



Njiri (Suing as the Legal Representative and Administrator of the Estate of the Late Wilson Njiiri Gikonyo Deceased) v Wangui & 7 others (Environment & Land Case 193 of 2014) [2024] KEELC 709 (KLR) (15 February 2024) (Judgment)

Neutral citation: [2024] KEELC 709 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 193 OF 2014
A OMBWAYO, J
FEBRUARY 15, 2024**

BETWEEN

DAVID GIKONYO NJIRI (SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF THE LATE WILSON NJIIRI GIKONYO DECEASED) PLAINTIFF

AND

RUTH MARY WANGUI 1ST DEFENDANT
WILLIAM WANJOHI MUREITHI 2ND DEFENDANT
FAMILY SHADE AFRICA LIMITED 3RD DEFENDANT
HELLEN NJERI WANJOHI 4TH DEFENDANT
KEREN JEPCHUMBA AYABEI 5TH DEFENDANT
DANIEL OWOUR ONYANGO 6TH DEFENDANT
GODFREY MICHAEL OTIENO NYAMA 7TH DEFENDANT
ELIJAH MBARU NDUNGU 8TH DEFENDANT

JUDGMENT

- David Gikonyo Njiri (suing as the legal representative and administrator of the estate of the late Wilson Njiri Gikonyo (deceased) (hereinafter referred to as the plaintiff) has come to this court against Ruth Mary Wangui, William Wanjohi Mureithi, Family Shade Africa Limited,Hellen Njeri Wanjohi, Keren Jepchumba Ayabei, Daniel Owour Onyango, Elijah Mbaru Ndungu and Godfrey Michael Otieno Nyama (hereinafter referred to as the defendants) claiming that at all material times, the plaintiff was the legal representative and son of the late Wilson Njiiri Gikonyo (hereinafter referred 'to as the



deceased), who died on 4th March, 2013. The Plaintiff avers that the said deceased and members of his family who include Plaintiff, have been in possession/occupation of all that parcel of land known as Njoro Ngata Block 1/61 (hereinafter referred to as the suit property) since the late 1980's. They have been using the same for sundry agricultural purposes. The Plaintiff contends that since the late 1990s the Plaintiff's father had overriding interest in the said suit property within the meaning of section 30 of the repealed Registered Land Act and now under section 28 of the Land Registration Act, 2012. The overriding rights include those already acquired and those in the process of being acquired by virtue of the Limitations of Actions Act, Cap 22 of the Laws of Kenya. He further contends that the plaintiff's father's and family's actual occupation of the suit property was capable of being disclosed to any person intending to purchase any portion of it including the 2nd to 8th Defendants. The Plaintiff further contends that in view of the plaintiff's father's overriding interest in the suit property, no valid title could be acquired or was acquired by the 2nd to 8th defendants over any portion of the suit property.

