



Nyaga v Njanja & another (Sued on their capacity as the personal representatives of the Estate of Esther Wambui Bianga (Deceased) (Environment & Land Case 44 of 2022) [2024] KEELC 3607 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3607 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 44 OF 2022**

JM MUTUNGI, J

APRIL 12, 2024

BETWEEN

SAMUEL IGIRI NYAGA PLAINTIFF

AND

MARGARET WAMBUI NJANJA AND GLADYS WANJIRU BIANGA (SUED ON THEIR CAPACITY AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF ESTHER WAMBUI BIANGA (DECEASED) DEFENDANT

JUDGMENT

1. The Plaintiff instituted the present suit vide an originating Summons dated 14th December, 2022, seeking for inter alia the following orders;
 - i. That the Respondents be declared to be holding in constructive trust in favour of the Applicant Land Parcel No. Mwerua/Kiandai/1352 measuring 0.20 HA and the same be transferred to the Applicant who has extensively developed the same.
 - ii. That the Applicant by virtue of having bought the above suit land from the deceased Esther Wambui Bianga and having stayed and extensively developed the same over twelve (12) years be declared to be entitled and registered as the owner thereof by way of adverse possession.
 - iii. That the Respondents be ordered to pay costs.
2. The Originating Summons is predicated upon the annexed affidavit of Samuel Igiri Nyaga. He avers that he purchased Mwerui/Kiandai/1352 from the Respondents' mother for the sum of Kenya Shillings One Hundred and twenty-five thousand (KShs. 125,000) pursuant to an agreement of sale dated 13th February 2006. The Plaintiff averred that he took possession of the suit land immediately after the payment of the purchase price and that he had extensively developed the same by carrying out subsistence farming and had erected a semi-permanent house thereon. He stated that he had been



- in open, uninterrupted and exclusive possession of the suit land for a period of more than 12 years and as such, he had acquired prescriptive rights over L.R Mwerua/Kiandai/1352. He further asserted that the payment of the full purchase price to the deceased created a constructive trust as against the Respondents in favour of the Applicant.
3. The Defendants entered appearance and filed their replying affidavit, through Gladys Wanjiru Bianga, on 13th January 2023. She averred that L.R Mwerua/Kiandai/1352 was distributed to the respondent vide the certificate of confirmation of grant issued on 22nd September, 2020 in the Chief Magistrate Court at Kerugoya Succession Cause No. 89 of 2019. She further averred that during the lifetime of their mother, she had sought to transfer the suit land to the Respondents but the transfer was not effected as the certificate of title of the suit land was reported to have been stolen and their brothers were suspected to be the culprits. Their mother subsequently died on 11.10.2006 and was buried in the suit property without any objection from the Applicant. The Respondents state that the sale agreement between the Applicant and their mother and the acknowledgment dated 7th March 2006 were a forgery. The Respondents further aver that the Plaintiff started using the suit land in 2018 with the permission of their brother and therefore 12 years had not lapsed. The Respondents further state that the Plaintiff had filed summons for the revocation of the grant issued in Succession Cause No. 89 of 2019, vide which the Respondents were awarded the suit land but the summons was dismissed with costs.
 4. The suit was heard on 5th October, 2023 when the Plaintiff and the Defendant testified and closed their respective cases. The Plaintiff testified as PWI and he testified that he knew the deceased as the registered owner of the suit property. It was his evidence that he purchased the suit land from the deceased and that they entered into a sale agreement in 2006. He exhibited in his bundle of documents the sale agreement and the acknowledgement receipt showing that he had made the purchase payments to the deceased.
 5. The Plaintiff stated that he took possession and occupation of the suit land immediately after the payment of the purchase price, constructed a residential house and planted coffee thereon. It was the Plaintiff's further evidence that he resided in the land while his family resided in another piece of land. He further stated that the sale between him and the deceased was witnessed by the Respondents' brothers. The Plaintiff maintained he had been in possession and occupation of the suit land from 2006 when he purchased the same.
 6. The Plaintiff under cross examination testified that the deceased fell sick and as a result, they could not attend the land control board for the consent to transfer the land to his name. He further testified that he paid the purchase price to the deceased in the presence of the two witnesses and in an advocate's office and that it was received by one of the deceased sons. He maintained that he was granted vacant possession and that at the time, the land was undeveloped. The plaintiff further stated that the deceased was not buried on the suit land and that he was not aware of the alleged intentions of Esther Wambui Bianga to transfer the suit land to the Respondents and that he was not given permission to enter into the suit land by the deceased son.
 7. DW1, Gladys Wanjiru Bianga, adopted the contents of her Replying Affidavit dated 13th January 2023, as her Evidence in Chief and relied on the bundle of documents as per the list dated 11th May 2023 produced as defendant's exhibits. DW1 testified that their deceased mother had allocated the suit land to them (Respondents) and had taken out a consent from the Land Control Board to transfer the land to them and had signed transfer forms for purposes of transferring the suit land to the Respondent's name. DW1 further testified that the transfer of the suit land could not be effected because the deceased title and Identity card were allegedly stolen. In her evidence DW1 stated that she knew the Plaintiff and that he had been allowed to enter into the land by her brother, Maina in 2018 to cultivate and



