



**Ndung'u (Suing as the Legal Representative of Daniel Ndung'u Mung - Deceased)  
v Nyangere; Karanja (Interested Party) (Environmental and Land Originating  
Summons E002 of 2023) [2024] KEELC 3680 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 3680 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2023  
LN GACHERU, J  
MAY 9, 2024**

**BETWEEN**

**ROBERT KAHUNGO NDUNG'U (SUING AS THE LEGAL REPRESENTATIVE  
OF DANIEL NDUNG'U MUNG - DECEASED) ..... APPLICANT**

**AND**

**KIBE DAVID NYANGERE ..... RESPONDENT**

**AND**

**SAMUEL MWAURA KARANJA ..... INTERESTED PARTY**

**JUDGMENT**

1. Through an Origination Summons dated 11<sup>th</sup> July, 2023 which is brought under Sections 17 and 38 of the *Limitation of Actions Act*, Order 37 Rule 1 & 7 and Order 51 Rule 1 of the Civil Procedure Rules, the Applicant seeks for the following reliefs:

- “(1.) A declaration that the title of KIBE DAVID NYANGERE of land parcel No. Loc.4/ MURUKA/90, has been extinguished by the applicant’s adverse possession thereof for a period of more than 12 years in terms of Sections 17 and 38 of the *Limitation of Actions Act*.
- (2) An Order do issue requiring and directing the Land Registrar, Murang’a to delete the name of the Respondent and register the name of the applicant in the place thereof.
- (3) An Order that the Respondent executes all necessary documents to effect registration and in case of default the Deputy Registrar of this Honourable court do execute all documents necessary to effect transfer to the Applicant’s name.



- (4) An order for the removal of the caution registered in favour of Samuel Mwaura Karanja, the interested party herein.
  - (5) An Order for the removal of the caution registered in favour of Daniel Ndung'u Mungai, now deceased.
  - (6) The costs of this suit to be borne by the Respondent.
  - (7) Such further and other orders be made as this Honourable Court deems fit.”
2. The Originating Summons is supported by the Affidavit of the Applicant, Robert Kahungo Ndung'u sworn on 11<sup>th</sup> July, 2023, wherein the Applicant averred that he is the grantee of Letters of Administration issued in respect of the estate of Daniel Ndung'u Mungai-(deceased) dated 22<sup>nd</sup> April, 2022. He contended that the Deceased, Daniel Ndungu Mungai, purchased land parcel number LOC.4/Muruka/490 (the suit property), from the Respondent herein who is the registered owner thereof in the year 1980. He further averred that the Deceased and the Respondent attended the Land Control Board at Kandara, Murang'a County for consent which consent was issued vide a Letter of Consent issued dated 2<sup>nd</sup> June, 1981.
  3. Further, the Applicant averred that the Respondent handed over the original title deed for the suit land to the deceased(Daniel Ndungu Mungai) upon receipt of the entire purchase price of Kshs.880/- from the deceased, who was a purchaser.
  4. The Applicant contended that the Respondent declined to sign the transfer documents in favour of the deceased, Daniel Ndungu Mungai, to facilitate issuance of a title deed to the suit property in the deceased's name. Consequently, the deceased lodged a caution in respect of the suit land on 6<sup>th</sup> February, 1984.
  5. The Applicant further averred that prior to his demise, the deceased( Daniel Ndungu Mungai), on 25<sup>th</sup> August 2020, he was in continuous and uninterrupted possession of the suit property for a period exceeding twelve (12) years, and he carried out agricultural activities thereon without any interference from the Respondent. Consequently, the Applicant prayed for Orders to the effect that the suit property had devolved to the deceased by way of adverse possession.
  6. The Respondent and the Interested Party were served with Summons to Enter Appearance as is evident from the Affidavit of Service sworn by James Nsungu Mbau, a Process server, dated 4<sup>th</sup> September 2023. However, they did not Enter appearance nor file response to the Originating Summons, despite being served with Summons to Enter Appearance and Mention Notices, on diverse dates as attested by several Returns of Service filed before the Court on 17<sup>th</sup> October, 2023; 25<sup>th</sup> January, 2024; 20<sup>th</sup> February, 2024; 28<sup>th</sup> February 2024 and 8<sup>th</sup> March, 2024. Consequently, the matter proceeded for hearing as a formal proof.

