



**Kangethe v Ngugi & another (Environment & Land Case E015 of 2021)
[2023] KEELC 15794 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15794 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E015 OF 2021**

JG KEMEI, J

FEBRUARY 23, 2023

BETWEEN

SIMON WAITHAKA KANGETHE PLAINTIFF

AND

TERESIA WANJIKU NGUGI 1ST DEFENDANT

**FRANCIS GITHUKA NGUGI (BEING SUED AS THE ADMINISTRATORS OF
THE ESTATE OF NGUGI KARARI) 2ND DEFENDANT**

JUDGMENT

Introduction and pleadings

1. The Plaintiff is the son of Geoffrey Kangethe (Kangethe) and the Defendants are the children and legal administrators of the estate of Ngugi Karari Wambui (Ngugi). The subject of dispute is a portion of 0.5 acres of LOC1/MUGUMOINI/700. (suit land)
2. The Plaintiff moved the Court vide an Originating Summons dated the 26/3/2021 seeking the following orders;
 - a. A declaration that the Plaintiff has been in possession of delineated 0.5 acres of land parcel No. LAND LOC 1/MUGUMOINI/700 since 1963, a period of over 50 years uninterrupted by Defendant amounts to adverse possession of the suit premises.
 - b. A declaration that the Plaintiff has acquired registrable interest of delineated 0.5 acre of land parcel No. LAND LOC 1/MUGUMOINI/700 Acre by way of adverse possession.
 - c. Upon ascertaining prayers (a) and (b) above this Honourable Court be pleased to declare that the Defendant's interest or anybody claiming under



him to delineated 0.5 acres of land parcel land parcel LAND LOC 1/ MUGUMOINI/700 has become extinguished by operation of the law and that the Plaintiff herein has become entitled to the said whole parcel of land through adverse possession.

- d. The Court be pleased to order that 0.5 acre delineated from land parcel LAND LOC 1/MUGUMOINI/700 be registered in the name of SIMON WAITHAKA KANGETHE.
 - e. The Defendants do execute all the necessary documents to effectuate the transfer of 0.5 acres delineated from land parcel known as LAND LOC 1/ MUGUMOINI/700 to the Plaintiff and in default the Deputy Registrar of this Honourable Court be empowered to do so.
 - f. The costs hereof be provided for by the Respondent.
3. The Plaintiffs case is based on the grounds set out in the Supporting Affidavit of the Plaintiff; that the Plaintiff has been in open peaceful and as of right possession and occupation of the 0.5 acres delineated from parcel LOC1/MUGUMOINI/7001(?) (suit land) for a period of 50 years; the Plaintiff's user and possession of the suit land has been open uninterrupted exclusive and without force; the Plaintiff has become entitled to ownership of the said parcel of land through the doctrine of adverse possession.
 4. Whilst resisting the suit, the 1st Defendant through her Replying Affidavit sworn on 26/11/2021 deponed that the suit is defective beyond redemption and should be struck out; that the Plaintiff filed a protest in CMCC Succ Cause No 277 of 2014 - Thika claiming a portion of 0.5 acres from the suit land which portion is averred to have been acquired by the Plaintiffs father from the Defendants' father in the 1960s.
 5. It was her case that her father Ngugi never sold any land to the Plaintiffs father, Kangethe. That they have lived on the suit land all their lives and the claim of land purchase by Kangethe is a mere fabrication geared at depriving them land. Inter alia, that Kangethe did not complete the payments and therefore the agreement became void; the transfer, if any, is void for lack of an executed transfer accompanied by a Land Control Board consent; the annexed transfer in his mothers' favour is unsupported and no evidence has been laid to show why it was being transferred to his mother and not his father if indeed his father purchased the land from Ngugi;
 6. She averred that the Plaintiff is nothing but a trespasser who is raising a false claim on the land after the demise of Ngugi, which claim was never raised during the lifetime of Ngugi and that the same was only raised at the confirmation stage in the succession proceedings. In sum that the claim of the Plaintiff cannot succeed given the strict conditions attached to a claim in adverse possession.

