



Kimani & 2 others (Suing on behalf and as representatives of Halleluiyah Gospel Church Karuri) v Chege & another (Environment & Land Case 798 of 2017 & 40 of 2018 (Consolidated)) [2024] KEELC 4739 (KLR) (13 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4739 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 798 OF 2017 & 40 OF 2018 (CONSOLIDATED)

JG KEMEL, J
JUNE 13, 2024

BETWEEN

JOHN KANYORO KIMANI 1ST PLAINTIFF
SERAH WAMBUI KAMAU 2ND PLAINTIFF
FRANCIS KIBUNYI MWANGI 3RD PLAINTIFF
SUING ON BEHALF AND AS REPRESENTATIVES OF HALLELUIYAH
GOSPEL CHURCH KARURI

AND

GEORGE WAINAINA CHEGE 1ST DEFENDANT
ELIZABETH WANJUHI CHEGE (ON BEHALF OF THE ESTATE OF PAUL
NGIGE MUNGAI) 2ND DEFENDANT

JUDGMENT

1. On the 17/10/2017 John Kanyoro Kimani, Serah Wambui Kamau & Francis Kibunyi Mwangi (representatives of Halleluiyah Gospel Church, Karuri) moved the court under Order 37 Rule 7 of the Civil Procedure Rules and Section 38 of the [Limitation of Actions Act](#). Later the Originating Summons was amended on the 16/8/22 and the Plaintiffs sought the following orders against the Defendant;
 - a. That the Applicant be declared to be entitled by adverse possession under Section 38 of the [Limitation of Actions Act](#) Cap 22 Laws of Kenya of Land Parcel No. Kiambaa/Karuri/T.959.
 - b. That the Applicant be registered as proprietor of the said Land Parcel No. Kiambaa/Karuri/T.959.
 - c. That the costs of this suit be awarded to the Applicant.



2. The Summons are supported by the Plaintiffs' Supporting Affidavit jointly sworn on 16/10/2017 in which the deponents state that the land was given to the Church by Samson Njuguna Wakaya a member of the Church in 1997 and the Church has been in quiet continuous and uninterrupted possession and carried out developments since then and that no one has tried to remove them from the suit premises. They annexed a copy of the suit land in the name of the Defendant in support of the said application. A photograph of the Church was also annexed to the application.
3. Further that the Church has been in possession of the suit land for over 12 years and that an interest in form of title by way of adverse possession has crystalized in its favour.
4. George Wainaina Chege denied the claim of the Plaintiffs vide his Replying Affidavit sworn on the 15/1/2017. He deponed that the Plaintiffs have no capacity to bring a representative suit on behalf of the Church in the absence of evidence of its registration in line with the Societies Act. He termed the Plaintiffs allegation that they got the land from Samson Njuguna Wakaya as false and a deliberate misrepresentation on the part of the Plaintiffs to deprive the respondents of their land. Further he added that the Originating Summons is resjudicata as it is supported by a defective affidavit tainted with falsehoods intended to mislead the court.
5. He added that parcel T. 893 was initially registered in the names of Ndungu Njibae and Chege Kinunua, the Defendants' father and following the demise of Kinunua Njibae the suit land was subdivided without the knowledge of the estate of Kinunua. One of the resultant subdivisions, he averred, that yielded from the subdivision was the suit land, parcel T.959 which was registered in the name of the defendant without his knowledge as can be seen in the copy of the search dated the 24/1/2008. That then there arose an error on the occupation of the parcels where it was found that the plaintiffs occupied parcel No T.959 belonging to the Defendant and the defendant occupied parcel 893 belonging to the Plaintiffs.
6. On the realization that he occupied the wrong parcel, he commenced action to evict the Samson Njuguna Wakaya from parcel T.959, land that was registered in his name. The matter ended up in the Land Dispute Tribunal which award was set aside at in the Environment & Land Court in 2017.
7. That Wakaya had no capacity either in law or equity to transfer the land to the Church. That a claim of adverse was interrupted by the Land Dispute Tribunal and Environment & Land Court cases stated above among other correspondences and notice to vacate dated the 13/7/2007 and the letter addressed to Wakaya on the 9/10/2017. He denied selling the suit land to Wakaya and sought to put the plaintiffs to strict proof in form of adduction of a sale agreement in support.
8. The 2nd Defendant avowed that her husband Paul Ngige Mungai purchased the suit land vide the agreement of sale dated the 24/10/2017 and paid the purchase price in full from the sons of Chege Kinunua , the 1st Defendant being one of them. That though the property was family land it was registered in the name of 1st Defendant on behalf of the family. That the 1st Defendant sought consent which was granted on the 9/1/2018.
9. That despite the said sale and purchase the Plaintiffs have remained on the suit land as trespassers, thus prejudicing the 2nd defendant's right to own the property. Maintaining that he is an innocent purchaser for value without notice, he stated that adverse possession is untenable in the circumstances because the property was given to the Plaintiffs as a gift by Wakaya . That going by the fact that the 2nd defendant only acquired the suit land in 2018, it follows that adverse possession has not crystallized.
10. The 2nd Defendant further contended that the Plaintiffs claim for adverse possession is unfounded based on a gift or permission from Samson Njuguna Wakaya.



