



**Kanotha (Suing as a Representative of the Estate of Alice Wangari Ruukwaro)  
v Njuguna & another (Environmental and Land Originating Summons  
E022 of 2024) [2024] KEELC 14151 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 14151 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E022 OF 2024  
JO MBOYA, J  
DECEMBER 19, 2024**

**BETWEEN**

**EPHRAIM KANIU KANOTHA (SUING AS A REPRESENTATIVE OF THE  
ESTATE OF ALICE WANGARI RUUKWARO) ..... PLAINTIFF**

**AND**

**FRANCIS NUMI NJUGUNA ..... 1<sup>ST</sup> DEFENDANT**

**JACOB NDOTONO WAIGANJO ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff herein approached the court vide Originating Summons dated the 11<sup>th</sup> March 2024 and wherein same [Plaintiff] has sought for the following reliefs;
  - i. That the deceased herein be declared the rightful owner of the suit property Title Number 13330/546 by adverse possession of over 12 years since 2011 and the same form part of her estate available for distribution to her beneficiaries.
  - ii. An order do issue to the Land Registrar Nairobi to strike out the names of the 1st respondents from the Register and subsequently enter the name of the administrator of the estate of the deceased as the proprietor of the suit property Title Number 13330/546.
  - iii. A permanent injunction do issue restraining the Respondents whether by themselves, their servants, representatives, agents and/or assigns howsoever from dealing with, entering in, obstructing any activities on, interfering with the Applicant's agents and or representatives subdividing, demolishing any structures on, selling, alienating, occupying and/or or in any other way interfering with the suit properties.
  - iv. That the costs of this suit be provided for.



2. The Originating Summons beforehand is anchored/premised on various grounds which have been highlighted in the body thereof. In addition, the originating summons is supported by the affidavit of one Ephraim Kaniu Kangotha [Plaintiff] sworn on the 11<sup>th</sup> March 2024. Furthermore, the deponent has also annexed assorted documents including a copy of the grant of letters of administration ad litem and copy of the sale agreement executed between Alice Wangari Rukwaro [now deceased] and the Second Respondent.
3. The originating summons beforehand was served upon the Defendants vide advertisement pursuant to an order of the court issued on the 7<sup>th</sup> October 2024. However, despite service vide advertisement, the Defendants herein neither entered appearance nor filed any statement of defence.
4. Arising from the foregoing, the Plaintiff implored the court to have the originating summons heard and disposed of on the basis of affidavit evidence. In this regard, the court proceeded to and issued directions in accordance with the provisions of Order 37 Rules 16 and 17 of the Civil Procedure Rules, 2010. In particular, the court directed that the originating summons shall proceed on the basis of affidavit evidence.
5. Additionally, the court ordered and directed the Plaintiff to file written submissions. To this end, the Plaintiff proceeded to and filed written submissions. Suffice it to state that the Plaintiff indeed filed Written Submissions and wherein, same [Plaintiff] highlighted the grounds contained in the body of the originating summons and the contents of the supporting affidavit.

### **Parties' Submissions:**

#### **a. Plaintiff's Submissions:**

6. The Plaintiff filed written submissions dated the 25<sup>th</sup> November 2024 and wherein the Plaintiff adopted and reiterated the averments contained in the body of the supporting affidavit. In addition, the Plaintiff also highlighted the contents of the various annexures annexed to the supporting affidavit.
7. Furthermore, the Plaintiff herein isolated and canvassed three [3] salient issues for consideration and determination by the court. Firstly, it was submitted that the deceased namely Alice Wangari Ruukwaro entered into and executed a sale agreement with the 2<sup>nd</sup> Defendant. Besides, it was contended that the sale agreement under reference was reduced into writing and same was executed by both parties.
8. It was the further submissions on behalf of the Plaintiff that at the time of entry into and execution of the sale agreement, the 2<sup>nd</sup> Defendant [vendor] had not procured and or obtained the certificate of title. Nevertheless, it was agreed between the 2<sup>nd</sup> Defendant and the deceased that upon procuring the certificate of title, the 2<sup>nd</sup> Defendant would facilitate the transfer and registration of the suit property to and in favour of the deceased.
9. Notwithstanding the foregoing, the Plaintiff has contended that upon the entry into and execution of the sale agreement, the 2<sup>nd</sup> Defendant granted vacant possession to and in favour of the deceased. In this regard, it was submitted that the deceased entered upon and took possession of the suit property. To this end, the Plaintiff submitted that the deceased took possession of the suit property in the year 2001.
10. Secondly, it was submitted on behalf of the Plaintiff that the deceased remained in occupation of the suit property up to and including the time of her death. In any event, the Plaintiff submitted that even after the death of the deceased, the Plaintiff herein has remained in occupation of the suit property. In



this regard, the Plaintiff has submitted that the occupation by the deceased and by extension by the Plaintiff himself has been continuous, uninterrupted and for a period exceeding 12 years.

