



**Githinji v Githinji & 2 others (Environment and Land Appeal  
E017 of 2022) [2024] KEELC 5696 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5696 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT AND LAND APPEAL E017 OF 2022**

**JO OLOLA, J  
JULY 26, 2024**

**BETWEEN**

**JAMES MWANGI GITHINJI ..... APPELLANT**

**AND**

**MARION NJERI GITHINJI ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH GATIMU GITHINJI ..... 2<sup>ND</sup> RESPONDENT**

**ALICE WANGARI GITHINJI ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. This is an Appeal arising from the Judgment of the Honourable K. M Njalale, PM delivered on 22<sup>nd</sup> June 2022 in Karatina PMELC Case No. 8 of 2021.
2. By their Originating Summons dated and filed in the Lower Court on 8<sup>th</sup> March 2021, Marion Njeri Githinji, Joseph Gatimu Githinji and Alice Wangari Githinji (the Respondents) sought for the determination of the following questions:-
  - 1). Whether the Plaintiffs (had) been in continues and uninterrupted occupation of the land parcel No. Konyu/Gakuyu/754 registered in the name of the Defendant for a period of over 44 years;
  - 2). Whether the Plaintiffs are entitled to a portion of 0.27 Ha within the suit land by way of adverse possession;
  - 3). Whether the Defendant should sub-divide and transfer to the 1<sup>st</sup> Plaintiff with her daughter 0.27 Ha and his son the 2<sup>nd</sup> Plaintiff 0.27 Ha within the suit land;
3. The said Originating Summons was supported by an Affidavit sworn by the 1<sup>st</sup> Respondent Marion Njeri Githinji wherein she avers that although the subject property is registered in the Appellant's



name, the same initially belonged to her husband and that they have lived thereon together with the Appellant who is also her son since the Appellant was registered as the proprietor thereof on 6<sup>th</sup> February 1977.

4. In response to the Summons, James Mwangi Kinyago (the Appellant) filed a Replying Affidavit sworn on 29<sup>th</sup> March 2021 wherein he asserted that the occupation and use of a portion of the suit land by the Appellants was out of a licence as he is the one who allowed them to use the portion.
5. It was the Appellant's case that the 1<sup>st</sup> Respondent who is his mother had separated with the Appellant's father, got married elsewhere but thereafter differed with the second husband. It was the Appellant's case that he then went for his mother and brought her together with the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to stay on his land.
6. The Appellant further asserted that he had filed Nyeri HCCC No. 266 of 1998 to evict the Respondents and asserted that the new suit as filed against himself was an abuse of the court process. He urged the court to order the Respondent's eviction asserting that he had already revoked the licence for them to be on the land.
7. Having heard the dispute and in her Judgment delivered on 22<sup>nd</sup> June 2022 aforesaid, the Learned Trial Magistrate did find that the Respondents had proved their case on a balance of probabilities and proceeded to answer the question posed by the Respondents in the Originating Summons in the affirmative. The Learned Trial Magistrate further dismissed the prayer by the Appellant to have the Respondents evicted from the suit property and ordered each party to bear their own costs.
8. Aggrieved by the said determination, the Appellant moved to this court and lodged the Memorandum of Appeal herein dated 28<sup>th</sup> June 2022 urging this court to set aside the Judgment on the grounds:
  - 1). That the Learned Magistrate erred in law and in fact in not appreciating that the suit property is solely owned by the Appellant;
  - 2). That the Learned Magistrate erred in law and fact in not appreciating that the Respondents came onto the suit property through permission from the Appellant;
  - 3). That the Learned Magistrate erred in law and fact in failing to appreciate that the Respondent's occupation of the suit property was actually consensual having been allowed by the Appellant;
  - 4). That the Learned Magistrate erred in law and in fact in ignoring the literal meaning of the words "non—permissive or non-consensual" which means that the occupation should not have been consented to by the Appellant; and
  - 5). That the Learned Magistrate erred in law and fact in ignoring the Appellant's evidence in its totality.
9. The duty of the first appellate court is provided for Section 78 of the [Civil Procedure Act](#), Cap 21 Laws of Kenya as follows:

“78

- (1). Subject to such conditions and limitations as may be prescribed, an appellate court shall have power:-
  - a). to determine a case finally;
  - b). to remand a case;



- c). to reframe issues and refer them for trial;
- d). to take additional evidence or to require the evidence to be taken; and
- e). to order a new trial.

