

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC CASE NO. 148 OF 2015 (OS)

CYPRIAN NJAGI NDEGWA (Suing in his capacity

as the administrator of the estate of

SEBASTIAN MBUI NDEGWA).....

PLAINTIFF

VERSUS

MICHAEL IRERI NGANGA.....

DEFENDANT

JUDGEMENT

1. The Plaintiff herein - CYPRIAN NJAGI NDEGWA (Suing in his capacity as the administrator of the estate of SEBASTIAN MBUI NDEGWA) (hereinafter referred to as the deceased) - filed this case here against the defendant - MICHAEL IRERI NGANGA - vide an Originating Summons dated 03.07.2013. He is seeking a declaration that the deceased has become entitled to ownership of land parcel Evurore/Evurore/2169 measuring approximately 0.046Ha by way of adverse possession. He further seeks that in the alternative there be a declaration that the Defendant is registered as proprietor of the said land on behalf of and in trust for the deceased.

2. It is said that on 06.02.1991 the deceased, who is his brother, entered into a sale agreement with the late Teresia Wambui Nganga for the purchase of a portion measuring approximately 0.05Ha out of land parcel Evurore/Evurore/93 at a consideration of Kshs. 20,000/= which was paid on the same date. He stated that at the time, the land was registered in the name of the late Nganga Mutema who was the husband to the late Teresia Wambui Nganga and whose estate was the subject of succession proceedings.
3. He averred that the deceased was granted vacant possession of the portion he purchased upon making payment and that he developed it by constructing his home, a shop and four rooms for rent. He further said that land parcel No. 93 was subsequently sub divided and the portion that the deceased was purchasing was registered as parcel No. 2169. That land parcel was registered in the name of the Defendant who is the late Teresia's son. He said that the deceased died before he could pursue the title to the suit land and that he left behind two surviving children. That later, his wife also died. He avers that after the death of the late Sebastian Mbui, his children who are still in school have been maintained from the rental income from the developments on the suit land.

4. He further said that recently, the Defendant chased away the tenants occupying the premises on the suit land and intended to sell the land, but the Plaintiff discovered this and registered a caution. He said that since 1991 when the deceased purchased the parcel of land in issue, he has lived openly and without disturbance from anyone on the suit land. He maintains that the beneficiaries of the estate of the deceased should be declared the rightful owners of the suit land and the name of the Defendant cancelled from the register.
5. The Defendant filed a replying affidavit and averred that the sale agreement was between the late Teresia Nganga and the deceased for the sale of an unspecified piece of land from land parcel No. 93. He said that the late Nganga Mutema is the registered owner of land parcel No. 93 and that he was not privy to the sale agreement. He stated that he is the registered owner of land parcel No. 2169 and that he has never entered into any sale agreement with the deceased to sell the suit land to him. He denied that the deceased or his family have been in occupation and or possession of the suit land.
6. He maintained that the Plaintiff ought to have filed a suit against the owner of land parcel No. 93 or the vendor in the

sale agreement. He contended that a claim for adverse possession cannot be filed and sustained on behalf of a deceased person and that the deceased is incapable of being in adverse possession of his suit land since he died a long time ago. He urges that the suit be dismissed with costs.

7. The suit proceeded for hearing on 01.11.2023 when the Plaintiff testified as PW1. He adopted his witness statement as his evidence in chief. He produced in evidence a sale agreement dated 06.02.1991, a copy of a certificate of official search for land parcel No. 93, a copy of an official search for land parcel No. 2169, a copy of a grant of letters of administration to the estate of the deceased, a copy of the green card for land parcel 2169, a sketch map and a copy of a letter for general information.
8. He testified that his brother had built a permanent house for his residence and rental rooms on the suit land and that he died before the suit land could be transferred to him. On cross examination, he stated that the suit land is not being used now and that he lives with his brothers two children in Chuka as both their parents are deceased. He stated that the Defendant does not also live on the suit land. That, the deceased was not buried on the suit land and neither was his wife.

9. He stated further, that the deceased was living on land parcel No. 93 before it was subdivided in 2002. He stated that he sued the Defendant because he told him to remove the buildings put up by the deceased from the suit land. He testified that his brother died in the year 2013 which was over 20 years after buying the suit land and that the land has been vacant since 2013. He stated that no one is living on the suit land now but the buildings are still there.

