



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
ENVIRONMENT AND LAND COURT DIVISION

ELC CASE NO. 176 OF 2014

MARION KAARI MBUI.....PLAINTIFF

VERSUS

ELISHA MBOGO NTHIGA.....DEFENDANT

JUDGMENT

By an amended Originating Summons filed herein on 21st November 2013 pursuant to leave granted on 12th November 2013, the plaintiff invoking **Section 38 of the Limitation of Actions Act** and claiming to be entitled to be registered as the proprietor of original parcel of land No. NGANDORI/KIRIARI/453 now resultant numbers NGANDORI/KIRIARI/4236, 4237 and 4238 by prescription sought the determination of the following questions:-

1A. Whether the plaintiff has been in open, continuous and exclusive occupation possession and use of land parcels now sub-divided into No. NGANDORI/KIRIARI/4236, 4237 and 4238 for over twelve years.

2A. Whether the plaintiff has acquired the Title to land parcels No. NGANDORI/KIRIARI/4236, 4237 and 4238 which are resultant sub-divisions of land parcel No. NGANDORI/KIRIARI/453 by way of adverse possession.

3A. Whether the defendant's Title to land parcel No. NGANDORI/KIRIARI/453 and the subsequent sub-divisions namely land parcels No. NGANDORI/KIRIARI/4236, 4237 and 4238 have been extinguished.

4. What should the order as to costs.

And the plaintiff seeks for the following orders:-

- a. That the defendant's Title to land parcel No. NGANDORI/KIRIARI/453 which has been sub-divided into land parcels No. NGANDORI/KIRIARI/4236, 4237 and 4238 has been extinguished.***
- b. That the plaintiff has acquired the Title to land parcel No. NGANDORI/KIRIARI/4236, 4237 and 4238 which are sub-divisions of land parcel No. NGANDORI/KIRIARI/453 by way of adverse possession and the plaintiff is therefore entitled to be registered as the proprietor of the said parcel of land.***
- c. That the names of ELISHA MBOGO NTHIGA be cancelled and/or deleted from the register for land parcels numbers NGANDORI/KIRIARI/4236, 4237 and 4238 by way of adverse***

- possession and Title Deeds to the said parcels of land be issued to her.**
d. **That the plaintiff be awarded costs of this suit.**

In support of the Originating Summons, the plaintiff has filed an affidavit in which she has deponed, inter alia, that her late father who died in 1967 was the registered proprietor of land parcel No. NGANDORI/KIRIARI/453 measuring approximately 5.37 Acres where she and her family have always lived until 1st August 2001 when her mother died and her only brother **NTHIGA MBUI** also died on 23rd August 2001. As no Succession Cause had been filed in respect of her late father's Estate, she followed up with the Lands office in search of the Title to the said land only to be discovered that her late brother had secretly filed a Succession Cause in respect of their late father's Estate in 1969 and transferred the land parcel No. NGANDORI/KIRIARI/453 to his son who is the defendant herein. All this was done without the consent of their mother who was still alive. The defendant then proceeded to divide the parcel of land into NGANDORI/KIRIARI/4236, 4237 and 4238 although no survey was done on the ground and at no time has the defendant tried to evict the plaintiff. Plaintiff has been in open, uninterrupted and exclusive occupation of the land parcels No. NGANDORI/KIRIARI/453 and the subdivisions NGANDORI/KIRIARI/4236, 4237 and 4238 for over 50 years having even buried one of his sons there without the defendant raising any complaint. The plaintiff therefore claims to be entitled by the law of Limitation to be registered as the proprietor of the original land parcel No. NGANDORI/KIRIARI/453 now sub-divided into land parcels No. NGANDORI/KIRIARI/4236, 4237 and 4238 in place of the defendant whose title should be extinguished and his name be cancelled from the register and the plaintiff be registered by way of adverse possession and the Title Deeds be issued to her.

Annexed to the Originating Summons are copies of the Green Card in respect of land parcels No. NGANDORI/KIRIARI/453, 4236, 4237 and 4238 – annexure **MKM 1**.