### **Applicant's Case.**

7. PW1 Robert Kahungo Ndung'u, testified that he is a teacher by profession and lives in Makuyu area of Murang'a County. He adopted his witness statement dated 11<sup>th</sup> July, 2023, as his evidence in chief. Further, he produced the list of documents dated 20<sup>th</sup> September, 2023, as Exhibits.
8. It was his testimony that the Interested Party placed a caution on the suit property, which he urged the court to have it removed. He did not call any other witnesses.



9. Thereafter, the Applicant filed written submissions on 7<sup>th</sup> February, 2023, through the Law Firm of M/S R.M. Kimani and Company Advocates. In the said submissions, the Applicant cited the holding of the Court of Appeal in the case of Richard Wefwafwa Songoi Vs Ben Munyifiwa Songoi [2020] eKLR, in support of the proposition that a person claiming ownership of land through adverse possession needs to prove the following five (5) elements to be successful, namely:
- (a) The date when he assumed possession of the subject land
  - (b) The nature of his/her possession
  - (c) Whether the fact of his/her possession was known to the other party
  - (d) The period or duration of possession
  - (e) That the possession was open and undisturbed for 12 years.
10. He further submitted that although no sale agreement was presented before the Court, he did furnish the Court with a Land Control Board Consent dated 2<sup>nd</sup> June, 1981, and the original title deed to the suit land, both documents attesting to the fact that a contract of sale of the suit property was executed between the Respondent and the deceased (Daniel Ndungu Mungai). He reiterated that the deceased (Daniel Ndungu Mungai), assumed possession of the suit property in 1981, when the consent to transfer the suit land to his was issued.
11. He also cited the decision of the Court of Appeal in the case of Gideon Mwangi Chege Vs Joseph Gachanja Gituto [2015] eKLR, to anchor the proposition that pursuant to Section 38 of the *Limitation of Actions Act*, a person claiming land through adverse possession must adduce evidence demonstrating that he became entitled to the land on account of his/her occupation, openly, continuously and without interruption for a period of twelve (12) years or more.
12. The above are the pleadings, evidence and the written submissions, which this court has considered and finds the issue for determination is whether the Applicant is deserving the orders sought for adverse possession?
13. The evidence of the Applicant in the present suit has not been controverted as the matter proceeded by way of a formal proof. However, it does not mean that because the Applicant's suit is uncontroverted, then his claim has to be allowed automatically. The Applicant had a duty to call sufficient evidence and prove his claim on the required standard of balance of probabilities. See the case of Samson S. Maitai & Another Vs African Safari Club Ltd & Another (2010) eKLR, where the Court held that: -

“I have not seen judicial definition of the phrase ‘formal proof’. ‘Formal’ in its ordinary dictionary meaning refers to being ‘methodical’ according to rules of evidence. On the other hand, according to Halsbury’s Laws of England, Vol. 17 Paragraph 260, proof is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption”.



14. The applicable standard of proof in civil cases is on a balance of probabilities as set out in the case of *Miller Vs Minister of Pensions* [1942] 2 ALL ER 372 in these terms:

“It must carry a reasonable degree of probability... If the evidence is such that the tribunal can say ‘we think it is more probable than not’ the burden is discharged., but if the probabilities are equal, it is not”

15. The onus of adducing evidence to support of any claim advanced in a suit falls on the party making the claim. In the case of *Hellen Wangari Wangechi Vs Carumera Muthini Gathua* [2005] eKLR, the Court held as follows:

“It is a well-established fact that whoever asserts a fact is under an obligation to prove it in order to succeed.”

