



REPUBLIC OF KENYA



**Kamwaro & 7 others v Nyamu & another (Environment & Land Case  
205 of 2016) [2022] KEELC 15702 (KLR) (1 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 15702 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT & LAND CASE 205 OF 2016**

**EC CHERONO, J**

**JULY 1, 2022**

**BETWEEN**

**NDITI KAMWARO ..... 1<sup>ST</sup> PLAINTIFF**  
**EVAN KAMANDO MUCHOKI ..... 2<sup>ND</sup> PLAINTIFF**  
**VIRGINIA WANJIRU MUCHOKI ..... 3<sup>RD</sup> PLAINTIFF**  
**TERESIAH WARUGURU MUCHOKI ..... 4<sup>TH</sup> PLAINTIFF**  
**PETER MWANGI MUCHOKI ..... 5<sup>TH</sup> PLAINTIFF**  
**ELIZABETH NJOKI MUCHOKI ..... 6<sup>TH</sup> PLAINTIFF**  
**LUCY WANGECHI MUNYI ..... 7<sup>TH</sup> PLAINTIFF**  
**NANCY WAMBUI MUCHOKI ..... 8<sup>TH</sup> PLAINTIFF**

**AND**

**PETER WANJOHI NYAMU ..... 1<sup>ST</sup> DEFENDANT**  
**MAGI INEGENE ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1 The plaintiffs commenced this suit by way of an originating summons dated May 28, 2016 where they seek they seek the following orders;-

1. That the applicants be declared to become entitled by adverse possession of over 12 years to all of that parcel of land known and described as NO. L.R Mwerua/kabiriri/589 And 590 Which Are Sub-division Of L.r Mwerua/kabiriri/294.
2. That the applicants be registered as proprietors of that parcel of land known and described as NO. Mwerua/kabiriri/589 And 590 Which Are Sub-division Of L.r Mwerua/kabiriri/294.



3. That The Land Registrar, Kirinyaga County Do Register The Applicants As Absolute Proprietors Of That Parcel Of Land Known And Described As No. Mwerua/kabiriri/589 And 590 Which Are Sub-division Of L.r Mwerua/kabiriri/294.
  4. That the respondent be ordered to pay the costs of the suit herein to the applicants.
  5. That the court do issue such further or better relief as may be just and expedient.
2. The originating summons is supported by the affidavit of Nditi Kamwaro, the 1<sup>st</sup> plaintiff herein sworn the same date. The said affidavit is further supported by numerous annexures. The suit is opposed with a replying affidavit sworn by Daniel Maina Magi, the 2<sup>nd</sup> respondent herein on 25/6/2018. The 1<sup>st</sup> defendant/respondent also opposed the application vide a replying affidavit sworn on 18/3/2019.
  3. After filing their compliance documents under order 11 C.P.R., this court certified this case as ripe for hearing.

#### **Plaintiffs/applicants Summary Of Facts**

4. Virginia Wanjiru Muchoki (PW1) who is also the 3<sup>rd</sup> plaintiff herein was sworn and stated that Nditi Kamwaro (1<sup>st</sup> plaintiff) gave her a power of Attorney to conduct this suit on her behalf. She produced the said power of Attorney in her evidence as P-exhibit 1. She also referred to the supporting affidavit sworn by the said Nditi Kamwaro which she sought to be adopted in her evidence. The 3<sup>rd</sup> plaintiff further referred to two documents annexed to the supporting affidavit of Nditi Kamwaro which she produced as P-exhibit 2 & 3 respectively.
5. On cross-examination, the 3<sup>rd</sup> plaintiff stated that she lives in Kirwaro but cultivate land parcel NO. Mwerua/kabiriri/294. She stated that She cultivates the suit land measuring approximately 19 acres except a portion of six (6) acres which she leased to Benson Ngari, Simon Nyamu, and Peter Mwangi. She stated that Previously, she had leased portions of the suit land to numerous other people but their leases expired and they surrendered back to her. She further stated that she entered the suit land in 1977.
6. The second witness (PW2) was Simon Nyamu Mwangi. He referred to his witness statement dated 24/10/2018 which was adopted in his evidence. On cross-examination, the witness confirmed that he had leased part of the suit land from Nditi Kamwaro measuring five acres in the year 2006 until 2011. He said that he is now cultivating 2 acres which he leased from Virginia Wanjiru Muchoki, the 3<sup>rd</sup> plaintiff/applicant herein. He said that there is nobody living in the suit land.
7. The 3<sup>rd</sup> witness was Johnson Ngari (PW3) whose witness statement dated 24/10/2018 was adopted as his evidence.
8. PW4 was Eliud Mwangi Mutugi who also gave sworn testimony and asked the court to adopt his witness statement dated 24/10/2018.

#### **1<sup>st</sup> Defendant's Summary Of Facts**

9. The 1<sup>st</sup> defendant was sworn and his witness statement dated 18/3 2019 adopted by the court as his evidence. He stated that the suit land parcel NO. Mwerua/kabiriri/590 is registered in his name after he acquired in the year 2015. He stated that he was given the land by his brother. He further stated that the suit land is being leased to people who plant food crops and leave after harvest. He said that he has never utilized the suit land after he was gifted.



## 2<sup>Nd</sup> Defendant's Summary Of Facts

10 The 2<sup>nd</sup> defendant also gave sworn testimony and sought to rely on his replying affidavit sworn on 25/6/2018. According to him, his father was the initial registered owner of land parcel No. Mwerua/kabiriri/589 on 4/5/1977. He said that they filed a succession cause NO. 59 of 2017 in Baricho Law Courts.

