's home and that Ngigi owns a parcel of land that is next to his.
37. He testified that the commotion happened in the early nineties and when he went there, he found the Defendant attempting to commit suicide.
38. It was his evidence that they performed first aid and he regained consciousness and it was later found that the Defendant and his wife and his mother had been quarreling. He stated that he did not know what the quarrel was about.
39. He testified that a lot of people including neighbors went to Ngigi's homestead to try and find a solution. Some of the neighbours who were present, he stated were: Leonard Nganga, Isaac Wagaca and Geoffrey Mbugua.
40. He testified further that they needed to find a place for the Defendant to go so that the Defendant's wife and mother-in-law would not come into contact.
41. PW2 testified that he contacted Joseph Gachoka (deceased) and asked him to give them his parcel of land which had a house so that the Defendant could live there and after a month, the Defendant was given the house and the land and was to pay Kshs. 6,000/= per year.
42. He testified further that the Defendant agreed to the terms and that every year the deceased would visit the suit land to collect rent and that whenever he visited, he would stay at his house.
43. It was his testimony that the deceased never told him that he had given the Defendant one acre but had only allowed him to put up a small house for his son who had been circumcised and could not, culturally, continue living in the same house with the Defendant.
44. He also testified that after Gachoka died, there was a dispute with regard to the suit property between the 2nd Plaintiff and the Defendant and at that at the time he was the Assistant Chief.
45. It was PW2's testimony that the wife of the 2nd Defendant had written a letter to increase the rent to Kshs. 12,000/= per year and the District Commissioner sat to arbitrate the dispute.
46. It was his testimony that the 2nd Plaintiff wanted the Defendant to be evicted but the Defendant refused to vacate and alleged that the deceased had given him one acre of the suit land but he had no documents to prove the same.
47. PW2 testified that they were not able to get a solution and so the 2nd Plaintiff was asked to get an eviction order.
48. On cross examination, he admitted that he saw the Defendant take possession of the suit property in the 1990's and that there was no agreement.



49. He also confirmed that Kshs. 6,000/= would be paid in cash and the deceased would collect the rent and stay at his house. He further confirmed that the deceased would tell him all the matters pertaining to the suit parcel and would confirm he had been given the rent.
50. PW2 testified that the outcome of the meeting with the District Commissioner was that the Defendant was to vacate the suit property or the Plaintiffs would go to court.
51. He admitted that he heard about the gifting of the one acre at the District Commissioner's meeting and that he had never heard about it before. He also admitted to have heard that the Defendant's crops were damaged.
52. When referred to the letter from the OCS Naishi Police Station to the Agricultural Officer Naishi dated 18th March 2016, he stated that he had never seen the letter and neither was he aware of its contents.
53. He stated that from the 1990's to 2013 he never heard of any quarrel between the deceased and the Defendant.
54. On Re-examination he stated that the agreement that led to the Defendant taking occupation of the suit property was not in writing and that he never heard of the Defendant being gifted one acre as the deceased never informed him of such a gift. He also stated that he has never been charged for causing destruction to the Defendant's crops.
55. Leonard Njenga Njoroge testified as PW3. He testified that he was neighbors with the deceased Joseph Gachoka and that he knew the suit land.
56. It was his evidence that he was present when Joseph Ngigi took occupation of the suit land. He testified that one morning in the year 1992 while he was digging a pit latrine he heard screams,
57. He testified further that they needed to know what the screaming was about as it was coming from the home of the Defendant's mother.
58. He testified that when they went there, they found the wife of the Defendant screaming outside the house. That they went into the house and found the Defendant suspended on a rope that was hanging from his neck.
59. It was his evidence that there was a stool nearby which he climbed on and cut the rope with a panga. He found out that the reason why the Defendant was taking his life was because his wife and mother did not have a good relationship and that his mother had made a decision to chase them away.
60. He testified that many people went to the homestead and they included Isaac Wagash, Godfrey Mbugua and Evans Mwaura. He added that neighbors held a meeting and tried to reconcile the Defendant and his mother but his mother declined.
61. It is his testimony that Evans- PW2 had an idea that there was a house at Gachoka's parcel of land that was not occupied and they therefore agreed that the Defendant should live there.
62. PW3 further testified that at the time they did not consult the deceased but tasked PW2 to reach out to him and seek his consent. That at the end of that month, the deceased visited the suit land and agreed to accommodate the Defendant and his wife at the house on the suit parcel of land.
63. He also stated that it was agreed that the Defendant and his wife would pay for three acres of land at Kshs. 2000 per acre and live in the house rent free. It was his testimony that the deceased would come once or twice a year to collect rent.



