



**Ng'ang'a v Njeri & another (Enviromental and Land Originating Summons
1616 of 2007) [2024] KEELC 4652 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4652 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 1616 OF 2007**

JA MOGENI, J

JUNE 6, 2024

BETWEEN

HANIEL MWAURA NG'ANG'A APPLICANT

AND

ESTHER NJERI 1ST RESPONDENT

JAMES MBURU NDAPANA 2ND RESPONDENT

JUDGMENT

1. The Applicant commenced this suit through Originating Summons dated 25/08/2005 and Amended Originating Summons dated 15/08/2023 against the Respondents, claiming as an Administrator and beneficiary of the Estate of Harun Ng'ang'a by virtue of letters of Administration *Ad Litem* issued on 17/09/2013 to have acquired the property known as Ngong/Ngong/6906 adjacent to property known as Ngong/Ngong/1752 by adverse possession. He therefore seeks determination against the Respondents for the following reliefs:
 1. That 0.5 acres or thereabout be and is hereby excised from the property known as Ngong/Ngong/6906 adjacent to the property known as Ngong/Ngong/1752 and be and is hereby declared as owned by Haniel Mwaura Ng'ang'a, as the administrator of the estate of Harun Ng'ang'a Kiiru, the title in the name of Ndapana Ole Kiriambu and Saloma Warigia Ndapana having been extinguished by adverse possession in favour of the Applicant.
 2. That the cost of this suit be provided for.
2. The Originating Summons is brought under Order 37 Rule 7 of the [Civil Procedure Rules 2010](#), Section 38 of the [Civil Procedure Act](#) and all enabling provisions of the law.
3. The Application is premised on the annexed Supporting Affidavit sworn by Haniel Mwaura Ng'ang'a, the Applicant herein. I do not need to reproduce them here.



4. In response to the Summons, the Respondents filed a Replying Affidavit sworn by James Mburu Ndapana on 18/09/2023 opposing the same.
5. Upon pleadings thereby being closed, the suit proceeded by way of viva voce evidence. The Applicant called three (3) witnesses and the Respondent called one witness. The parties testified on 8/11/2023.

Applicant's case

6. The Applicant asserts that Ndapana ole Kiriambu and Salome Warigia Ndapana initially owned LR No Ngong/Ngong/1951, later sub-divided into LR Ngong/Ngong/6906 and Ngong/Ngong'/1752. The late Harun Ng'ang'a Kiiru bought Ngong/Ngong/1752. The other portion, Ngong/Ngong/6906, was partly occupied by Kiiru. After Ndapana's deaths, the Respondents sought to evict Kiiru from the 0.5 acres he occupied. Kiiru contested, claiming ownership through a 1976 Sale Agreement. Kiiru fenced and used the land openly since 1976, unchallenged by the Respondents. He now seeks ownership through adverse possession.

Applicant's Evidence

7. PW1 – Miriam Njoki Harun Ng'ang'a testified that the late Ng'ang'a was her husband. She adopted her witness statement dated 15/08/2023 as her evidence before the court. She testified that they have been on the suit property since 1972. They were never served with papers from court seeking to evict them. They are still on the suit property.
8. In cross-examination, the PW1 stated that she purchased the suit property in 1972, initially unaware of a larger portion designated by the surveyor, which included an extra half-acre. They eventually paid for this additional land. She didn't recall signing for the purchase but confirmed her husband did. PW1 was unfamiliar with certain documents on page 11 and 12 of the Plaintiff's bundle presented in court and disagreed with suggestions that they were falsified. The document on page 11 and 12 is the sale agreement dated 3/07/1976 between Dapana Ole Kariambu and Harun Ng'ang'a. She also mentioned being unaware of the splitting and sale of parcel number 1751.
9. In re-examination, she clarified that they initially couldn't afford the additional half-acre but have resided on it since 1972.
10. PW2- Joseph Katashei Ngosso adopted his witness statement at page 29-30 of the Applicant's trial bundle as his evidence. He recounted his acquaintance with Harun, facilitated by a probation officer named Kageche. PW2, upon Mr. Ndapana's intent to sell land, connected him with Harun through Kageche. He witnessed the transaction between the two parties, affirming his presence during the sale at the Chief's office. He was a Chief. He clarified that while he wasn't present during the drafting of the agreement on page 11, he actively participated in discussions regarding the sale of the property to Harun. PW2 further confirmed that since their purchase in 1972, they have resided on the property without interruption.
11. In cross-examination, PW2 clarified that he didn't sign the sale agreement for the property in question; instead, village elders did. He mentioned Miriam, a surveyor, who assessed the land and advised payment for an extra half-acre. He emphasized that the issues regarding the map presented were untrue. His purpose was solely to testify that Harun had indeed purchased the land.
12. In re-examination, he reiterated that Harun entered the property in 1972 and emphasized that any payment issues were between the seller and buyer. He also stated there had been no disputes over the property to his knowledge.



