



**Gatei v Gatei (Environment & Land Case 12 of 2019)  
[2024] KEELC 3323 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3323 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT & LAND CASE 12 OF 2019**

**JM MUTUNGI, J**

**APRIL 24, 2024**

**BETWEEN**

**FRANCIS KARANI GATEI ..... APPLICANT**

**AND**

**PERIS WAINOI GATEI ..... RESPONDENT**

**JUDGMENT**

1. The Plaintiff instituted the instant suit vide an Originating Summons dated 19<sup>th</sup> February 2019 seeking for the following orders:
  1. That the Applicant be declared to become entitled by adverse possession of over 12 years to all of that parcel of land known and described as Inoi/Kaitheri/396 (suit land) measuring approximately 0.098 Hectares.
  2. That the said Applicant be registered as the sole proprietor of that parcel of land known and described as LR Inoi/Kaitheri/396 measuring approximately 0.098 Hectares.
  3. That the Land Registrar, Kirinyaga County do register the Applicant as the absolute proprietor of that parcel of land know and described as LR Inoi/Kaitheri/396.
  4. That the Respondent be ordered to pay the costs of the suit herein.
  5. That the Court do issue such further or better reliefs as may be just and expedient.
2. The Originating Summons is predicated upon the annexed Supporting Affidavit of Francis Wainoi Gatei through which he avers that his uncle John Comba Gatei invited him to stay in his portion of land on 24<sup>th</sup> May 2002. He states that his uncle inherited the suit land from his grandfather, as his mother could not inherit under the Kikuyu Customary Law. The Applicant claims that he took possession of the suit land on the date he was invited and that he has extensively developed the same by putting up a fence, building a dwelling house and a kitchen. He further claimed that he had been in continuous,



uninterrupted possession of the suit land and he depends on it for his livelihood. He deponed that when he attained majority age, he adopted his uncle's name as his surname. He further stated that sometimes on the 6<sup>th</sup> July 2011, the Respondent who is the registered proprietor of the suit land, wrote a letter to him demanding that he vacates from the suit land.

3. The Respondent filed her Replying affidavit dated 16<sup>th</sup> April 2019. She deponed that she was the legal wife of John Comba Gatei who gifted her LR Inoi/Kaitheri/396. She stated that her husband had been gifted the suit property and others, to wit LR Inoi/Kaitheri/395, 397, 398, 399 and 400 by his father during his lifetime. She averred that it was after her father-in-law passed on, that her husband filed Succession Cause No. 61 of 2010 to have the remaining portions transmitted to him. She further stated that on 4.02.2011, all the deceased beneficiaries appeared in Court and that they consented to the transfer of LR Inoi/Kaitheri 395, 396 and 400 in the names of John Comba Gatei. She stated that there was no objection and the grant was confirmed. She stated that it was in the year 2011, that the Applicant, having started an egg selling business, came to their home and requested her husband to give him a temporary place to stay as his home town, Mwea, was too far. She averred that her husband agreed but when the Applicant became abusive, her husband issued him with an eviction notice. She stated that on 9.08.2011 she was served with copies of Summons for the Revocation of Grant in Embu High Court Misc. Succession Cause No. 325 of 2011, by the Applicant and his Aunt Faith Muthoni Mbui. The Application was heard and was dismissed. She stated that she lives on the suit land with her family and that the some of the deceased family members are buried on the land. She claimed that her family allowed the Applicant onto the land on humanitarian grounds and that he has been a licensee in the suit land all along.

4. Evidence of the parties

The Applicant's case was heard on 15<sup>th</sup> May 2023 and it was the Plaintiff's evidence that the Respondent was his Aunt and the registered owner of LR/Inoi/Kaitheri/396, the subject of this suit. He stated that he had resided in the suit land since the year 2002, when his Uncle allowed him to build a house thereon. He stated that in the year 2011, the Respondent sent him a demand notice demanding that he vacate from the suit land. He averred that he has constructed a semi-permanent house thereon and knew the suit land as his only abode. Under Cross Examination, PW1 stated that by the time he had been asked to vacate from the land, he had lived in the suit land for 9 years.

