



Mutahi & 5 others v Ndururi (Being Sued in her capacity as the legal representative of Ndururi Kigotho – Deceased) (Environmental and Land Originating Summons 319 of 2014) [2024] KEELC 13425 (KLR) (22 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13425 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 319 OF 2014
JO OLOLA, J
NOVEMBER 22, 2024
IN THE MATTER OF REGISTERED LAND ACT CAP 300 LAWS OF
KENYA
AND
IN THE MATTER OF LAND PARCEL NO.
RUGURU/KARUTHI/798

BETWEEN

JAMES WARURU MUTAHI 1ST PLAINTIFF
ANTONY KAMAU MUTAHI 2ND PLAINTIFF
MICHAEL WAMAI MUTAHI 3RD PLAINTIFF
PETER KARIUKI MUTAHI 4TH PLAINTIFF
CELSUS MAINA MUTAHI 5TH PLAINTIFF
EZEKIEL NDIRANGU 6TH PLAINTIFF

AND

MARATA WANGARI NDURURI (BEING SUED IN HER CAPACITY AS THE LEGAL REPRESENTATIVE OF NDURURI KIGOTHO – DECEASED) DEFENDANT



JUDGMENT

Background

1. This suit was initially filed at the High Court at Nyeri as Civil suit No. 71 of 2012 before being transferred to this court and given its current reference on 26th November 2014. On 13th July 2015, directions were given that this suit be heard alongside Nyeri ELC No. 51 of 2013.
2. As it turned out however, on 29th January 2014, the Defendant herein had raised a Preliminary Objection in the said ELC No. 51 of 2013 seeking to have it struck out. Having heard the objection and in a Ruling delivered on 12th June 2018, the Honourable Lady Justice L.N. Waithaka did uphold the objection and proceeded to strike out Nyeri ELC Case No. 51 of 2023. The said suit had been filed by one Paul Thimbara against the Defendant herein.
3. By their Originating Summons dated 27th March 2012 as amended on 14th May 2012, the six (6) Plaintiffs claiming to have acquired title to the parcel of land known as Ruguru/Karuthi/798 by virtue of adverse possession sought for the determination of the following issues:-
 1. Whether the Plaintiffs have had quiet occupation and un-interrupted possession of 1.17 Hectares since 1967 of Land Parcel No. Ruguru/Karuthi /798 by way of adverse possession;
 2. Whether the Plaintiffs have acquired the title in respect of 1.17 Hectares out of land parcel No. Ruguru/Karuthi/798 by way of adverse possession;
 3. Whether the Defendant's title has (been) extinguished in respect of 1.17 Hectares out of land parcel No. Ruguru/Karuthi/798 and whether a title deed should be issued in the names of the Plaintiffs in respect of the said 1.17 Hectares; and
 4. Who should bear the costs of this suit.
4. The Originating Summons is supported by an Affidavit jointly sworn by the six (6) Plaintiffs wherein they aver that their father Lazaro Mutahi Kigotho purchased the said Land Parcel No. Ruguru/Karuthi/798 in the year 1967 from his brother Ndururi Kigotho. It is their case that since they have been in continuous, uninterrupted and exclusive occupation, possession and use of 1.17 Ha comprised in the suit land.
5. The Plaintiffs aver that in the year 1996, the Defendant herein secretly filed Nyeri High Court Succession Cause No. 217 of 1996 in respect of the Estate of the said Ndururi Kigotho wherein she was issued with a Grant of Letters of Administration on 7th July 1998 listing the entire suit property as part of the estate.
6. Marata Wangari Ndururi sued in her capacity as the Legal Representative of Ndururi Kigotho (the Defendant) is opposed to the Plaintiffs' claim. In her Replying Affidavit sworn on 4th September 2013, the Defendant avers that the suit property is part of her husband Ndururi Kigotho's estate. The Defendant asserts that the Plaintiffs' father was only utilizing the said land on the permission of her late husband.
7. The Defendant avers that she is aware that her husband only sold to the Plaintiffs' father a parcel of land known as Ruguru/Karuthi/624 and that the said parcel is registered in the name of Lazaro Mutahi Kigotho. She avers that she informed the Plaintiffs' father of the Succession Cause she filed at the time of filing.



8. The Defendant further avers that this suit is an abuse of the court process as the Plaintiffs' father had instituted a similar one which he failed to prosecute and was dismissed. She asserts further that in the year 2006, the Plaintiffs' father had acknowledged her rights over the suit property and as such 12 years had not lapsed at the time this suit was filed.

