



Chege & 2 others (Administrators of the Estate of the Late James Chege Ndwaru) v Njuguna (Environmental and Land Originating Summons 529 of 2000) [2025] KEELC 3208 (KLR) (27 March 2025) (Judgment)

Neutral citation: [2025] KEELC 3208 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 529 OF 2000
MD MWANGI, J
MARCH 27, 2025
IN THE MATTER OF THE LIMITATION OF ACTIONS ACTS
{CHAPTER 22 OF THE LAWS OF KENYA}
AND
IN THE MATTER OF TITLE NUMBER DAGORETTI/RIRUTA/T.36

BETWEEN

MARY WACUKA CHEGE 1ST APPLICANT
JANE WANJIKU CHEGE 2ND APPLICANT
JAMES WAINAINA CHEGE 3RD APPLICANT
ADMINISTRATORS OF THE ESTATE OF THE LATE JAMES CHEGE NDWARU
AND
JOEL GITAU NJUGUNA DEFENDANT

JUDGMENT

1. Through an Originating Summons dated 31st March, 2000, the Applicants claim they have had an exclusive and uninterrupted possession of the parcel of land known as Dagoretti/Riruta/T.36. They therefore call pray that the court determines the following questions;
 1. Have the Applicants become entitled under the Limitations of Actions Act CAP 22 of the Laws of Kenya to all Dagoretti/Riruta/T.36?
 2. Are the Applicants entitled to be registered as proprietors of the said parcel of land?



3. in the alternative does a partly –performed contract for the transfer of Dagoretti/Riruta/T.36 to James Chege Ndwaru (deceased) by the Respondent herein exists?
 4. Should the aforesaid contract then be seen to full completion?
 5. Who should meet the costs of this Application?
2. The Originating Summons is supported by the Affidavit of Mary Wacuka Chege sworn on 4th April, 2000. She deposes that she is one of the administrators of the estate of James Chege Ndwaru. She avers that when James Chege Ndwaru (deceased) purchased Dagoretti/Riruta/T.36 from Joel Gitau Njuguna in 1961, he immediately took possession pending its formal transfer. He continued to enjoy exclusive and uninterrupted possession of the property until his demise in 25th June, 1981. She avers that they have been enjoying exclusive and uninterrupted possession of the suit property jointly with her siblings since 22nd February, 1994 when they were issued with letters of administrator’s intestate.
 3. She affirms that upon discovery of the original certificate of the suit property in their possession, they approached the Respondent on 9th October, 1994 seeking that transfer be formalized. However, he was uncooperative despite attempts to have the matter resolved by the Assistant Chief of Kawangware Sub-location. She asserts that on 20th January, 2000, they were astonished when they learnt that the Respondent had applied for a new title deed through Gazette Notice No. 6306 dated 12th November, 1999. They objected to it by registering a caution on the same date.
 4. It is her view that as administrators of the estate of James Chege Ndwaru, they are entitled to the suit property through adverse possession because they have had uninterrupted and exclusive possession of it for 39 years since 1961.

Respondent’s Case

5. Responding the Originating Summons, the Defendant filed a Replying Affidavit sworn by Judy Njeri Joel on 11th April, 2023 who avers that she is the administrator of the estate of Joel Gitau Njuguna, the registered owner of the suit property as well as her grandfather. She affirms that Joel Gitau Njuguna never sold the suit property to James Chege Ndwaru neither was there any contract for sale nor was any consideration paid for the same as allege by the Applicants.
6. She explains that being a building contractor, James Chege Ndwaru was requested by her grandfather to pour soil on the suit property to make it level. Subsequently, he was granted a license to derive benefits from the property until such a time that the value of the suit property was paid as a way of consideration. She deposes that the license expired before the demise of James Chege Ndwaru.
7. The deponent contends that even though her grandfather gave Nganga Macharia, his deceased brother-in-law, the original title deed for safe keeping, the same could not be traced following the demise his brother-in-law.
8. She avers that James Chege Ndwaru’s property Dagoretti/Riruta/T.35 was adjacent to the suit property, and they took advantage to encroach into it. It is Respondent’s case that James Chege Ndwaru never occupied the suit property because he resided on Dagoretti/Riruta/T.35 all his life. The Respondent asserts that the deceased did not have exclusive and uninterrupted possession of the suit property. She denies that the Applicants hold the original title deed of the suit property as alleged.



