

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC CASE NO. E001 OF 2022

DINAH CAMU GEOFFREY.....
PLAINTIFF

-VERSUS-

SPERADA WARIIMI NJAMBURI..... 1ST
DEFENDANT

SALESIO GITONGA NJERU..... 2ND
DEFENDANT

MICHAEL NTHIGA NJAMBURI..... 3RD
DEFENDANT

JUDGEMENT

1. This suit was instituted by way of a plaint dated 7/1/2022 filed on the same date. That plaint was later followed by an undated Amended Plaint filed on 28/2/2022. The Plaintiff pleaded that at all material times pertaining to this suit, the 1st Defendant was the registered proprietor of Land Parcel KAAGARI/KIGAA/5529, which has so far been subdivided into several portions, variously known as Land Parcels Kaagari/Kigaa/6638, Kaagari/Kigaa/6669, then

Kaagari/Kigaa/12193, Kaagari/Kigaa/12194, Kaagari/Kigaa/12195 and Kaagari/Kigaa/12196.

2. Prior to the aforesaid subdivisions, the 1st Defendant had entered into an agreement for the sale of one acre out of the original Kaagari/Kigaa/5529 for a purchase price of Kshs.100,000/= . The Plaintiff avers that she paid the money, leaving only a balance of Kshs. 10,000/= . The balance was to be paid upon obtaining the Land Control Board Consent for transfer. They allegedly attended the Board on 14th May 1999 and consent was granted.
3. The Plaintiff stated that she immediately took possession of the said portion of one acre. She has extensively developed the one acre over the years and has been in quiet possession of the same for over a period of more than twelve years.
4. The 1st Defendant is said to have requested for more time to effect the process of subdivision and asked the Plaintiff to be patient as he pulled resources together to facilitate the process.
5. Sometime in June 2021, the Plaintiff avers that she approached the 1st Defendant and informed her that she is in dire need of the title deed for the parcel. That required the 1st Defendant to initiate the process of executing the Land Control Board forms and

transfer documents. The 1st Defendant became uncooperative and demanded for the balance of Kshs. 10,000/= upfront, which the Plaintiff obliged to pay.

6. To protect her interest, the Plaintiff lodged a restriction on Land Parcel No. KAAGARI/KIGAA/6639, a resultant subdivision of the original KAAGARI/KIGAA/5529.

7. Sometime in November 2021, the 2nd Defendant trespassed on her land and violently chased her workers out of it, claiming that the land has been sold to a 3rd party. Upon conducting a search at the Embu Lands Registry, the Plaintiff found out that indeed the land has been transferred to the 3rd Defendant. She therefore claims that the purported transfer of Kaagari/Kigaa/12196, a subdivision of Kaagari/Kigaa/6639 was irregular, unlawful and fraudulent. She particularized the fraud and illegality. They consisted in 1st Defendant unlawfully removing the restriction lodged and unlawfully subdividing the land while she was in occupation and transferring the same to a 3rd Party.

8. The following orders were prayed for:

i. A declaration that the Plaintiff has become entitled to Land Parcel Kagaari/Kigaa/12196 by way of adverse possession as a result of the quiet uninterrupted occupation for a period exceeding 12

years and that the purported sale and transfer to the 3rd Defendant was unprocedural, unlawful and null.

ii. IN THE ALTERNATIVE a refund of the purchase price of Kshs.100,000 paid to the 1st Defendant and interest at Court rates from the year 1999 and the cost of developments and interests thereon.

iii. A declaration that the sale of Land Parcel Kagaari/Kigaa/12196 by the 1st Defendant to the 2nd Defendant was irregular and unlawful and therefore null and void.

iv. An order of cancellation of the title deed for Land Parcel Kagaari/Kigaa/12196.

v. The costs of this suit.

The 1st 2nd and 3rd Defendants' statement of defence

9. The 1st 2nd and 3rd Defendants' filed a joint statement of defence and stated, *inter alia*, that there is an ELC Case No. E021 of 2021(OS) between the Plaintiff and the 1st Defendant herein, which is pending hearing and determination before this court over the same parcel of land.