(2). Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein."

10. Considering that duty in *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123, the Court of Appeal held thus:

".....this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court..... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...."

- 11. Accordingly, I have carefully re-evaluated the evidence that was presented before the Lower Court as contained in the Record of Appeal. I have also given due consideration to the submissions and authorities placed before this court by the Learned Advocates representing the parties herein.
- 12. By their Originating Summons filed in the Lower Court, the Respondents who are a mother and her two (2) adult children had urged the court to determine that they had been in an interrupted occupation of the suit property for a period in excess of 12 years and that they had acquired two portions thereof each measuring some 0.27 Ha by adverse possession.
- 13. In support of that position, the 1<sup>st</sup> Respondent had sworn an affidavit deposing that she was the mother of both the Appellant and her co-respondents. It was the 1<sup>st</sup> Respondent's position that the suit property initially belonged to her husband who is now deceased and that the same had been registered in the name of the Appellant on 6<sup>th</sup> February 1977 to stop her husband who was hell-bent on selling the suit land from doing so. The Respondents were now concerned that the Appellant had declined to sub-divide to them their respective portions and was now intent on evicting them from the land and hence the suit filed in the Lower Court.
- 14. On his part, the Appellant asserted that the occupation of portions of the suit property by the Respondents was not adverse as stated but was out of a licence as he is the one who had invited the Respondents to the land and had allowed them to use a portion thereof.
- 15. At the trial, the Respondents called five (5) witnesses in support of their case while the Appellant testified as the sole witness in his case. Having heard the testimonies of the witnesses and considered the evidence placed before her, the Learned Trial Magistrate concluded as follows at Page 3 of her Judgment (Page 69 of the Record):-

"The 1<sup>st</sup> Plaintiff has stated that she has been in occupation of the suit property for a period of 63 years as per her pleading, which is a period of over 12 years. She also stated that she have (*sic*) been in occupation and possession of the suit property openly and continuously and without interruption for all that period. There was no evidence availed to contradict



the Plaintiff's averments. I state as such because the defendant admits to have gone for his said mother (1<sup>st</sup> Plaintiff) when her alleged second marriage failed. The Plaintiffs produced a copy of Certificate of Official Search confirming that the property is registered in the name of James Mwangi Kinyago, who is the 1<sup>st</sup> Plaintiff's deceased husband and father to the Defendant.

Considering the totality of the evidence availed in this case, and applying the legal principles as outlined above, it is clear that the Plaintiffs have proved their case on a balance of probability and have brought themselves within the limits of the doctrine of adverse possession."

16. In regard to the question of acquisition of land by way of adverse possession, Section 38 of the *Limitation of Actions Act*, Cap 22 of the Laws of Kenya provides as follows:-

"In order to acquire by the statute of limitation title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it."

18. Again as the Court of Appeal stated in *Mtana Lewa v Kabindi 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 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."

19. As it were, the circumstances leading to this Appeal were rather interesting. While it was common ground that the suit property was registered in the name of the Appellant in the year 1977, the parties differed as to the reasons for such registration and what happened thereafter.
20. From the material placed before the court, it was not contested that the suit property was initially registered in the name of one Joshat Githinji who was the husband to the 1<sup>st</sup> Respondent herein. The Appellant in this matter was their first born son, while the 2<sup>nd</sup> Respondent was their second born son. According to the Appellant, the suit property was registered in his name at a time when the 1<sup>st</sup> Respondent's marriage to his father had broken down and the 1<sup>st</sup> Respondent had left together with the 2<sup>nd</sup> Respondent and had gone to get married elsewhere.
21. It was the Appellant's case that many years later when he heard that her mother's second marriage had broken down, he went and brought her back home together with the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and gave them a portion of land to reside on.
22. That position was seriously contested by his 1<sup>st</sup> Respondent mother. While the 1<sup>st</sup> Respondent concedes that she had an issue with the Appellant's father and that the Appellant was registered as the proprietor of the land at a time when she had separated with the father, it was her case that they had only been separated for a short period of about two (2) years and that they later reconciled and lived together until 1994 when her husband, the Appellant's father, passed away.



