



**Ruchu Gacharage Farmers Co-operative Society (Suing through the Chairman, Treasurer and Hon Secretary) v Mugo (Enviromental and Land Originating Summons 22 of 2020) [2024] KEELC 3907 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3907 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 22 OF 2020  
LN GACHERU, J  
APRIL 25, 2024**

**BETWEEN**

**RUCHU GACHARAGE FARMERS CO-OPERATIVE SOCIETY  
(SUING THROUGH THE CHAIRMAN, TREASURER AND HON,  
SECRETARY) ..... PLAINTIFF**

**AND**

**SAMUEL MICHAEL WAGOI MUGO ..... DEFENDANT**

**JUDGMENT**

1. Vide this Originating Summons, the Plaintiffs herein have sued the Defendant Samuel Michael Wagoi Mugo, wherein they have sought for determination of the following questions;
  - a. That the Plaintiff having been in continuous uninterrupted occupation and possession of the suit land parcel number LOC 3/ Gacharage- Ngoe/ T.21, for a period in excess of 12 years have acquired the title thereto by adverse possession;
  - b. That the Land Registrar, Muranga be ordered and directed to delete the names of the Defendant and register the name of the Plaintiff in the place thereof;
  - c. That the costs of the application be in the cause;
  - d. That such further or other orders be made as this Honourable court deems fit and just;
2. This Originating Summons is premised on the Supporting Affidavit of the officials of the Plaintiff, being Josphat Kinyanjui Ngure, Pius Mwangi Muigai and Margaret Waringa Karaka, who averred that they are the registered officials of the Plaintiff as per the Certificate of Registration attached as JSN2.



3. The deponents averred that the suit land parcel No. LOC 3/ Gacharage/T.21, is currently in the name of the Defendant as per the copy of the official search for LOC 3/ Gacharage/T.21 JSN3, which suit land belonged to the Defendant's late father the late Mugo Gatabae, who died in 1996.
4. It was their averments that the Co-operative Society has been in possession of the suit land since the time of land consolidation in 1970. This possession has been continuous, and uninterrupted for a period in excess of 12 years, as of right. Further that this land parcel neighbours the ones owned by different individuals in form of plots.
5. They also deposed that the owners of the said parcels of land were requested by the management committee of Ruchu Gacharage Farmers Co- operative Society, to sell to them the said parcels of land at the rate of ksh100/= per plot.
6. It was their allegation that the Defendant father disagreed with the other owners, and he was compensated with a plot which was equivalent to the suit land. The equivalent land parcel was Land parcel No. LOC 3/ Gacharage/ T/8, marked as JSN4, and that the Defendant is still in occupation of Loc 3/ Gacharage/ T.8, and still utilises the same.
7. Further, they alleged that the Defendant has never stepped on LOC 3/ Gacharage/T.21, or in any way occupied or utilized the same. It was their prayer that the Defendant should not interfere with their quiet possession and/or occupation of the suit land as they have acquired the said parcel of land by adverse possession.
8. They urged the court to declare them as having acquired the suit land by prescriptive right, as stated in their claim.
9. This Originating Summons is opposed by the Defendant herein Samuel Michael Wagoi Mugo, who filed his Replying Affidavit on 25<sup>th</sup> March 2022, and averred that he inherited the suit land from his father the Mugo Gatabae(deceased). He confirmed that the suit land is currently registered in his name as is evident from a copy of the title deed.
10. It was his allegations that the Plaintiff had approached the late Mugo Gatabae to sell the suit land to them for purposes of construction of the Plaintiffs coffee factory, to which his father declined to sell. However, his father allowed the Plaintiffs request on condition that they cause a transfer of similar land parcel in both size and location, as that of the suit property.
11. Due to the above condition, the late Mugo Gatabae allowed the Plaintiff to take possession of the suit land while waiting to complete the transaction as agreed. However, the Plaintiff never completed the transaction as had been agreed.
12. It was his further claim that the continuous use and occupation of the suit land by the Plaintiff was pursuant to a licence that was issued to the Plaintiff by the Defendant and/ or his late father.
13. He contended that the suit property was registered in his name on 13<sup>th</sup> January 1999, and upon such registration, he demanded that the Plaintiff remove the factory structure and/ or equipment from the suit land and give vacant possession, which they declined to give.
14. However, the Plaintiff requested the Defendant to sell the suit land to them at ksh 50,000/=, but he demanded ksh 300,000/= which offer the Plaintiff declined.
15. That the Defendant has allowed the Plaintiff to continue being in possession as licensees, without paying any consideration, and that was an act of good faith.



