



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO 138 OF 2012**

**GRACE TOROME.....PLAINTIFF**

**VERSUS**

**TITUS M. MBUGUA.....1<sup>ST</sup> DEFENDANT**

**EDITH TOROME.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

***(claim for adverse possession to land; evidence not showing that applicant has been in open, continuous and quiet possession for 12 years; possession by threats to spear the defendant cannot be said to be quiet possession; change of proprietorship; change does not stop time from running; for failure to prove quiet possession for 12 years suit is dismissed with costs)***

1. This suit was commenced by way of an Originating Summons filed on 18<sup>th</sup> August 2009, pursuant to the provisions of Sections 37 and 38 of the Limitation of Actions Act, CAP 22, and Order XXXVI Rule 3D of the Civil Procedure Rules (then existing before the Civil Procedure Rules of 2010). The claim is one of adverse possession whereby the applicant (whom I will refer to as the plaintiff) wants to be declared to have become owner by way of adverse possession, over the properties Narok/Cis Mara/Nairagie Enkara/564 and 565. These two properties are registered in the names of the two respondents (whom I will refer to as defendants).

2. In the supporting affidavit to the Originating Summons, the plaintiff deposed that she has been in uninterrupted and exclusive possession of the two properties since the year 1961 when they comprised of the land parcel Narok/Cis Mara/Nairagie Enkara/270 (parcel No. 270) which land the plaintiff has averred was allocated to her late husband, Clement Torome, by her father in law. The first defendant is brother to Clement Torome and the 2nd defendant is daughter of the 1st defendant. The plaintiff has deposed that in the year 1984, the 1st defendant had himself registered as proprietor of the land parcel No. 270 without her knowledge or the knowledge of the plaintiff's husband.

3. It is stated that the land parcel No. 270 was later subdivided without the plaintiff's knowledge but her occupation continued and the same has been uninterrupted. It is her case that she has been in continuous and quiet possession for a period of over 12 years and she therefore deserves to be declared owner of the two parcels of land through the doctrine of adverse possession.

4. The defendants have opposed the Originating Summons through the replying affidavit of the 1st defendant. He has averred that he became registered as proprietor of the land parcel No. 270 on 8 March

1974 whereas his step brother, Clement Torome, became registered as proprietor of a parcel No. 274.

5. The 1st defendant deposed that since then, he has been in possession of his land whereas the plaintiff has been in possession of their land. In the year 1974, he has deposed that he permitted the plaintiff to farm a portion of his land but in the process, the plaintiff destroyed his fence and made the two parcels appear as one.

6. He has deposed that the plaintiff lives in Ntulele (a different area from where the suit property is situated and has never made any developments on the suit land. The 1st defendant has averred that after the encroachment by the plaintiff, he filed a boundary dispute before the Narok Land Registrar and he requested him to visit the ground but this was never done due to the absence of the plaintiff. He has deposed that after the death of her husband, the plaintiff threatened him with death if he stepped on the land which made him write letters of complaint to the authorities.

7. He has stated that both himself and the plaintiff have been leasing out their respective parcels of land until the year 2006 when his son wanted to plough his land. He has denied possession by the plaintiff and has averred that the plaintiff has only been in physical possession of the suit properties since forcefully taking over for 4 years before the filing of the suit.

8. Directions were taken that the matter do proceed by way of oral evidence. The plaintiff testified and called one witness in support of her case whereas the 1st defendant testified on behalf of both defendants as the sole witness.

9. In her evidence, the plaintiff testified that her late husband, Clement Torome, died in the year 2003 and that the land parcel No. 270 belonged to him. She testified that they have been living on this land since the year 1961. At some point she went to do business away from the land but came back in the year 1981 and continued ploughing it.

10. After her husband died, she went to obtain the title deed in the year 2006 and that is when she found that the defendants have already taken the same. She arranged for a family meeting to resolve the issue and later went to the Land Disputes Tribunal. She testified that the tribunal ordered the defendants to return to her the title but they refused. She testified that the 1st defendant is her neighbor in the land parcel No. 283.

11. In cross-examination she testified that she has filed the case on behalf of her husband, but she did not have any grant of letters of administration. She was asked whether she is aware of a land parcel No. 294 and she testified that it is the 1st defendant who ploughs it. She denied that the land parcel No. 294 bears the name of her husband. She was not aware that the 1st defendant had a title deed to the land parcel No. 270 in the year 1988 and she denied that the title of the 2nd defendant to one of the subdivided portions was obtained in the year 2006.

