



**Ngugi v Kimunio (Environment & Land Case E006 of 2023)
[2024] KEELC 1518 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1518 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E006 OF 2023
LN GACHERU, J
MARCH 20, 2024**

BETWEEN

ROBERT MAARI NGUGI PLAINTIFF

AND

SAMUEL KINYANJUI KIMUNIO DEFENDANT

JUDGMENT

1. The Plaintiff herein Robert Maari Ngugi, brought this Originating Summons dated 8th August 2023, which is anchored under Sections 17 and 38 of the Limitation of Actions Act, Section 7 of the Land Act and Order 37 Rule 7, of the Civil Procedure Rules. He sought for the following Orders;-
 - a. Whether the Plaintiff is entitled by adverse possession to ¼ Acre of parcel number LOC.5/Kagunduini/213.
 - b. Whether the Defendant’s right to own ¼ Acre of parcel number LOC.5/Kagunduini/213 in the agreement of sale has been extinguished and the Defendant do transfer ¼ Acre of the said title to the Plaintiff.
 - c. Whether the Defendant should pay the costs of this suit.
2. The Originating Summons is supported by the Affidavit of the Plaintiff, Robert Maari Ngugi, sworn on 8th August 2023, and the annexures thereto, together with his Witness Statement even dated.
3. The Plaintiff’s claim against the Defendant is that he purchased ¼ Acre of land from land parcel No. LOC.5/Kagunduini/213, from the Defendant herein through an agreement for sale of land executed on 3rd May 2002, as shown in annexure “RMN 1”. It was the Plaintiff’s averment that he assumed occupation of the said portion of land immediately the agreement was executed and carried out substantial developments thereon as shown in annexure “RMN 2”.



4. He alleged that the Defendant declined to execute the necessary transfer forms in the Plaintiff's favour, thereby, necessitating the present suit. It was his further allegation that neither the Defendant nor him ever appeared before the Land Control Board, in respect of the suit property.
5. Simultaneous to the Originating Summons, the Plaintiff filed a Notice of Motion Application, even dated and sought for temporary injunction to restrain the Defendant from entering or interfering with the Plaintiff's use and occupation of ¼ acre from land parcel No. Loc 5/ Kagunduini/ 213.
6. However, the Court directed the Plaintiff to abandon the Interlocutory Application and prepare the main suit for hearing, by complying with Pre-trial directions or Order 11 of Civil Procedure Rules.
7. As deponed by Edwin Munyoro Wandai, a Process Server, in his Affidavit of Service dated 7th September 2023, the Defendant was duly served with Summons to Enter Appearance and the Originating Summons.
8. However, the Defendant did not Enter Appearance nor file a Defence, and therefore, as directed by the court on 4th October 2023, the matter proceeded for hearing in open court, in the absence of the Defendant. The matter proceeded via viva voce evidence, but exparte

Plaintiff's Case

9. PW 1 Robert Maari Ngugi, the Plaintiff gave evidence for himself and did not call any witnesses. It was his evidence that he is a peasant farmer and lives in Kagunduini areas of Murang'a County. He adopted his witness statement, Supporting Affidavit and list of documents as his evidence in the suit.
10. After the close of his case, the Plaintiff filed brief written submissions through Karuga Wandai & Co Advocates on 21st December 2023.
11. In his submissions, the Plaintiff reiterated the averments contained in his Supporting Affidavit and Witness Statement and submitted that he has been in occupation of the suit premises for a period of 21 years, which is more than the required 12 years for acquisition of title through adverse possession. Further, he argued that his occupation was continuous and peaceful year until the year 2023, when the Defendant interfered with his possession by cutting down his trees and banana groves.
12. He further submitted that the Defendant's right to own the ¼ Acre portion of the suit land currently occupied by the Plaintiff has been extinguished by the doctrine of adverse possession, and the Court ought to direct that the same be transferred and registered in the Plaintiff's name.
13. The court has carefully considered the pleadings herein, the evidence and submissions tendered by in the Plaintiff and finds the single issue for determination is whether the Plaintiff has proved his case on the required standard, and thus entitled to the prayers sought.
14. The Plaintiff's evidence herein has not been controverted as the matter proceeded as a formal proof. However, it does not mean because the Plaintiff's suit is uncontroverted, then the Plaintiff's claim has to be allowed automatically. The Plaintiff has a duty to call sufficient evidence and prove his claim on the required standard of balance of probabilities. See the case of Samson S. Maitai & Another v African Safari Club Ltd & Another [2010] eKLR, where the Court held that: -

“I have not seen judicial definition of the phrase ‘formal proof’. ‘Formal’ in its ordinary dictionary meaning refers to being ‘methodical’ according to rules of evidence. On the other hand, according to Halsbury's Laws of England, Vol. 17 Paragraph 260, proof is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally,



as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption”.

15. The Plaintiff produced a sale agreement dated 3rd May 2002, which forms part of the Plaintiff's evidence. In the said sale agreement, under Clause 4, it states as follows; -

“The Purchaser has already been given possession and use of the said quarter an acre portion.”

16. Therefore, the question as to what point in time that the Plaintiff take possession of the ¼ Acre portion which he claims herein is answered in the preceding Clause 4, of the sale agreement, wherein it is confirmed that he was in possession of the suit premises as at 3rd May 2002.