13. PW3- Haniel Mwaura Ng'ang'a identified himself as the seventh child of the late Harun Ng'ang'a. He adopted his witness statement as his evidence in chief. He recounted that his father initially purchased 6 acres of land but later discovered an additional 0.5 acres, subsequently acquiring it. Describing the layout of the property, he delineated the 0.5-acre strip adjacent to their neighbor, stretching from the top of the land to the valley, housing structures like a kitchen and a water tank. Ng'ang'a emphasized that the 0.5-acre parcel seamlessly integrates with the rest of the property and has been part of it since acquisition, refuting claims of its occupation starting in 2003. He affirmed continuous residence on the property since 1972, asserting the visibility of structures on the premises.
14. During cross-examination, he recounted his age in 1972, stating he was seven years old, while his sister Mary Wanjiru was an adult. He listed his siblings, including Stanley, Ruth Wanjiku, Joseph, and Janet, none of whom were witnesses to the land transaction. As the team leader for letters of administration, he detailed his application process, emphasizing the acquisition of the 0.5-acre parcel in 1976. He clarified that their claim for adverse possession stemmed from a letter received in 2003 after the seller's death in 1996, during which time they faced no disruptions. Asserting the presence of structures like the kitchen and water tank on the property since 1972, he highlighted their continuous use until the letter's arrival in 2003. He confirmed his father's public officer status, his death in 2013, and his role as the sole administrator, attributing his statement's contents to personal knowledge and previous case filings.
15. In re-examination, he addressed concerns about elder sibling involvement in administration, explaining his limited grant's purpose to manage the 0.5-acre issue. He reiterated their uninterrupted possession of the fenced land and clarified their claim's basis on adverse possession, not solely on the agreement at page 11, which primarily concerned the seller and purchaser.
16. With that evidence, the Applicant closed his case.

Respondents' case

17. The Respondent argues that the claim for adverse possession is premature and lacks merit. They assert that the portion of land in question was used for grazing by their parents and remained under their control until 2003. They claim that the Applicant's intrusion and subsequent claim of adverse possession in 2005 are unfounded. They challenge the alleged purchase in 1976, stating it contradicts the actual ownership history of the land. The Respondent contends that the alleged trespass and fencing off began in 2003, making the claim for adverse possession legally invalid. They argue that only twelve years of uninterrupted occupation can justify such a claim, which hadn't occurred by the time of filing the Originating Summons. They request the dismissal of the summons with costs.

Respondents' Evidence

18. DW1 – James Mburu Ndapana identified himself as a Ngong resident and a businessman, with Mr. Harun Ng'ang'a being his former neighbor and the son of the late Mr. Ndapana. He added that the late Ndapana left them land known as LR No Ngong/Ngong/6906 as seen on page 14-16 of the Defendant's bundle. The title was a jointly owned parcel of land. His father died in 1992 and his mother died in 1996. There is a road on the suit property Ngong/Ngong/6906. The document at page 16 outlines the acreage under title No 6906, 2049 is a subdivision of 1751. Mr. Harun's property comprised 6 acres. DW1 indicated his intention to rely on his replying affidavit as his primary evidence, which includes a list of supporting documents. He highlighted the subdivision of parcel No 1335 into 1751 and 1752, noting that during his parents' lifetime, the demised suit property remained fenced and unused, primarily serving as grazing land. Additionally, he clarified that the 0.5-acre portion featured only temporary structures like a kitchen and water tank.