From my perusal of the record herein, the defendant does not appear to have filed any replying affidavit to the Originating Summons either before or after the amendments in 2013. What I can see from the record is only his replying affidavit in response to the plaintiff's application for injunctive reliefs which was dated 15th October 2002 and in which he deponed, inter alia, that following the demise of his grandfather **MBUI M'NJAU** on 26th October 1967, he was appointed by the Court and his beneficiaries as the Administrator of his Estate and the land was registered in his names and the grant of letters of Administration issued to him has not been challenged by the plaintiff who has never lived on the land since her birth and who is married elsewhere. The defendant added that the plaintiff had not met the test set out in the case of **GIELLA VS CASSMAN BROWN LTD 1973 E.A 358**. What that really means therefore is that there is no response by the defendant to the main Originating Summons.

Most importantly, however, is that when this suit came up for hearing before me on 12th May 2016 during my visits in Embu High Court, Mr. Muyodi, counsel for the plaintiff informed me that the hearing date had been taken by consent and he had not seen either Mr. Njue counsel for the defendant nor his client and asked that the Court do proceed with the hearing as he had the plaintiff and three witnesses. Upon checking the record, I confirmed that indeed on 2nd March 2016, the hearing date had been taken by consent in the registry by a representative from the office of Muyodi Advocate for the plaintiff (Agnes) and another from the office of E.N. Njue Advocates (Nyagah). The Court therefore allowed the plaintiff to proceed with the case as there was no explanation for the absence of the defendant or his counsel.

In her testimony, the plaintiff **MARION KAARI MBUI** informed the Court that the defendant is a son to her brother and is registered as the proprietor of the suit land on which she has lived since 1949 when she was born. She added that the defendant has never lived on the suit land and she has planted tea and nappier grass and has four houses on the land. She asked the Court to rely on her recorded statement as well as the list of documents and grant her orders as per her Originating Summons.

She called in support of her case two witnesses namely **NEWTON FELIX IRERI** (PW2) and **ROSALINE RUGURU WAWERU** (PW3). **NEWTON FELIX IRERI** told the Court that the plaintiff who is her cousin has lived on the suit land since her birth and the defendant lives in Kamvui and has never lived on that land which is occupied by the plaintiff.

ROSALINE RUGURU WAWERU testified that the plaintiff is her sister and the defendant is a son to their late brother. She added that the plaintiff has lived on the land subject of this suit since her birth and although the land is registered in the defendant's names, he lives some ten kilometers away in his father's land where he settled in 1967 and only the plaintiff, who is un-married, lives on that land.

This is a claim for adverse possession of land parcel No. NGANDORI/KIRIARI/453 now sub-divided into NGANDORI/KIRIARI/4236, 4237 and 4238 (the suit land) premised under **Section 38 of the Limitation of Actions Act**. That section provides as follows under **sub-section 1:-**

38 (1) *“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”*

Section 7 of the Limitation of Actions Act on the other hand provides 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 accrued to him or, if it first occurred to some person through whom he claims, to that person”

Section 13 of the Limitation of Actions Act provides that a right of action in adverse possession does not accrue unless the claimant is in possession of the land in question while **Section 17** of the same Act provides that the title of the registered owner becomes extinguished at the end of the limitation period stipulated in the Act. 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 the adverse possessor of the same at the expiry of twelve years of the adverse possession of that land – **BENJAMIN KAMAU & OTHERS VS GLADYS NJERI C.A CIVIL APPEAL No. 2132 of 1996.**

The new Land laws promulgated after 2010 also recognize the doctrine of adverse possession. **Section 28 (h) of the Land Registration Act 2012** recognize some of the overriding interests in land 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”*

