



**Ngondi v Muriuki & 3 others (Environment and Land Case
22 of 2020) [2024] KEELC 1810 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1810 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND CASE 22 OF 2020**

**A KANIARU, J
MARCH 20, 2024**

BETWEEN

RACHAEL WAMBURA NGONDI PLAINTIFF

AND

JUSTA MUTITU MURIUKI 1ST DEFENDANT

CYPRIAN NDWIGA 2ND DEFENDANT

AMBROSE NDWIGA 3RD DEFENDANT

LUKA MURIUKI 4TH DEFENDANT

JUDGMENT

1. The plaintiff herein- Rachael Wambura Ngondi – impleaded the defendants vide an Originating Summons dated 05.08.2020. As initially sued, the defendants were four – Justa Mutitu (1ST defendant) Cyprian Ndwiga (2nd defendant), Ambrose Nwiga (3rd defendant) and Luka Muriuki (4th defendant). However, through an application made on 20.09.2022, the plaintiff withdrew the suit against the 1st defendant who is deceased. In the summons, the plaintiff claims land parcel no. Kyeni/Kathunguri/T43 as a disseisor or an adverse possessor. The land is registered in the name of Henry Muriuki Kiviuva, who is deceased, and the defendants are his legal representative and beneficiaries to his estate. The plaintiff wishes the court to order that the deceased’s title to the suit land has become extinguished by way of adverse possession. She also wishes that the Land Registrar, Embu, be ordered to register her as the proprietor of the suit land and for the production of the original title deed to be dispensed with. She asks for costs of the suit too.
2. The defendants responded to the plaintiff’s suit via a replying affidavit dated 08.09.2020 and filed 14.10.2020. The replying affidavit is sworn by the 4th Defendant – Luka Muriuki - who is said to be the administrator of the estate of the deceased proprietor. That proprietor defendants father. It is accompanied by proceedings of case no. CC 18/84 as well as photographs of the suit land. He denies



in his affidavit that the plaintiff has been in occupation of the suit land since 2004 as has been alleged. He says that it was the plaintiff's mother who was living on the said parcel of land but vacated after the outcome of a case filed in a tribunal over the suit property, where the parcel of land was awarded to their deceased father.

3. He further deposed that the plaintiff has always lived with her husband, her father in law, and two children in a separate parcel of land which belongs to her father in law. He also denies that there are developments made on the suit land as alleged and deposes that the suit land is a small town plot measuring 50 by 100 metres which is meant for putting up of shops. That according to the photographs, there are no permanent structures on the suit land. He denies too that they have ever forced the plaintiff out of the plot because she was never on the said parcel of land. He claims that the suit land belongs to his deceased father.

Evidence

4. The matter was set down for hearing on 19.01.2023 where the plaintiff and two other witnesses testified. The plaintiff testified as PW1. She began by adopting her witness statement and producing her documents in evidence in her case. She produced a copy of the register of the suit land as Plaintiff's exhibit 1 and photographs of the suit land as plaintiff's exhibit 2. She stated that exhibit no. 2 showed her houses, bananas, some natural trees and fruit trees.
5. She testified that she has been in occupation of land parcel no. Kyeni/Kathunguri/T43 which is registered in the name of Henry Muriuki Kiviuva who is deceased. That she occupied the same until March 2020 when the defendants forcefully entered it and started felling down trees dangerously towards her house. That she occupied the land since the year 2004 after the death of her mother who was also living on the said land and she has therefore acquired title to the said land by way of adverse possession. That she has been cultivating on the said land and has constructed a permanent building, planted mature grevillea trees, over 600 banana stems and conducts farming on the land every season.
6. That she occupies and utilizes the whole of the suit parcel which measures approximately 0.05 ha. That neither the defendants nor the registered proprietor have entered into, occupied or utilized the suit parcel since 1986 until recently in March 2020 when they threatened her with eviction. Her occupation and utilization of the land has therefore been continuous and uninterrupted for a period of more than 12 years. She urged that she has therefore acquired title to the suit land by way of adverse possession.
7. On cross examination, she testified that she was not aware of a case between her mother and the registered proprietor of the suit land or that the same was done in 1997 before the D.O Runyenjes. She said that she got married in 1980 but in 1985 she stopped being married and went home around the same time. That the land she is claiming is 0.05 ha which land belonged to her grandmother which is also where she and her mother lived. That when her mother died, she was buried on the land in dispute and so also was her grandmother who was buried in 1971.
8. That the land was originally registered in the name of Mthiri Karugeria before it was registered in the name of the deceased proprietor, Henry Muriuki. That her mother acquired the land through inheritance and she couldn't get a title deed because she was disabled. She testified further that the graves were not in the photos she produced in evidence because the defendants erased them by digging on them. That she also did not photograph the graves that were cemented but they are there.
9. She further testified that there is a church she built and two houses on the land and that there were permanent houses therein which were demolished by the defendants. That the defendants also cut trees that were on the land and transported them away. That she was born on the land in 1960, got married in 1980, and left her marriage in 1985. That she came back to live with her mother until she