12. She was not aware of any Land Adjudication proceedings between her late husband and the 1st defendant. She agreed that she filed suit before the Land Disputes Tribunal but denied receiving any summons from the Land Registrar. She stated that they have had no disputes over the subject parcels of land. She further testified that she has her house on the land parcels that she claims. She testified that the suit properties belong to her and that is why she wants title to the same.

13. PW-2 was one Kamishna Ole Njololo. He is a neighbor to the litigants and he knows them well. He testified that he knows the land of the 1st defendant and that of the plaintiff's late husband. He testified that the 1st defendant leases out his land and that there was no complaint when the plaintiff's late husband was alive. He testified that the land of the plaintiff is not subdivided and that the plaintiff has planted maize on it whereas on the land of the 1st defendant is planted wheat.

14. In cross-examination, he testified that he does not know the parcel numbers of the litigants nor the acreages. Although he stated that he does not know the history of the land, he testified that the land was originally owned by the father of the 1st defendant, and that he subdivided the land amongst his sons. He

testified that the 1st defendant has not built any structure whereas the plaintiff has developed a house for her cow herders and a boma for goats. He testified that the plaintiff does not live on the land but lives elsewhere in Ntulele.

15. With the above evidence the plaintiff closed her case.

16. The 1st defendant testified that he currently resides in Maai Mahiu. He testified that he owns the land parcel No. 564 whereas the parcel No. 565 is owned by his daughter who is the 2nd defendant. He testified that during demarcation in the year 1973, his father gave him the land parcel No. 270 and boundaries were placed in the year 1974.

17. He testified that he had leased out at the land from the year 2003 but before that he had allowed his late brother to plough maize on it. His brother however leased it out and wheat was grown. He was not happy with this and he decided to take back his land. He testified that it is when he told him to stop using his land that they resorted to suing him. He testified that his late brother owns the land parcel No. 294 and he produced the copy of register to prove this.

18. He testified that the plaintiff has threatened him with death and he produced a letter of complaint to the District Commissioner, Narok, dated 5<sup>th</sup> June 2009. He testified that owing to the threats of the plaintiff, who threatened to spear him, he has not been on his property. He testified that there is no development on the land save for a shed made by the plaintiff in the year 2011 for sheltering from the rain. He stated that they had their dispute with his brother over the land settled in the year 1976 and he produced the minutes from the Land Adjudication Office.

19. He also produced the proceedings of the dispute referred by the plaintiff to the Land Disputes Tribunal. He testified that to him the dispute is a boundary dispute and he had himself referred the matter to the Land Registrar. He produced payment receipts for a boundary dispute over the land parcels No. 270 and 294. He denied that the plaintiff has been on the land since the year 1961 as at that time, demarcation had not been done and there were no boundaries. He denied that the plaintiff has been on his land for a period of 12 years.

20. In cross-examination, the 1st defendant asserted that the plaintiff has not been living on the land as she has been living in Ntulele. He testified that he only gave his late brother the land to plough in the year 2002. It was in the year 2006 that the plaintiff threatened to spear him. He stated that he has tried to have her removed but the plaintiff has been hostile. The plaintiff now uses both the parcels No. 564 and 565.

With the above evidence, the defendants closed their case.

21. In his submissions, Mr. Cheruiyot for the plaintiff submitted inter alia that the registration of the 1st defendant as owner of the land parcel No. 270 and the later subdivision to the parcel numbers 564 and 565 were done without the knowledge of the plaintiff or her husband. He submitted that the plaintiff has been in continuous, open, peaceful and uninterrupted possession of the properties for over 12 years while none of the registered proprietors have been in actual possession of the said parcels. He submitted that the right of action of the 1st defendant to claim the land arose in the year 1984 when he became registered as owner of the land parcel No. 270 which has lapsed. He submitted that the plaintiff has never been evicted by the defendants from the suit properties and that the plaintiff has met the test required to acquire land by way of adverse possession. He relied on various authorities on the doctrine of adverse possession.

