



**Kamau & 4 others v Wacheche & 6 others (Environment & Land Case
114 of 2016) [2024] KEELC 4484 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4484 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 114 OF 2016**

JM MUTUNGI, J

JUNE 6, 2024

BETWEEN

**MUIRURI KAMAU 1ST PLAINTIFF
ANASTACIA WAIYUA MUTINDA 2ND PLAINTIFF
MONICA MUTHEU MBATHA 3RD PLAINTIFF
REGINA NJERI MBATHAT 4TH PLAINTIFF
JOHN MBUU MBATHA 5TH PLAINTIFF**

AND

**JOSHUA MARIAHE WACHECHE 1ST DEFENDANT
AGNES GICHUKI GICHURU 2ND DEFENDANT
MICHAEL M. MUTUA 3RD DEFENDANT
SICILY WAMBUA NDWIGA 4TH DEFENDANT
JAMES KARIUKI NJOKA 5TH DEFENDANT
OBADIAH NYAGA NJOKA 6TH DEFENDANT
PIUS MUTUNGA MUE 7TH DEFENDANT**

JUDGMENT

1. The Plaintiff commenced this suit by way of an Originating Summons dated 21ST July 2016, seeking the following orders:



1. That the registration of the current owners of Land Parcel Kirinyaga/Marurumo/857, 858, 859, 860 and 861 be cancelled from the register and the said land parcels be registered in the names of the Plaintiffs as tenants in common with equal shares.
 2. The Plaintiffs be awarded the costs of this suit.
2. The Originating Summons was supported by the annexed affidavit of Muiruri Kamau, who averred that the original suit land LR Kirinyaga/Marurumo/703 was registered in the name of his father Mbatha Nguti (deceased). He claimed that the land was allegedly sold to the 7th Defendant, who subdivided the original suit land and sold the subtitles to the 1st to 6th Defendants. He asserted that he and the other Plaintiffs have occupied the land in question since 1971, during which time they have significantly developed the property. He stated that they had continuously, openly, and exclusively occupied, possessed, and utilised the disputed land without interruption, and to the exclusion of the Defendant. He asserted that since their acquisition, the Defendants have not exercised any land use rights as they never took possession of the land.
3. The Defendants opposed the Originating Summons. The 7th Defendant filed his Replying Affidavit on 27th July 2016. He asserted that Mbatha Nguti (deceased) sold him Land Parcel Kirinyaga/Marurumo/703 during his lifetime and gave him vacant possession. He stated that after dividing the original suit land, he sold the resulting parcels to the other Defendants while the deceased was still alive. The Plaintiffs did not express any objections during that time. He stated that it was only after the passing of Mbatha Nguti, that the Plaintiffs moved back from Murang'a and filed a complaint alleging that he (the Defendant) had acquired the original suit land through fraudulent means. The 7th Defendant stated that this led to him being charged in Criminal Case No. 2144 of 2001, but he was ultimately acquitted. The 7th Defendant stated that he had severally demanded that the plaintiffs vacate his land to no avail. The 4th Defendant filed her Replying Affidavit dated 25th August 2016 and stated that she bought her parcel of land from the 7th Defendant. She claimed she had been tilling the land and planting trees in the suit land and maintained that the Plaintiffs were residing in the County of Murang'a and only came into the suit land after Mbatha Nguti's death. She stated she reported to the police the interference by the Plaintiffs in her parcel of land. The 2nd Defendant filed his Replying Affidavit on 30th August 2016 and stated that he is the absolute owner of Kirinyaga/Marurumo/859, having bought it from the 7th Defendant. He asserted that he only interacted with the Plaintiffs at the trial of Criminal Case No. 2144 of 2001.

Evidence of the Parties

4. The 1st Plaintiff, PW1, in his evidence adopted his witness statement and relied on the bundle of documents exhibited and filed together with the Originating Summons. He testified that he was born in Kigumo, Murang'a to Reuben Kamau and Monica Mutheu, the 3rd Defendant. He stated that his mother relocated to Mwea in the 1960s and got married to the deceased and was living in the suit land, where he used to visit her occasionally. He averred that during this time he was living and working in Nairobi and Thika and that he relocated to Mwea in 1996. He stated he had a house on the suit land though he availed no evidence to show the existence of a house on the land. He confirmed that the suit land had been subdivided into 5 portions, and he did not know on which part of the suit land he was living in. He stated that he was given permission to enter into the land by the deceased and insisted that the deceased did not transfer the suit land to the 7th Defendant. In re-examination, he stated that he lived in the suit land with the other Plaintiffs and maintained that the Defendants had never entered into the suit land.



