



**Gatimu v Mwaura & another (Environment and Land Case
64 of 2016) [2024] KEELC 1422 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1422 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND CASE 64 OF 2016
JM MUTUNGI, J
MARCH 14, 2024
IN THE MATTER OF LR NUMBER NGARIAMA/MERICHI/1279
AND
IN THE MATTER OF THE LIMITATION OF
ACTION ACT CAP 22 OF THE LAWS OF KENYA**

BETWEEN

NGUGI GATIMU PLAINTIFF

AND

STEPHEN MWANGI MWAURA 1ST DEFENDANT

MWINJI NDWIGA 2ND DEFENDANT

JUDGMENT

Background

1. The Plaintiff commenced this suit by way of an Originating Summons dated 10th may 2016, He prayed for orders:
 1. That the Plaintiff has acquired title by adverse possession to a portion of 0.20 Ha on LR Ngariama/Merichi/1276 situated within Kirinyaga County.
 2. That the said portion of 0.20 HA on LR Ngariama/Merichi/1276 and registered in the name of the Plaintiff in place of the 1st Defendant.
 3. That the costs of this suit be provided for.
2. The Originating Summons was predicated upon the annexed affidavit of Ngugi Gatimu. The Plaintiff averred that he purchased a portion of Land parcel Ngariama/Merichi/1276 at the purchase price of Kshs. 80,000 in the year 2000 from the 2nd Defendant. He averred that he took possession and



occupation of the suit land immediately and had extensively developed it by way of cultivating maize, beans, coffee trees and planting trees. He stated that he had been in open, uninterrupted and exclusive possession of the suit land for a period of more than 12 years and as such, asserted that he had acquired prescriptive rights over land parcel Ngariama/Merichi/1276. He further stated that the 2nd Defendant transferred the title to the suit land to the 1st Defendant.

3. The 1st Defendant entered appearance and filed his replying affidavit on 31st May 2016 in which he confirmed that he was the registered owner of the suit land, having purchased it from the 1st Defendant on 19th December 2014. He averred that he conducted all the necessary due diligence expected of him before purchasing the suit land and that the same had no encumbrances. He averred that the 2nd Defendant's wife confirmed to him that no one besides them was in occupation of the suit land and that the crops in the suit land belonged to her. He stated that he learnt of the Plaintiff's presence in the suit land when he went to till the land and after the 2nd Defendant and his wife had vacated the suit land. The 1st Defendant subsequently filed CMCC No. 82 of 2015 in Kerugoya seeking to have the Plaintiff restrained from trespassing onto the suit land. He stated that he also learnt that the Plaintiff had sued the 1st Defendant in Kerugoya SRMCC No. 72 of 2015 seeking to recover his purchase price from the 2nd Defendant. The file was consequently transferred and consolidated with this suit.
4. By consent of the parties, the Application dated 19th May 2022 seeking for the withdrawal and transfer of Kerugoya CMCC No. 82 of 2015 to this Court for consolidation with the instant suit was allowed.
5. In CMCC No. 82 of 2015, Stephen Mwangi Mwaura (the Plaintiff) filed a Plaint against Ngugi Gatimu (the Defendant) for Orders:
 1. A declaration that the Plaintiff is the registered owner of the land parcel number Ngariama/Merichi/1276 and the Defendant should therefore vacate from the land, and a permanent injunction do issue restraining the Defendant by himself, his relatives, servants, agents and/or anybody else claiming through him from trespassing, cultivating, committing acts of waste or in any other way interfering with land parcel number Ngariama/Merichi/1276.
 2. The caution registered against the title of land parcel number Ngariama/Merichi/1276 be lifted.
 3. Costs of the suit with interest.
6. The Plaintiff in the suit before the Magistrate's Court averred that he was the registered owner of the suit land and that the Defendant had lodged a caution against the suit land. The Plaintiff further averred that the Defendant had unilaterally occupied ½ acre portion of the suit land for his use without the Plaintiff's consent and/or authority.
7. The Defendant in the said suit in the Magistrate's Court filed his defence and counterclaim on 9th December 2015. He admitted placing a caution against the suit land and admitted that he had been utilizing half an acre of land parcel Ngariama/Merichi/1276 since the year 2000 when he bought the suit land from Mwinji Ndwiga. He pleaded a Counterclaim, in which he stated that he bought half an acre of the suit land in the year 2000 from Mwinji Ndwiga and took possession of the suit land immediately. The Plaintiff further stated that he had extensively developed the suit land and that he had discovered that Mwinji Ndwiga had fraudulently transferred the suit land to the Plaintiff when he visited the Land Registry to enquire about the status of the land. He asserted the transfer to the Plaintiff was fraudulent and set out the particulars of fraud as follows:-
 1. Transferring the whole land parcel number Ngariama/Merichi/1276 to the Plaintiff instead of half an acre.



