



Warui & another v Njuguna (Sued on his behalf and for and on behalf of the Estate of Carrie Jame Wanjira – Deceased) & another (Environmental and Land Originating Summons 176 of 2023) [2024] KEELC 4744 (KLR) (7 March 2024) (Judgment)

Neutral citation: [2024] KEELC 4744 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA

ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 176 OF 2023

YM ANGIMA, J

MARCH 7, 2024

(FORMERLY NYAHURURU ELCOS NO. 176 OF 2017)

**IN THE MATTER OF THE REGISTERED LAND ACT
CHAPTER 300 (REPEALED) OF THE LAWS OF KENYA**

AND

IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012

AND

IN THE MATTER OF THE LAND ACT NO 6 OF 2012

AND

**IN THE MATTER OF SECTIONS 38 OF THE LIMITATION
OF ACTIONS ACT CHAP. 22 OF THE LAWS OF KENYA**

AND

IN THE MATTER OF TITLE NO. NYANDARUA/ORAIMUTIA/222

BETWEEN

GLADWELL MUTHONI WARUI 1ST PLAINTIFF

ZAKAYO ITEGI MWANGI 2ND PLAINTIFF

AND

**GACHAU NJUGUNA (SUED ON HIS BEHALF AND FOR AND ON BEHALF OF
THE ESTATE OF CARRIE JAME WANJIRA – DECEASED) 1ST DEFENDANT**

**PERRY WANGARI KIUNA & MARGARET WANJIKU (AS THE
ADMINISTRATION OF THE ESTATE OF THE LATE CARRIE JANE
WANJIRA GACHAU ALSO KNOWN AS CARRIE JANE WANJIRA –
DECEASED) 2ND DEFENDANT**



JUDGMENT

A. Plaintiffs' Claim

1. By an originating summons dated 29.09.2014 and amended on 06.05.2019 filed pursuant to Section 38 of the *Limitation of Actions Act* (Cap.22), Order 37 rule 7(1), (2) & (3) of the Civil Procedure Rules, 2010 and all other enabling provisions of the law, the Plaintiffs sought of the following reliefs:
 - a. That there be a declaration that the Plaintiffs have each become entitled to be registered forthwith as the owner/proprietor of two (2) acres out of all that parcel of land known as Title No Nyandarua/Oraimutia/222 by adverse possession where they have been in continuous, quiet, peaceful and uninterrupted possession and occupation for over twelve (12) years preceding the presentation of this suit.
 - b. That there be a declaration that the 1st and 2nd Defendants' rights over the whole of Title No. Nyandarua/Oraimutia/222 have become extinguished or expired by prescription and/or that the rights of the Plaintiffs as adverse possessors and their accrued overriding interests against the suit land could not be interrupted or extinguished either by the filing of any suit, sale or transfer of the suit land or by mere change of ownership whatsoever or at all.
 - c. That an order be made for the subdivision of the said parcel of land and for the transfer of the two (2) acres each thereof by the Defendants to the Plaintiffs and in default, the Deputy Registrar of the High Court to execute all relevant documents in order to facilitate the subdivision, obtaining of the consents, advertisement or proclamation of the title deed and/or all related and necessary documents to effect the transfer thereof in favor of the Plaintiffs.
 - d. A permanent injunction do issue restraining the Defendants by themselves, their servants, agents, employees, relatives, heirs, assigns, holders of power of attorney, representatives and/or persons claiming through them or under them or by them by virtue of any written law from alienating, entering into, selling, transferring, charging, surveying, excising, sub-dividing, parting with possession and/or in any other manner disposing of Title No. Nyandarua/Oraimutia/222 or in any other manner whatsoever interfering with the Plaintiff's overriding interests or rights of an adverse possessors in actual and exclusive occupation and possession of the said parcel of land.
 - e. That an order be made for costs and interest to be paid by the Defendants jointly and severally, which application is supported by the annexed affidavit of Gladwell Muthoni Warui and Zakayo Itegi Mwangi such other grounds and/or evidence to be adduced at the hearing hereof.
2. The Plaintiffs pleaded that they had been in open, continuous and exclusive possession of 2 acres each out of the suit property for a period exceeding 12 years without any interruption from the registered owner or her legal representatives.
3. The originating summons was supported by supporting affidavits sworn by Gladwell Muthoni Warui and Zakayo Itegi Mwangi both sworn on 06.05.2019 and the annexures thereto. The 1st Plaintiff pleaded that she and her father entered their portion of 2 acres in 1994 after purchase from its occupant whereupon they developed the land by fencing it, planting trees and constructing semi-permanent houses.
4. The 2nd Plaintiff on his part pleaded that he and his family members took possession of their portion 2 acres of the suit property about 1989 upon purchasing the same from the 1st Defendant. He pleaded



that his family developed the said land by fencing it, planting trees, building a latrine and constructing 3 semi-permanent houses.