- died. That she now lives on a plot belonging to someone else at Kathunguri. That she has planted permanent crops which include bananas and mango trees but the mango trees were destroyed by the defendants. She testified that the defendants have never chased her from the land.
10. On re-examination, she testified that the land is now registered in the name of Henry Muriuki. That the houses on the land are built with bricks and mud and that there is a store built with iron. That the tree on her photographs fell on 12.08.2022 and that there were other trees surrounding the compound. That the defendants went to the plot first and burned things later.
 11. PW2 was Desderio Njeru. He adopted his witness statement as his evidence in the case. He testified that he knew the plaintiff as she was married to his cousin known as Daniel Kiuga around 1978 or 1979 but they are separated now; that he did not know the year they were separated. That the plaintiff was born on the suit land and has been brought up on the said land by her parents who are now deceased. That the plaintiff's mother was buried on the suit land and he attended the burial. That the defendants and the deceased proprietor live within the locality of the suit land and were aware of the burial of the plaintiff's mother, her grandmother, and grandfather, on the land but none of them objected to the same.
 12. That the plaintiff has utilized the suit land for over sixty years where she was living with her mother and three children until her mother's death in 2004. That he was involved in the burial preparations of the plaintiff's mother and they had their meetings in the plaintiff's home in the suit land. That after the death of the plaintiff's mother, the plaintiff continued with her occupation of the suit land to date. The defendants have never interfered with the plaintiff's occupation in any way until recently when they threatened her with eviction.
 13. That the plaintiff has on the suit land mature grevillea trees, banana stems, three dwelling houses, one pit latrine, one avocado tree and three mature mango trees. He testified further that he did not know of any case handled over the suit land by elders. On being shown the alleged photographs of the land, he said that he did not know whether they were the photographs of the plaintiffs land. He said that the plaintiff has enjoyed continued and uninterrupted occupation of the suit land and she is entitled to be registered as the proprietor of the land by way of adverse possession.
 14. PW3 was Jesse Ngondi. He adopted his witness statement as his evidence in the case. He testified that he knew the plaintiff since her childhood and that she was the child of Rebecca Mengi who is deceased. That she also knew the defendants who are the children of Henry Muriuki Kiviuva who is also deceased. That the plaintiff was born on the suit land and was brought up on the land and got married until 1985 when she came back and occupied the suit land. That there are three graves on the suit land for the plaintiff's grandfather - Johanna Murvavenya, Ruth Ngondi - the plaintiff's grandmother and Rebecca Mengi - the plaintiffs mother. That the plaintiff's mother died in the year 2004. That after the death of the plaintiff's mother, the plaintiff continued enjoying uninterrupted occupation of the suit land.
 15. That the plaintiff had planted mature banana stems, mango trees and avocado trees on the land and had three houses and graves belonging to her relatives on the suit land. He testified that he personally attended the burial of the plaintiff's mother in the year 2004 and that the defendants did not object to the burial on the suit land. That through out the period that the plaintiff and her family have occupied the suit land, the defendant and the deceased proprietor of the suit land have never interfered with her occupation. That the plaintiff has therefore become entitled to the suit land by way of adverse possession.
 16. The defendants on the other hand had one witness - Luka Ndwiga Muriuki, - DW1. He asked that his replying affidavit dated 08.09.2020 be adopted as his evidence. He produced proceedings in tribunal



case no. CC 18/84 in a dispute between his father, Henry Muriuki, and Rebecca Johanna, as his evidence. He also produced photographs showing structures on the suit land as well as statements of his fellow defendants as evidence. He then testified that the plaintiff's mother had a dispute with his late father over the suit land in the land disputes tribunal where the plaintiff's mother lost. That the plaintiff's mother left the land accompanied by the plaintiff. He denied that the plaintiff lives on the suit land.

