



REPUBLIC OF KENYA



KENYA LAW
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**Gichuhi & 2 others v Kiago & another (Civil Appeal 66 of 2019)
[2025] KECA 182 (KLR) (6 February 2025) (Judgment)**

Neutral citation: [2025] KECA 182 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 66 OF 2019
S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA
FEBRUARY 6, 2025**

BETWEEN

**LUCY WAIRIMU GICHUHI 1ST APPELLANT
VERONICA MUTHONI MUGURO 2ND APPELLANT
PHYLLIS NJERI MACHARIA 3RD APPELLANT**

AND

**JOYCE WANJIKU KIAGO 1ST RESPONDENT
REGINA WANJIRU MWAGO 2ND RESPONDENT**

(Being an appeal from the Judgment of the Environmental and Land Court at Murang'a [Kemei, J] delivered on 28th February 2019 in ELC Case No. 9 of 2018 (O.S))

JUDGMENT

1. To contextualize the dispute, a brief history will suffice. The respondents filed an Originating Summons (O.S) dated 2nd February 2018, seeking a declaration that the respondents had acquired all rights and title to Land Parcel No. Loc 20/ Mirira/183, the suit property herein by way of adverse possession; that the title to suit property be canceled to read the respondents' names; and for the appellants to be restrained from interfering with the said property.
2. The grounds relied upon were that the respondents took possession by way of a sale in 1998; they have been farming peacefully for more than 12 years without any interruptions; the 1st respondent's husband and father to the 2nd respondent passed away and was buried on the suit property; efforts to resolve the issue through local administration have not been successful; and the suit property is the only home the respondents have known.



3. The appellants opposed the suit by a replying affidavit jointly sworn on 21st February 2018. They denied the respondents' allegation of ownership and occupation of the suit property, stating that the suit property belongs to the estate of Macharia s/o Gichuhi, who died on 30th September 1972; they are the beneficiaries of the said estate; there was no valid sale of the disputed property in 1998, or at any other time, between Kiago Gitimu and the deceased son, Alexander Gichuhi; Alexander Gichuhi could not sell the land as the Grant of Letters of Administration had not been confirmed by then; it is incorrect to claim that the land has been transferred to the respondents through adverse possession; the suit was fundamentally flawed and should have been dismissed with costs; the respondents' only recourse is to seek a refund of the purchase price they paid to the individual who sold them the land; and that the respondents were required to vacate the suit property so that the estate could be redistributed.
4. The trial court found that the issues for determination were whether a claim for adverse possession could be urged against the deceased person's estate and whether the respondents had established a claim under the doctrine of adverse possession.
5. The court found that the 1st respondent's husband had purchased the property in question in 1998. The purchase price was paid in instalments and was completed by 2000. Further, there has been open occupation and possession of the property from 1998 to the present. Further, the appellants did not provide evidence that the respondents had ever been dispossessed of the disputed land parcel. The respondents presented affidavits indicating that since 1998, they had not given up their rights to the land and had occupied it openly and exclusively. They had continued to develop the land, including burying their relatives there, without any objection from the appellants.
6. The trial court was of the view that a claim for adverse possession can be made against the estate of a deceased person. That the respondents had gained possession and occupation of the disputed property not from the deceased owner but from his son, who sold the suit property to the respondents, yet at the time, he could not sell, the Grant of Letters of Administration had not been confirmed to pave the way for such transaction. Therefore, the respondents' entry was considered wrongful, which is the essence of adverse possession.
7. Further, the trial court determined that in this case, adverse possession could be assessed based on two key points: first, in 1998, when the respondents entered the disputed parcel of land to 2010; and second, in 2000, when the final purchase price was paid, concluding in 2012. The court concluded that in both scenarios, it was clear that adverse possession had crystallized and accrued. The respondents had occupied the disputed land under their own right since 2009, following the death of the 1st respondent's husband. The deceased's right to the suit property had been extinguished in either 2010 or 2012, and the title was being held in trust for the respondents. Although the appellants obtained Letters of Administration and confirmation of grant in which the deceased's estate was distributed, this did not affect the rights of the respondents. As a result, the court granted the orders that were sought.
8. Aggrieved by the judgment, the appellants have raised 7 grounds of appeal in their undated memorandum of appeal, seeking the appeal be allowed with costs and the respondents' suit in the superior court be dismissed with costs. The grounds of appeal are that the learned judge erred in law and, in fact, in finding that the respondents had acquired the right by way of adverse possession when the evidence on record was that the respondents had entered into the suit property by way of sale which cannot crystallize into adverse possession; and when possession of the suit property by the respondents in 1998 was given to them by a person who was not the registered owner; failing to note that adverse possession can only be claimed against a registered owner; in finding that there had been open, continuous and uninterrupted possession without the consent of the owner since 1998 whereas the registered owner had died in 1972; in finding for the respondents in the absence of any evidence