5. The Respondent's case was heard on 21<sup>st</sup> September 2023, the Respondent called 3 witnesses. DW1, the Respondent testified that she resided on the suit land together with the Applicant. She stated her deceased husband allowed the Applicant in the suit land and the Plaintiff built a timber house thereon. She stated that there was no boundary that separated the portions where they resided. She affirmed that the Applicant had resided in the suit land since the year 2002. The Respondent stated that the suit land initially had been registered in her late husband's name but was later registered to her name.
6. DW2, Jane Muthoni Gatei, a daughter to the Respondent testified that the Applicant came into the suit land in 2011 after the succession of her grandfather had been completed. She confirmed that the Applicant had built a semi-permanent house on the portion that he occupies in the suit land. She averred that her grandfather subdivided LR Inoi/Kaitheri/127 into 14 portions, 6 of which were gifted to her deceased father. She stated that her deceased father filed the succession cause to have the remaining 3 plots registered in his name. Under cross examination, she stated that the Respondent had built rental house and planted bananas in the suit land. DW2 stated that the Applicant was voluntarily given a place to stay by her father and that he filed this suit after his application in the succession cause filed at Embu was dismissed. DW3, Michael Meshack Karubia, testified that he had been instructed by the Applicant's grandfather to carry out subdivision of LR Inoi/Kaitheri/127. He testified that he subdivided the land into 14 portions from parcel LR Inoi/Kaithera/395 to 408, 6 of the portions were



given to the Respondent's husband and the other 6 were given to his brother. He stated that at the time, the Applicant was living with his uncle.

7. Submissions by the parties.

The parties filed their written submissions pursuant to the Court's directions. The Plaintiff filed his written submissions on 15<sup>th</sup> February 2024. The Plaintiff reiterated that he entered into the suit land with the consent of his uncle, although the Uncle was not the registered owner of the suit land at the time of his entry. He therefore argued that since the uncle had not been registered as owner he could not be deemed to have been occupying the land with his uncle's permission. Having lived in the suit land without permission for a period of more than 22 years, the Applicant submitted that he was entitled to the suit land by way of adverse possession. He relied on the Case of Patrick Ndegwa Munyua Versus Benjamin Kiiru Mwangi (2020) eKLR.

8. The Respondent filed her submissions on 14<sup>th</sup> November 2023. She submitted that the Applicant had not proved that he had been in adverse possession of the suit property as his entry onto the land was with the permission of his Uncle. Counsel for the Respondent submitted that the very fact that the Applicant had admitted that he had been allowed entry by his uncle, automatically defeated his claim for adverse possession. Counsel further submitted that the Applicant was a licensee who was allowed by the Uncle to build a temporary structure on humanitarian grounds. Counsel further submitted that the intention of the Applicant's Uncle to give him a place to build his house was not of a permanent nature because if it were, the Uncle would have gifted him the same during his lifetime. Counsel relied on the cases of Abdirashid Adan Hassan Versus Estate of WHE Edgry (2022) eKLR and Joseph Macharia Kairu Versus Kenneth Kimani Muiruri (2021) eKLR.

9. Analysis and Determination.

I have considered the Originating Summons, the Respondent's Replying Affidavit, the evidence adduced and the rival submissions of the parties. The primary issue for determination in this suit 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 Respondent.

10. 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:

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.

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

11. Section 38 of the Act provides for the procedure to be followed by a person claiming adverse possession and provides as follows: -

“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.”

12. The doctrine of adverse possession has been articulated 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 definition of what the doctrine of adverse possession entailed and the circumstances that gives rise to it. In the case, the Court stated thus: -

“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.”

13. 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 averse 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.”

14. In the decision of the Environment and Land Court at Mombasa in the case of Celina Muthoni Kithinji v Safiya Binti Swaleh & 8 Others [2018] eKLR, the decision of the Court of Appeal in Wambugu v Njuguna (1983) KLR 173 on what constitute adverse possession was cited with approval. The requirements for adverse possession were also set out in the Case of Mbira –v- Gachuhi (2002) IEALR 137 where 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....”

15. Therefore, 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 and above. 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.”