19. During cross-examination, DW1 stated that he relocated to the suit property in the 1970s, noting that Harun's family had already settled there before him. He clarified that the property lacked a fence as it had been removed, previously being a live fence. The purchase of the suit property by Mr. Kamiti occurred in 1985, with his father verbally informing them about their portion of land adjacent to Harun's. Following his parents' passing, the plaintiffs established a kitchen and water tank on the property. Despite concerns, he did not formally report the matter to the registrar or pursue legal action, opting only to send a letter. Due to the presence of a fence, he had limited visibility of the demised property and had not submitted the raised protest against Harun's burial on the land to the court. The property served both agricultural and residential purposes.
20. During re-examination, he affirmed that three individuals resided on suit property 6906. The acquisition of the land by Kimiti occurred in 1985, while he had been residing in Kibiku since 1972. He clarified that he never wrote the letter in 2003 because the Plaintiff was not interfering with his land.
21. With that evidence, the Respondents closed their case.

Written Submissions

22. The Court gave directions on filing of written submissions on 8/11/2023. By the time of writing this judgement, it was only the Applicant who had duly submitted and I have considered them. The Applicant filed his submissions dated 5/03/2024 on the even date.

Issues for determination.

23. I have considered the pleadings and the evidence on record. I have considered the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:
 - a. Whether the Applicant has met the threshold for grant of orders for adverse possession.
 - b. Whether the Applicant is entitled to 0.5 acres to be excised out of property known as Ngong/ Ngong/6906.
 - c. Who should bear the cost of the suit?

= Analysis

Whether the Applicant has established ownership by way of adverse possession.

24. It is trite that a claim for adverse possession is attached to land and not title and it matters not that the land was owned by either the Late Ndapana Ole Kiriambu or the late Harun Ng'ang'a. This was the position in *Maweu v Liu Ranching & Farming Cooperative Society* [1985] eKLR as quoted in Civil Appeal No 164 of 2011 *Gachuma Gacheru v Maina Kabuchwa* [2016] eKLR where the Court held "Adverse possession is a fact to be observed upon the land. It is not to be seen in a title".
25. It is the Applicant's case that the late Harun Ng'ang'a has been in continuous uninterrupted occupation and possession of the suit property since 1976 to date. The burden of leading the Court to ascertaining this lies with the Applicant. This Court concurs with the sentiments of Justice Kuloba J, (as he then was,) in Nairobi Civ No 283 of 1990 *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, where the Court held:

"The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve



or more years. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown”

