



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CIVIL SUIT NO. 169 OF 2017 (OS)

(FORMERLY NAIROBI ELC NO. 112 OF 2009)

PHYLLIS WANJIRU KAMAU.....PLAINTIFF

VERSUS

WILSON GICHUHI GACHAGWE.....1ST DEFENDANT

PETER GICHUHI MWANIKI.....2ND DEFENDANT

ALICE NJOKI GICHUHI.....3RD DEFENDANT

JUDGMENT

1. The suit land herein is Land parcel no. LARI/BATHI.T.110 measuring a quarter of an acre and it is registered in the name of GICHUHI GATHUNGA who died in the 1960s. Gichuhi Gathunga was the father of ALICE NJOKI (3rd defendant), Benson Mwaniki Gichuhi (Deceased), Samwuel Gachangwe Gichuhi (Deceased) and others. Benson Mwaniki is father of PETER GICHUHI MWANIKI (2nd defendant), while Samuel Gachangwe is father of WILSON GICHUHI GACHANGWI. Alice Njoki is therefore an Aunt to 1st and 2nd defendants. There is an ongoing dispute regarding the administration of the estate of Gichuhi Gathunga.

2. Alice Njoki was issued with the letters of administration of the estate of her father in Nairobi Succession Cause no. 1257 of 2000 on 23.8.2000 and the confirmed grant was issued on 16.7.2001. However, an application to have the grant revoked was filed on 2.10.2001 by the 1st and 2nd defendants along with the mother of 1st defendant (Tabitha Gachangwe wife of Samuel Gachangwe). The matter is still pending in court.

3. The plaintiff filed an Originating summons on 13.3.2009 against the first two defendants (Gichuhi Gachangwe and Gichuhi Mwaniki) under **Section 7 and 38 of the Limitation of Actions Act and Order 37 Rule 1 and 7 of the Civil Procedure Rules** claiming entitlement to the suit land by way of adverse possession. An amended Originating Summons was filed on 7.2.2014, to bring on board the 3rd defendant (Alice Njoki).

4. The Originating Summons is supported by the affidavit of the plaintiff sworn on 27th January 2014, where she has deponed inter alia that land parcel L.T. No. Lari/Bathi/T. 110 (hereinafter '**Suit Land**') which is registered in the name of Gichuhi Gathunga (deceased) is where she resides with her children and she has carried out extensive developments. She entered the Suit Land on 2nd June 1969 where she occupied it peacefully, openly, exclusively and without any interruption for 40 years. Thus, she acquired title over the Suit Land through adverse possession.

5. The suit is opposed by the 1st and 2nd defendants through the replying affidavit of Wilson Gichuhi Gachagwe sworn on 18th September 2013. It is contended that the Suit Land is registered under the name of their grandfather of which neither of them is an administrator of his estate. The grant was issued and confirmed to the 3rd defendant but there is an application for revocation since the 3rd defendant failed to include the Suit Land among other reasons of which the cause is still pending in court. They aver that plaintiff cannot be an adverse possessor of an asset forming part of a deceased's estate when the estate is subject to court proceedings in the succession cause. They also aver that plaintiff has not been in open, exclusive and peaceful occupation of the Suit Land as alleged.

6. **PW1 Phyllis Wanjiku Kamau** relied on her Supporting Affidavit filed on 7th February 2014 and her statement filed on 31st January 2012 respectively as her evidence. She stated that the 3rd defendant has the grant letters of administration of the estate of Gichuhi Gathunga. She avers that none of the defendants have ever tried to evict her from the suit land which she has occupied since 1969.

7. Further plaintiff avers that she has also fenced the suit plot with kei apple trees, barbed wire and there is a gate. She has a semi-permanent house, cow pen, fruit trees and other tress. This is the place she calls home where she has raised her 7 children.

8. **PW1** also relied on her documents in her list of 30.1.2012, item 1 & 2 which were produced as P Exhibits 1 & 2 respectively.

9. **DW1 Alice Njoki Gichuhi**, is the 3rd defendant herein. Her evidence amounts to an admission of plaintiff's claim. She stated that were it not for the fact that the land is cautioned, she would have effected the transfer of the land to plaintiff. She avers that from what she had heard, plaintiff had bought the suit plot from Samuel Gachangwe Gichuhi (*deceased*), who is her (Alice's) brother.