11. Thirdly, learned counsel for the Plaintiff has submitted that unknown to the deceased, the 2<sup>nd</sup> Defendant herein appears to have entered into another agreement with the 1<sup>st</sup> Defendant in the year 2011 and wherein the 2<sup>nd</sup> Defendant sold to and in favour of the 1<sup>st</sup> Defendant the suit property. In particular, it has been contended that the sale and transfer of the suit property to the 1<sup>st</sup> Defendant arose in the year 2011.
12. Nevertheless, it has been submitted that by the time the 2<sup>nd</sup> Defendant was entering into a sale agreement with the 1<sup>st</sup> Defendant and thereafter transferring the suit property to the 1<sup>st</sup> Defendant, the deceased was already in occupation and possession of the suit property.
13. Further and at any rate, learned counsel for the Plaintiff has submitted that even though the 1<sup>st</sup> Defendant bought and purchased the suit property in the year 2011, the 1<sup>st</sup> Defendant has neither entered upon nor taken possession of the suit property. To the contrary, it has been submitted that the suit property has been under the occupation and possession of Alice Wangari Rukwaro [ Deceased]; and thereafter under the occupation/possession of the Plaintiff herein.
14. Arising from the foregoing, it has been submitted that the deceased acquired and/or accrued adverse possessory rights to and in respect of the suit property. In any event, it has been submitted that the adverse possessory rights/prescriptive rights have accrued against both the Defendants herein.
15. Premised on the foregoing, learned counsel for the Plaintiff has therefore implored the court to find and hold that the Plaintiff herein has established/proved the requisite ingredients that underpin a claim for adverse possession. In this regard, counsel has contended that the occupation and possession of the suit property by the deceased and subsequently by the Plaintiff herein, have been adverse to the interest[s] and rights of the Defendants.

#### **b. Defendants' Submissions:**

16. The originating summons was served upon the Defendants vide advertisement. However, despite service, the Defendants neither entered appearance nor filed any statement of defence. Furthermore, neither of the Defendants attended court nor participated in the proceedings.
17. Additionally, it suffices to underscore that the Defendants herein also did not file any written submissions. In this regard, the only written submissions which were filed and form part of the record are the submissions on behalf of the Plaintiff.

#### **Issues for Determination:**

18. Having reviewed the originating summons dated the 11<sup>th</sup> March 2024; the supporting affidavit thereto and the written submissions filed on behalf of the Plaintiff, the following issues crystalize and are thus worthy of determination;
  - i. Whether the deceased and by extension the Plaintiff herein have been in occupation and possession of the suit property.
  - ii. Whether the occupation and possession of the suit property by the deceased and the Plaintiff, if any; was adverse/hostile to the rights/interests of the Defendants.
  - iii. Whether the Plaintiff is entitled to the orders sought or otherwise.



## Analysis and Determination

### Issue Number 1

Whether the deceased and by extension the Plaintiff herein have been in occupation and possession of the suit property.