Similarly, **Section 7 of the Land Act 2012** provides as follows:-

“Title to land may be acquired through –

- a.
- b.
- c.
- d. **Prescription”**

It is the plaintiff's evidence that the suit land originally belonged to her late father before the defendant who is a son to her late brother become the registered proprietor thereof in circumstances that were not known to the family. It is also clear from the proceedings in **EMBU LAND DISPUTES TRIBUNAL CASE No. 2 of 2002** which is part of the plaintiff's Exhibits that the dispute has previously been the subject of litigation before the Land Disputes Tribunal which ordered that the suit land be shared equally between the parties herein. That award was of course issued by a Tribunal in excess of jurisdiction but it serves to demonstrate that the plaintiff has all along sought a share in the suit land. The plaintiff has also availed photographs of the developments done on the suit land (Exhibit 6) and her evidence, as supported by that of her witnesses **NEWTON FELIX IRERI (PW2)** and **ROSALINE RUGURU WAWERU (PW3)** is that it is the plaintiff who has developed and lives on the suit land since her childhood and the defendant does not live there and instead has a home on his father's land. The

plaintiff herself told the Court that the defendant has never evicted her from the suit land and her occupation has been continuous, un-interrupted, open and exclusive. In order to mount a claim for adverse possession of land registered in the names of another person, 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” – see KASUVE VS MWAANI INVESTMENT LTD & FOUR OTHERS 2004 1 K.L.R 184.

The plaintiff's evidence that she has been in open, exclusive, continuous and un-interrupted occupation of the suit land where she was born in 1949 is not rebutted and that means that by the time she filed this suit in 2002 (before the Originating Summons was amended in 2013), she had been in occupation of the suit land for fifty three (53) years well above the twelve (12) year period that would entitle her to orders in adverse possession over the suit land. Annexed to her Original Originating Summons filed on 18th September 2002 is a copy of the Green Card in respect to the land parcel No. NGANDORI/KIRIARI/453 which shows that the said land parcel was registered in the names of MBUI M'NJAU, the plaintiff's father on 23rd December 1960 and it was not until 17th October 1978 (eleven years after the death of her father) that the said land was registered in the names of the defendant before mutating into parcels No. NGANDORI/KIRIARI/4236, 4237 and 4238 which are now registered in the defendant's names on 26th March 2002. That change of ownership did not interrupt the plaintiff's adverse possession of the suit land – ***GITHU VS NDEETE 1984 K.L.R 776***. In any event, going by the plaintiff's un-controverted evidence herein, by 2002, the defendant's right to the suit land had long been extinguished.

Having considered the plaintiff's oral and documentary evidence herein which is un-controverted, I am satisfied that she has proved that she is entitled to be registered as the owner of the suit land by virtue of adverse possession of the same as required in law and that the defendant's title thereto has been extinguished and his registration as the proprietor thereof should be cancelled. I would therefore determine the questions set out by the plaintiff in her amended Originating Summons in her favour.

Ultimately therefore, judgment is entered for the plaintiff against the defendant in the following terms:-

- 1. The defendant's Title to land parcel No. NGANDORI/KIRIARI/453 which has been sub-divided into land parcels No. NGANDORI/KIRIARI/4236, 4237 and 4238 has been extinguished.***
- 2. The plaintiff has acquired the Title to land parcels No. NGANDORI/KIRIARI/4236, 4237 and 4238 which are sub-divisions of land parcel No. NGANDORI/KIRIARI/453 by way of adverse possession and the plaintiff is therefore entitled to be registered as the proprietor of the said parcel of land.***
- 3. That the names of ELISHA MBOGO NTHIGA be cancelled and/or deleted from the register for land parcels No. NGANDORI/KIRIARI/4236, 4237 and 4238 by the relevant District Land Registrar.***
- 4. That the plaintiff MARION KAARI MBUI be registered as the proprietor of land parcels No. NGANDORI/KIRIARI/4236, 4237 and 4238 by way of adverse possession and Title Deeds to the said land parcels be issued to the plaintiff.***
- 5. The circumstances of this case shows that there was a covert attempt by the defendant to disinherit the widow and children of the late MBUI N'NJAU of their right to the suit land. I therefore order that the defendant meets the plaintiff's costs of this suit.***

B.N. OLAO

JUDGE

9TH JUNE, 2016

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

Mr. Muyodi for the Plaintiff present

Mr. Njue for the Defendant absent

Right of appeal explained.

B.N. OLAO

JUDGE

9TH JUNE, 2016