16. It was his allegations that the Plaintiff could not compensate his late father with land parcel No. LOC 3/Gacharage- Ngoe/ T.8, as the same is registered in the name of Waigi Kimani, and hence the Plaintiff could not transfer a clean title to the Defendant's father or the Defendant as agreed. He attached a copy of the official search for the said parcel of land.
17. The Defendant also contended that since he acquired the title to the suit land, he has tried to evict the Plaintiff from the suit land and thus the reasons why the Plaintiff filed ELC Case No. 42 of 2018, in Muranga, which was later transferred to Kandara Law Courts as Kandara ELC No. 24 of 2018, which was finalized on 23<sup>rd</sup> June 2020, in favour of the Defendant herein, as the trial court held that the Defendant herein is the rightful owner of the suit property and that the Plaintiff should be evicted.
18. He averred that the Plaintiff herein did not file an appeal and/ or stay of the said judgement, which judgement is still valid. He urged the court to dismiss this Originating Summons.
19. After several interlocutory Applications, the Originating Summons was eventually heard through viva voce evidence, wherein each of the party herein supported their case by each only calling one witness.

### **Plaintiff's Case**

20. PW1, Josephat Kinyanjui Ngure, the Chairman of Ruchu Gacharage Co-operative Society, adopted his witness statement dated 7<sup>th</sup> September 2020, as his evidence in chief. He also produced a list of documents as exhibits 1-4.
21. It was his evidence that Ruchu- Gacharage Co-operative Society, entered into the suit land in 1970, after purchasing the said land from the owner. It was his further evidence that from 1970, they have built a coffee factory, which has machinery and have fenced it. That they used about 15 million on the suit land for development, and that one has ever told them to stop construction on the suit land.
22. On cross examination by counsel for the Defendant, he testified that he has been the Chairman of the Society from 2019. Further that he has been a member of the Board since 2014, and he was not an official before 2014, but he had no document to show that he was the chairman of the Plaintiff. He reiterated that the Plaintiff entered into the suit land in 1970, and that the owner was Mugo Gatabae.
23. He also confirmed that there was an agreement before Ruchu Gacharage entered into the Suitland, but he did not have the documents to that effect. He also confirmed that Mugo Gatabae, refused to sell his portion of land, and there were about 26 plots, that the Society had earmarked for purchase.
24. He also stated that the elders convinced Mugo Gatabae to take another plot, but he did not have any agreement to that effect. He also stated that Mugo was given another plot No. T/8, by the Board, but there was no evidence to that effect, and that the said land was for Kimani.
25. He confirmed that the Defendant herein is the son of Mugo, who has not entered into the suit land. Further that the said Mugo did not transfer the land to them, and T/ .8 was never transferred to Mugo, and they never sued Mugo, and they did not know how the Defendant got registered as the owner of the land.
26. The witness confirmed that they have come to court since they have a right over the suit land, which right is a claim for adverse possession, and therefore the land is theirs.
27. In re-exam, he stated that the Defendant demanded the land in 2016, but the Society has been on the suit land since 1970. He also stated that the initial owner Mugo Gatabae died in 1996, and he had been given land parcel No. Loc 3/ Gacharage/ T/ 8, in exchange for the suit land No. Loc 3/ Gacharage/



T/21. He also confirmed that T/8, is in the name of Waigi Kimani, and that the Defendant uses the said land, and the Society is in T/ 21, which is not in the name of the Plaintiff.