19. The Plaintiff herein has filed the subject originating summons and wherein same [Plaintiff] has contended that Alice Wangari Ruukwaro [deceased] entered into and executed a sale agreement with the 2<sup>nd</sup> Defendant. In addition, it has been contended that the sale agreement was reduced into writing.
20. Additionally, it was posited that at the time of entering into and execution of the sale agreement, the 2<sup>nd</sup> Defendant, namely the vendor, was not in possession of the certificate of title. Nevertheless, the Plaintiff contended that the deceased and the 2<sup>nd</sup> Defendant agreed that the suit property would be transferred to the deceased as soon as the 2<sup>nd</sup> Defendant procured the certificate of title.
21. Be that as it may, the Plaintiff averred that despite the absence of the certificate of title, the 2<sup>nd</sup> Defendant granted vacant possession to and in favour of the deceased. To this end, it was posited that the deceased indeed entered upon and took possession of the suit property. For coherence, it has been averred that the deceased entered upon and took possession of the suit property in the year 2001.
22. It was the further averment by the Plaintiff that upon taking possession of the suit property, the deceased commenced to and carried out subsistence farming on the suit property. Besides, it was also contended that the deceased also erected/constructed a structure on the suit property.
23. Furthermore, the Plaintiff averred that even though the deceased did not procure and obtain title to the suit property, the deceased remained in occupation of the suit property until her death. Besides, it has been averred that even after the death of the deceased, the Plaintiff herein has remained in occupation of the suit property to date.
24. Suffice it to underscore that the averments contained and/or adverted to in the body of the supporting affidavit have neither been controverted nor challenged. In this regard, the court has no alternative but to believe the veracity thereof.
25. To this end, it is therefore my finding and holding that the Plaintiff has established and demonstrated that the deceased and by extension himself [Plaintiff] have been in occupation and possession of the suit property to date. [See the provisions of sections 107,108 and 109 of the [Evidence Act](#), Chapter 80, Laws of Kenya]
26. Before departing from this issue, it is instructive to outline that being a civil claim, the Plaintiff is only obligated to prove the facts on a balance of probabilities/preponderance of probabilities. Suffices it to point out that on the basis of balance of probabilities, it is enough to make a statement on oath and when the statement of oath is neither controverted nor impugned, a court of law is called upon to believe the statement of facts, unless there exists some compelling reason[s] to the contrary.
27. In the case of Agnes Nyambura Munga (suing as the Executrix of the Estate of the late William Earl Nelson) v Lita Violet Shepard (sued in her capacity as the Executrix of the Estate of the Late Bryan Walter Shepard) [2018] eKLR, the court of Appeal addressed the incidence of burden of proof and stated as hereunder:

The burden of proving the existence of any fact lies with the person who makes the assertion. That much is clear from Sections 107 and 109 of the [Evidence Act](#). The standard of proof



is on a balance of probabilities which Lord Denning in the case of *Miller vs Minister of Pensions (1947)* explained as follows:

That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

See *D. T. Dobie & Company (K) Ltd vs Wanyonyi Wafula Chebukati [2014] eKLR*.

28. Flowing from the foregoing, my answer to issue number one[1] is to the effect that the Plaintiff herein has established and demonstrated that the deceased and by extension himself [Plaintiff] have been in continuous and uninterrupted occupation/possession of the suit property, to the exclusion of the Defendants.

## **Issue Number 2**

Whether the occupation and possession of the suit property by the deceased and the Plaintiff, if any; was adverse/hostile to the rights/interests of the Defendants.

29. Having found and held that the deceased entered into and executed a sale agreement with the 2<sup>nd</sup> Defendant; and having further found and held that the deceased took possession and occupation of the suit property in the year 2001, the next issue that merits consideration is whether or not the occupation and possession was adverse/hostile to the Defendants' title.
30. To start with, there is no gainsaying that the entry upon and taking possession of the suit property by the deceased was borne out of contract. In particular, it is not lost on this court that the deceased and the 2<sup>nd</sup> Defendant entered into and executed a sale agreement. In this regard, it suffices to underscore that the granting of possession in favour of the deceased was therefore underpinned by the sale agreement.
31. Be that as it may, it is also important to outline that the contract/sale agreement between the deceased and the 2<sup>nd</sup> Defendant could only subsist for a period of 6 years. In this regard, if the contract was not performed and or actualized within the statutory 6 years, the rights attaching to and arising from the sale agreement would stand extinguished. See the provisions of Section 4[1] of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.
32. Be that as it may, it has been contended that even though the deceased entered into and executed a sale agreement with the 2<sup>nd</sup> Defendant, the 2<sup>nd</sup> Defendant herein neither transferred the suit property to the deceased nor caused same [suit property] to be registered in the name of the deceased. On the contrary, it has been contended that the 2<sup>nd</sup> defendant entered into another sale transaction with the 1<sup>st</sup> Defendant in the year 2011.
33. Nevertheless, evidence abound that even though the 2<sup>nd</sup> Defendant entered into a sale agreement with the 1<sup>st</sup> Defendant and thereafter transferred the suit property to the said 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant neither commenced any eviction proceedings against the deceased nor recovered vacant possession of the suit property from the Deceased.



