



**Kamau v Ngondi & 3 others (Environment & Land Case
24 of 2014) [2024] KEELC 1203 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1203 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 24 OF 2014**

JM MUTUNGI, J

MARCH 7, 2024

BETWEEN

BENDELE GACHIRI KAMAU PLAINTIFF

AND

GITHINJI KARUKI NGONDI 1ST DEFENDANT

JAMES MUNENE GITHINJI 2ND DEFENDANT

GRACE MARY MUTHONI KARIUKI 3RD DEFENDANT

GRACE NJERI MUGO 4TH DEFENDANT

JUDGMENT

1. The Plaintiff instituted the present suit vide an Originating Summons dated 6th January, 1999 seeking for orders that a portion measuring 2 acres of Land Parcel No. Ngariama/Lower/Ngariama/819 and the entire land parcel Ngariama/Lower/Ngariama/820 be registered in his name, as he had acquired them by way of adverse possession. The Plaintiff amended the Originating Summons on 11th December 2002 and further amended it on 9th July 2004. The Plaintiff by the Amended Plaint abandoned his claim over land parcel Ngariama/Lower/Ngariama/820 and sought for orders that a portion measuring 2 acres be excised from land parcel Ngariama/Lower Ngariama/819 (suit land) and that he be registered as the proprietor having acquired it by way of adverse possession; that the Executive Officer of the Court do execute all the relevant documents pertaining to the transfer of the suit land; and the costs to be provided.
2. The Plaintiff in his Affidavit sworn on 17.12.1998 averred that he entered into a sale agreement dated 9.01.1984 with the 1st Defendant, for the purchase of land parcel Ngariama/Lower/Ngariama/820 for the consideration of Kshs. 20,000. He deponed that he further entered into an unwritten sale agreement for the purchase of land parcel Ngariama/Lower/Ngariama/819 with the 1st Defendant and that he subsequently went into possession in the year 1984 and had been in occupation ever since.



3. The amended Originating Summons was supported by the Plaintiff's Supporting Affidavit dated 11th December 2002 where he stated that he entered into a sale agreement with the 1st Defendant for the purchase of land parcel Ngariama/Lower/Ngariama/820. He further averred that the 1st Defendant changed his intention of selling the 2 acres of land parcel Ngariama/Lower Ngariama/820 and decided to sell to him land parcel Ngariama/Lower/Ngariama 819. He stated that they went back to their advocate and recorded the said changes. He claimed that the 1st Defendant pointed out to him the portion of the land on the ground and that he took possession of the 2 Acres immediately and that he had been in continuous, open, exclusive and uninterrupted possession and use of the suit land since then, and had extensively developed the suit land. He asserted that he had developed the suit land by planting 909 coffee trees, cash crops and trees. He averred that in 1999 the 1st Defendant secretly transferred the suit land to his son the 2nd Defendant. The Supporting Affidavit dated 9th July 2004 sworn in support of the Further Amended Originating Summons remained substantially the same as the initial Supporting Affidavit.
4. The 2nd Defendant filed his Replying Affidavit dated 11th October 2002 and confirmed that he was the registered owner of land parcel Ngariama/Lower/Ngariama/819 and that he had been in exclusive use and possession of the suit land since 1999. He averred that the Plaintiff had not been in possession, use or occupation of any portion of the suit land as he alleged. He pleaded that he was in sole and exclusive possession, use and occupation of the suit land.
5. The 3rd Defendant filed her Replying Affidavit dated 6th April 2018 in opposition of the Plaintiff's further amended originating Summons and averments in his Supporting Affidavit. She averred that she was the wife of the 2nd Defendant and that the 1st Defendant was her father-in-law. She affirmed that the suit land was initially registered in the name of the 1st Defendant who transferred it to the 2nd Defendant and his mother Elena Wangigi Githinji in the year 1999. She deponed that they built their matrimonial home in the suit land in the year 1990 and that she had been living there together with her children. She stated that she had developed the suit land by cultivating cash crops which she used to sustain their livelihood. She claimed that the Plaintiff had not been in occupation and/or possession of the suit land and further claimed that contrary to the Plaintiff's assertion that he purchased the suit land, the Plaintiff purchased land parcel Ngariama/ Lower Ngariama/822 which was transferred to his name. She stated that it was land parcel Ngariama/ Lower Ngariama/822 that the Plaintiff took possession of and not the suit property.
6. The 1st and 2nd Defendants did not file any response to the further amended Originating Summons. The suit as against the 1st Defendant abated when he died, and was not substituted within the prescribed period. The suit against the 4th Defendant was withdrawn and she was discharged from the proceedings.