The evidence

7. The Plaintiff led evidence as PW1. He stated that he knows the Defendants as they all come from the same Mbari Ya Ithanga Clan. He relied on his Supporting Affidavit sworn on 26/3/2021 as his evidence in chief. That his father Kangethe purchased land from Ngugi vide agreements of sale dated the 2/4/1964 and 5/2/1966. Kangethe took possession of the suit land and he and his family have been in possession openly, continuously and without any force or secrecy for over 50 years. That the said possession was in the knowledge of the Defendants who filed a succession cause with the intent of distributing the whole land including the 0.5 portion that had been acquired by Kangethe.
8. The witness led evidence that in 1983 Ngugi subdivided the land into two portions; 0.5 and 2.3 acres so as to facilitate the transfer of the smaller portion to Kangethe. That in 1985 Ngugi transferred the land



to Kangethe's wife but was rejected because it was discovered that contrary to the parties' intention the transfer contained the whole land instead of the portion of 0.5 acres.

9. That he and his siblings have been in open user occupation and possession of the portion of the land since 1963 and the Defendants have never attempted to remove them or interrupt their occupation.
10. The witness informed the Court that the portion of the land he is claiming is delineated on the ground and that his father planted coffee which he continues to harvest to date and which he supplies to Muchai Coffee Factory in the neighbourhood. That there is a permanent feature that divides the suit land from the whole. He produced a sketch plan in support. In addition, that he has constructed on the land. That the process of transferring the land was not completed before Ngugi, the registered owner of the suit land passed on.
11. DW1 – Teresia Wanjiku Ngugi testified and stated that she knows the Plaintiff as they are neighbours. That their parcel of land parcel 697 is adjacent to theirs – parcel 700. That parcel 700 measuring 2.8 acres is registered in the name of Ngugi, their deceased father. That she learned about the Plaintiff's claim in 2014 when he filed the protest in the succession cause. That she went to see the Plaintiff to inform him that she wanted to fence the land. That the Plaintiff advised her to get the surveyor before undertaking the fencing, an exercise that she admitted did not accomplish.
12. Further she stated that she does not know when the Plaintiff entered the land. That her father's land does not have coffee but the portion of the Plaintiff has coffee which she found on the land. She stated that her brother lives in Mugumoini and therefore none of her siblings live on the land. That upon relocation he demolished the family house that was on the land leaving farming activities on the land. She stated that she is not aware of the subdivision of the land into two portions of 2.3 and 0.5 acres respectively. In addition, that the portion claimed by the Plaintiff is not ascertainable given the parcels are adjacent to each other.

The written submissions

13. It was submitted that the Plaintiff has acquired the suit land by way of adverse position. In advancing this argument the Plaintiff relied on the case of Josinter Atieno Oumo & Anor Vs Joshua O Omiti & Anor (2018) eKLR. That the Plaintiff's father entered the land through a purchase which took place via two agreements in 1964 and 1966. He settled on the land and the Plaintiff has been in possession of the land since then for a period of over 50 years without any interruption from the Defendant. See the case of Public Trustee Vs Wanduru (1984) KLR and Peter Mbiri Michuki Vs Samuel Mugo Michuki to support the proposition that though his entry was pursuant to a purchase, adverse possession should be calculated from the date of the payment of the purchase price to the span of 12 years if the purchaser takes possession of the property because from that date the true owner is disposed of the possession of the land.
14. The Plaintiff submitted that the Defendants have never taken any action to assert their right over the portion of 0.5 acres either through disposition of the Plaintiff or filing suit seeking eviction of the Plaintiff from the land.
15. The Defendants submitted that the basis for the Plaintiff claim of adverse possession for a portion of 0.5 acres out of the suit land is that his late Father Kangethe purchased the suit land from the deceased Ngugi in 1963 with consequent sale agreements dated the 2/4/1964 and 5/2/1966. In response the Plaintiff's claim is denied by the Defendants who aver that the claim is illegal seeing that the Plaintiff had filed a protest in the Succession Cause No 277 of 2014.



