



Gichemi (Suing as the personal representative of the Estate of the Late Gichemi Njuguna - Deceased) v Kamanu & another (Environment & Land Case 308 of 2015) [2024] KEELC 1644 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1644 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 308 OF 2015
A OMBWAYO, J
MARCH 14, 2024
FORMERLY HCCC NO 385 OF 2012**

BETWEEN

PAUL MWANIKI GICHEMI (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE GICHEMI NJUGUNA - DECEASED) PLAINTIFF

AND

BRENDAN KIMANI KAMANU 1ST DEFENDANT

MWATHI NDIBARU 2ND DEFENDANT

JUDGMENT

Introduction

1. Paul Mwaniki Gichemi (suing as the personal representative of the estate of the late Gichemi Njuguna (deceased) has come to this court seeking orders against Brendan Kimani Kamanu and Mwathi Ndibaru that he be declared entitled to parcel of land known as :-



Bahati/ Kabatini	Block	1/742,	Bahatiikabatini	Block	1/743,
Bahati/ Kabatini	Block	1/744,	Bahati/ Kabatini	Block	1/745,
Bahati/ Kabatini	Block	1/746,	Bahatiikabatini	Block	1/747,
Bahati/ Kabatini	Block	1/748,	Bahati/ Kabatini	BlocK	1/749,
Bahati/ Kabatini	Block	1/750,	Bahati/ Kabatini	Block	1/751,

by way of adverse possession and that upon such declaration being made, the plaintiff seeks to be registered as proprietor of the three (3) acres of land and he be issued with a title deed for the above new parcels of land.

2. That originating summons is supported by affidavit of Gichemi Njuguna deceased who states that in or around 1961, he became a member and shareholder of Ndeffo Company Limited, private limited company dealing in land with the main intent of acquiring land through the said company.
3. He purchased the suit property Bahatiikabatini Block 1/742, Bahati/kabatini Block 1/743, Bahati/kabatini Block 1/744, Bahati/kabatini Block 1/745, Bahati/kabatini Block 1/746, . Bahatiikabatini Block 1/747, Bahati/kabatini Block 1/748, Bahati/kabat'ni Block 1/749, Bahati/kabatini Block 1/750, Bahatukabatini Block 1/751, Bahati/kabatini Block 1/752 and Bahati/kabatini Block 1/753 previously known as Bahati/kabatini Block 1/2557 from a land estate agency, Ndeffo Company Limited. He purchased two shares in the said company and started to remit payments for the requisite fee to be allotted land as from the year 1961 to 1971. .
4. In 1971, he took possession of the suit property and started farming maize, beans and potatoes which farming he has been undertaking to date. He constructed a house on the suit property soon thereafter and has been cultivating that parcel of land to date. Accordingly, he has remained in open continuous and uninterrupted occupation of the suit property. It became a policy of Ndeffo Company Limited that a shareholder could not be allotted more than one share at any one time.
5. It is with this in mind that he intimated to his parents-in-law Mr and Mrs Mwangi Kuria on whether they would be interested in acquiring land in the area vide the said estate agency. They responded in the affirmative and he then transferred one of his shares to my father-in-law and brought them from Limuru to live with his wife and he constructed a house for them on the suit property. His parents subsequently settled on the suit property once their house was completed. At the time of Title Deed extraction they were unable to pay for the same albeit he cleared their fee of Kshs 820/=.
6. The plaintiff's family has remained on the suit property even after the demise of his father-in-law and the subsequent relocation of his mother-in-law to live with the 2nd Defendant who is also his brother-in-law Mwathi Ndibaru with whom they have married from the same family.



