



**Mugo v Mugo & another (Environment & Land Case 67 of 2015)
[2024] KEELC 13404 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13404 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 67 OF 2015
JM MUTUNGI, J
NOVEMBER 20, 2024**

BETWEEN

CYRUS GITUTO MUGO PLAINTIFF

AND

DAVID WACHIRA MUGO 1ST DEFENDANT

CATHERINE MUTHONI THIAKA 2ND DEFENDANT

JUDGMENT

1. The Plaintiff filed the instant suit vide the Originating Summons dated 4th June 2015 praying for orders;
 - a. That the Court be pleased to declare and issue a declaration that the Applicant is the legal owner entitled by adverse possession for over twenty-three years of all that parcel of land comprised in Title Number LR No. Inoi/Mbeti/515 situated in Kirinyaga.
 - b. That the Applicant be registered as the sole proprietor of the said parcel of land namely LR No. Inoi/Mbeti/515 in place of Harrison Muchira Karimi the 2nd Respondent in whose favour the land is currently registered.
 - c. The last original Title Deed in respect Parcel Number Inoi/Mbeti/515 of which are with the 2nd Respondent be dispensed with.
 - d. That pending the hearing and determination of the suit the court do issue inhibitory orders restraining the Respondents, their agents, servants and/or representatives from alienating, dealing in whatsoever way or disposing of the parcel of land known as L.R Inoi/Mbeti/515.
 - e. That the Honourable court be pleased to set aside the order issued in favour of the 2nd Respondent in Civil Suit No. 147 of 2014 declaring the 2nd Respondent the legal owner of parcel of land known as Inoi/Mbeti/515.



- f. Costs of this application be provided for.
2. The summons are supported on the grounds set out on the body thereof and the supporting affidavit sworn by the Applicant. The Applicant claims that their brother, David Wachira Mugo, the 1st Defendant, was registered as the owner of land parcel number Inoi/Mbeti/514, to hold in trust for his parents and his siblings. According to the Applicant, the land was originally part of land parcel Inoi/Mbeti/51, owned by their Aunt Eunice Kagure.
 3. Following subdivision of the initial land parcel No. Inoi/Mbeti/51, the 1st Defendant (then a minor) was registered as owner of land parcel No. Inoi/Mbeti/514 on 3rd August 1993 while Thomas Muriuki Koro was on the same day registered as owner of land parcel Inoi/Mbeti/515. On the ground Thomas Muriuki Koro occupied land parcel 514 while the Plaintiff occupied land parcel 515. The Plaintiff stated the occupation on the ground was as a result of an inadvertent mistake. The Plaintiff averred the 1st Defendant was registered to hold the land in trust for himself, the Plaintiff's family and their brother one Julius Kariuki Mugo. The Plaintiff further averred that he and his family settled on the suit land parcel No. Inoi/Mbeti/515 and has thereon effected developments including putting up permanent structures.
 4. The Plaintiff stated that the 1st Defendant without any reference to the family secretly and fraudulently sold and transferred the suit property to the 2nd Defendant and the transfer was effected to the 2nd Defendant on 4th March, 2015 after restrictions placed on land parcel Inoi/Mbeti/514 were removed and thereafter on 21st August 2015 the inadvertent error relating to ground occupation was rectified such that Thomas Muriuki Koro was registered as the owner of land parcel No. Inoi/Mbeti/514 and the 2nd Defendant was registered as the owner of Land parcel No. Inoi/Mbeti/515.
 5. The Plaintiff averred that the 1st and 2nd Defendants colluded and obtained an order fraudulently from the Magistrate's Court that facilitated the removal of the restrictions registered by the family and transfer of the suit property was effected to the 2nd Defendant. The Plaintiff claims that he and his family had occupied and had been in possession of the suit land continuously and for uninterrupted period of over Twenty three (23) years and was therefore entitled to be declared as owner of the suit land by virtue of adverse possession.
 6. The 1st Defendant swore a Replying Affidavit on 6th July 2015 in response and he admitted that he was given land parcel Inoi/Mbeti/515 as a gift by his late grandmother Eunice Kagure Gituto. He affirmed he was given land parcel Inoi/Mbeti.515 though he was issued title deed for land parcel Inoi/Mbeti/514. He however explained that they exchanged the titles with his relative who had been issued title for land Parcel Inoi/Mbeti/515. He denied he held the land in trust for anybody and that the title did not indicate so. The 1st Defendant further deponed that his grandmother gave him the coffee stems and tea bushes that she had planted on the land. He denied the Applicant had constructed any house on his land and contended the Applicant had no basis to claim he was entitled to be declared as owner of the land on account of being an adverse possessor.
 7. The 2nd Defendant filed a Replying Affidavit sworn on 24th November 2015 where he deponed that he purchased land parcel Inoi/Mbeti/514 from the 1st Defendant vide a sale agreement dated 6th February for Kshs 1,000,000/- and stated that as the 1st Defendant delayed in transferring the land to him he sued him in Kerugoya CMCC No. 147 of 2014 where the Court issued orders for transfer of the land to him. He stated that he discovered the land he bought on the ground was land parcel Inoi/Mbeti/515 and that he approached Thomas Muriuki Koro who held title for land parcel Inoi/Mbeti/515 and they effected an exchange. He claimed he took possession of the land when he bought and averred there were no standing structures on the land at the time of sale. The 1st Defendant withdrew instructions