The Plaintiffs' Case

9. At the trial, the Plaintiffs called three witnesses who testified in support of their case.
10. PW1 – James Waruru Mutahi is the 1st Plaintiff and a retired Police Officer residing in Gatunyanga Location. Relying on his recorded statement dated 17th March 2015, PW1 told the court that way back in 1966-1967, Ndururi Kigotho had sold the suit land to his father at a consideration of Kshs. 2,700/=.
11. PW1 testified that his father was awarded the land by the elders in Nyeri HCCC No. 68 of 1989 though there was confusion on the description of the land. He further told the court that sometime in 1990, their father had obtained orders restraining the said Ndururi Kigotho from interfering with the suit property.
12. PW2- Morris Mureithi Mahinda is a retired Administration Police Officer and was an Assistant Chief in Gatunyanga between the year 1987 and 1998. Relying on his recorded statement dated 17th March 2015, he told the court that he had seen the Sale Agreement relating to the suit land but he does not know where it disappeared to.
13. PW3- Joseph Kiama Magayu is a retired officer from the Kenya Army and now a farmer. He told the court that the elders sitting in the Tribunal had observed that the Plaintiffs' father actually bought the land and that the main dispute then was that Ndururi Kigotho who had sold the land wanted to get a buyer who would pay more money.

The Defendant's Case

14. On their part the Defence called a single witness at the trial.
15. DW1- Ephraim Githambo Ndururi is a step son of the Defendant. He told the court the Defendant was unwell and unable to attend court. Relying on his statement filed herein dated 17th April 2015, DW1 told the court his father had sold land parcel No. Ruguru/Karuthi/624 to the Plaintiffs' father and that since it was adjacent to the suit property, his father asked the Plaintiffs' father to watch over the land on his behalf.
16. DW1 testified that the Plaintiffs' father agreed to the arrangement and was given permission to graze on the land and ensure no person encroached thereon.

Analysis And Determination.

17. I have carefully perused and considered the pleadings filed herein, as well as the evidence placed before the court by the parties herein. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the parties herein.
18. By their suit herein, the six (6) Plaintiffs' assert that they have acquired all that parcel of land known as Ruguru/Karuthi/798 measuring approximately 1.17 Ha by way of adverse possession. It is their case that they have been in quiet occupation and uninterrupted possession of the suit property since they year 1967 when according to them, their father bought the property from his elder brother one Ndururi Kigotho.



19. The Defendant does not deny that the Plaintiff have been utilizing the land for a long period of time. It was however her case that the said use was not adverse to their interests as the Plaintiffs' father had been allowed and permitted to use the same by her husband Ndururi Kigotho.

20. On matters of adverse possession, Section 38 (1) and (2) of the [Limitation of Actions Act](#), Cap 22 of the Laws of Kenya provides as follows:

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(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 subsection (1) of this Section shall by registration take effect subject to any entry on the register which has not been extinguished under this Act.”

21. As was long stated in *Wambugu –vs- Njuguna* (1983) KLR 172:

“In order to acquire by the statute of limitations 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 for which he intended to use it.”

22. The court in the *Wambugu* case (*supra*) went on to state as follows:

“The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”

23. Explaining how adverse possession comes to be in *Mtana Lewa –vs- Kahindi Ngala Mwangandi* [2015] EKLR, the Court of Appeal opined as follows:

“Adverse possession is essentially a situation where a person takes possession of land and asserts right 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 of the owner.”

24. That being the case, in order for this court to determine whether or not the Defendant's rights to the suit property have been extinguished by operation of the law, the court will seek to answer the following:-

- i). How did the Plaintiffs take possession of the suit property?
- ii). When did the Plaintiffs take possession and occupation of the suit property?
- iii). What was the nature of the Plaintiffs occupation and possession?



