



Kariobangi Sewage Farmers Self Help Group v Nairobi City Council & 2 others (Environmental and Land Originating Summons 1680 of 1999) [2024] KEELC 4961 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4961 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 1680 OF 1999
LC KOMINGOI, J
JUNE 20, 2024**

BETWEEN

KARIOBANGI SEWAGE FARMERS SELF HELP GROUP PLAINTIFF

AND

NAIROBI CITY COUNCIL 1ST DEFENDANT

MERAB ANYANGO POCHE 2ND DEFENDANT

**WILLIAM KINYUA GATHARA AND RASHID KABERE (AS CHAIRMAN
AND SECRETARY FOR AND ON BEHALF OF KARIOBANGI NORTH LIGHT
INDUSTRIES JUA KALI ASSOCIATION) 3RD DEFENDANT**

JUDGMENT

1. By Originating Summons dated 25th August 1999 brought under Section 38 of the [Limitation of Actions Act](#) seeks determination that:
 - i. The Plaintiffs have been in adverse possession of land reference no. Light Industrial Plot No. 107 Kariobangi North (Block B) peacefully, openly and as of right from the year 1964 that is to say for a period of over twelve years proceeding presentation of this originating summons to court.
 - ii. The title of the Defendant is extinguished under the [Limitation of Actions Act](#).
 - iii. That the Plaintiffs are under Section 38 of the [Limitation of Actions Act](#) entitled to be registered as the proprietors of the suit. (sic)
 - iv. That the costs of this suit be awarded to the Plaintiffs.
2. This is premised on the grounds that members of the Applicant have been peacefully and openly residing and using the suit property (the Affidavits make reference to LR No.s 8285/161 and 8282/163



Kariobangi North Block B) from the year 1964. However, sometime in October 1999 the then area Councillor informed them that the 1st Respondent intended to allocate the suit property to other individuals including the 2nd Respondent. They contested the allocation on the grounds that it would leave them homeless and should the allocation be done, they should be given first priority since that they had been on that land for over three decades.

3. The 1st Respondent through the sworn affidavit of Karisa Iha the Director of Legal Affairs, sought for striking of the Originating Summons on grounds that the Applicant had no proprietary rights to the suit property to maintain the suit. He also contested all the Applicant's averments.
4. The 2nd Defendant neither entered appearance nor filed a statement of Defence.
5. The 3rd Defendant in its Replying Affidavit sworn by the Chairman William Kinyua Gathara confirmed that the group was formed in the year 1995 and registered in the year 2001 and at all times he has been a resident of Kariobangi North where land LR No. 8285/161 is situated from the year 1978. And the land had been vacant through until the group applied for its allotment in the year 2002. The City Council approved the allotment and a subdivision exercise was undertaken, a Part Development Plan prepared and the plots allotted to the group's members. In 2003 the Council authorised its members to take possession and there were plans to resurvey the land for purposes of members whose beacons were unclear. However, this never took place because the Plaintiff laid claim of the land, although the City Council contested this claim on grounds that the documents produced by the Plaintiff were fake and never originated from the Council. The 3rd respondent claimed that a report from the Director of Criminal Investigations also showed that the documents possessed by the Plaintiff were forgeries. Therefore, it was not true that they had been in possession of the suit land. The Respondent added that the land known as Plot No. R4 Kariobangi North Komarock was unknown to them and in any case adverse possession could not be claimed against government / City Council land.
6. The 3rd Respondent claimed that since the Plaintiff had trespassed against their land they were entitled to:
 - a. An order of injunction do issue restraining the Plaintiff's group and its members, by themselves, their agents, employees and or servants from trespassing into, constructing on, encroaching, remaining on or in any way whatsoever interfering with all that parcel of land known as LR No. 8285/161 situate at Kariobangi off Komarock Road, Nairobi.
 - b. An order directing the Plaintiff's group and its members to give the 3rd defendants vacant possession of all that parcel of land known as LR No. 8285/161 situate at Kariobangi off Komarock Road, Nairobi.
 - c. Damages for loss of user and mesne profits.
 - d. That the officer in charge, Kariobangi North Police station do supervise and ensure compliance with the court orders issued hereinabove.
 - e. Costs of this suit and interest.
7. The Applicant in its response to the Defence and Counterclaim stated that having been allotted the suit land, no other allotment second was valid without cancelling the initial allotment which had never been done. Therefore any claim by the 3rd Respondent was false and should be dismissed with costs and plot no. R4 or LR No. 8285/161 should be granted to the applicant.