from his Advocate, J. Ndana Advocate vide a Notice of Withdrawal dated 17th March, 2021. He filed a Supplementary Affidavit where he deponed he never sold and/or transferred the land to the 2nd Defendant and that the order obtained before the Magistrate's Court was through coercion.

8. The Suit proceeded to hearing and the Plaintiff called three witnesses in support of his case while the 1st and 2nd Defendants testified as the sole witnesses in support of their respective cases.
9. The Plaintiff testified as PW1 and he reiterated the contents of his Affidavit sworn in support of the Originating Summons. The Plaintiff in his evidence explained that their Aunt Eunice Kagure (deceased) was the spouse of their father's brother and owned land parcel Inoi/Mbeti/51 which she subdivided into 3 portions and gave one portion to her daughter; another portion to Thomas Muriuki Koro and the last portion to his father, Stephen Mugo (deceased). He stated that on transfer, Thomas Muriuki was registered as owner of title Number Inoi/Mberi/515 while the family agreed that the 1st Defendant, David Wachira Mugo though he was in school be registered to hold the portion that was intended for their father as a trustee for the family. The 1st Defendant was registered as owner of title number Inoi/Mbeti/514. The Plaintiff stated he was the one who took possession and started utilizing the land intended for the family. He however explained there was a mistake in as far as the occupancy was concerned as he took occupancy of land parcel No. Inoi/Mbeti/515 while Thomas Muriuki Koro occupied land parcel No. Inoi/Mbeti/514. Rectification of the occupancies was subsequently effected such that Thomas Muriuki's title was reverted to land parcel Inoi/Mbeti/514.
10. The Plaintiff testified that at the time the 1st Defendant was registered he was still in school and that he was registered to hold the land in trust. He stated the 1st Defendant never at any time took possession of the land and that it was him (Plaintiff) who took possession and was utilizing the land. He stated he had occupied and utilized the land as from 1994 when he was handed possession. He stated the 1st Defendant and the 2nd Defendant colluded and had the restriction placed over the title removed and the property transferred to the 2nd Defendant without any consultation with the Plaintiff and/or other family members. The Plaintiff explained that he was not aware of the case filed in the Magistrate's Court by the 2nd Defendant against the 1st Defendant.
11. In Cross examination the Plaintiff reiterated the 1st Defendant was registered to hold the suit property in trust. He stated the title registration for land parcels 514 and 515 was mismatched such that the ground occupancies were equally mismatched. The Plaintiff asserted he was given the suit land by his Aunt at a family meeting in 1993/94 though it was the 1st Defendant who was registered. The Plaintiff repeated that Kerugoya CMCC No. 147/2014 was between the 1st and 2nd Defendants and it was filed in collusion between them and was used to remove the caution registered by the family against the title.
12. PW2 Julius Kariuki Mugo gave evidence that mirrored the evidence given by the Plaintiff. He testified that he was a Police Officer and that both the Plaintiff and the 1st Defendant were his brothers and that the Plaintiff was their eldest brother. The witness affirmed that their Aunt Eunice Kagure subdivided her land parcel No. Inoi/Mbeti/51 into 3 portions and gave one portion to her daughter, another to their Uncle and the portion she was using to their family. He stated their father at a family meeting held after the subdivision of the land around 1991 stated that the portion intended for their family be registered in the name of David Wachira Mugo (1st Defendant) in trust for the family as he was brilliant. He stated the title was issued in 1993 and it was Inoi/Mbeti/514. He confirmed there was a mismatch of titles Inoi/Mbeti/514 and 515 but it was later rectified.
13. PW2 confirmed that the Plaintiff started cultivating on land parcel 515 from 1994 and planted about 2500 tea bushes and 500 coffee trees. He stated the 1st Defendant completed school in 1996 and that he never occupied or utilized land parcel 515 but resided on land parcel Inoi/Mbeti/44 which belonged to