64. PW3 further stated that when the deceased visited the suit land, they would meet at PW2's house adding that he never heard that the deceased had gifted land to the Defendant.
65. He also testified that the parcel of land had a house and subsequently a small house was built for the Defendant's son. He also testified that the last time he saw the deceased was in 2010.
66. On cross examination he confirmed that the Defendant was to pay an annual rent of Kshs. 6000 and that he witnessed the payment of the rent twice or thrice.
67. He also confirmed that the Defendant lived peacefully on the parcel of land since the year 1992 to 2013 and that there was no problem at all.
68. The Plaintiffs then closed their case.

The Defendant's Evidence.

69. Tabitha Wairimu testified as DW1. It was her evidence that the Defendant is her husband while Joseph Gachoka is the owner of the suit property.
70. She adopted her witness statement dated 6th February, 2018 as part of her evidence. In her statement, she stated that she sought a place to stay from the late Joseph Gachoka Kaguku after her husband had disagreed with his mother.
71. She stated further that the late Gachoka allowed them to stay on the suit property which measures around five acres to cultivate and take care of it.
72. In her statement she indicated that they planted trees, Napier grass, maize and other food products that was meant to sustain them.
73. She states that after they moved to the suit property, the late Gachoka took her to "mzee wa kijiji" (village elder) and was given permission to demolish the house and build a more comfortable one to live with her family.
74. She also states that after their son turned seventeen years, the late Gachoka took her back to the "mzee wa kijiji" (village elder) and told him to assist her in constructing a house where their son would stay since he had become a grown man.
75. She further states that after they finished constructing the house, the late Gachoka informed her that he would not chase them out of the suit property and instead he was going to give them one acre out of the five acres.
76. She also states that the late Gachoka would visit them once every year and if he was not able to, he would call them to find out how they were doing. That in the year 2012, they were informed by the area Assistant Chief that Gachoka had died.
77. Her statement also indicated that in the year 2014, the area Chief, assistant Chief, District Officer and one of the Plaintiffs went to the suit property and destroyed the trees, napier grass, maize and bananas.
78. As a result, they went for a meeting at the District Officers office where the Plaintiffs came forward and identified themselves as step brothers to the deceased and yet for the time they had known the late Gachoka, he had told them that he had no wife and children.
79. In her oral evidence, DW1 testified that she has been on the suit property for a period of over thirty-six years and that they have never had any dispute with Joseph Gachoka.