16. It was submitted that the Plaintiff has failed to show by way of evidence that the Defendants are the registered owners of the land either by way adducing a copy of the title or an official search. In addition, that the Plaintiff has failed to place before Court evidence that would help ascertain the land being claimed on the ground. The Court was urged to disregard the hand drawn sketch plan adduced in evidence by the Plaintiff on the ground that he is not an expert surveyor in matters land survey. Neither has the Plaintiff provided evidence to show that the portion of 0.5 acres being claimed is distinctly marked separately from the entire 2.8 acres of the suit land. The Defendant took issue with the land description contained in the Plaintiffs affidavit in protest to the confirmation of grant dated the 22/8/2016 against the plea in the originating summons which referred to the land as parcel 770. That in the absence of any evidence rectifying the error the Court was urged to take the Plaintiff's claim refers to a different plot other than parcel 770. The Plaintiff having failed to establish that the Defendants are the registered owners and further having failed to identify the suit property the Court was urged to dismiss the Plaintiff's suit.
17. As to whether the entry into the property was adverse, the Defendants submitted that the general rule is that entry and possession after a sale agreement is consensual and fails to meet the necessary prerequisites to satisfy a claim for adverse possession. Reliance was placed in the case of Gabriel Mbui vs Mukinda Maranya [1993] eKLR, which stated as follows;

“ Accordingly, the rule should be, that where it is only the fact that a squatter is in possession as a purchaser under a contract which has become in operative, null and void/ or unperformed by him, and which has enabled him to claim title by adverse possession, the position is that although the full period required by the statute has elapsed, the squatter's possession remains consensual and does not found a claim of being in adverse possession”.
18. The Defendants submitted that the entry of the property having followed a sale agreement adversity has not been satisfied because the entry was with the permission of the vendor. In any event it was argued that time does not run for purposes of the Plaintiffs adverse possession until the intention of possession by way of adverse possession is expressly made known to the vendor. That there is no evidence adduced to show that Kangethe repudiated the agreement and sought to rely on the rights of an adverse possessor. The Defendants argued that the alleged possession was and still founded on the said sale agreement. Relying on the case of Public Trustee Vs Wanduru Ndegwa (1984) the Defendants stated that the Court expounded on the exception to that said general rule in a matter where the buyer has paid the final purchase price then only can time begin running. It was submitted that the claim of the Plaintiff fails because he has not demonstrated that the final purchase price was has been paid nor that he has demonstrated that his alleged occupation is in repudiation of the sale agreement upon which his alleged occupation and possession was based. The Defendant was of the view that the entry of the Plaintiff cannot be said to have been adverse to the ownership of the registered owner of the suit land.
19. In the alternative it was submitted that if there was any time that the Plaintiff entered the suit land in a manner that may be adverse it was in 2014 when the Plaintiff made known to the Defendants his claim for a portion of 0.5 acres, that the Plaintiff encroached on to land in 2014 and therefore 12 years have not elapsed since.
20. Further that the Plaintiff failed to establish if the purchase price was paid in full and when the last instalment was paid in the absence of that fact the claim of adverse fails. That according to the agreement of 1966 the price for 0.1 of an acre was Kshs 100 and therefore 0.5 acres would be Kshs 500/-. There is no evidence that the full amount of Kshs 500/- was ever paid. That the amount of Kshs 465/- allegedly paid fell short of the full Kshs 500/-.



21. It was further submitted that the Plaintiff failed to lay evidence in support of continuous possession of the suit land by providing evidence of recent habitation of the suit property. That there is no evidence that the coffee on the photograph refers to the parcel of land in question. That the Plaintiff failed to demonstrate that he generates income from the sale of the said coffee from the suit land. Relying on the case of Gabriel Mbui Vs Mukindia Maranya [1993] eKLR where the Court held that possession must be accompanied by adverse possessory acts which are hostile to the rights of the owner in the land. Evidence of such adverse or hostile acts must be demonstrated.
22. With respect to the alleged transfer of the suit land to the Plaintiff's mother, the Defendants submitted that the lack of consent from the land control board rendered the transaction voidable and any possession in furtherance of an avoided agreement does not support a claim in adverse possession.

