



Mahuthu & 2 others v Muhiu (Environmental and Land Originating Summons 144 of 2013) [2024] KEELC 13379 (KLR) (22 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13379 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 144 OF 2013**

**JO OLOLA, J
NOVEMBER 22, 2024**

BETWEEN

JAMES WANJOHI MAHUTHU 1ST PLAINTIFF

JOSEPH NGARI MACHARIA 2ND PLAINTIFF

GLADY WANJIRU MWANGI 3RD PLAINTIFF

AND

GITHAIGA MUHIU DEFENDANT

JUDGMENT

1. By an Originating Summons dated 25th July 2013, James Wanjohi Mahuthu, Joseph Ngari Macharia and Gladys Wanjiru Mwangi (hereinafter “the Plaintiffs”) urge the court to determine the following:
 - a. Whether the Plaintiffs have acquired title by way of adverse possession of the portion that they occupy in LR. No. Konyu/Gachuku/466 measuring approximately 0.110 Ha;
 - b. Whether the Plaintiffs should be registered as absolute proprietors as tenants in common in equal shares of the portion that they occupy in LR. No. Konyu/Gachuku/466 measuring approximately 0.110 Ha having acquired title thereto by way of adverse possession; and
 - c. Who should bear the costs of this suit.
2. The Originating Summons is supported by an Affidavit sworn by the 1st Plaintiff. He deposes that the three of them have been in continuous, exclusive, open and uninterrupted use and occupation of part of the suit land since land demarcation and consolidation in the area and that they have been in active and productive use thereof. It is their case that they have since acquired title over the said portion by way of adverse possession.



3. Githaiga Muhiu (the Defendant) however denies the Plaintiffs claims of having acquired title to a portion of the suit property. In his Replying Affidavit sworn on the 30th July 2013, the Defendant avers that he purchased the suit property from one Esther Njambi Kimiti who had always been cultivating the entire piece of land. He denies that the Plaintiffs have been in occupation of any portion of the suit land.

The Plaintiffs' Case

4. The Plaintiffs called four (4) witnesses in support of their case.
5. PW1- James Wanjohi Mahuthu is the 1st Plaintiff. Relying on his Supporting Affidavit to the Originating Summons, PW1 told the court that the three (3) Plaintiffs have been in continuous, exclusive, open and uninterrupted use and occupation of the suit property extending for more than 30 years.
6. PW1 further told the court that the Defendant became registered as the proprietor of the suit property on 2nd August 2011 and that the Defendant's predecessor in title had failed, neglected and or refused to defend her property rights to the portion occupied by the Plaintiffs.
7. PW2- Joseph Ngari Macharia is the 2nd Plaintiff. Relying on his Statement dated 19th July 2016, PW2 told the court that they have occupied about 0.5 acres of the suit property for more than 30 years and that their occupation was exclusive and open. He accused the Defendant of lately using the Police to try and intimidate them to vacate the land.
8. PW3- Gladys Wanjiru Mwangi is the 3rd Plaintiff. Relying on her Statement dated 19th July 2016, she reiterated the Statements made by her Co-Plaintiffs.

The Defence Case

9. The Defendant testified as the sole witness in his case. Relying on his Replying Affidavit sworn on 30th July 2013, DW1 told the court he had legally acquired the suit property from one Esther Njambi Kimiti on 2nd August 2011. He further told the court he was aware that the said Esther had inherited the land from her deceased father one Motho s/o Karira.
10. DW1 testified that the Plaintiffs have their separate and known parcels of land and that the allegation that they had occupied a portion of the suit property cannot be true as Esther had always cultivated the suit property in full.

Analysis And Determination

11. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the parties herein.
12. By their Originating Summons as filed herein, the three (3) Plaintiffs have asked the court to determine two issues; one whether they have acquired title by way of adverse possession of a portion of LR. No. Konyu/Gachuku/466 and whether or not they should now be registered as proprietors as tenants in common in equal shares of the portion of land that they occupy.
13. It is the Plaintiffs' case that they have for more than 30 years been in continuous, exclusive, open and uninterrupted use and occupation of a portion of the suit property measuring some 0.110 Ha or thereabouts and that they have been in active and productive use of the same utilizing it as a watering point, as a garden, pasture and well.