80. She testified that the dispute over the suit property begun after Joseph Gachoka had died.
81. It is her testimony that she has never paid anything to Joseph Gachoka because he had asked her to stay on the land and take care of it. She testified further that Joseph Gachoka had promised her one acre of land in the event that he sold the land.
82. She further testified also that there was no agreement in place and that the late Gachoka used to visit the land once a year to check on its progress and that it is not true that the Defendant used to visit to collect rent as stated by PW3.
83. She testified that PW3 never attended their meetings with Joseph Gachoka.
84. In her witness statement she prays that the court to grants her one acre from the suit property as promised by the late Gachoka to enable her take care of their seven children so that they are not rendered homeless.
85. On cross examination DW1 confirmed that the deceased allowed her and the Defendant to stay on his land because the Defendant had quarreled with his parents and had nowhere to stay.
86. She admitted that her husband attempted suicide but was rescued by the villagers including PW2 and PW3 who were their neighbors.
87. She also admitted that Joseph Gachoka had given them permission to stay on the land but he was not living on it. She stated that the deceased would come to the land once a year and it was during one of those visits that he gave them permission to live on it.
88. She further admitted that she was the one who was given the land and this was after the deceased had found her grazing cattle on it. She stated that they did not have any relationship and only met that day she was grazing cattle.
89. DW1 confirmed that PW2 was Gachoka's workmate but he was not the one who introduced her to the deceased. She stated further that after permission to occupy the land was given, they went to the village elder.
90. She stated that it is not true that PW2 is the village elder whose name she did not disclose in paragraph 3 of her witness statement.
91. She also stated that Evans Mwaura who testified as PW2 was not present during the negotiations and permission to take occupation of the land.
92. She confirmed that there was a portion of land on the suit property which they lived in when they occupied the land. She also confirmed that as per paragraph 4 of her statement, when her son attained seventeen years of age, they asked the village elder and Gachoka for permission to build a house for their son.
93. She stated that the house that they build for their son has three rooms and is made of mud. She also stated that she could bring photos of the house but they were not attached.
94. DW1 further stated that the deceased had told her that he would give her one acre of the land in the event that he sold the land but the land was not sold. She admitted that she could not remember the year that agreement was made.
95. DW1 further admitted that the agreement for one acre was not in writing and that they never went to the Land Control Board. She admitted that there was no survey done nor did a surveyor subdivide the land, there was also no transfer form executed in their favor and that they had no title to the one acre.



96. She confirmed that after the death of Gachoka, they did nothing to have the land registered in their name.
97. She was referred to her statement and she confirmed that she had stated that Gachoka did not have a wife or children. She reiterated that she never visited the deceased but only met him the first time when she was grazing cattle.
98. She stated that when she met Gachoka, he had told her that he did not have a wife or children and that they never filed a Succession cause to claim one acre from his estate.
99. On re-examination she stated that she knew PW2 who is her neighbor but he was not present during the agreement with Gachoka.
100. She also reiterated that her husband attempted suicide and that they took possession of that property the same day.
101. She stated that she did not know the name of the village elder and that there is a house on the suit property that belongs to her son.
102. She concluded her testimony by stating that Gachoka didn't have any family in the thirty-one years she knew him as she never saw any family members.
103. Joseph Ngigi Kamau testified as DW2. He adopted his witness statement dated 16th February, 2018 as part of his evidence in this matter. His witness statement reiterated the contents of the witness statement of his wife Tabitha Wairimu Chege.
104. It was his evidence that he met the deceased James Gachoka on the suit parcel of land where he has lived for over thirty-six years without any dispute.
105. He testified that the dispute begun after Gachoka's death- nine years ago and before he died, he had lived on the land for twenty-seven years.
106. It was his evidence that he knew Leonard Njenga Njoroge who testified as PW3 and that he was not present during their talks with Gachoka but had assisted them.
107. He testified further that he knew Evans Mwaura who testified as PW2 as he was the Assistant Chief. That there was no agreement for payment of rent for the land and that Gachoka had told them that he would give them one acre for taking care of the land.
108. It was further his evidence that Gachoka had said that he does not have a family after he had asked him to introduce him to his family.
109. He testified that he did not know Samuel Kinyanjui who had testified as PW1 and that he has never asked them to vacate the land. He also testified that he has never been involved in any succession cause in respect to the suit land.
110. He also testified that the village elder he mentioned was Ngige Kiriba and that Gachoka would go the land once a year to check up on it. That the land had two houses on it, one which he found already constructed and the other that he built with Gachoka's permission.
111. On cross examination, he confirmed that he had attempted suicide and that it was his mother and brother who rescued him and not the neighbors and that anyone saying that the neighbors rescued him is not telling the truth. He also stated that he doesn't know if that's what his wife had stated.
112. He also confirmed that PW2 and PW3 were his neighbors and one of them is an assistant chief.