5. The Plaintiffs further pleaded that they had in open, peaceful and exclusive possession of their respective portions of land for periods exceeding 12 years and that the Defendants had never utilized or cultivated the land for that period. It was also pleaded that the Defendants had never issued them with eviction notices or initiated legal proceedings for recovery of the suit property. The Plaintiffs consequently contended that they had acquired their respective portions of the suit property through the doctrine of adverse possession.

B. Defendants' Response

6. The 1st Defendant filed a replying affidavit sworn on the 28.06.2022 in answer to the amended originating summons. He disputed having sold any portions of the suit property to the Plaintiffs and contended that the sale agreements he had entered into did not materialize due to lack of consent of the Land Control Board (LCB) and that he refunded the purchase price to the concerned purchasers who were not the Plaintiffs in the suit. He disputed the Plaintiffs' claim for adverse possession and pleaded that they had never been in possession of the suit property for a period exceeding 12 years as alleged or at all.
7. The 1st Defendant pleaded that the trees on the suit property were planted by him hence they did not belong to the Plaintiffs or their respective families. It was contended that the 1st Plaintiff had constructed a semi-permanent house on the suit property only in 2019 during the pending of the instant suit. He consequently prayed for dismissal of the Plaintiff's claim for adverse possession with costs.
8. There is no indication on record of the 2nd Defendant having entered appearance or having filed a response to the summons.

C. Trial of the Summons

9. The record shows that the 2nd Plaintiff's earlier suit being Nyahururu ELC No. 18 of 2017 (OS) was consolidated with the 1st Plaintiff's suit for adverse possession by an order made on 19.02.2018 and it was ordered the instant originating summons shall be the lead file. The parties thereafter filed their respective trial bundles in preparation for hearing after the filing of the amended originating summons dated 06.05.2019.
10. At the trial hereof, the 1st Plaintiff testified on her own behalf and relied on essentially the same evidence as contained in her supporting affidavit. The 2nd Plaintiff similarly testified on his own behalf and adopted the contents of his supporting affidavit as his evidence in-chief. The 1st and 2nd Plaintiffs therefore considered to have acquired the claimed portions of the suit property on account of adverse possession and urged the court to allow the prayers sought in the originating summons.
11. The 1st Defendant testified at the trial on his own behalf and called one more witness to oppose the Plaintiffs' claim. The 1st Defendant adopted the contents of his replying affidavit sworn on 28.06.2022 as his evidence in-chief. He disputed that the Plaintiffs were in possession or occupation of the suit property. It was the 1st Defendant's evidence that the 1st Plaintiff built structures on the suit property in 2019 during the pendency of the suit. He also disputed any occupation for a period exceeding 12 years by any of the Plaintiffs.



D. Issues for determination

12. The court has considered the pleadings, evidence and documents on record and is of the view that the following are the key issues which arise for determination herein:
 - a. Whether the Plaintiffs have proved their claim for adverse possession.
 - b. Whether the Plaintiffs are entitled to the reliefs sought in the suit.
 - c. Who shall bear costs of the suit.

E. Analysis and Determination

a. Whether the Plaintiffs have proved their claim for adverse possession

13. The court has considered the evidence and submissions on record on this issue. The elements of adverse possession were summarized in the case of *Kasuve –vs- Mwaani Investments Ltd & 4 Others* [2004] 1KLR 184 as follows:

“...and in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, *Wanja vs Sakwa No.2* [1984] KLR 284. A title by adverse possession can be acquired under the *Limitation of Actions Act* for part of the land...”

14. Similarly, in the case of *Chevron (K) Limited –vs- Harrison Charo Wa Shutu* [2016] eKLR it was held, inter alia, that:

“At the expiration of the twelve-year period the proprietor’s title will be extinguished by operation of the law and section 38 of the Act permits the adverse possessor to apply to the High Court for an order that he be registered as the proprietor of the land. Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner’s permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner’s enjoyment of the soil for the purpose for which he intended to use it. See *Littledale v Liverpool College* (1900)1 Ch.19, 21.”

15. It is evident from the material on record that the 1st Defendant made every effort to denounce whatever sale agreements he may have made with the purchasers of the suit property on the basis of lack of the consent of the LCB as required under Section 6 of the *Land Control Act* (Cap.302). It was his contention that the sale agreements were void for lack of such consent and that the only recourse the respective purchasers had under the terms of the sale agreements was a refund of the purchase price which he claimed to have refunded.
16. The court is of the view that since the Plaintiffs are not seeking enforcement of these sale agreements then it is not necessary for the court to consider or determine the validity of those agreements. It would not even be necessary to consider or determine whether the purchase price was refunded to the



respective purchasers. The court shall only consider and make a decision on whether the Plaintiffs have proved the various elements of adverse possession.