2. The suit property was bought from the 1st defendant by the deceased Wilson Njiri Gikonyo on the 2nd September 1998 vide a sale agreement which had express terms. The 1st defendant in breach of the terms of agreement, failed to discharge the title and proceed to transfer the suit property into the names of the deceased, but the 1st defendant proceeded to take a loan from the bank hence impeding the purchaser to process a transfer. The plaintiff further states that he is entitled to the property by virtue of section 17, 37 and 38 of the limitation of Action Act cap 21 Laws of Kenya that provides for adverse possession. The plaintiff further pleads that having been in possession of the property by virtue of an agreement of sale, the family had an overriding interest in the property
3. The plaintiff further claims that the defendants obtained the suit property fraudulently as the consent of the Land Control Board was not obtained by the 1st defendant to subdivide the property and transfer the same to the 2nd – 8th defendants.
4. The plaintiff prays for a permanent injunction restraining the defendants either by themselves servants agents representatives and or employees from transferring, alienating, selling, dealing, exercising, charging trespassing and or in any way interfering with the parcels of land registered in their respective names. The plaintiff further prays for a declaration that on September, 2010, Plaintiff's father acquired adverse possession. The plaintiff further prays for a declaration that the 1st Defendant became a constructive trustee in respect of Njoro Ngata Block 1/61 on 2nd September 2010,
5. Moreover, a declaration that the purported sale on 13th March 2012 and subsequent transfer of Njoro Ngata Block 1/61 to the second defendant on 27th March 2013 was a nullity
6. The plaintiff seeks a declaration that the subdivision of Njoro Ngata Block 1/61 into 46 plots by the 2nd Defendant and the subsequent transfer of Njoro Ngata Block 1/61 to the second defendant on 27th March 2013 was a nullity and a declaration that the subdivision of Njoro Ngata Block 1/61 into 46 plots by the 2nd Defendant and the subsequent transfers of the subdivisions to the 3rd to 8th defendants are illegal, null and void. He seeks the court to declare that the correct LR Number of the suit property is Njoro Ngata Block 1/61. An order that the 1st to 8th Defendants do deliver up the title deeds in respect of the parcels of which they are registered proprietors to the Registrar for cancellation. An order that the 1st defendant transfers to the plaintiff forthwith Njoro Ngata Block 1/61. That the title document issued to the 2nd defendant (William Wanjohi Mureithi) be cancelled and that the estate of the late Wilson Njiri Gikonyo be allowed time to apply for consent and complete the purchase price as per the sale agreement dated 2.9.1998 and the title deed be issued in the name of Wilson Njiri Gikonyo for purposes of distribution in a succession cause.



7. That in the alternative, the 1st defendant do pay to the estate of the deceased through the plaintiff a sum equivalent to the current market value of Njoro Ngata Block 1/61 which sum shall be assessed by either a joint valuer or as court appointed valuer as the court deems fit. Lastly, the plaintiff prays for General damages for trespass against the '2nd defendant plus Costs of this suit ad interest thereon.
8. In the statement of defence the defendants jointly deny the plaintiff's claim and state that the agreement being sought to be enforced cannot be enforced as prayed as the suit is time barred having been brought 16 years since the said agreement became null and void. They plead that the possession of the suit property by the plaintiff is not adverse and does not satisfy the legal requirement of the law on adverse possession.
9. When the matter came up for hearing, PW1 Julius Waiharo Mariuko testified first and relied on his witness statement which was adopted as evidence in chief. He testified that Wilson Njiiri was a member of Kiamunyi and at the time he was buying the land, he was a worker at Thumaini Bar. PW1 was a neighbour of the said Wilson Njiiri since 1975. On cross examination he states that he did not know the owner of the plot and whether the person using the plot was using with the consent of the owner. He knew that Wilson Njiri was operating a lodging and hotel in Nairobi. Many people were using and grazing cattle on the plot. This was up to the year 2012.
10. PW2, Grace Mwihaki Mwangi states that he knew family of the plaintiff since 1975. She owned the adjacent plots No 59 and 60. The owner of the adjacent plot which is the suit property was Mary Njiiri. She adopted her witness statement dated 6th November 2017. On cross examination she states that the owner of the suit plot was Mary Njiiri. She had been using the plot since 1975. That the plaintiff bought the land from the 1st defendant.
11. PW3, Reuben Koskei adopted his witness statement and on cross examination he states that he was hired to cultivate the land in the year 2008, 2010 and 2011. In 2008, it looked like it had stayed long without being used. He did not know whether Wilson Njiiri lived on the plot.
12. PW4, David Gikonyo Njiiri adopted his statement as evidence in chief. The statement is dated 30th June 2014 and a supplementary statement dated 24th February 2016. In a nutshell, he has a grant of letters of administration intestate in respect of the estate of Wilson Njiri Gikonyo, his late father. The 1st defendant was a family friend and allowed them to use her land in Kiamunyi thus Njoro/Ngata/Block 1/61. She allowed her parents to use the land but later sold the land to the plaintiff's father in 1998 through a sale agreement dated 2nd September 1998. The parties to the agreement were his father and Ruth Mary Wangari. The purchase price was Kshs1, 320,000 payable by bankers cheque. The plaintiff paid Kshs800, 000/= and that the balance was to be paid upon a charge existing on the title being redeemed and the land transferred to the plaintiff. More money thus Ksh 50,000 was paid on 6th June 2006 by the plaintiff's father to the son of the 1st defendant. The son was later paid an additional Kshs50, 000. Kshs40, 000 was later paid to the agent. Before passing on his father had paid Kshs1,143,000. The balance being Kshs177, 000. All this happened when the plaintiff was in possession.
13. The property was charged to the Barclays Bank. The 1st defendant charged the property further hence making it impossible to complete the agreement. More charges were registered without the permission of the plaintiff. Ultimately the 1st defendant sold the property to William Wanjohi Mureithi on 13th March 2012 for Kshs9, 000,000. Later the property was subdivided and sold to the 3rd to 8th defendants. The defendants invaded the land and someone burnt the grass on the land and uprooted the fence. They planted maize but someone sprayed the same with herbicide. On cross examination by Mr Ikua, he states that the agreement of 2nd September 1998 was between his late father and the 1st defendant.