14. On his part, the Defendant denies that the Plaintiffs have been using a portion of the land as stated by the Plaintiffs. It is his case that he bought the suit property in the year 2011 from one Esther Njambi Kimiti and that the said Esther had prior to the sale been solely utilizing the entire parcel of land known as Konyu/Gachuku/466.
15. In respect to a claim based on adverse possession, Section 38 (1) and (2) of the *Limitation of Actions Act*, Cap 22 of the Laws of Kenya provides as follows:-
 - “ 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 the proprietor of the land.
 - 2). An order made under sub-section (1) of this Section shall by registration take effect subject to any entry on the register which has not been extinguished under this Act.”
16. As the Court of Appeal stated in *Mtana Lewa –vs- Kahindi Ngala Mwamgandi* [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 license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”
17. In the matter herein, it was not in dispute that the Defendant is the registered proprietor of the suit property having acquired the same from one Esther Njambi Kimiti on 2nd August 2011. According to the Defendant, the Plaintiffs had never ever used any portion of the suit property as it was only the said Esther Njambi Kimiti who had been utilizing the land.
18. It was however the Plaintiffs’ case that they had been using various portions of the suit property. While it was obvious to me that the Plaintiffs were not sure of the measurements of the portions of the land that each one of them were utilizing, I was left with no doubt that the Plaintiffs had been using some portion of the land for quite some time and that they had had a dispute on the ownership thereof with the Defendant’s predecessor in title.
19. The Defendant himself confirmed this position during cross examination when he told the court that the Plaintiffs had been using the disputed portion on and off and that he did not know exactly when the Plaintiffs started using the land.
20. At Paragraph 8 of his own Replying Affidavit sworn on 30th July 2013 in opposition to the Originating Summons, the Defendant avers as follows:-
 - “ 8. That I am informed by the said Njambi that there has been several sittings (sic) between the said Esther Njambi Kimiti and the Plaintiffs (or the Plaintiffs’ parents and predecessors) at the Gakuyu Chief’s Office concerning issues pertaining to uncertain boundaries relating to several parcels of land in the neighborhood and parcel number Konyu/Gachuku/466.”



21. That averment in my considered view lends credence to the Plaintiffs' testimony that they did respectively find their parents utilizing those portions of land from the time land demarcation and consolidation was done in the area and the fact that they had been utilizing the same over a period in excess of the statutory 12 years required in law.
22. Arising from the foregoing I was persuaded that the Plaintiffs had dispossessed the Defendant and his predecessor in title of the portion of land that they occupy over a long period of time. While the Plaintiffs were unclear of the measurements of the portion, that was settled following the filing herein of a joint Report by the County Surveyor and the Land Registrar Nyeri dated 21st March 2023. That Report whose contents were adopted by the consent of the parties herein on 29th January 2024 confirmed that the disputed portion was 0.110 Ha in measurement.
23. In the premises, I am persuaded that the Plaintiffs have since acquired the portion measuring 0.110 Ha of the suit property under the doctrine of adverse possession. Accordingly I hereby make the following orders:
 - a. A declaration is hereby made that the Plaintiffs have acquired title by way of adverse possession of all that portion of land measuring 0.110 Ha presently comprised in LR. No. Konyu/Gachuku/466.
 - b. An order is hereby issued that the Plaintiffs be forthwith registered as the absolute proprietors as tenants in common in equal shares of all that portion measuring 0.110 Ha presently comprised in LR. No. Konyu/Gachuku/466 having acquired title thereto by way of adverse possession.
 - c. Each party shall bear their own costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS FRIDAY 22ND DAY OF NOVEMBER, 2024.

In the presence of:

Mr. Waweru Macharia for the Plaintiff.

No appearance for the Defendant.

Court Assistant: Kendi

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J. O. OLOLA

JUDGE