Evidence of the Plaintiff.

8. PW1 Mary Warigia Mwangi a member of the Plaintiff aged 86 years at the time of her testimony stated that she among others, entered the suit land in the 1960s. They then formed the Plaintiff group and contributed money to acquire the land and City Council of Nairobi allotted them the said land. She stated that she has all along been residing on the land and cultivating on it, adding that some of the initial members and officials of the group had since passed away.
9. On cross examination she stated that they had been on cultivating on the land even before it was allocated to them. And at that point, they had authority from the County Council to cultivate on it. After allotment they moved in and constructed houses thereon. She stated that whereas she had lost her allotment documents they built on the land over 20 years ago.
10. On re-examination she stated that they had been on the land way before Kenya gained independence and had since been allotted the land legally and were pursuing ownership of the land. She stated that the 3rd Defendant had never been occupied the land and were unknown to her.
11. PW2 Mary Wangui Kamau also stated that she was a farmer and a member of the group who had been cultivating on it from the year 1960. She also stated that they formed the group and the land was allotted to them group and they were shown their individual plots by a surveyor from the City Council. She confirmed that they had been paying land rates. She stated that the 3rd Defendant was unknown to her and had never been on the land.
12. On cross examination she stated that before moving to the suit property she used to cultivate on it and the city council was aware that they were cultivating on it although they had not expressly allowed them to use it. She stated that after the land was allotted to the group, they were shown their individual plots of land by the City Council surveyor by the name Owaga and her plot was number 127. And she built her house on the plot although she did not have building plans. She indicated that while she was aware that the land was allotted to them, she was not aware of the duration of the lease. She also stated that they were all paying land rates to the City Council.
13. PW3 Emmanuel Kenga, a retired Commissioner of Police and a forensic documents examiner testified that on 31st August 2007 he received documents and exhibits for analysis from one officer Paul Kitungu. The documents included: documents marked A1-A2 were the questioned documents; documents marked B1-B17 were specimen signatures and documents marked C1-C2 were the known signatures. He confirmed that he examined and analysed the documents and found that all the documents bore similar signatures as the ones provided as specimen which meant that all the signatures were from the same author. He then prepared a forensic report dated 7th September 2007 which he produced as P. Exhibit 26. He testified
14. On cross examination he confirmed that he was a retired Commissioner of Police. He stated that he conducted and prepared the report in 2007 and as per his report, he received specimen signatures and spoke to the authors of the said signatures. Upon examining the signatures on the documents in possession of the applicants and the specimen signatures given, he found that the signatures were consistent which meant the authors were the same. He indicated that the documents he received were copies of the original but they were clear copies and legible, and therefore there was no margin of error. He also confirmed that upon finalising his investigation and drafting of the report, he returned the documents and exhibits to the investigating officer although the said documents were not in court.
15. On re-examination he re-stated that at the time of conducting the analysis he was in possession of the documents but he had handed them back to the investigating officer.