reside thereon and that her brother informed her and the sister that the plaintiff was leasing the land. She stated that the coffee and macadamia trees in the suit land had been planted by the deceased.

8. Under cross-examination, the DW1 admitted that the Plaintiff came into the land in the year 2006. She stated that the Applicant built a semi-permanent house in 2018. She further testified that she had not taken any steps to evict the Applicant from the suit land.
9. The parties filed their written submissions pursuant to the Court's directions. The Plaintiff filed his written submissions on 13th November 2023. In his submissions, he reiterated the contents of his replying affidavit and cited the cases of *James Maina Kinyua Versus Gerald Kwendaka (2018) eKLR* and *Stephen Mwangi Gatunge Versus Edwin Onesmus Wanjau (2022) eKLR* to buttress the position that the Plaintiff had been in exclusive control of the suit property and that he had subsequently acquired prescriptive rights over it.
10. The Defendant submitted that the applicant's occupation of the suit land had not been continuous, open and without permission. She relied on the cases of *Mate Gitabi Versus Jane Kaburu Muga & Others (2017) eKLR* and *Samuel Miki Waweru Versus Jane Njeru Richu (2007) eKLR* to buttress her argument that the Plaintiff had not satisfied the necessary ingredients of adverse possession, that the possession was peaceful, open and continuous and uninterrupted with the knowledge of the registered proprietor.
11. I have considered the Originating Summons, the Respondent's Replying Affidavit, the evidence adduced and the rival submissions of the parties and the issues that arise for determination are as follows: -
 - a. Whether the Plaintiff has acquired the suit property by way of adverse possession?
 - b. Whether the Plaintiff is entitled to the suit property by virtue of constructive trust?
 - c. Whether the Plaintiff should be registered as the owner thereof in place of the Respondent.
12. 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 provides that:

Section 7:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

Section 13:

1. A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where undersections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
2. Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land



Section 38 of the Act provides for the procedure to be followed by a person claiming adverse possession.

“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.”

13. The doctrine of adverse possession has been explained and applied in numerous 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] e KLR, gave a definition of what the doctrine of adverse possession entails and the circumstances that gives rise to it:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

The Court of Appeal in the case of *Ruth Wangari Kanyagia –vs- Josephine Muthoni Kinyanjui* [2017] eKLR while acknowledging that adverse possession is a common law principle reiterated the same by citing the India Supreme Court decision in the case of *Kamataka Board of Wakf –vs- Government of India & Others* [2004] 10 SCC 779 where the Court stated thus: -

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continues. The possession must be adequate in continuity, in publicity and in extent to show that their possession is 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 *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 relied upon. The requirements for adverse possession have also been set out in the case of *Mbira –v- Gachuhi* (2002) IEALR 137 in which the Court held that:

“..... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive or non-consensual actual, open,



notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption....”

15. A person claiming under the doctrine of adverse possession must demonstrate actual occupation or possession of another’s land, without the consent of that other, and in such a way that the occupation or possession is open, peaceful and continuous for a period of 12 years and above. The Court of Appeal in the case of *Kweyu Versus Omutut* (1990) eKLR observed as follows as to what constitutes adverse possession:

“By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor. (Colour of title is that which is a title in appearance, but in reality). Adverse possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford Colour, and, second such possession under it as will be adverse to the right of a true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms (“claim or colour of title”) mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land or the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant’s use done publicly and notoriously.”

In the case of *Gabriel Mbui Vs Mukindia Maranya* [1993] e KLR, Kuloba J observed 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 adviser possession must be visible, open and notorious, given reason for notice to the owner and the community, of the exercise of dominion over the land,
- f) The possession must be continuous uninterrupted, unbroken, for the necessary statutory period.



- g) The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.”

