



Ndungu & another v Munori & another (Environmental and Land Originating Summons 021 of 2023) [2024] KEELC 811 (KLR) (15 February 2024) (Judgment)

Neutral citation: [2024] KEELC 811 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 021 OF 2023
YM ANGIMA, J
FEBRUARY 15, 2024**

BETWEEN

JANE WACUKA NDUNGU 1ST PLAINTIFF

WAKABA NDERI MUCHIRI 2ND PLAINTIFF

AND

ELIZABETH NDUITA MUNORI 1ST DEFENDANT

HANNAH NYOKABI NGONYO 2ND DEFENDANT

JUDGMENT

A. Applicants' Claim

1. Vide an originating summons dated 03.01.2022 expressed to be brought under Sections 38 of the [Limitation of Actions Act](#) (Cap.22), Sections 1A & 1B of the [Civil Procedure Act](#) (Cap.21), Order 37 rules 1, 2 & 3 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law, the 1st and 2nd Plaintiffs sought determination of the following questions:
 - a. Whether John Ndungu Gichuki (deceased) bought 19 acres of land being a portion of the land known as Nyandarua/South Kinangop/781 from Leah Wangui Ndinguri.
 - b. Whether Wakaba Nderi (deceased) bought 3 acres of land being a portion of land known as Nyandarua /South Kinangop/781 from Leah Wangui Ndinguri.
 - c. Whether Leah Wangui Ndinguri sold the afore mentioned portion of land in her lifetime.
 - d. Whether John Ndungu Gichuki and Wakaba Nderi bought the said portions for valuable consideration.
 - e. Whether the sold portions form part of the estate of Leah Wangui Ndinguri (deceased)



- f. Whether a declaration should issue that the titles Nos. land known as Nyandarua/South Kinangop/7593 and Nyandarua/South Kinangop/7594 in the names of John Ndungu Gichuki and Wakaba Nderi confer legal and indefeasible proprietary interest to their respective estates.
 - g. Whether Leah Wangui Ndinguri and the Respondents' title to the suit land has been extinguished through the doctrine of adverse possession.
 - h. Whether the Respondents, their agents, servants and/or employees should be permanently restrained from trespassing, entering, taking possession and/or interfering with the applicants' quiet possession and occupation of their respective portions, buildings and premises on title numbers land known as Nyandarua/South Kinangop/7593 and Nyandarua/South Kinangop/7594.
 - i. Who should bear the costs of this suit.
2. The summons was based upon the grounds set out on the face thereof and supported by supporting affidavit sworn by Jane Wacuka Ndungu on 03.01.2022 and on her own behalf and on behalf of the 2nd Plaintiff. The Plaintiffs contended that they had been in open, peaceful and continuous possession and occupation of portions of 19 acres and 3 acres respectively out of Title No. Nyandarua/Sought Kinangop/781 for over 45 years. The claimed to have purchased their respective portions from the previous owner the late Leah Wangui Ndinguri (Leah) for valuable consideration.
 3. The 1st Plaintiff pleaded that it was her late husband, John Gichuki, who had bought 19 acres of land from Leah between 1976 and 1983 whereas the 2nd Plaintiff pleaded that he had bought 3 acres from Leah in 1986 or thereabouts. The Plaintiffs pleaded that they had settled on their respective portions of land for many years and developed the same without objection from any quarters.
 4. The Plaintiffs further pleaded that despite the purchases made Leah passed on before she could transfer the said portions of land to them. It was further pleaded that the Defendants upon obtaining letters of administration of the estate of Leah had ignored their beneficial interest in the estate and obtained a certificate of confirmation of grant completely excluding them. The Plaintiffs further pleaded that the Defendants had in 2021 issued them with eviction notices for them to vacate the portions of land they were occupying.
 5. It was thus the Plaintiffs' contention that by virtue of the longevity of their occupation and the continuous and uninterrupted nature of their possession they had acquired adverse possession of the portions of land they had purchased from Leah hence the summons under Section 38 of the *Limitation of Actions Act* (Cap.22).

