



REPUBLIC OF KENYA



**Kinyanyui & 2 others v Mbugua (Environment & Land Case 185B of 2019)
[2022] KEELC 14634 (KLR) (7 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14634 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 185B OF 2019**

BM EBOSO, J

NOVEMBER 7, 2022

BETWEEN

AMOS NDUNGU KINYANYUI 1ST PLAINTIFF

JOSEPH KARIUKI KINYANJUI 2ND PLAINTIFF

JOHN MBURU KINYANJUI 3RD PLAINTIFF

AND

WINNIE WAMBUI MBUGUA DEFENDANT

JUDGMENT

1. On December 18, 2019, Amos Ndungu Kinyanjui, Joseph Kariuki Kinyanjui and John Mburu Kinyanjui [previously referred to as John Kirobi Kinyanjui] took out an originating summons under Section 38 of the *Limitation of Actions Act* and Order 37 rule 7 of the *Civil Procedure Rules*. Through the originating summons, they seek an order to the effect that they are entitled to be registered as proprietors of land parcel number Kiambaa/Kihara/15 [the suit property] under Section 38 of the *Limitation of Actions Act*. The single question to be answered in this Judgment is whether the plaintiffs have satisfied the criteria upon which title to land is acquired through the doctrine of adverse possession. It is important to note in this opening paragraph that counsel for the plaintiffs applied to amend the name of the 3rd plaintiff to read John Mburu Kinyanjui instead of John Kirobi Kinyanjui. The plea was granted on the day of trial.
2. The plaintiffs are siblings sired by the late Kinyanjui Gacheru B who died in 2010. The late Kinyanjui Gacheru B was a step-brother to the defendant's mother. The plaintiffs are therefore cousins to the defendant.



Plaintiffs' Case

3. The plaintiffs' case is contained in the affidavit sworn on December 16, 2019 by Amos Ndungu Kinyanjui in support of the originating summons; the further affidavit sworn on June 7, 2021 by Amos Ndungu Kinyanjui; the oral testimony tendered in the physical court on May 26, 2022, together with the exhibits produced by the said plaintiff; the testimony of Joseph Kariuki Kinyanjui tendered in open court on May 26, 2022; and the written submissions dated June 23, 2022, filed by M/s Njoroge Baiya & Co Advocates.
4. In summary, the plaintiffs' case is that their late father was registered as proprietor of the suit property in 1958. They have lived on the suit property throughout their lives. Their late father sold the suit property to the defendant without involving their mother. The defendant was subsequently registered as proprietor of the land on April 15, 1993. They disapproved of the sale and have been in adverse possession of the land from 1997 up to the time of taking out the originating summons in December 2019.
5. The plaintiffs further contend that when their mother, Salome Wambui Kinyanjui, died in 1996, they buried her on the suit property. Similarly, when their sister, Eunice Wanjiru Kinyanjui, died in 1998, they buried her on the suit property. Lastly, when their brother, Peter Njoroge Kinyanjui, died in February 2017, they buried him on the suit property. All the burials happened without resistance or objection from the defendant who was and still is the registered proprietor of the land. They add that between 1997 when they became adverse possessors of the suit property and 2019 when they took out the originating summons, the defendant had not initiated any action against them to recover the land, hence they have acquired title to the land under the doctrine of adverse possession.

Defendant's Case

6. The defendant's case is contained in the replying affidavit dated April 8, 2020; the witness statement dated October 12, 2021; the oral testimony tendered on May 26, 2022; the five (5) exhibits produced during trial, and the written submissions dated July 25, 2022, filed by M/s Mburu Machua & Co Advocates. Her case is that she bought the suit property from the plaintiffs' father, Kinyanjui Gacheru B, in 1991 at a consideration of Kshs 315,417. The plaintiffs' father used the money to buy land for his two families in Ndabibi, Naivasha, where he relocated his two families. In September 1993, the plaintiffs went back to the suit property. She immediately took steps to evict them by obtaining an eviction order against "those who were mature." When she enforced the eviction order, rowdy villagers held a demonstration against the eviction. The court case was not concluded. She convened meetings with the plaintiffs in the hope that an amicable solution to the dispute would be found. She took the dispute to the Area Chief in 2019 and the Area Chief summoned the plaintiffs.

Plaintiffs' Evidence

7. The plaintiffs led evidence by two witnesses. The 1st Plaintiff, Amos Ndungu Kinyanjui, testified as PW1. He adopted his supporting affidavit and further affidavit as part of his sworn evidence in-chief. He produced a certified copy of the land register as Plaintiff exhibit 1. His evidence was a restatement of their case as summarized above.
8. In cross-examination, PW1 admitted that he was 17 years old when his father sold the suit property to the defendant and he never challenged the sale upon attaining the age of majority. He stated that the defendant's previous suit was concluded in 1997 and later, in 2019, they held a dispute resolution meeting at the Chief's Office over the suit property.



9. The 2nd Plaintiff, Joseph Kariuki Kinyanjui, testified as PW2. He adopted his written witness statement dated December 1, 2020 as part of his sworn evidence in-chief. It was his testimony that he and other members of their family were born on the suit property. The suit property was initially registered in his father's name. In July 1997, at the defendant's behest, a group of people came to their compound and demolished their houses, forcing them to live with neighbours for three weeks. They engaged a lawyer to trace the origin of the eviction orders in vain. They went back onto the land and continued to occupy the land.
10. In cross-examination, PW2 recalled that in 1999 when his mother died, she was buried on the land. Burial took place at about 2 pm. PW2 also admitted that the defendant's mother used to till the land between 1991 and 1997 and added that the defendant is their paternal cousin. He wondered why the defendant never pursued exhumation of their kin buried on the suit land. In re-examination PW2 stated that they occupy the entire suit land and have been doing so openly and without interruption since 1997.

