



**Githua v Kimaru; Mwathi & 3 others (Interested Parties) (Suing on their own behalf and as officials of Village D Welfare Association Members) (Environment & Land Case E046 of 2021) [2024] KEELC 3943 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3943 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ENVIRONMENT & LAND CASE E046 OF 2021**  
**CA OCHIENG, J**  
**APRIL 30, 2024**

**BETWEEN**

**GEORGE GICHUKI GITHUA ..... PLAINTIFF**

**AND**

**JOSEPH MWANGI KIMARU ..... DEFENDANT**

**AND**

**CONSOLATA MWATHI ..... INTERESTED PARTY**

**RICHARD NZIOKA MUINDI ..... INTERESTED PARTY**

**MARY MUSYIMI ..... INTERESTED PARTY**

**KIMATU MUTUKU ..... INTERESTED PARTY**

**SUING ON THEIR OWN BEHALF AND AS OFFICIALS OF VILLAGE D  
WELFARE ASSOCIATION MEMBERS**

**JUDGMENT**

1. By a Plaint dated the 12<sup>th</sup> May, 2021 and filed on 18<sup>th</sup> May, 2021, the Plaintiff prays for Judgment against the Defendant for:-
  1. Return of all stones and hardcore materials stolen from his land by the Defendant assessed by a Valuer at Kshs. 38,777,268.
  2. Professional Fee
    - i. Valuer – Kshs. 179,854
    - ii. Surveyor – Kshs. 115,000.



3. Damages for trespass.
  4. Mesne profits.
  5. Exemplary damages.
  6. Permanent injunction restraining the Defendants, their agents or servants or anyone claiming under them from interfering with the Plaintiff's land.
  7. Costs and interest of the suit.
2. The Defendant opposed the suit by filing his Statement of Defence dated the 14<sup>th</sup> June, 2021. He denied the averments in the Plaint except the descriptive and jurisdiction of the court. He confirmed being a Lessee in possession of a portion of land measuring three (3) acres hived off, from the greater LR No. 12610/5 which is communal land under custody of Village D welfare group, for a period of two years. He contends that, at the time he took possession of the suit land, the Plaintiff was not in possession nor a bona fide purchaser, nor registered owner of the suit land.
3. The Interested Party joined in these proceedings wherein it filed its Defence including Counter-claim dated the 9<sup>th</sup> November, 2021 where it seeks the following Orders against the Plaintiff:-
- a. A declaration that the Interested Parties are the rightful owners of the suit premises.
  - b. An order of injunction permanently restraining the Plaintiff/his agents or servants from interfering with the Interested Party's peaceful enjoyment of the suit premises.
  - c. A declaration that the Interested parties have acquired title to land parcel 15051/20 by way of adverse possess and they are entitled to be registered as proprietors and a title be given to them.
  - d. An order that the Plaintiff's title to the said piece of land that is 15051/20 measuring 2 hectares or thereabouts has been extinguished in favour of the Interested Party under Section 37 and 38 of the *Limitation of Actions Act*.
  - e. An order that the Plaintiff do transfer the suit premises to the Interested Party free from all encumbrances, failure to which the Deputy Registrar of this Court be authorized to sign the transfer documents and all other necessary documents to ensure effective transfer of the suit premises to the Interested Party.
  - f. Damages.
  - g. Costs of this suit.
  - h. Any other or further relief that this Honourable Court may deem fit and just to grant.
4. The matter proceeded for hearing where the Plaintiff had three (3) witnesses while the Defendant and Interested Party each had two witnesses.

### **Evidence of the Plaintiff**

5. The Plaintiff claims to be the registered proprietor of land parcel LR No. 15051/20 hereinafter referred to as the 'suit land'. He contends that the Defendant entered the suit land without his permission and commenced quarrying activities thereon. Further, that despite sending the Defendant a demand letter he declined to stop quarrying and claimed the land belonged to him. He sought for orders as per the Plaint.



6. The Plaintiff produced the following documents as exhibits: Certificate of Title for LR No. 1505/20; Certificate of Official Search; Valuation Report; Correspondences; Sale Agreement dated the 20<sup>th</sup> May, 2014; Fee Note and Survey Report.