5. The Plaintiffs called PW2, Dominic Mulwa Kivovu, their neighbour who testified that the Plaintiffs have been in possession and utilizing the suit land. He stated that Mbatha Nguti had sold part of his land before his demise and that he was buried in the suit land. He further testified that the 1st Plaintiff never used to stay in the suit land but would visit his parents periodically.
6. The 1st Defendant, Joshua Marahe Wacheche, testified as DW1 and stated he bought his land in 1998 from the 7th Defendant when it had already been subdivided. He stated that he got to know about the Plaintiffs in 2001 and also maintained that he was cultivating maize and beans in his land until 2016 when the present matter was filed. He testified that he had leased his parcel land to one Beatrice Mueni in 2015/2016 and further explained that he had no idea that the Plaintiffs had buried any of their relatives in the suit land as claimed by them. He explained that his portion of land was pointed out to him by the 7th Defendant, who was the seller.
7. The 2nd Defendant testified that she purchased land parcel Kirinyaga/Marurumo/860 from the 7th Defendant on 3/01/1998. She confirmed that the surveyor was present at the time when she was shown her parcel of land and that the land was sold with vacant possession. She testified that she came to the land in the year 2015/2016 but could not use it because the 1st Defendant threatened her with violence. She stated that there were some houses on a portion of the suit land and that some areas had been cultivated.
8. The 7th Defendant testified as DW3. He stated that he was an Assistant Surveyor and he adopted his witness statement and relied on his bundle of documents as his evidence. He testified that he purchased Kirinyaga/Marurumo/703 from the deceased for consideration and stated that he paid for the land starting from 1996 and completed the payment in 1997, after which he got a surveyor who surveyed the land and subdivided it. He testified that he was using his parcel LR Kirinyaga/Marurumo/858 from 1999 to 2016. He stated that they had agreed that the deceased house was to be removed but it became impossible when the 1st Plaintiff entered the land. He confirmed that Mbatha Nguti was buried in his parcel of land with his permission. In cross-examination, he affirmed that Mbatha died before he had moved from the suit land and further explained that at the time he bought the suit land, there was only one house on the land that Mbatha (deceased) was living in.

Submissions, Analysis and Determination

9. Following the close of the trial, the Plaintiff filed written submissions. The 1st Plaintiff in his submissions asserted that the Plaintiffs have been in quiet possession of the suit land since 2001, when they found out that the suit land was transferred to the 7th Defendant. The Plaintiffs submitted that they have been in occupation of the suit land from 1998 to date with the full knowledge of the Defendants.

The 2nd and 7th Defendant filed their submissions on 5th March 2024. They submitted that the plaintiffs had failed to discharge their burden of proving they had been in adverse possession and prayed that the Plaintiffs' Originating Summons ought to be dismissed. The 1st and the 4th Defendant filed their submissions on 1st February 2024 and it was their position that the plaintiffs had not met the threshold required for adverse possession to be held to be applicable.

10. I have considered the pleadings, the evidence adduced by the parties and their submissions and the issue that arise are as follows:
 - i. Whether the Plaintiffs have established that they were in adverse possession of the suit land?



- ii. Whether the doctrine of adverse possession is applicable in favour of the Plaintiffs in the instant Case?
 - iii. Whether the Defendants titles have been extinguished on account of the Plaintiffs having been in adverse possession for the statutory period of 12 years?
 - iv. What reliefs should the Court grant?
11. The doctrine of adverse possession in Kenya is embodied in Section 7 and Section 13 of the [Limitation of Actions Act](#), CAP 22 Laws of Kenya, which provide as follows :

Section 7:

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

Section 13:

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

Section 38 of the [Act](#) provides for the procedure to be followed by a person claiming adverse possession. It provides as follows:-

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this [Act](#), or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this [Act](#).”

12. The doctrine of adverse possession has been articulated in multiple cases in Kenya, and various courts have laid down the essential ingredients that an Applicant requires to prove for the doctrine to be held to be applicable. The Court of Appeal in the Case of [Mtana Lewa v Kabindi Ngala Mwangandi](#) [2015] eKLR gave a definition of what the doctrine of adverse possession entailed and the circumstances that give rise to it. In the case, the Court stated thus: -

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The



process springs into action essentially by default or inaction of the owner. The essential prerequisite is that the possession of the adverse possessor is neither by force nor 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.”

13. The Court of Appeal in the Case of *Ruth Wangari Kanyagia v 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 v 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. For a party to succeed in a claim for adverse possession, such party must demonstrate and prove that they were in possession of a defined and distinct parcel of land and that their possession and use of the land was without permission and was hostile to the rights of the true owner and the possession was open continuous and uninterrupted. The requirements for adverse possession have also been set out in the Case of *Mbira –v- Gachubi* (2002) IEALR 137 in which the Court of appeal stated thus:

“..... 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. In essence therefore, a person claiming under the doctrine of adverse possession must demonstrate actual occupation or possession of another’s land without the consent of that other person 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 v Omutut* (1990) eKLR observed that:

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



must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant's use done publicly and notoriously.”