22. On the other hand, Mrs. Mukira for the defendants, reviewed the evidence and submitted, first, that the plaintiff in her evidence stated that she has brought this suit on behalf of her late husband yet she has no capacity to do so for want of letters of administration. She submitted that the suit is therefore fatally defective. She further submitted that the plaintiff has not satisfied the test for adverse possession. She pointed out that PW-2 negated the evidence of the plaintiff on occupation of the land. She further submitted that even the plaintiff's occupation has not been continuous for the 1st defendant had testified that he used to lease out the land. She submitted that this was affirmed by PW-2. She submitted that no proof had been tendered of any form of development as claimed by the plaintiff. She further submitted

that the period of 12 years has not been met. It was her view that time will only start running from the time of registration of a proprietor and in the case of the 2nd defendant, she became registered as proprietor of the land parcel No. 565 on 4 March 2006, and therefore 12 years had not lapsed to the institution of the suit. On this argument, counsel relied on the case of **Titus Kigoro Munyi vs Peter Mburu Kimani (2015) eKLR**. She submitted that the plaintiff has miserably failed to prove her case.

23. I have considered the pleadings, the evidence and submissions of counsel. The starting point is to appreciate that this is a case of adverse possession. At times, I got the feeling that the plaintiff was not presenting a case for adverse possession, but a case of actual entitlement to the land, either for herself or for her husband, not so much based on possession, but based on the argument that the land actually belonged to their family and not to the family of the 1st defendant. But this to me appears to have been settled way back in the year 1976, when the matter was presented before the Land Adjudication Officer. I do not really want to dwell on the issue of who between the plaintiff or her late husband, and the 1st defendant, were entitled to be registered, in the first instance, as proprietors of the land in issue, for that is not the case before me.

24. It is irrelevant to the determination of the issues herein, how the 1st defendant came to be registered as owner of the original land parcel No. 270 and whether that registration was proper or fraudulent. The case before me as presented is a case of adverse possession and I will determine it on that basis.

25. It is trite law that to succeed in a case of adverse possession, one needs to demonstrate that she has been in open, peaceful, continuous and uninterrupted possession of the land claimed for a period of at least 12 years. This is brought out in the maxim, *nec vi, nec clam, nec precario*, that is without force, without secrecy and without permission. Such possession must also be accompanied by the necessary *animus possidendi*, or desire to acquire the land as one's own.

26. In our case, the plaintiff seemed to suggest that she has presented this case on behalf of her late husband. That, as pointed out by Mrs. Mukira, cannot lie, for she has not demonstrated that she has capacity to represent the estate of her late husband and further, the suit as filed is not one filed on behalf of her late husband. The plaintiff has filed this suit on her own behalf and she needs to demonstrate that she herself, not her late husband, has been the one in open, continuous, peaceful and uninterrupted possession of the two properties that she claims.

27. In her pleadings and evidence, the plaintiff claimed to have been in possession from the year 1961, and that this possession has been uninterrupted by the 1st defendant who was the original owner of the land parcel No. 270 before its subdivision. I have serious doubts on the quoted year of 1961 and nothing has been presented before me to show that the plaintiff has been in possession of the land since the year 1961, independent of any possession that her late husband may have had.

28. The land in question seems to have been demarcated in the year 1976 when the dispute between the plaintiff's late husband and the 1st defendant was resolved by the Land Adjudication Officer and I do not know where the plaintiff got the year 1961 from. The 1st defendant became first registered owner of the original land parcel No. 270 in the year 1984. This land was subdivided into the land parcels No. 564 and 565 in the year 1988 when the registers for these later two parcels were opened. The husband of the plaintiff died in the year 2003 and it has not been shown that since his death, the plaintiff has independently been in quiet possession of the defendants' land for a period of 12 years, this suit having been filed in the year 2009.

29. The plaintiff also pleaded that she has since developed the said parcels of land. However, this evidence of the plaintiff has been negated by that of PW-2 who testified that the 1st defendant leases his land and further that he does not know what parcel number the plaintiff ploughs. PW-2 also affirmed that save for a structure for cow herders and a boma for goats, there are no other developments since the plaintiff lives in Ntulele and not on the suit property. The evidence of PW-2 seems to have support from that of the defendant.