Analysis and determination

23. Having considered the pleadings, the evidence adduced at the hearing, the written submissions and all the material placed before me, I find the key issue for determination is whether the claim of adverse possession is merited; secondly who meets the costs of the suit.
24. It is not in dispute that the registered owner of the suit land according to the copy of the green card issued in 2021. The whole suit land measuring 2.8 acres became registered in the name of Ngugi Karari Wambui on the 16/11/64.
25. The Plaintiff's father was Kangethe and the Defendants' father was Ngugi. According to the copies of letters of grant of administration for the two gentlemen, Kangethe died in 2002 while Ngugi met his demise in 2003.
26. It is averred that Kangethe purchased a portion 0.5 acres of land from Ngugi vide two agreements of sale in 1964 and 1966 and took possession of the portion and planted coffee and his family has been utilising and living on the portion of the land continuously without any interruption by the Ngugi or the Defendants. It is the Plaintiff's case that he has been in possession of the portion of the land on his own right from 1963.
27. The Defendants have opposed the Plaintiff's claim on the grounds that; the land being claimed is not ascertained; the description of the land is different; it is alleged that only Kshs 465/- out of Kshs 500/- was paid leaving a balance and no evidence was led to show that Kangethe paid the full amount; The transaction being subject to LCB consent was a voidable transaction for want of consent; no evidence of possession by the Plaintiff.
28. In the case of Mtana Lewa Vs Kahindi Ngala Mwangandi [2015] eKLR, the Court defined 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 nor 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.”



29. In order to do so, they need to acquire possession or reside on that property for a period of 12 years. The doctrine is not new. In the case of *Bejoy Chundra Vs Kally Prosonno* (1878) 4 Cal 1327 the late My Justice Markby, as he then was, defined adverse possession as follows;

“By adverse possession I understand to be meant possession by a person holding the land on his own behalf (or on behalf) of some person other than the true owner, the true owner having a right to immediate possession.”

30. To be successful in a claim for adverse possession one must prove that he has been in exclusive possession of the land openly and as of right and without any interruption for a period of 12 years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition. Further the claimant must show that he is using the land as of right and that he has the necessary animus possidendi to use the land to the exclusion of the owner.

31. The starting point is whether the agreement of sale was valid and whether the purchase price was paid in full. Though DW1 attempted to fault the agreement of sale. She was categorical that she was not aware whether the father sold land to Kangethe or whether the purchase price was paid in full. That said the Defendants have also faulted the claim on adverse on the ground that the full purchase price was not paid and also that consent of the LCB was not obtained rendering the transaction void and illegal to found adverse possession.

32. PW1 led unchallenged evidence that indeed the parties entered into a sale agreement in 1964 and 1966. For purposes of effect I shall reproduce the said agreements as follows;

“2.4.64

I have bought land from Daniel Ngugi C/o Karari Gituamba the portion that has been occupied by my coffee trees. We have agreed shs. 225/- Two Hundred Twenty Five.

Witness:-

Isack Ngugi Kihhu

Kangethe Mahindi.”

5.2.66

I have give Daniel Ngugi Karari shs. 240/- for buying manure for his land we have agreed that this money is also for the land mentioned here above and we shall sub-divide the land according to the size equivalent to the money he has received. Now is shs. 225/- + 240 = 465/-. One (0.1) point of land now is shs. 100/- this is to say it is almost 0.5 point taken out of his land Gituamba.”

