



REPUBLIC OF KENYA



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**Mwangi & another v Gathoni & 2 others (Environment & Land Case
386 of 2014) [2024] KEELC 147 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 147 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 386 OF 2014**

**JO OLOLA, J
JANUARY 25, 2024**

BETWEEN

AGNES MUTHONI MWANGI 1ST PLAINTIFF

PETER NDEGWA MWANGI 2ND PLAINTIFF

AND

PRISCILLA WANJERI GATHONI 1ST DEFENDANT

PRIMO THUKU GATHONI 2ND DEFENDANT

SERAH WANGARI MBUGUA 3RD DEFENDANT

JUDGMENT

Back ground

1. This suit was initially instituted in the High Court in the year 2010 as Nyeri HCCC No. 137 of 2010. It was transferred to this court and given its current reference in the year 2014.
2. By their Originating Summons dated and filed on 13th October 2010 as amended on 2nd October 2018, Agnes Muthoni Mwangi and Peter Ndegwa Mwangi (the Plaintiffs) claim to be entitled to be registered as the owners of the parcel of land known as Thegenge/Karia/1682 and urge the court to determine the following questions:-
 - 1). Whether the Title of Priscilla Wanjeri Gathoni, Primo Thuku Gathoni and Serah Wangari Mbugua over the parcel of land Title Number Thegenge/Karia/1682 has become extinguished by virtue of the provisions of the Limitations of Actions Act, Cap 22 of Laws of Kenya;
 - 2). Whether having been in continuous, quiet and uninterrupted possession and occupation of the land Title No. Thegenge/Karia/1682 for a period in excess of 12 years the Plaintiffs have now acquired prescriptive rights to the title thereto by adverse possession;



- 3). Whether the Land Registrar at Nyeri should be ordered and directed to delete the names of the Defendants Priscilla Wanjeri Gathoni, Primo Thuku Gathoni and Serah Wangari Mbugua and register the names of the Plaintiffs herein to say (sic) Agnes Muthoni Mwangi and Peter Ndegwa Mwangi in place thereof absolutely; and
 - 4). Whether the Defendants should meet the costs of this suit.
3. The Originating Summons is supported by and sworn by the Plaintiffs jointly and is premised on the grounds that:-
- i). The Plaintiffs have each enjoyed uninterrupted occupation and possession exclusively for a period in excess of 12 years;
 - ii). The said possession and occupation was at all times adverse and hostile to the interest of the registered proprietors of the land;
 - iii). The registered proprietors have totally failed to exert and/or establish their rights over the suit property and their title has been extinguished permanently;
 - iv). The registered proprietor transferred the suit land to one Serah Wangari Mbugua to avoid establishing their right over the land; and
 - v). It is now desirable to have the names of the Plaintiffs entered in the register of lands as proprietors and to have those of the Defendants deleted.
4. Priscilla Wanjeri Gathoni and Primo Thuku Gathoni (the 1st and 2nd Defendants) are opposed to the orders sought in the Originating Summons. In a Replying Affidavit sworn on their behalf by the 2nd Defendant, they aver that one Pauline Gathoni Murage, a mother-in-law to the 1st Plaintiff and grandmother of the 2nd Plaintiff did own a parcel of land known as Thegenge/Karia/1091. It is the said Pauline Gathoni who sub-divided the piece of land into Land Parcels No. 1680, 1681 and 1682 (the suit property).
5. The 1st and 2nd Defendants further aver that the suit property was then registered in the name of Pauline Gathoni on 23rd October 1991 before being transferred to Virginia Muthoni Thuku who is the 1st and 2nd Defendants deceased mother on 30th August 1994.
6. It is further the Defendant's case that the Plaintiffs could not have been in adverse possession of the land given their relationship with the said Pauline Gathoni. It is their case that they only acquired title to the suit property on 22nd August 2007 some three years before the suit herein was instituted and the claim for adverse possession does not therefore arise.

The Plaintiffs' case.