Response to the Respondent's Replying affidavit

9. Replying to the Respondent's replying affidavit through the further affidavit of Mary Wacuka Chege sworn on 18th October, 2000, the Applicants restated that upon purchase of the suit property in 1961, the late James Chege Ndwaru immediately took up its possession pending formal transfer. It is alleged that even after his death on 25th June, 1981, the Applicants continued to enjoy exclusive and uninterrupted possession of the suit premises. The deponent avers that a caution was registered on the suit premises after they learned that the Respondent had sought to obtain a new title deed. She adds that the caution was removed by the Land Registrar on 6th September, 2000 after conducting a hearing.

Evidence adduced

10. PW1- Jane Wanjiku Chege, testified that she is a co-administrator of the estate of the late James Chege Ndwaru. She adopted her witness statement dated 13th September, 2023 and produced the documents on the list of documents dated 8th November, 2021 and 13th July, 2023 respectively as exhibits in support of the Applicants' case.
11. Responding to questions put to her in cross-examination, she averred that the suit property was acquired in 1961 even though she was not aware what happened prior to its purchase by her father. Even though she testified that there was a written agreement, she informed court that she never knew if her father had any relationship with the owner. Further, upon being granted possession of the suit property by the owner, her father used it for commercial purposes. The court was informed that in 1966, temporary structures were demolished from the suit property and proper ones were built. Additionally, that they lived on the suit property until 1970s when they moved to their fathers' farm.
12. Referring to the sale agreement dated 27th March, 1966, she testified that as at the time of the agreement, the seller had given the original title deed to her father. Further that the balance of Ksh. 270/= was paid in kind, not cash. Notwithstanding her admission that she never knew the persons who had witnessed the agreement, she stated that they were all dead. It was her evidence that before their father passed on in 1981, transfer of the suit property had not been effected. He had attempted to reach out to the seller. Likewise, their efforts to have the transfer effected in their favour did not bear any fruits. According to her testimony, permanent structures were constructed after their father passed away.
13. According to her evidence, no dispute existed in respect of the suit property with the owner which all along had been used for commercial purposes specifically rental houses. She affirmed that when the seller refused to effect the transfer upon the death of their father, they reported the matter to the chief. She informed court that the seller tried to remove the caution placed on the title. She admitted that she was aware of the proceedings before the Land Registrar and their outcome.
14. On re-examination, the witness testified that the proceedings before the land registrar took place in 2001 and that subsequent to their father's demise, they collected rent from the wooden structures erected on the suit property. Further, the proceedings before the Land Registrar showed that they only appeared before the Kawangare Chief once. In addition, the proceedings revealed that it was Wacuka who had been given the original title deed who lived on the property. She told court that although she met Gitau, the seller in 1999. He had never asserted any rights over the suit.
15. PW2-Njoki Chege informed the court that the Applicants in this matter were her brothers and sisters and were the administrators of the estate of James Chege Ndwaru. She adopted her witness statements dated 8th November, 2021 and 13th July, 2023 as her evidence in chief.



16. Responding to questions in cross examination, it was her evidence that as at the time the suit property was sold through a sale agreement dated 17th March, 1966, the purchasers was already in possession. She swore that the balance of the purchase price amounting to Ksh. 270/= was paid. She affirmed that her father had developed wooded structures with mabati on the suit property prior to his death in 1981. The structures were later replaced with permanent homes from which they collected rent.
17. She informed court that after the demise of her mother in 1996, she commenced construction of permanent houses on the property. Despite having in their possession the original title, efforts to have it transferred to them did not bear any fruits. She affirmed that she was not aware whether her father tried to effect transfer of the title to himself neither did she know if he communicated with the seller of the suit property. Although she admitted that she was aware of existence of disputes and proceedings over the suit property before the Land Registrar, she was not aware of the outcome. She acknowledged that she did not have any documentation to prove she personally paid rates of the suit property as alleged.
18. When she was referred to the invoices and receipts of water bill from Nairobi City Council during re-examination, she confirmed that they were issued in the name of James Gitau Ndwaru. It was her testimony that the suit property which she jointly occupies with her family belongs to her father. She added that her father used to send her to collect rent from the property since he was its owner. Through her own admission, she affirmed that the Land Registrar's decision was delivered in the year 2000.
19. DW1- Judy Njeri Joel testified that she was the administrator of the estate of Joel Gitau Njuguna. In support of her case, she adopted her replying affidavit sworn on 11th April, 2003, and the witness statement dated 24th October, 2023 as her evidence in chief. She further produced the documents on the list of documents dated 24th October, 2023. It was her evidence that although she did not know the Applicants personally, she had heard that their late father was a friend of her late grandfather. It was her testament that her grandfather used to state that the Applicants' father had attempted to take over the suit property from him. There were attempts to resolve the dispute.
20. In cross-examination, she attested that she did not have any evidence to prove existence of a reconciliation meeting as alleged. She told court that before her grandfather's death in 2003, he used to take her to suit property. Further, he never informed her if he had any case in respect of the suit property. She admitted that they were not in possession of the suit property. She also informed court that the Applicants took possession of the property upon the demise of their father.
21. When she was referred to the proceedings before the Land Registrar, she stated that her grandfather admitted that he never lived in T.86 and that Wachuka was in possession of the suit property. Upon being asked whether she had any evidence to proof Ndwaru came into the suit property as a licensee, she responded that she did not have any proof.
22. Though she testified that she never knew Nganga Macharia in person nor did she have any evidence that he had the original title deed at any time, it was her evidence that her grandfather never gave him the original title to sell the property. She testified that according to the proceedings before the Land Registrar, her grandfather stated that he gave the title to the suit property to Nganga Macharia to sell the property. She confirmed that the Applicants had been paying rates for the suit property.
23. In re-examination, she stated that in January she had discovered that the suit property rates had been paid by someone else though she had previously paid them. She informed court that she became aware of the existence of the suit property from her grandfather who used to talk about it. She affirmed that Joel Gitau Njuguna gave the original title deed to his deceased brother-in-law Ng'ang'a Macharia in 1994 for safe custody.