### **Evidence of the Defendant**

7. The Defendant claimed it is Village 'D' (Interested Party), that leased him the suit land which is community land, to undertake quarrying activities. He confirmed that he undertook quarrying activities on the suit land until he was stopped by a Court Order. Further, that he had not done a search to confirm ownership of the suit land before entering it. He produced the following documents as exhibits: Lease Agreement dated 7<sup>th</sup> September, 2020; Plan of Property; Letter dated 16<sup>th</sup> November, 2020; Letter dated 19<sup>th</sup> November, 2020; Certificate of Official Search and Ruling dated 27<sup>th</sup> October, 2021.

### **Evidence of the Interested Party**

8. The Interested Party through its witnesses claimed their members have resided on LR No. 12510/5 for a long time. They confirmed leasing the land to the Defendant to undertake quarrying. They explained that another group called KIMWAA is also on the land. Further, that they have several lawsuits wherein, they claim ownership of L.R. No. 12510/5 from some Asians. It produced the following documents as exhibits: National Land Commission (NLC) Advert on Notice of Intention to allocate land; Survey Map; Star Newspaper Cutting; Letter from P.N. Musila Advocates to Assistant Chief-Ngelani Location; Letter Chief to P.N. Musila Advocate; Certificate of Registration of Village D Welfare Association; Certificate of Registration for Village D Self Help Group; Funeral Notice of Awtar Kaur Birdi from Internet Search; and Letter to NLC Chairman by Lawyers dated 23<sup>rd</sup> March, 2018.

### **Submissions**

9. The Plaintiff in his submissions reiterated his testimony as presented, relied on documents produced as exhibits and challenged the Interested Party's evidence claiming it is contradictory. He contended that he was the registered proprietor of the suit land. Further, he argued that for the Interested Party to succeed in a claim for adverse possession, the members have to demonstrate they have been in actual, open, continuous, uninterrupted, peaceful, exclusive occupation, in this case for a period of 12 years. He reiterated that the members of the Interested Party are claiming a title LR 12510/5 that was closed on 13<sup>th</sup> December, 1991 after subdivision into 65 plots and have not annexed an extract of title. Further, that none of the Interested Party's witnesses' confirmed residing on the suit land. To support his averments, he relied on the following decision: *Gatimo Kinguru vs Muya Gathangi* (1976) KLR 253.
10. The Defendant in his submissions relied on the evidence he presented and challenged the evidence presented by the Plaintiff. He argued that this court does not have jurisdiction to hear and determine the Plaintiff's claim of stealing as this is contained in the Penal Code. Further, that the said claim is to determine whether he is guilty of stealing or not. He contended that the Plaintiff had previously raised the claim of theft against him in *Mavoko Criminal Case No. E 435 of 2021 Republic v Joseph Mwangi Kimaru*, wherein he was acquitted of the said charges. Further, that there is no locus contract, strict liability, or tort to act as a basis for the claim for compensation for lost materials by Plaintiff. He further submitted that the Plaintiff had not proved its claim for trespass as he is not in possession of the suit land, but left a neighbour to watch it for him. Further, that the Plaintiff did not produce evidence to confirm he is physically on suit land. To support his averments, he relied on the following decisions: *Republic v Karisa Chengo & 2 Others* (2017) eKLR; *In the matter of Interim Independent*



Electoral Commission (2011) eKLR; Narikae Ole Sakuda vs Santaine Ole Kimoso Muyaki (2003) eKLR; Munyu Maina v Hiram Gathiha Maina Civil Appeal No. 239 of 2009; and Daudi Kiptugen v Commissioner of Lands & 4 Others (2015) eKLR.

11. The Interested Party in its submissions relied on the evidence as presented and insisted that its members have been on the suit land since time immemorial as the said land was for their ancestors. Further, that they have occupied the said land without interruption. It argued that even if the Plaintiff purchased the suit land in 2014, it never took possession nor construct thereon. Further, it knew the suit land as LR 12610/5 and was not aware of its subdivision. It reiterated that, it had proved its claim for adverse possession as its members have been in possession of the suit land for more than 12 years. Further, that its members are still in possession thereon and the Plaintiff is holding his title in trust for them. To support its averments, it relied on the following decisions: Benjamin Kamau Murma & Others v Gladys Njeri, CA No. 213 of 1996; Civil Appeal No. 56 of 2014 Mtana Lewa v Kahindi Ngala Mwangandi (2015) eKLR; Civil Appeal No. 306 of 2013, Peris Nyiha Kangethe & 3 others v Fortunatus Charles Kamau (2011) eKLR; Milka Wangui Nduthu v Mwangi Njuguna & 4 Others (2021) eKLR; Nathan Lusasi Mukhono v Maurice Pius Makokha & 5 Others (2022) eKLR and Chevron (K) Ltd v Harrison Charo Wa Shutu (2016) eKLR.