2. Transferring the portion of ½ acre which belongs to the Defendant to the Plaintiff.
 3. Transferring the said land without obtaining a proper consent of Land Control Board.
 4. Transferring the portion which the Defendant was utilizing on ground to the Plaintiff.
8. The Defendant before the Magistrate’s Court vide the Counter-claim sought orders as follows:-
1. The Plaintiff’s suit be dismissed with costs.
 2. A declaration that the Defendant is entitled to ½ acre of Ngariama/Merichi/1276 having lawfully bought it from the registered owner and utilized the same since the year 2000 and the said portion be transferred to the Defendant.
 3. Cost of the Counter-Claim.
9. The Plaintiff filed a Reply to Defence and Defence to Counterclaim dated 17th December 2015, where he reiterated the contents of his Plaint. He stated that he was not a party to the sale of half an acre of the suit land to the Defendant and further averred that, if at all the sale took place, the Defendant should have sued the person who sold him the portion for the recovery of his money. The Plaintiff further averred that the suit land had not been surveyed and that the Defendant was not the registered proprietor of the portion that he claimed.

Evidence of the Parties

10. PW1, Ngugi Gatimu testified that he purchased a portion of half an acre of the suit land in March 2000, and that he paid the entire purchase price of Kenya Shilling eighty thousand (kshs. 80,000). He stated that he planted coffee trees, bananas, trees and fruits. He prayed for the Court to declare him as the rightful owner of the portion. On being cross examined, he stated that Mwinji Ndwiga showed him the portion to occupy after they signed the sale agreement. He testified that before buying the suit land, he was leasing the land. On being asked why the acknowledgment slip he produced was dated 21.09.2005, he stated that that was the time he paid the last instalment of the purchase price. In his further evidence he stated he had planted trees along the boundary that he had been shown.
11. DW1, Stephen Mwangi Mwaura, testified that he acquired the title to the land in the year 2014 and that the Plaintiff had not occupied his land for 12 years. He stated that at the time of the purchase, Mwinji Ndwiga and his wife were the only people in occupation and who were utilizing the land. He further stated that the Plaintiff entered into the land in 2015 and that the land had not been demarcated. On Cross-examination, DW1 stated that he was using half of an acre of the suit land while the other half was being used by the Plaintiff. He testified that the portion that the Plaintiff uses had coffee and so did his portion. He testified that the land had a temporary structure that belonged to the vendor. He affirmed that there were trees delineating the boundary between the half that he was utilizing and the other half. He also confirmed that he was not on the land in the year 2000. On re-examination, he affirmed that the land had no boundary features showing that the land had been sold.

Parties Submissions

12. Following the close of the defendant’s case, the parties were directed to file written submissions. The Plaintiff filed his written submissions on 31.10.2023, while the Defendants filed theirs on 8.11.2023.
13. The Plaintiff in her submissions raised two issues for consideration.
 1. When did time start running?



2. Whether the Defendant is affected by the Plaintiff's claim of adverse possession.
14. Concerning the first issue, Counsel for the Plaintiff argued that after signing the agreement dated 14th March 2000, the parties therein did not take out a Land Control Board consent within the statutory six months required and that time started running after the lapse of the six months. Counsel relied on the case of *Public Trustee and Beatrice Muthoni v Wanduru Ndegwa* (1984) eKLR where the Court of Appeal stated as follows: -
- “...that once an agreement of sale of agriculture land become null and void on account of lack of Land Control Board consent, adverse possession begins to mature and time starts running against the owner of the land.”
15. On whether the Defendant is affected by the Plaintiff's claim of adverse possession, the Plaintiff submitted that by the time the Defendant obtained his title in 2014, title had passed to the Plaintiff by way of adverse possession. In support his claim, Counsel for the Plaintiff relied on the cases of *Kasuve v Mwaani Investment & 4 others* (2004) 1 KLR 184 *Gitbu v Ndeete* (1984) KLR 776; *Miriam Wangari Munyiri v Bernard Mugambi Gituru & Anor* (2006) eKLR and the case of *Kimani v Kibogoro* (1990) KLR 49.
16. The Defendant on his part raised three issues for consideration:
1. Whether the Plaintiff has established a claim based on adverse possession for a portion of 0.20 Ha out of the land parcel number Ngariama/Merichi/1276.
 2. If not, whether the Defendant has proved his claim as contained in the plaint dated 24th March 2015, and made a Counter-claim in this case.
 3. Who should bear the costs of the suit and the Counter-claim.
17. The Defendant's Counsel submitted that the Plaintiff had not proved that he had been in the suit land from the year 2000 and further submitted that if it was to be found that indeed he was, then the occupation was by consent. Counsel for the Defendant relied on the cases of *Kasuve v Mwaani Investment Limited & Others*, (2004) eKLR 184; *Samuel Miki Waweru v Jane Njeri Richu* (2007) eKLR; and *Wambugu v Njuguna* (1983) KLR 173.