- He did not participate in the agreement. As at the date it was signed there was no considerations. The consideration was paid on 22nd September 1998 in the sum of Kshs800, 000.
14. PW5 Mary Wanjiku Njiri relied on the witness statement dated 24th February 2016 and 29th September 2018. She states that the plaintiff is her son whereas the 1st defendant was her friend. On cross examination she states that she was using the 1st defendant land with her consent until 2012. On re-examination, she states that they were given consent in 1975 and used the land until 2011. There was an agreement between her husband and the 1st defendant on 2nd September 1998. From 1985 to 1998 they were using the land with her consent. But from 1998 onwards they were using the land as purchasers and not with her permission.
 15. PW6 Charles Mubei relied on his statement which was adopted as evidence in chief. His mother and Mrs Njiiri were friends and both used to work on the farm. She assisted Mrs Njiiri on the farm since 1993. They used to plant maize and beans on the land. They later planted grass. On cross examination he states that he did not know the number of property. He did not know who owned the land. He stated that they planted maize in 2008. That was the close of the plaintiff's case.
 16. The defence called DW1, Ruth Mary Wangari the 1st defendant who also adopted her statement and stated that she knew Wilson Njiiri Gikonyo because she used to work with the wife. She never used the land in dispute but Wilson Njiiri Gikonyo and family was using the land. They did an agreement in 1998 for Njiiri to purchase the land. He paid a deposit but did not pay the balance. She could not remember how much money he paid but she acknowledges that he paid some money. She sold the land to a 3rd party because he did not pay all the money. On cross examination by Mr Gitonga, she states that when Wilson Njiiri bought the land, he became a purchaser and not just a friend. She did not transfer the land to Njiiri because he did not pay all the money.
 17. DW2 William Wanjohi Mureithi relied on his statement that was adopted as his evidence in chief. He is the managing Director of Shade African Ltd. The 4th defendant is his wife. He bought the suit property from the 1st defendant. The land was charged to Barclays Bank. He caused the property to be discharged from the bank by paying the loan and securing a discharge of charge. He entered into agreement with Ruth Wangoi and the consideration was Kshs9, 000,000. DW2 later caused the property to be transferred to himself, subdivided the property into 46 plots and title deeds were issued. He never enjoyed the property because the fence was destroyed and the land sprayed with herbicide. On cross examination, he states that he was not aware of a valid sale agreement between Wilson Njiiri and Ruth Mary Wangui. However she acknowledges the existence of an agreement but the purchaser failed to pay the agreed purchase price. He states that there was no consent of the Land Control Board between William Njiri and Ruth Mary Wangui .
 18. DW3 Daniel Maina Waruinge, a pastor, estate agent and businessman testified that the 2nd defendant gave him the consent to sell the land. He went to the land and found it a bush in 2012. He subdivided the land and put a warning signpost that the land was not for sale. When he went to the land it was bushy and not occupied. On cross examination by Mr Gitonga he states that he did not know the place very well. Before 2011, he did not know more about the suit property. He did not know who lived there before.
 19. DW4, Stanley Bolimu Ogova a resident of Rongai in Nakuru and a businessman relied on his statement dated 23rd March 2018. He was given the duty to clear the land in 2011. He burnt the bushes. The land was not occupied but had trees and grass and thorny shrubs. He burnt the grass and cleared the bush. While he was clearing, a neighbor came and called the chief. On cross examination he states that there was nothing on the land.