16. Further, Section 107 (1) and (2) of the *Evidence Act* (CAP. 80) provides as follows:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any facts it is said that the burden of proof lies on that person.”

17. Again, Sections 109 and 112 of the *Evidence Act* (CAP. 80) state as follows:

S.109. “The burden of proof as to any particular fact lies on the person who wishes the court to believe in the existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

S.112 “In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him”.

18. For a claimant to succeed and be entitled to land by virtue of adverse possession, he/she must prove that he has been in exclusive possession of the land openly and as of right, without interruption for a period of 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition. See the case of *Kasuve Vs Mwaani Investments Ltd & 4 Others* (2004) eKLR 184, where it was held that:

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly and as of right without interruption for a period of 12 years after dispossession the owner or by discontinuation by the owner of his own violation.”

19. However, the right to adverse possession does not accrue automatically, unless the person in whose right has accrued acts, and asserts his right. This action is taken by filing a claim to Court as provided by Section 38 of the *Limitation of Actions Act*. The Applicant has thus filed this claim to assert his claim. In the case of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR the Court declared that;

“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 nor 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.”

20. For a claim of adverse possession to crystalize, dispossession of the owner of land must be apparent. This aspect is found in the Latin maxim of *nec vi, nec clam, nec precario*: that is without secrecy, without force and without permission. See the case of *Munyaka Kuna Company Limited -Vs- Bernado Vicezo De Masi (The Administrator of the Estate of Domenico De Masi (Deceased) (2018) eKLR*, where the Court stated; -

“To establish adverse possession, a litigant must prove that he has both the factual possession of the land and the requisite intention to possess the land (*animus possidendi*). Secondly, one must prove that he has used the suit land without force, without secrecy, and without persuasion (*nec vi nec clam nec precario*), for the prescribed limitation period of twelve years.

Third, he must demonstrate that the registered owner had knowledge (or the actual knowing) that the adverse possessor was in possession of the suit property. Fourth, the possession must be continuous; it must not be broken or interrupted.”

21. The Applicant alleged that the deceased, Daniel Ndungu Mungai assumed occupation of the suit land in 1981, following the execution of a consent to transfer by the Respondent to the said Daniel Ndungu Mungai on 2<sup>nd</sup> June, 1981. The Applicant alleged that after the consent, the said Daniel Ndungu Mungai took possession of the suit land and continued to occupy and use it, to the exclusion of the Respondent. The Applicant too averred that the Respondent gave the late Daniel Ndungu Mungai, the original title deed. This evidence was not controverted by the Respondent, since he failed to appear in court.
22. Even if there was no other evidence to prove that the late Daniel Ndungu Mungai occupied the suit property in 1981, the court has seen photographs of crops, which the Applicant has alleged are on the suit land. This evidence too has not been controverted, and the Court finds and holds that it is more probable than not that the Applicant who is the administrator of the estate of Daniel Ndungu Mungai, is still using the suit land.
23. This Court has also perused the consent to transfer the suit land from the Respondent Kibe David Nyangere to Daniel Ndungu Mungai, marked “RKN 3” and dated 2<sup>nd</sup> June, 1981 whereby, it is indicated that the transfer of the suit property in favour of the deceased was pursuant to a sale.
24. Further, the Court has perused the Certificate of Official Search annexed by the Plaintiff marked “RKN 2” wherein it is shown that a caution was placed on the suit property by the deceased on 6<sup>th</sup> February, 1984. This Court holds and finds that the deceased, Daniel Ndungu Mungai, took possession of the suit land after the consent to transfer was granted. Further, the court finds that the said occupation and possession of the suit property by Daniel Ndungu Mungai(deceased), became adverse to the registered owner Kibe David Nyangere, from 6<sup>th</sup> February, 1984, the date when a caution was registered by the deceased.
25. The court too finds that the Applicant also annexed pictures marked “RKN 5(a), (b) (c)” showing mature trees and maize crops on the suit property. The aforesaid pictures are authenticated as required by the law. Taking to account the totality of the evidence adduced in this suit, it is the holding and finding of the Court that the Applicant herein has established that the deceased, Daniel Ndungu



Mungai, was in occupation of the suit land for a period in excess of 12 years from 1984, to the date of filing of the suit herein.