26. This Court notes that the land in question is registered in the name Dapana Ole Kiriambu and Salome Warigia Ndabana (now deceased) as proprietors in common for ½ share each. It is not in doubt that Ndapana Ole Kiriambu (deceased) sold 0.5 acres from LR No Ngong/1751/Kibiku ‘B’ to the late Harun Ng’ang’a. Attached to the Applicant’s Supporting Affidavit is a copy of translation which indicates a sale agreement dated 3/07/1976 between Mr. Ndapana Ole Keriambu and the late Harun Ng’ang’a. This Court has no reason to doubt the authenticity of the same as it corroborates the Applicant’ claim that his father bought land from Ndapana Ole Kiriambu. The parties requested for fingerprint authenticity in the said sale agreement from the National Registration Bureau vide a letter dated 8/10/2003. Evidence before me demonstrates that the issue of the thumbprint belonging to the late Ndapana was resolved on 17/10/2003. There is no evidence by the Respondents that they instituted any legal proceedings to report any alleged forgeries and/or irregularities.
27. The late Harun’s mode of entry was as a result of a sale agreement which means it was a permissive one. It is trite that claim of adverse possession to suffice, the claimant must demonstrate that the same was non-permissive and non-consensual and without license. (See *Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others* [2018] eKLR, where the Court enumerated the required elements to prove adverse possession as follows:
- “Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, nec vi nec clam nec precario.”
28. The Applicant’s occupation having been permissive, it will follow that a claim for adverse may not issue. However, Courts have found that such claim can be sustained after payment of the last installment. The Court in Nairobi Appeal No 73 of 1982 *Public Trustee v Wanduru Ndegwa* [1984] eKLR found that Limitation of Action begun running from the date of final payment. In the case *Hosea v Njiru & others* [1974] EA 526, Simpson J, following *Bridges v Mees* [1957] 2 All ER 577, held that once payment of the last installment of the purchase price had been effected, the purchaser’s possession became adverse to the vendor and that he thenceforth, by occupation for twelve years, was entitled to become registered as proprietor of it. From the copy of translation of the sale agreement dated 3/07/1976, the Applicant made a final payment on 3/07/1976.
29. The Applicant contends that his late father took possession and occupation of the land after the purchase in 1976 and the Respondents in their testimony told the Court that the family of the late Harun family moved to the suit property before him as he moved thereon in the 1970s. Therefore, it follows that he entered into the suit property immediately after the sale and has remained in occupation. For purposes of computing time as elaborated above, this Court finds and holds that time started running in 1976 after the final installment.
30. As to the nature of occupation, the Applicant contends that he has been in open occupation without any interruption from the Respondents, a fact which has been objected to by the Respondents though I note that DW1 testified that when his parents were alive, the demised suit property was fenced and not in use. When his mother and father were alive, the suit property was empty. They used it for grazing. This is contradictory. If the suit property was fenced, how then did the Respondents access it? To



determine the nature of possession, this Court is guided by the decision in Kisumu Civil Appeal No 27 of 2013; - *Samuel Kihamba v Mary Mbaisi* [2015] eKLR where the court held:

“Strictly, for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land”

31. The Applicant produced evidence to show that the late Harun has put up a home, a kitchen, water tank and/or was tiling thereon. The Respondents in their testimony corroborated the Applicant’s evidence that he is in occupation of the land and has been in occupation before him as DW1 had moved to stay on the suit property in the 70s. DW1 did testify that when his parents were alive, the demised suit property was fenced and not in use and added that the 0.5 acres was only constructed on temporary structure. DW1’ led evidence that his father used to tell them orally that they had their portion on Mr. Harun’s side. That when his parents died, the plaintiffs set up a kitchen and tank on the suit property. He admitted that he never reported to the registrar nor did he take the matter up to the court. He only wrote a letter to them. He never reported the plaintiff for trespass nor did he evict them.
32. To this end, in my view, the act of occupying the land since 1976 is a demonstration of the Applicant’s intention of dispossessing the Respondents. Undoubtedly, the nature of his possession was open, without secrecy and with the sole intention of acquiring ownership.
33. On whether time stopped running at any point, there was evidence that the Respondents issued the late Harun Ng’ang’a with a notice to vacate date 21/09/2003. Adverse possession accrues to land and not title and unless the Respondents took steps to evict the Applicant from the suit land, which they did not. The mere act of claiming ownership on does not stop time from running. In Eldoret Civil Appeal No 212 of 2012; - *Isaac Cypriano Shingore v Kipketer Togom* [2016] eKLR the Court held:

“We are unable to appreciate how steps taken by the respondent to assert his claim to the property can be construed as steps by the appellant to assert his right to ownership of the property.

As the Court held in *Githu v Ndeete* [1984] KLR 776:

“Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land; see Cheshire’s Modern Law of Real Property, 11th edition at p 894”).

