



**Mwanje v Ikundu & another (Enviromental and Land Originating Summons
20 of 2018) [2024] KEELC 13634 (KLR) (5 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13634 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 20 OF 2018
LC KOMINGOI, J
DECEMBER 5, 2024**

BETWEEN

JUSTUS INONDA MWANJE PLAINTIFF

AND

NANCY WAIRIMU IKUNDU 1ST DEFENDANT

EUNICE MUTHONI GATHU 2ND DEFENDANT

JUDGMENT

1. By way of Originating Summons dated 14th December 2015 brought under Section 38 of the [Limitation of Actions Act](#) and other enabling provisions, the Plaintiff seeks the following reliefs;
 - i. That this Court be pleased to declare Justus Inonda Mwanje as the owner of land Ngong/ Ngong/18772 having obtained title thereto by adverse possession.
 - ii. That the name Lawrence Samuel Gathu as registered owner thereof be deleted from the register and in the place thereof be entered the name Justus Inonda Mwanje.
 - iii. That any subsisting title in respect of the property issued in the name of Lawrence Samuel Gathu be cancelled.
 - iv. That costs of this application be provided for.
2. The Plaintiff in his Supporting Affidavit dated 14th December 2015 claims that on 22nd January 1999 he entered into a sale agreement with Lawrence Samuel Gathu for the purchase of property known as Ngong/ Ngong/18772 for Kshs. 500,000. Upon executing the agreement, he paid a deposit of Kshs. 150,000 and the remaining amount was paid by January 2000. He took possession of the land, developed it and had been residing thereon together with his family since then. He stated that upon the purchase, the said Lawrence gave him the original title deed of the land and he was still in possession of the same. He stated that they were to attend the Land Control Board meeting to get consent to



transfer the land, but the said Gathu was often sickly and the visit to the Land Control Board had never materialised by the time he passed away in 2008. After his demise the Defendants' who are Gathu's widows and the Plaintiff's neighbours obtained letters of administration of Gathu's Estate vide High Court Succession Case No. 874 of 2011 and in a letter dated 11th September 2014 they tried to evict him from the suit property. He claims that he has openly and without interruption been on the suit property since 2000 and ought to be declared the owner of the property which he rightfully purchased.

3. The 1st Defendant Nancy Wairimu Ikindu in her Replying Affidavit sworn on her own behalf and that of the 2nd Defendant stated that while there was an agreement between the Plaintiff and the late Lawrence Gathu dated 24th September 1996, the Plaintiff breached his obligations under the agreement by not completing the payment as per the agreement terms stating that the Plaintiff only paid Kshs. 328,000 and not the entire Kshs. 500,000 as claimed. She went to depose that since the property had not been transferred to the Plaintiff by the time of Gathu's demise, it remained as part of his Estate and should devolve as such. He was therefore unlawfully on the property and should be compelled to vacate.

Evidence of the Plaintiff

4. PW1 Justus Inonda, the Plaintiff adopted his witness statement as part of his evidence and produced his bundle of documents which was marked as P. Exhibit 1 to 15. He testified that he knew the late Lawrence Gathu who in 1997 told him that he was selling a parcel of land. Subsequently they executed a sale agreement in 22nd January 1999 produced which was produced as evidence. In 2000 he took possession, developed the property and started residing there with his family. In 2002 thugs raided the house and unfortunately his son was shot dead. Due to this incident and cases of insecurity, they moved out of the property in the year 2005 but maintained the property including having a caretaker thereon and had been visiting it from time to time. He stated that in 2014 he received a letter from the Defendants' advocates asking him to vacate the premises on grounds that he had not completed paying for the same, which he stated that he had duly paid the late Lawrence Gathu. This led to the filing of this suit.

Evidence of the Defendants

5. DW1 Eunice Muthoni Gathu, the 2nd Defendant adopted her witness statement dated 27th June 2023 and produced her documents which was marked as D. Exhibit 1 to 4 as evidence. She stated that the suit property belonged to her husband and she has been residing close to where the suit property is located for over 50 years. She confirmed that a sale agreement was entered between the Plaintiff and her husband for sale of the suit property for Kshs. 500,000 and the Plaintiff was given permission to take possession of the property. However, he never completed paying for the same. She indicated that he moved out of the property sometime in 2005 until 2013 when he went back and stayed for about a year before moving out again.
6. During cross examination she confirmed that she was aware that her husband sold the property to the Plaintiff who put up a house on it. However, the entire purchase price for the property was never paid and that there was a balance of Kshs. 300,000. Although she confirmed that her husband never asked him to vacate the property, where it is located. She also confirmed that the Plaintiff and his family though they don't reside on the suit property, they still visit it from time to time.
7. On re-examination she stated that the letter dated 11th September 2014 was the first time they asked the Plaintiff to vacate the suit property although her husband had severally tried to reach him to pay the balance unsuccessfully.