113. DW2 further confirmed that when they took possession of the land, there was one house on it which they lived in. He admitted that it was Gachoka who gave them permission to live on the land after taking them to the Chief.
114. He denied that the village elder he had mentioned was Evans Mwaura and instead the elder was Ngige Kariba and that it was not Evans Mwaura who had arranged for them to live on that land.
115. Dw2 stated that the arrangement to live on the suit property was between himself, his wife and Ngige Kariba. He confirmed that the entire parcel of land is five acres and that they were allowed to use the entire parcel of land.
116. He stated that they used two acres for farming while they lived on a quarter of the suit property. He confirmed that there was no written agreement and that the oral agreement was done in 1987.
117. He confirmed further that he was allowed to build a mud house for his son and that he also lived in a mud house. He stated that Gachoka had agreed to give them one acre in the year 1992.
118. He admitted that there has never been a survey done and neither did they go to the Land Control Board. He also admitted that the late Gachoka did not write anywhere that he would give them one acre of land and that he also did not execute any transfer.
119. He admitted further that the late Gachoka used to go to the land once a year but it was not to collect rent. That the late Gachoka never demanded anything from them as they were only looking after the land and that the five acres was rent free.
120. He stated that the dispute arose after he had died and it had been going on for eight years. That he had done nothing to claim the one acre and has never filed a succession cause to try and get it.
121. He stated further that Allan Mwaura Mbugua, the Chief and the District Officer caused havoc and started destroying his property.
122. He admitted to not knowing who the Plaintiffs were and after he was referred to the Grant for Letters of Administration, he admitted to not knowing that they were the Administrators of the Estate of Gachoka.
123. He admitted further that after the death of Gachoka, he continued to farm on two acres without getting any permission.
124. He stated that there is nothing from the court that gives them permission to use the land.
125. He confirmed to not knowing who the 2nd Plaintiff was as he saw him for the first time in court and before the matter was filed, he had never seen him.
126. He also confirmed that in his statement he had stated that the Chief, Assistant Chief, the District Officer and one of the Plaintiffs went to the land and destroyed his trees, grass, maize, and bananas but it is not true that the Plaintiffs went to his land.
127. He went on to state that in 2014, the 2nd Plaintiff never went to the suit property to inform him that he was an Administrator of the Estate of the deceased.
128. He admitted that he never visited the home of Gachoka to find out if he had a family and that he never approached the family of Gachoka to talk about the one acre.
129. He admitted further that he never filed any objection to the succession cause as he did not know about it adding that he continued farming the land after the death of the deceased.



130. He has also admitted that he has never given the Plaintiffs any money and that he never gave the deceased anything.
131. On re-examination he stated that he never filed any objection to the succession cause because he was not aware that they had filed it.

Submissions.

132. The Defendant in his submissions gave a background of the matter.
133. The issues for determination as identified by the Defendant are:
 - a. Whether adverse possession has been established by the Defendants
 - b. Whether the Defendant's prayer should be granted.
134. On the first issue the Defendant submitted that he has proved to the required standard the ingredients of adverse possession and cited the cases of *Mtana Lewa Vs Kabindi Ngala Mwangandi* [2005] eKLR and *Tabitha Waitberero Kimani Vs Joshua Ng'ang'a* [2017]. He then sought that the prayers in his Counter Claim be granted.
135. As at the time of writing this judgment, there are no submissions filed by the Plaintiffs.
136. It is my considered view that the issues for determination are:
 - a. Whether the Plaintiffs are the legal and beneficial owners of LR. Nakuru/ Rare/ Kiriri/574.
 - b. Whether the claim of gift of one acre out of the suit land is binding on the Plaintiffs.
 - c. Whether the defence of adverse possession is available to the Defendants.
 - d. Whether orders of evictions should issue against the Defendant.
 - e. Who should bear the cost of this suit.

Analysis And Determination.

137. I have read and taken into consideration the pleadings filed in respect of this matter, oral evidence tendered, exhibits produced, submission of the defendant and judicial decisions referred to.