10. The Defendants denied the particulars of fraud and pleaded that the sale of land to the plaintiff was for an unspecified land for a purchase price of Kshs. 90,000/= . They said that a balance of Kshs. 10,000/= has never been paid to date and denied that the

payment was to be paid after obtaining the Land Control Board consent. To them that was not a term of the agreement.

11. Further, the 1st Defendant stated that he has always been ready to refund the Plaintiff the Kshs. 80,000/= which the plaintiff paid to her and that the Plaintiff has no valid claim against any of the defendants jointly and severally. She required the plaintiff to prove the contrary. She therefore prays that the suit be dismissed with costs.

Evidence at the Trial Court

12. The hearing of the suit began on 9th May 2024. **PW 1, Dinah Camu Geoffrey** adopted her witness statement dated 5th January 2022 and her trial bundle of documents as her evidence in chief. In her witness statement, she had reiterated the contents of her plaint and added that after she took possession of the suit land, she planted Hass avocado trees and left the other part to cultivate seasonal crops around the year.
13. That the 2nd Defendant then invaded her portion of the land and violently chased away her workers and destroyed her crops. She reported the incident to the area chief. That was when she learnt that the 1st Defendant had already transferred her portion

somebody else. She prays that the 1st Defendant be held liable for the unlawful transactions.

14. PW 1 told the court that the 1st Defendant said to her that as the road was now tarmacked, she had bought the land cheaply. She therefore wanted to refund the plaintiff her money.

During cross-examination, PW 1 stated that she knows the 1st defendant, and that the 3rd defendant is the 1st defendant's son who informed her that the land had been sold to someone else. She insisted that she bought one acre of the land for a monetary sum of Kshs. 100,000/= and that it was a portion of a bigger land. That also she paid the entire purchase price, but did not get the title deed. She stated that she had filed another case that she withdrew in order to pursue this suit. I do note that there is a letter on record from the Plaintiff to the Deputy Registrar of Embu High Court, requesting to have the Embu ELC OS 21 of 2021 suit withdrawn with no order as to costs.

15. PW 1 further stated that she has been living on the land peacefully since the year 1999 until 2020 when the defendant attempted to remove her from the land. She denied wanting a refund of the money and stated upon re-examination that she is

entitled to the land. She said the value of the land has since gone up. That was the close of the plaintiff's case.

16. **DW 1 - Sperada Wariimi Njamburi** - was the 1st Defendant herein. She gave her testimony and adopted her witness statement, her trial bundle of documents, as well as other documents therein as her evidence in chief.

17. In her witness statement, the 1st Defendant stated that she knows the Plaintiff and that she entered into an oral agreement with her sometime in 1999 to sell to her one-acre portion of her land parcel Kagaari/Kigaa/4172 at Kshs. 90,000/=. That the plaintiff only paid Kshs. 10,000/= and she failed to pay the balance. The 1st Defendant stated that she offered to refund the amount paid but the Plaintiff refused and also declined to vacate the land.

18. The 1st Defendant further stated that they have had several cases heard before the D.O of Runyenjes, which the plaintiff withdrew when she realized that she did not have the evidence.

19. The 1st Defendant acknowledged that she has already subdivided her land into several portions. She sold and transferred the resultant parcels to other persons, including the 2nd and 3rd defendants and they have their respective title deeds. She noted

that the land which the plaintiff currently occupies is LR Kagaari/Kigaa/12196 which she sold and transferred to the 2nd defendant and that she only remained with LR Kagaari/Kigaa/12193 and 12194 in her name, which she is reserving for her daughters.

20. The 1st Defendant denied ever owning LR Kagaari/Kigaa/5529 and stated that the application to the Land Control Board to transfer the said Land Parcel to the Plaintiff as a gift is a forgery. She challenged the Plaintiff to call the Land Registrar to testify and produce the documents.