34. On the other hand, it is also appropriate to state that by the time the suit property was being sold to and in favour of the 1<sup>st</sup> Defendant, the deceased was already in occupation thereof. However, the 1<sup>st</sup> Defendant did not request the 2<sup>nd</sup> Defendant to evict the deceased from the suit property. In this regard, it suffices to underscore that the 1<sup>st</sup> Defendant acquired the suit property during the occupation and possession of the suit property by the deceased.
35. Having acquired the suit property during the subsistence of the occupation and possession by the deceased, it is imperative to underscore that the acquisition of the suit property by the 1<sup>st</sup> Defendant was therefore subject to the rights/ overriding Interests which had accrued in favour of the deceased and by extension the Plaintiff herein.
36. In particular, it suffices to posit that whosoever acquired a property which is under the occupation of a third party, the deceased not excepted, is taken to have acquired such property [suit property] subject to the encumbrances/ overriding Interests attaching thereto. Simply put, the sale/ transfer of the land does not defeat the subsisting overriding Interest[s].
37. To underscore the foregoing statement of the law, it suffices to cite and reference the provisions of Section 28 of the *Land Registration Act*, 2012. Same stipulate thus;
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—
- (a) spousal rights over matrimonial property;
  - (b) trusts including customary trusts ;
  - (c) rights of way, rights of water and profits subsisting at the time of first registration under this Act;
  - (d) natural rights of light, air, water and support;
  - (e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
  - (f) leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies;
  - (g) charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;
  - (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
  - (i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and
  - (j) any other rights provided under any written law.
38. Other than the cited provisions [detains in terms of the preceding paragraph] it is also apposite to state that the claim of adverse possession also affects a purchaser of a property, who acquires a property which is subject to adverse possession claims. To this end, the adverse possessory claims affect[s] both the original land owner as well as the purchaser. Consequently, the 1<sup>st</sup> Defendant who purchased the



suit property which was under the occupation by the deceased and by extension the Plaintiff herein, is bound by the plea of adverse possession.

39. To buttress the foregoing exposition of the law, it is instructive to recall and reiterate the dictum of the Court of Appeal in the case of *Mwangi Githu v Livingstone Ndeete* (Civil Appeal 24 of 1979) [1980] KECA 35 (KLR) (Civ) (8 July 1980) (Judgment), where the court stated as hereunder;

Firstly, he submitted that change of ownership interrupts adverse possession, and that accordingly time did not begin to run against the appellant until he was registered as proprietor of the land in 1966. The answer to this submission is that immediately before the appellant became the registered proprietor in 1966 the respondents were in the course of acquiring rights under section 7 of the *Limitation of Actions Act*, cap 22, and by virtue of section 30 (f) of the Registered *Land Act*, cap 300, those rights are overriding interests. The appellant even as a registered purchaser for value could never be in a better position than his predecessor in title and must take subject to the rights of squatters.

40. Secondly, the Plaintiff herein tendered and adduced evidence that even though the 1<sup>st</sup> Defendant became the registered proprietor of the suit property in the year 2011, same [1<sup>st</sup> Defendant] has never taken any action to reclaim or recover the suit property. To this end, it is therefore evident that the 1<sup>st</sup> Defendant has been dispossessed of his title to and in respect of the suit property by the law of limitation. [See Sections 7,12 and 13 of the *Limitation of Actions Act*].
41. Additionally, the Plaintiff averred that the occupation and possession of the suit property by the deceased and by extension himself [Plaintiff] have been continuous, open and uninterrupted. In short, the activities that were being undertaken on the suit property by the deceased and by extension, the Plaintiff, have been overt and discernible by all and sundry, the 1<sup>st</sup> Defendant not excepted.
42. To my mind, the Plaintiff has demonstrated and proved that the occupation and possession of the suit property by the deceased and by extension the Plaintiff herein, have been adverse and hostile to the rights/interests of the Defendants.
43. Suffice it to underscore that the Plaintiff has met and established the requisite ingredients that underpin a claim for adverse possession. In this respect, it is apposite to take cognizance of dictum in the case of *Mbira –vs- Gachuhi* (2002) IEALR 137 , wherein the court stated thus;

“...a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive of non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption.....”

44. Additionally, the ingredients to be proved and/or established before successfully mounting a claim for adverse possession were also highlighted in the case of *Jandu –v- Kirplal & Another* (1975) EA 225, where it was held:

“.....to prove title by Adverse Possession, it is not sufficient to show that some acts of Adverse Possession must be adequate in continuity, in publicity and in extent to show that it is Adverse to the owner. It must be actual, visible, exclusive, open and notorious. ”

45. Arising from the foregoing, my answer to issue number two [2] is threefold. Firstly, the 1<sup>st</sup> Defendant herein bought/acquired the suit property subject to the encumbrances/ overriding Interest[s]



attaching thereto. In this regard, the 1<sup>st</sup> Defendant's title is subject to the adverse possessory claims/prescriptive rights in favour of the Plaintiff.