Directions by the Court

24. Upon close of the hearing, the court directed parties to file written submissions. Both parties complied and the court has had an opportunity to read and consider them in writing this judgement. They form part of the record of this court.
25. The Applicants in their submissions dated 28th November, 2024 cite sections 7 and 38 of the Limitations of Act and various court decisions amongst them *Mbira vs Gachuki (2002) I EA, 137* and *Celina Muthoni Kithinji vs Safiya Binti Swaleh & Others (2018)eKLR*. They submit that for their case to succeed, the following questions must be answered in the affirmative;
 - a. Have the Applicants' use of the suit property been continuous for 12 years and exclusively?
 - b. Have the Plaintiffs/Applicants' use of the suit property been without the permission of the Defendant?
 - c. Have the Plaintiffs/Applicants' use of the suit property been open, adverse and notorious to the interest of the Defendant?
26. In respect of the first question, it is argued that the Respondent has not contested that fact that the Applicants constructed houses on the suit property from which they collect rental income. Further the Applicants have proved existence of their have developments on the suit property. The proceedings before the Land Registrar also confirm possession of the suit property from 1961, a fact that was within the knowledge of the registered owner and his estate. It is further submitted that the Respondent admitted in their evidence that the Applicants' occupation of the suit premises began in 1961.
27. According to the Applicants, it is undisputed that Joel Gitau Njuguna, the registered proprietor of the suit property was issued with its freehold certificate of title on 13th July, 1961. It is further argued that upon being granted possession of the suit property in 1961, the Applicants' father settled therein and in 1966 was collecting rental income from the structures erected on the suit property. Further, possession and open development of permanent structures on the suit property continued even after the demise of the Applicants' father in 1981.
28. The Applicants have been in exclusive possession of the suit property openly and as of right without interruption for a period of 12 years either after dispossessing the Respondent or by discontinuation of the possession of the Respondent on his own volition.
29. The Applicants submit that a person claiming adverse possession must prove when they came into possession, nature of possession, whether fact of possession was known to the other party, duration of continuous possession and if possession was open and undisturbed for a requisite period of 12 years. It is argued that the Applicants have acquired title to the suit property by adverse possession for more than 12 years effective either 1961 to 1981 or 1981 to 2000. In conclusion, the court is beseeched to enter judgment in favor of the Applicants as prayed because they have proved their claim over the suit property through adverse possession.
30. The Respondent places reliance on court decisions in *Mtana Lewa vs Kahindi Ngala Mwangandi (2015) eKLR*, *Mwinyi Hamis Ali -vs- Attorney General and Philemon Mwaisaka Wanaka, Civil Appeal No.125 of 1997* and *Gabriel Mbui vs Mukindia Maranya (1993) eKLR*, to argue that adverse possession only arises out of non-permissive possession. It is submitted that the Applicants' father never entered the suit premises as a trespasser but with the permission of the registered owner. It is submitted that according to the Applicants, their father's entry into suit property was purportedly pursuant to an oral agreement of 1961 which was later reduced into writing. It is argued that the



purported sale agreement was manufactured for the purposes of this case as demonstrated from the inconsistencies in the Applicants' testimony and documentations.

