



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT EMBU**

**ELC CASE NO. 216 OF 2014**

GEOFFREY MURAGE.....1<sup>ST</sup> PLAINTIFF

JOSEPH KINYUA.....2<sup>ND</sup> PLAINTIFF

PETER NYAGA.....3<sup>RD</sup> PLAINTIFF

EDWARD NJERU.....4<sup>TH</sup> PLAINTIFF

HAMTON MUCHANGI.....5<sup>TH</sup> PLAINTIFF

SIMEON KITHINJI.....6<sup>TH</sup> PLAINTIFF

VERSUS

STEPHEN MURIITHI MUGWIMI.....1<sup>ST</sup> DEFENDANT

JAMES KARIUKI MUGWIMI.....2<sup>ND</sup> DEFENDANT

**JUDGMENT**

The parties herein are siblings all being the children of the late **MUGWIMI KABUTHI** and his two wives namely **ALICE RUGURU** and **JOYCE RUNJI**. The 1st, 2nd and 3rd plaintiffs and the 1st defendant are children of **ALICE RUGURU** while the 2nd defendant, 4th, 5th and 6th plaintiffs are the children of **JOYCE RUNJI**.

The plaintiffs moved this Court by their Originating Summons brought under **Section 38 of the Limitation of Actions Act** dated 9th June 2011 and filed on 10th June 2011 seeking a determination of the following questions:-

- 1. Whether the plaintiffs have become entitled to be registered as proprietors of land parcels No. NGANDORI/KIRIGI/835 and NGANDORI/KIRIGI/836 respectively.***
- 2. Whether the defendants should each be ordered to transfer 5 acres of land to their brothers' plaintiffs respectively.***
- 3. Whether the defendants should be ordered jointly and severally to pay compensation for development now standing on the land parcel at current market value.***
- 4. Whether the defendants should be ordered to pay costs of this suit.***

The Originating Summons is supported by the affidavit of **HAMILTON MUCHANGI** the 5th plaintiff sworn on behalf of the other plaintiffs in which he has deponed, inter alia, that the parties are all children of the late **MUGWIMI KABUTHI** and entitled to equal rights and that their late father had caused the defendants to be registered as proprietors of the land in 1961 to hold in trust for themselves and the other children. That their late father showed them portions of the land parcels to occupy and they have occupied those portions for a period in excess of 12 years and they are therefore entitled to those portions.

In response to the Originating Summons, the 1st defendant **STEPHEN MURIITHI MUGWIMI** swore a replying affidavit on behalf of the 2nd defendant in which he deponed, inter alia, that he is the registered proprietor of land parcel No. NGANDORI/KIRIGI/835 while the 2nd defendant is the registered proprietor of the land parcel No. NGANDORI/KIRIGI/836 (herein the suit land). He added that the land was given to them by their clan and not by their late father and denied that they were to hold it in trust for the plaintiffs who were not even born. That their late father was also given land parcel No. NGANDORI/KIRIGI/839 measuring 17 acres by the clan and that is where the plaintiffs have developed and live. That the defendants have developed and live on the suit land and it would be unfair and unequitable for the plaintiffs who are heirs of their father's property to also have a share in the suit land. That the defendants have no interest in inheriting their father's land.

**HAMILTON MUCHANGI** the 5th plaintiff testified on behalf of the other plaintiffs and called their mother **JOYCE RUNJI** (PW2) as their witness. He confirmed that the parties are siblings but born of the two wives of the late **MUGWIMI KABUTHI** and that the suit land originally belonged to their grandfather **KABUTHI**. He added that each of the plaintiffs is claiming one acre each out of land parcel No. NGANDORI/KIRIGI/835 which they have not developed but on which they grow coffee although the 4th plaintiff **EDWARD NJERU** has a home and all of them were born on that parcel.

**JOYCE RUNJI** (PW2) is mother to the 2nd defendant, 4th, 5th and 6th plaintiffs and her testimony was that the suit land belonged to their late father which he shared out between his two wives each of who had a son being the defendants herein.

