



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**ORIGINATING SUMMONS NO. 166 OF 2012 (OS)**

**IN THE MATTER OF LAND PARCEL NO. NYAKI /NKABUNE/186 REGISTERED IN THE  
NAMES OF KIRIMANIA M'MATHAE**

**BETWEEN**

**DAVID KIRIINYA MICHAEL.....APPLICANT**

**VERSUS**

**JANE ROSE KINYA (sued as the administrator of the estate of**

**KIRIMANIA M'MATHAE (Deceased).....RESPONDENT**

**J U D G M E N T**

1. The Suit land is No. NYAKI/NKABUNE/ 186 originally owned by one KIRIMANIA MATHAE who had acquired title in 1970's. He died in 1973.
2. His Son Stephen Kiogora Kirimania apparently sold  $\frac{1}{4}$  of an acre of that land to Plaintiff in 2000 but the land was not transferred to Plaintiff. The Suitland is now owned by defendant, a sister of Stephen Kiogora Kirimania.
3. Plaintiff is now claiming the land by way of adverse possession.

**PLAINTIFF'S CASE**

Vide the O.S Filed on 19:09.16, Plaintiff has put forth the following questions for determination;

1. Has the Plaintiff occupied 0.25 Acres of land parcel known as NYAKI/NKABUNE/186?
2. Has the plaintiff's occupation been open, unhindered, notorious, undisturbed and uninterrupted for more than 12 years?
3. Has the Plaintiff been in occupation of the suit land since the year 2000?
4. Has the Plaintiff become entitled to the 0.25 Acres of the suit land by way of adverse possession?
5. Who is in possession and occupation of parcel No. NYAKI/NKABUNE/186?

4. Plaintiff relied on the contents of his affidavit filed on 19.09.16 as his evidence. He contends that in 2000, he entered into a land Sale agreement in 2000 with one Stephen Kiogora Kirimania and the land in

question was NYAKI/NKABUNE/186 which was registered in name of deceased Kirimania Mathae.

5. The portion that Plaintiff bought was 0.25 of an acre. He (Plaintiff) apparently occupied the land where he built a 3 roomed residential house for himself and two houses for his sons.

6. He avers that he farms on the land, he has also installed electricity and water and he also does zero grazing and that this is where he calls home.

7. Plaintiff avers that he has peacefully occupied this land for the last 16 years without any interruption, but that he has now gotten wind that the defendant intends to evict him.

8. In support of his case, Plaintiff has produced the following documents as exhibits.

1. A Search Certificate of 21.07.16 showing that Parcel No. Nyaki /Nkabune/186 was registered in the name of Kirimania Mathae where the Title was issued on 07.03.1970.

2. The land Sale Agreement of 2000 between Plaintiff and Stephen Kiogora Kirimania.

3. Certificate of confirmation of grant dated 16.08.16 issued to Jane Rose Kinya(defendant ) in respect of the estate of Kirimania M'Mathae.

9. Plaintiff also avers that it had been agreed between him and Stephen that the latter would file a Succession Cause to facilitate the finalization of the agreement. He didn't file the cause prompting the Plaintiff to file a citation in Succession Cause No. 66 of 2012. The Ruling there in was that Plaintiff was not the right person to file a citation.

#### DEFENCE CASE

10. Defendant admits that indeed the land in question belonged to her father. She however states that Plaintiff was aware that the land did not belong to her brother Stephen.

11. Defendant avers that through a Succession Cause, she is now the administrator of her father's land and she now has a title issued on 16.08.16.

12. Defendant states that plaintiff has indeed built on that land where he stays there with his family.

13. In support of her case, defendant produced the following documents;

1. Copy of titled deed for parcel No. Nyaki/Nkabune/186 (1.0 Ha) in name of Jane Rose Kinya Kirimania issued on 23.08.16.

2. Copy of ruling in Succession Cause No. 766/12.

#### 14. DETERMINATION

Having weighed all the issues raised herein and the submissions of the parties, I find that the following issues are not disputed.

1. That the land NYAKI/NKABUNE/ 186 belonged to one Kirimani Mathae.

2. That Defendant and one Stephen Kiogora are siblings.

3. That the land is now registered in the name of defendant.

#### 15. ISSUES FOR DETERMINATION.

1. What is the impact of the Sale Agreement in this dispute?
2. Whether the Plaintiff has been in exclusive use and possession of the land.
3. Whether the occupation by Plaintiff (if any) has been open and notorious.
4. Whether the occupation has been uninterrupted for a period of at least 12 years
5. Whether the occupation has been adverse to the title of the owner (hostile occupation)

16. Impact of the Sale Agreement

The agreement between Plaintiff and Stephen Kiogora was null and void from the start since Stephen Kiogora was not an administrator of the estate of his father. The issue at hand is however not the legality of that Sale Agreement. What is note able is that Plaintiff's entry into the suit land is anchored on that agreement of 2000. There appears to be no dispute about that.