21. DW 1 concluded by denying any fraud on her part and denied that the Plaintiff ever restricted or cautioned her original land. She also denied that the Plaintiff had occupied an acre of her land continuously and without interruption for 12 years. She stated there is even a criminal case proceeding in Runyenjes - Criminal Case No.189 of 2022 - in which her and her son have been charged with conspiracy to defraud the plaintiff Kshs. 80,000/= . She further stated that she has resisted the plaintiff's occupation for years. She stated that the plaintiff is only entitled to a refund of Kshs. 80,000/= .

22. On cross-examination, DW 1 stated that she could not recall how long the plaintiff has been on the land and denied attending the Land Control Board with the plaintiff. She also stated that she could not recall if the plaintiff entered the land she was selling to her and acknowledged that the plaintiff is now using the land, but that the plaintiff was not using the land when she sold it to the 2nd defendant.

23. **DW 2 Salesio Gitonga Njeru**, the 2nd Defendant gave his testimony, stating to the Court that he did not know the Plaintiff but knows the 1st Defendant, who sold him the land parcel LR Kagaari/Kigaa/12196, measuring one acre. He stated that he could not recall when he bought the land and that he had been on the land and had planted maize when the plaintiff came and told him that she had bought that land a long time ago.

24. He stated that his title should not be cancelled as he bought his land legally. He adopted his witness statement dated 24th February 2023 in which he stated that his sale and transfer of the suit land from the 1st Defendant to him happened sometime in July 2021 and the sale was approved by the Land Control Board at Runyenjes and that he was issued with a title deed on 19th August 2021.

25. DW 2 denied any fraud or illegality in his transaction and stated that the Plaintiff was only put into occupation of his land by the police after she obtained interim orders to maintain the status quo in this suit. His statement was that the interim orders issued in this suit have denied him use of the lawfully acquired parcel and that he is an innocent purchaser for value. He said the plaintiff has no valid claim against him.

26. On cross-examination, DW 2 stated that the land was vacant when he bought it and started cultivating.

27. **DW 3 Michael Nthiga Njamburi**, the 3rd defendant also gave his testimony that the 1st Defendant is his mother and that the 2nd Defendant bought land from his mother. He stated that the money that the plaintiff paid has been deposited in court and that that is when the plaintiff removed the caution. He adopted his witness statement dated 24th February 2023 as his evidence in chief.

28. In his statement, DW 3 stated that the original land parcel LR was subdivided into LR Kagaari/Kigaa/6639, and later into Kaagari/Kigaa/12193, Kaagari/Kigaa/12194, Kaagari/Kigaa/12195 and Kaagari/Kigaa/12196 when his mother, the 1st defendant,

was sick and her right leg was amputated and required money for medication.

29. That it is only after the 1st Defendant subdivided the land in the year 2021 that the Plaintiff demanded to be given the one acre she had intended to buy. The Plaintiff insisted on getting the land and not a refund of the money she had paid. The D.O Runyenjes was therefore unable to resolve the dispute.
30. Further, the 3rd Defendant stated that he has been advised by his advocate on record that the oral agreement made in 1999 cannot be enforced as it is statutorily time barred. He denied that the 1st Defendant had committed any crime, fraud or illegality.
31. On cross-examination, DW 3 stated that his land is LR Kaagari/Kigaa/12195 and that he was a witness to the sale of the suit land. He denied that anyone was previously using the suit land and also stated that the balance from the sale of the land to the plaintiff was sh.35,000/=. Also that his mother's memory of the remaining balance is not good as she has been sick. He estimated the value of one acre to be Ksh.1.2 million shillings. He also stated that they did not get any records from the chief or DC's attendance to discuss the dispute.

32. This was the close of the defence case and parties proceeded to file written submissions.

Plaintiff's written submissions.

33. Counsel for the Plaintiff gave a summary of their case and submitted that it is worth noting that the plaintiff has produced photographic evidence of when the 1st Defendant's agents cut down her Hass avocado trees, which are an income generating project for the plaintiff. It was also noted that the 1st Defendant confirmed that he has never taken any steps to evict the plaintiff since the year 1999 when she started living on the land and that there was no evidence to support that she was ever successfully evicted.