8. At the close of the oral testimonies parties tendered final written submissions.

The Plaintiff's Submissions

9. Counsel for the Plaintiff submitted that from evidence produced by the Plaintiff, as of 20th January 2000 he had paid Kshs. 498,000 of the purchase price with only a balance of Kshs. 2,000 contrary to the Defendant's argument that the purchase price was never entirely paid. Counsel submits that if there was breach of contract, then the late Gathu would have enforced the default by either terminating the sale, but he did not exercise this right during his lifetime. Therefore, his continued use and occupation of the property in default of the sale as claimed by the Defendants was adverse from the year 2000 citing Madan J.A in the case of Gatimu Kingura vs Muya Gathangi [1976] KLR 253. He went on to submit the only thing that was never done was seeking consent from the Land Control Board although the forms had been duly executed. Adding that the Defendants equally confirmed the Plaintiff's presence on the suit property from the year 2000. As such, the Plaintiff was entitled to the reliefs sought.

The Defendants' Submissions

10. Counsel for the Defendants submitted that it was not in contention that the Plaintiff and the late Gathu entered a sale agreement for the sale of the suit property. However, the Plaintiff breached the agreement by not completing payment of the purchase price. Therefore, if his occupation was based on the sale agreement, then he should have sued for specific performance and not adverse possession. Adding that late Plaintiff was on the property during Gathu's lifetime by his consent. Counsel went on to submit that it was on record that the Plaintiff moved out of the suit property in 2005 to sometime in 2013 and only visits. Therefore he was neither in actual possession of the land nor in continuous possession as was held in Pauline Mpaka vs Mark Mungiria Muguna [2018] eKLR and Manason Ogendo Afwanda vs Alice Awiti Orendo & another [2020] eKLR. The owner could not be said to have been aware that the Plaintiff was still in possession since the property was left completely vacant and as such was not in its possession for 12 continuous years citing Roman Nyoike Mugacia & 4 others vs Makindi Banks Limited [2020] eKLR. On the issue that the caretaker was left on the property, counsel asked the court to regard this as hearsay because the said caretaker was never called to testify.
11. Counsel went on to submit that up until 2014, the Plaintiff was in possession of the suit property by consent through a sale agreement of the owner and could therefore not claim adverse possession citing retired Justice Kuloba in Gbariel Mbui vs Mukindia Maranya [1993] eKLR, Justice Gacheru in Njeri Kimani (suing in her capacity as the Administratrix of the Estate of Nasser Kimani Njoroge (Deceased) v Edwin Onesmus Wanjau (suing in his capacity as the Administrator of the Estate of Kimingi Wariera (Deceased) and Mwangi Kimingi (deceased) [2022] eKLR. As such, the Plaintiff had not met the threshold for adverse possession and the suit should be dismissed.

Analysis and Determination

12. I have considered the pleadings, the evidence on record, the written submissions and the authorities cited and find that the issues for determination are:
 - i. Whether the Plaintiff has proved his claim for adverse possession;
 - ii. Whether the Plaintiff is entitled to the reliefs sought;
 - iii. Who should bear costs of this suit?
13. It is not in contention that the Plaintiff gained possession of the suit property following a sale agreement dated 22nd January 1999. However, as much as the transfer was never effected due to the



health condition of Lawrence Gathu who did not manage to attend the Land Control Board meeting to acquire consent to transfer. The Plaintiff was in peaceful, notorious and exclusive possession of the same until 2014 when the Defendants asked him to vacate the property. The letter dated 11th September 2014 referenced Encroachment on parcel Ngong/Ngong/18772 from the Defendants advocates reads in part, "... it has come to their notice that you have encroached on and erected a structure on a portion of the deceased property known as Ngong/Ngong/18772. Our clients require you to remove all these structures within 14 days from the date hereof, in default of which they will obtain court orders to compel you to do so..."

14. This letter only gives the reason for eviction as encroachment. To encroach from Google search is to take control or possession of something in a gradual way and often without being noticed.
15. As clearly affirmed by all parties, the Plaintiff's entry to the suit property was pursuant to a sale agreement.
16. The 2nd Defendant in her testimony stated that the reason for the eviction letter was because the Plaintiff had failed in his contractual obligations by not paying the full purchase price. The sale agreement was executed in 1999 and the eviction letter sent in 2014, which is a period of about 15 years later. Is this claim valid? I wish to direct parties to Section 4(1) of the [Limitation of Actions Act](#) which provides that:
 - (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued-
 - (a) actions founded on contract;
 - (b) ...
17. This being an action founded on a sale could only be validly brought up until 2005 which is the period the six (6) years lapsed. It is on record that at this time, the Defendants husband, the late Lawrence Gathu was alive, but he had neither asked the Plaintiff to vacate the property nor brought a suit against him claiming breach of contract if any. I note that counsel for the Plaintiff submitted that only Kshs. 2,000 was not paid. However, on the strength of Section 4(1) of the [Limitation of Actions Act](#), any claim for contractual obligations became time barred and invalid as of 2014.
18. This then takes us to the next issue for consideration which is the claim for adverse possession.