23. It was further the 1<sup>st</sup> Respondent's case that the Appellant who was then a young man only came to be registered as the proprietor of the property for purposes of keeping it away from the Appellant's father who was hell-bent on disposing the same and thereby leaving his family destitute. That position appears to be in tandem with the Appellant's position that his uncle had helped to refund money to someone who was intent on buying the land. It was also corroborated by the testimony of the Respondent's witness Charles Macharia Githaiga (PW4).
24. Arising from the foregoing and the scanty material placed before the trial court, it was difficult to come to the conclusion that it was the Appellant who had permitted the Respondents to be in the suit property that had been registered in his name in rather unclear circumstances.
25. It was also evident to me that, it was only after the family patriarch's demise in the year 1994, that the Appellant had attempted to assert more rights over the land and that the Respondents had resisted his attempts. That much is clear from the documents annexed to the Appellant's own Replying Affidavit sworn on 29<sup>th</sup> March 2021 and filed in the trial court on 21<sup>st</sup> April 2021.
26. From a perusal of the said Affidavit, it was apparent that the Respondent contended that the suit land had been sub-divided into 3 portions of 0.27 Ha by the family Patriarch before his death and that according to the Respondents, the Appellant and his 2<sup>nd</sup> Respondent brother had each been given their portions each measuring 0.27 Ha while the 1<sup>st</sup> Respondent and her younger children had been left with a portion also measuring 0.27 Ha.
27. From Paragraph 12 of the 1<sup>st</sup> Respondent's Affidavit annexed to the Appellant's Affidavit aforesaid, it was apparent that the dispute had gone to the clan elders who had arbitrated the matter under the Chairmanship of the Area District Officer and a decision had been made in favour of the Respondents on the basis that each of them already had their known distinct portions that they had developed. That apparently was the decision that led the Appellant to apply for the consent to sub-divide the land into 3 portions as demonstrated by the applications made in his name to the Mathira Land Control Board (Pages 31 and 32 of the Record).
28. It would appear however that at some point in time, the Appellant changed his mind about the sub-divisions and he then proceeded to institute as he states in his pleadings, Nyeri HCCC No. 266 of 1998 seeking for the Respondents' eviction on account that he had now withdrawn the licence he had granted them to stay on the land.
29. As it turned out, neither the Appellant nor the Respondents were clear as to what became of the suit. What was clear was that some 24 years after it was filed on account of withdrawal of the licence, the Respondents had remained in occupation of their respective portions of the suit property without the Appellant's permission and/or consent.
30. In the circumstances herein, I was persuaded that the Respondents had dispossessed the Appellant of their respective portions of the suit property for a period in excess of 12 years and that the Appellant's interests therein had been extinguished by operation of the law.
31. In the premises, I was unable to find any basis to disturb the Judgment of the Learned Principal Magistrate as delivered on 22<sup>nd</sup> June 2022. It is my finding that this Appeal lacks merit and I dismiss the same.
32. I make no order as to costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS FRIDAY 26<sup>TH</sup> DAY OF JULY, 2024.**

In the presence of:-



No appearance for the Appellant.

No appearance for the 1<sup>st</sup> Respondent.

Mr. Joseph Githinji- 2<sup>nd</sup> Respondent present.

Ms. Alice Githinji – 3<sup>rd</sup> Respondent present.

Court Assistant: Michael

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**J. O. OLOLA**

**JUDGE**