34. Thus, the Plaintiff submits that she has proven continuous and uninterrupted occupation. She relied on the case of **Peter Mbiru Michuki vs Samuel Mugo Michuki(2012)eKLR.**

35. Counsel for the plaintiff also submitted that there is evidence of an agreement between the plaintiff and the 1st defendant made in the year 1999 and that there is an application for Land Control Board consent dated 14th May 1999. It was submitted that the plaintiff took possession as per the agreement upon payment of

the purchase price and has been on the land since. That it therefore follows that twelve years run from the year 1999 and that it was therefore unlawful for the 1st Defendant to proceed to subdivide LR Kaagari/Kigaa/6639 and subsequent transfer was also illegal.

36. Counsel concluded by submitting that the Plaintiff has proven her case on a balance of probabilities to warrant judgment being entered as prayed.

Defendants' written submissions

37. Counsel for the Defendants submitted that the plaintiff has not proven her case as the suit land, LR Kaagari/Kigaa/12196, was not in existence when she allegedly purchased it. The title deed thereof was said to have been issued on 18th August 2021 in the 2nd Defendant's name.

38. It was submitted that the plaintiff has had no home on the suit land and that her occupation was not factual. That the evidence of actual and continuous occupation was not adduced to the satisfaction of the Court.

39. In addition to this, it was submitted that the plaintiff's entry onto the land was permissive, as a result of an agreement and that there have been several cases over the occupation of the land by

the plaintiff, therefore the occupation cannot be deemed to have been continuous and peaceful.

40. Counsel also noted that the said agreement was not produced as an exhibit, neither was the alleged payment of the sum of Kshs. 100,000/=. That the said sum was already deposited in court and that the value of the developments was not proven by evidence.

41. On the claim of fraud, Counsel submitted that it must be strictly proved, which the Plaintiff failed to do, and therefore no evidence has been given to impeach the title deed for the suit land. Further that the defendants have also exhibited certificates of official search and title deeds whose authenticity has not been challenged. They submit that the Plaintiff has not proved her case against the defendants and urged the court to dismiss the case with costs to the defendants.

Analysis & Disposition

42. This is a suit where the Plaintiff claims that she bought land from the 1st defendant way back in the year 1999 for a sum of Kshs. 100,000/=. She exhibited an application for consent of the Land Control Board at Runyenjes for transfer of 0.406Ha of LR. Kagaari/Kigaa/5529 which is approximately one acre. The form

indicates that the same was approved on 15th May 1999 and that it was a transfer by way of gift.

43. The 1st Defendant denied the authenticity of this consent form and stated that the said LR. Kagaari/Kigaa/5529 was never hers to begin with. I note that she did not produce any evidence that the thumbprint affixed thereon was not hers. She should for example have given forensic evidence. However, I also note that the plaintiff and the 1st Defendant both state that their agreement for the sale of one acre of land was oral. At the time the oral agreement was made, the applicable law allowed it provided it was accompanied by possession or other act of specific performance. Section 3 (3) of the Contract Act which makes it obligatory for a contract for sale of land to be in writing came into force in the year 2003. The party's oral agreement in this matter took place before that time and the applicable law at least tolerated oral agreements.

44. This means that the parties' agreement for sale would not fail to be valid merely because it was not in writing. Let us now consider the Plaintiff's claim that the suit land is hers by way of adverse possession as she has been on the land since the year 1999. The legal basis for adverse possession in Kenya is provided for under

Section 7 of the Limitation of Actions Act (Cap 22). The Act provides that:

“An action may not be brought by any person to recover the 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.”

45. In the case of **Mombasa Teachers Co-operative Savings & Credit Society Limited -vs- Robert Muhambi Katana & 15 others [2018]** eKLR, the Court enumerated the required elements to prove **adverse possession** as follows:

“Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non-permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, nec vi nec clam nec precario.”