### **Analysis and Determination**

12. Upon consideration of the Plaint, Defences including Counter-claim, Testimonies of the Witnesses, Exhibits and rivalling submissions, the following are the issues for determination:
  - a. Who is the owner of the suit land?
  - b. Whether the Defendant has trespassed on the suit land.
  - c. Whether the Interested Party has acquired the suit land through adverse possession.
  - d. Whether the Plaintiff is entitled to the orders sought as per the Plaintiff.
  - e. Whether the Interested Party is entitled to orders sought in the Counter-claim.

### **As to who is the owner of the suit land.**

13. The Plaintiff claimed to be the owner of land parcel LR No. 15051/20 (suit land) and PW1 in his testimony stated that he entered into a Sale Agreement with Awtar Kaur Birdi in 2014 for purchase of the said land, on 30<sup>th</sup> May, 2014 and produced a Sale Agreement to that effect. He explained that, he paid Stamp Duty later in 2020 after which he obtained his title. The Interested Party claimed that they have been in possession of land parcel LR No. 12510/5 since time immemorial as it belonged to their ancestors. However, the Interested Party's two witnesses, were not aware that the said land had been subdivided in 1991. It was PW1's testimony that after he purchased the suit land, he used a surveyor to identify beacons on 12<sup>th</sup> November, 2020. I have perused documents presented by each party, I note the Interested Party did not present any extract of title as opposed to the Plaintiff who produced a Certificate of Title with entry dated the 5<sup>th</sup> March, 2021 confirming transfer to George Gichuki Githua; Deed Plan, on line Certificate of Search indicating transfer to Awtar Kaur Birdi on 30<sup>th</sup> May, 2016, and KRA Receipt dated the 21<sup>st</sup> February, 2021 for payment of Kshs. 300,040 as stamp duty. The Defendant insisted that the suit land was community land, but did not produce any document of title to prove this assertion. On proof of ownership of land, Section 26 of the [Land Registration Act](#) of 2012 provides as follows:-

26.



- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
  - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.” Emphasis mine

14. In the case of *Dr. Joseph Arap Ngok -vs- Justice Moiwo Ole Keiwua & 5 Others*, Nai. Civil Appeal No. 60 of 1997 the court declared that:-

Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Section 25 and 26 of the *Land Registration Act*) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the titleholder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

15. Based on the evidence before me while relying on the legal provisions I have cited as well as associating myself with the quoted decisions, I find that the Plaintiff was able to prove, he legally acquired the suit land. I opine that even though the Interested Party sought to challenge the root of the Plaintiff’s title, it failed to tender any evidence to confirm that the Plaintiff acquired the suit land through fraud. Further, I note the land claimed by the Interested Party had since been subdivided on 13<sup>th</sup> December, 1991. In the foregoing, I find that the Plaintiff is indeed the absolute proprietor of Land Reference Nos. 15051/20 and will proceed to uphold his title.

**As to whether the Defendant has trespassed on the suit land.**

16. The Plaintiff claims the Defendant trespassed on his land and established a quarry thereon. The Defendant as DW1 confirmed that he entered into a Lease Agreement dated the 7<sup>th</sup> September, 2020 with the Interested Party over LR No. 12610/5 wherein they allowed him to occupy three acres of the said land, after which he commenced quarrying thereon. During cross examination DW1 explained that there were no people on the land when he took possession and commenced undertaking quarrying activities. He did not know if LR No. 12610/5 had been subdivided and title closed in 1991. He failed to provide proof that LR No. 12610/5 was Community land as claimed. He confirmed that he stopped quarrying in 2021 when he was served with a court order. He explained that he was not the owner of the suit land as he had claimed in his letter dated the 19<sup>th</sup> November, 2020. DW2 Kimatu Mutuku confirmed that, they allowed the Defendant to undertake quarrying activities on the suit land. Further, that it was only the Defendant’s quarry on the said suit land. As per the valuation report which was produced by the Plaintiff, I note from the photographs in the said report, it was clear there was indeed quarrying activities on the suit land, a site house thereon including machines and one homestead of one Nyabuto.