17. Whether Plaintiff has been in exclusive possession of the land in question

Plaintiff avers that he occupied  $\frac{1}{4}$  portion of the land in 2000. He has put up a home there. On this issue of occupation, defendant appeared hesitant on what to say. In her statement filed on 18.6.17, Defendant avers that she met the Plaintiff for the first time when the latter filed a citation No. 766/12 in High Court in Meru. However, in her testimony before this court, she stated that:-

**“I do not know David He is a brother in Law of my husband...”**

While being cross examined, she stated that:-

**“Plaintiff has built on the land but I do not know him. He stays there with his family.....”**

18. In light of this admission by defendant that Plaintiff stays on the suit land, then I need say no more on this issue save to state that Plaintiff is the one in exclusive occupation of the suit land to the extent of  $\frac{1}{4}$  of an acre.

19. Has the occupation been open and notorious?

There is no evidence to indicate that Plaintiff's occupation has been discrete. He has built houses there. He farms there. This is where he has put up a home. It follows that, the occupation has been open and notorious.

20. Whether the plaintiff has occupied the suit land for 12 continuous years. Plaintiff has averred that he occupied the land in year 2000. Defendant claims he met Plaintiff in 2012 when the latter was filling the case. She has however not shed light on when Plaintiff occupied the land yet she admits that this is where he stays with his family.

21. By the time this case was filed, plaintiff had occupied the land for a period of 16 years. Defence has not challenged this averment. There is no evidence to show that such occupation has been interrupted during this period of occupancy. I therefore find that plaintiffs occupation of the 0.25 acres of the suit land has been un interrupted for a period of more than 12 years.

22. Whether the occupation has been adverse to the title of the owner

Plaintiff has cited the case of :-

**“Grace Kamene M'Berece versus Joyce Rigiri & Another** the Court of Appeal where it was held **“We note that the 1<sup>st</sup> respondent is a holder of Letters of Administration to the Estate of**

**David Mbogori, which were issued by the High Court at Nairobi on 9<sup>th</sup> September, 1997. Section 16 of the Limitation of Actions Act-Cap 22 of the Laws of Kenya states as follows; “for the purposes of the provisions of the Act relating to actions for the recovery of land, an administration of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration”.**

23. Defence on the other hand submits that there is no way one can dispossess a dead person of his land or other property and neither can a dead person discontinue his possession of land. It is further averred that dispossession and discontinuation applies to living people only.

24. In the Grace Kamene case, (Supra), the Court was dealing with a situation where deceased had died in 1980 but letters of administration were acquired in 1997. The Court had cited provisions of Section 16 of Cap 22. The question the Court posed was: **“What did the 1<sup>st</sup> Respondent do to ward off adverse claims...?”**

25. In the present case, it is the Plaintiff who tried to nudge the defendants family to get letters of administration through the citation.

26. What is apparent in this case is that the beneficiaries of the estate of deceased (including the defendant) did nothing to ward off the Plaintiff who had certainly dispossessed the estate of deceased the use of the land.

27. In **Peter Mbiri Michuki v. Samuel Mugo Michuki court of appeal case no. 22 of 2013, Nyeri**, the court invoked the provisions of section 16 of the limitations of actions act while holding that **“rights of a person in possession or occupation of land were equitable rights which were binding on the land, and the land was subject to those rights”.**

28. I am inclined to find that the occupation of the plaintiff on the portion of land 1/4 acre was adverse to the title of the owner.

29. I also find that all the questions set forth as no. 1 to 5 in the originating Summons have been answered in the affirmative.

30. I therefore proceed to give final orders as follows:-

**1. It is hereby declared that David Kiriinya Michael, the Plaintiff herein has become entitled by adverse possession, to 0.25 Acres of that parcel known as L.R. NO. Nyaki/Nkabune/186.**

**2. An order is hereby issued for the Plaintiff to be registered as sole proprietor of the 0.25 Acres parcel of Land known as Nyaki/Nkabune/186 by the Land Registrar, Meru Central District in respect of that portion of land where he is occupying.**

**3. The Defendant is hereby ordered to execute all the requisite instruments and/or documents to effectuate transfer to the Plaintiff of 0.25 Acres from Land parcel LR No. NYAKI/NKABUNE/186 and in default, the Deputy Registrar is hereby empowered to execute the transfer instruments on her behalf.**

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

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 23<sup>rd</sup> JANUARY, 2018 IN THE PRESENCE OF:-**

**Court Assistant: Janet/Galgalo**

Miss Njenga for Plaintiff present

Nyamu Nyaga H/B for Riungu for Defendant Present

**HON. L. N. MBUGUA**

**ELC JUDGE**