16. The Plaintiff in the present case stated that he took possession of the suit land in 2006 after he purchased the land from the Defendants’ mother. The certificate of title to the land Mwerua/Kiandai/1352 confirms that Esther Wambui Bianga (deceased) was registered as the proprietor. The Plaintiff exhibited the sale agreement dated 13th February 2006 which is shown to have been witnessed by Jackson Maina Bianga and Fredrick Micugu Bianga who are the Defendants brothers. The full purchase price of Kshs. 125,000 was paid as the Vendor (deceased) acknowledged receipt of Kshs. 90,000 on signing the agreement and was on 7th March 2006 paid the balance of Kshs. 35,000. Although the Respondents raised the concerns that the sale agreement and the acknowledgment dated 7th March 2006 were a forgery, they did not adduce any evidence to support this claim. Under Section 107 of the Evidence Act Cap 80 Laws of Kenya, the burden of proof rests on the person who asserts to prove the existence of any facts.
17. On the basis of the evidence, the agreement was valid as between the deceased and the Plaintiff and bound the deceased and her personal representatives were not at liberty to resile from it. It was the Plaintiff’s position that as a result of this transaction between him and the deceased, he took possession immediately after the payment of the purchase price. The Plaintiff admitted that he did not attend the Land Control Board for the consent to transfer, as the deceased fell ill. The Plaintiff however stated he continued to be in occupation and possession of the land and was utilising the same. The Respondent contested the fact that the Plaintiff has been living in the suit land since 2006 and asserted that the Plaintiff entered the suit land in the year 2018. However when she testified, the Defendant admitted that the Plaintiff entered into the land in 2006 in her evidence in chief. This evidence by the Respondent corroborated the Plaintiff’s claim of occupation and use of the suit land since the year 2006. The Plaintiff further claimed that he had built a residential house and planted coffee in the suit land and though he did not produce any evidence to attest to this fact, the Respondent confirmed that in fact the Plaintiff had built a one roomed semi-permanent house on the land. The Respondent also confirmed that they had knowledge of the Plaintiff’s presence in the suit land as an alleged lessee who had been given permission by one of their brothers, though no evidence respecting the lease was availed to the Court.

The second limb in proof of the doctrine of adverse possession demands that the Plaintiff’s occupation and/or possession should be peaceful, continuous and uninterrupted. The Respondents testified that they got to know about the Plaintiff’s occupation of the suit land in 2006 though they stated the Plaintiff built a house in 2018 on the land. The Respondents did not initiate any action to have the Plaintiff vacate from the land. DW1 testified that they were waiting for the certificate of confirmation of grant to be issued, so as to make a formal complaint. The Certificate of confirmation of grant was issued on 22nd September 2020 and the Respondents as at the time the Plaintiff commenced the instant suit, had not filed any suit to claim ownership of the suit land.

On the basis of the above analysis, the facts, and the evidence, it is evident that the deceased and the Plaintiff indeed entered into a sale agreement for sale of the suit land. That no consent of the Land Control Board was sought and obtained within the prescribed period within the provisions of the Land Control Act, Cap 302 Laws of Kenya. The agreement under Section 6(1) of the Land Control Act, became null and void after the expiry of 6 months’ from 13th February 2006. The occupation and possession of the land by the Plaintiff as from 13th August, 2006 was as an adverse possessor. The occupation and possession of the land by the Plaintiff as borne out by the evidence was open,



continuous and uninterrupted. The Plaintiff had not only planted coffee and macadamia but had also constructed a semi-permanent house where he was living. The Plaintiff in my view had occupied and adversely possessed the suit land for a period in excess of 12 years by the time he commenced the instant suit and is therefore entitled to be declared as owner by virtue of the doctrine of adverse possession.

18. As concerns the issue as to whether the Respondents were holding the land in trust for the Applicant, the Applicant pleaded that he was granted possession of the suit land upon paying the purchase price in full. The Applicant claims this action by the Respondent's mother created a constructive trust in his favour over the suit land and that the Respondents, inherited the land pursuant to the succession proceedings subject to the constructive trust created in favour of the Plaintiff/Applicant.
19. Section 25 of the [Land Registration Act](#), 2012 defines what the rights of a registered proprietor are and the limitation of such rights. Section 25 provides as follows: -

25 ...

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -
- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

The registration of a person as a proprietor of land is subject to any trust as may affect such land though the same is not noted in the register of the land. Under Section 28 of the [Land Registration Act](#), trusts and rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription are acknowledged as overriding interests that affect the title of a registered owner.