7. At the trial herein which proceeded by way of viva voce evidence, the Plaintiffs called one witness in support of their case.
8. PW1- Peter Ndegwa Mwangi is the 2nd Plaintiff and a son of the 1st Plaintiff. He told the court he is a farmer in Ngangarithi, Nyeri and that his mother had authorized him to proceed with the case.
9. PW1 testified that the suit property was a sub-division of the parcel known as Thegenge/Karia /1091 which was owned by her paternal grandmother one Pauline Gathoni Murage. His grandmother transferred the same to the 1st and 2nd Defendants' mother, one Virginia Gathoni Thuku who was issued with a title deed on 8th September 1994.



10. PW1 further told the court that Virginia resided on the suit land as his step-mother. PW1's father and Virginia had 3 other children who passed away but the Defendants lived with their grandmother in Gachatha in Tetu. PW1 told the court Virginia passed away in the same year 1994 and was buried in Gachatha. PW1's father James Mwangi Murage also later passed on in 1999.
11. PW1 told the court that the 1st and 2nd Defendants later in 2007 claimed their title deed was lost and started the process of getting a replacement. They eventually succeeded. He asserted that the 1st and 2nd Defendants obtained the registration through fraud and an illegality and hence the same should be cancelled. He further told the court the land had been in their possession over the years and asserted that they had acquired the same by way of adverse possession.

The Defence Case.

12. On their part, the Defendants called two witnesses in support of their case.
13. DW1- Priscilla Wanjeri Gathoni is a resident of Gachatha in Tetu sub-county and the 1st Defendant herein. Adopting the position taken in the Replying Affidavit in response to the Originating Summons, DW1 told the court that they had only acquired title on 26th October 2007 and that by the time this suit was filed on 13th October 2010, 12 years had not lapsed as contended by the Plaintiffs.
14. DW1 further told the court that Serah Wangari Mbugua (3rd Defendant) was registered as proprietor of the land on 28th November 2011 and that the 1st and 2nd Defendants no longer had title and had no interest on the suit property.
15. DW2- Serah Wangari Mbugua is the 3rd Defendant. Relying on her Affidavit filed in court on 6th March 2019, DW2 testified that she purchased the suit property for valuable consideration from the 1st and 2nd Defendants and that she became the registered proprietor thereof on 29th November 2011. DW2 further told the court that as at the time the suit was filed, she was yet to be registered as the proprietor of the land and hence the Plaintiffs had no prescriptive rights against her.

Analysis and Determination

16. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the written submissions and authorities placed before me by the Plaintiffs acting in person and Mr. Gikonyo, Learned Counsel for the Defendants.
17. By their Originating Summons as filed in the year 2010 and amended on 2nd October 2018, the two Plaintiffs have urged the court to determine whether the Defendants' title over the parcel of land known as Thegenge/Karia/1682 has become extinguished by virtue of the provisions of the Limitations of Actions Act, Cap 22 Laws of Kenya and whether having been in an uninterrupted possession and occupation thereof for a period in excess of 12 years, they have now acquired prescriptive rights to the title thereto by adverse possession.
18. In addition, the Plaintiffs urge the court to consider whether in the circumstances herein, the Land Registrar Nyeri should now be ordered and directed to delete the names of the Defendants from the said title and to instead register the names of the Plaintiffs herein as the absolute proprietors of the said property.
19. It is the Plaintiffs' case that they have each enjoyed uninterrupted occupation and possession of the suit property for a period in excess of 12 years and that the said possession has been at all times adverse and hostile to the interests of the registered proprietors of the land. The Plaintiffs assert that the registered



proprietors have totally failed to exert and/or establish their rights over the suit property and that their title thereto has now been extinguished permanently by operation of the law.

20. As it were, the doctrine of adverse possession in Kenya is captured under Section 7 of the *Limitation of Actions Act* (Cap 22 of the Laws of Kenya) in these terms:-

“An action may not be brought by any person to recover land after the end of 12 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.”

21. Section 13 of the said Cap 22, Laws of Kenya, further provides as follows:-

“A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in the Act referred to as adverse possession) and, where under Sections 9, 10.11 and 12 (of the Act), a right of action to recover land accrues on a certain date and no person is in possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.”