### Defence Case

28. DW1, Samuel Michael Wagoi Mugo, the Defendant herein testified that he lives in Gitaimbuka, which is in Loc 3. He adopted his witness statement dated 23<sup>rd</sup> March 2022, as his evidence in chief. He also produced his list of documents as D. Exhibits 1-10.
29. He denied ever having been given land parcel No. Loc.3/Gacharage/T/ 8, and that his late father did not live on T/8. That he got the title deed for the suit land in 1990, and he has had disputes with the Plaintiff since 2001. He denied ever exchanging the suit land with T/8.
30. He admitted having valued the suit land, that is T/21 at ksh 300,000/=and he wanted to sell it to the Plaintiff, but they gave him an offer of 50,000/=, but he refused to settle for ksh 50,000/=.
31. It was his further evidence that the Plaintiff wanted to give him another plot and that he accepted that offer, but when he was shown the plot, it did not have the title deed. That he has not been given the title for T/ 8, to date and he does not use T/8 at all. He confirmed that he sued the Plaintiff at Kandara Law Courts, and the suit was decided in his favour.
32. On cross exam by counsel for the plaintiff, the Defendant testified that he does not use T/8, but he owns T.21 since 1999. He confirmed that his father was the original owner of the suit land, and that Ruchu Gacharage Co-operative Society entered into the suit land in a year that he could not remember, and they entered into the suit land when his father was alive.
33. It was his evidence that his father did not demand the land from the Plaintiff from 1968, to 1996 when he died. He also confirmed that he got the suit land through transmission, and thereafter, he wrote a demand letter on 14<sup>th</sup> July 2016 to the Plaintiff.
34. In re-exam, he confirmed having written a demand letter on 25<sup>th</sup> June 2001, to the Plaintiff, but the Plaintiff stated that it could not buy the land for ksh 300.000/=. It was his evidence that he got the title deed in 1999.
35. After the close of viva voce evidence, parties filed their respective written submissions. The Plaintiff filed its written submissions on 31<sup>st</sup> October 2023, through Mbiyu Kamau & co Advocates. The Defendant filed his written submissions on 23<sup>rd</sup> November 2023, through Njoroge Kugwa & Co Advocates, which rival submissions this court has carefully read and considered.
36. In it submissions, the Plaintiffs set out two issues for determination, being;
  - a. whether the Plaintiff acquired the suit land by way of adverse possession;
  - b. whether the decision of Kandara Law Court in ELC No. 24 of 2018, ought to be set aside.
37. On whether the Plaintiff acquired the suit land by way of adverse possession, it was submitted that the Plaintiff has been in open, continuous and uninterrupted possession of the suit land, which possession has been detriment of the Defendant. Further that in the ELC case filed in Kandara Law Courts, the court recognized such possession, which has been for a long time.
38. To support its claim, the Plaintiff relied on various cases among them. Gabriel Mbui vs Mukindia Maranya( 1993) eklr; Mtana Lewa vs Kahindi Ngala Mwangandi ( 2015) eklr and various provisions of law; sections 7, 37,38 of the Limitation of Actions Act and section 28(h) of the Land Registration Act.



39. On whether the decision of Kandara ELC No. 24 of 2018, ought to be cancelled, it was submitted that the said decision recognized that the Plaintiff has erected and has been operating coffee processing factory on the suit land to the exclusion of the Defendant and his late father.
40. Therefore, the Plaintiff was prevented from asserting his right to suit land and title due to adverse possession by the Plaintiff, as the Defendant was holding the suit land in trust for the Plaintiff through the doctrine of adverse possession.
41. The Plaintiffs urged the court to allow the its claim, and find that it has acquired the suit land by adverse possession, and that the Defendant title should be cancelled, and the said title should be registered in favour of the Plaintiff herein.
42. The Defendant on its part submitted the Plaintiff has not met the threshold for grant of title by virtue of adverse possession. Reliance was also placed on sections 38, and 37 of the Limitation of Actions Act, and the cases already cited by the Plaintiff.
43. The Defendant further relied on the following cases; Mate Gitabi vs Jane Kabubu Muga & others (Nyeri Civil Appeal No. 43 of 2015 (UR)); Githu vs Ndeete (1994) KLR; Amos Weru Murigu vs Marata Wangari Kambi & Another and Macharia Kairu vs Kennedy Kimani Muiruri (2021) eKLR; wherein the court cited the case of Peter Kamau Njau vs Emmanuel Charo Tinga (2016) eKLR where the court held;
- “it must be demonstrated that the owner of land took positive steps to asserts his right by for instance taking effective entry into the land. While this court finds that time started running in 2010, after the ruling, there is a compelling evidence that there were that there were orders of court issued on 16<sup>th</sup> March 2012...”
44. It was the Defendant’s further submissions that the Plaintiff has not met the threshold for grant of orders of adverse possession as the element of uninterrupted possession has not been fulfilled and therefore, the claim should fail in totality.
45. The above are the Pleadings, the evidence of the parties and their rival written submissions, which this court has considered and finds as follows; there is no doubt that the suit land No. Loc 3 Gacharage/ T. 21, is registered in the name of the Defendant as from 3<sup>rd</sup> December 1998, through transmission. There was evidence that initially this suit land belonged to Mugo Gatabae, the father to the Defendant herein.
46. There is no doubt that the Plaintiffs have been in occupation of the suit property for a while now, wherein they have constructed coffee factory. From the available evidence, the Plaintiff entered into the suit land with permission of the initial owner Mugo Gatabae.
47. There was evidence that the Plaintiff had intended to buy the suit land from Mugo Gatabae, but the said Mugo Gatabae declined to sale and opted to have an exchange of the suit land with another, being No. Loc 3/ Gacharage/ T. 8. The Defendant alleged that this T/8 is in the name of Waigi Kimani, and not the Plaintiff. This evidence was not denied by the Plaintiff.
48. The Defendant got registered as the owner of the suit land on 3<sup>rd</sup> December 1998, under the regime of The Registered Land Act, Cap 300 LOK (repealed). Under the said Act, section 27, provides that the registered proprietor of a parcel of land was entitled to enjoy all rights and privileges appurtenant thereto. The Defendant is such a proprietor and on the face of it, he is entitled to enjoy all rights appurtenant to such a proprietor.