10. PW2 was George Wainaina Nganga who is the Defendants brother. He adopted his written statement as his evidence in chief. He recalled that his mother the late Teresia Wambui sold a small part of his father's land at Ishiara market to the deceased. He further recalled that in July 2010, he accompanied the Plaintiff to the Defendants home where the plaintiff paid the Defendant Kshs. 20,000/= that the Defendant had requested for subdivision of the land.

11. On cross examination, he stated that he did not know where the deceased's children were living now or where the deceased was buried. He stated that the Defendant does not live on the suit land and that the land is currently unoccupied.

12. PW3, Lydia Mbura Mutegi the Plaintiff's brother in law also adopted her written statement as her evidence in chief. She

stated that the deceased bought and constructed on the land that he purchased from the late Teresiah Wambui Nganga. That he had constructed his residence, four rental rooms and a shop in 1991 on the suit land and that she took over the responsibility of collecting rent and assisting the two children that the deceased had. She averred that later in the year 2013, the Defendant chased away the tenants. On cross examination, she stated that nobody currently lives on the suit land except for a caretaker known as Emilio Gitonga who looks after the building constructed by the deceased. After the testimony of this witness, the plaintiff's case was closed.

13.DW1 Michael Ireri Nganga adopted his written statement as his evidence in chief. That was on 18/9/2024 when hearing of defence case started. He produced in evidence an official search for land parcel 93, a copy of a sale agreement dated 06.02.1991, letters dated 11.04.2013 and 22.11.2012, a copy of a grant of letters of administration to the estate of Nganga Mutema, a certificate of confirmation of grant and the title deed to land parcel 2169. He stated that in 1993, his brother was issued with letters of administration for the estate of Nganga Mutema and land parcel No. 93 was shared equally between him and the late Teresiah Wambui Nganga. He

averred that the said land was subdivided into two parcels No's 2001 which was given to him and parcel No. 2002 which was given to his mother.

14. He further stated that upon getting the title, he went ahead and subdivided the said land and transferred the resultant portions to his family and he was left with land parcel No. 2169 which had no connection with the Plaintiff. He stated that he found out that the deceased was putting up a building on the suit land and he cautioned him to stop, which he did. He averred that the deceased requested him not to demolish the building as he sought clarity from the Defendants mother. He averred that the deceased died before demolishing the structure.

15. On cross examination, he maintained that the deceased wanted to construct on the suit land but he stopped him when he had only put up a foundation. This happened around the year 1997. He stated that the house was roofed but he stopped the construction. On re-examination, he stated that nobody lives in the incomplete house and that the land is in his possession now.

16. The court directed the parties to file written submissions; however, as at the date of this judgement, none had been

filed.

17. I have considered the suit as filed, the response made to it, and the evidence proffered by the two contending sides. The issue for determination is whether the late Sebastian Mbui Ndegwa is entitled to land parcel entitled to land parcel No. Evurore/Evurore/2169 by way of adverse possession.

18. The principles governing adverse possession are settled. A claimant must demonstrate open, continuous, exclusive and uninterrupted possession of the suit land for a period of at least twelve (12) years. Such possession must be adverse to the interests of the registered proprietor. The law requires that the possession be *nec vi, nec clam, nec precario*, meaning without force, without secrecy, and without permission (see the cases of **Samuel Kihamba -vs- Mary Mbaisi [2015] KECA 853 (KLR)** and **Mtana Lewa -vs- Kahindi Ngala Mwagandi [2015] eKLR: Malindi App. No. 56 of 2014**).

19. In the case of **Wambugu -vs- Njuguna [1983] KLR 172** (at pages 172 - 173) the Court of Appeal stated the law of adverse possession as follows:

“(2) In order to acquire by the statute of limitation title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having

discontinued his possession of it. Dispossession of the proprietor that defeats his title is an act ... inconsistent with his enjoyment of the soil for the purpose for which he intended to use it..."

"(3) The Limitation of Actions Act, on adverse possession, contemplates two concepts: Dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years."