22. Under Section 37 and 38 of the said Act, it is stipulated that if the land is registered under one of the registration Acts specified therein, then the title is not extinguished but held in trust for the person in adverse possession until he shall have obtained and registered an order of this court vesting the land upon himself.

23. As the Court of Appeal did state in *Kasuve –vs- Mwaani Investments Limited & 4 Others* [2004] eKLR:-

“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 without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.”

24. Accordingly, the key test in a claim such as this is whether the owner of the land had been dispossessed of the same or whether he had himself discontinued possession of the suit property.

25. In support of their case, the 2nd Plaintiff who testified on behalf of himself and that of his mother (the 1st Plaintiff) told the court that he had lived on the suit property since the year 1971 and that he had been in an uninterrupted occupation and possession thereof ever since. The 2nd Plaintiff told the court that his possession was at all material times adverse and hostile to the title of the Defendants and that the Defendants had failed to lodge a claim against himself and his mother for the recovery of the land.

26. As to how they came to be on the suit land, the 2nd Plaintiff testified that the suit property was a sub-division of a parcel of land known as Thegenge/Karia/1091 which parcel was then registered in the name of his paternal grandmother one Pauline Gathoni Murage. The 2nd Plaintiff told the court that it was his said grandmother who did transfer the portion of the sub-division known as Thegenge/Karia/1682 (the suit property) to one Virginia Gathoni Thuku who was the mother to the 1st and 2nd Defendants.

27. According to the 2nd Plaintiff, the 1st and 2nd Defendant’s mother was also his step-mother as she was married to the 2nd Plaintiff’s father. The 2nd Plaintiff told the court the Defendants’ mother passed away shortly after acquiring title to the suit property on 8th September 1994. He told the court that his father James Mwangi Murage also later passed away in 1999.



28. It was the 2nd Plaintiff's testimony that sometimes in the year 2007, the 1st and 2nd Defendants who had been staying in their maternal grandmother's place in a place known as Gachatha in Tetu Sub-county made a claim that the title to the suit property was lost and they then commenced the process of replacement of the same. He urged the court to cancel the title in the name of the Defendants as the same had been obtained by way of fraud and through an illegality.
29. From the material place before the court, it was apparent that the Plaintiffs had laid a claim to the suit property for a considerable period of time. As the 2nd Plaintiff conceded during his cross-examination at the trial herein, prior to the institution of this suit, the 2nd Plaintiff had in the year 2008 instituted Nyeri Land Disputes Tribunal Claim No. 5 of 2008 against the 1st and 2nd Defendants claiming an interest in the land as a beneficiary. It would appear from a perusal of the proceedings that as at that time, the 2nd Plaintiff was unaware that the late Virginia Gathoni Thuku was survived by any children.
30. As it turned out both the Nyeri Municipality Tribunal as well as the Provincial Appeals Tribunal to which he proceeded thereafter, dismissed his claim. Two years later in the year 2010, the 2nd Plaintiff and his mother lodged this claim for adverse possession against the 1st and 2nd Defendants. In the course of time and upon realizing that the ownership of the suit property had somehow passed to the 3rd Defendant, the two applied to amend their pleadings and were allowed to do so to include the 3rd Defendant.
31. As it were, it was not in dispute that the mother to the 1st and 2nd Defendants had acquired the suit property from Pauline Gathoni Murage who was a paternal grandmother to the 2nd Plaintiff. A copy of the extract of the title produced in evidence indicates that following the sub-division of the original parcel No. Thegenge/Karia /1091 which was registered in Pauline's name, the suit property was on 30th August 1994 registered in the name of Virginia Gathoni Thuku at a consideration of Kshs. 60,000/=.
32. According to the 2nd Plaintiff however, no money had exchanged hands as the title was given to the said Virginia as a daughter-in-law since Virginia was a co-wife to the 1st Plaintiff and step-mother to the 2nd Plaintiff. That kind of understanding would probably explain why the 2nd Plaintiff went to the Tribunal after the death of his grandmother in 2007 to claim the land as a beneficiary.
33. I did however find it strange that the 2nd Plaintiff would make a claim for adverse possession against his so-called step-mother and her children. If indeed Virginia was the wife to the 2nd Plaintiff's father, I was unable to see how time could run from 1971 before she was given the land for purposes of computing time for adverse possession. From the Plaintiffs' own evidence, the land was until 1994 registered in the name of their grandmother.
34. Indeed, I was still unable to see how the Plaintiffs could claim to have taken adverse possession of the land while their husband and father, who is said to also be Virginia's husband was still residing on and using the land. Even if it were to be assumed that the 1st and 2nd Defendants who were minors at the time permanently resided in their maternal grandmother's place and that the Plaintiffs were unaware of their existence on the face of the earth, James Mwangi Murage who was said to be their father remained on the land. The 1st Plaintiff's presence on the parcel of land could only be by virtue of her marriage to the said Murage while the 2nd Plaintiff was there having been born to the two.
35. In his testimony before the court, the 2nd Plaintiff testified that his father died in the year 1999 and was buried where he lived on the suit land. Given that scenario, it would mean that as at the year 2010 when the Plaintiff brought this suit for adverse possession, only 11 years had lapsed during which the second household was in their assessment completely missing.