10. **DW2 Wilson Gichuhi Gachagwe** is the 1st defendant herein. He adopted as his evidence his statement dated 27th July 2015 and his Repeating Affidavit sworn on 18th September 2013. He stated that the suit ought to be dismissed as the plaintiff is not the true owner of the Suit Land. He is surprised that the 3rd defendant stated that Samuel Gachagwe Gichuhi, his father, sold land to the plaintiff. He avers that the plaintiff and the 3rd defendant are conspiring to commit fraud as the two want to defeat the cause of justice.

11. He further testified that when other family members discovered that Alice Njoki had obtained letters of administration in respect of the estate of Gichuhi Gathunga, they made an application for the revocation and nullification of the grant. He further stated that the suit land no. 110 had not been included as part of the estate of deceased in the succession cause. The evidence of Wilson was to apply to 2nd defendant too.

12. The plaintiff submitted that she has met the conditions of an adverse possessor as she entered the Suit Land without the defendants' consent of which her occupation has been open, exclusive, peaceful and uninterrupted for a period of 49 years. Thus, the rights of the defendants and any other claimants if any have been extinguished by operation of the law.

13. The 1st and 2nd defendants submitted that all the defendants have no *locus standi* to be sued in respect of the Suit Land which is registered in the name of Gichuhi Gathunga (deceased). This is because the 1st and 2nd defendants are not holders of the grant of letters of administration. They also submitted that the Grant issued to 3rd defendant is not applicable as she is not an administrator in respect to the Suit Land since she had not listed the suit land in the succession cause. They aver that the claim of adverse possession can only be sustained against a registered owner of which none of the defendants are.

14. The 1st and 2nd defendants proffered the following authorities in support of their case;

- **Isaya Masira MManji vs Daniel Omwoyo & Another [2017] eKLR.**
- **Rhoda & 4 others vs Kitole Mutinda & another MKS HCC 362/2011.**
- **Sophie Wanjiku John vs Jane Mwhaki Kimani [2013] eKLR.**
- **Chevron (K) Limited vs Harrison Charo Wa Shutu [2016].**
- **Peter Kamau Njau vs Emmanuel Charo Tinga [2016] eKLR.**
- **Samuel Miki Waweru vs Jane Njeri Richu [2007] eKLR.**
- **Francis Gitonga Macharia vs Murimi Waithaka [1998] eKLR**
- **Fauzia Tariq Abukar Zubedi vs Athuman Hassan Awadh & 3 others (2016) eKLR.**

15. The issue for determination is; **whether the plaintiff has acquired the Suit Land through adverse possession.**

Analysis and Determination

16. It is trite law that in a claim of adverse Possession, the possession of the land must be actual, open, continuous and exclusive for a prescribed period of 12 years which is uninterrupted and peaceful. See- **Chevron (K) Ltd v Harrison Chato wa Shutu [2016] eKLR.** Such occupation is also without the consent of the owner of the land.

17. This term adverse possession has been judicially defined in **Gabriel Mbui v Mukindia Maranya [1993] eKLR** as follows;

“It is possible to define “adverse possession” more fully, as the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owners enjoyment of the land for the purposes for which the owner intended to use it.”

18. The burden of proof is placed on the plaintiff to establish that she has acquired title through adverse possession. The evidence of the plaintiff herein is that she entered the Suit Land on 2nd June 1969 up to date. The 3rd defendant affirmed that indeed the plaintiff has been in occupation of the Suit Land for a long time and that she is still there.

19. During cross examination, PW1 stated that she stays on the suit land with her children and grandchildren and that no one else uses that land except herself and her family. She further stated that the defendants stay on another parcel of land which is about 3 kilometers away

from the suit land.

20. She also stated that defendants have never attempted to evict her, and they have never sued her for eviction. This evidence was not controverted by the defendants. If anything, the 3rd defendant appears to be in agreement with plaintiff's case.

21. It is not very clear as to how plaintiff entered this land. She doesn't appear to have known the owner, Gichuhi Gathunga. 3rd defendant has stated that she hears that it is her brother, Samuel Gachangwe Gichuhi (father of 1st defendant) who had sold the land to plaintiff. This is however a moot issue considering that none of the defendants appear to have given the plaintiff the permission to occupy the land. Further, even if such a sale had occurred, the seller had no legal mandate to sell the land of a deceased person.

22. From the foregoing analysis, it is quite apparent that plaintiff is in actual occupation of the suit land exclusively and without permission of the owner of the land. This occupation has been there for decades, from 1969.