17. From the above clause, the entry into the land and possession by the Plaintiff was permissive, as it resulted from the sale agreement executed by the parties on 3rd May 2002. Therefore, it follows that a claim for adverse possession cannot be sustained. However, there are exceptions to this holding because once the last instalment is paid, then time for purpose of limitation of actions begins to run after the payment of the last instalment. See the case of Wanyoike v Kahiri [1979] KLR, at page 239, where Justice Todd (as he then was), held that;

“in a purchase scenario, the period of limitation starts to run on the date of the payment of the last installment of the purchase.”

18. In the instant suit, the total purchase price for the suit land was allegedly Kshs.40,000 (forty thousand),out of which Kshs.25,000/= (twenty-five thousand,) was acknowledged as received by the Vendor (the Defendant herein) at the signing of the agreement on 3rd MAY 2023, while the balance of Kshs.15,000/= (fifteen thousand), was to be paid under Clause 2(b) of the aforesaid contract as follows:

“Balance thereof in the sum of Kenya Shillings fifteen thousand (Kshs.15,000/-) to be paid by the purchaser to the vendor as per his needs as he used to give him the money and pending the succession cause to be filed”.

19. From the above clause 2, it is apparent that it is not clear when the last instalment of the purchase price was paid. There is no doubt that for a claimant to be entitled to land by adverse possession, he/she must prove that he has been in exclusive possession of the land openly, and as of right, without interruption for a period of 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition. See the case of Kasuve v Mwaani Investments Ltd & 4 Others [2004] eKLR 184, where it was held that:

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly and as of right without interruption for a period of 12 years after dispossession the owner or by discontinuation by the owner of his own violation.”

20. However, the right to adverse possession does not accrue automatically, unless the person in whose right has accrued takes action. This action is taken by filing a claim to Court as provided by Section 38



of the *Limitation of Actions Act*. The Plaintiff has thus filed this claim to assert his claim. See the case of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR where the Court held;

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the 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.”

21. For this Court to determine whether the Plaintiff herein has satisfied the ingredients for adverse possession, these questions must be answered.
 1. How did the Applicant take possession of the suit property?
 2. When did he take possession and occupation of the suit property?
 3. What was the nature of possession and occupation?
 4. How long has the applicant been in possession of the land?
22. It is trite that pursuant to the doctrine of adverse possession, the limitation of actions sets in and time begins to run once the vendor acknowledges receipt of the final instalment. The Plaintiff has not furnished the Court with evidence demonstrating when, if all, he made the final payment in respect of the purchase of the suit premises. Therefore, the Court is unable to compute the time when the Plaintiff's possession of the suit property became adverse to the Defendant.
23. Further, it is evident that the Defendant is not the registered owner of the suit land. In the sale agreement marked as “RMN 1”, the suit property is stated to be registered in the name of Kimunio Gachio (deceased), while the Defendant herein is described therein as “the beneficiary of Kimunio Gachio”. Further it is stated that the Defendant was desirous of disposing $\frac{1}{4}$ Acre of the suit property following the filing and determination of succession proceedings in respect of the estate of Kimunio Gachio.
24. From the totality of the evidence and documents produced as exhibits in the present case, the Court was not informed whether the prospective Succession Cause in respect to the estate of Kimunio Gachio, was ever commenced and, if it was filed, what was the outcome of the said Succession Cause.
25. The suit land is not in the name of the Defendant, and he could not give what he does not have. This position is emphasized by the principle of ‘nemo dat non-quod habet’, which was enunciated by the Court in the case of *Daniel Kiprugut Maiywa v Rebecca Chepkurgat Maim* [2019] eKLR as follows:

“The nemo dat principle means one cannot give what one does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else.”



26. Further, in the case of Hellen Wangari Wangechi Vs Carumera Muthini Gathua [2005] eKLR, the Court held as follows:

“It is a well-established fact that whoever asserts a fact is under an obligation to prove it in order to succeed.”

27. It is trite that whoever alleges must prove. For this Section 107 of the Evidence Act, suffices which provides; -

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any facts it is said that the burden of proof lies on that person.”

28. Again, Sections 109 and 112 of the Evidence Act (CAP. 80) state as follows:

S.109. “The burden of proof as to any particular fact lies on the person who wishes the court to believe in the existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

S.112 “In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him”.

29. It is also trite that the standard of proof in civil cases is on a balance of probabilities. The Court in the case of Miller v Minister of Pensions [1942] 2 ALL ER 372, defined the standard of proof on a balance of probabilities as follows:

“It must carry a reasonable degree of probability... If the evidence is such that the tribunal can say ‘we think it is more probable than not’ the burden is discharged., but if the probabilities are equal, it is not”.

29. It is evident that the Defendant herein is not the registered owner of the suit property- as there is no Certificate of Official Search in respect of the suit property availed to the Court. Further, the sale agreement was clear that the suit property was in the name of another person, and not the Defendant herein.

29. Consequently, the Court holds and finds that the Plaintiff has not established that the suit land is registered in the name of the Defendant, which would make the Plaintiff’s possession adverse to the Defendant’s ownership rights over the suit property.

29. Having considered the available evidence, this Court holds and finds that even if the Defendant did not adduce evidence, the Plaintiff herein has not called sufficient evidence to prove his case on the required standard of balance of probabilities.

29. The upshot of the foregoing is that the instant suit as filed by the Plaintiff is found not merited. For these reasons, the suit herein is hereby dismissed entirely, with no orders as to costs since the Defendant did not defend the suit.

It is so ordered



DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 20TH DAY OF MARCH, 2024.

L. GACHERU

JUDGE

Delivered online in the presence of:

Joel Njonjo – Court Assistant.

Absent for the Plaintiff (though he was earlier Present in open court)

Absent for the Defendant

L. Gacheru

Judge

20/03/2024