17. On cross examination, he testified that his father died in 1998 and that the land in dispute is being used by Maria Njiru who is their sister. That there are crops on the land now. He testified that for the photos he made available, the houses shown therein are on the land in dispute together with the bananas therein. That the houses belonged to the plaintiff's mother when she was living there. That the plaintiff's mother left the land in 1984 and that the brick house has been on the land since 1984. He testified further that he knew that the plaintiff's mother is deceased though he does not know when she died and that he did not think that she was buried on the suit land. He then clarified that the plaintiff's mother is not buried on the land and that he did not know who was buried on the land.
18. He further also testified that there was no house belonging to his father on the suit land on the photographs he produced. That he was not using the land and that it was lying idle when the plaintiff's mother left. The case was closed at that point and it was directed that the parties file written submissions.

Submissions

19. The parties filed written submissions, with the plaintiff's submissions being filed on 26.09.2023. The plaintiff gave a brief analysis of the case before the court. It was then submitted that it is trite law that in order for one to succeed in a claim for adverse possession, certain requirements must be present. That in the case of *Stephen Mwangi Gatunge v Edwin Onesmas Wanjau* (2022) eKLR the court held that to determine the nature of possession, this court is guided by the decision in Kisumu Civil Appeal no. 27 of 2013 - *Samuel Kibamba v Mary Mbaisi* (2015) Eklr where the court held:

“Strictly, for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is without force, without secrecy and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land”

20. It was submitted that the plaintiff took full control of the suit land from the registered proprietor from the year 2004. That during that period the plaintiff enjoyed uninterrupted occupation and performed acts that were adverse to the registered owner of the suit land. That some of the activities carried out by the plaintiff on the land included interring the remains of her late mother on the land which fact was confirmed by PW2 and PW3. That the plaintiff's possession was open, notorious and continuous. That the registered owner and/ or his beneficiaries live within the proximity of the suit premises and they never interfered with the plaintiff's use of the suit land. That it was safe to conclude that the plaintiff's occupation, use and development of the suit property was done openly and without interruption from the defendants or the registered proprietor for a continuous period of more than twelve years.
21. It was denied that the defendants sister was utilizing the land as according to the plaintiff the defendants denied ever utilizing the suit land when an application for contempt of court was filed. That the defendants argument that their deceased father had filed a case in the tribunal where the plaintiff's



mother was ordered to give vacant possession of the suit land to the registered proprietor could not hold. It was submitted that this was because, the plaintiff's claim over the suit land arose in the year 2004 after the death of her mother. That the deceased proprietor did not implement the judgement or have it adopted by a court of law as was the norm. That the decision in the said judgement cannot not be implemented and is of no consequence as provided for by section 4 (4) of the [Limitation of Actions Act](#).