- iv). How long have the Plaintiffs been in occupation of and possession of the suit property?
25. From the material placed before the court, there was no dispute that the suit property is registered in the name of Ndururi Kigotho. The said Ndururi Kigotho who was the husband of the Defendant herein was also an elder brother of the Plaintiffs' father – Lazaro Mutahi Kigotho.
 26. When Ndururi passed away on 18th September 1995, the Defendant instituted Nyeri High Court succession Cause No. 217 of 1996. Subsequently, on 9th November 2001, the Defendant was issued with a Certificate of Confirmation of Grant listing the suit property as part of the estate of the late Ndururi and thereby sparking the dispute herein.
 27. It is the Plaintiffs position that they did take possession of the suit property and have remained in occupation thereof since the year 1967 when their father Lazaro executed a sale Agreement with their uncle Ndururi. There was not much disagreement between the parties as to when the Plaintiffs started utilizing the land. The Defendant's sole witness Ephraim Githambo Ndururi (DW1) confirmed during cross-examination that his family had not used the land since 1968 when the Plaintiffs started using it.
 28. According to the Defendant and her witness, there was no sale agreement executed between the two brothers in respect of the suit property. It was the defendant's case that Ndururi had earlier on sold the property known as Ruguru/Karuthi/624 to the Plaintiffs' father. Since Ndururi and his family were moving to far away Kiganjo and given that the suit property is adjacent to the said LR. No. Ruguru/Karuthi/ 624, they had left the Plaintiffs' father to watch over the same with permission to graze thereon and to ensure no third parties encroached thereon.
 29. In support of that arrangement, the Defendant told the court that sometime in the year 2006, when one Paul Thimbara encroached on the land and cut down some tress, the Plaintiffs' father had rushed over to inform the Defendant of that infringement and thereby acknowledging the fact that the land belonged to Ndururi and his family.
 30. As it were, while the Defendant vehemently denied that the two brothers had executed a sale Agreement in regard to the suit property, much of the evidence placed before the court pointed to its existence. In their List of Documents filed herein, the Plaintiffs have exhibited a document written in Kikuyu language dated 9th November 1967 and titled "Kirikaniro" (Pexh 3). When cross-examined about the same, James Waruru Mutahi (PW1) conceded that the document was not signed and that the one executed by the parties disappeared.
 31. That position was supported by the testimony of Morris Mureithi Mahinda (PW2) who served as the Gatunyanga Area Assistant Chief between 1987 and 1998. In his testimony before the court, PW2 testified that when the dispute between the two brothers was first reported to him, he had seen a copy of the agreement executed between them and that he did not know where the same had disappeared to.
 32. A better confirmation of the existence of the said agreement however came from the Defendant herself. At Paragraph 16 to 18 of her Replying Affidavit filed in response to the Originating Summons, the Defendant refers to a suit earlier on instituted against her husband by the Plaintiffs' father. At Paragraph 18 of the Affidavit, the Defendant has annexed the Judgment of the Court of Appeal arising from Nyeri Civil Appeal No. 40 of 1991; Lazaro Mutahi –vs- Ndururi Kigotho. That Judgment arose from a decision rendered by the Honourable Justice P.K. Tunoi (as he then was) on 8th November 1990.



33. At Page 3 of the Judgment delivered by the Court of Appeal on 13th May 1994, the Learned Judges of Appeal recite the findings of the High Court on an application made by Ndururi and state as follows:

“On 3rd January 1990, the respondent applied to set aside the award under Order 45 rule 14 of the Civil Procedure Rules alleging misconduct among other grounds.

The Judge heard the application and found no misconduct established. Nevertheless, he allowed the application on a different ground which he stated in his ruling as follows:

“However, one matter has caused me grave concern. The Plaintiff has sued for land parcel number Ruguru/Karuthi/798 and the sale Agreement is in respect of it. The arbitration proceedings were over parcel number Ruguru/Kiamariga/798. This is not in my opinion a small error. It is so fundamental that it would affect the award. On this score alone I allow the application as prayed. There will be no order as to costs. (Underlining mine).

34. Arising from the foregoing, it was evident that as at the time the parties appeared in court some 34 years ago, there was an agreement which the court viewed and affirmed was in respect of the sale transaction between the Plaintiffs’ father and Ndururi. Its failure to be produced now can only mean that it was misplaced at some point in time.

35. It was however apparent that even though the Plaintiffs were placed in possession ever since 1967, the parties did not proceed to transfer the suit property to the Plaintiffs and a title deed was many years thereafter on 29th March 1988 issued in the name of Ndururi. That marked the beginning of the wrangles between the parties as a year later on 31st July 1989, the Plaintiffs’ father registered a caution on the land claiming “purchaser and occupier’s interest.”

36. Some three months earlier on 18th May 1989, the Plaintiffs’ father instituted Nyeri HCCC No. 68 of 1989 against Ndururi seeking among other reliefs an order transferring the suit property to his name on account that he had purchased the same in 1967. That was the matter that the court had referred to arbitration by the elders and which led to the decision of the Court of Appeal in Nyeri Civil Appeal Case No. 40 of 1991.

37. In their list of documents, the Plaintiffs have exhibited a copy of the elders’ award. A perusal thereof reveals that the Plaintiffs’ father had called a witness by the name Henry Gitonga Ndikwe who testified that he is the one who was approached on 9th November 1967 and had drafted the sale Agreement between the two brothers. According to the said Ndikwe whose name also appears in the unsigned Pexh 3, he gave the original copy of the agreement to Ndururi while the Plaintiffs’ father had retained a copy. The witness further told the panel of elders that the parties had agreed to have the suit property transferred to the name of the Plaintiffs’ father in three (3) years’ time.