A. Whether the plaintiffs are the legal and beneficial owners of LR. Nakuru/ Rare/ Kiriri/574.

138. PW1 is the son of the late Gachoka. The late Gachoka is the registered owner of the suit land. PW1 produced a title deed as Exhibit P1.
139. PW1 also produced a copy of the death certificate of the late Gachoka as Exhibit P5. The death certificate shows that the deceased died on 28/2/13. The plaintiffs also produced letters of administration and a certificate of confirmation of grant as Exhibit P2.
140. The certificate of confirmation of grant describes the suit land and states that the plaintiffs herein together with Rahab Wacuka Mwangi holds the suit property for themselves and in trust for certain other persons listed in the certificate of confirmation of grant.
141. Importantly, the defendant and all his witness acknowledge that the suit property belongs to the defendant. However, they are laying claim to one acre thereof for the reason that the defendant said he would gift it to them or gifted it to them and if that is not too convincing then they will claim it by way



of adverse possession. I will deal with this aspect of the defendant's claim and defence in subsequent paragraphs.

142. Bearing this evidence in mind, I find that the plaintiffs are the legal and beneficial owners of LR. Nakuru/ Rare/ Kiriri/574.

B. Whether the claim of a gift of one acre out of the suit land is binding on the plaintiffs.

143. The modes of acquisition of title to land are provided in section 7 of The Land Act, 2012.

Title to land may be acquired through—

- a) allocation;
- b) land adjudication process;
- c) compulsory acquisition;
- d) prescription;
- e) settlement programs;
- f) transmissions;
- g) transfers;
- h) long term leases exceeding twenty-one years created out of private land; or
- i. any other manner prescribed in an Act of Parliament

144. The defence witness Tabitha Wairimu (the defendant's wife) in her filed witness statement states;

“the late Joseph Gachoka Kaguku informed me that he cannot chase us out of his property instead he is going to give us (emphasis is mine) one acre of land out of the five acres of the said land.”

145. The Defendant filed his witness statement in which he states as follows;

“that after we finished constructing our son's house. The late Joseph Gachoka Kaguku (Deceased) informed my wife that he cannot chase us out of his property instead he is going to give (emphasis is mine) us an acre of land out of the five acres of the said land.”

146. Their oral testimonies are also to the effect that the deceased promised to give them an acre.

147. The plaintiffs who are family members of the deceases and their witnesses who are neighbours of the defendant and friends of the deceased have testified and, in their testimonies, they deny knowledge on this promise.

148. The question that follows is whether an oral promise by a deceased person to transfer an interest in land to another entitles that other person to an interest in the said parcel. I think not.

149. The law recognizes transfers as a mode of acquisition of title to land. The promise by the deceases should have been followed by execution of transfer instruments. This didn't happen and I have no way of establishing the intention of the deceased person.



150. In the case of *Evans Onguso & 2 others v Peter Mbuga & 4 others* [2020] eKLR, the learned judge faced with a similar circumstance relied on the decision in *Estate of M'Raiji Kithiano (Deceased)* eKLR Meru HC Succ. Cause No. 419 of 2006.

“—A gift inter vivos should be complete in order to be valid. Ordinarily a gift in land should be effected through a written memoranda or transfer on a declaration of trust in writing showing that the land was gifted --But, if a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the Court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor’s subsequent conduct gives the donee a right to enforce the promise.”

147. In the said decision of *Evans Onguso* Supra, the learned Judge also made reference to the decision *in The Estate of the late Gedion Manthi Nzioka (deceased)* (2015) eKLR where the learned judge stated as follows concerning gifts inter vivos;

“In law, gifts are of two types. There are the gifts made between living persons (gifts inter vivos), and gifts made in contemplation of death (gifts mortis causa). For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of. Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing (Emphasis is mine). Gifts inter vivos must be complete for the same to be valid...”

151. What is meant by an incomplete gift? In the Estate of the late Gedion Manthi Nzioka Supra, the learned judge makes reference to the definition contained in *Halsbury’s Laws of England* 4th Edition Volume 20(1) at paragraph 67. It is as follows;

“Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor’s subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.”

152. In the circumstances, I find that the promise by the deceased to gift the one acre the defendant is incomplete and imperfect. There is no written evidence of the promise and further no evidence that the deceased executed transfer forms so as to initiate the transfer process. I cannot therefore compel the plaintiff to complete or perfect it.

