



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**ENVIROMENT & LAND CASE NO. 3 OF 2018**

**LUCY FRANCIS KANINI.....PLAINTIFF**

**-V-**

**JOYCE CIERURI MBOROKI.....DEFENDANT**

**JUDGMENT**

1. By an Originating Summons filed in court on 31<sup>th</sup> January 2018, the plaintiff seeks the following orders as against the defendant;

**a) A declaration that Lucy Kanini Francis, the plaintiff herein has become entitled by way of adverse possession to all that parcel of land known as Njia/Buri-e-ruri/3918**

**b) An order for rectification of the register and the said plaintiff be registered as the sole proprietor of all that parcel of land known as Njia/Buri-e-ruri/3918.**

**c) An order that the defendant herein do execute all the required instruments and/or documents to effectuate transfer to the plaintiff of land parcel. No. Njia /Buri-e-ruri/3918 and in default the court's Deputy Registrar be empowered to so execute the transfer instruments on her behalf**

**d) Costs of the suit be borne by the defendant.**

2. The plaintiff's case is that she had bought a portion of land measuring 0.30 Acres from the defendant herein, way back in the year 1995 at a consideration of Kshs 68,000/= which portion was to be excised from the defendant's land parcel No. Njia/Burieruri/3820 which was at that time registered in the name of the defendant's husband who was already deceased by then and that the defendant upon signing the agreement gave her vacant possession pending transfer. Afterwards, the land was subdivided and got registered in the names of the defendant and her portion given land title number Njia/Burieru/3918, but the defendant refused to execute transfer documents into Plaintiff's names.

3. The suit is defended via the Replying affidavit of the defendant filed in court on 9.5.2018, where it is averred that the doctrine of adverse possession is not applicable herein, that plaintiff's case is time barred, and that the dispute was arbitrated upon by the Njuri Ncheke where by it was resolved that plaintiff was to pay to the defendant a sum of Ksh. 50 000.

4. **PW1 Lucy Kanini Francis** while adopting her witness statement dated 30.5. 2018, testified that on 28<sup>th</sup> April 1995, she had bought a portion of land measuring 0.30 acre from the defendant herein which land was Njia/Burieruri/3820 which was then registered in the name of the defendant's deceased husband. After conclusion of the succession cause, the land was subdivided and new title subject herein came forth. It was her further testimony that she had lived on the land for a period of over 23 years and extensively developed the same and the defendant had refused to effect transfer of the same. The matter was taken up by *Njuri Ncheke* council of elders whereupon defendant agreed to transfer the land but later on renegade on this promise.

5. The plaintiff contends that she is entitled by way of adverse possession of all that parcel of land known as Njia/Burieruri/3918 as this is the place she calls home. She has a shop there, a posho mill and she has installed water and electricity.

6. **PW2, Joyce Mwokari** also adopted her witness statement filed in court on 4<sup>th</sup> June 2018. She testified that she knew the plaintiff herein as she had worked for her as a house manager for more than 5 years. She knew the defendant too. She contends that in the year 1995, the defendant had approached the plaintiff at her home and asked her if she could buy a portion of land she was selling. Subsequently thereafter, the two entered into an agreement for sale. Plaintiff paid a consideration of Kshs.55,000 and left the balance of Kshs 13,000 and plaintiff was to take possession of the land immediately upon signing the agreement for sale and transfer was to be effected immediately upon payment.

7. **DW1, Joyce Cieruri M' Mboroki**, is the defendant in this case. It is her evidence that the plaintiff had occupied her land for a very long time. She had given 10 points to Hellen Ntundu who then gave these points to the plaintiff and that when she paid her, she added her 10 more points. At that time, she had problems and that was why she was selling the land. It was her further evidence that the plaintiff did not pay her Kshs. 5000 whereupon she decided to abandon the same and subsequently sold the land to one Mungathia for Kshs 100,000. It was her further evidence that to date, she has not been paid and that was the reason why she had refused to give her the land.

8. **DW2, one Hellen Ntundu** testified that plaintiff is her cousin and that she knew the defendant as a person who had sold land to them. It was her evidence that she used to work in the same market with the plaintiff and that when she bought land, she informed the plaintiff who also became interested. Since she knew that the defendant had more land, she took the plaintiff to the defendant who agreed to sell 20 points to the plaintiff at Kshs.55,000. Plaintiff had no money, so she was to get money and give it to DW2 for onward transmission to the defendant. It was her evidence that they did not write an agreement, that she was the only witness and that whenever the plaintiff would get money, she would give her the same for onward transmission to the defendant. Plaintiff eventually paid all dues in respect of the 20 points.

9. After sometime, the defendant sold her parcel at Kangeta and told her that the plaintiff had borrowed her Kshs 50,000 though she did not witness this transaction. Plaintiff later informed DW2 that she had bought 10 more points from Joyce, but DW2 did not get involved in this transaction.