## Analysis And Decision

11 I have considered the pleadings, the evidence by the parties and the witnesses. I have equally considered the materials produced and the submission by the advocates as well as the applicable law. The only issue for determination in this case is whether the plaintiffs can be declared to have acquired the defendants title by adverse possession. Adverse possession is a doctrine founded on section 7 of the *Limitation of Actions Act* which provides as follows;

“7. 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.”

12 Section 38 of the same Act is also applicable in adverse possession and provides as follows;

“38(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 proprietor of the land or lease in place of the person then registered as proprietor of the land.”

13 The Superior Courts in Kenya have set guidelines on what constitutes adverse possession. In the case of *Wambugu v Njuguna* (1983) KLR 1973, the Court of Appeal rendered itself as follows

“--Adverse possession contemplates two concepts, possession and discontinuance of possession. It was further held that the proper way of assessing proof of adverse possession is 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 or she has been in possession for the requisite number of years.”

14 From the evidence by the 1<sup>st</sup> plaintiff, the suit land parcel No Mwerua/kabiriri/294 Belonged To Her Father, One Kamando Githure who was registered as proprietor on June 8, 1961. She stated that upon demise of her father in 1961 or thereabouts, she filed Succession Cause in Kerugoya D.m Succession Cause No. 36 OF 1977 through the Land Registrar, Kirinyaga as the law then required. She said that judgment was delivered on 7/11/1981 and the Court directed that she be registered as the proprietor of the said Land. She said that ever since then, they have been in continuous possession and occupation of the suit land together with her daughter Virginia Wanjiru and her children who are also plaintiffs in this case without interruption to date.

15 The plaintiffs called witnesses who either leased portions of the suit property in the past or currently occupying portions of the land as licensees.

16 The 1<sup>st</sup> defendant/respondent on his part stated that he is the registered proprietor of a resultant portion of the original land being No. Mwerua/kabiriri/590 which was initially registered in the name of his brother, one Francis Thombe Nyamu before transferring to him as a gift. He, however



admitted that when he visited the suit land, he found someone cultivating and that he has never been in occupation or possession of the same.

17 The 2<sup>nd</sup> defendant on his part stated that his father was registered as owner of land parcel No. Mwerua/kabiriri/589 on May 4, 1977 and that they filed succession cause. He also stated that he is not using the suit land.

18 It is clear from the evidence that though they are registered as proprietors of the suit land parcels No. Mwerua/kabiriri/589 And Mwerua/kabiriri/590, the defendants would not give account how the two parcels of land were acquired by the original owners whom they claim under. It is also not in doubt that despite its acquisition of land parcel No. Mwerua/kabiriri/589 on 4/5/1977, neither the 2<sup>nd</sup> defendant nor his father who was the original owner took possession and/or occupation of the said land.

19 The 3<sup>rd</sup> plaintiffs in her testimony averred that on 26/1/1978, Magi Ingene, the 2<sup>nd</sup> defendant herein and one Susan M. Wambui allegedly partitioned L.r No. Mwerua/kabiriri/294 To Give Rise To L.r No. Mwerua/kabiriri/589 And Mwerua/kabiriri/590. She Further Stated That Magi Ingene Was Registered Proprietor Of L.r No. Mwerua/kabiriri/589 On 4/5/1977 While Susan M. Wambui Was Registered Proprietor Of L.r No. Mwerua/kabiriri/590 the same date. From her evidence, it is clear that time started to run from January 26, 1978 when the plaintiffs' possession and occupation of the suit land(s) became adverse. They have continued to occupy the suit land nec vi, nec clam nec precario. They have been in possession of the suit properties openly and continuously from 26/1/1978 without any interruption to date.

20 Having carefully evaluated the evidence in totality, I have arrived at an irresistible conclusion that the plaintiffs have proved their claim for adverse possession to the required standard.

21 For all the reasons given herein above, I enter judgment for the plaintiffs against the defendants as follows:-

1. The Plaintiffs be and are hereby declared to have become entitled by adverse possession of over twelve (12) years to all of that parcel of land known and described as No. Mwerua/kabiriri/589 And Mwerua/kabiriri/590 which Are Subdivision Of L.r Mwerua/kabiriri/294.
2. That the Plaintiffs/Applicants be registered as proprietors of that parcel of land known and described as NO. L.r Mwerua/kabiriri/589 And 590 Which Are Subdivision Of L.r No. Mwerua/kabiriri/294.
3. That the Defendants to surrender to the Land Registrar, Kirinyaga the original Title deeds to the parcels of land referred under paragraph 1 & 2 above within 30 days from the date of this judgment failing which the Land Registrar is ordered to dispense with the production of Title deeds and any other statutory requirements and proceed to register the Plaintiffs as proprietors of L.r No. Mwerua/kabiriri/589 And Mwerua/kabiriri/590 respectively.
4. The respondents are condemned to pay costs of this suit plus interest at court rates, jointly and severally from today till payment in full.

**JUDGMENT READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 1<sup>ST</sup> DAY OF JULY, 2022.**

**HON. E.C. CHERONO**

**ELC JUDGE**

In the presence of;



Ms Amba holding brief for Magee for Plaintiff

Ms Ndungu holding brief for Wanjiru Wambugu for 1<sup>st</sup> Defendant

Kabuta – Court Assistant.