Analysis and Determination

18. I have carefully considered the pleadings proffered by the parties and their rival submissions, and the singular issue for determination in this suit is whether the Plaintiff has acquired LR Ngariama/Merichi/1276 measuring 0.20 Ha by way of adverse possession.

The doctrine of adverse possession in Kenya is embodied in Section 7 and Section 13 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya,

Section 7 provides as follows:-

“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 provides as follows:-

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 undersections 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

Section 38 of the Act provides for the procedure to be followed by a person making a claim of adverse possession.

(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 or lease in place of the person then registered as proprietor of the land.

- (2) An order made under subsection (1) of this Section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”

19. The doctrine of adverse possession has been espoused in multiple cases in Kenya with the essential elements being laid down by various Courts.

The Court of Appeal in the Case of, *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR, gave a definition of what the doctrine of adverse possession entails and the circumstances that gives rise to it:

“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, it 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 or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

The Court of Appeal in the Case of *Ruth Wangari Kanyagia v Josephine Muthoni Kinyanjui* [2017] eKLR while acknowledging that adverse possession is a common law principle reiterated the same by citing the India Supreme Court decision in the case of *Kamataka Board of Wakf v Government of India & Others* [2004] 10 SCC 779 where the court stated thus: -

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continuous. The possession must be adequate in



continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

In the Case of *Celina Muthoni Kitbinji v Safya Binti Swaleh & 8 Others* [2018] eKLR, the court reiterated the decision of the Court of Appeal in *Wambugu v Njuguna* (1983) KLR 173 on what constitute adverse possession, a portion of which has been cited by the parties herein. The requirements for adverse possession have also been set out in the Case of *Mbira v Gachubi* (2002) IEALR 137 in which the Court held that:

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

20. A person claiming under the doctrine of adverse possession must demonstrate actual occupation or possession of another’s land, without the consent of that other, and in such a way that the occupation or possession is open, peaceful and continuous for a period of 12 years and above. The Court of Appeal in *Kweyu v Omutut* (1990) eKLR, the Court observed that:

“By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor. (Colour of title is that which is a title in appearance, but in reality). Adverse possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford Colour, and, second such possession under it as will be adverse to the right of a true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms (“claim or colour of title”) mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land or the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant’s use done publicly and notoriously.”

In the Case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, Kuloba J observed that:

- a) The intruder resisting suit or claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for statutory period.
- b) The entry and occupation must be with, or maintained under, some claim or colour of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.
- c) The occupation of land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupant.



- d) The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with an evinced unmistakable animus possidendi. that is to say occupation with the clear intention of excluding the owner as well as other people.
- e) The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, given reason for notice to the owner and the community, of the exercise of dominion over the land,
- f) The possession must be continuous uninterrupted, unbroken, for the necessary statutory period.
- g) The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.”

21. In the present case, the Plaintiff avers that he purchased the suit land from the 2nd Defendant in 2000 and he took possession immediately. A look at the sale agreement produced by the Plaintiff indicates that Plaintiff paid Kshs. 20,000/- as the initial purchase price and the balance of Kshs. 60,000/- was to be paid to the vendor after the title was issued in the name of the purchaser. The Plaintiff went ahead and paid some balance of the purchase price on 3.12.2001 and 21.09.2005 as indicated in the two acknowledgment slips produced by the Plaintiff. The Plaintiff therefore was as at the time he paid the last instalment acknowledging the 2nd Defendant’s title in regard to the suit land.

22. So, when did time start running as against the previous registered owner? Did it start running in the year 2000 as claimed by the Plaintiff, or did it start running in the year 2005 when the Plaintiff paid the last instalment of the purchase price or did it start running in the year 2015 as claimed by the 1st Defendant?