- by the respondents that they had dispossessed or discontinued the owner of his volition, by failure to note that the appellants could not be sued in their individual capacities, but could only have been sued as the legal representatives or administrators of the estate of Macharia Gichuhi, who was the registered owner of the suit property when the appellants acquired the title deed.
9. Submissions and a list of authorities dated 1st September 2023 were filed on behalf of the appellants. Learned counsel submitted that the respondents had the burden of proving that they had acquired rights to the suit property by way of adverse possession; he took issue with the orders granted by the court, more particularly the order that the Deputy Registrar signs documents necessary to effect the orders of the court; the order directed to the District Land Registrar Murang'a to register the respondents as proprietors of the suit property in place of the appellants and, awarding costs to the respondents, yet the said orders had not been sought.
 10. It was further submitted that the subject matter before the superior court was Loc 20/Gikindu/Mirira/183 yet the respondents had in their supporting affidavit put Loc 20/Mirira/183 yet the trial judge, without prompting from the respondents, amended the description and put the correct one in the judgment without the respondents amending their Originating Summons; the respondents did not submit evidence in support of their case against the appellants; they did not adopt the witness statements as their evidence in chief yet it was incumbent upon the respondents to swear an oath and adopt their witness statements which were not done.
 11. Learned counsel relied on the case of Sisto Wambugu vs. Kamau Njuguna [1983] eKLR, where the court held that to acquire by the Statute of Limitations a land title, which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. In the instant case, when the 1st respondent's husband is said to have bought the suit property in 1998, the title holder was dead, and the court had appointed no legal representative. Thus, it cannot be said that the respondents dispossessed or discontinued the proprietor's title to the suit property. The court also referred to the case of Mwinyi Hamisi Ali vs Attorney General [1997], eKLR, where this Court held that adverse possession can only be claimed against the registered owner.
 12. Learned counsel contended that since the 1st respondent's husband had acquired the suit parcel by purchase, the entry was permissive and could not crystallize to adverse possession. Although the respondents had occupied the suit property for a long time, they failed to establish by way of evidence that the said occupation was without the appellants' permission.
 13. On the part of the respondents, their submissions are dated 2nd November 2023. Learned counsel for the respondents submitted that there was evidence of an agreement that allowed possession in 1988 for Kshs. 60,000; further the trial judge considered the conditions to be fulfilled for adverse possession to take effect; the condition set by the appellants that a sale cannot crystallize into adverse possession is wrong, improper and misguided; the trial judge calculated the period of open and continuous possession in two-fold, that is between 1998 to 2010 and 2000 to 2012 and in calculating relied at the point of entry and/or when the payment was made in full, hence it would be mischievous for the appellants to refer to 1972.
 14. Further it is submitted that the appellants did not raise any preliminary objection during the trial regarding their capacity or the lack of such capacity to be sued, and it is an afterthought to raise it at the appellate stage since the issue was deliberated and exhausted at the trial stage; the trial judge appreciated that the respondents were in occupation and a letter by the Chief, Gikindu dated 23rd January 2018 fortified the fact that the respondents had been in occupation for 19 years; the learned judge relied on several cases to buttress his holding that the rights of a person in possession or occupation of land, are equitable rights which are binding on the land.