Rival Submissions

20. The gravamen of the plaintiff's submissions is that the defendant are holding the property in trust for the plaintiff under the principle of constructive trust. That the plaintiff has an overriding interest in the said property. The plaintiff relies on section 28 of the [Land Registration Act](#) 2012 and section 4 of the Trust of [Land Act](#) Cap 290.
21. On adverse possession the plaintiff submits that [Land Control Act](#) does apply to adverse possession. The plaintiff submits that the death of a claimant does not stop the period of adverse possession from running. He submits that their possession was open not secret, neighbors and area chief knew it. The plaintiff submits that the 1st defendant never utilized the property and was never in possession.
22. According to the plaintiff the sale agreement dated 2nd September 1998 never received the consent of the Land Control Board and therefore became null and void after expiry of 6 months of its execution and therefore possession became adverse 12 years after the sale agreement became null and void. In conclusion the plaintiff submits that he has proved his case on a balance of probabilities and therefore the suit should be allowed.
23. Mr N. Ikua learned counsel for defendant submits that the plaintiff entered the suit land due to express permission by the 1st defendant and therefore it can't be adverse possession. There is no evidence that the family of 1st defendant left the property at any one time and came back.
24. Moreover, the defendant submits that there is evidence that the plaintiff family never left the parcel of land and continued occupying due to the permission by the 1st defendant and that they never left the land. Moreover, that a claim of adverse possession cannot stand where there is a charge or encumbrance.
25. The defendant further argues that the sale agreement became null and void after expiry of 6 months of the agreement due to the fact that the consent of the Land Control Board was not obtained. The defendant further submits that an extract of title has not been annexed hence the suit should be dismissed with cost. The gist of the defendant's submissions is that the plaintiff's family was not in possession of the land and therefore adverse possession does not apply.

Analysis And Determination

26. I have carefully considered the submissions on record and evidence adduced by the parties and the pleadings of parties and do find the following issues ripe for determination
 1. Whether the defendants are holding the property in trust for the plaintiffs (constructive trust)
 2. Whether the plaintiffs has established the principle of adverse possession.
 3. Whether the plaintiff has established the claim of specific performance
27. The court is satisfied and finds that the plaintiff's mother was a friend to the 1st defendant and that both used to work Kenton College for a long period of time and that the 1st defendant purchased the suit property sometime in 1975 and allowed the plaintiff's mother and father to utilize the same as they managed the land as caretakers. However, the plaintiff's father Wilson Njiri Gikonyo later bought the property on 2nd September 1998 vide a sale agreement of the same date. Upon purchasing the land, the family continued using the suit property. The agreement dated 2nd September, 1998 had terms and conditions that were met by the plaintiff's father but not the 1st defendant. The plaintiff's father paid an instalment of KShs 800,000 and that the balance was to be paid upon discharge of charge and transfer but unfortunately, the 1st defendant took a further loan and charged the property further and



therefore no transfer could take place. When she caused a discharge of charge, instead of transferring the property to the plaintiff, she transferred to the 2nd defendant. The 1st issue is whether the principle of adverse possession is available in this case.

