



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ngari v Gichoni (Environment & Land Case 12 of 2019)  
[2023] KEELC 529 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 529 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT & LAND CASE 12 OF 2019**

**A KANIARU, J**

**JANUARY 19, 2023**

**IN THE MATTER OF THE ESTATE OF AN APPLICATION, UNDER  
SECTION 37 AND 38 OF THE LIMITATION OF ACTIONS AND THE  
MATTER OF LAND REFERENCE NUMBER EMBU/GANGARA/1823**

**BETWEEN**

**JOHN KARIUKI NGARI ..... PLAINTIFF**

**AND**

**MUGO GICHONI ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff filed this suit by way of originating summons on 24/9/2018 against the defendant. The same is brought under the provisions of Section 37 rule 7(1)(2) and (3), Rule 8 of the Civil Procedure Rules and Section 17,37 and 38 of the Limitations of Actions Act.
2. The plaintiff is claiming that he has become entitled to half of suit parcel of land Embu/Gangara/1823 by way of adverse possession as the defendant's title has become extinguished in his favour since he has occupied the land openly, continuously and as of right for over 12 years. He seeks for the defendant to be ordered to transfer the said parcel to him failing which the Executive Officer be ordered to do so. He has also sought for the defendant to be ordered to pay costs of the suit.
3. The summons are accompanied by a supporting affidavit sworn by the plaintiff. He deposed that the defendant is the registered owner of the land parcel Embu/Gangara/1823. He averred that he has been in occupation of half of the suit parcel openly, continuously, and as of right and without interruption from any person. According to him, he has extensively developed the said half portion of land parcel Embu/Gangara/1823. He contended that by virtue of his continuous, open and uninterrupted occupation for over 12 years, then the defendant's title had been extinguished. He urged the court to order the Executive Officer to execute all necessary documents to effect the transfer for reason that the defendant was unlikely to cooperate. According to him, no attempt has ever been made



- by the defendant to terminate his occupation and he therefore urged the court to grant the prayers sought.
4. The respondent initially defended the suit by way of Replying affidavit and preliminary objection both filed on 26.10.2018. Pursuant to orders by the court issued on 7.10.2019, the court directed that the originating summons be treated as a plaint and the replying affidavit be treated as defence. The defendant then moved the court via an application dated 12.2.2022 seeking leave to amend his defence and introduce a counterclaim. The said orders were granted and subsequently the defendant filed an amended defence and counter claim dated 12.2.2020.
  5. In the amended defence and counterclaim, the defendant admitted being the registered owner of suit parcel of land where he stated to have lived with his family since the 1970s. He deposed that the plaintiff is a nephew (a son to his elder sister) and according to him, the plaintiff had requested to occupy a portion of his land to cultivate after being evicted from his father's land by his brother. He stated that he had felt pity on him and allowed him to cultivate on his land. He further averred that in the year 2008, the plaintiff had also asked him to allow him to build a semi-permanent house and he allowed him on condition that the plaintiff would look for money and purchase his own land.
  6. It his averment that the plaintiff instead constructed a permanent house in the year 2010 but assured him that he would leave upon purchasing his own land. He denied the plaintiff's occupation of the land for the 12 years as pleaded. He stated that the occupation was instead from the year 2007 and with his permission. With regard to the year 2003, which is when the plaintiff alleges to have occupied the land, it was said that he was then living at his father's land in Kithunthiri area. The defendant deposed that the plaintiff later bought land parcel Embu/Gangara/2139. According to the defendant, the plaintiff did not meet the threshold for adverse possession and the suit had been brought prematurely before the court.
  7. In the counterclaim, the defendant reiterated the averments in his defence and stated that in the year 2017, he learnt that the plaintiff had secretly purchased his own land. They then agreed that the plaintiff would build on that land and vacate from his property in the year 2018. He alleged that the plaintiff then became troublesome. The defendant demanded that the plaintiff vacate his property for being a trespasser but the plaintiff had refused to heed the same. The defendant stated that his claim against the plaintiff was for eviction from the suit property. He sought for orders that the plaintiff's suit be dismissed with costs; that there be eviction of the plaintiff, his family or employees from the land; the removal of any structures on the property and that in default he be allowed to destroy them. He also sought for the OCS Siakago police station to provide security to ensure compliance with the orders. Lastly, he asked for costs of the main suit and counterclaim.
  8. In reply to the amended defence and counterclaim, the plaintiff reiterated the averments in his summons and sought for judgment to be entered as prayed and for the defence and counterclaim to be dismissed with costs.
  9. The suit was set down for hearing. PW1 was John Kariuki Ngari, the plaintiff. He stated that he hailed from Gitira, Karimani village. He adopted his witness statement and list of documents as evidence in his case. He said that he had occupied the land in the year 2004 but had been cultivating it from the year 2003. He also said he was not allowed to occupy the land but continued staying there. He said too that he had developed the land, had miraa crops and a chicken coop on it, and that he had built there and had a mud walled house together with a permanent house.
  10. In cross examination, he stated that he was born in 1975 and that the defendant is his uncle. He said that he initially resided in Gikondi village on his father's land which is Embu/Gachoka/1771 & 1770. That his father had died in 1990, but that the family was yet to carry out succession but continued to