16. PW4 Hassan Ibrahim Hillo the organising Secretary of the Applicant adopted his witness statement as his evidence in chief. He testified that he joined the group in 1996 and that is the year the group was issued an allotment letter. The land was surveyed and a beacon certificate issued in 2001. In 2002, they were issued a lease agreement issued. They have been paying tares since the land was allotted. He testified that in 2007 they were arrested but after they produced documents that proved the land was properly allocated to them and investigations carried out, they were released. He stated that the 2nd Defendant used to be a Councillor and he tried to grab the land together with others including the 3rd Defendant. However, the 3rd Defendant had never been in possession of the suit land. He sought that the 1st Defendant be compelled to issue them with title to the land as the legal owners.
17. On cross examination he stated that he joined the Plaintiff in the year 1994 and confirmed that the 1st Defendant gave them allotment letters and had been paying standard ground rates as late as 2017. He confirmed that an allotment letter was not title to land but stated that they were yet to be issued with titles due to ongoing suits. He indicated that there were over 200 people on the suit land and the 3rd Defendant was on the property adjacent to the one in question although he their plot number was unknown to him. He restated that in 2007 they were arrested but released without being charged.
18. On re-examination he stated that members of the Plaintiff have been on the land since it was issued to them carrying out farming and other activities.
19. PW5 Peter Ndungu Wanyoike, a Senior Land surveyor at the Nairobi City Council confirmed that he was well aware of the suit land. He confirmed that the land was allocated in 1996 to members of the Plaintiff. The land was surveyed and the survey was completed in 2017 and members given parcel numbers. He confirmed that he together with his team of surveyors are the ones who carried out the survey of the suit land. He confirmed that he had the survey maps which had been approved by the Director of Surveys. Afterwards the Director of Surveys prepared a Registry Index Map and leases issued to Kariobangi Sewerage Farmers Group. These documents were produced as P. Exhibit 2.
20. He stated that before leases are issued, the land had to be first allocated, Part Development Plans prepared, payment of dues done, the land surveyed and plans forwarded to the Director of Surveys for approval, a registry Index Map generated and approved by the Director of Surveys, and then the parcel numbers are indicated on the lease documents. He indicated that this process involved many people at the County Department.
21. On cross examination he stated that he is an employee of the 1st Defendant and upon issuance of summons to the Chief Officer Lands, he was assigned to attend court to present documents involving the suit land. He stated that he was well versed with the workings of the County in relation to land matters. He confirmed that he had gone through the land file and he was in court to testify regarding the Plaintiff's claim. He confirmed that in 1999 when this suit was filed, they had not been issued with leases. He indicated that land is allocated to one person or entity at a time and once the allotment has been effected the land cannot be repossessed without following due process. He stated that in the past, allotment letters were signed by the town clerks. On the question on why the allotment letter dated 15th May 1996 made reference to plot R.4, he stated that R4 and the suit property was one and the same land. He also confirmed that there was an agreement for lease in favour of the Plaintiff dated 10th February 2002. He stated that the lease agreement could only be entered between valid entities otherwise it would be invalid.
22. On being showed the 3rd Defendant documents, he confirmed that there was a legal officer by the name Mary Ng'ethe at the Nairobi City Council but stated that he was not aware that she denied having signed any documents. He also stated that he was neither aware that the Nairobi City Council had



informed the 3rd Defendant that their documents were genuine nor that the Plaintiff had been asked to demolish their structures.

23. This marked the close of the Plaintiff's case.

Evidence of the Defendants.

24. The 1st Defendant indicated that it was not calling any witnesses and the 2nd Defendant never entered appearance. This marked close of the Defendant's case.

25. Counsel for the 3rd Defendant filed an application to cease acting. The 3rd Respondent never filed change of advocates and its secretary personally appeared and indicated that he would give evidence. However he continually being absent despite several opportunities to present his defence. The 3rd Defendant's case was also closed.

26. At the close of the oral testimonies, parties tendered final written submissions.

The Plaintiff's Submissions

27. On who is the rightful owner of plot number 8285/161 Kariobangi off Komarock Road, counsel submitted that the Plaintiff had presented evidence of how they acquired the property which included an allotment letter dated 15th May 1996; lease agreement dated 10th February 2002; beacons certificate for the land and payment of ground rates. He indicated that the allotment had never been cancelled and this was confirmed by the 1st Defendant's testimony. The lease certificates also issued had never been revoked nor cancelled and the Plaintiffs had religiously been paying their rates. There was also evidence that the land was legally surveyed and beacon certificates issued as per the Land Surveyor's testimony. Additionally, testimony from the document examiner confirmed that the documents were not forged and were lawfully signed in favour of the Plaintiff. Therefore, this was concrete evidence of their ownership and they had proved their case on the required balance of probability.

28. Counsel went on to submit that despite having legal documents in regard to the suit property, in 2020 the government illegally demolished their property rendering them homeless in total disregard of their fundamental rights. Since they had valid title deeds to the property, they should thus be allocated the property with costs.