17. On trespass, Clerk & Lindsell on Torts 18th Edition at paragraph 18-01 defines it as follows:-

Any unjustifiable intrusion by one person upon land in possession of another.” ... Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession.”

18. Section 3 of the *Trespass Act* further provides that:-

(1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

19. In the case of *Duncan Nderitu Ndegwa v. KP& LC Limited & Another* (2013) eKLR, P. Nyamweya J (as she then was) held that:-

As regards the award of mesne profits, these are special damages which not only need to be pleaded but also proved. The Plaintiff did not bring any proof of the basis for the mesne profits of Kshs. 50,000/= per month, but brought evidence to show that the land was in a state that was unusable, and it therefore could not provide any sort of profits... once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff’s right to use and enjoy the suit property occasioned by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ trespass.”

20. In the case of *Attorney General v Halal Meat Products Limited* [2016] eKLR, the Court of Appeal observed that:-

It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another..... As was succinctly observed by this Court in *Juliet Karisa -v- Joseph Barawa & Another - Civil Appeal No. 108 of 1988* (Unreported);

“Expert evidence is entitled to the highest possible regard and though the court is not bound to accept and follow it as it must form its own independent opinion based on the entire evidence before it, such evidence must not be rejected except on firm grounds.”

It is our considered view that the reasons given by the trial Judge for adopting the respondent’s valuation and rejecting the respondent’s are cogent.”

21. Based on the evidence before me, noting that the Defendant produced a Lease Agreement, which he had with the Interested Party and admitted he was on the suit land by virtue of the said Lease Agreement, and conducted quarrying activities thereon, until he was stopped by dint of a Court Order, yet this land did not belong to the Interested Party, while associating myself with the decisions cited, I find that the Plaintiff has indeed demonstrated that the Defendant trespassed on his land as he was thereon without his permission.

**As to whether the Interested Party has acquired the suit land through adverse possession.**

22. The Interested Party claims to have been on the suit land since time immemorial as its ancestors had been thereon, and hence acquired it through adverse possession.



23. The doctrine of Adverse possession is governed by Section 7 and 38(1) of the [Limitation of Actions Act](#). Section 7 of the said Act stipulates that:-

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.”

24. While, Section 38(1) of the [Limitation of Actions Act](#) provides instances when a person is entitled to apply for adverse possession and states that:-

(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, 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.”

25. In order for a party to succeed in a claim for adverse possession, there are various requirements he/she needs to fulfill. These requirements were well articulated in the case of *Wambugu V Njuguna (1983) KLR 173* where the Court of Appeal stated that:-

Adverse possession contemplates two concepts: Possession and discontinuance of Possession. It further held that the proper way of assessing proof of Adverse Possession would be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.”

26. Further, in the case of *Haro Yonda Juaje V Sadaka Dzengo Mbauro & Another (2014) eKLR* Judge Angote aptly outlined the ingredients of adverse possession as follows:-

- a) That one has made physical entry on the land and is in actual possession of the land for the statutory period;
- b) That the said occupation is non permissive;
- c) That the occupant has the clear intention of excluding the owner from the property (*animus possidendi*);
- d) The acts done by the claimant are inconsistent with the owners enjoyment of the land for the purpose which he intended to use it; and
- e) that the possession was continuous, uninterrupted and unbroken for the statutory period.”