16. Kuloba J in the Case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, outlined what would constitute adverse possession in the following terms:

- 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 unequivocally exclusive, and with an evinced unmistakable animus possidendi. that is to say occupation with the clear intention of excluding the owner as well as other people.
- e) The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, given reason for notice to the owner and the community, of the exercise of dominion over the land,
- f) The possession must be continuous, uninterrupted, unbroken, for the necessary statutory period.
- g) The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.”

17. In the present suit, the plaintiffs have alleged that they have been living in the suit land since the year 1971. This has been contradicted by the 1st, 2nd, 4th and 7th Defendants who claim that they bought each of their portions of land in 1998 when they were vacant. The 4th Defendant, in her evidence, testified that she bought land parcel Kirinyaga/Marurumo/860 with vacant possession. She testified that despite the fact that she was working in Nakuru, she was cultivating on her land. The 1st Defendant, on the other hand, testified that he purchased the suit land in 1998 and had been cultivating on it until the year 2016 when the Plaintiffs instituted the instant suit. He also testified that despite possessing the suit land, he learned about the Plaintiffs in 2016 when they filed a criminal suit against the 7th Defendant. The 1st Plaintiff, on his part, testified that he was not living in the suit land but was visiting his parents from his place of work in Murang'a occasionally. His evidence was corroborated by PW2, who affirmed that PW1 was not living in the suit land, but he would visit his parents occasionally. So, who actually possessed the suit land from 2001 to 2016? While the 1st Plaintiff claims that the Plaintiffs have been in actual occupation of the suit land since 1970, he has not led the evidence to demonstrate and prove this fact. He and PW2 gave evidence to the effect that he actually did not reside in the suit land but only used to visit his parents up to 1996 when claimed he relocated. There was no evidence that he was in actual possession and/or that he possessed the land in a manner that could be deemed to be hostile to the rights of the true owner(s).



18. The evidence adduced by the Plaintiffs fell short of proving they had been in adverse possession of the suit land as alleged. The evidence by the 1st Plaintiff and PW2 who testified in support of the Plaintiffs case did not illustrate the nature of possession, if any, that the Plaintiffs exercised over the suit land. Indeed PW2 under Cross Examination by Nduku Advocate affirmed that before Mbatha Nguti died he had sold 4 Acres of land parcel Kirinyaga/Marurumo/703 to two persons who had each bought 2 acres each. When was this sale and who were the buyers? From the abstract of title (green card) for land parcel Kirinyaga/Marurumo/703, Mbatha Nguti (deceased) was registered as owner on 14/3/1995 and issued title on 20/5/1996 and the land was subdivided on 4/1/1998. The subtitles resulting from the sub division were transferred to the Defendants on 4/2/1998. There were no subdivisions of the suit land earlier than 4/1/1998 and any sales could only relate to the transfers registered in February 1998. Which were these transfers?
19. From the evidence of the 1st Plaintiff there is no clear evidence as to when the alleged adverse possession by the Plaintiffs commenced. The evidence from the Defendants, notably the 1st and 4th Defendants is that after purchasing their portions of land from the 7th Defendant, they engaged in cultivating their portions of land until 2015/2016 when the 1st Plaintiff unlawfully entered their respective portions of land and disrupted their activities. Indeed resulting from the acts of the 1st Plaintiff, the 4th Defendant, Sicily Wambui Ndwiga in 2016 had the Plaintiff arrested and charged with the offence of trespass vide Wang'uru Cr. Case No. 548 of 2016. The 1st Plaintiff challenged his prosecution before the Wang'uru Magistrates Court vide Kerugoya High Court Petition No. 8 of 2016 but the High Court declined to stop the prosecution. The action of the 4th Defendant to prefer criminal proceedings in my view goes to illustrate the fact that the Plaintiffs never had exclusive and uninterrupted possession of the suit land.
20. The Plaintiffs further inspite of alleging they had effected developments in the suit land, did not adduce any evidence to demonstrate the nature of developments they had made to support their case. If pictorial evidence which should have been easy to obtain was adduced, the Court would have been able to evaluate the same in determining the issue of possession, but in the absence of any such evidence, the Court is left in doubt as to whether indeed the Plaintiffs have been in possession and/or what the extent of their possession was, bearing in mind land parcel Kirinyaga/Marurumo/703 was subdivided into five (5) distinct titles being land parcels Kirinyaga/Marurumo/857, 858, 859, 860 and 861. It is not apparent which of the land parcels the Plaintiffs claim to be in exclusive possession of as they have not specified any particular parcel. In a claim of adverse possession, the adverse possession must be possession of a clearly defined portion of land and the occupied land cannot be left to speculation and/or assumption.
21. The burden of proof lay on the Plaintiffs to prove that they were in adverse possession of all the parcels of land resulting from the subdivision of land parcel Kirinyaga/Marurumo/703. I am not satisfied they have succeeded in doing so and it is my determination that they have failed to prove their case on a balance of probabilities. Their claim fails and I order the suit to be dismissed with costs to the Defendants.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 6TH DAY OF JUNE 2024.

J. M. MUTUNGI

ELC - JUDGE