31. The Respondent submits that considering it is not known when the last installment of the balance of the purchase price was paid according to PW1 and PW2 testimonies, then the claim for adverse possession is uncertain.
32. It is submitted that the Applicants have not demonstrated that they have had peaceful, open and continuous possession of the suit property without the permission of the owner. According to Respondent, the Applicant cannot claim the suit property through adverse possession because there was permission and consent to enter into the suit property. It is further submitted that PW2 who is in occupation of the suit property attested during cross-examination that she put up the permanent structures on the suit property after her father's demise. It is argued that the suit property was never sold and that if it was sold, the Applicants' fathers would have taken action to have the title that was allegedly in his custody transferred to his name.
33. The Respondent reiterates that a claim for adverse possession cannot succeed if entry into the suit property was through a license. It is further argued that the Applicants have failed to demonstrate that they have had a peaceful and quiet possession of the suit property. The Tribunal proceedings showed existence of a long-standing dispute between the Respondent's grandfather and the late James Ndwaru over the suit property. The proceedings also show that the late Joel Gitau asked the Applicants and their father to exit the suit property severally.

Issues for determination

34. The issues for determination are as defined in the OS which are highlighted at the beginning of this judgement.

Determination

35. The law governing adverse possession in Kenya which parties have extensively quoted in their submissions is the *Limitation of Actions Act*, CAP 22 of the laws of Kenya.
36. Section 13 which is hereby reproduced provides as follows in respect to right of actions for adverse possession;

“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.”

37. The Court of Appeal in Mtana Lewa case (supra) while interpreting the above provisions explained the concept and meaning of adverse possession as follows;

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against



such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or 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 owner.”

38. The Applicants’ claim for adverse possession over the suit property is premised on grounds that upon purchase of the suit property from Joel Gitau Njuguna in 1961, their father, the late James Chege Ndwaru took possession of the suit property pending transfer of the title to be effected in his name. They also allege that he had in his possession the original title to the suit property and which was given to him by the late Joel Gitau Njuguna. The Applicants contend that their occupation and possession of the suit property was uninterrupted until the demise of their father, James Chege Ndwaru in 1981.
39. During their testimony, PW1 and PW2 testified that as at 1961 when the suit property was purchased, they were already in possession of it. They also informed court that in 1966, their late father put up temporary structures on the property. The temporary structures were later replaced in 1981 with permanent structures from which they collect rental income. During the hearing, they also testified that during their father’s lifetime, he attempted to have the title of the suit property transferred to his name but failed. Upon his demise, they too attempted but never succeeded because the Respondent adamantly refused to effect the transfer.
40. The Respondent has dismissed the Applicants’ assertions and maintains that possession of the title of suit property is not evidence of ownership of the suit property.
41. Parties have not disputed that the registered owner of the suit property is Joel Gitau Njuguna. This can be confirmed from a certificate of freehold title issued on 13th July, 1991. The Respondent avers that the late Joel Gitau Njuguna gave the suit land original title deed to his deceased brother-in-law Ng’anga Macharia in 1964 for safe custody. Following the death of Ng’anga Macharia, Joel Gitau could not trace the whereabouts of the title deed. He was in fact taken ill at the same time. Joel Gitau Njuguna therefore sought issuance of a new title deed. This was effected through gazette notice no. 6306 of 12th November, 1999. Through the notice, the Land Registrar, Nairobi states that a new title deed shall be issued upon the expiry of 60 days if no objection was raised.
42. The Applicants accuse the Respondent of applying for issuance of a new title deed without their knowledge. According to the Applicants, this was done to defeat their purchaser’s rights because they had attempted to persuade the Respondent to effect transfer of the suit property in their favour with no success.
43. During cross-examination, PW1 attested that there existed a written sale agreement over the suit property between her father, James Chege Ndwaru and Joel Gitau Njuguna. In support of her evidence, she produced a sale agreement dated 27th March, 1966. The court notes that the agreement though written in Kikuyu was translated into English. However, the Applicants never filed a certificate of translation. Given the non-existence of the stated certificate, the court cannot place reliance on it. This is because its existence and contents have been disputed by the Respondent.
44. Even if the court were to proceed and consider the said agreement, the Applicants have not placed any material evidence before this court to demonstrate if the Respondent was paid the purported consideration in respect of the suit property. When Joel Gitau Njuguna appeared before the Land Registrar on 27th June, 2000, during the hearing for the removal of the caution, he stated that he had not sold the suit property as alleged.