28. The 1st issue is whether the principle of adverse possession is available in this case. The law on adverse possession is provided for under the Limitation of Actions Act. Section 7 of the Act provides:

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. Section 13 “(1) 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 this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land

- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
- (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land”.

29. Section 17 extinguishes the rights of a registered owner where there is a successful claim for adverse possession. Section 38 on the other hand provides;

(1) (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land.”

30. The Court of Appeal in Kisumu Civ App. No. 110 of 2016 *Richard Wefwafwa Songoi v Ben Muniyifwa Songoi* [2020] eKLR opined that a person claiming adverse possession must establish the following

- (a) On what date he came into possession.
- (b) What was the nature of his possession?
- (c) Whether the fact of his possession was known to the other party.
- (d) For how long his possession has continued and
- (e) That the possession was open and undisturbed for the requisite 12 years.

31. This court finds that the plaintiff entered the land in 1975 and was using the land for general farming but was by the consent of the 1st defendant and the plaintiff was basically a caretaker of the land until the date of the purchase of the property. Upon the purchase of the property on the 2nd September 1998 the plaintiff became a purchaser and ceased being a caretaker and that the 1st defendant had a duty to clear the bank loans and transfer the property to the plaintiff but the same did not happen. Upon the expiry of the 6 months window given by the *Land Control Act* for the consent for sale of property, the period for adverse possession being 12 years began running and the same came to fruition in the year



2010. The suit herein was filed in 2014 approximately 16 years of hostile possession by the plaintiff. This court finds for the plaintiff that he is in adverse possession of the property.

32. On the second issue of constructive trust, the defendants argue that the agreement made between the late Wilson Njiiri Gikonyo and the 1st defendant is null and void due to the fact there was no consent of the land control board as required by the land control act cap 305 Laws of Kenya.

33. The transactions affecting agricultural land which are controlled are specified in Section 6(1) of the Land Control Act and include, sale, transfer, lease, mortgage, partition, sub-division and sale of shares in a private company or co-operative society which owns land. Section 6 (1) further provides that such a transaction:

is void for all purposes unless the Land Control Board for the land control board area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.”

Section 6 (2) of the Land Control Act provides:

For avoidance of doubt, it is declared that the declaration of trust of agricultural land situated within a Land Control Board area is a dealing in land for purposes of subsection (1)”.

34. Further, Section 6 (3) (b) states that Section 6 of the Land Control Act does not apply to:

a transaction to which the Government or the Settlement Fund Trustees or (in respect of Trust land) a county council is a party.”

35. Section 8 (1) requires that an application for consent should be made in the prescribed form within six months of the making of the agreement but the proviso thereto gives the High Court power to extend the period if it considers that there are sufficient reasons to do so upon such conditions, if any, as it may think fit. Section 8 (2) requires the Land Control Board either to give or refuse its consent and Section 9 (1) specifies the matters that the Land Control Board should consider and the principles it should apply in making its decision whether to grant or refuse consent. Section 11 (1) of the Act provides for appeals from the decision of the Land Control Board to the Provincial Land Control Appeals Board for each Province chaired by a Provincial Commissioner. Further appeal is provided under Section 13 (1) to Land Control Appeal Board chaired by the Minister.

36. [9] Under Section 7 of the Land Control Act, consideration paid for a transaction which becomes void is recoverable as a debt subject to Section 22 which provides:

Where a controlled transaction; or an agreement to be a party to a controlled transaction, is avoided by Section 6 and any person –

- (a) pays or receives any money; or
- (b) enters into or remains in possession of the land, in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months or to both such fine and imprisonment.

