



Kimani & another v Kuria & another (Environmental and Land Originating Summons E019 of 2022) [2024] KEELC 13343 (KLR) (19 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13343 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E019 OF 2022**

JG KEMEI, J

NOVEMBER 19, 2024

BETWEEN

JOEPH KIGURU KIMANI 1ST PLAINTIFF

EDWIN KIMANI MUGURE 2ND PLAINTIFF

AND

SOLOMON KURIA 1ST DEFENDANT

ROSE NJERI KAMAU 2ND DEFENDANT

JUDGMENT

1. By an Originating Summons dated the 23/5/2022 the Applicants herein sought for the following orders against the Respondents;
 - a. That the late Eunice Wanjiru, her family who include the Applicants Joseph Kiguru Kimani and Edwin Kimani Mugure who have been in adverse possession of L.R. Githunguri T. 101 from 1960 to date be declared the owners thereof and be registered as the absolute proprietors thereof.
 - b. That the Respondents herein being the heirs / administrators of the late Milka Njoki do file and transfer L.R. Githunguri/Githiga/T.101 to Joseph Kiguru Kimani & Edwin Kimani Mugure in trust for other family members.
 - c. That the Deputy Registrar of this Honourable Court be authorized to sign all requisite documents/papers on behalf of the Respondents to facilitate the transfer of L.R. Githunguri/Githiga/T.101 to the Applicants and their siblings.
 - d. That cost of this application is borne by the Respondents.



2. The Applicants are the grandson and great grandson of Kiguru Mwiigi who was the brother of Phinehas Waningi Mwiigi.
3. The application is premised on the Supporting Affidavit of the 1st Applicant herein sworn on 22/5/2022. He averred that in 1959 Kiguru Mwiigi (Kiguru), deceased bought the suit land from his brother also deceased namely Phinehas Waningi Mwiigi (Phinehas). That in 1960 Kiguru gave Eunice Wanjiru Kimani (Eunice Wanjiru), his mother, the plot where she settled with her family. That the two brothers died before the transfer of the land was effected. That he and his co-Applicant were born and bred on the land 60 and 35 years ago respectively. That when the family of Phinehas declined to transfer the land, her mother obtained a grant in the estate of Phinehas and title was issued in her name. However, that state of affairs was short-lived as Milka Njoki, the wife to Phinehas obtained orders revoking the grant whereupon she was issued with a title for the suit land. That in 1990 Milka Njoki filed a complaint at the District Officer's office at Githunguri against Eunice Wanjiru. On deliberations the panel of elders determined ownership in favour of Eunice. Lastly, that they have been in occupation of the suit land since 1960 openly, exclusively and uninterrupted.
4. Rose Njeri Kamau, the 2nd Respondent denied the claim of the Applicants vide her Replying Affidavit sworn on the 5/8/22. That she and the 1st Respondent are the children of Phinehas and Milka Njoki. Denying the allegation of sale of land to Kiguru, she contended that Kiguru sold his land and relocated to Machakos and later Eldoret. When he fell sick he returned to Gachie where his brothers allowed him to cultivate the suit land on humanitarian grounds to sustain his family as he lived with his family in the communal villages (ex mau mau). She added that 1 acre was finally given to Kiguru's two wives by his brothers vide the Succ. Cause No. 6 of 1994 where Margaret Magiri Kimani, the mother of Eunice Wanjiru got 0.5 acres. That Kiguru never lived nor claimed the suit land in his lifetime. That while Eunice was actually married with her own land, she lived with her family on the suit land but was finally buried on her family land on her demise.
5. The deponent deposed to the cases that were filed with respect to the suit land to wit; Eunice obtained a grant leading to the issuance of title in her name vide Succ. Cause No. 151 of 1993; Milka successfully obtained orders revoking the grant on 23/2/1998; attempts to set aside the said orders was struck out on 8/12/1998. On 27/1/1999 Eunice moved the Court against Milka Njoki who by then was the registered owner of the suit land by way of Originating Summons seeking title by way of adverse possession over the suit land. Eunice Wanjiru and her witnesses concluded their testimony but when it came to the Defendants, Milka was stood down due to her failing health at 85 years old. The suit was later dismissed for want of prosecution.
6. Denying any adversity, the deponent stated that the occupation was interrupted by Milka Njoki and that moreover the said occupation was with the permission of the owner and that the Plaintiffs were but licencees.