- live on the respective portions shown to them by their father. He denied having a disagreement with his brothers. He stated that the defendant allowed him to live on his land but said that he started chasing him away. He said he had refused to leave the land.
11. He also said that he was allowed to live on half of the portion of land, which was about an acre in size. He confirmed having bought his own land - Embu/Gangara/2139 measuring 3.0 Ha. He said that at the time of his occupation of the defendant's land, no person was residing there. He denied that they had agreed that he would leave or vacate the land. He further said that his brother and the deceased sons were present when they agreed that he should settle on that land. He claimed that the portion he occupies ought to have been his father's land though registered in the defendant's name. He however said that there was no agreement made between his father and the defendant that the land would become his father's property. It was his testimony that the defendant also resides on the said land and has developed it. He said that he does not get along well with the defendant. He said further that there was no time when he told the defendant to sell him land.
  12. In re-examination, he said that the land he occupies was fenced and there was a clear boundary between his portion and that of the defendant. He said too that he had occupied the land in the year 2004 against the defendant's wishes.
  13. PW2 was Ireri Njiru. He said that he hailed from Itira and he knew the plaintiff as they hail from the same village. He also said that he knew the defendant and was familiar with the suit land which belonged to the defendant. He adopted his witness statement as evidence in the plaintiff's case. He reiterated the averments made by the plaintiff in his evidence to the effect that he had occupied the land in the year 2004, had developed it, and the said portion was fenced. According to him, the defendant has never attempted to evict the plaintiff from the land.
  14. In cross examination, he said that he lives 200 metres from the said land but was not there when the plaintiff was allowed to live on the land. He was not aware of what was agreed upon at the time. He testified that he saw the disagreement between the parties in the year 2004 but was not sure whether the same had been reported to the police. He said that he thought the parties had reconciled and was aware that the plaintiff had bought his own land parcel.
  15. PW3 was Joseph Magara Kiura. He stated that he hails from Gachegethiuri. He said that he knows both parties and his place was about 2kms from the suit parcel of land. He adopted his witness statement as evidence in the plaintiff's case. Just like PW1 and PW2, he said that the plaintiff has been living on the defendant's land from the year 2004, and that his portion was fenced and developed. He testified that he had never heard of any quarrel between the parties. In cross examination, he stated that the defendant was an uncle to the plaintiff and that the defendant had allowed the plaintiff to live there. He said that he has never witnessed the disagreement between the parties but only heard of it from the plaintiff. He testified that he was a relative to the parties.
  16. PW4 was Steven Maina Warutere, a valuer who resides in Nairobi. He testified that he was contacted to conduct valuation on the disputed property by the plaintiff. That the valuation was not for the entire parcel but the one pointed out to him by the plaintiff. He prepared a report and filed it as exhibit 3 of the plaintiff documents.
  17. In cross examination, he stated that he was not a surveyor but a valuer. He said that he had conducted valuation on a portion of the land but that the report was like for the entire portion. He later said that he was a property surveyor and not a land surveyor. It was his testimony that he did not get professional services of a surveyor to identify the land but went ahead to state that, he did not need such services as he had the map which he had attached to the report. He said that he valued half of the land but that he did not take measurement to ascertain the entire portion. He also said that the land



was owned by the defendant but claimed not to have bothered to check the other portion since he had not been called upon to value that land. According to his testimony, the land he valued was worth Kshs. 750,000/= without developments and that the developments therein were worth Kshs. 700,000/=. In re-examination he said that he indeed visited the land. With that, the plaintiff closed his case.