23. The bone of contention is that the suit land is still in the name of Gachuhi Gathunga, the father of 3rd defendant and grandfather of 1st and 2nd defendants. The 1st and 2nd defendants contend that they are not holders of the grant of letters of administration in respect of deceased estate. They also claim that the grant issued to 3rd defendant is contested. Further, they state that the suit land was not included as part of the estate of the deceased. The two defendants contend that a claim of adverse possession can only be maintained against a registered owner. The 1st and 2nd defendants had submitted that the matter with regard to Suit Land is being dealt with by the probate court under P & A No. 1257 of 2000 in Nairobi High Court.

24. It should be noted that the Probate court and this court have two distinct jurisdictions. For the probate and administration court it was rightly put by Musyoka J in the case of **In re Estate of Alice Mumbua Mutua (Deceased) [2017]eKLR** that:

“The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.”

25. **Article 162 (2) of the Constitution of Kenya, 2010** provides for the Jurisdiction of the environment and land court as follows;

“(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –

(a)

(b) The environment and the use and occupation of, and title to land.”

26. The jurisdiction of the ELC court is further set out under section 13 of the Environment and Land Court Act.

27. In the case of **Priscilla Ndubi & Another vs. Gerishon Gatobu Mbui Meru H.C.C. SUCCESSION CAUSE NO. 720 of 2013**, the court was dealing with an issue touching on claim of ownership of land in respect of the estate of a deceased person. The court stated thus;

“Applying the test of law in section 76 of the Law of Succession Act, the fact that there was an agreement between the deceased and the Applicant for sale of the suit land is important to these proceedings. It seems also that consideration may have passed between the two parties. I am aware that this court does not have jurisdiction to determine the validity or enforceability of the said agreement. Environment and Land Court does; it is the court which is constitutionally mandated to determine such matters.”

28. In the aforementioned case of **Priscilla Ndubi (Supra)**, the court made reference to the provisions of **rule 41 (3) of the probate and administration rules** which provide that ;

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules”

29. From the foregoing analysis, it is clear that claims may be made in respect of the estate of a deceased person by persons who are not necessarily the heirs to that estate. Jurisdiction to deal with such claims of ownership lies with the Environment and Land Court. The assertions made by the 2nd and 3rd defendant that this court has no mandate to deal with the matter when there is an ongoing succession dispute is un-founded.

30. Having established that this court has jurisdiction to deal with the dispute, I will now turn to the question; **whether the claim for adverse possession can be made against the estate of a deceased person and whether defendants have been properly sued.**

31. Section 16 of the Limitation of Actions act provides that;

“For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a

deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration”.

32. In the case of **Peter Mbiri Michuki vs. Samuel Mugo Michuki Court Of Appeal at Nyeri Civil Appeal No. 22 of 2013**, the court had this to say in respect of section 16 of the aforementioned Act;

“The effect of this provision is that when the letters of administration was granted for the estate of the plaintiff in this case, the administration of the estate dates back to the date of death”

33. In the case of **Mate Gitabi vs. Jane Kaburu Muga and 3 Others Nyeri Court Of Appeal Civil Case No. 43 of 2015**, the court was dealing with a situation where an adverse possessor claimant was in occupation of the land of a deceased person. The court stated thus;

“He continued to occupy the land openly, without secrecy, without violence and without permission. He did so in a manner inconsistent with and wholly adverse to the right of the estate of the deceased, his heirs and all those claiming under him. In this regard, it little matters that the 1st Respondent did not take out letters of administration until 2003, or that she did not get to be the registered owner until 2004, both events being more than thirty years since the appellant took adverse possession of the land or dispossessed the 1st Respondent...”

34. This question as to whether a claim for adverse possession can be made against the estate of a deceased person was also aptly captured in the case of **Peter Gichuki Wanjohi vs. Julia Mumbi Muturi Nyeri ELC No. 211 of 2013** where the court adopted the decision in **Karuntimi Raiji v. M’Makinya M’itunga (2013)eKLR** where the Court of Appeal observed:-

“...Another issue raised by the appellant is that a claim for adverse possession does not survive a deceased person. Section 30 (f) of the Registered Lands Act and Section 2 of the Law Reform Act provide an answer to the issue. Section 30 provides that:

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

a.;

b.;

c.;

d.;

e.;

f. rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;

Section 30 (f) preserves rights being acquired by virtue of limitation of actions.....”

35. From the foregoing analysis, it is clear that the assertion by the 1st and 2nd defendant that a claim of adverse possession cannot be made in respect of the estate of a deceased person does not hold.