7. In 1989 the 2nd Defendant, whilst taking advantage of his mother-in-law's advanced age and through acts of misrepresentation to the Land registrar, Nakuru fraudulently and illegally caused the title to be extracted in his name.
8. The plaintiff prudently registered a caution on grounds of beneficiary interest in 1991 in regard to the suit property on 20th February 2001 albeit his brother-in-law had the same fraudulently deregistered. This matter was adjudicated by the Bahati Land Dispute Tribunal in case No. 14/99 and the same was adopted by the Chief Magistrate's court in Land Dispute No. 2 of 2000.
9. Magistrate's Court ordered inter alia that the title over the suit property registered in the name of his brother-in-law Mwathi Ndibaru be cancelled and the same be re-issued in the name of his mother-in-law Mary Njoki Mwangi. Another caution was registered by his wife, Elizabeth Wanjiru Gichemi on the 9th of September 2009. His advocate on record at the time, the firm of M/S Musembi Ndolo & Co Advocates applied for registration of the Decree in 2007 and again in 2009 albeit unsuccessfully due to interference of his brother-in-law.
10. Unfortunately, the 2nd Defendant proceeded to fraudulently collude with the Registrar to have the caution by his wife above deregistered with no recourse to her whatsoever so as to enable him sell the suit property and subsequently transfer the same to the 1st Defendant on the 27th of May 2005. He decided to confirm the status of the land by conducting a search at the lands office and the results of the official search are contained in the Certificate of Official Search.
11. The said sale and transfer was fraudulent and marred with illegality as the same was in flagrant contravention of the law and flew in the face of the court's order and decree above,
12. The defendant has proceeded to attempt eviction and has pressed charges against his son Paul Mwangi Gichemi and his wife Elizabeth Wanjiru Gichemi in Nakuru CMCR No. 2902/09.
13. On the other hand, Brendan Kimani Kamanu filed a suit in the lower court, being NKR CMC No.46 of 2014 claiming to have purchased the suit property from John Njuguna Mwathi who was the beneficial owner of the said land. That sometimes in July 2009 he subdivided the land in 12 portions.
14. The plaintiff's father attacked and chased him away with his agents and to-date has not been able to take actual possession of the suit plots due to threats by the plaintiffs and that the plaintiffs have been cultivating the land to-date. The plaintiffs have without any justification removed all the beacons erected to demarcate the suit plots. The defendant seeks a declaration that the land belongs to the defendant and that the plaintiff be evicted from the land and that a permanent injunction be issued by the court against the plaintiffs from interfering with the land. The lower court matter was transferred to this court and the two were consolidated.

Evidence of Parties

15. The plaintiff called three witnesses starting with Elizabeth Wanjiku Gichemi the widow of Gichemi Njuguna who relied on her statement dated 16th April 2019. In summary the land is at Gachura where she stays. She has lived in the land since they were given by the society. She gave birth to her son on the land in 1970. The defendant has never lived on the land. He claimed to have bought the land but the Land Dispute Tribunal Bahati held that the land did not belong to him. He came to the land and wanted to subdivide the land but the plaintiffs refused. He went away and never returned to the land.
16. PW2, Paul Mwangi Gichemi stated that his father recorded a statement on 31st March 2014. He died on 9th December 2015. He states that the land in dispute is Bahati/Kabatini block/2577, it measures one acre and was subdivided. His family has lived on the land since 1971 for 52 years. Mwathi Ndibaru



has never lived on the land. On cross examination by Mr Karanja, he states that he was born on the land. He has lived on the land by virtue of his father.

17. PW3 Peter Macharia relies on his statement dated 16th April 2019 and the same was adopted by the court. He knew the plaintiffs as he is their neighbour. They share a boundary. He was born in 1967 on his parents land and he is an agemate to Mwangi Njuguna. He has known the plaintiff for many years.
18. The plaintiff closed his case and the defence called one witness Brendan Kimani who stays at Nakuru Teachers. He relocated in 2007 after teaching for 30 years. He relied on the witness statement dated 21st January 2014 and filed on 23rd January 2014. He received his pension in 2008 one year after retirement and invested in land. He bought the suit property from John Njuguna Mwathi. He went through the due process and the land was transferred to him. He paid Kshs1,050,000. He subdivided the land into 12 equal plots. He went to the land and the plaintiff prevented him from taking possession and selling the same.
19. On cross examination by Kibet learned counsel for the plaintiff, he states that he did not buy the land from Mwangi Ndibaru who has never been in possession. He does not know when Mwangi Ndibaru relocated but he acknowledges that Mwangi Ndibaru had a problem taking possession of the land and therefore they relocated. John Njuguna bought the land from Mwangi Ndibaru and sold it to the defendant. When he visited the land, he found a structure that did not belong to John Njuguna. He was not able to take possession because he was repulsed by the plaintiff.