26. The deceased Daniel Ndungu Mungai's occupation and possession is the one that is adverse to that of the registered owner. Daniel is now deceased, but the Applicant is the legal administrator to his estate as is evident from Grant of Letters of Administration intestate, issued to the Applicant, Robert Kahungo Ndungu on 22<sup>nd</sup> April 2022.
27. Consequently, this court finds that the Applicant has locus to file this suit on behalf of the estate of his deceased father, Daniel Ndungu Mungai. See the case of Otieno vs Ougo (1986 -1989) EARL, where the Court held;

“...An administrator is not entitled to bring any action as administrator before he has taken out letters of administration if he does so, the action is incompetent as of the date of inception”

See also Section 79 of the Succession Act which specifies the powers and duties of a Personal Representative as follows;

“the executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of the grant, and subject to any limitation imposed by the grant, all property of the deceased shall vest in him as personal representative.”

28. The Respondent and interested Party did not participate in the trial, but the Court is satisfied that the said Respondent and the Interested Party did not Enter Appearance in the suit, notwithstanding that a proper Service was affected upon both of them.
29. Further, it is evident that the Interested party Samuel Mwaura Karanja, placed a caution on the suit land on 18<sup>th</sup> November 1977, claiming purchaser's interest. That caution was placed under section of the Registered Land Act. It was placed before the consent to transfer the land to Daniel Ndungu Mungai, was obtained.
30. The said Interested Party did not file his response to the Originating Summons to confirm whether he is still claiming purchaser's interest over the suit land or not. Without his evidence, and given that the court has found and held that the late Daniel Ndungu Mungai, took possession of the suit land after the Consent to transfer was granted, and that the said Daniel Ndungu Mungai has been in possession and occupation of the suit land since 1984, until his demise in 2022, then this court finds that the said Caution ceased to serve its purpose.
31. Further, the caution cannot remain in perpetuity, and since no reasons have been given by the Interested party for it to remain in place, the court finds it prudent to direct its removal. Daniel Ndungu Mungai also placed a caution in 1984. He has now been declared to have acquired the suit land by adverse possession, thus the caution has served its purpose and need not remain in place. The same should also be removed. See the case of Maria Nganga Gwako...Vs... Charles Mwenzi Nganga, Civil Appeal No.287 of 2012 (2014) eKLR, the Court held that:-

“When a caution is objected to by a proprietor of land affected thereby, the onus is upon the cautioner to justify the lodging of the said caution and the need for it to remain in place.....

In the absence of any reasonable cause shown by the Respondent as to why the said caution should not be removed, the application for the removal of the same must succeed”.



32. Having now carefully considered the available evidence, the court finds and holds that the Plaintiff herein has proved his case on the required standard of balance of probabilities.
33. For the above reasons, Judgement is entered for the Plaintiff herein against the Defendant/ Respondent and the Interested Party herein as prayed in the Originating Summons dated 11<sup>th</sup> July, 2023, in terms of prayers No.1, 2, 3, 4, and 5 of the said Summons.
34. Since the suit was not defended, there will be no orders as to costs.

Judgement is entered accordingly.

Dated, Signed and Delivered in Murang'a this 9<sup>th</sup> day of May, 2024.

**L. GACHERU**

**JUDGE**

**Delivered virtually in the presence of;**

**Absent - Applicant**

**Absent - Respondent**

**Absent - Interested Party**

**Joel Njonjo - Court Assistant**

**L. GACHERU**

**JUDGE**

**9/5/2024**

TABLE

**ELC No. E002 of 2023 5J| 5**