33. The agreement above has all the hallmarks of a valid agreement. It is in writing, signed by both parties and witnessed by two witnesses. It was a term of the agreement that the land was to be subdivided into two portions according to the size equivalent to the money Ngugi had received. The amount paid was Kshs 465/- which was said to be for land almost 0.5 acres to be exercised from the main parcel 700. Further evidence was adduced in form of an acknowledgment by Ngugi that he had received Kshs 480/- for the sale of a portion of his land at Gituamba. The Defendant's sole witness testified and stated that she was not aware of the agreement nor the payments hence this evidence is taken to be credible and unchallenged.



34. I shall turn my focus to the conduct of the parties post agreement. It is on record and evidence was led that Ngugi sought LCB consent to subdivide the suit land into two portions of 2.3 and 0.5 acres respectively. The LCB Consent for subdivisions was obtained on the 7/1/1986. A draft transfer of the land in favour of the Plaintiffs mother dated the 20/12/1985 was produced before the Court. On the top corner of the instrument is a comment by the Land Register to the effect that the transfer was rejected because the owner (read Ngugi) was to transfer a part of the land not the whole parcel. This evidence is in agreement with the testimony given by the Plaintiff that as at 1985/86 the original parties to the agreement acted in contemplation of conveying the land to Kangethe. All these actions were done in contemplation of a transfer of the portion of land that Kangethe acquired through sale from Ngugi. And perhaps this explains why Ngugi never took any steps to recover the land from Kangethe in recognition of the sale. Trouble started when the family of Ngugi in total disregard to the interest of the family of Kangethe attempted to distribute the land including the 0.5 acre portion purchased by Kangethe. DW1 led evidence that she visited PW1 to inform him that she wanted to fence the land. PW1 asked her to seek the services of a surveyor. She stated that she did not carry out the survey. Why would she be asking for permission to enter the land and fence if indeed the land was in their possession? This is clear evidence that Ngugi and his family had been dispossessed. There is no evidence that Ngugi nor the Defendants repossessed the land from the Plaintiff and his family or evicted them or even filed a suit to recover the land.
35. I find that the Plaintiff was in possession of the portion of the land.
36. PW1 led evidence that the family planted coffee on the land. DW1 explained to the Court that her brother relocated from the portion of land that he used to occupy but the portion being claimed by the Plaintiff has coffee trees. This evidence can be gleaned from the agreement of sale dated the 2/4/1966 where the parties recognised that the 0.5 portion had coffee trees. I am satisfied that the Plaintiff has demonstrated the animus possidendi on the portion being claimed.
37. Was the possession adverse? Given the evidence analysed above it is the finding of the Court that the possession was adverse to that of Ngugi. I say so because all the evidence shows that Ngugi did not dispossess the Kangethes from the land to date. Neither did the Kangethes relinquish possession to the Ngugis.
38. Is the land ascertainable? The answer is found in the unchallenged sketches produced by PW1 which clearly shows the demarcation of the suit land on the ground.

Final orders and disposal

39. In the end I find for the Plaintiff and allow the claims as follows;
- a. A declaration that the Plaintiff has been in possession of delineated 0.5 acres of land parcel No. LAND LOC 1/MUGUMOINI/700 since 1963, a period of over 50 years uninterrupted by Defendant amounts to adverse possession of the suit premises.
 - b. A declaration that the Plaintiff has acquired registrable interest of delineated 0.5 acre of land parcel No. LAND LOC 1/MUGUMOINI/700 Acre by way of adverse possession.
 - c. It is hereby orderd that 0.5 acre delineated from land parcel LAND LOC 1/MUGUMOINI/700 be registered in the name of SIMON WAITHAKA KANGETHE.
 - d. The Defendants do execute all the necessary documents to effectuate the transfer of 0.5 acres delineated from land parcel known as LAND LOC 1/MUGUMOINI/700 to the Plaintiff and in default the Deputy Registrar of this Honourable Court be empowered to do so.



e. The costs shall be in favour of the Plaintiff.

40. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 23RD DAY OF FEBRUARY, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Plaintiff – Absent

Ms. Nyamu HB Gachau for 1st and 2nd Defendants.

Court Assistants – Esther / Kevin