Submission

20. I have not seen the plaintiff's submissions. The gravamens of the defendant's submissions is that the plaintiffs has been in possession of the suit property assuming that the 2nd defendant is the owner. That the plaintiff have been in possession of the suit property assuming that their late father in law was the registered owner of the suit property.
21. That hostility or adverseness must be to the true owner of the parcel of land and not the assumed owner. In this case the true owner is Brendan Kimani Kamanu and not Mwathi Ndibaru. The defendant relied on the case of *Richard Wefwafwa Songoi Vrs Ben Munyifwa Songoi* (2020) eKLR where the court stated that:

“The person seeking to persuade the court that same is entitled to an order for adverse possession, must place before the court, cogent and tangible evidence to demonstrate continuous and uninterrupted occupation, possession and use of the suit property or the requisite statutory duration”.
22. The defendant further relies on the case of *Wellington Lusweti Barasa & 75 others Vrs Lands Limited & Another* (2014) eKLR where it was held:-

“A party cannot plead adverse possession and at the same time assert cancellation of the same title by way of fraud. The two orders cannot be made in the same suit, for to sustain a claim for adverse possession, there must be a title, to which the party claims possession that is adverse to that of the title holder”
23. And *Haro Yonda Juaje Vs Sadaka Dzenge Mbauro & Kenya Commercial Bank* (2014) eKLR where the court stated:-

“One cannot succeed in a claim of adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the



mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession. If the plaintiff's averment is that the title which was issued to the Defendant was fraudulently acquired, then his cause of action would be for the rectification of title by cancellation pursuant to the provisions of Section 143 of the Registered Land Act and not adverse possession. He cannot use the doctrine of adverse possession to go around the decision of the Minister”

24. I have considered the evidence on record and submissions on records and I do find that the suit property was registered in the name of Mwathi Ndibaru Mutheki on 20th March 1989 and a title issued on 27th May 2005. By the time the land was registered in the names of Mwathi Ndibaru Mutheki, the plaintiff was in possession. Elizabeth Wanjiku Gichemi the widow of Paul Mwangi Gichemi states that the family has lived on the land for a long period of time and gave birth to his son in 1970 on the said parcel of land.
25. I do find that the allegation that Mwathi Ndibaru never lived on the land true. Though Mwathi Ndibaru sold the parcel to John Njuguna Mwangi, John Mwangi Njuguna never lived on the land either. John Mwangi Njuguna sold the land to Brendan Kimani Kimanu who has never lived on the land. The alleged subdivisions of the land was done on paper and not on the ground as the defendant has never stepped in the land with the surveyors. I do find that the possession by the plaintiff has been exclusive, notorious non-permissive since 1970, even before the register was opened on 19th September 1984. On 19th September 1984, the register was opened and the 1st entry was the government of Kenya. The second entry is Mwathi Ndibaru Mutheki on 20th March 1989 and title deed was issued on the same date. On 22nd February 1991 a caution was registered in favour of Mwangi Gichemi claiming beneficial interest. On 23rd July 2004 the caution was removed but another caution was placed by the Land Registrar in favour of Elizabeth Wanjiku Gichemi claiming beneficial interest. On 15th March 2006, the caution was withdrawn and on the 13th February 2009 the property was registered in the name of Brendan Kimani Kimanu and title deed issued on the same date.
26. Though the defendant is the registered owner the plaintiff has been in exclusive, notorious and non-permissive possession with the knowledge of the registered owner for a period of more than 12 years from 1970 to the time of filing suit on 4th October 2012.
27. For the plaintiffs to succeed in their claim of having obtained title by way of adverse possession, they must fulfill certain conditions. These conditions were clearly outlined in the case of *Virginia Wanjiku Mwangi v David Mwangi Jotham Kamau* [2013] eKLR, relied on by the defendant and which I cite with approval. This court identified the five basic conditions to be met to perfect the title of the adverse party as follows;

“... Adverse Possession requires at a minimum five basic conditions being met to perfect the title of the adverse party. These are namely;

- (a) open and notorious use of the property. For this condition to be met the adverse party use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim. The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about.