20. The concept's *raison d'être* was captured well in the case of **Magu -vs- Nyawanga & Another: HCCC No. 1509 of 2002 (OS) [2005] eKLR** as follows:

"The law on adverse possession is founded on a rational principle: he who enters upon a parcel of land, innocently and in the normal course of living, without anybody's permission, without stealth, and using no violence, is socially recognized as the legitimate and moral possessor of that land, and the public institution of sanctification and protection should vindicate that moral position, and confer overriding rights upon the person in question, where possession has been retained for a certain minimum duration. The legal position created in

protection of such a person carries so much moral force that it would defeat any other claims which appear to be not so well founded and which emerge only from the fact of registration in formal records. Although the title holders, by such formal records, hold a valid position in law, they stand to have their recorded rights taken away and conferred, instead, upon the new moral claimant who has had the physical possession of the suit land and who entered there upon nec vi, nec clam, nec pre cario - that is, the legitimate claimant who has long use not by violence, not by stealth, not by entreaty."

21. From the evidence on record, it is clear that the deceased entered into a sale agreement dated 6/2/1991 with the late Teresia Wambui Nganga for the purchase of a portion of land out of parcel No. Evurore/Evurore/93. It is clear from the written evidence of PW2 that the defendant is his brother. The seller of the land to the deceased party on whose behalf the suit is instituted was also actually his mother. What this means is that the same seller was the defendant's mother. It was envisaged in the agreement that the portion sold would be identified and registered to the deceased purchaser upon subdivision of the entire land. It is clear too that later, the same parcel was subdivided into parcel No's 2001 and 2002.

Further sub-division still took place with the disputed portion ultimately becoming parcel No. 2169. That parcel became registered in the name of the defendant. By then however, the deceased party on whose behalf this suit was instituted had already gone into possession and occupation.

22. Credible evidence has it that he had constructed a residence, some rental rooms, and a shop on the land. The deceased remained in possession and occupation until his death in the year 2013. This position comes out clearly in the evidence of PW2 and PW3. These two witnesses confirmed both the fact of sale and the developments on the land. The defendant however told a different story. According to him, the deceased party never went into occupation and whatever development the deceased wanted to undertake was allegedly stopped at the foundation stage. This story however runs counter to the evidence of the defendant's own brother (PW 2) who confirmed that his own mother sold the land to the deceased and that the deceased carried out development thereon.

23. The court is persuaded that the deceased went into possession and occupation long before the parcel of land became parcel No. 2169 and registered in the name of the defendant. The possession and occupation took place

sometimes in 1991. The parcel of land was registered in the name of the defendant in the year 2006. The agreement of sale is dated 6/2/1991. The transacting parties were supposed to obtain consent of Land Control Board within six (6) months after entering into agreement. The 6 (six) months ended sometime in August 1991. After that, the continued possession and occupation of the land by the deceased buyer became adverse to the seller. Time therefore started running for purposes of adverse possession sometimes in August 1991. By August 2003, the deceased purchaser had already become an adverse possessor. After that, neither the seller nor anybody claiming ownership under or through her could legitimately gain or get registered ownership. The defendant is the Son of the seller. His own brother - PW 2 - was clear that the disputed land was sold to the deceased purchaser. The defendant couldn't legitimately acquire rights of ownership by the time the land was registered in his name in the year 2006. That land already had an adverse possessor - the deceased buyer - who was entitled to be registered as owner.

24. Further, the deceased purchaser clearly used and/or developed the land as his own. He put up permanent buildings on the land because he obviously viewed it as his own. By the

time the defendant became the registered owner, the deceased purchaser had already become an adverse possessor some three (3) or so years earlier. From that time onwards, any person – such as the defendant herein – who acquired registered ownership would have to reckon with the fact that such ownership would be held in trust for the deceased purchaser and/or his estate. That would be so because adverse possession rights would have crystallized or matured. That is the scenario that obtains here. It is a farfetched argument to say that adverse possession suit can only run against a living person. Adverse possession is about property rights and such rights obviously survive the demise of a person.

25. The upshot, in light of the foregoing is that the plaintiff's case is well proved on a balance of probabilities and is hereby allowed. Costs are awarded to the plaintiff.

JUDGEMENT DATED, SIGNED and DELIVERED virtually at **KITUI**
this **30TH DAY OF JUNE, 2026** pursuant to notice dated
17/6/2026.

In the presence of;

Court Assistant – Musyoki

No Party Present

No Counsel Present

A. KANIARU

JUDGE - ENVIRONMENT & LAND COURT, KITUI

ORIGINAL