B. Defendants' Response

6. The record shows that the Defendants filed grounds of opposition dated 28.02.2022 in opposition to the summons. The 2nd Defendant also filed a replying affidavit sworn on 28.02.2022 on her own behalf and on behalf of the 1st Defendant in opposition to the summons. The Defendants opposed the suit on several grounds. First, that the claim for adverse possession was untenable because the suit property was registered in the name of the Settlement Fund Trustees (SFT) until 2006 when it was illegally registered in the names of John Gichuki and the 2nd Plaintiff. Second, that the Defendants were not the registered owners of the suit land hence a claim for adverse possession could not lie against them.
7. The third objection was that the Plaintiffs had sued the Defendants in their personal capacities whereas their claim was against the estate of Leah. The fourth was that Wakaba Nderi was already deceased and



the claim had not been instituted by his legal representative. The 5th objection was that the Plaintiffs' claim in so far as it was based on purchase was time-barred. The Defendants also contended that the summons had been filed prematurely since the succession court had directed the Plaintiffs to await the full administration of the estate of Leah before lodging their claims against the estate.

C. Summary of Evidence at the Trial

a. Plaintiffs' Evidence

8. At the trial hereof, the 1st Applicant testified on her behalf as PW1. She adopted the contents of her supporting affidavit dated 03.01.2022 and her witness statement of even date as her evidence in-chief. She also produced the documents in the Plaintiffs' list of documents as exhibits P1 – P16. The 1st Plaintiff called 5 more witnesses in support of her case for adverse possession who all testified that they knew the 1st Plaintiff and that her late husband had bought the claimed portion of land from the late Leah. They also testified on the longevity her occupation.
9. It was the 1st Plaintiff's case that she and her late husband settled on the land they had acquired from Leah in 1976 and that they had developed the land by constructing a permanent building and farming thereon. It was her further evidence that they took possession during the lifetime of Leah who never sought to evict them. The 1st Plaintiff thus contended that she had acquired the portion of 19 acres under the doctrine of adverse possession.
10. The 2nd Plaintiff did not tender any evidence at the trial since her claim was withdrawn before the hearing of the suit.

b. Defendants' Evidence

11. The 2nd Defendant was the one who testified on behalf of the Defendants. She adopted the contents of her replying affidavit sworn on 28.02.2022 as her evidence in-chief. She also produced the annexures thereto as exhibits D1 – D14. Her evidence was to the effect that her late mother Leah was the owner of the suit property which was allocated to her by the SFT. It was her evidence that she had fully repaid her loan to SFT which had discharged the property but she died in 1986 before she could obtain a title deed.
12. The Defendants denied that Leah had sold any portion of her land during her lifetime. They also denied that their father had sold any land to the Plaintiffs or any other persons. They also denied the existence of any sale agreements for the sale of any portion of Leah's land. They disputed that the Plaintiffs had been in occupation of the disputed land for decades and stated that they entered the land around 2006. The 2nd Defendant, nevertheless, conceded that none of her family members were occupying or utilizing any portion of the suit property.

D. Directions on Submissions

13. Upon conclusion of the trial, the parties were given timelines within which to file and exchange their respective submissions. The record shows that the 1st Plaintiff's submissions were filed on or about 30.10.2023 whereas the Defendants' submissions were filed on or about 26.11.2023.

E. Issues for determination

14. The court has perused the originating summons dated 03.01.2022, the replying affidavit in opposition thereto as well as the documents on record. The court is of the opinion that the following issues arise for determination herein:



- a. Whether the Defendants were wrongly sued in their personal capacities.
- b. Whether the 1st Plaintiff is entitled to the claimed portion of 19 acres on account of purchase.
- c. Whether the 1st Plaintiff is entitled to the claimed portion of 19 acres on account of adverse possession.
- d. Whether the 1st Plaintiff is entitled to the permanent injunction sought.
- e. Who shall bear costs of the suit.

F. Analysis and Determination

a. Whether the Defendants were wrongly sued in their personal capacities

15. In their grounds of opposition and replying affidavit, the Defendants raised the issue of the capacity in which they had been sued. It was contended that they had been wrongly sued in their personal capacities whereas the 1st Plaintiff's claim was against the estate of Leah. Although this issue was not canvassed by the parties in their submissions, the court is of the view that it is an important issue which requires determination since it may affect the competence of the proceedings.
16. It is evident that the 1st Plaintiff did not in her originating summons describe the capacity in which she had sued the Defendants. The Defendants were simply described as daughters of the late Leah who was the owner of the suit property. However, a perusal of the supporting affidavit and the exhibits makes it clear that the 1st Plaintiff's claim was against the estate of Leah and not the Defendants in their personal capacities. It is also clear from the material and exhibits on record that the Defendants were the administrators of the estate of Leah.
17. The court is thus of the view that the Defendants being the administrators of the estate of Leah were not wrongly sued in the proceedings. They were not incapacitated in defending the claim. The record shows that they fully appreciated the nature of the claim and that it was against the estate of Leah. They also filed a detailed and comprehensive response to the summons. As such, they did not suffer any prejudice by the 1st Plaintiff's failure to specifically describe them as administrators of the estate of Leah.