18. DW1 was the Mugo Gichoni, the defendant. He stated that the plaintiff's mother was his sister but she was now deceased. He adopted his witness statement and list of documents as evidence in his case. He testified that he had allowed the plaintiff to occupy his land as he took him as his child. He averred that the plaintiff had started causing problems by telling him that he would sue him on claims that he was a land thief. In cross examination he said that the plaintiff had entered his land in the year 2007 and not 2004 as alleged. According to him, the plaintiff had initially resided on his father's land but after being chased away by his brothers, he requested to move to his land and he allowed him until the time he purchases his own land.
19. He alleged that the plaintiff occupies half an acre of the land and that he has built on it using bricks. He confirmed that there was miraa crop on the land which he says was planted in the year 2007 together with mango, pawpaws and grivella trees. He further said that he told the plaintiff to leave his land, when he bought his own in the year 2017 and that that is when the plaintiff sued him. He alleged that the plaintiff had demanded half share of his land. He stated too that the plaintiff had brought police to him in the year 2019 and not 2004 as alleged. He said that the plaintiff has a brick house and another temporary house on the land. He said that the property has no electricity and challenged the court to visit the place to confirm this. With regard to the fence he said that the same had been put up during the pendency of the suit.
20. DW2 was Onesmus Ndiu Mugo, who hails from Gikondi, Kirunduri area. He is a son to the defendant and a cousin to the plaintiff. He adopted his witness statement as evidence in the defendant's case. In cross examination he said that the plaintiff had built a structure on the land, which he later upgraded to a permanent house. He clarified it is a brick house. The plaintiff was said to have put up a mud walled, iron roofed structure, which structure was said to have been left to his children when he built the brick one. Just like DW1, he testified that the plaintiff had quarreled with his brother upon which he requested his father to allow him to settle there. It was said that he occupied half an acre of land and had developed it. He denied that his father had chased the plaintiff away and that they had had any disagreement. He however said that the only disagreement was when this case was started. With regard to the fence, he asserted that it was for security reasons and not as a boundary. He said that when the plaintiff moved in there in the year 2007, the defendant called all his sons and informed them.
21. DW3 was Ephantus Njue Mugo, also a son to the defendant and cousin to the plaintiff. He confirmed that his statement was similar to that of his brother, DW2, but in his defence said that it was possible for people to make similar statements. He stated that maybe the plaintiff had occupied the land in the year 2004 if he was not wrong. Just like the rest of the defence witnesses, he said that the plaintiff did not occupy half of the land; that he had built a brick house; and that he had developed the land by planting miraa trees, mango trees and pawpaw trees. He denied that there was any dispute between the parties and said that the dispute that occurred was in the year 2018. He said that he did not live on the disputed land.
22. When questioned on the similarity of the evidence with DW2, he said that he was truthful and denied that he had conspired with his brother. In re-examination, he stated that the plaintiff had been allowed to occupy the disputed land in the year 2007 and he averred that there was no boundary demarcation between where his father lives and the plaintiff. The defence, with that, closed its case.