49. Further, section 28 of the said CAP 300(repealed) provides that the rights of a registered proprietor are only liable to be defeated, only as provided by the Act. The instances when rights of a registered proprietor can be defeated are found in section 30 of the repealed Registered [Land Act](#)(Cap 300), which provision of law is now mirrored in section 28 of the [Land Registration Act](#)( 2012).
50. Section 30 of Cap 300(repealed) is on overriding interests, which attaches to land, and are capable of defeating a registered proprietor's right.
51. The Plaintiff claim is on adverse possession, which is one of the methods of land acquisition in Kenya as [provided by section 7 of the [Land Act](#), which states;

“Methods of acquisition of title to land Title to land may be acquired through—

- (a) allocation;
- (b) land adjudication process;
- (c) compulsory acquisition;
- (d) prescription;
- (e) settlement programs;
- (f) transmissions;
- (g) transfers;
- (h) long term leases exceeding twenty-one years created out of private land; or (i) any other manner prescribed in an Act of Parliament.”

52. As stated earlier, the provisions of Section 30 of repealed Cap 300, are reiterated in Section 28 of [Land Registration Act](#), and specifically section 28(h) of the said Act which provides;

28. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.

53. Therefore, from the above background, the Defendant title can indeed be defeated and/ or extinguished, if the Plaintiffs herein can prove that they have acquired the said title by virtue of adverse possession, which possession is culminated by exclusive long possession for a period of over 12 years.

54. Therefore, for the Plaintiff to succeed in their claim, they needed to call sufficient evidence to satisfied all the ingredients for adverse possession. These elements or threshold has been enumerated in various decided cases. See the case of *Kimani Ruchire –v – Swift Rutherfords & Co. Ltd.* (1980) KLR 10 at page 16 letter B, where Kneller J. held that:

“The plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion). So the plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it by way of recurrent consideration”.



55. As submitted by both parties, the claim of adverse possession stems from the [Limitation of Actions Act](#), specifically sections 7 of the said Act, which provides;

“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”.

56. Further Sections 13(i), section 37 and section 38( 1) of Cap 22 Laws of Kenya, also underpin the claim for adverse possession.

57. Adverse possession is a situation where one obtains a legal right to another parcel of land by reason of actual, open, continuous and exclusive possession of the registered owners parcel of land for a period of exclusive occupation of 12 years.

58. The law on adverse possession is well established or settled, and the person claiming a right to title must show clearly and unequivocally evidence that his possession was not permissible, open, with the knowledge of the true owner and excluded the true owner from enjoyment of his property. See the case of *Mbira vs Gichuhi* (2002) 1EALR 137, where the court held;

“..... a person who seeks to acquire title by land by the method of adverse possession for 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 a statutory prescribed period without interruption...”

59. In the case of *Maweu vs Liu Ranching and Farming Cooperative Society* 1985 klr, the Court of Appeal held as follows;

“Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstance...”

60. Further in the case of *Samuel Miki Waweru vs Jane Njeru Richu*, civil Appeal No. 122 of 2001, the Court of Appeal held as follows;

“.....it is trite in law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner, or in accordance with provisions of the agreement of sale or lease or otherwise. Further, as the High Court correctly held in *Jandu vs Kirpal* (1975) E.A 225, possession does not become adverse before the end of the period for which permission to occupy has been granted”

61. Therefore, the manner of entry into the suit land is very crucial. If the entry was with permission of the owner, no matter the period of occupation, adverse possession cannot attach. See the case of *Samuel Miki Waweru*(Supra).

62. The Court of Appeal too in the case of *Richard Wefwafwa Songoi vs Ben Munyifwa Songoi*(2020) eKLR; set out the elements to be considered while determining a claim for adverse possession as follows;

- a) on what date he came into possession.
- b) what was the nature of his possession.