153. Consequently, the claim of a promise by the deceased to gift one acre out of the suit land to the defendant fails.

C. Whether the defence of adverse possession is available to the defendants.

154. In *Kabindi Ngala Mwangandi Vs Mtana Lewa* [2014] eKLR, the learned judge while making a determination on the constitutionality of the doctrine of adverse possession, began his analysis by defining the term “adverse possession and he stated thus;



Adverse possession is the process by which a person can acquire a title to someone else's land by continuously occupying it in a way that is inconsistent with the right of the owner. If the person in adverse possession continuously occupies land, and the owner does not exercise his right to recover it by the end of the prescribed period of 12 years, the owner's remedy as well as his title to the land are extinguished by virtue of the provisions of sections 7,9,13,37 and 38 of the [Limitation of Actions Act](#).

155. A registered owner of land by the provisions of section 7 of the [Limitation of Actions Act](#) may not bring an action-

“...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
“.

156. Section 9 (2) provides as follows;

Where a person brings an action to recover land of a deceased person, whether under a will or on intestacy, and the deceased person was on the date of his death in possession of the land, and was the last person entitled to the land to be in possession of the land, the right of action accrues on the date of death.

157. In [Chevron \(K\) Ltd v Harrison Charo Wa Shutu](#) [2016] eKLR, the learned Judges of appeal remind us of the rationale of acquiring land by adverse possession and in doing so referred to the passage from the decision in *Adnam v Earl of Sandwich* (1877) 2QB 485.

“The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties “

158. In [Peter Okoth v Ambrose Ochido Andajo & Benedict Odbiambo Oketch](#) [2021] eKLR it was observed as follows;

Adverse possession has been defined as a method of gaining legal title to real property by actual, open, hostile and continuous possession of it to the exclusion of its true owner for the period prescribed by law which is 12 years as per the [Limitation of Actions Act](#), Cap 22 of the Laws of Kenya

According to Halbury's Laws of England, 4th Edition Volume 28, paragraph 768; No right to recover land accrues unless the land is in the possession of some person in whose favour the period of limitation can run. What constitutes such possession is a question of fact and degree. Time begins to run when the true owner ceases to be in possession of his land.”

159. The import of section 7 is that a defence of adverse possession is available to a person in possession of land and that an owner is barred from instituting a claim against a person in possession after the end of 12 years from the time that the right of action accrues to him.

160. Section 9 speaks to the circumstances in this case. The plaintiffs have instituted action to recover land of a deceased person- Joseph Gachoka Kaguku. The deceased person died intestate, as at the date of his death, he was in possession of the suit land. The right of action- by his legal representatives- to take



possession of the suit land accrued on the date of death i.e. 28th February, 2013 and it is on the same date that time began to run.

161. DW1 have tendered evidence that the plaintiff would visit the suit land every year to check on its progress.
162. Dw2 acknowledges that the dispute pertaining to the suit land started when the owner died in the year 2013.
163. In my view, for the defendant to successfully sustain a defence of adverse possession against the representatives of the estate of the late Gachoka, they would have to prove that they have been in occupation of the suit land without force, without secrecy, and without persuasion for more than 12 years from the date of death of the owner. This suit was filed in 2017. The period between the death of the owner and the institution of this suit is only 4 years.
164. In *Munyaka Kuna Company Limited Vs Bernado Vicezo De Masi (The Administrator of The Estate of Domenico De Masi (Deceased))* (2018) eKLR, the court addresses the ingredients of a claim of adverse possession as follows:

“To establish adverse possession, a litigant must prove that he has both the factual possession of the land and the requisite intention to possess the land (animus possidendi). Secondly, one must prove that he has used the suit land without force, without secrecy, and without persuasion (nec vi nec clam nec precario) for the prescribed limitation period of twelve years. Third, he must demonstrate that the registered owner had knowledge (or the actual knowing) that the adverse possessor was in possession of the suit property. Fourth, the possession must be continuous; it must not be broken or interrupted.”