Analysis and Determination

29. I have considered the pleadings, the evidence on record, the written submissions and the authorities cited. The issues for determination are:

- i. Whether the claim for adverse possession by the Applicant is valid and legally sustainable?
- ii. Whether the Plaintiff should be declared the rightful owners of the suit property.
- iii. Who should bear costs of this suit?

30. This is a dispute that has span over two decades and there have been different developments over the said period. Without belabouring the summary already outlined at length, the Plaintiff moved the court by way of Originating Summons in 1999 seeking to be declared the rightful owners of land reference number Light Industrial Plot No. 107 Kariobangi North (Block B) by way of adverse possession. This was on the ground that they had openly been on the land since 1960s.

31. Adverse possession is a doctrine under Kenyan law, governed by Section 38 of the [*Limitation of Actions Act*](#), which allows a person to acquire legal ownership of land by possessing it openly and continuously



for a statutory period of at least 12 years, under conditions that are adverse to the interests of the true owner. The said section provides:

Section 38 (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

32. It is on record that the Plaintiffs were allotted the said land by the 1st Defendant in the year 1996 and they filed this suit seeking adverse possession in 1999. The critical question that arises is: was the land already theirs by 1999 due to the allotment three years prior, and can a claim of adverse possession stand in these circumstances? An allotment letter signifies an intention by the allotting authority to grant the allottee an interest in the land, subject to compliance with certain conditions, such as payment of fees and obtaining requisite approvals. For adverse possession to apply, the possession must be without the consent of the true owner and for a continuous period of at least 12 years as was held by the Court of Appeal in *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR:

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.

...

... before one can claim title to land by adverse possession and a part from proving 12 years of uninterrupted, open and peaceful possession, certain strictures must be satisfied. Those strictures are summarized in the Latin maxim, *nec vi, nec clam, nec precario*, that, one's possession has not been through use of force, not in secrecy and without the authority or permission of the true owner.

33. Since the Plaintiffs were allotted the land by the 1st Defendant, their possession of the land from 1996 to 1999 was with the consent of the allotting authority. This consent negates the element of adversity required for a claim of adverse possession. The possession under an allotment is permissive, and thus cannot form the basis for an adverse possession claim until such permissive use is revoked or ceases to be authorized.

34. Section 13 of the *Limitation of Actions Act* also stipulates that:

(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 under sections 9, 10, 11 and 12 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.

35. In these circumstances, the claim of adverse possession cannot stand because the Plaintiff's possession of the land from 1996 to 1999 was permissive and not adverse to the interests of the true owner. Therefore, the suit seeking adverse possession is fundamentally flawed and legally unsustainable.
36. It however, looks like the claim for adverse possession was deserted in the course of these proceedings and the Plaintiff started claiming to be declared the lawful owners of the suit property.
37. It is not in contention that the Plaintiff was allotted the suit property as per the allotment letter dated 5th May 1996 to the Plaintiff from the 1st Respondent for plot No. R4. The Plaintiff also produced an agreement for lease between 1st Defendant and them dated 10th Feb 2002 for plot no. R4 Kariobangi North Komarock Road; a beacon certificate dated 28th September 2001 for plot no. R4; and assortment payment of rates receipts for the said plot all the way to 2017; as well as lease certificates issued to the Plaintiff's members in 2019. PW5, the land surveyor with the 1st Defendant also confirmed that the land was allotted to the Plaintiff in 1996 and confirmed that he was among the team that carried out the survey, the survey map approved by the Director of Surveys, a beacon certificate issued, a Registry Index Map and Part Development Plan regarding the suit property generated. He confirmed that the suit property was duly allotted to the Plaintiff and affirmed that they were in the process of issuing members with lease certificates for their individual plots. He also confirmed that two persons or entities could not be allotted the same property. Unless one allocation had been revoked, and that had not happened.
38. This court noted the discrepancy in the plot numbers indicated in the pleadings and on the Plaintiff's documents. However, PW5 in his testimony stated that plot number R4 and 8285/161 were one and the same plot.
39. The Plaintiff also produced a letter dated 11th March 2008 from Director of Criminal Investigations to the Town Clerk Nairobi City Council which is referenced as: Alleged forged allotment letters for LR 8285/161 within Kariobangi North and reads in part:

