



**Gachau v Njoroge (Environment & Land Case 15 of 2021)  
[2023] KEELC 15800 (KLR) (22 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15800 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI  
ENVIRONMENT & LAND CASE 15 OF 2021  
AK BOR, J  
FEBRUARY 22, 2023  
(FORMERLY NYERI ELC CASE NO. 128 OF 2014)**

**BETWEEN**

**STEPHEN NDUNGU GACHAU ..... PLAINTIFF**

**AND**

**PETERSON MWANGI NJOROGE ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed suit on October 19, 2014 seeking a declaration that under Section 38 of the *Limitation of Actions Act*, he was entitled to be registered as proprietor by adverse possession of the land known as Laikipia Tigithi Matanya Block 3/1010 (Matanya Centre) (the suit property) in place of the registered owner Peterson Mwangi Njoroge. He sought to have the Laikipia Land Registrar directed to rectify the register and register him as proprietor of that land.
2. He averred in the supporting affidavit that his late father Eldard Gachau Kiriithi, was a shareholder and Chairman of the board of directors of Matanya Estate Limited and that his father was allocated the suit property and took possession in 1983. He claimed that when his father died in 1989, he took possession of the suit property, constructed a house and pit latrine and continued to farm on it until when he filed suit.
3. He conducted a search in 2013 at the lands registry and found that the suit property was registered in the Defendant's name. Upon further enquiry, he discovered that Margaret Wanjiru Maina had been fraudulently registered as proprietor of the suit property on 25/5/1994 and that she transferred the land to David Njogo Kimondo without disturbing his possession of the land.
4. He deponed that he had occupied and developed the suit property continuously, openly, exclusive and uninterrupted for over 12 years. He contended that the Defendant did not have a legitimate claim over the suit property by virtue of his adverse possession or through prescription. He emphasised that when



- the Defendant got the suit property transferred to his name, he should first have confirmed whether there was a trespasser on the land.
5. The Defendant opposed the Plaintiff's claim through the replying affidavit filed on 28/5/2015. He deponed that he was the registered owner of the suit property which he purchased from David Njogo Kimondo vide a sale agreement dated 5/8/2009, a copy of which he produced. He deponed that at the time he purchased the suit property it was vacant. That since he resided in Karatina, he was farming on the land in Laikipia through David Maina Murithi. He stated that he stopped cultivating the land that after the harvest in 2009.
  6. He claimed that sometime in 2013 and while in Karatina, he was informed that a semi-permanent structure had been constructed on the suit property. He maintained that it was not true that the Plaintiff had been in occupation of the land since 1994. He came to know about Margaret Wanjiru Maina when this case was filed but confirmed that he purchased the land from David Njogo Kimondo. He maintained that the Plaintiff should have filed a similar suit against the previous registered owners.
  7. The hearing of this suit proceeded on 29/9/2018 before Lady Justice Waithaka when the Plaintiff gave evidence. He basically restated what was contained in his supporting affidavit regarding how he came to be in possession of the suit property. On cross-examination, he confirmed that he had not produced documents showing how his father was allocated the land. He claimed that he visited the lands office and found the land was still registered in the government name. He did not have letters of administration to prove that he was a son of Eldard Kirithi and he did not have photographs showing the developments he had erected on the land.
  8. He stated that the Defendant had not been farming on the land that they meet at the shopping Centre for the first time in 2013. He clarified that he was claiming the suit property because of his occupation and not through his father. The matter was adjourned to allow the Plaintiffs advocate to bring the other witnesses.
  9. The suit was transferred from the Nyeri Environment and Land Court (ELC), to the Nanyuki ELC on 19/8/2021.
  10. Linus Mathenge Murithi gave evidence before this court on 28/9/2022. He lives in Matanya and knew the Plaintiff, who he stated was his neighbor. He confirmed that the Plaintiff had been occupying the suit property from the time his father was alive. He stated that the Plaintiff occasionally allowed him to cultivate a portion of the suit land. He had never seen anyone else occupy the suit property since 1983. He was surprised to learn that the suit property had been registered in the name of Margaret Wanjiru Maina who transferred it to David Kimondo before it was finally transferred to Peterson Mwangi Njoroge without disturbing the Plaintiff.
  11. On cross-examination, he stated that he became the Plaintiff's neighbour in the 1980s. His land was not far from the Plaintiffs. He confirmed that there was a house on the Plaintiff's land which was semi-permanent and that the Plaintiff's employee lived on the land. Further, that the Plaintiff goes to inspect his land and that in 1991-1992 he was ploughing the suit property. He did not know and had never seen David Kimondo and Margeret Maina.
  12. The Defendant gave evidence and adopted his affidavit. He stated that he lives in Karatina. He bought the suit land from David Njorgo Kimondo and they went to a lawyer and entered into an agreement. He confirmed that the person who sold him the land was not staying on it. He wrote a demand letter to the Plaintiff on 4/7/2013 to remove his house from the land. He was taken to the police by the person who was tilling the land. The police called him and he presented his title.