10. **DW3, one Samuel Kiboare** testified that he knew the parties herein, and that plaintiff had sued the defendant at *Njuri Ncheke*. During the course of hearing of their case it emerged that the plaintiff had bought 20 points of land whereupon they asked the defendant why she had not shown the plaintiff her portion but the defendant stated she had sold a plot and gave Kshs 50,000 which was a loan to the plaintiff and there were iron sheets too but the plaintiff didn't pay the loan hence the dispute.

11. I have carefully considered the evidence on record. This is essentially a claim for adverse possession where the plaintiff inter alia seeks a declaration that she had become entitled by way of adverse possession to the suit property. PW1 testified that on 28<sup>th</sup> April 1995, she had bought a portion of land measuring 0.30 acre from the defendant herein which land was Njia/Burieruri/3820 which was then registered in the name of the defendant's deceased husband and that after conclusion of the succession cause, the land was subdivided and new title subject herein came forth. It was her further testimony that she had lived on the land for a period of over 23 years and extensively developed the same and the defendant had refused to effect transfer of the same whereupon she complained to the *Njuri Ncheke* council of elders whereupon she agreed to transfer but later on renegaded on this promise.

12. The plaintiff contends thus that she is entitled by way of adverse possession to of all that parcel of land known as Njia/Burieruri/3918. Her evidence on this issue remained unchallenged and unshaken even in cross examination. She further denied having been ordered to pay Kshs 50,000 to the defendant by the *Njuri Ncheke* and stated that she was the one who won the case. Similarly, PW2's evidence was not challenged by the defence in cross examination.

13. DW1 on the other hand admitted that the plaintiff had occupied the suit property for a very long time. She also admits that she had given 10 points to Hellen Ntubu who then gave the same to the plaintiff. She stated that the plaintiff had not paid her Kshs 5,000 whereupon she decided to abandon the Kshs 5,000 and subsequently sold the land to one Mungathia at Kshs 100,000. DW 2 on the other hand testified having witnessed the plaintiff buying land from the defendant. She however contended that they had no written agreement. She however appeared to contradict DW1 when she stated that the plaintiff eventually paid the balance of Kshs 10,000 whereas DW1 referred to Kshs 5,000.

14. In ***Kimani Ruchine v Swift Rutherford & Co.Ltd (1980) KLR*** it was stated that;

***"The plaintiffs have to prove that they have used this land which they claim, as of right: nec vi, nec clam, nec precario ..... So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration; See Wanyoike Gathire v Berverly (1965) EA 514, 518, 519 per Miles, J."***

15. The plaintiff's evidence that she had bought 0.30 points of an acre from defendant were not challenged in cross examination. Indeed the plaintiff produced a sale agreement in her bundle of documents dated 28<sup>th</sup> April 1995 confirming the aforementioned sale and the contents thereof were never challenged by the defendant. The defendant indeed admitted in her evidence in chief that the plaintiff had been in occupation of the suit property for a very long time. This was also confirmed by DW2.

16. It is not lost on this court that the defendant failed to produce her documents in court despite having been given ample time to do so.

17. The plaintiff had entered the suit land with consent of the defendant, but the agreement was not fully executed and as such, the consent did not remain in force after the fall out between the two parties. They even resulted to taking each other to different Njuri Ncheke elders, which is a clear manifestation of lack of consent.

18. In ***Peter Mbiri Michuki v Samuel Mugo Michuki [2014] eKLR*** the Court of Appeal made reference to ***Wambugu – v- Njuguna, (1983) KLR 172 at holding 4***, where it was held that:

***"Where the claimant is in exclusive possession of the land with leave and license of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined".***

19. I have no doubts that plaintiff has been in occupation of the suit land for a period of over 12 years. This is where she has put up a home, where she operates a shop and a posho mill, and she has also developed the property by installing water and electricity.

20. A perusal of the certificate of search for parcel no. Njia Buru-e-ruri/3918 reveals that this land measures 0.089 hectares. That amounts to 0.21 acres (one hectares is equal to 2.471 acres). The suit land is therefore not 0.3 acres. Nevertheless, plaintiff has proved that she is entitled to the suit land.

**21. Final orders;**

**a) A declaration is hereby issued to the effect that Lucy Kanini Francis, the plaintiff herein has become entitled by way of adverse possession to all that parcel of land known as Njia/Buri-e-ruri/3918**

**b) An order is hereby issued for rectification of the register, where plaintiff is to be registered as the sole proprietor of all that parcel of land known as Njia/Burieru/3918 instead of defendant, Joyce Cieruri M'Mboroki.**

**c) The court's Deputy Registrar is hereby authorized to sign all requisite documents in order to give effect to the implementation of this Judgment.**

**d) Any orders of injunction, inhibition, restrictions or caution that may be subsisting are hereby discharged in order to facilitate the transfer of the land to plaintiff.**

**e) Each party is to bear their own costs of the suit.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 20<sup>TH</sup> MARCH, 2019 IN THE PRESENCE OF:-**

**C/A: Kananu**

**Plaintiff**

**Defendant**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**