Evidence of the Parties

7. The Plaintiff called 3 witnesses. PW1, Bendele Gachiri, adopted his witness statement and relied on his bundle of documents dated 13.05.2015 and a further list of documents dated 17.05.2022. In cross examination, he stated that he entered into a sale agreement of the suit land with the 1st Defendant. He stated that the 1st Defendant transferred land parcel Ngariama/ Lower/ Ngariama/ 822 to him. He stated that where the 2nd and 3rd Defendants have built was not where he bought his land and the 2nd and 3rd Defendants were in a different parcel of land whose particulars he did not know. He stated that he had planted coffee trees on the suit land that he had purchased. The Plaintiff In re-examination, he stated that he bought the suit land from the 1st Defendant and had also purchased another piece of land measuring 1 acre from the 1st Defendant, whose title number he had forgotten. He maintained that the 3rd Defendant's house was not in the suit land.



8. PW2, testified that he was a farmhand employed by the Plaintiff from 1984 and that he was the one who planted the coffee plants and the trees on the boundary of the Plaintiffs land portion. He confirmed that the 1st and 2nd Defendants were neighbours of the Plaintiff and that they did occupy the portion that belonged to the Plaintiff. In cross examination, PW2 stated that he was born in 1974 and that he did not know how the Plaintiff acquired his parcel of land. He confirmed that he knew the 3rd Defendant and stated that the 3rd Defendant and her husband had built their house in a neighbouring land.
9. PW3 testified that his father bought the suit land from the 1st Defendant and took possession of the land in 1984. He stated that his father's claim was for the portion comprising 2 acres of the suit land and not the entire of 4.5 acres. He confirmed that the 2nd Defendant's homestead was in the suit land but it was not on the portion which his father was claiming. He testified further that the defendants had not used their portion of land. In cross examination, he affirmed that the suit land was registered in the 2nd Defendant's name and one Elena Wangigi Githinji. He confirmed that the house that was in the photo that had been produced by the 3rd Defendant belonged to the 2nd Defendant. He further stated that the bananas that had been photographed also belonged to the 2nd Defendant and agreed that the bananas extended to the portion that they were claiming. He further confirmed that the 3rd Defendant lived in the house that belonged to the 2nd Defendant on the suit land. The witness affirmed that though the 1st Defendant did not transfer the suit land to his father, the Plaintiff, he transferred Land Parcel Ngariama/Lower/Ngariama/822 to the Plaintiff, which the Plaintiff later sold to a 3rd party.
10. The 3rd Defendant, testified as DWI. She stated the 1st Defendant was her father in law while the 2nd Defendant was her husband. She stated that she and her mother in law were residing on the suit land and had their home on the land. She denied that the Plaintiff was in occupation of any portion of the land and/or utilising any part of it. It was DW1's evidence that indeed the Plaintiff had purchased land from the 1st Defendant but that the land he purchased was land parcel Ngariama/Lower/Ngariama/822 which he sold to another person. She denied the assertion by the Plaintiff that he had been using any part of the suit land. In cross-examination, she stated that she was married in 1990 and that at the time, there was no coffee on the land and/or any mature trees. She maintained that her homestead was in the suit land that the Plaintiff was claiming.
11. Following the close of the trial, the parties were directed to file their written submissions. The Plaintiff filed his written submission on 11.09.2023. The Defendants inspite of being afforded the opportunity to do so, did not file any submissions.
12. The Plaintiff submitted that the he paid the full purchase price, took possession of the portion measuring 2 acres of the suit land in 1984 and that he had effected developments on the land over a period exceeding 12 years. The Plaintiff asserted that he had occupied the land exclusively, openly and without any interruption and had therefore acquired title over the 2 acres by way of adverse possession.

Analysis and Determination

13. I have considered the Originating Summons, the 1st and 2nd Defendant's Replying Affidavits, the evidence adduced and the submissions filed by the Plaintiff. The singular issue for determination is, Whether the Plaintiff has acquired the suit property by way of adverse possession, and if so, whether he should be registered as the owner thereof in place of the 2nd Defendant.

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, which provide as follows:



Section 7:

“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:

- (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.
- (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.”

Section 38 of the Act provides for the procedure to be followed by a person claiming adverse possession in order to be declared as owner of the land he adversely possessed
Section 38 of the Act provides as follows:-

38. “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.”

14. The application of 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 Vs Kahindi Ngala Mwangandi* [2015] eKLR, gave a concise definition of what the doctrine of adverse possession entailed and the circumstances that gave 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, 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 –vs- 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 –vs- 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 continues. 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.”

The requirements for adverse possession have also been set out in the Case of *Mbira –v- Gachuhi* (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....” See also *Wambugu –vs- Njuguna* (1983) KLR 173.

15. 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 or more. The Court of Appeal in the Case of *Kweyu Versus Omutut* (1990) eKLR, 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 Vs Mukindia Maranya* [1993] e KLR, 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 the 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 un-equivocally 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.”