22. That time started running in this case from the year 2004 which is when the plaintiff solely assumed full control over the suit land. That her first act was to bury her mother on the land which was done openly and with the knowledge of the defendants. That she continued to work on the land peacefully until the defendants interfered with her stay in 2021, which is what prompted the plaintiff to file this case. That the defendants allegations that the plaintiff's mother was evicted after the decision of the tribunal is not backed by any evidence and remains to be mere allegations. They cited Civil Appeal No. 121 of 2006 - [Benson Mukuwa Wachira v Assumption Sisters](#) of Nairobi Registered Trustees (2016) Eklr citing the case of [Amos Weru Murigu v Marata Wangari Kambi & Anor](#) to support this position.
23. The plaintiff concluded by saying that the defendants admitted that they and their deceased father did not occupy or utilize the suit land at any time. That although the defendants deny that the plaintiff occupied the land, there exists overwhelming evidence against the defendants arguments. It was urged that the plaintiff's suit be allowed as prayed.
24. The defendants filed their submissions on 18.01.2024. They gave brief facts of the case. They submitted that the law relating to adverse possession is captured under the provisions of section 13 of the [Limitation of Actions Act](#). Their argument was that the land claimed by the plaintiff is not land suitable for farming but only a plot measuring approximately 50 by 100 meters which is meant for construction of shops. That there are no permanent structures on the plot nor are there plants as alleged and that the size of the plot cannot accommodate the items alleged by the plaintiff. It was submitted further, that the right to acquire land by way of adverse possession is not automatic even where a party has been in possession for a period exceeding 12 years. The applicant must prove that they have been in non - permissive or non – consensual, actual, open, notorious, exclusive and adverse use of the land which occupation and/or possession must be adverse to the rightful owner. It was submitted that the plaintiff has failed to discharge that burden.
25. That according to the defendants testimony, the land in question was initially occupied by the plaintiff's deceased mother who after lengthy proceedings in the tribunal, it was directed that she gives vacant possession in favour of the registered proprietor. That also, after the death of their father, succession proceedings were initiated in respect of the deceased estate involving the land in question. That this means that the plaintiff's occupation of the suit property has not been continuous and uninterrupted thus failing to meet the legal threshold to prove ownership by way of adverse possession. The court was urged to dismiss the plaintiff's suit with costs to the defendants. The case of [Edwin Onesmus Wanjau \(suing in her capacity as the administrator of the estates of Kimingi Wariera \(deceased\) and of Mwangi Kimingi \(deceased\)\)](#) was cited to support the submissions.

Analysis And Decision

26. I have considered the pleadings as filed, the evidence tendered during hearing, and the written rival submissions. I find that the issue for determination is whether the plaintiff has become entitled to land parcel Kyeni/Kathunguri T43 by way of adverse possession and whether she is entitled to the orders sought.



27. The law under Section 13 (1&2) of the *Limitation of Actions Act* provides:
1. A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of Limitation can run (which possession is this Act referred to as adverse possession), 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 cease 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.
28. In the case of *Mtana Lewa – v- Kabindi Ngala Mwangandi* [2015] eKLR as cited in *Otwoma v Ombele* (Environment & Land Case 13 of 2021) [2022] KEELC 2522 (KLR) (10 May 2022) (Judgment) the court of Appeal defined adverse possession as:
- “Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or in action of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”
29. In the case of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020]eKLR, the court pointed out, inter alia, that an adverse possessor needed to demonstrate the following:
- a. On what date he went into possession.
 - b. What was the nature of his possession.
 - c. Whether the fact of his possession was known to the other party and;
 - d. For how long the possession had continued.
18. It follows that in order for a person to succeed in a claim for adverse possession, he must prove use and occupation or in other words possession of the land, with the knowledge of the owner. Such use and occupation must not be broken or interrupted for a period of at least twelve years. The possession must also be open and notorious and with the intention to defeat the registered owner’s title.
19. The plaintiff herein claims to have taken possession of the suit land in 2004. She says that she used to live on the land with her mother before she passed away in 2004, which land she said originally belonged to her grandmother and that her mother acquired it by way of inheritance. She denied that her parents sold the land to the registered proprietor, Henry Muriuki. From the evidence produced, it appears that the land was initially registered in the name of Mthiri Karugeria in the year 1972. It was later sold to Henry Muriuki who was registered as proprietor in 1982. Those are the only entries in the proprietorship section in the register of the suit land.
20. The plaintiff claims to have cultivated the land by planting banana trees, a grevillea tree, avocados and mango trees. She is also said to have built a church and permanent houses on it and that the houses are



built with bricks and mud. She is also said to have buried her mother on the suit land. The graves of her grandmother and that of her grandfather are also said to be on the land, which fact was corroborated by PW2 and PW3. In support of this, she produced in evidence photographs showing the status of the land.