I have considered the Defendant's submissions that a person who entered into someone's land by consent should not be allowed to then move back and claim adverse possession and reference was made to the retired Kuloba J.'s pronouncement in *Gabriel Mbui v Mukindia Maranya* [1993] eKLR. Indeed, the facts of this case are almost similar to the facts of the instant whereby parties in that cited case entered a sale agreement and the Plaintiff took possession although a consent to transfer was never sought. Additionally, the Defendant claimed that the Plaintiff had never been in adverse possession because he would only cultivate seasonal crops from time to time but not for the entire period of possession. Which is the same argument that was fronted in this instant suit that after 2005, the Plaintiff was never fully in possession of the property.
19. In the above case, Justice Kuloba pronounced himself as follows;

"Statements of the rule on adverse possession arising from failed land sale contracts have created an uncertainty in the law pertaining to land. Normally, a person claiming adverse possession is allowed in possession as a purchaser pending completion of the purchase price, or if he has already paid in full, then pending compliance with the requisite statutory



formalities; and he is allowed to stay there because he is a purchaser, and not a mere trespasser. The vendor decides by accident or design to allow matters to drift on without taking steps to evict the purchaser from the land after the contract fails on account of non-completion, late performance, or non-compliance with legal requirements, relying on the belief that the purchaser will get out on his own, or on the hope that it will all turn out right in the end. Both the vendor and the purchaser may be ignorant of the legal consequences. The purchaser believes he is in possession as a purchaser, and wishes to remain there and found his title on contract. When things come to a head, the purchaser says in retrospect, that although he looked and acted like a purchaser in possession, but the vendor did not evict him, and although he did not say he no longer relied on the contract and did not repudiate it, and the vendor was still entitled to look on him as a purchaser and he did not realize it and it might not have suited the purchaser for the vendor to regard him otherwise than as purchaser, the purchaser was in fact a person in adverse possession, quietly picking up the years which are necessary to elapse to bar the owner's title. The obvious rule against this unconscionable approach of the purchaser should naturally be, that the purchaser having been able to go in and stay under the contract, cannot be allowed to repudiate the contract with the hindsight of a fool and claim adverse possession..."

20. The Plaintiff herein did not repudiate the contract. The Plaintiff claims that whatever pending was a transfer of the suit property to his name and has at all times adhered to the terms of the contract. In Gabriel Mbui case Justice Kuloba held that "...The vendor is at liberty to allow a purchaser to stay on the land, expecting the purchaser to complete payment, or to apply for extension of the time within which the consent of the Land Control Board may be sought and obtained or otherwise to comply with the law; and the vendor is entitled to extend the time for putting things right, including fulfilment of legal requirements; and until the purchaser evinces a clear intention not to rely on the contract but on adverse possession, time does not run. If such repudiation is not shown, the purchaser remains in occupation with the permission of the vendor even if the contract becomes null and void by operation of law..." Madan, J.A in *Public Trustee v Wanduru Ndegwa* [1984] KECA 72 (KLR) held: "...A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run.." and Kneller, J.A added that, "...The limitation period will begin to run from the date of the payment of the purchase price in full or last instalment of it..." Similarly, the Court of Appeal in *Peter Mbiri Michuki v Samuel Mugo Michuki* [2014] eKLR also pronounced itself on this issue by holding that: "... A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run..."
21. On whether the Plaintiff had been on the suit property continuously by himself or by proxy or otherwise, the Court of Appeal once again in the case of *Peter Mbiri Michuki v Samuel Mugo Michuki* [2014] eKLR held:

"It was submitted that the plaintiff/respondent entered the suit property in 1964 and occupied the same by claim of right and he put his elder brother on the suit property; that the respondent's occupation was not only actual and physical but open and uninterrupted. Possession of land or any property for that matter need not be actual and physical; possession can also be constructive. In the instant case, the record shows that the plaintiff entered the suit property in 1964; constructed a house thereon in 1970 and put his elder brother to live in the house and the plaintiff together with his wife occasionally visited and lived in the house. These facts on record not only prove actual possession but also constitute constructive possession of the suit property by the plaintiff. The elder brother of the plaintiff



was in possession of the suit property by license and permission of the plaintiff. In law, actual possession of any property by a licensee is constructive possession thereof by the licensor...”

22. I find it that the Plaintiff whether by himself or otherwise was in possession of the property from the year 2000. While I agree that the Plaintiff could have sought for specific performance for the sale agreement, his election to seek the reliefs sought herein cannot be faulted.
23. I find that the Plaintiff is entitled to be registered as the legal and lawful owner of property Ngong/Ngong/18772.
24. Accordingly I grant the following orders;
 - i. That the Plaintiff is hereby declared the owner of the suit property known as Ngong/Ngong/18772 by way of adverse possession;
 - ii. That the Land Registrar Kajiado, is hereby ordered to effect these changes in the subsisting title for property Ngong/Ngong/18772; within Ninety (90) days from the date of this Judgement.
 - iii. That costs of this suit shall be borne by the Defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 5TH DAY OF DECEMBER 2024.

L. KOMINGOI

JUDGE.

In the presence of:

Mr. Keyonzo for the Plaintiff.

Mr. Mbogori for the Defendants.

Court Assistant – Mutisya.