46. Secondly, the Plaintiff has ably demonstrated that the deceased had been in occupation and possession of the suit property without the consent and permission of the 1<sup>st</sup> Defendant. In any event, the permission/consent hitherto attaching to the contract/sale agreement with the Second Defendant lapsed by effluxion of time.
47. Thirdly, the Plaintiff has been able to demonstrate that acts underpinning the claim for adverse possession have been open, overt continuous and uninterrupted. In this regard, the plea of adverse possession has been duly established and proven.

### **Issue Number 3**

Whether the Plaintiff is entitled to the orders sought or otherwise.

48. Taking into account the holding in terms of issue number two [2] herein before, it is evident that the Plaintiff has proved his claim to and in respect of the suit property. To this end, it suffices to posit that the Plaintiff is therefore entitled to a declaration that the 1<sup>st</sup> Defendant's title to the suit property stands extinguished by the operation of the law of limitation.
49. Additionally, it is also imperative to underscore that flowing from the extinction of the 1<sup>st</sup> Defendant's title to the suit property, the title to the suit property vests and/or inheres in the estate of Alice Wangari Rukwaro, now deceased. In this regard, the title to the suit property shall be registered in the name of Alice Wangari Ruukwaro [deceased] or her duly constituted legal administrator.
50. Finally, the Plaintiff herein sought for an order of permanent injunction. Notably, the court has found and held that the estate of Alice Wangari Ruukwaro is entitled to the suit property. To vindicate the rights and/or interest emanating from the declaration, it suffices to decree an order of permanent injunction. [See the decision in the case of Kenya Power and Lighting Company Limited versus Shariff Molana Habib [2018]ekl]
51. Without belabouring the point, it is my finding and holding that an order of permanent injunction is merited. In any event, unless such an order is issued then the rights and interests flowing from the judgment may not be actualized.

### **Final Disposition:**

52. Flowing from the findings and holdings [detains highlighted in the body of the judgment] it is evident that the court has come to the conclusion that the Plaintiff's case is meritorious. Notably, the Plaintiff has met and satisfied the provisions of Sections 107, 108 and 109 of the *Evidence Act*, Chapter 80 Laws of Kenya.
53. In the premises, the final orders that commend themselves to the court are as hereunder;
  - i. The Originating summons dated the 11<sup>th</sup> March 2024 be and is hereby allowed.
  - ii. A declaration be and is hereby issued that the Defendants title to and in respect of L.R No. 13330/546 [suit property], has been extinguished by effluxion of time and in particular vide Section 7 of the Limitation of Actions, Chapter 22, Laws of Kenya.
  - iii. The Defendant's title to and in respect of L.R No. 13330/546 [suit property], be and is hereby invalidated and nullified.



- iv. A declaration be and is hereby issued to the effect that L.R No. 13330/546 [suit property], belongs to Alice Ruukwaro Wangari [now deceased] and same forms part of her estate.
- v. A declaration be and is hereby made that L.R No. 13330/546 [suit property], shall be transferred to and registered in the name of the Plaintiff albeit to hold on trust for himself and the other beneficiaries of the estate of the deceased pending the relevant succession proceedings and ultimate distribution in accordance with the provisions of Section 71 of the Laws of Succession Act, Chapter 160 Laws of Kenya.
- vi. The Chief Land Registrar be and is hereby ordered and/or directed to effect the transfer and registration of L.R No. 13330/546 [suit property], in the name of the Plaintiff herein.
- vii. There be and is hereby granted an order of permanent injunction to restrain and/or prohibit the Defendants either by themselves, servants, employees and/or anyone acting on their behalf from entering upon, trespassing onto, dealing with and/or interfering with the Plaintiffs rights and/or interests over L.R No. 13330/546 [suit property], in any manner whatsoever and howsoever.
- viii. Costs of the suit be and are hereby awarded to the Plaintiff.

54. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF DECEMBER 2024.**

**OGUTTU MBOYA**

**JUDGE.**

**In the presence of:**

Benson/Hilda – court Assistant.

Mr. Mak’Owade for the Plaintiff.

N/A for the Defendants.