30. On my part, I opt to believe the evidence of PW-2 and that of the 1st defendant. The plaintiff's

demeanour did not impress me much as a witness. She was overly hostile, even to her counsel, and seemed to have a lot to hide. This was in contrast with the 1st defendant who appeared to me to be a forthright and honest witness. Both PW-2 and the 1st defendant testified that the 1st defendant used to lease his land. This of course does not tally with the plaintiff's evidence that she has continuously been on the land. On a review of the evidence, I am not persuaded that the plaintiff has been in continuous occupation of the original parcel No. 270 or of its subdivisions for a duration of 12 years as she claimed.

31. The plaintiff has failed to show continuous occupation for a period of 12 years, but I feel that I need to address a point raised by Mrs. Mukira, who argued that the claim on the title No. 565 cannot succeed on the basis that the 2nd defendant only became registered as proprietor in the year 2006, and 12 years had not lapsed to the year 2009 when the suit was filed. That however is not the law, for the change of proprietor does not affect the running of time. In other words, the change of proprietorship is immaterial and time does not start running afresh every time the proprietorship of the land changes. Time for accumulating the 12 years continues to run even where the land is sold to another person.

32. This position was affirmed by the Court of Appeal in the case of *Githu v Ndeete (1984) KLR 776*. I have looked at the case of *Titus Kigoro Munyi vs Peter Mburu Kimani (2015) eKLR*, cited by Mrs. Mukira, but the holding therein was not as presented by Mrs. Mukira. The Court of Appeal in the said case actually affirmed the principle that the law on prescription affects not only the present holders of the title but their predecessors as well (See paragraph 23 of the said decision). Be as it may, as I have stated earlier, what is important is that the plaintiff has not proved continuous uninterrupted occupation for a period of 12 years, the change of proprietorship notwithstanding.

33. Even if I was to believe that the plaintiff has been in continuous occupation for a period of 12 years, I cannot classify that occupation as being peaceful. The plaintiff has been having feuds with the 1st defendant over the original land parcel No. 270. It is clearly not land that the 1st defendant had ignored or given up on.

34. The plaintiff herself testified that to resolve the differences over the land, she called a family meeting, which probably failed to settle the issue, for she later proceeded to the Land Disputes Tribunal. I have looked at her evidence before the Tribunal and her complaint was that the 1st defendant has encroached onto the land parcel No. 270, which she believed ought to belong to her husband.

35. Now if in the year 2006, she was already complaining that the 1st defendant was in the land parcel No. 270, how can she, in these proceedings, attempt to state that the 1st defendant has never been on the land? This of course does not tally. The issue at the Tribunal was whether the plaintiff or her husband deserved the land parcel No. 270 which the 1st defendant strongly resisted.

36. The 1st defendant has also demonstrated that before this case was filed, he did report to the District Land Registrar of a possible boundary dispute between himself and the plaintiff as it was the position of the 1st defendant that the plaintiff has strayed from what her husband owned, which is the land parcel No. 294. Clearly, the 1st defendant wanted the plaintiff out of any portion of the original land parcel No. 270.

37. Moreover, the 1st defendant testified that the plaintiff has only succeeded in keeping him away from the land by threats that he will spear him. These threats were reported by the 1st defendant as demonstrated by his letter of 5 June 2009, written to the District Commissioner Narok, and copied to the OCPD Narok and the OCS, Nairekia Enkare Police Station.

38. Given the above, it cannot be said that any possession of the plaintiff, of the suit properties has been quiet or peaceful. In fact, her current possession is one obtained by force and not by peaceful means. The plaintiff has failed to satisfy the important criterion of being in open, quiet and peaceful possession.

39. On my above analysis, it is apparent to me that the plaintiff cannot succeed in this suit. Her case is hereby dismissed with costs. The plaintiff ought to confine herself to the boundaries of the land parcel No. 294 owned by her husband, and if she is in possession of the land parcels No. 564 and 565, she must immediately give vacant possession to the defendants or be evicted by an order of this court.

40. She cannot occupy other peoples' land by threatening to spear them or by threatening their lives. If there is an issue on where the boundaries lie, this ought to be resolved by the Land Registrar.

41. The plaintiff has failed and I award costs to the defendants.

42. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 19<sup>th</sup> January, 2016.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of:-**

Ms. Alwala holding brief for Mr. Mwalo for plaintiff

Mrs. Mukira for defendants

CA: Janet

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**