36. I now have to deal with the issue as to whether defendants have been rightly sued. The 3rd defendant is the legal representative of the estate of deceased, having been issued with a grant to that effect in August 2000. She has admitted the claim of the plaintiff.

37. As for the 1st and 2nd defendants, they don’t have a grant. Not yet. However, they have presented themselves as heirs to the estate of deceased, and that was their basis for filing an application for revocation of the grant. Indeed much of the defence of these two defendants revolve around their entitlement to be heirs of the estate of deceased. Going by the holding in **Mate Gitabi vs. Jane Kaburu case (supra)**, the plaintiff has **continued to occupy the land openly, without secrecy, without violence and without permission, and she did so in a manner inconsistent with and wholly adverse to the right of the estate of the deceased, his heirs and all those claiming under him.**

38. The 1st and 2nd defendant are not just heirs to the estate of Gachuhi Gathunga, they are potential legal representative of the estate of deceased. This is a situation whereby deceased passed on in the 1960s. These potential heirs did not assert their rights to prevent the estate of deceased from being dispossessed. It is not lost to this court that the application for revocation appears to be life, un determined. In the event that the 1st and 2nd defendants succeed and get the grant, then what would be the fate of the plaintiff who in all aspects has proved to be an adverse possessor? Further, it is noted that plaintiff essentially went to court because she had believed that 1st and 2nd defendants are the ones who had acquired the grant. When she learnt that it is 3rd defendant who had the grant, she acted accordingly and brought her on board. I am inclined to find that the circumstances of this case dictate that it was not fatal for the plaintiff to sue the 1st and 2nd defendants too.

39. The claim by 1st and 2nd defendant that the suit land was not included in the grant issued to 3rd defendant does not in any way divest the

property from being part of deceased estate since the suit land is still in the name of deceased.

40. In the case of **Mary Muthoni Kathu vs. Fredrick Kigo Mbogo, and another, ELC No. 386 of 2013, Kerugoya**, the court made reference to the case of **Mary Mbaisi CA Civil Appeal no. 27 of 2013 Kisumu** where it was stated that ;

“It is now clear that the effect of the provisions of Section 7, 13, and 17 of the Limitation of Actions Act is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of the 12 years of that possession”.

41. The plaintiff apparently entered the suit land in 1969. The owner of the land had died in 1960 or there about. It follows that plaintiff had been in occupation of the suit land in a manner inconsistent with the estate of deceased for 31 years by the time 3rd defendant was acquiring a grant in 2000. The estate of the deceased had long been dispossessed of the suit land for decades.

42. The rationale behind the doctrine of adverse possession was aptly captured in the case of **Kahindi Ngala Mwangandi vs. Mtana Lewa, ELC NO. 108 of 2011 Malindi**, where the court cited the case of **Adnam vs. Earl of Sandwich (1877) 2 QBD 485** where the court held as follows;

“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 principle 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”.

It follows that adverse possession is all about Laches.

43. Plaintiff has now been on the suit land for 50 or so years. Her occupation has been uninterrupted, actual, open, exclusive and peaceful. This is the place she calls home. I am inclined to find that she has fulfilled and met the conditions of an adverse possessor.

44. **Final orders:**

- 1) A declaration is hereby made to the effect that plaintiff has acquired ownership of L.R. No. Lari/Bathi/ T.110 through adverse possession.**
- 2) An order is hereby issued for the plaintiff to be registered as the sole proprietor of L.R. No. Lari/Bathi/ T.110.**
- 3) The legal representative of the estate of GACHUHI GATHUNGA or the Deputy Registrar of the court is hereby authorized to sign all requisite documents to facilitate the aforementioned registration.**
- 4) The consent of land control board is hereby dispensed with in the implementation of this judgment.**
- 5) Any order of inhibition, injunction, caution or restriction that may be subsisting in respect of land parcel Lari/Bathi/T.110 is hereby discharged in order to facilitate the implementation of this Judgment**
- 6) As to costs, each party is to bear their own costs of the suit.**

Dated, signed and delivered at Thika this 2nd day of May, 2019.

MBUGUA LUCY

JUDGE

2/5/2019

In the presence of

Court Assistant: Diana

J. Kouna H/B for Wainaina for 1st & 2nd defendant.

Muturi H/B for Mr. Chege for Plaintiff

Nickson Kamau (Son of Plaintiff) Present