46. The occupation of the Plaintiff on the suit land was confirmed during the trial even by the 1st Defendant herself. The first defendant, in her witness statement at paragraph 2 that was adopted as her evidence in chief stated as follows:

“I know Dinah Camu Geoffrey the Plaintiff. Sometime in 1999 I entered into an oral

agreement to sell to her one-acre portion out of my land parcel no. LR. Kagaari/Kigaa/4172 at Kshs. 90,000/= She paid a total of Kshs. 80,000/= in instalments. She failed to pay the balance. I refused to transfer the portion to her for non-payment of the balance of Kshs. 10,000/= and I offered to refund the amount of Kshs. 80,000/= which she paid but refused. I requested her to vacate the land but she refused."

47. The 1st Defendant acknowledged the fact that she did enter into an oral agreement with the plaintiff to purchase an acre of her piece of land. She also acknowledged that the plaintiff was on the land. Further, the 1st Defendant during the hearing, confirmed that the land which the plaintiff currently occupies is LR Kagaari/Kigaa/12196. Thus, occupation by the Plaintiff was acknowledged.

48. Secondly, the Defendants have claimed that the occupation of the Plaintiff was by agreement and was therefore permissive possession, contrary to the requirements of adverse possession. However, we have already established that there was a valid agreement though it was not in writing. In my view that possession of the land by the plaintiff became adverse when the parties went to Land Control Board, were given a consent, but the 1st defendant refused to transfer the land to the plaintiff. The

consent is dated 14/5/1999. The 1st defendant was supposed to follow up her refusal to transfer the land by ejection of the plaintiff from the land or by filing a suit. She didn't do so.

49. The occupation by the plaintiff therefore became adverse sometimes in 1999. The Court of Appeal sitting at Nyeri found as follows in the case of **Karuntimi Raiji v M'makinya M 'itunga [2013] eKLR:**

“There are two issues relevant to the claim of adverse possession in this matter. First is the date from which the 12 years should be calculated; second, did the respondent have a peaceful, uninterrupted occupation based on a claim of right and without consent of the appellant” The answer to the first question is provided by the case of Francis Gitonga Macharia - v Muiruri Waithaka Civil Appeal No. 110 of 1997 where this Court stated that the limitation period for purposes of adverse possession only starts running after registration of the land in the name of the respondent. In this case, the appellant was registered as proprietor of the suit property on 22nd March, 1973; we find that the claim for adverse possession against the appellant starts to run from this date and not 1954. For avoidance of doubt, we reiterate that the claim for overriding interest of the respondent in relation

to the suit property started to run from 1954 and this overriding interest was in existence and protected under Section 30 of the RLA as at 22nd March, 1973 when the appellant became the registered proprietor of the suit property.”

50. There is no evidence on record as to when the original mother title to the 1st defendant's land was registered, but a copy of the title of subdivision of LR Kagaari/Kigaa/6639 was exhibited as Defence Exhibit 1, and it is clear it was registered in the 1st Defendant's name on 22nd December 2006. According to the above precedent by the Learned Judges of Appeal in **Karuntimi Raiji v M'makinya M 'itunga [Supra]** the title is registered with any overriding interests in existence. The equivalent of Section 30 of the repealed Registered Lands Act is Section 28 of the current Land Registration Act CAP 300 which includes one of the overriding interests at Section 28(1)(h) as: ***“rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.”***

51. Twelve (12) years running from the date of registration on 22nd December 2006 would make it 22nd December 2018, when the rights of adverse possession for the Plaintiff crystallised. Thus, the 1st Defendant sold the suit property to the 2nd Defendant

when it already had the overriding interest of adverse possession in favour of the plaintiff. That was the legal position when she sold the land in the year 2021. The Plaintiff relied on the Court of Appeal case of Peter **Mbiri Michuki -vs- Samuel Mugo Michuki [2014] KECA 342 (KLR)** where it was held that:

“The dicta in Mwangi & another -v - Mwangi, (1986) KLR 328, establishes the principle that the rights of a person in possession or occupation of land are equitable rights which are binding on the land. In Public Trustee - v- Wanduru, (1984) KLR 314 at 324, it is stated that in adverse possession, the title of a registered proprietor is not extinguished but is held by him in trust for the person who, by virtue of the Limitation of Actions Act, has acquired title against the proprietor. In the instant case, the plaintiff was in occupation of the suit property and his possessory rights are not only equitable rights but an overriding interest binding on the land.”