**STEPHEN MURIITHI MIGWI** the 1st defendant gave evidence on behalf of his step brother the 2nd defendant and told the Court that the suit land was given to them by the clan and the plaintiffs live on their late father's land being NGANDORI/KIRIGI/839 measuring 17 acres. He produced the Green cards for those parcels of land – Defence Exhibit 1 – 3. He added that their late father was given land parcel No. NGANDORI/KIRIGI/839 to share among the plaintiffs and he urged that this case be dismissed adding that the 4<sup>th</sup> plaintiff has trespassed onto parcel No. NGANDORI/KIRIGI/836. He stated further that the plaintiffs have filed several cases including Case No.18 of 1994 at Runyenjes Court, Cases No. 24 of 2002 and No. 39 of 2008 at Embu and finally this case.

Submissions have been filed by the firm of **A.K. KARIITHI** Advocates for the plaintiffs and **NJERU ITHIGA** Advocates for the defendants.

I have considered the pleadings, the oral and documentary evidence by the parties and the submissions by counsel.

This Originating Summons is founded under the provisions of **Section 38 of the Law of Limitation of Actions Act** which provides under **Sub-section (1)** that:-

*“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”*

And under **Section 7 of the Limitation of Actions Act**, it is provided as follows:-

*“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action occurred to him or, if it occurred to some person through*

*whom he claims, to that person”*

It is now well established that the combined effect of the relevant provisions of **Section 7, 13 and 17 of the Limitation of Actions Act** is to extinguish the title of the registered 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**. It is also noteworthy that the new land laws promulgated after 2010 recognize the doctrine of adverse possession. **Section 7 of the new Land act 2012** provides as follows:-

*“Title to land may be acquired through –*

*(a)*

*(b)*

*(c)*

*(d) Prescription”*

And **Section 28 (h) of the new Land Registration Act 2012** recognizes some of the overriding interests in land as

*“rights acquired or in the process of being acquired by virtue of any written law relating to the Limitation of Actions or by Prescription”*

The plaintiffs herein, through their Originating Summons seek orders that they have acquired the suit land by adverse possession and their claim will therefore be considered in light of the above principles and the relevant case law.

In **KASUVE VS MWAANI INVESTMENT LTD & FOUR OTHERS 2004 1 K.L.R 184** the Court of Appeal restated what a plaintiff in a claim for adverse possession has to prove and said:-

*“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”*

And in **MAWEU VS LIU RANCHING & FARMING CO-OPERATIVE SOCIETY LTD 1985 K.L.R 430 at Page 434**, the Court of Appeal stated that:-

*“Adverse possession is a fact to be observed upon the land. It is not to be seen in title even under Cap 300”.*

Have the plaintiffs led evidence to satisfy the Court that indeed they are in possession of the suit land to justify this Court making orders extinguishing the defendants’ title to the suit land in their favour? From the evidence, I am not persuaded that the plaintiffs have proved their claim. It is not in dispute that the suit land is registered in the names of the defendants since 1961. However, there is no evidence that any of the plaintiffs live on the suit land. In his evidence in chief, the 5th plaintiff told the Court that none of the plaintiffs have developed any portion of the suit land although he said they grow coffee. In cross-examination by counsel for the defendants Mr. Ithiga, he said:-

*“It is true that I live on my father’s land which is either NGANDORI/KIRIGI/2066 or 2067”*

The evidence of the plaintiffs mother **JOYCE RUNJI** (PW2) did not advance their claim any further since she only testified to the effect that the suit land belonged to the parties’ father. On the other hand, the 1st defendant told the Court, and this was confirmed by the 5th plaintiff’s evidence quoted above, that

the plaintiffs reside on their father's land No. NGANDORI/KIRIGI/839 which measures 17 acres. The only plaintiff who it is said has a home on the suit land and cultivates thereon is the 4th plaintiff who, according to the 1st defendant, has forcefully trespassed onto parcel No. NGANDORI/KIRIGI/836. The 4th plaintiff himself did not testify nor record a statement and so this Court can only rely on the evidence of the 5th plaintiff which I must say is rather scanty. In any case, if the 4th defendant has forcefully entered into the suit land, then he cannot be entitled to orders of adverse possession because, as was held in the case of ***KIMANI RUCHINE VS SWIFT RUTHERFORD & CO. LTD 1980 K.L.R 10***, a party claiming land by adverse possession has to show that:-

***“..... they have used this land which they claim as of right NEC VI NEC CLAM, NEC PRECARIO (no force, no secrecy, no evasion)”***.