11. At the hearing of the suit John Kanyoro Kimani testified as PW1. He relied on his affidavit sworn on the 16/10/2022 together with the annexures as his evidence in chief. He stated that he is a member of the Church, constructed on the suit land since 2001. That the land was registered in the name of the 1st Defendant who was gifted the land by Samson Njuguna Wakaya. That they received a demand letter from the respondent to vacate the suit land. In addition he led evidence that the registered owner filed a case at the Land Dispute Tribunal tribunal in 2002 where the Tribunal allowed the Church to continue occupying the land.
12. PW2 – Samson Njuguna Wakaya relied on his affidavit sworn on the 16/8/2022 and averred that he is one of the Church members who built the Church in 2001 which Church is still standing on the suit land. That he sued the 1st Defendant in the Land Dispute Tribunal where he won the case but on appeal the award was set aside because the Land Dispute Tribunal did not have jurisdiction to determine the matter.
13. DW1 – George Wainaina Chege relied on his affidavit sworn on the 22/9/22 together with the exhibits annexed thereto in evidence in chief. He stated in cross that the suit land measuring 30 by 100 feet belonged to his father. That his portion was vacant and that Ndungu sold his undeveloped portion to Paul Ngige. He stated that he does not know how the title became registered in his name. He stated that he never sued the Church for eviction from the suit land. That though Ndungu Chibae had the right to sell his inheritance, he sold the wrong plot being his share that emanated from the mother plot. That later he sold the suit land to Paul Ngige, the current owner of the land.
14. DW2 – Elizabeth Wanjuhi Ngige testified and relied on his Replying Affidavit deponed on the 22/9/22 as her evidence in chief. She admitted that the Church has been on the Church for many years.
15. At the close of the hearing of the suit the case closed on the 28/2/24, Parties elected to file and exchange written submissions. Both parties complied with the directions with respect to the filing of written submissions.
16. It is not in dispute that the Plaintiffs filed two suits one against the 1st Defendant (current) and another against the 2nd Defendant being ELC 40 of 2018 seeking title by way of adverse possession. With leave of the court the two Summons were consolidated and the current suit became the lead file.
17. The issue before the court is whether the Plaintiffs have proven their case.
18. Simply put the case of the Plaintiffs is that they have occupied the suit land since 2001, a period of over 12 years and therefore are entitled to title by way of adverse possession.
19. The 1st Defendant stated in his defense that the plaintiffs occupied the suit land with the permission of Wakaya and therefore cannot succeed in claiming adverse possession. In addition, it is his case that adverse possession is unfounded because the suit in Land Dispute Tribunal which was litigated all the way to the ELC court thus interrupted adverse possession of the Plaintiffs and that time only starts to run in 2017 after the case was heard and determined.
20. The 2nd Defendant contends that her husband purchased the suit land from the 1st Defendant in 2018 and obtained title and therefore the suit having been filed in 2018 adverse possession cannot succeed.
21. The doctrine of Adverse Possession is one of the ways of land acquisition in Kenya. I will highlight some of the statutory provisions that underpin the doctrine as set out in the Limitations of Actions Act Cap 22 and the Registration of *Land Act* No 6 of 2012;



Section 7 states that:-

“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.”

Further in 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 under sections 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.
- (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be Adverse Possession of the land.”

Section 16 provides as follows;

“For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration.”

Section 17 goes on to state;

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”

Finally, Section 38(1) and (2) states;

- “(1) 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.”

22. The combined effect of these sections is to extinguish the title of the proprietor of the land in favour of the adverse possessor at the expiry of 12 years of occupation of the Adverse Possession on the suit land.