16. The issue for determination in the present matter is whether having regard to the evidence and material placed before the Court, the Plaintiff has proved that he was in adverse possession of a portion of 2 acres of land parcel Ngariama/Lower Ngariama/819 and therefore entitled to have the same excised and a title issued to him.
17. The Plaintiff stated that he took possession of the suit land in 1984 after he purchased the land from the 1st Defendant. The certificate of title in respect of the land parcel Ngariama/Lower/Ngariama/819 confirms that at the time of the purported purchase of the suit land, the 1st Defendant was the registered proprietor. The sale agreement produced by the Plaintiff indicated that the parties entered into a sale agreement for the purchase of land parcel Ngariama/Lower/Ngariama/820 at the purchase price of



Kshs. 20,000. Under paragraph 4, of the agreement, the purchase price was for two acres of the land and the initial deposit was Kshs. 12,000/-. The agreement made no provision in regard to possession but provided that the final balance of the purchase price of Kshs 5,000/- was to be paid after the consent of the Land Control Board had been obtained. As concerns the disparity in the title numbers, the Plaintiff explained that it had been the intention of the 1st Defendant to sell land parcel Ngariama/Lower/Ngariama/819 but he had carried the title relating to land parcel Ngariama/Lower/Ngariama/820 at the time the agreement was prepared at the Lawyers office. The Plaintiff further explained that once they discovered the mistake, they both (Plaintiff and 1st Defendant) went to their mutual Advocate who rectified the error. This evidence by the Plaintiff contradicted his earlier assertion that he had purchased land parcel Ngariama/Lower Ngariama/820 in its entirety and that he subsequently entered into another agreement (unwritten) to purchase a portion of 2 Acres out of land parcel Ngariama/Lower Ngariama/819.

18. On his part, the 2nd Defendant in his Replying Affidavit dated 14th October 2002 maintained that he became the registered owner of the suit land on 23rd February 1999. He averred that he had been bequeathed the said suit land by his father when he was a youth and insisted that the sale agreement that the Plaintiff produced was for the purchase of land parcel Ngariama/Lower/Ngariama 820 and not the suit land. The 3rd Defendant gave evidence that the Plaintiff had indeed been sold a parcel of land which was land parcel Ngariama/Lower/Ngariama/822, which the Plaintiff later sold to a third party. She maintained that she had been living in the suit land since she got married to the 2nd Defendant and that she and her mother-in-law have been living in the suit land and that they have been cultivating the land to sustain their livelihood. She insisted that they had been living in the suit land exclusively and that the Plaintiff did not occupy any portion of the suit land!.
19. On the basis of the evidence presented there is no credible evidence to prove that the Plaintiff purchased a portion of land parcel Ngariama/Lower Ngariama/819. The sale agreement exhibited refers to land parcel Ngariama/Lower Ngariama/820. The Plaintiff testified that their mutual Advocate rectified the erroneous reference to land parcel 820 in the agreement to reflect the correct land parcel 819 but if ever there was such a variation to the agreement, the amended and/or varied sale agreement was not tendered in evidence. What however appears not to be in dispute is that the Plaintiff purchased from the 1st Defendant land parcel Ngariama/Lower Ngariama/822 and the parcel was transferred to him by the 1st Defendant. The abstract of title for this parcel of land shows that the parcel was transferred to the Plaintiff on 21/6/1982 but the Plaintiff sold the same soon thereafter to one James Stephen Kihara as per the transfer registered on 9/12/1982.
20. The Plaintiff's claim is that he had been in occupation and in adverse possession of a portion of 2 acres of land parcel Ngariama/Lower Ngariama/819. There was no clear evidence of possession by the Plaintiff of any portion of land parcel Ngariama/Lower Ngariama/819. The Plaintiff did not reside on the land and there was no clear evidence of adverse possession and/or identification of the portion occupied. What was clearly evident was that the 2nd and 3rd Defendants have a permanent house on the suit property and were carrying out farming activities on the land. Notably, there are banana plants extending to a large portion of the land and indeed PW3, the Plaintiff's son admitted the bananas extend to the portion they were claiming. If that was the case, how then could the Plaintiff be in adverse possession? The evidence adduced by the Plaintiff in my view did not clearly identify the portion they claimed they were in adverse possession of and/or that the occupation constituted adverse possession.



In the Case of Wilson Kazungu Katana & 101 Others -vs- Salim Abdalla Bakshwein & Another (2015) eKLR the Court underscored the importance of clear identification of land in adverse possession cases. The Court stated thus:-

“The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was stated by this Court in the Case of Githu -vs- Ndele (1984) KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them.”

21. I would say that a similar situation obtains in the instant matter. The Plaintiff has failed to prove that he was in adverse possession of any identifiable portion of land parcel number Ngariama/Lower Ngariama/819. The Plaintiff has failed to prove his claim on a balance of probabilities and I accordingly dismiss the suit with costs to the 2nd and 3rd Defendants.

Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA Via VIDEO LINK THIS 7TH DAY OF MARCH 2024.

J. M. MUTUNGI

ELC - JUDGE