Section 28(b) and (h) of the [Land Registration Act](#) provides as follows:

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.
- (b) trusts including customary trusts.
 - (h) rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.

In the present case, the deceased entered into an agreement to sell the land to the plaintiff, received the full purchase price and put the plaintiff in possession. Though the Respondents claim the deceased had bequeathed to them the parcel of land, during her lifetime, the gift never got completed by having the land registered in their name. Other than a purported letter of consent and form of transfer that was supposedly signed by the deceased, there was no other evidence adduced to support the claims that



the deceased had gifted the Respondents the suit land. The deceased could, however, have changed her intention to gift her daughters the land and decided to sell the land to the plaintiff. Be it as it may be, if indeed there was the intention to give a gift to the Respondents, that intention was vitiated by the death of the deceased and the Respondents henceforth could only acquire title to the land by way of succession as beneficiaries and that was to be subject to any encumbrances and/or overriding interests that the land may have been subject to, at the time the succession proceedings were commenced.

I have found and held that the Plaintiff was in adverse possession of the suit land from August 2006 when his agreement with the deceased became void. As observed, the deceased having granted the Plaintiff possession of the land after he had paid the full purchase price, she continued to hold title to the land as a trustee and a constructive trust was created in favour of the Plaintiff. The Respondents filed a Succession Cause No. 89 of 2019 in the CM's Court Kerugoya, for the Estate of Esther Wambui Bianga where they were the Petitioners and obtained a grant which was confirmed on 22nd September 2020 awarding them the land as beneficiaries. As at the time the Succession Cause was filed, the deceased title to the suit land had become extinguished in favour of the Plaintiff by operation of the law and there was no title that the Respondents could inherit as the Plaintiff had become entitled to be registered as the owner thereof.

In the case of *Macharia Mwangi Maina & 87 Others Versus Davidson Mwangi Kagiri* (2014) eKLR, the Court of Appeal considered the application of the concept of constructive trust and stated as follows:

The evidence on record reveals that the appellants are in possession of plots in L.R No. 6324/10 and as such they come within the protection in Section 30 (g) of the Registered *Land Act*. We find that the respondent having put the appellants in possession of the suit property created an overriding interest in favour of the appellants in relation to L.R No. 6324/10. It is our considered view that the Honourable Judge erred in law in failing to give due consideration to the fact that the appellants were in possession and occupation of L.R No. 6324/10 prior to the title being issued and registered in the name of the respondent.

The Court further held in the same case as follows: -

This Court is enjoined to dispense substantive justice. What is justice? Justice is conscience, not a personal conscience but the conscience of the whole humanity, (See Alexander Solhenitsya). Would the conscience of humanity allow an individual to receive purchase price and later plead that the agreement is void? The conscience of humanity dictates that constructive trust and proprietary estoppel shall apply in such cases. Lord Denning in *Hussey – vs- Palmer* (1972) 3 All ER 744 held that a constructive trust is a trust imposed by law whenever justice and good conscience require it. It is an equitable remedy by which the Court can enable an aggrieved party to obtain restitution.”

In the instant case common intention to sell the land is evident, the seller received the purchase price and the purchaser occupied and developed the land on the strength of the agreement of sale. The Plaintiff/Applicant in my view acquired overriding interests over the suit land under the twin concepts of adverse possession and constructive trust. The deceased and subsequently her estate held the suit land subject to the overriding interests of the Plaintiff/Applicant. Consequently, the Respondents inherited the suit



land subject to the overriding interests acquired by the Plaintiff/Applicant through the operation of the law.

I accordingly find and hold that the Plaintiff/Applicant has proved his case on a balance of probabilities. I enter judgment in the Plaintiff/Applicant's favour and grant the following final orders: -

- i. That the deceased Esther Wambui Bianga (deceased) before her death held land title Mwerua/Kiandai/1352 under a constructive trust in favour of Samuel Igiri Nyaga the Plaintiff/Applicant herein.
- ii. That the Plaintiff/Applicant additionally has acquired title to Land Parcel Mwerua/Kiandai/1352 measuring 0.20 hectares by way of adverse possession and is entitled to be registered as the owner therefore.
- iii. The Land Registrar Kirinyaga is hereby directed to cancel the registration of Esther Wambui Bianga (deceased) and in place thereof to register Samuel Igiri Nyaga as the owner of Land Parcel Mwerua/Kiandai/1352.
- iv. Each party to bear their own costs of the suit.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 12TH DAY OF APRIL, 2024.

J. M. MUTUNGI

ELC - JUDGE