The evidence of the parties

7. PW1 – Joseph Kiguru Kimani relied on his witness statement dated the 23/5/22 and produced documents marked as PEX No 1-19 in support of his claim.
8. That he is the son of Eunice Wanjiru born in 1961 on the suit land. Without producing any agreement of sale, he stated that Kiguru bought the suit land from his brother Phinehas in 1959. Upon purchase Kiguru gave the suit land to his daughter Eunice Wanjiru to reside in 1960. Phinehas died in 1987 while his brother Kiguru died in 1992 before the transfer of the suit land was effected. That said Kiguru never claimed the suit land from Phinehas from 1959 – 1992. Equally that Eunice Wanjiru never claimed the suit land from 1960 – 1987 before Phinehas passed away.



9. Lastly the witness stated that for the past 60 years none of the Respondents and their successors removed them from the suit land.
10. PW2 – Edwin Kimani Mugure stated that he is the grandson of Eunice Wanjiru and was born on the suit land in 1985. That his mother and grandmother were never buried on the suit land. Reiterating the evidence of PW1, he stated that he is not conversant with the history of the suit land.
11. PW3 - Monica Nyambura Gachie stated that she has known the family for a long time and she was present when Phinehas sold the land to Kiguru, who later gave to his daughter Eunice Wanjiru to reside in.
12. DW1 – Rose Njeri Kamau testified and relied on her witness statement dated 18/8/22 in chief and produced documents marked DEX 1-8.
13. She stated that she is the daughter of Milka Njoki and Phinehas. She denied that Phinehas sold the suit land to Kiguru. The Plaintiffs live on the land with the permission of Phinehas as licencees. That Kiguru died in 1992 while her father died in 1987 and for all that time Kiguru never claimed the land hence he had no claim on the land other than as a licensee. That Milka Njoki wrestled the land from the hands of Eunice Wanjiku and got registered in 1994 to date.
14. Parties filed written submissions which I have read and considered.
15. The key issues for determination are;
 - a. Whether the Applicants are entitled to title by way of adverse possession
 - b. Costs of the suit
16. I will lay the statutory foundation of the doctrine of adverse possession in Kenya as founded in the Limitations of Actions Act Cap 22 and the Registration of *Land Act* No 6 of 2012; Section 7 states that:-

“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.”

Finally, Section 38(1) and (2) states;

 - “(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 or lease in place of the person then registered as proprietor of the land.
 - (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”
17. The doctrine of adverse possession is indeed settled. In the case of *Mtana Lewa Vs. Kahindi Ngala Mwangandi* (2005)eKLR the Court of Appeal held that adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period which in Kenya is 12 years.



18. The Court in the case of *Leonola Nerima Karani Vs. William Wanyama Ndege*[2012] eKLR the Court citing the case of *Wambugu Vs. Njuguna* (1983) KLR 171 distilled the following guiding principles in respect to adverse possession:-
- a. The general principle is that until the contrary is proved possession in law follows the right to possess.
 - b. 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 for which he intended to use it.
 - c. The *limitation of Actions Act*, in adverse possession contemplates two concepts, disposition and discontinuance of possession. 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.
 - d. Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid sale or agreement, the possession becomes adverse and time begin to run at the time the licence is determined. Prior to the determination of the licence, the occupation is not adverse but with permission. The occupation can only be either with permission or adverse; the two concepts cannot co-exist.
 - e. The rule on permissive possession is that possession does not become adverse before the end of the period during which the possessor is permitted to occupy the land.
 - f. Adverse possession means that a person is in possession in whose favour time can run...
 - g. Where the claimant is a purchaser under a contract of sale of land, it would be unfair to allow time to run in favour of the purchaser pending completion when it is clear that he was only allowed to continue to stay because of the pending purchase because had it not been for the pending purchase, the vendors would have evicted him. The possession can only become adverse once the contract is repudiated...
 - h. Where a claimant pleads the right to land under an agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is the claimant's possession is deemed to have become adverse to that of the owner after the payment of the last instalment of the purchase price. The claimant will succeed under adverse possession upon occupation of at least 12 years after such payment.
17. Equally in the case of *Kimani Ruchine Vs. Swift Rutherford & Co. Ltd* (1980) KLR 10 as per Kneller J. stating:

“... The Plaintiffs have to prove that they have used this land which they claim as of right. *Nec vi, Nec Clam, Nec Precario* (no force, secrecy or persuasion) ...show that the company had knowledge of possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavors to interrupt it or by way of recurrent consideration.”