52. The other issue that must be addressed is the Defendants’ contention that they resisted the occupation of the Plaintiff and that there are a number of cases relating to the Plaintiff’s occupation of the suit land. The law is that time ceases to run

when the owner of land subject to a claim of adverse possession asserts their rights over the property as was held in the case of **Githu vs Ndeete [1994] KLR** quoted by the Court of Appeal in **Kenya Commercial Bank (Suing as administrator of the Estate of Paul Njoroge Muchene) v Serah Njeri Muchene (sued on behalf and as the administratrix of the Estate of Perminus Muchene Mwangi)**. It was observed thus:

“Time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his rights or when his right is admitted by adverse possession. Assertion occurs when the owner takes legal proceedings or makes an entry into land.”

53. The Defendants averred that they have had several cases before the chief and the D.O Runyenjes, but did not produce any evidence to show it. Therefore, the Court cannot take this as a matter of fact. The defendants did not file a suit against the plaintiff to assert their legal rights. The defendants state that the plaintiff was removed from the land in the year 2020 but was returned by *status quo* orders of the court. By the year 2020, the Plaintiff's rights of adverse possession over the suit land had already accrued or crystallized. Therefore, this cannot be

deemed as appropriate or timely assertion of rights. The fact of adverse possession had already become a legal reality several years earlier.

54. Another contention that the Defence raised is that the possession of the plaintiff is not actual as she does not have a home on the suit land. The Court of Appeal in the case of **Gichomo & another v Kiiru (Civil Appeal 109 of 2021)** **[2025] KECA 124 (KLR)** found that:

“In a claim for adverse possession, the owner's non-use of the property, even for an extended period, does not affect their title. The situation changes only when another individual takes possession of the property and asserts a claim over it. In the case of Alfred Welimo v Mulaa Sumba Barasa, CA No 186 of 2011, this Court stated that: “It is trite that adverse possession is not established merely because the owner has abandoned possession of his land and ceased to use it; for as Robert Megarry aptly observed in his Megarry’s manual of the Law of Property, 5th ed. page 490, the owner may have little present use for the land and that land may be used by others, without the users demonstrating a possession inconsistent with the title of the owner. So, the mere fact that the appellant abandoned possession of the suit property and went to live at

Ndalu scheme by and of itself does not establish adverse possession. The abandonment of possession must be coupled with the respondent taking possession of the land with animus possidendi (the intention to possess) and asserting thereon rights that are inconsistent with those of the appellant as the owner of the land..... From the foregoing, we find that the respondent and his brothers had a peaceful and uninterrupted use of the suit land from 1996 until 2017 when the 2nd appellant came into the picture. By farming on the suit land, and particularly growing coffee trees thereon, which is a long-term venture, the respondent proved the physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner of the suit land.”

55.The fact that the plaintiff had planted trees on the suit land is evidence that she had taken possession. There is no requirement for an adverse possessor to live on the land.

56.In light of the foregoing, it is clear to me that the plaintiff has established that she is an adverse possessor. She was already one when the land was being sold to the 3rd defendant. At the time, the 1st defendant held the portion occupied by the plaintiff in trust for her. I therefore allow the plaintiff’s suit in terms of

prayer (i) in the amended plaint. On the issue of costs, I order that the plaintiff also gets costs. She has won the case.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **KITUI** this **28th** day of **April, 2026** pursuant to notice dated **21/4/2026**.

In the presence of,

Court Assistant - Musyoki

Plaintiff - absent

Defendant -absent

M/s Migwi absent for plaintiff

A. KANIARU

JUDGE- ENVIRONMENT & LAND COURT, KITUI