17. During his cross-examination by the Plaintiffs' advocate the 1st Defendant conceded that he was a resident of Muranga County. He conceded that every time he would sell a portion of the suit property he would go back to Muranga County. He could not remember when he last utilized the suit property or when he planted trees thereon. In his own words, he stated thus:

“...No, I have never fenced the said land. There is a time I planted potatoes on the suit land and went back to Muranga. It is a long time ago so I can't remember the year. Yes, there is a time I used to graze animals there a long time ago. I cannot remember when it was...”

18. The 1st Defendant's witness who testified as DW2 conceded during cross-examination that the Plaintiffs were the ones utilizing the suit property and that the suit property was fenced even though he disputed that the Plaintiffs were the ones who had erected the fence. In his own words, he stated that:

“It is true that the Plaintiffs are utilizing the suit property. They have been utilizing it for long. I do not know for how long they have been there. The 1st Plaintiff is cultivating the land... I do not know if the trees grew naturally or they were planted by someone...”

19. During his cross-examination DW2 further stated as follows:

“... Yes, there is a time we used to graze on the land in 1988 and 1989. We have never used the land since it was sold. No, Gacau Njuguna has never utilized the land since he sold it.”

20. The court is satisfied on the basis of the evidence on record that the 1st Defendant has never occupied, utilized or developed any part of the suit property since he disposed of the same in the late 1980s. The developments on the suit property did not just drop from the sky. They must have been undertaken by some people. The court finds that those people were the Plaintiffs and their family members. The court is satisfied that the 1st and 2nd Plaintiffs have had exclusive possession and control of their respective portions of the suit property as from 1994 and 1989 respectively. The court has noted that the letter dated 15.08.2014 from the Chief of Oiramutia Location which was tendered in evidence indicates that the Plaintiffs and their families had been in possession of the suit property for over 20 years by then.
21. The material on record shows that the Plaintiffs have been utilizing and developing the suit property as of right and dealing with it as owners thereof and not as mere licencees. There is no evidence on record to show that their possession was ever interrupted in the legal sense. There was no evidence to show that the Defendants ever made a peaceable and effective entry into the suit property or that they sued for recovery thereof within the limitation period. The court is thus satisfied that the plaintiffs have proved their respective claims for adverse possession on a balance of probabilities.

b. Whether the Plaintiffs are entitled to the reliefs sought in the suit

22. The court has already found and held that the Plaintiffs have proved their respective claims to a portion of 2 acres each out of the suit property. It would, therefore, follow that they are entitled to the reliefs sought in the originating summons in order to vest their respective portions of the suit property upon them. The court is, however, not inclined to grant the permanent injunction sought against the Defendants since the same is not necessary in view of the reliefs the court shall grant in the summons.



c. Who shall bear costs of the suit

23. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287. The court finds no good reason why the successful litigants should not be awarded costs of the suit. As a result, the court shall award the Plaintiffs costs of the consolidated suits to be borne by the Defendants.

F. Conclusion and Disposal Order

24. The upshot of the foregoing is that the court finds and holds that the Plaintiffs has proved their respective claims for adverse possession of 2 acres each out of the suit property. As a consequence, the court makes the following orders for disposal of the suit.

- a. A declaration be and is hereby made that the 1st and 2nd Defendant’s right of recovery of Title No Nyandarua/Oraimutia/222 has become extinguished under Section 7 of the Limitation of Actions Act (Cap.22).
- b. A declaration be and is hereby made that the 1st and 2nd Plaintiffs have become entitled to be registered as proprietors of 2 acres each out of Title No. Nyandarua/Oraimutia/222 on account of the doctrine of adverse possession under Section 38 of the Limitation of Actions Act (Cap.22).
- c. An order be and is hereby made directing the Defendants to sub-divide and transfer two (2) acres to the 1st and 2nd Plaintiffs each within 21 days from the date hereof in default of which the Deputy Registrar of the court shall sign all necessary documents on their behalf to facilitate the process.
- d. The Land Registrar – Nyandarua County shall dispense with the production of the original title deed for the suit property and all other documents in the possession, custody and control of the Defendants while transferring the suit property as aforesaid.
- e. The Plaintiffs’ prayer for a permanent injunction is hereby declined.
- f. The 1st and 2nd Plaintiffs are hereby awarded costs of the suit.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 7TH DAY OF MARCH, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. Joel Sigilai for the Plaintiffs

Mr. Njoroge for the 1st Defendant

N/A for the 2nd Defendant

C/A - Carol

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Y. M. ANGIMA



JUDGE