23. The suit was canvassed by way of written submissions. The plaintiff filed his submissions on 21.10.2022. He reiterated the averments in his pleadings and testimony before the court and averred that he had proven his case on a balance of probability. He maintained that he had occupied the suit land for the statutory period as required by the law without any interruption, and that he had displaced the defendant from the land and had developed it.
24. With regard to the counterclaim, it was submitted that the same was bad in law for reason that the defendant could not counterclaim against the originating summons. According to the plaintiff, the defendant ought to have filed a separate suit for eviction as opposed to the present case. It was also argued that the suit on eviction was an afterthought, having been brought after the plaintiff's claim on adverse possession. The plaintiff was of the view that the orders in the counterclaim could not be granted based on what he termed as an incompetent suit. The plaintiff prayed that the court allow the originating summons and dismiss the counterclaim.
25. The defendant on his part filed submissions on 14.11.2022. He gave a summary of both cases as presented by the parties. He identified three issues for determination by the court. The first was whether the plaintiff has proven his case on a balance of probability. The defendant relied on the provisions of Section 107 of the *Evidence Act*. He further relied on the East African Court of Appeal case of *Jandu v Kirpal & Another* [1975] EA 225 which cited with approval the case of *Gabriel Mbui v Mukindia Muranya* [1993] Eklr where the court defined the term adverse possession. Also relied upon was the case of *Wilson Kazungu Katana & 101 Others v Salim Abdalla Bakshwein & Another* [2015] eKLR where the court stated the requirements to be proved for a claim on adverse possession to succeed.
26. The defendant cast doubt on the plaintiff's evidence on the allegation that the plaintiff had occupied the land in the year 2003. According to him the evidence was not credible. He however argued that his own witnesses were consistent and that possession by the plaintiff on his land was in the year 2007, hence 12 years had not lapsed from the time of occupation. On the issue of the occupation being non-permissive, it was argued that the same was by way of permission by the defendant and it was contended that the plaintiff had admitted this in his witness statement and cross examination. It was also said that the plaintiff could not prove the size of the piece of land he occupies as he had failed to provide a surveyor's report. It was therefore argued that the plaintiff occupies half an acre of the defendant's land. It was reiterated that adverse possession does not lie where occupation is permissive and reliance was made on the case of *Gabriel Mbui Vs Mukindia Maranya* [1993] eKLR where the court stated that permissive occupation was inconsistent with adverse possession.
27. The defendant went ahead to state that he was a maternal uncle and argued that in the African culture relatives are known to seek land to settle their families on another relative's land. It was his assertion that this being a customary practice, it could not be superseded by common law practice which was alien to the African custom. The court was urged to find that the transactions that led to the occupation were as a result of love by an uncle who played the role of "a father" to the plaintiff and accommodated him.
28. The second issue was whether the counter claim should be allowed. The defendant submitted that he had filed the defence and counterclaim pursuant to leave granted by the court on 17.2.2020 and refuted claims that the same was bad in form as alleged by the plaintiff. On the merits of the counterclaim, it was said that the defendant was the absolute proprietor of the suit property and that he had invited the plaintiff to vacate his land once he purchases his own. He was of the view that his rights as an absolute proprietor were protected under sections 24, 25 and 26 of the *Land Registration Act*. He argued that the plaintiff had in his evidence acknowledged having acquired his own land and that in the year 2018, when he demanded that he vacates the suit property, he had become a trespasser on the land. On this,



the defendant relied on the case of *Gathenya Ngumi v Eric Kotut & 4 Others* [2022] Eklr and urged the court to determine the case in his favour.

29. Lastly, on costs, it was contended that costs follow the events and the defendant urged the court to grant him costs of the suit.

### **Analysis And Determination**

30. I have considered the pleadings, the evidence presented before the court and the rival submissions by the parties. The plaintiff seeks to be recognized as having acquired half of suit parcel of land Embu/Gangara/1823 by way of adverse possession. There are therefore four issues for the court's determination which are;

- a) Whether the Applicant has met the threshold for grant of orders for adverse possession?
- b) Whether the Applicant is entitled to half of the land to be excised out of land parcel Number Embu/Gangara/1823?
- c) If issues (a and b) fail, can the orders for eviction be allowed?
- c) Who should bear the cost of the suit?

31. The court of Appeal, in the case of *Mtana Lewa v Kahindi Ngala Mwangandi* [2005] eKLR defined and set out the ingredients of adverse possession. It stated 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."

32. That court went ahead to rely on the provisions of Section 7 of the [Limitation of Actions Act](#), which is in the following terms:

"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."

33. Further, Section 38(1) and (2) of the [Limitation of Actions Act](#) states that;

- "(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.

34. The characteristics of a claim on adverse possession was stated in the case of *Stephen Mwangi Gatunge v Edwin Onesmus Wanjau* (Suing in her capacity as the administrator of the estates of Kimingi Wariera



(Deceased) and of Mwangi Kimingi (Deceased) [2022] eKLR where the court cited with approval the case of Mbira v. Gachuhi (2002) 1 EALR 137: The court stated as follows;