165. I am minded to delve substantially on the question of possession as an important aspect of the defendant’s claim. The Court of Appeal in *Wilson Kazungu Katana & 101 others v. Salim Abdalla Bakshwein & another* [2015] eKLR sought to define what constitutes adverse possession. The court stated as follows:-

“From all these provisions, what amounts to adverse possession? First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.

This concept of adverse possession has been the subject of many discourses and decisions of this Court. Suffice to mention but two, *Kasuve v Mwaani Investments Limited & 4 others* [2004] 1KLR 184 and *Wanje v saikwa (2)* (supra).

In the first decision, the court was emphatic that in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of twelve years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition.

In the *Wanje* case, the Court went further and took the view that in order to acquire by statute of limitations a 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 and that what constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use.

Further, the court opined that a person who occupies another's persons land with that person's consent, cannot be said to be in adverse possession as in reality he has not dispossessed the owner of the land and the possession is not illegal. (Emphasis is mine)

What these authorities are emphasizing is that for one to stake a claim on a parcel of land on the basis of adverse possession, he must show that he entered the parcel of land more or less as a trespasser as opposed to by consent of the owner. (Emphasis is mine)

In other words, his entry must be adverse to the title of the owner of the land. It is also possible to enter the land with the consent of the owner, but if the owner at some point terminates the consent and the applicant does not leave but continues to occupy the land and the owner takes no steps to effectuate the termination of the consent for a period of twelve years after then, such applicant would be perfectly entitled to sue on account of adverse possession.....”

166. In the case of *Wilson Kazungu Katana* Supra the Court of Appeal also made reference to its decision in *Samuel Miki Waweru v Jane Njeri Richu*, Civil Appeal No. 122 of 2001, (UR), where it held as follows:

“...it is trite law that a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in *Jandu v Kirpal* [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted...”

167. In the said decision of *Wilson Kazungu Katana* Supra the Court of Appeal also referred to the decision of the Indian Supreme Court decision in *Karnataka Board of Wakf vs Government of India & Others* [2004] 10 SCC 779 where the court stated thus: -

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. (Emphasis is mine) It is a well settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continues. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

168. The evidence tendered in this matter points to the tragic circumstances under which the defendant and his wife took occupation of the suit land. Importantly, and as confirmed by defendant and his witness, occupation and possession was with the consent of the deceased and not as a trespasser. At no point was their entry and possession adverse to the title of the deceased.
169. The defendant in his written statement of defence states that he was invited together with his wife by Joseph Gachoka Kaguku (Deceased) to live on land parcel No. Nakuru/Rare/Kiriri/574 and cultivate it.



170. The Defendant has refuted claims of paying rent to the deceased owner. In my view the fact of payment or rent is of no legal consequence to the claim for eviction or adverse possession.
171. I believe that I have conclusively dealt with the question of adverse possession and I am not persuaded that the Defendant has been in possession of the suit land without force, without secrecy and without persuasion for 12 years as against the legal representatives of the Late Gachoka or the late Gachoka.

D. Whether orders of evictions should issue against the Defendant.

172. On account of my finding in (c) and (d), I have no doubt that orders of eviction should issue should issue against the Defendant.
173. The Administrators of the Estate of the deceased wish to take possession of the suit land and they have every right to do so.

E. Who should bear the cost of this suit.

174. The general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21).
175. In the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* SC. Petition No. 4 of 2012: [2014] eKLR. The Supreme Court held that costs follow the event and that the Court has the discretion in awarding such costs.

Disposition.

176. The Upshot of the foregoing is that judgment is entered in favour of the plaintiff in the following terms;
- a. A declaration is hereby issued that the Plaintiffs are the legal and beneficial owners of land known as LR Nakuru/Rare/Kiriri/574.
 - b. An eviction order is hereby issued against the Defendant, his servants and/or agents in respect of the land known as LR Nakuru/Rare/Kiriri/574.
 - c. There shall be a stay of execution of the orders in (b) for a period of 90 days from the date of this judgment.
 - d. Each party shall bear its own cost.
177. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 7TH DAY OF JULY, 2022

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Njoroge for the Plaintiffs

Miss. Chepnetich for the Defendant

Court Assistant; Ms. Jeniffer Chepkorir.