Defendant's Evidence

11. The defendant testified as DW1. She adopted her witness statement dated October 12, 2021 and replying affidavit dated April 8, 2020 as part of her sworn evidence in-chief. She produced five exhibits.
12. DW1 testified that she bought the suit property from her uncle, the late Kinyanjui Gacheru B, after attending the land control board with him and his second wife. She added that after purchasing the land, she got her title and took possession of the land. She allowed her mother to till the land. She added that after her uncle sold to her the land, he relocated with his two families to Ndabini, Naivasha. However, in September 1993, the plaintiffs came back to the suit property. She sued her uncle and obtained eviction orders which the plaintiffs resisted. Efforts to amicably resolve the dispute were fruitless.
13. In cross-examination, DW1 acknowledged that her late uncle had two wives and one of them was the Plaintiffs' mother who was ailing at the time her uncle sold the suit property to her. She stated that after her mother passed on in 1999, she never went to the suit property but hoped for a peaceful resolution of the land dispute. She added that in 1993, she sued her late uncle with a view to obtaining peaceful occupation of the suit property after her cousins refused to vacate from it. Admitting that she was aware burials relating to the plaintiffs' kins took place on the land on diverse dates, DW1 was adamant that the burials were carried out against her wishes.
14. The plaintiff filed brief written submissions dated June 23, 2022. The defendant filed written submissions dated July 25, 2022. I have read the respective submissions.

Analysis and Determination

15. I have considered the originating summons and the defendant's response to the originating summons; the parties' respective evidence and the rival submissions. I have also considered the relevant legal frameworks and jurisprudence. As observed in the opening paragraph of this Judgment, the key issue falling for determination in this Judgment is whether the plaintiffs have satisfied the criteria upon which title to land is acquired under the doctrine of adverse possession. Before I answer the above question, I will briefly outline the statutory and jurisprudential underpinnings of the doctrine of adverse possession in Kenya's legal system.



16. The common law doctrine of adverse possession has statutory underpinnings in Section 7 of the [Limitation of Actions Act](#) which provides as follows:
- “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”.
17. Suffice it to also observe that Section 7(d) of the [Land Act](#) recognizes prescription as one of the methods through which title to land is acquired. It is also important to observe that the question relating to the constitutionality of the doctrine of adverse possession was examined by the Court of Appeal and was answered in the affirmative in the case of [Mtana Lewa v Kabindi Ngala Mwagandi \[2015\] eKLR](#).
18. The common law doctrine of adverse possession of land connotes possession which is inconsistent with and in denial of the title of the registered owner of the land. To establish adverse possession, the claimant must prove that he has had both the factual possession of the land and the requisite intention to possess the land [animus possidendi]. Secondly, he must prove that he has used the land without force, without secrecy, and without persuasion [nec vi, nec clam, nec precario] for the prescribed and uninterrupted limitation period of twelve years preceding the initiation of proceedings for the vesting order. Third, he must demonstrate that the registered proprietor had knowledge [or the actual or constructive means of knowing] that he [the claimant/adverse possessor] was in possession of the land. Fourth, possession must be continuous; it must not be broken or interrupted.
19. The Court of Appeal defined adverse possession in [Mtana Lewa v Kabindi Ngala Mwagandi \[2015\] eKLR](#) as follows:
- “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 or 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.”
20. The Court of Appeal outlined the following criteria for acquisition of title under the doctrine of adverse possession in [Wilson Kazungu Katana & 101 others v Salim Abdalla Baksbwein & another \[2015\] eKLR](#):
- “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.”
21. In the present originating summons, the plaintiffs contend that they have been in adverse possession of the suit property from 1997. Evidence placed before the court reveals that the defendant purchased the suit property from the plaintiffs’ father in 1991. The defendant was registered as proprietor of the land in 1993 and was still the registered proprietor at the time this suit was initiated. It was the evidence of the defendant that the plaintiffs were relocated by their late father to Ndabibi, Naivasha, but came back onto the suit property in 1993. It was also the defendant’s evidence that her mother who used to till the land died in 1999. The defendant testified that she did not go to the land after the death of her mother



because she wanted to avoid confrontation with the plaintiffs. Further, the defendant confirmed that she was aware that the plaintiffs' mother and two siblings were buried on the suit property but she chose not to seek any redress.

22. Although parties to this suit alluded to some court proceedings involving the defendant and the plaintiff's deceased father, neither the pleadings nor the judgment/decreed/order relating to the said suit were produced as exhibits. There was therefore no evidence of the defendant's resistance against the plaintiffs' occupation and adverse possession of the suit property between 1999 when her mother passed on and 2019 when this originating summons was taken out. The only modicum of resistance was the report which the defendant made to the Area Chief in 2019, the same year when this originating summons was taken out.
23. The result is that it is clear from the plaintiffs' evidence and from the defendant's own evidence, both in-chief and during cross-examination, that the plaintiffs' possession of the suit property from 1999 to December 2019 was open; was without permission nor resistance from the defendant; and was adverse to the defendant's title over the suit property. The plaintiffs' possession of the suit property during the above period had all the hallmarks of adverse possession and lasted from 1999 [when the defendant's mother died] to 2019, a period of approximately 20 years.

Finding and Disposal Orders

24. Consequently, it is the finding of this court that the plaintiffs have satisfied the criteria upon which title to land is acquired under the doctrine of adverse possession. The result is that the plaintiffs are entitled to, and are hereby granted, vesting orders in terms of prayers 1 and 2 of the originating summons dated December 16, 2019.
25. Given the nature of these proceedings, parties will bear their respective costs of the originating summons.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 7TH DAY OF NOVEMBER 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Njoroge Baiya for the Plaintiffs

Court Assistant: Ms Osodo

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