It has been confirmed by the former Mayor (Dick Waweru) and Town Clerk (Geoffrey Mate) that the signatures appended on the lease agreement belonging to Kariobangi Farmers Self Help Group are theirs.
40. The signatures were subjected to scrutiny by the document examiner who testified as PW3 and confirmed their authenticity and produced his report dated 7th September 2007 as evidence.
41. This testimony was not controverted and the 2nd and 3rd Defendants never led evidence to the contrary. Additionally, the 3rd Defendant in their pleadings indicated that the suit property was allocated to them in 2002. By this time, the Plaintiff had lodged this claim in court seeking the 1st Defendant to be compelled to grant them title to the property.
42. Even, for argument's sake, assuming that there was double allocation of the property, the Plaintiff's allocation was first in time and thus ought to be held as valid. The Court of Appeal in *Richard Kipkemei Limo v Hassan Kipkemboi Ngeny & 4 others* [2019] eKLR held:

55. "... We are cognizant of the decisions such as *M'Ikiara M'Rinkanya & Another -v- Gilbert Kabeere M'Mbijiwe*, (1982-1988) 1KAR 196, where it was held that where there is a double allocation of land, the first allotment prevails and there is no power to allot the same property again.



43. To this end, Section 26 of the *Land registration Act* provides that a certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner ... unless the same is acquired illegally and unprocedurally, through fraud or illegal scheme.
44. Therefore, all factors constant, the Plaintiff have proved that the suit property was legally allotted to them.
45. However, as I already remarked, this being an old case, a lot has transpired from the time it was instituted to now. Counsel for the Plaintiff submitted that at the height of Covid in the year 2020, they were forcefully evicted from their land and their structures demolished. They attached ELC Petition No. 11 of 2020 as part of their list of authorities. This Petition which is between the Plaintiffs herein and eight Respondents including Principal Secretary Ministry of Lands and Physical Planning and County Government of Nairobi is as a result of eviction of the Plaintiffs from their land. In that Petition they sought restitution and damages among others orders. A reading of the Petition I note that the land in which the eviction was carried out was plot no. R4 Kariobangi North Komarock Road, which is the land in this case.
46. Omollo J. rendered her judgement in that Petition on the 6th July 2023 where she found:
53. The Petitioner (Kariobangi Sewerage Farmers Self Group) has provided evidence that the suit land is registered in her name. The Petitioner has provided evidence that the land was legally allocated to them by the Nairobi County Council... They annexed several documents ... an agreement of lease executed on the 10th February 2002 ... over plot no. R4 Kariobangi North Komarock Road...
56. I am satisfied that the Petitioner and its membership has satisfied this court that it followed due process in acquiring their titles.
58. In light of my findings that the Respondents actions of forcefully evicting the members of the Petitioner were in breach of the law ...
59. ... prayer 5 and 6 seek for liberty of the individual members of the Petitioner to bring a suit for ascertainment of special, general and exemplary damages.”
47. The court went on to grant the petitioner special damages, general and exemplary damages against the Respondents and ordered that the Petitioner’s members were at liberty to file separate civil claims for the ascertainment of individual special damages.
48. The Plaintiff’s case has not been controverted. No evidence was tendered by the Defendant’s to rebutt the same.
49. Though the Plaintiff’s members’ structures were demolished, the land still exists and as Honourable Omollo J ordered in her Judgement dated 6th June 2023 that they be restituted into the parcel of land.
50. I find that the Plaintiff has proved its case as against the Defendants on a balanced of probabilities.
51. Accordingly judgement is entered for the Plaintiff as against the Defendants as follows:-
- a. That the Plaintiff members are entitled to be registered as the proprietors of the land known as Nairobi/Block 175 within Ninety (90) days from the date of this Judgement.
- b. That costs of this suit be borne by the Defendants.



DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 20TH DAY OF JUNE 2024.

L. KOMINGOI

JUDGE.

IN THE PRESENCE OF

Mrs Gulenywa for the Plaintiff.

N/A for Defendants.

Court Assistant – Mutisya.