16. In the Case of *Gabriel Mbui Vs Mukindia Maranya* [1993] e KLR, Kuloba J observed as follows:

- “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 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.”

17. In the present suit, it is not disputed that the Applicant has been living in the suit land. The time as to when he entered into the suit land has been disputed, with the Applicant insisting that he took possession in the year 2002 and DW1 and DW2 insisting that he came into the land in the year 2011. The contradiction notwithstanding, DW1 while under cross examination admitted that the Applicant came into the suit land in the year 2002 thereby corroborating the Applicant’s assertion. As regard the nature of possession, the Applicant is required to prove that he came into the suit land without permission of the land owner, force or secrecy and that his possession and use was adverse to the rights of the registered owner.
18. In the Case of Samuel Kihamba Versus Mary Mbaisa (2015) eKLR the Court stated that:
- “Strictly, for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology; nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land.”
19. In the Case of Samuel Miki Waweru -vs- Jane Njeri Richu (2007) eKLR the Court opined that a claim of adverse possession cannot succeed if the person asserting the claim is in the possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise. The Applicant in the instant suit admitted in evidence that he came into the land with the permission of his uncle, the husband to the Respondent. In his evidence, the Applicant testified that “my late Uncle invited me to reside on the land and allowed me to build a house.” It was in his submissions that the Applicant changed the narrative as his Counsel submitted that he was in the suit land without permission for two reasons; Firstly, the demand notice dated 6.7.2011 stated that he was in the suit land illegally, hence without the permission of the Respondent and secondly, that he was given permission to enter the suit land by his Uncle, who however, as at the time of his entry was not the registered owner and hence lacked the capacity to give permission.
20. The Respondent in her evidence was emphatic that the Applicant was allowed to enter and occupy a portion of the suit land by her deceased husband. The Applicant in his evidence equally admitted that he was let into the suit land by his Uncle, who was the Respondent’s husband. The Applicant thus acknowledged the Respondent’s husband as the owner and/or the beneficial owner of the suit property. In my view it matters not that as at the time of entry onto the land the Respondent’s husband may not have been the registered owner of the suit land. The Applicant acknowledged him as the person who was exercising ownership rights and for that reason had sought his permission to enter onto the land.
21. The occupation and possession by the Applicant of the suit property was not as adverse possessor as his entry onto the land was with the permission of the beneficial owner. After the death of his Uncle, the Respondent who was the Uncle’s wife, had the suit property transferred to her name by her husband during his life time. That is evident from the Judgment delivered on 24<sup>th</sup> January 2019 L. W. Gitari, J in Kerugoya HC Succ Cause No. 350 of 2012 where the Applicant and one Faith Muthoni Mbui had applied for the revocation of Grant issued to the Respondent’s husband pursuant to which he had been granted land parcels Inoi/Kaitheri/395, 396 and 400 (subdivisions from Inoi/Kaitheri/127)



absolutely. The application for revocation was dismissed and that precipitated the filing of the instant suit by the Applicant. In the Succession cause the Applicant unequivocally admitted he resided on plot No. 395 (should have meant plot No. 396) with the permission of John Gatei (Uncle) who gave him a place to build in 2003. How then could his possession of the suit property have become adverse? It could not as he was expressly given permission to occupy the land. The Applicant was a licensee and his possession and occupation could not override the title of the real owner.

22. It is noteworthy that both the Applicant and the Respondent reside on the suit land and that the same status that obtained at the time that the Applicant's Uncle was alive obtains to date. There is no delineation of the portion that the Applicant occupies as he only has the house that he was allowed to construct on the land by the Respondent's deceased husband. The Applicant does not exercise exclusive control over the suit land and his claim of adverse possession of the suit land is unsustainable.
23. In the premises it is my finding and holding that the Applicant has not proved his claim on a balance of probabilities and that he cannot be entitled to have Judgment in his favour. The suit is ordered dismissed with no order as to costs. Each party shall bear their own costs.

Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY Via VIDEO LINK THIS 24<sup>TH</sup> DAY OF APRIL 2024.**

**J. M. MUTUNGI**

**ELC - JUGDE**