36. As Kneller J stated in *Kimani Ruchine – vs- Swift Rutherfords & Co. Ltd* [1980] KLR;-

“The Plaintiffs have to prove that they have used this land which they claim as of right; nec vi, nec clam, nec precario (no force, no secrecy, no persuasion). So the company must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or any endeavors to interrupt it by way of recurrent consideration.”

37. In the matter herein, it was apparent that the registered owner of the suit property was long dead by the time the Plaintiffs thought they could acquire the land by adverse possession. Her children were minors and there was no way the owners of the land could be said to have had knowledge of what the Plaintiffs were doing on the land.

38. At any rate, it was apparent at the hearing hereof that the Plaintiffs had abandoned any claim based on adverse possession. I say so because at the trial herein, no evidence whatsoever was produced as to how the Plaintiffs had entered the land and how they had taken exclusive possession thereof. Instead the Plaintiffs asserted that the late Virginia was registered as the owner of the suit property to hold in trust for the rest of the family. No attempt was however made to demonstrate the existence of the said trust.

39. While the Plaintiff insisted that Virginia was a member of the family, the Defendants insisted that she was a single parent. That defence position was in my view more plausible given that upon her death, Virginia was taken back to her parents' place in Gachatha where she was buried. There was no evidence that the man said to be her husband- James Murage made any attempt to claim the suit property during the next five (5) years that he remained alive following Virginia's death.

40. It was also apparent that following Virginia's death during the tender years of the 1st and 2nd Defendants herein, it was the Public Trustee who filed High Court Succession Cause No. 68 of 1998 and was thereafter issued with a Grant. It was through that Grant that the Public Trustee who has not been made a party herein, transferred the land to the 1st and 2nd Defendants upon attaining the age of majority. Again there was no evidence placed before the court to demonstrate that the said grant had been challenged in any way by the Plaintiffs.

41. Regarding the claim that the 1st and 2nd Defendants had transferred the suit property to the 3rd Defendant during the pendency of this suit, it was evident that that was not the case. The Defendants have exhibited documents demonstrating that the 1st and 2nd Defendants on the other hand and the 3rd Defendant executed a Sale Agreement on 30th September 2008, some 2 years before this suit was filed.

42. It was further apparent that the parties on 8th July 2009 did apply to the Nyeri Municipality Land Control Board for consent to dispose of the land. That consent was issued to them on 30th July 2009. The 3rd Defendant was subsequently registered as the proprietor of the suit land on 29th November 2011. I was in the circumstance not persuaded that the Plaintiff had acquired any prescriptive rights on the suit property as against the Defendants herein.

43. In the premises, I did not find any merit in the Plaintiff suit. The same is hereby dismissed with costs to the Defendants.

DATED, SIGNED AND DELIVERED AT NYERI THIS THURSDAY 25TH DAY OF JANUARY, 2024.

In the presence of:

The Plaintiffs present in person.



The 1st Defendant present in person.

Court Assistant: Kendi

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J. O. OLOLA

JUDGE

