



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 793 OF 2013

ANN WANJIRA GATIMU.....PLAINTIFF

VERSUS

FREDRICK KANYI KIMANI.....DEFENDANT

JUDGMENT

By her Originating Summons brought under **Section 38 of the Limitation of Actions Act** and filed herein on 12th November 2013, the plaintiff **ANN WANJIRA GATIMU** sought the following orders:-

- 1. That she be declared to have become entitled by adverse possession of over 12 years to all that 0.20 Ha parcel of land registered under Cap 300 Laws of Kenya and comprised in the title No. BARAGWE/KARIRU/1822 situated within Kirinyaga County.***
- 2. That the said plaintiff be registered as the sole proprietor of 0.20 Ha of the said parcel of land namely BARAGWE/KARIRU/1822 in place of FREDRICK KIMANI who is the current registered owner.***
- 3. That the Land Registrar Kirinyaga do register the plaintiff as the proprietor of land parcel No. BARAGWE/KARIRU/1822.***
- 4. That the defendant be ordered to pay the costs of this suit.***

Annexed to her Originating Summons were the supporting affidavit, a copy of the Green Card showing that **FREDRICK KANYI KIMANI** the defendant herein is the registered proprietor of the land parcel No. BARAGWE/KARIRU/1827 since 13th September 2000 and a letter from the Chief Thumaita in Gichugu Central dated 22nd October 2013 confirming that she has lived and developed the said land for over twelve years – see annexures **AWG I** and **AWG 2** respectively. In her supporting affidavit, she deponed, inter alia, that she entered the said land parcel No. BARAGWE/THUMAITA/1922 (herein the suit land) in 2000 and has extensively developed and cultivated it and it is also her matrimonial home where she has brought up her family. She added that all this time, her occupation of the suit land has been quiet and has not been interrupted.

In resisting the claim, the defendant filed a replying affidavit in which he confirmed that he is the registered proprietor of the suit land but added that nobody lives thereon including the plaintiff and neither are there any developments on the same. He urged therefore that this Originating Summons be dismissed with costs as it is un-founded.

Directions having been taken on 8th July 2015 and the parties having also complied with the provisions of

Order II Civil Procedure Rules, the hearing date was fixed for 25th January 2016 in the presence of counsel with Ms Twili advocate appearing for the plaintiff and Mr. Ndana advocate for the defendant. However, on the hearing date, neither the defendant nor his advocate appeared and the plaintiff was allowed to prosecute her claim.

In her evidence, the plaintiff testified that she has lived on the suit land all her life the same having originally been registered in the names of her late grandfather **GAKUBU MUGO** before being registered in the defendant's names. She added that the defendant has never interfered with her possession and occupation of the suit land nor even chased her away and neither does she occupy it with his consent. Plaintiff added that it was only in 2013 that Auctioneers visited the suit land but she showed them a letter from the Chief – Exhibit 1. She also produced the Green Card to the suit land (Exhibit 2) and asked that judgment be entered for her as per the Originating Summons.

I have considered the plaintiff's oral evidence and her documentary exhibits in support of her claim. As the defendant did not attend the trial, the plaintiff's evidence is largely un-controverted save for a defence which was not prosecuted. **Section 38(1) of the Limitation of Actions Act** provides as follows:-

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land”

It is now well established that the combined effect of the relevant provisions of **Sections 7, 13 and 17 of the Limitation of Actions Act** is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of the adverse possession of that land – **BENJAMIN KAMAU & OTHERS VS GLADYS NJERI C.A CIVIL APPEAL NO. 2132 OF 1996**. Similarly, the new land laws promulgated after 2010 recognize the doctrine of adverse possession. **Section 28(h) of the new Land Registration Act of 2012** recognizes some of the overriding interests as

(h) “rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription”.

On the other hand, **Section 7 of the new Land Act of 2012** provides as follows:-

“Title to land may be acquired through –

(a)

(b)

(c)

(d) Prescriptions”

What does a plaintiff in a claim of adverse possession need to establish to prove his case? In **KASUVE VS MWAANI INVESTMENT LIMITED & FOUR OTHERS 2004 1 K.L.R 184**, the Court of Appeal re-stated the following:-

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”

It is common ground that the suit land was registered in the defendant's names on 13th September 2000 as shown on the copy of the Green Card (Exhibit 2). The plaintiff's un-rebutted oral evidence is that she has lived on the suit land all her life and the defendant has never interrupted her occupation thereof. The

letter from the Chief (Exhibit 1) confirms that position and in her evidence, she told the Court that she was aged thirty six (36) years at the time of the trial. From the totality of all the above evidence, uncontroverted as it is, I am satisfied that the plaintiff has been in open, continuous and un-interrupted occupation of the suit land for over twelve (12) years to entitle her to an order that she is entitled to be registered as proprietor of the same in place of the defendant herein. That is the only conclusion that this Court can arrive at on that evidence.

Ultimately therefore, the plaintiff having proved her case as required in law, I enter judgment for her as sought in her Originating Summons. Each party shall meet their own costs.

B.N. OLAO

JUDGE

22ND APRIL, 2016

Judgment dated, signed and delivered in open Court this 22nd day of April, 2016.

Plaintiff present in person

Defendant absent

Right of appeal explained.

B.N. OLAO

JUDGE

22ND APRIL, 2016