23. Section 28(h) of the [Land Registration Act](#), 2012 recognizes overriding interests on land, some of which are rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription. Under Section 7 of the [Land Act](#), 2012 prescription is one of the ways of acquisition of land.
24. In *Kasuve v Mwaani Investments Limited & 4 Others* 1 KLR 184, the Court of Appeal restated what a Plaintiff in a claim for Adverse Possession has to prove;

“In order to be entitled to land by Adverse Possession, the claimant 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.”
25. In *Mwangi & Another v Mwangi*, [1986] KLR 328, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights.
26. In this case it is not in dispute that the suit land was registered in the name of the 1st Defendant 2002. It is the plaintiff’s case that they acquired the land by way of a gift from Wakaya who confirmed the same in his testimony in court. It is trite that permission of the land owner destroys adverse possession.
27. However, in this case the permission flowed from Wakaya who was not the registered owner of the suit land. Theoretically therefore the permission came from a known stranger who had no identifiable interest or right in the suit land. He was simply a member of the Halleluiya Church with a good heart. The court did not receive evidence either from the Plaintiffs or the 1st Defendant that he allowed or permitted the Plaintiffs to occupy the land.
28. Did time stop running. It is the 1st Defendants case that time was stopped from running by the suit that Wakaya filed against him in the Land Dispute Tribunal in 2007.
29. It is not in dispute that the 1st Defendant was sued by Wakaya in the LDT in 2007 where the elders awarded the land to the Church. Aggrieved by the decision of the elders the 1st Defendant successfully challenged the award of the elders in the decision of the Environment & Land Court issued on the ELCA No 79 of 2014. The court finds that the litigation before the Land Dispute Tribunal and the Environment & Land Court did not involve the Plaintiffs. In any event the suit was filed by Wakaya who was advertising a right in the land and not the 1st Defendant.
30. Chanan Singh J, in *Jandu Vs. Kirpal* [1975] E A 225, at p 237 and *Simpson, J* (as he then was), in *Wainaina v Murai and others* [1976] Kenya L R 227 at p 231 were unanimous that the paper owner must have knowledge of the occupation of the adverse possessor and that he has been dispossessed. In this case the Defendant’s father had knowledge of the open and exclusive possession of the suit land by the Plaintiff.
31. The 1st Defendant admitted not ever filing suit to evict the Plaintiffs or any such action to disturb the possession of the Plaintiffs on the land notwithstanding the fact that he held title to the suit land from 2002 to 2018 and if anyone was to take action to retake possession of the suit land, it was the 1st Defendant. But he failed.



32. In the case of Joseph Gahumi Kiritu v Lawrence Munyambu Kabura CA No 20 OF 1993 Justice Kwach JA (as he then was) stated as follows;

“The passage from Chesire’s Modern Law of Real Property to which Porter JA made reference in Githu Vs Ndeete is important and deserves to be read in full.Time which has begun running under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that merely formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. He must either make a peaceable and effective entry, or sue for recovery of the land.” (Emphasis is mine).

33. For that reason, therefore, the court finds that litigation did not interrupt time from running against the 1st Defendant. Simply time run unabated under the nose of the 1st Defendant.

34. By the time the land was transferred to the 2nd Defendant in 2018 adverse possession had run the full course of 12 years that is to say from 2002 to 2014. The 2nd Defendant therefore acquired an interest in land that was encumbered with adverse possession in favour of the Plaintiffs. The 1st Defendant therefore holds title in trust for the Plaintiffs.

35. Finally, there is no evidence led to demonstrate that the plaintiffs discontinued possession of the suit land nor that the Defendants dispossessed them and retook possession.

36. In the end the Plaintiffs suit succeeds and I enter judgment in favour of the Plaintiffs as follows;

- a. That the Applicant be and is hereby declared to be entitled by adverse possession under Section 38 of the *Limitation of Actions Act* Cap 22 Laws of Kenya of Land Parcel No. Kiambaa/Karuri/T.959.
- b. That the Applicant be registered as proprietor of the said Land Parcel No. Kiambaa/Karuri/T.959.
- c. The Cost of the suit in favour of the Applicant.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 13TH DAY OF JUNE, 2024
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of

Gatitu for 1st, 2nd and 3rd Plaintiffs

Waweru HB Juma for 1st and 2nd Defendants

Court Assistant – Phyllis/Oliver