- their father and that he was utilizing about one (1) acre of the land. The witness clarified that land parcel Inoi/Mbeti/44 was shared between himself, the 1st Defendant and their sisters and that the Plaintiff did not have a share in the land.
14. PW2 further stated that he and his Uncle lodged a caution against land parcel Inoi/Mbeti/515 in 2015 but the same was removed in unclear circumstances vide an order issued in Kerugoya CMCC No. 147 of 2014 where he was not a party. He stated the original title deed for land parcel Inoi/Mbeti/515 was in his custody when the land was purportedly transferred to the 2nd Defendant.
 15. Under Cross examination PW2 affirmed that it was only the Plaintiff who had been using the suit land from 1993. He further stated he did not know how the land was transferred to the 2nd Defendant yet he was holding the original title. He stated he was not made a party in the Magistrate's court case. He maintained the 1st Defendant was registered to hold the suit land as a trustee.
 16. PW3 Mutuota Njogu in his evidence adopted his witness statement recorded on 11th November 2016. The witness explained that at the time the 1st Defendant was registered as owner of the suit property he was a student in school and the agreement was that he would hold the land in trust for the family. He stated the land belonged to one Eunice Kagure and he gave the same to Stephen Mugo, who was the 1st Defendant's father. The witness stated that when he learnt the 1st Defendant wanted to sell the land he placed a caution but he was not notified when it was removed.
 17. PW4 Loise Wangithi Mugo, a sister to the Plaintiff and 1st Defendant testified that Eunice Kagure who was the wife of their father's brother subdivided her original land, land parcel No. Inoi/Mbeti/51 and gave land parcel Inoi/Mbeti/515 a resultant subdivision to their father, Stephen Mugo Ndwiga. She stated their father was not registered as it was agreed following a family meeting that the land be registered in the 1st Defendant's name to hold in trust for the family. The witness explained at the time the 1st Defendant was a student in Form Two at Kangaru High School. She stated the title to the land was collected by their father from the Land Registry after registration and the original title was still held by the family. She stated she did not know how the 2nd Defendant got to be registered.
 18. The witness explained their father had another family land parcel Inoi/Mbeti/44 measuring 4 Acres and that the 1st Defendant and PW2 and their unmarried sisters reside on this land. She stated the Plaintiff has no share in land parcel number 44 as they did not give him a share of the same since he was utilizing land parcel No. 515 now registered in the 2nd Defendant's name.
 19. In cross examination the witness stated she had no knowledge the 1st Defendant had been sued by the 2nd Defendant in the Magistrate's Court. She stated they had not as yet done succession in respect of their deceased fathers estate. The witness explained they never made any minutes of the family meeting that resolved to have the suit property registered in the 1st Defendant's name to hold as a trustee for the family. She explained the 1st Defendant was in school and was aged 16 years when he was registered.
 20. The 1st Defendant testified that land Parcel Inoi/Mbeti/515 was registered in his name in 1993 when he was in school as a gift. He stated in 2014 he sold the land to the 2nd Defendant for the consideration of Kshs 1,000,000/-. He stated that in the same year 2014, the 2nd Defendant sued him alleging he had failed to effect transfer of the land to him in Kerugoya CMCC No. 147 of 2014. He further stated that they entered a consent in the case where he agreed to transfer the land to the 2nd Defendant on payment of the balance of Kshs 100,000/-. He stated he was later in 2015 served summons in the present suit where the Plaintiff who is a brother had sued him together with the 2nd Defendant claiming the land by way of adverse possession.