45. The Court of Appeal in *Richard Wefwafwa Songoi vs Ben Munyifwa Songoi* [2020] KECA 942 (KLR), held that a claim for adverse possession will only succeed subject to fulfillment of the following conditions;

“A person who claims adverse possession must inter alia show:

- 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.

46. This position was further expounded by the Court in its decision in *Samuel Kihamba vs Mary Mbaisi* [2015] KECA 853 (KLR) which held as follows;

“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.”

47. Both parties acknowledge existence of disputes in respect of the suit property. Given this undeniable fact, did the existence of the dispute disrupt continuous possession and occupation of the suit property by the Applicant? In answering this question, it is crucial that I point out the following crucial information based on documentation placed before this court.

48. On 18th October, 1999, the Land Registrar issued summons to Joel Gitau Njuguna to appear before him on 4th November, 1999. The summons was in respect of a boundary dispute between him and James Chege Ndwaru as relates to Dagoretti/Riruta/T.39 on one hand and Dagoretti/Riruta/T.36 & 38 which was stated to have been encroached.

49. On 23rd November, 1999, the Chief of Kawangare location requested the Nairobi Land Registrar to assist Mr. James Chege Ndwaru children put a caution on the suit premises occasioned by an existence of dispute between them and Joel Njuguna Gitau who sold the suit property to their father. Upon consideration the dispute, the Nairobi District land registrar rendered a decision in respect to the boundary dispute.

50. The Respondent insists that they never sold the suit property. Clearly, the from the proceedings before the Land Registrar which took place in June 2000, the period between 1961 to 2000 cannot be used to compute the claim for adverse possession. Even though Joel Gitau Njuguna admitted that Wacuka was in occupation of the suit property and that he had never tried to evict her, he stated that he had severally requested them to leave peacefully the suit property.



51. The Court of Appeal in *Joseph Macharia Kairu v Kenneth Kimani Muiruri* [2021] eKLR, held as follow in respect of computation of time for adverse possession where a dispute exists;

“In order to stop time which has started running, it must be demonstrated that the owner of land took positive steps to assert his right by, for instance taking out legal proceedings against the person on the land or by making an effective entry into the land.”

52. Guided by the above decision, If the Applicants’ claim for adverse possession were to succeed, then the 12 years period time ought to be computed from the year 2000.

53. Following the demise of Joel Gitau Njuguna on 17th May, 2003, Solomon Njuguna Gitau and Judy Njeri Joel were issued with letters of administration intestate in respect of his estate in Nairobi High Court succession cause No. 969 of 2010 on 13th October, 2010. According to the certificate of conformation of grant issued on 7th November, 2017 in Nairobi High Court Succession Cause No. 1751 of 1993, the suit property was bequeathed upon all the deceased children and was to be shared equally. Through a ruling delivered on 21st July, 2021 by Muchelule J, the suit property was excluded from deceased estate. This was because the property was contested. While making its determination, the court stated as follows;

“It is therefore evident that at the time that the administrators herein were distributing the estate of the deceased, they knew that Dagoretti/Riruta/T.36 was not the free property of their late father (the deceased). They knew this was a disputed property. They stated that the deceased had a vide a sale agreement dated 27th March, 2006 bought the parcel from the late Joel Gitau Njuguna but that the transfer had not been effected. This information they were required to give to this court at the time of the confirmation of the grant of the estate of the estate of the deceased...”

54. While reviewing its judgment, the court stated that once HCCC No. 529 of 2000 (OS) is heard and determined and it is found that the parcel belongs to the deceased, it would be shared as ordered in its judgment.

55. From the totality of the evidence before the court, the court finds that the Applicants have not established their claim of adverse possession over the suit property on a balance of probabilities. Their occupation and possession was not peaceful due to on-going and protracted disputes of the suit property in various foras.

56. It is also apparent that the Applicants’ entry into the suit property was permissive; with the permission or license of the owner. They did not prove when the permissive entry became adverse to the title of the registered owner. Accordingly, the court holds and finds that the Plaintiffs claim is unmerited and dismisses it with cost.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 27TH DAY OF MARCH 2025

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Muigai h/b for Mr. Ndegwa for the Applicants



Ms. Amani Ndungu for the Respondent

Court Assistant: Mpoye