34. It is my considered view that a notice to vacate letter did not amount to assertion of rights that could stop time from running. The suit was commenced by the Applicant and there is no evidence of assertion of rights by the Respondents. The Court finds no reason to infer that the notice to vacate letter stopped time from running. It has been admitted that the Respondents did not take any further action after the lapse of 30 days of the vacation notice.
35. The Court of Appeal in Civil Appeal No 121 of 2006; - *Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees* [2016] eKLR affirmed the sentiments of the Court in *Amos Weru Murigu v Marata Wangari Kambi & another* where the Court held:

“...as regards assertion of title, it is not enough for a proprietor of land to merely write to the trespasser (to vacate). A letter by the proprietor, even if it be through an advocate or the



chief of the area does not amount to assertion of title in law and cannot therefore interrupt the passage of time for the purpose of computing the period of adverse possession. For there to be interruption, the proprietor must evict or eject the trespasser but because eviction is not always possible without breach of peace, institution of suit against a trespasser does interrupt and stop the time from running.”

36. This Court finds that there was nothing that stopped time from running as the Respondents never took any plausible step to assert rights over the suit property. There being nothing that stopped time from running, this Court finds and holds that the Applicant as at the time of filing the suit had been in occupation of the suit property for a period of over 12 years.
37. To this end, the Court finds and holds that the Applicant has on a balance of probability established that he meets the threshold for the grant of orders for adverse possession.

**Whether the Applicant is entitled to 0.5 acres to be excised out of property known as Ngong/
Ngong/6906**

38. What flows from the pleadings is that the agreement expressly states that the Applicant was purchasing 1/2 an acre to be excised from sale of LR. Ngong/1751/Kibiku ‘B’. The occupation of the Applicant on the suit property has been confirmed by the Respondents. From the attached extract of Green Card, it is evident that the land is registered under the name of Dapana Ole Kiriambu and Salome Warigia Ndabana as proprietors in common ½ shares each. The Court appreciates that the land can easily be identified.
39. For a claim of adverse possession to issue, it is important that the said land is clearly identified as was held by the Court in *Wilson Kazungu Katana & 101 others v Salim Abdalla Baksbwein & another* [2015] eKLR where the Court observed: -

“The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of *Githu v Ndele* [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them.”
40. The Court in the foregoing case found that the requirement of identification was crystalized by the mandatory provisions of Order 37 Rule 7 of the *Civil Procedure Rules*, which requires that an application for adverse possession be accompanied with a title deed extract.
41. The Applicant has attached a copy of a title deed extract as required by law. The title shows that the land is registered in the name of Dapana Ole Kiriambu and Salome Warigia Ndabana as proprietors in common ½ shares each measuring 2.4 Ha identified as subdivision No 1751. This Court has not had the benefit of being able to identify the exact occupation of the Applicant out of the entire parcel of subdivision No 1751, but what is not in dispute is that the Applicant is occupying part of the land which is 0.5 acres. It would not be difficult for this Court to conclude that the Applicant and the Respondents are aware of the Applicant’s confines and or borderlines the larger portion notwithstanding.
42. In totality, the Court finds and hold that the Applicant has on a balance of probability demonstrated that he is entitled to 0.5 acres or thereabout to be excised from property known as Ngong/
Ngong/6906.



Who should bear costs

43. Costs normally follow the events, and the successful party is always awarded costs. The Applicant herein is the successful party and the Court finds no reasons not to exercise its discretion in his favour.

Disposal orders

44. Having now carefully considered the available evidence and the Applicant’s written submissions, the Court finds that the Applicant herein has proved his case on the required standard of balance of probabilities. For the above reasons, the Court enters judgment for the Applicant as prayed in the Amended Originating Summons dated 15/08/2023 in terms of prayers No (1) and (2).

45. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY JUNE 2024.

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**MOGENI J
JUDGE**

In the Virtual presence of: -
Mr. Marete for Respondent/Applicant
Ms. Amunde for Plaintiff/Respondent
Ms. Caroline Sagina - Court Assistant

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**MOGENI J
JUDGE**