If therefore the plaintiffs are exerting force in their occupation of the suit land, if at all, then the use of force would negate a claim by adverse possession. In ***ELEMENTS OF LAND LAW 5<sup>th</sup> EDITION*** by ***KERIN GARY*** and ***SUSAN FRANCIS GRAY***, the authors identify the following elements that a party claiming land by adverse possession must establish:-

- 1. There must be a complete and exclusive physical control of the land in dispute.***
- 2. The possession should be open meaning not in secret.***
- 3. It must be peaceful and not by force.***
- 4. It must be adverse and not by consent of the true owners.***

A party claiming land by adverse possession must also show that he has dispossessed the registered owner of the land in dispute or that the registered owner has, on his own volition, discontinued his possession of the same – ***KASUVE VS MWAANI*** (supra). There is no evidence before me that the plaintiffs have dispossessed the defendants of the suit land. Indeed the evidence is that the defendants occupy the suit land. Dispossession only occurs where the claimant does acts on the land which are inconsistent with the owner's enjoyment of the land in dispute – see ***HALLI'S CAYTON BAY HOLIDAY CAMP LTD VS SHELL MEKLAND B.P LTD (1975) Q B 94***. In this case, there is no evidence suggesting that the defendants have at any time lost their right to the suit land either by being displaced by the plaintiffs or by having discontinued their possession voluntarily. The plaintiffs were required to show that they have been in exclusive physical possession of the suit land or an identifiable portion of the same for a period of 12 years having dispossessed the defendants of the same. They have not done so and therefore their claim to the suit land by adverse possession is not sustainable.

Although the plaintiffs claim is based on adverse possession, the 5th plaintiff referred to an element of trust in the supporting affidavit at paragraph 4 where he deponed thus:-

***“That they were to hold in trust for themselves and other children of our father some of who were not yet born”***

It is trite law that parties are bound by their pleading and any evidence led by any of the parties and which does not find support in the pleadings is of no consequence and must be disregarded. This is because, parties to a litigation are adversaries and each must state his case with clarity so that the other party has notice of what case to meet. Therefore the plaintiffs not having pleaded any trust, this Court cannot interrogate that issue and in any event, no evidence was led to suggest that the defendants hold the suit land in trust for the plaintiffs. Besides, as was held in the case of ***MBOTHU VS WAITIMU 1986 K.L.R 171***, the Court will not imply a trust except in cases of absolute necessity and in order to give effect to the intention of the parties which must be clearly determined.

The plaintiffs also sought an order that the defendants be ordered to jointly and severally pay compensation for the developments now standing on the land parcels at current market value. The power donated to the Court by ***Section 38 of the Limitation of Actions Act*** is limited to making an order that the

claimant “***be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land***” No power is given to this Court to make any orders of compensation. Even if this Court had such powers and was minded to make the orders for compensation, there is no material placed before me on which I can base any order of compensation. That request must therefore be rejected.

Upon considering all the evidence before me, I would answer the questions raised by the plaintiffs for my determination as follows:-

- 1. The plaintiffs are not entitled to be registered as proprietors of land parcels No. NGANDORI/KIRIGI/835 and NGANDORI/KIRIGI/836 by adverse possession.***
- 2. The defendants cannot be ordered to transfer 5 acres of land to the plaintiffs.***
- 3. The defendants cannot, either jointly or severally, be ordered to pay compensation for the developments now standing on the land parcels.***
- 4. As the parties are siblings, I order that they meet their own costs.***

**B.N. OLAO**

**JUDGE**

**9<sup>TH</sup> JUNE, 2016**

Judgment delivered, dated and signed in open Court this 9<sup>th</sup> day of June 2016.

Mr. Muyodi for Mr. Ithiga for the Defendants present

Mr. Andande for Mr. Kariithi for Plaintiffs present

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**9<sup>TH</sup> JUNE, 2016**