b. Whether the 1st Plaintiff is entitled to the claimed portion of 19 acres on account of purchase

18. The 1st Plaintiff put great emphasis on the fact that the late John Gichuki purchased 19 acres of land for valuable consideration. She produced the relevant sale agreements and acknowledgements of payment as evidence. The first sale agreement was dated 30.09.1976 for the sale of 15 acres whereas the second was dated 04.04.1983 for the sale of an additional 4 acres. There is no doubt from the material and evidence on record that such a sale took place.
19. There is credible evidence on record to show that the 1st Plaintiff's family took possession of the said 19 acres during the lifetime of both Leah and her husband. There is credible evidence that they developed the land by constructing buildings and cultivating it without any protests or objection by Leah. There is no evidence to show that Leah ever reported to any authorities that the 1st Plaintiff's family was illegally occupying her land and there is no indication of any legal action towards their eviction.
20. The court does not believe the 2nd Defendant's evidence that Leah never sold any portion of her land during her lifetime and that her father too never sold any land. The court finds that the 2nd Defendant was not a credible and truthful witness when she testified in court that she did not know the 1st Plaintiff and that she had never resided on the suit land prior to 2006. The court does not believe the 2nd



Defendant when she claimed at the trial that her late father had complained that the late John Gichuki had grabbed 19 acres of his land. If, indeed, there was such a complaint why didn't she include it in her replying affidavit and her evidence in chief? Why wasn't the alleged land grab never reported to either the local administration or law enforcement agencies? How come there was not a single document or letter of complaint from either Leah or her husband on the alleged land grab? The court finds that the 2nd Defendant was simply an unapologetic liar.

21. Be that as it may, the existence of sale agreements and payment of the purchase may not entirely resolve the 1st Plaintiff's grievances. It is evident from the material on record that in framing the first five questions in the summons she was essentially seeking recognition and enforcement of those agreements. It is evident that the sale agreements are dated 1976 and 1983. The court agrees with the Defendants' contention that those agreements are time-barred under the Limitation of Actions Act (Cap.22). They are not capable of recognition and enforcement in a summons of this nature. In the event, the 1st Plaintiff is not entitled to 19 acres of the suit land on account of purchase.

c. Whether the 1st Plaintiff is entitled to the claimed portion of 19 acres on account of adverse possession

22. The court has considered the material and submissions on record on this issue. The 1st Plaintiff submitted that she had satisfied the elements of adverse possession of the 19 acres she was occupying. She relied, inter alia, upon *Joseph Macharia Kairu v Kenneth Kimani Muiruri* [2021] eKLR and *Mageta Enterprises Limited v Tilak Company Ltd* [2020] eKLR in support of her case.
23. The Defendants, on the other hand, submitted that the claim for adverse possession was premature and untenable because the land belonged to the SFT at all material times until 2006 or thereabouts. It was contended that the land was essentially public land which could not be the subject of a claim for adverse possession. The Defendants relied upon the cases of *Ravji Karsan Sanghani v Peter Gakunu* [2019] eKLR and *Ann Itumbi Kiseli v James Muriuki Muriithi* [2013] eKLR in support of their submissions.
24. The elements of adverse possession were summarized in the case of *Kasuve v Mwaani Investments Ltd & 4 Others* [2004] 1KLR 184 as follows:

“...and 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 and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, *Wanja vs Sakwa No.2* [1984] KLR 284. A title by adverse possession can be acquired under the Limitation of Actions Act for part of the land...”

25. Similarly, in the case of *Chevron (K) Limited v Harrison Charo Wa Shutu* [2016] eKLR it was held, inter alia, that:

“At the expiration of the twelve-year period the proprietor's title will be extinguished by operation of the law and section 38 of the Act permits the adverse possessor to apply to the High Court for an order that he be registered as the proprietor of the land. Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of



the soil for the purpose for which he intended to use it. See *Littledale v Liverpool College* [1900]1 Ch.19, 21.”