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

35. For one to succeed in a claim of adverse possession, one needs to prove to have occupied the subject land for a continuous period of 12 years and such occupation should be non permissive, without the consent of the owner, open, notorious, exclusive and adverse to that of the registered owner of the land. In essence, there must be clear dispossession of the owner of the land for the claim to succeed. Equally the claim should be made against the registered owner of the land.
36. In the matter before the court, it is not in dispute that the plaintiff is in possession of the suit parcel of land. At least all the witnesses have so testified. It is also not in dispute that he has developed the land. This is clear based on the testimonies of the plaintiff's witnesses and the defendant's witnesses though the said defendant's witnesses were not consistent on the extent of development. But this court finds that indeed the plaintiff has developed the land based on the evidence available. The land is also registered in the name of the defendant and evidence has been adduced to this effect.
37. The issues that I find to be in dispute are when and how the plaintiff came to occupy the land. According to the plaintiff and his witnesses, the plaintiff occupied the land in the year 2004 and has been in such occupation ever since. The plaintiff further averred that he occupied the land by way of permission by the defendant. However, he states that they had a disagreement with the defendant immediately he occupied the land and he was told to leave the land but that he continued with such occupation.
38. The defendant on his part presented a contrary scenario to that of the plaintiff. His case is that he allowed the plaintiff to occupy his land after the plaintiff had a disagreement with his brothers; that the occupation was therefore by way of permission; and has never therefore been adverse until recently when he told the plaintiff to vacate his land after the plaintiff bought his own. To him, the plaintiff occupied the land in the year 2007 and not 2004 as alleged.
39. The evidence by all parties, save for PW4, is that the plaintiff entered the defendant's land by way of permission. But according to the plaintiff's witnesses the said permission seems to have ended when a disagreement arose between the parties. PW1, the plaintiff, said that the defendant started chasing him away but that he continued occupying the land. PW2 on his part also said that there was a disagreement which he claimed to have witnessed though he said he thought the parties had reconciled. PW3 also stated that there was a disagreement but later said that he only heard of the disagreement from the plaintiff. As aforementioned, a claim of adverse possession cannot succeed if the occupation is by way of permission.
40. The court, in the case of Mwinyi Hamis Ali v Attorney General and Philemon Mwaisaka Wanaka, Civil Appeal No. 125 of 1997. held that:

“adverse possession does not apply where possession is by consent and in a court of law, sympathy takes a second stand as the Court is governed by statutes.”



41. Further, the case of Samuel Miki Waweru v Jane Njeri Richu, Civil Appeal No. 122 of 2001, (UR), it was held that;

“...it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in Jandu v Kirpal [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted...”

42. Considering that the issue of non-permission is a key ingredient for a claim on adverse possession to succeed, I find that the plaintiff, having admitted that his occupation was by way of permission, at least needed to have sufficiently shown when and how exactly the permission ended and when his occupation essentially became adverse. This cannot be just by way of simple statements as made by him and his witnesses. The plaintiff should at the onset have clearly narrated the nature of disagreement, when the same arose, and at what point the occupation became adverse. This was not done by the plaintiff. It is very hard for this court to point out the time and even proceed to calculate the period when the alleged occupation became adverse for purposes of adverse possession.

43. A claim of this nature needs to be proven on a balance of probability. However, the plaintiff has not discharged this duty. A lot is left for the court to speculate, which should not be the case. The claim should be proved by clear facts, and evidence. This claim falls short of that. Simply put, the plaintiff has been living on the defendant's land by way of permission and that permission has never been withdrawn until 2018, hence his claim of adverse possession fails in its entirety. As rightly stated by the defendant, it is not uncommon in the African culture for relatives to allow their kins to stay on their land. More believable is the narrative by the defendant that the plaintiff was chased away by his brother and he therefore hosted him on his land. I say this for reason that the plaintiff, despite stating that his father had land did not explain why he was living at his uncle's place when the rest of the family resided on his father's land.

44. I need not therefore proceed to determine whether the applicant is entitled to half of the land to be excised out of land parcel Number Embu/Gangara/1823. However, even assuming I were minded to determine this prayer, the plaintiff failed to prove the portion he occupies. He claimed that the portion he occupied was half of the land, which was about an acre but did not call a surveyor or file a report by one. Instead, he called a property valuer to testify on the portion he occupies yet the expertise of a valuer does not include marking of boundaries or identifying demarcations of land. This too would have been a hard nut for the court to crack. I therefore dismiss the plaintiff's suit and turn my focus on the defendants counter-claim.

45. On the issue of eviction, it is not in dispute that the plaintiff occupies the defendant's land. The defendant has a right to use his land as he deems fit and having opted to evict the plaintiff from the land, then I see no reason to deny him his claim. The plaintiff has already admitted that he purchased his own land. It is only fair for him to let the defendant enjoy exclusive possession of his land as he enjoys his own. I allow the counterclaim and direct that the plaintiff do vacate the defendant's land within 90 days from the date hereof, failing which the defendant should evict him. Further orders are given for the OCS Siakago to ensure compliance with these orders.

46. As for costs I award the costs of the suit and counterclaim to the defendant herein.

**JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 19<sup>TH</sup> DAY OF JANUARY, 2023.**



**In the presence of Ms. Ndorongo for Mogusu for plaintiff and Njeru Ithiga for Ndolo for defendant.**

**Court assistant: Leadys**

**A.K. KANIARU**

**JUDGE**

**19/01/2023**