38. The reason for the 3 years transfer period was apparent from the testimony of the Plaintiffs’ father before the panel of elders. Their record capture him testifying as follows:

“Plaintiff

My name is Lazaro Mutahi Kigotho. The defendant Ndururi Kigotho is my elder brother. I have sued him for refusing to transfer land parcel No. Ruguru/Kiamariga/798 approximately three (3) acres.

On 9th November 1967, I and my brother (the defendant) entered into agreement that he would sell me the above referred land which was at that time in the name of his wife Thuguri who had passed away back in 1960.



.....

In our agreement we had noted that he would transfer the said land to me in three years' time. This was to give him time to file a succession to have the land transferred from the deceased wife to his name.”

39. From a perusal of the defendant's own List of Documents filed herein on 18th December 2013, they have annexed a copy of the Green Card for the suit property. That Green Card indeed confirms that the suit property was on 19th May 1959 registered in the name of Thuguru w/o Ndururi. It was transferred to Ndururi's name on 29th March 1988 when he was issued with a title.
40. It was telling that save for the mistake in referring to the suit property as Ruguru/Kiamariga/798 instead of Ruguru/Karuthi/798, the elders' awards was unanimous that Ndururi had sold the land but now that he had a brand new title in his name he wanted to re-sell the land at a higher purchase price.
41. In my considered view, upon the expiry of the three (3) years when the parties agreed to have the suit transferred to the name of the Plaintiffs' father, the Plaintiffs occupation and possession of the suit land became hostile and adverse to Ndururi's title. It was also evident to me that from 1970 to 1989 when the Plaintiffs' father filed the suit at the High Court, Ndururi had literally discontinued his possession of the suit property for some 19 years. There was nothing placed before the court to demonstrate that during that period, Ndururi had exercised any rights proprietary or otherwise over the suit property.
42. In support of their claim that the Plaintiffs had as late as the year 2006 acknowledged Ndururi's title to the suit land, the Defendant asserted that sometime in the year 2006 when one Paul Thimbara entered the suit property and cut down some trees thereon, the Plaintiffs' father had reported the destruction to the Defendant who was then paid compensation for that destruction.
43. There was however no proof put forward of this alleged occurrence. On the contrary, the evidence placed before the court suggests that the Defendant and her family knew about the said Paul Thimbara much earlier. It was apparent that when Ndururi had been issued with his new title in 1988, he had, as stated by the panel of Arbitrators started looking for someone who would offer him more money for the suit property. It was around that time that Ndururi met Paul Thimbara
44. A perusal of the pleadings filed by the said Paul Thimbara against the defendant in Nyeri ELC Case No. 51 of 2013 which had earlier been linked to this matter before being struck out on 12th June 2018, reveals that the said Thimbara pleaded that Ndururi sold him the suit property in March 1989 for Kshs. 100,000/=.
45. The fact that Ndururi had indeed attempted to re-sell the suit property was what in my view had triggered the earlier proceedings by the Plaintiffs' father. According to PW2 who was the Gatunyanga Assistant Chief between 1987 and 1998, the two parties had approached him during the time and informed him of their intention. Recalling that Ndururi already had another Sale Agreement over the property with the Plaintiffs' father, PW2 alerted the Plaintiffs' father about the new development and it was clear to me that that is what led the Plaintiffs' father to file the suit in May 1989 and thereafter to lodge the caution in July 1989.
46. It was further evident that after Ndururi's death on 18th September 1995, the Defendant herein was issued with a temporary grant of letters of administration on 28th July 1997. The Defendant did not however take any steps to recover possession of the suit property from the Plaintiffs and had not done so by the time this suit was filed in the year 2012.



47. In the premises, I am persuaded that the Defendant and her deceased husband had been dispossessed of the suit property for a period in excess of 12 years and that the Plaintiffs have had quiet uninterrupted occupation and possession thereof for the said period.

48. Accordingly, I hereby order and declare as follows:-

1. The Plaintiffs have acquired the title in respect of LR. No. Ruguru/Karuthi/798 measuring 1.17 Ha by way of adverse possession.
2. The Defendant's title to the said LR. No. Ruguru/Karuthi/798 has been extinguished by operation of law and her title should be cancelled and a new one issued in the names of the Plaintiffs herein.
3. 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. Mathanya for the Plaintiffs.

Ms. Macharia holding brief for Muchiri for the Defendant.

Court Assistant: Kendi

J. O. OLOLA

JUDGE