- (b) Continuous use of the property –The adverse party must, for statute of limitations purposes, hold that property continuously for the entire limitations period, and use it as a true owner would for that time. This element focuses on adverse possessor's time on the land, not how long true owner has been dispossessed of it. Occasional activity on the land with long gaps in activity fail the test of continuous possession. Incidences such as merely cutting timber at intervals, when not accompanied by other actions that demonstrate actual and continuous possession, fails to demonstrate continuous possession. If the true owner ejects the adverse party from the land, verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party return. He cannot count the time between his ejection by the true property owner and the date on which he returned.
- (c) Exclusive use of the property– The adverse party holds the land to the exclusion of the true owner. If, for example, the adverse party builds a barn on the owner's property, and the owner then uses the barn, the adverse party cannot claim exclusive use. There may be more than one adverse possessor, taking as tenants (i.e. owners) in common, so long as the other elements are met.
- (d) Actual possession of the property– The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not establish actual possession. The actions of the adverse party must change the state of the land, as by clearing, mowing, planting, harvesting fruit of the land, logging or cutting timber, mining, fencing, pulling tree stumps, running livestock and constructing buildings or other improvements. If the property is residential, such actions may include mowing the yard, trimming trees and hedges, changing locks, repairing or replacing fixtures (such as a swimming pool, sprinkler system, or appliances), or other actions so as to maintain the property for its intended use, to the exclusion of its true owner.
- (e) Nonpermissive, hostile or adverse use of the property– The adverse party entered or used the land without permission. Renters, hunters or others who enter the land with permission are not hostile. The adverse party motivations may be viewed by the court in several ways: Objective view—used without true owner's permission and inconsistent with true owner's rights. Bad faith or intentional trespass view—used with the adverse possessor's subjective intent and state of mind. Good faith view where the party mistakenly believed that it is his land. The law requires that the adverse party openly claims the land against all possible claims.

The Specific requirements for adverse possession by the court is a Claim of title or claim of right.

The mere intent to take the land as one's own constitutes "claim of right. A claim of right exists if the person believes he has rightful claim to the property, even if that belief is mistaken. A negative example would be a timber thief who sneaks onto a property, cuts timber not visible from the road, and hauls the logs away at night. His actions, though



they demonstrate actual possession, also demonstrate knowledge of guilt, as opposed to claim of right, Good faith or bad faith, improvement, cultivation, or enclosure, Payment of property taxes, color of title: A legal document that appears (incorrectly) to give the claimant title, dispossession not under force of arms is a specific requirement for the principle of adverse possession to apply. In such cases dispossessing the owner or after discontinuation of possession by the owner of his own volition the person in adverse possession has a right to acquire title."

28. I do find that the plaintiff has satisfied the five basic conditions as elucidated above and therefore has proved on a balance of probabilities that she is in adverse possession of the property and therefore entitled to orders sought. I do grant orders that the plaintiff be and is hereby declared as being entitled to parcel of land known as

Bahati/ Kabatini	Block	1/742,	Bahatiikabatini	Block	1/743,
Bahati/ Kabatini	Block	1/744,	Bahati/ kabatini	Block	1/745,
Bahati/ Kabatini	Block	1/746,	Bahatiikabatini	Block	1/747,
Bahati/ Kabatini	Block	1/748,	Bahati/ kabatini	Block	1/749,
Bahati/ Kabatini	Block	1/750,	BAhati/ kabatini	Block	1/751,

- by way of adverse possession and that upon such declaration being made, the plaintiff to be registered as proprietor of the three (3) acres of land and he be issued with a title deed for the above new parcels of land. Costs of the suit to the plaintiffs.

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

A. O. OMBWAYO

JUDGE