In *Samuel Miki Waweru v Jane Njeri Richu* – (2007) eKLR the Court of appeal stated:-

“In our view, where a purchaser of land or a lessee of land in controlled transaction is permitted to be in possession of the land by the vendor or lessor pending completion and the transaction, thereafter becomes void under Section 6 (1) of the *Land Control Act* for lack of consent of the Land Control Board, such permission is terminated by the operation of law and the continued possession, if not illegal becomes adverse from the time the transaction becomes void”.

23. In the instant case, there was no clear proof that the Plaintiff entered into the suit land in the year 2000. The agreement of sale dated 14th March 2000 tendered in evidence by the Plaintiff did not grant the Plaintiff possession. Under the agreement, the Plaintiff paid Kshs 20,000/- on execution of the agreement, and under special condition number (2), the balance of the purchase price of Kshs 60,000/- was to be paid after the consent of the Land Control Board was granted and title issued to the Plaintiff. The Plaintiff paid the instalment of Kshs 21,000/- on 3rd December 2001. The implication is that the Plaintiff acknowledged the sale transaction between him and the 2nd Defendant was still alive and ongoing as at the time he paid the final balance. He was acknowledging the 2nd Defendant still as the owner of the suit land. Even if the Plaintiff may have taken possession of the land, such possession was with the permission and consent of the 2nd Defendant and the Plaintiff indeed did confirm he required to pay the balance of the purchase price to enable the transaction to be completed.



24. The effect of the Plaintiff making payment of the balance of the purchase price on 21st September 2005 and the 2nd Defendant accepting the payment was to renew the transaction such that the parties could within a period of six (6) months from the date the last instalment was made apply for the consent of the Land Control Board to legitimize the transaction. As they did not, the sale transaction became null and void after the expiry of six (6) months from the date of the payment of the last instalment. The period of limitation as relates to a claim by way of adverse possession in the premises would only have began running six months after the payment of the last instalment on or about 21st March 2006.
25. It was the 1st Defendant's evidence that when he noticed the presence of the Plaintiff in the suit property, he instituted a suit before the Chief Magistrate's Court vide Kerugoya CMCC No.82 of 2015 which was ordered transferred and consolidated with the present suit. In the suit the 1st Defendant sought for a declaration that he was the duly registered owner of the suit land and an order that the Plaintiff herein vacates from the suit land; an order of permanent injunction against the Plaintiff; and an order lifting the caution registered by the Plaintiff against the title of the suit land. The 1st Defendant was registered as the owner of the suit land on 22/12/2014 as per the green card (abstract of title) exhibited by the Plaintiff in his bundle of documents. The 1st Defendant filed his suit to be declared as the lawful owner and for the eviction of the Plaintiff before the Magistrate's Court on 26th March 2015. Without any doubt if any period of adverse possession of the suit property by the Plaintiff was running, the suit by the 1st Defendant effectively seeking to have the Plaintiff vacate the land, stopped the period from further running. The issue for determination therefore is whether as at the time the 1st Defendant instituted the suit before the Magistrate's Court the period of 12 years had lapsed.
26. I had earlier in this Judgment held that on 21st September 2005 when the Plaintiff made payment of what was the last instalment, he was acknowledging the title of the 2nd Defendant and he could not up to that point have been in adverse possession of the land. The period of adversity at best would have ran from the time he made the payment or after the expiry of 6 months from that date, if the act of paying the money is taken as being a renewal of the agreement, which I consider it was. Whatever the case maybe, the period of 12 years had not lapsed from the time the Plaintiff paid the last instalment and the time the 1st Defendant filed his suit to claim possession of the land that he had purchased from the 2nd Defendant and had the same transferred to his name. The filing of the suit by the 1st Defendant against the Plaintiff interrupted the running of the time of adverse possession which had ran for slightly under 9 ½ years.
27. Having regard to the foregoing analysis it is my determination that the Plaintiff has failed to prove his case on a balance of probabilities and accordingly order the Plaintiff's suit dismissed. The 1st Defendant has proved that he is the duly registered owner of land parcel Ngariama/Merichi/1276 and that the Plaintiff is unlawfully in occupation of a portion of the same. Judgment is entered in favour of the 1st Defendant, Stephen Mwangi Mwaura, in the following terms:-
1. A declaration be and is hereby issued that he is the lawfully registered owner of land parcel Ngariama/Merichi/1276.
 2. The Plaintiff is hereby ordered to vacate and deliver vacant possession of the suit land within the next 30 days from the date of this Judgment failing which an eviction order to issue on application.
 3. The caution registered against the title is ordered to be lifted.
 4. The 1st Defendant is awarded the costs of the suit and the Counterclaim as against the Plaintiff.



**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 14TH DAY
OF MARCH 2024.**

J. M. MUTUNGI

ELC - JUDGE