18. He who alleges must prove. It is trite that adverse possession is a fact to be observed upon the land and not on the title. The Applicant bears the burden of leading evidence to ascertain adverse possession. This Court agrees with the dicta of the Court in *Gabriel Mbui Vs. Mukindia Maranya* [1993]eKLR when it stated that;

“The adverse character of 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 12 years or more. In addition there must be facts showing a clear intention to hold adversely and under a claim of right. Defacto use and defacto occupation must be shown.”

19. In this case it is not in dispute that the 1st Applicant’s mother Eunice entered the suit land in 1960 allegedly pursuant to a sale between Phinehas and Kiguru, her deceased father. It was the 1st Applicant’s case that Phinehas and Kiguru being brothers sold land to each other but both died before the transfer was affected. The Respondents on the other hand admit that Kiguru was cultivating the land with the permission of Phinehas as he lived in the community villages and due to his proximity, he was tasked to care for the land as well as cultivate it to feed his family. They deny any sale between the two brothers.
20. The import of the above evidence is that possession is commonly acknowledged. Even if the Court was to accept the Applicant’s mother’s mode of entry was through a purchase, the same would be a permissive entry. That said the Applicants failed to prove any evidence in support of a purchaser’s right. The Court therefore finds that the entry of the Applicant’s mother was permissive from 1960 – 1987 when Phinehas died. Evidence was led that neither Kiguru nor Eunice claimed the land during the lifetime of Phinehas the original owner of the land.
21. After the demise of Phinehas in 1987, Eunice and the Applicants continued their occupation of the land cultivating and building houses for their families. Unchallenged evidence was led that Eunice and her whole family lived on the land.
22. In 1990 Milka Njoki filed a suit at the Land Dispute Tribunal at Githunguri seeking to remove Eunice and her family from the land. The panel of elders found in favour of Eunice and the matter rested there.
23. Fastforward Kiguru died in 1992 and Eunice hinging for a title approached Milka Njoki to transfer the land to her but upon her refusal, she took matters in her own hands and petitioned for Letters of Grant of Administration in the estate of Phinehas in 1993. On hearing the outcome, Milka moved the Court to revoke the said Grant in 1998 and immediately procured a title for the suit land in her name. That notwithstanding Milka Njoki being the registered owner of the suit land took no steps to remove Eunice and the Applicants from the suit land.
24. When did time start running for purposes of calculating adverse possession? From the above analysis the Court finds that time started running from 1998 when Milka became registered as owner of the land and for the next 12 years that is to say 2010, adverse possession matured and crystalized in favour of the Applicants. I say so because there was no evidence led by the Respondents to show any action that was taken by the estate of Phinehas, Milka Njoki or the Respondents for that matter to remove the Applicants from the suit land.
25. It is not disputed that Eunice filed an Originating Summons in 1999 seeking title by way of adverse possession. This case was dismissed in 2012 for want of prosecution. It suffices to note that this case did little to interrupt time from running.
26. In the case of *Jandu Vs. Kirpal* [1975] E A 225, at p 237 and *Wainaina Vs. Murai and Others* [1976] Kenya L R 227 at p 231 the Court was unanimous that the paper owner must have knowledge of the



- occupation of the adverse possessor and that he has been dispossessed. In this case the Respondents and their mother Milka Njoki had knowledge of the open and exclusive possession of the suit land by the Applicants and took no steps to either successfully dispossess them or file suit for their removal.
27. From the forgoing, therefore, the title held by Milka Njoki was encumbered with a beneficial interest of adverse possession in favour of the Applicants as at 2010.
28. Costs follow the event and in this case the Applicants have become successful in their claim and I see no reason to deny them costs.
29. In the end the Court finds for the Applicants and I enter judgment in their favour as follows;
- a. That it is hereby ordered that the late Eunice Wanjiru, her family who include the Applicants Joseph Kiguru Kimani and Edwin Kimani Mugure who have been in adverse possession of L.R. Githunguri T. 101 from 1960 to date be and are hereby declared the owners thereof and be registered as the absolute proprietors thereof.
 - b. That the Respondents herein being the heirs / administrators of the late Milka Njoki do transfer L.R. Githunguri/Githiga/T.101 to Joseph Kiguru Kimani & Edwin Kimani Mugure in trust for their family members.
 - c. That the Deputy Registrar of this Honourable Court be and is hereby authorized to sign all requisite documents on behalf of the Respondents to facilitate the transfer of L.R. Githunguri/Githiga/T.101 to the Applicants and their siblings.
 - d. That cost of this application to be borne by the Respondents.
30. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 19TH DAY OF NOVEMBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Mwai for 1st and 2nd Applicants

Wanderu HB Kingara for 1st and 2nd Respondents

Court Assistant – Phyllis