21. In Cross examination the 1st Defendant admitted he entered into the sale agreement voluntarily. He stated the land was given to him as a gift and that he was not to hold the land in trust for anybody. He stated the 2nd Defendant sued him in Kerugoya CMCC 147 of 2014 and that the transfer was effected following a consent order made in the suit.
22. The 1st Defendant affirmed that the suit land was registered in his name when he was in school. He admitted it was the Plaintiff who has been in possession and had been using the land all along. He stated the Plaintiff had however not built a house on the land and that they all resided on land parcel Inoi/ Mbeti/44 which belonged to their father. He affirmed he had never objected to the Plaintiff utilizing the suit property. The 1st Defendant further stated he had requested the 2nd Defendant to do a search on the suit property and when he did, he came with a sale agreement which he signed though he claimed he was not paid any money. He stated the consent in Kerugoya CMCC No. 147 of 2014 compromised the suit. He denied receiving Kshs 100,000/- which as per the consent order was to be paid to him by the 2nd Defendant.
23. The 2nd Defendant Harrison Muchira Karimi in his evidence adopted his witness statement recorded on 9th November 2020 and further relied in support of his case on the bundle of documents he had filed which were produced as 2nd Defendant's Exhibits 1 – 4.
24. In cross examination he stated he did not know when the Plaintiff entered into the suit land. He stated he first visited the suit land in 2013 and as at that time there were tea bushes and coffee trees. He stated that he conducted a search before buying the land which showed the 1st Defendant was the registered owner. He stated he paid the 1st Defendant in cash and when he failed to take him to the Land Control Board to obtain consent he sued the 1st Defendant. He admitted he has not taken possession of the land as the Plaintiff continues to be in possession.

Parties Submissions

25. The Plaintiff filed his written submissions on 1st September 2022, where he submitted the evidence he presented unequivocally demonstrated his fulfillment of the necessary legal criteria to be awarded legal title and ownership of the disputed property, under the doctrine of adverse possession. The Plaintiff submitted that he took possession of the suit property in 1994, and by 2006, he had been in continuous and uninterrupted possession of the property for a 12-year period. The Plaintiff asserted that over the period he was utilizing the land as his own and had planted tea bushes, coffee trees and various species of trees. He argued he was using the land adversely and the rights of ownership of the registered owner had become extinguished.
26. He further argued that by 2013, legal ownership of the 1st Defendant had become extinguished and he had no title that he could sell and transfer to the 2nd Defendant.
27. In support of his case, the Plaintiff cited and relied on several authorities, including Chevron (K) LTD v. Harrison Charo Wa Shutu (2016)eKLR, Mathew Ndaui Kiambati v. James Gichuki Magondi & Another (2018)eKLR, and Mwangi & Another v. Mwangi (1986)KLR 328, to support his claim for ownership through adverse possession.

Analysis And Determination

28. I have reviewed the parties' pleadings, the evidence on record, and their written submissions. The issues for determination is whether the Plaintiff has acquired title to the suit land by adverse possession; whether the 1st Defendant held the land in trust; and whether the 2nd Defendant acquired a valid title of the suit property.



29. The law on adverse possession is provided for under the *Limitation of Actions Act*. Section 7 of the Act provides:

“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) of the *Limitation of Actions Act* provides:-

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.
3. For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land”.

30. Section 17 of the Act extinguishes the rights of a registered owner where there is a successful claim for adverse possession. Section 38 on the other hand provides;

“(1) 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.”

31. In the case of Kisumu Civil Appeal No. 110 of 2016, *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR, the Court of Appeal held that for a claim of adverse possession to be successful, the claimant is required to demonstrate the following:

- a. On what date he came into possession.
- b. What was the nature of his possession?
- c. Whether the fact of his possession was known to the other party.
- d. For how long his possession has continued and
- (e) That the possession was open and undisturbed for the requisite 12 years.

32. In Kisumu Civil Appeal No. 27 of 2013 *Samuel Kihamba v Mary Mbaisi* [2015] eKLR 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.”

33. In Nairobi Civ No. 283 of 1990 Gabriel Mbui v Mukindia Maranya [1993] eKLR 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”

Adverse possession is a fact to be observed upon the land. It is not to be seen in a title, even under cap 300. Any man who buys land without knowing who is in possession of it risks his title, just as he does, if he fails to inspect his land for twelve years after he had acquired it.

34. In the instant matter it is not in dispute that the 1st Defendant was registered as proprietor of the suit land when he was in school in 1993 then aged about 16 years. When the 1st Defendant completed school and was of age he did not occupy or take possession of the suit land. It is further not disputed that the Plaintiff took occupation and possession of the suit land in 1994 and started utilizing it as his own land. He had tea and coffee on the land and had planted various trees. The 1st Defendant conceded the Plaintiff had been in possession of the land since 1994 and that he had not prevented him from utilizing the land. The entry into the land by the Plaintiff in 1994 cannot be said to have been with the permission of the 1st Defendant. If anything, the other family members had accepted that the suit land belonged to the Plaintiff and it was the Plaintiff who was exclusively utilizing the land such that when their father passed on they agreed on how land parcel Inoi/Mbeti/44 that belonged to their father was to be shared to the exclusion of the Plaintiff.