13. On conclusion of the hearing, the court directed parties to file submissions which the court has considered. The Plaintiff submitted that he had been in possession of the suit property since 1989 and that his occupation was not in secret and had not been interrupted despite different people being registered as the proprietors of the suit property.
14. He relied on *Gabriel Mbui v Mukindia Maranya (1993) eKLR* where adverse possession was defined as the non-permissive physical control over land coupled with the intention of doing so by a stranger having actual occupation on his own behalf or on behalf of another person in opposition and to the exclusion of other people including the true owner of that land. He submitted that his occupation of the suit property had been open, notorious and continuous.
15. He urged that time began to run from 1994 to 2014 when he took out the originating summons. He pointed out that the Defendant did not counterclaim for trespass. He contended that by 25/5/2006, David Njogo Kimondo was prevented by Section 7 of the *Limitation of Actions Act* from bringing any suit to recover the land against the Plaintiff. He also relied on Section 37 (a) of that Act.
16. The Defendant submitted that the Plaintiff had not produced evidence to show that he had put up a home or planted anything on the suit land. He submitted that the Plaintiff's allegations were challenged by his own affidavit where he claimed that when he purchased the land in 2009, it was vacant. He asserted that he cultivated the suit property up to the harvest of 2009 then stopped.
17. He maintained that without proof of occupation through photographs, the Plaintiff had failed to discharge the burden of proof. He also relied on the Gabriel Mbui decision on the finding that the adverse character of the possession must be established as a fact and cannot be assumed as a matter of law from mere exclusive possession even if it was for 12 or more years. That in addition, there must be facts showing a clear intention to hold adversely under a claim of right.
18. The Defendant argued that having been registered as proprietor of the suit property on 5/8/2009, the statutory period of 12 years had not lapsed by the time the Plaintiff filed suit in 2014. He urged the court to dismiss the suit and award costs.
19. The issue for determination is whether the Plaintiff proved his claim for adverse possession of the suit property on a balance of probabilities. Through the evidence adduced in court, the Plaintiff established that he had been in open, exclusive and uninterrupted possession of the suit property since 1989. Linus Mathenge Murithi who lives in Matanya and knows the Plaintiff gave evidence and told the court that he is the Plaintiff's neighbour and that the Plaintiff had in the past allowed him to till part of the suit land. He confirmed that the Plaintiff had been possession of the land for more than 20 years.
20. The Defendant claimed that the suit property was vacant when he purchased it and that he utilised the land but stopped after the harvest in 2009. That is highly unlikely because the sale agreement which he tendered in evidence was executed on 5/8/2009. For purposes of the claim for adverse possession, time started running in May 1994 when Margaret Wanjiru Maina was registered as the proprietor of the suit proprietor. Time did not stop running when the suit land was first transferred to David Njogo Kimondo and subsequently to the Defendant.
21. The Plaintiff has proved that he is entitled to be registered as proprietor of the whole suit property. The Defendant is directed to execute all the necessary conveyance documents to facilitate the registration of the Plaintiff as proprietor of the suit property failing which the Deputy Registrar of this court will execute the documents on behalf of the Defendant.
22. Since the Plaintiff has succeeded in his claim and the Defendant has lost title over the suit land, it is only fair that each party bears its costs.



**DELIVERED VIRTUALLY AT NANYUKI THIS 22<sup>ND</sup> DAY OF FEBRUARY 2023.**

**K. BOR**

**JUDGE**

In the presence of: -

Ms. N. Wachira holding brief for Mr. A. Chweya for the Plaintiff