27. In the current scenario, DW2 testified that they were in possession of the suit land. DW1 had confirmed undertaking quarrying on the suit land. Both DW2 and DW3 gave contradictory evidence on when they had put Nyabuto on the suit land. One said she entered thereon in 2006 while the other insisted she was thereon from 2017. DW2 and DW3 did not explain when they entered the suit land and insisted that they were on a larger parcel being LR No. 12610/5. DW3 in his testimony confirmed, there was another group that came to the suit land in 2018, called KIMWAA who were violent towards them culminating in their members leaving the suit land and moving to rent houses in Mlolongo, Ngelani and Kinanie areas. I note both DW2 and DW3 did not produce any extract of the title of the land they were claiming and sought to rely on the National Land Commission newspaper advert, which I find is not proof of ownership of land. The Interested Party never produced the list of its members purportedly on the suit land. Further, from the documents presented, I note it was formed in 2014 but registered in 2017. From the evidence presented, I take judicial notice of the fact that the disputed land



is a quarry, and if so, how could the members of the Interested Party reside in a quarry wherein there are ongoing mining activities. The Defendant as DW1 confirmed in his testimony, that the suit land had been vacant when he went to quarry. In the foregoing, while relying on the legal provisions cited, while associating myself with the decisions quoted, I find that the Interested Party had not proved its claim of adverse possession over the suit land. In the circumstances, I find that it is hence not entitled to the orders as sought in the Counter-claim and will proceed to dismiss it, with costs to the Plaintiff.

**As to whether the Plaintiff is entitled to the orders sought as per the Plaintiff.**

28. The Plaintiff sought various orders in the Plaintiff as enumerated above. Having found that the Plaintiff is the owner of the suit land and that the Defendant had trespassed thereon, I find that he is entitled to the as orders sought. However, on the issue of mesne profits, I wish to refer to Section 2 of the Civil Procedure Act Cap 21 which defines it as follows: -

mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession.”

29. From the evidence tendered in court, I find that the Plaintiff provided proof of the basis for the demand of mesne profits, as the Defendant trespassed on his land and undertook quarrying thereon and I will award him, Kshs. 1,000,000.

30. However, from the valuation report which was an expert report produced by the Plaintiff, while associating myself with the observation in the case of Wambua v Kenya Power and Lighting Company Limited (Environment & Land Case 172 of 2016) [2023] KEELC 22403 (KLR) (13 December 2023) (Judgment) where Justice A. Nyukuri held that the duty of an expert is to assist the court with objective and impartial opinion, which duty overrides the expert’s obligation to the instructing party; noting that the Plaintiff only became the registered proprietor of the suit land in 2021, had never utilized the said land, I find that the compensation he is seeking is exaggerated as operating a quarrying also involves expenses, which I believe the Defendant incurred. Further, since the Plaintiff failed to prove that it is only the Defendant that had been quarrying thereon, noting that the Defendant only got into a Lease Agreement with the Interested Party in 2020 and stopped quarrying in 2021, I find that he is not entitled to the disturbance allowance as per valuation report. I opine that since he failed to demonstrate that it is the Defendant, who had removed/stolen the stones including hardcore over a period of time, in my view he is only entitled to be compensated for damages for trespass and mesne profits from the time, he became the registered proprietor of the suit land. I further hold that these should include the value of affected land, which is Kshs. 1,066,625.00; professional fees as itemized; and mesne Profits as other losses amounting to Kshs. 1,000, 000, damages for trespass as well as costs of the suit.

31. In the circumstance, I find that the Plaintiff has proved his case on a balance of probability as against the Defendant and Interested Party and will proceed to enter Judgement in his favour and make the following final Orders:-

Plaintiff is awarded:

- a. Value of affected land, which is Kshs. 1,066,625.00;
- b. Mesne Profits as other losses amounting to Kshs. 1,000,000;
- c. Professional Fee
  - i. Valuer – Kshs. 179, 854



- ii. Surveyor – Kshs. 115, 000.
- d. Damages for trespass – Kshs. 100,000.
- e. Permanent injunction be and is hereby issued restraining the Defendant including Interested Party, their agents or servants or anyone claiming under them from interfering with the Plaintiff's land.
- f. The aforementioned amounts awarded in (a), (b), (c) and (d) above to attract interest at court rates until payment in full.
- g. Costs of the suit including Counter-claim.
- h. The aforementioned awards including costs to be borne jointly by the Defendant and Interested Party.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 30<sup>TH</sup> DAY OF APRIL, 2024**

**CHRISTINE OCHIENG**

**JUDGE**

In the presence of;

Macharia for Plaintiff

Nderitu for Defendant

No appearance for Interested Party

Court Assistant – Simon