37. However, equity abhors unjust enrichment and seeks to do justice where strict application of the law would create an injustice. The word equity broadly means a branch of law denoting fundamental



principles of justice. It has various meanings according to the context but three definitions from Black's Law Dictionary, Ninth Edition will suffice for our purpose:

2. The body of principles constituting what is fair and right.
 3. The recourse to principles of justice to correct or supplement the law as applied to particular circumstances ---
 4. The system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law (together called "Law" in the narrower sense) when the two conflict"
38. The court of appeal in applying the doctrine of constructive trust and estoppel in the case of Willy Kimutai Kitilit v Michael Kibet [2018] eKLR held that:-

The Land Control Act does not, unlike Section 3 (3) of the Law of Contract Act and Section 38 (2) of the Land Act save the operation of the doctrines of constructive trust or proprietary estoppel nor expressly provide that they are not applicable to controlled land transactions. Although the purpose of the two statutes are apparently different, they both limit the freedom of contract by making the contract void and enforceable. Since the doctrines of constructive trust and proprietary estoppel apply to oral contracts which are void and enforceable, in our view, and by analogy, they equally apply to contracts which are void and enforceable for lack of consent of the Land Control Board especially where the parties in breach of the Land Control Act have unreasonably delayed in performing the contract. However, whether the court will apply the doctrines of constructive and proprietary estoppel to a contract rendered void by lack of the consent of Land Control Board will largely depend on the circumstances of each particular case."

39. This court finds that the plaintiff has proved the existence of a constructive trust between the plaintiff's father and the 1st defendant, the latter having received a purchase price for the suit by virtue of the agreement dated 2nd September, 1998. It is clear that the sale agreement does not indicate that the time was of essence. The plaintiff's father acted on the 1st defendant's promise but the 1st defendant did not transfer the property and contrary to the agreement transferred the property to another person and did not refund the money thus enriching herself unjustly.
40. On the issue of specific performance, I do find that the claim is time barred as it is based on enforcement of contract whose limitation period is 6 years. In the premises, the Plaintiff herein was at liberty to file and/or commence any civil proceedings for breach and/or violation of the Contract, that is, if the said Contract was in existence as at 6 months from the 2nd of September 1998. For clarity, the right for commencement of such a suit would subsists for a duration of a period of six years in line with the Provision of Section 4(1) of the Limitation of Actions Act, Chapter 22 Laws of Kenya, which provides as hereunder;

4. Actions of contract and tort and certain other actions
 - (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—
 - (a) actions founded on contract;
 - (b) actions to enforce a recognizance;
 - (c) actions to enforce an award;



- (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
- (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

I do find the claim based on specific performance is time barred and cannot be allowed.

41. On the issue as to which prayers the court ought to grant, I do find that the plaintiff having proved to be in adverse possession of the suit property and having satisfied this court that the 1st defendant held the title to the property in trust for Wilson Njiri Gitonga, I do grant a declaration that on September, 2010, Plaintiffs father acquired adverse possession. Further I do grant a declaration that the 1st Defendant became a constructive trustee in respect of Njoro Ngata Block 1/61 on 2nd September 2010,
42. Moreover, I do grant a declaration that the purported sale on 13th March 2012 and subsequent transfer of Njoro Ngata Block 1/61 to the second defendant on 27th March 2013 was a nullity and that the subdivision of Njoro Ngata Block1/61 into 46 plots by the 2nd Defendant and the subsequent transfer of Njoro Ngata Block1/61 to the second defendant on 27th March 2013 was a nullity. Moreover, that the subdivision of Njoro Ngata Block1/61 into 46 plots by the 2nd Defendant and the subsequent transfers of the subdivisions to the 3rd to 8th defendants are illegal, null and void. And be cancelled and to revert to Njoro Ngata Block 1/61 to be registered in the plaintiffs name. An order that the 1st to 8th Defendants do deliver up the title deeds in respect of the parcels of which they are registered proprietors to the Land Registrar for cancellation. Costs of the suit to the plaintiff. Orders accordingly.

DATED SIGNED, DELIVERED VIRTUALLY AT NAKURU THIS 15TH DAY OF FEBRUARY 2024.

A.O. OMBWAYO

JUDGE