15. This being a first appeal, it is our duty to analyze and re-assess the evidence on record and reach independent conclusions in the matter. This approach was adopted in *Arthi Highway Developers Limited vs. West End Butchery Limited & 6 Others* [2015] eKLR, where the court cited the case of *Selle vs. Associated Motor Boat Co.* [1968] EA 123 and held as follows;

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

16. We have considered the evidence on record, submissions by the parties, case law cited and the law. Two issues render themselves for our consideration. First, whether the appellants entered into the premises based on a sale agreement, and secondly, whether the doctrine of adverse possession would apply in the circumstances of this case.
17. The parties are in agreement that the genesis of the dispute is an agreement for sale entered into in 1998 regarding the disputed property between one Kigo Gitimu, husband to the 1st respondent, and Alex Gichuhi, son to the initial owner Macharia S/O Gichuhi, who died in 1972. It is not disputed that possession took place in 1998, and the payments were made in instalments until 2000.
18. It is also not in dispute that at the time of selling the property, Alex Gichuhi could not act on behalf of his father’s estate; he was not an administrator, nor was the grant confirmed to allow the selling of the asset. The 1st appellant is said to have been part of the sale; she did not dispute the letter dated 23rd January 2018 written by the Chief of Gikindu Location, which formed part of the respondent’s document and which states in part:

“After the death of the said proprietor, both the wife and the son entered into a land sale agreement with one Kiago Gitimu (deceased) concerning land Reg No. Loc 20/Mirira/183 – 0.44 Ha.”

19. It is also not in dispute that by the time of the trial the respondents had lived on the suit property for 19 years.

Interestingly both parties speak to the principles of adverse possession. The appellants argue that possession was permissive, though they at the same time urge that the sale was unlawful as Alex Gichuhi had no mandate to sell the suit property. On the other hand, the respondents’ position is that since the sale was void ab initio, there is no permission from the rightful owner, who was deceased, or a legal representative. The heirs allowed a continuous and peaceful possession for 19 years, and the appellants cannot be heard to claim permissive occupation, mainly because the respondents moved the court to assert their right.

20. Therefore, the question to ask is whether the respondents’ entry was permissive or whether the claim of adverse possession is applicable in that the sale agreement entered into by the 1st respondent’s husband, Kiago Gitimu, and Alex, was null and void ab initio.



The appellants' evidence is that the property's owner died in 1972, no one was appointed to represent the estate when the impugned sale agreement was signed, and neither had the grant been confirmed. This means that Alex had no authority to sell if he attempted to sell; he acted illegally. The sale agreement was null and void. With the argument advanced by the appellants, the respondents' entry was adverse to the title of the deceased owner and, for this matter, his estate. Further, the sale agreement cannot be relied on, and it was a non-starter.

21. Secondly, the estate or beneficiaries stayed put as the respondents occupied the suit property, did not complain, nor did they obtain Letters of Administration to assert their rights and only claimed it upon the appellants coming to court claiming possession and seeking to evict the respondent as he had no colour of right to have occupied the premises.
22. Therefore, the ground that the respondent entered based on a sale agreement cannot stand as the sale agreement was a non- starter, null and void ab initio, and, therefore, this ground must fail. The appellants cannot approbate and reprobate at the same time.
23. For adverse possession to take place, as was stated in *Mbira vs. Gacuhi* [2002] 1 EALR:

“a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non- permission or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory period without interruption.”

In *Samuel Miki Waweru vs. Jane Njeri Richu, Civil Appeal No. 122 of 2001* (UR) this Court stated:

“It is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in *Jandu vs. Kirpal & [1975] EA 225* possession does not become adverse before the end of the period for which permission to occupy has been granted.”

24. Section 7 of the *Limitation of Actions Act* embodies the doctrine of adverse possession by providing that:

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 thereof provides:

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 possessor), and, where under section 9, 10, 11 & 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 purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3), the land in reversion is taken to be adverse possession of the land.
25. In Benjamin Kamau Murima & Another vs. Gladys Njeri, CA No. 213 of 1990, this Court held that; -
- “The combined effect of the relevant provisions of sections 7, 13 & 17 of the Limitation of Acts Act, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of the land.”
26. We have said enough about the doctrine of adverse possession. Closer home, the agreement purportedly allowing the respondent permission to take possession was void, a fact known to all the beneficiaries. There was no question of repudiation or failed terms of agreement. Having found no valid sale agreement and that the estate's beneficiaries knew or ought to have known but were indolent, the respondent remained in occupation uninterrupted for 19 years; the only logical conclusion is that the respondents' entry into the suit property was illegal, not permissive, and adverse to the owner's title.
27. Ultimately, we see no fault with the trial court's determination and dismiss the appeal with costs to the respondent.

DATED AND DELIVERED AT NYERI THIS 6TH DAY OF FEBRUARY, 2025.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

Deputy Registrar