26. As indicated before, there is no doubt from the material on record that the 1st Plaintiff’s family settled on a portion of 15 acres in 1976 or thereabouts and later on acquired an additional 4 acres in 1983. The evidence on record from the 1st Plaintiff and her witnesses clearly demonstrated that they had been in occupation for decades and that their entry was peaceful and without the use of force and without secrecy. The evidence shows that it was continuous and without interruption. The 1st Plaintiff’s family treated the land as their own since they developed it with dwelling houses one of which was a permanent house.
27. The only issue which requires further interrogation is whether the suit land belonged to Leah or whether it was public land belonging to SFT at all material times. This issue may be resolved by 2nd Defendant’s replying affidavit sworn on 28.02.2022 where we stated as follows:
- “ 4. That the owner of parcel of land Nyandarua/South Kinangop/781 was my deceased mother Leah Wangui Ndinguri who died in the year 1986.
5. That the parcel of land was known as Plot Number 781 measuring approximately 12.3 Ha and allocated to her through the Settlement Fund Trust (hereinafter SFT).
6. That I am aware that my mother had executed a charge on the 27th July, 1982 on the land, later on paid up the loan and she was discharged however she died before she would be issued with a title deed. Attached hereto and marked HNN 2 is a copy of a letter confirming this.”
28. It is further evident from the certificate of confirmation of grant dated 11.02.2021 issued to the Defendants that the suit property was distributed amongst the beneficiaries of the estate of Leah as part of her estate. The court is thus satisfied on the basis of the material on record that the suit property is not public property but the same forms part of the estate of Leah hence amenable to the doctrine of adverse possession. The court does not agree with the Defendants’ contention that Leah should have been issued with a title deed first for the property to become amenable to adverse possession. The court is of the opinion that the interest of SFT ceased in the 1980s when Leah paid up for the property and the same was discharged. The SFT had no legal interest in the suit property upon discharge. The court is thus satisfied that the 1st Plaintiff has adequately proved her claim for adverse possession of 19 acres out of the suit property.

d. Whether the 1st Plaintiff is entitled to the permanent injunction sought

29. It is evident from the material on record that the Defendants have never interfered with the 1st Plaintiff’s occupation of the 19 acres in her possession. In fact, the Defendants conceded at the trial that none of the daughters and family members of the late Leah are utilizing or cultivating any part of the suit land. The only action the Defendants took was to issue a demand letter in 2021 asking the Plaintiffs to vacate the land. That was before the filing, hearing and determination of this suit. There is nothing on record to suggest that the Defendants shall interfere with the 1st Plaintiff’s occupation, use and enjoyment of the 19 acres after delivery of the judgment. As a result, the court is not inclined to grant the injunction sought.



e. Who shall bear costs of the suit

30. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful litigant should not be awarded costs of the suit. Accordingly, the 1st Plaintiff shall be awarded costs of the suit.

G. Conclusion and Disposal Orders

31. The upshot of the foregoing is that the court is satisfied that the 1st Plaintiff is entitled to the portion of 19 acres claimed on account of adverse possession. The court is further satisfied that the 1st Plaintiff has proved her claim for adverse possession on a balance of probabilities. As a result, the court makes the following orders for disposal of the suit:

- a. A declaration be and is hereby made that the 1st Plaintiff, Jane Wacuka Ndungu (as administrator of the estate of John Ndungu Gichuki) is entitled to the portion of 19 acres claimed out of Title No. Nyandarua/South Kinangop/781 from the estate of the late Leah Wangui Ndinguri on account of the doctrine of adverse possession.
- b. The Land Registrar – Nyandarua County shall cause the said Jane Wacuka Ndungu to be registered as proprietor of the said portion of 19 acres in her capacity as the administrator of the estate of John Ndungu Gichuki (deceased).
- c. The Defendants as the administrators of the estate of the late Leah Wangui Ndinguri are hereby directed to sign all the necessary forms, documents and instruments to facilitate the transfer to the 1st Plaintiff within 30 days from the date hereof in default of which the Deputy Registrar of the court shall do so on their behalf.
- d. The 1st Plaintiff is hereby awarded costs of the suit.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 15TH DAY OF FEBRUARY, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. Karuga for the 1st Plaintiff

Mwariri for the 1st and 2nd Defendants

C/A - Carol

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Y. M. ANGIMA

JUDGE