- c) whether the fact of his possession was known to the other party.
  - d) for how long has his possession continued,
  - e) that the possession was open and undisturbed for a requisite period of 12 years.
63. It was the Plaintiff evidence that the suit land herein initially belonged to Mugo Gatabae, the father to the Defendant herein. It was their further evidence that they had requested the said Mugo Gatabae to sell the suit land to the Society, but he declined, to sell but he was ready to exchange the suit land with parcel T/ 8, which land is in the name of Waigi Kimani, but not the Plaintiff.
64. Given that the Plaintiff entered into the suit land with the permission of the initial owner, then this court cannot hold that the said occupation and possession became adverse to the true owner. See the case of Ndiema Samburi Soti vs Elivis Kimtai Chepkeses(2010) eklr, the Court of Appeal held as follows;
- “ A Person who occupies land with the consent of the owner cannot be said to be in adverse possession as in reality he has not dispossessed the owner and the possession is not illegal (Wanje vs. Saikwa (No.2) (1984) KRL 284).”
65. The Defendant herein became the registered owner of the suit land in 1998, and it is evident that in 2001, he issued a demand letter to the Plaintiff to vacate the suit land or compensate him. The defendant gave the Plaintiff on offer to buy the land at ksh 300, 000/= which offer the Plaintiff alleged that they could not accept.
66. Thereafter, the parties were involved in a civil case in court, thus the Defendant as a registered owner asserted his right by filing a claim in court. The Plaintiff cannot therefore aver that they have been in exclusive and uninterrupted possession and occupation of the suit land as the civil suit interrupted the flow of time. See the case of Wambugu ...Vs...Njuguna (1983) KLR page 172 the where the Court of Appeal held as follows;
- “ 1. In order to acquire by statute of limitations title to land which has a known owner the owner must have lost his right to the land either by being dispossessed of it or by having continued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed of the suit land for a continuous period of twelve years as to entitle him, the respondent to title to the land by adverse possession.
  - 2. The limitation of Actions Act, on adverse possession contemplates two concepts: dispossession and discontinu-ance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not the claimant has proved that he has been in possession for the requisite number of years.”
67. It is evident that the Defendant herein was a Plaintiff in Civil Case No. 24 of 2018, filed at Kandara Law Courts, where Judgement was entered in his favour. The court declared the Plaintiff the rightful owner of the suit land, and directed the Defendant, who is the Plaintiff herein to give vacant possession to the Plaintiff, the Defendant herein within a period of 60 days from the date of the said judgement.



68. The judgement delivered on 23<sup>rd</sup> June 2020, was issued by a court of competent jurisdiction, which court derives its jurisdiction and discretion from *the Constitution* and statute law. There is no evidence that the said determination of trial court in Kandara ELC 24 of 2018, has been appealed against, set aside or reviewed. Therefore, the said judgement remains valid and can only be interfered with, either through an Appeal, or through an Application for review or revision, but not through another suit.
69. If this court was to set aside the judgement of the trial court through this suit which is not an appeal, then the action of this court will be tantamount to undermining the authority or discretion of the said trial court, which would not augur well in the administration of justice, would cause confusion, uncertainty and inconsistencies.
70. For the above reasons, the court finds and holds that it cannot set aside the Judgement of Kandara Law Court in MELC No 24 of 2018, and that judgement remains a valid determination, until such time that is set aside and/or reviewed, by a court of competent jurisdiction.
71. Having found that the entry of the Plaintiff was through permission of the initial owner, Mugo Gatabae, and later the Defendant herein, this court finds that the said entry disqualifies the Plaintiff from claiming ownership of the suit land through adverse possession. The Defendant has been asserting his right, and the Plaintiff cannot claim that their possession and occupation is exclusive, peaceful and/ or without interruption for a period of over 12 years.
72. The Defendant is the owner of the suit land and he can deal with it as he so wishes as provided but section 24 of *Land Registration Act*. However, in the event the Plaintiff are interested in keeping the suit land, then they can enter into meaningful negotiation with the Defendant herein, the registered owner, for purchaser of the same at an agreed amount. Indeed, the right to own property must be respected as provided by section 40 of *the Constitution*.
73. Having considered the available evidence, the court finds the Plaintiffs herein have failed to prove their case against the Defendant on the required standard of balance of probabilities.
74. For the above reasons, the Plaintiff's claim as contained in the Originating Summons dated 7<sup>th</sup> September 2020, is found not merited, and the same is dismissed entirely with costs to the Defendant.

It is so ordered.

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT MURANGA THIS 25<sup>TH</sup> DAY OF APRIL, 2024**

**L. GACHERU**

**JUDGE**

25/4/2024

**Delivered online in the presence of; -**

**Joel Njonjo, Court Assistant.**

Ms Mbiyu H/B for Mr Mbiyu Kamau for the Plaintiff

Ms Waigwa for the Defendant

**L. GACHERU**

**JUDGE.**

25/4/2024