35. PW2 and PW4 who are brother and sister to the Plaintiff explained their said father’s land was distributed amongst the children but the Plaintiff was not given a portion of it since he was in possession of and was utilizing the suit property. The 1st Defendant was allocated one (1) acre in his father’s land parcel Inoi/Mbeti/44 and that is the portion he utilizes. The 1st Defendant agreed as much. The evidence adduced in this matter irresistibly points to the suit land having been given by Eunice Kagure to Stephen Mugo, the father of the Plaintiff, the 1st Defendant, PW2 and PW4 and for reasons that are not entirely explicit, the father determined that the land be registered in the 1st Defendant’s name even though he was a minor at the time. The 1st Defendant indeed stated in evidence that he discovered he had been registered as owner of the suit land when he saw his name on the title. The Plaintiff and the witnesses who testified in support of his case asserted that the 1st Defendant was registered to hold the land in trust. I am on the evidence adduced by the parties persuaded that the Plaintiff’s and 1st Defendant’s father could not have intended that the 1st Defendant holds the land as an absolute proprietor but in trust for the family.

36. The 1st Defendant has contended that he was registered as an absolute proprietor and not to hold the land in trust. That assertion by the 1st Defendant fails as he never asserted his ownership rights when he saw the Plaintiff was in exclusive possession and was utilising the land as his own. The Plaintiff before instituting the suit in June 2015 had exclusively possessed the suit land for 21 years. That possession was adverse to the rights and interests of the registered owner. In those circumstances the title of the registered owner had become extinguished after the expiry of 12 years from the date the period of adverse possession started running. In the premises, it is my determination that the Plaintiff as at the time he instituted the suit he had acquired title to the land by adverse possession and was entitled to be registered as the owner. The title of the registered owner was extinguished on or about 2006 such



that as at 2013 when the 1st Defendant purported to sell the land to the 2nd Defendant he had no title that he could have transferred to the 2nd Defendant.

37. Under Section 28 of the *Land Registration Act*, 2012 customary rights and rights acquired by virtue of being an adverse possessor are overriding interests that require no noting in the title register. Section 28(b) and (h) provide as follows:-

28. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

b. trusts including customary trusts;

h. rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;

38. After the period of adversity crystallized after the expiry of 12 years the registered owner continued to hold title in trust for the adverse possessor. The 1st Defendant hence had no title that he could sell to the 2nd Defendant. The title he held was subject to the overriding interests that had accrued in favour of the Plaintiff. The title that the 2nd Defendant acquired was subject to the Plaintiff's overriding interest over the suit property. The title he acquired was not valid as the 1st Defendant had no title on the suit land that he could have transferred to him. The 2nd Defendant did not acquire any rights or interest on the suit property since the 1st Defendant had none that he could pass.

39. The 2nd Defendant did not carry out appropriate due diligence as if he had done so, he would have discovered the Plaintiff was the owner of the tea bushes and coffee that he stated he saw on the land in 2013 and he would have known the Plaintiff had been in possession of the land since 1994. By his own admission, the 2nd Defendant has not been able to take possession of the land by reason of the Plaintiff's possession and occupation. That is what he should have verified before entering into the purported sale transaction.

40. Upon evaluation and analysis of the evidence, I am satisfied the Plaintiff has proved his case on a balance of probabilities and I enter Judgment in his favour and make the following final and consequential orders:-

1. The Plaintiff, Cyrus Gituto Mugo, is hereby declared to have acquired title to land parcel Inoi/Mbeti/515 by virtue of being in adverse possession for a period of over twelve (12) years.

2. The title number Inoi/mbeti/515 registered in the name of Harrison Muchira Karimi, the 2nd Defendant is ordered to be cancelled.

3. The Land Registrar Kirinyaga is ordered to register Cyrus Gituto Mugo as the owner of land parcel Number Inoi/mbeti/515 in place of Harrison Muchira Karimi.

4. The order issued in Kerugoya CMCC No. 147 of 2014 declaring Harrison Muchira Karimi, the 2nd Defendant herein the legal owner of title number Inoi/mbeti/515 is hereby set aside.

5. The costs of the suit are awarded to the Plaintiff.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 20TH DAY OF NOVEMBER 2024.

J. M. MUTUNGI

ELC - JUDGE