21. The defendants on their part denied the plaintiff's occupation of the land. They argued that the plaintiff's mother was evicted from the land after their deceased father won the case in the tribunal over the suit land and that she left together with the plaintiff. They also denied that there were permanent structures on the land and asserted that the land is small and can not accommodate the items identified by the plaintiff. It was said to be only an eighth of an acre. They were unable to confirm that the plaintiff's mother was buried on the suit land or whether there were other graves on the land though they admitted that the plaintiff's mother was deceased. In a contrary statement, they argued that the plaintiff's occupation of the suit land was not for a continuous period as the same was interrupted after they instituted succession proceedings of their fathers estate and the suit land was awarded to their sister. According to them, the suit land belongs to their deceased father who was found to be the owner in the suit that was filed before the tribunal.
22. Both parties produced photographs of the suit land. The court examined the said photographs. The photographs produced show a semi-permanent structure covered by black plastic polythene papers and another structure made of bricks. The plaintiff's photographs have evidence of both young and slightly mature banana trees and some sign of farming activity on the land. They also show a fallen mature tree. The presence of the bananas was confirmed by the defendant in his testimony. The defendants photographs on the other hand show a cleared parcel of land with another photograph showing the brick house demolished but with the semi-permanent structure still standing, which in my view supports the plaintiff's claims that the defendants demolished her houses and cut down trees and transported them away.
23. The defendant's argument that the brick house belonged to the plaintiff's mother before she was evicted in 1984 does not hold any water in this case. They did not produce any evidence that they have been utilizing the land since 1984 as alleged. In fact they admitted that they were not using the land and that the same was lying idle when the plaintiff's mother left. Yet, it is evident that there had been on-going activity on the land over time as there were flourishing banana trees and the brick house was still intact after that prolonged period of time. This could only have happened if they were being maintained by someone, who this court is persuaded to be the plaintiff. The court is persuaded that the plaintiff has been in actual use and occupation of the suit land and therefore the issue of possession has been proven by the plaintiff.
24. Apart from the issue of possession, the element of knowledge of possession by the defendants must be determined. The plaintiff testified that her mother was buried on the suit land. This was corroborated by PW1 and PW2 who testified that the defendants were aware of the said burial as they live within the locality of the suit land and that they never objected to it. The defendants never denied that they live within the locality of the suit land which can be deemed to be an admission of that allegation. The plaintiff had developed the suit land by building structures thereon and planting fruit trees. This to me is satisfactory evidence that the defendants were aware of the plaintiff's occupation of the land. The plaintiff even buried her mother on the land. Burials in the African culture are usually public affairs that attract an assembly of people and without evidence that the burial was done in secret, this court is also satisfied that the plaintiff's occupation of the suit land was open and notorious.
25. The other element for determination is whether the plaintiff's occupation was uninterrupted for a period of 12 years. The plaintiff testified that she started occupying and utilizing the suit land in 2004 after the death of her mother. The defendants on the other hand denied such occupation as their



case was that the plaintiff's mother was evicted from the suit land after the decision of the tribunal or sometimes in 1984. However, the plaintiff's case is that she started occupying the suit land in 2004, which means that time for purposes of adverse possession ought to be computed from that year.

26. There has been no evidence tendered that the plaintiff's occupation was ever interrupted from the period between 2004 and 08.08.2020. The defendants argued that the plaintiff's occupation of the land was not continuous as the same was interrupted by the commencement of the succession proceedings of their father's estate where their sister was granted the suit land. Evidence of the said proceedings or the plaintiff's interruption of her occupation was also not tendered. From 2004 to 2020 is a period of 16 years which is beyond the statutory requirement period of 12 years for a case of adverse possession to succeed. This court is therefore of the view that the plaintiff has proved all the elements of adverse possession to its satisfaction. Further, it needs appreciating that the alleged succession proceedings mentioned by the defendant were not a suit to recover the land from the plaintiff.
27. The upshot of the above is that the plaintiff has established a case of adverse possession against the defendants. Her suit is therefore allowed in its entirety.
28. It is trite law that costs shall follow the event. Also, courts will normally award costs to the successful party. The plaintiff being the successful party herein is hereby awarded costs of the suit.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 20th day of MARCH, 2024.

In the presence of;

Plaintiff – present

Defendant – present

Court Assistant - Leadys

A. KANIARU

JUDGE – ELC, EMBU

