



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 12 OF 2015 (OS)**

**MICHAEL MUGO IRERI.....PLAINTIFF/RESPONDENT**

**VERSUS**

**NELSON NTHIGA IKOU.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**GILBERT IRERI NAMU.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**JUDGMENT**

Land parcels No. EVURORE/NGUTHI/1624 and EVURORE/NGUTHI/1625 (the suit land) are registered in the names of the 1st defendant (**NELSON NTHIGA IKOU**) and 2nd defendant **GILBERT IRERI NAMU** respectively. Previously, land parcel No. EVURORE/NGUTHI/1624 was registered in the names of **NAHASHON IKOU IRERI** (the 1st defendant's father) who on 9th July 1993 or thereabout transferred it to 1st defendant. The 2nd defendant on the other hand purchased parcel No. EVURORE/NGUTHI/1625 from **JOHNSTON NYAGA NAMU** on 6th January 2004. All this time, the plaintiff's father **EDWARD IRERI KIATHI** was living on the suit land and so the defendants issued notices to him to vacate after a Court case. The plaintiff's father vacated the suit land following the notices but the plaintiff did not do so even after notices were issued to him in 2008.

On 19th December 2008 the plaintiff filed this Originating Summons seeking the following orders:-

- a. *That the plaintiff has acquired land parcels No. EVURORE/NGUTHI/1624 and EVURORE/NGUTHI/1625 by way of adverse possession.*
- b. *That the 1st and 2nd defendants be holding land parcels No. EVURORE/NGUTHI/1624 and EVURORE/NGUTHI/1625 in trust for the plaintiff.*
- c. *That the plaintiff be registered as the proprietor of land parcels EVURORE/NGUTHI/1624 and EVURORE/NGUTHI/1625 by virtue of adverse possession.*
- d. *That the plaintiff be awarded costs of this suit.*

In his supporting affidavit, the plaintiff has deponed that he was born on parcel No. EVURORE/NGUTHI/1624 in 1972 and has lived there ever since. He has extensively developed the said parcel and planted avocado, mangoes, grevillia and Eucalyptus trees and the 1st defendant who is the registered proprietor has never occupied nor utilized that parcel of land. The plaintiff further deponed that he utilizes and occupies the land parcel No. EVURORE/NGUTHI/1625 registered in the name of the 2nd defendant who has also never occupied nor utilized that parcel of land. That the plaintiff's occupation and utilization of the suit land has been open, un-interrupted, exclusive and continuous for over 12 years and he has therefore acquired the suit land by way of adverse possession and the defendant's titles to the same have been extinguished. He therefore prays that the suit land be registered in his names. Annexed to his Originating Summons are copies of the register confirming that parcel No.

EVURORE/NGUTHI/1624 is registered in the names of the 1st defendant while parcel NO. EVURORE/NGUTHI/1625 is registered in the names of the 2nd defendant – annexures **MM 1** and **MM 2**.

In resisting the plaintiff's claim, the 1st defendant filed a replying affidavit in which he deponed that he is the registered proprietor of land parcel No. EVURORE/NGUTHI/1624 which he acquired as a gift from his father **NAHASHON IRERI IKOU**. He denied however that the plaintiff has had un-interrupted possession of the parcel for 12 years adding that his father and plaintiff's father had Court cases over the land and in 2001, he issued the plaintiff's father with notice to vacate from land parcel No. EVURORE/NGUTHI/1624 which he complied with but the plaintiff refused and/or neglected to vacate therefrom and instead filed this suit. Annexed to that replying affidavit are the following:-

**1. Title Deed in respect of land parcel No. EVURORE/NGUTHI/1624.**

**2. Affidavit by 1st defendant's father NAHASHON IKOU IRERI.**

**3. Notices to vacate land parcel No. EVURORE/NGUTHI/1624 dated:-**

**a. 13th December 1982**

**b. 13th October 1987**

**c. 26th May 2001**

**d. 16th September 2008.**

**4. *Plaint in EMBU PRINCIPAL MAGISTRATE'S COURT CIVIL CASE No. 62 of 1992 NAHASHON IKOU IRERI VS EDWARD IRERI KIATHI.***

**5. *Defence of EDWARD IRERI KIATHI in the above case.***

**6. *Order of W. OUKO J. (as he then was) dated 24th October 2008 dismissing HIGH COURT CIVIL APPEAL No. 82 of 1994 for want of prosecution.***

In his affidavit, **NAHASHON IKOU IRERI** confirmed that on 3rd August 1979 he was the registered proprietor of the land parcel No. EVURORE/NGUTHI/1624 which he transferred to his son the 1st defendant on 9th July 1993 while the plaintiff's father and his family were unlawfully living thereon. That he issued the notices dated 13th December 1982, 13th October 1987 and 26th May 2001 to the plaintiff's father and even filed **EMBU PRINCIPAL MAGISTRATE'S COURT CIVIL CASE No. 62 of 1992** against the plaintiff's father which was determined in his favour and although the plaintiff's father filed an appeal being **HIGH COURT CIVIL APPEAL NO. 82 of 1994**, the same was dismissed for want of prosecution and the plaintiff's family vacated and therefore it is not proper for the plaintiff to institute this suit against the 1st defendant over the same subject matter.

On his part, the 2nd defendant also confirmed that he bought the land parcel No. EVURORE/NGUTHI/1625 from **JOHNSTON NYAGA NYAMU** on 6th January 2004 with the intention of building his house but suspended the plans because he works far away in Mwingi. He denied that the plaintiff had been living un-interrupted for a period of 12 years on the land adding that the plaintiff's father was unlawfully living on the land. He added further that after notices had been issued to the plaintiff's father, he vacated and a further notice was issued to the plaintiff. He denied that the plaintiff has developed the said land or has acquired it through adverse possession. He annexed to his replying affidavit a copy of the title deed for parcel No. EVURORE/NGUTHI/1625 and the sale agreement between him and **JOHNSTON NYAGA NAMU** dated 6th January 2004 – see annexures **GIN 1** and **GIN 2** respectively.

Directions having been taken, the trial commenced before **Bwonwonga J** on 2nd March 2015 when the

plaintiff testified at length and was cross-examined by the defendants. Then came the decision of the Court of Appeal in the case of **KARISA CHENGO & OTHERS VS REPUBLIC 2015 e K.L.R** whose effect was that **Bwonwonga J.** (not having been appointed as a Judge of the Environment and Land Court) could not continue hearing this case and so when I started visiting the High Court at Embu to handle Environment and Land cases, I took over this case and with the consent of the parties, it was agreed that the case commences de-novo. The plaintiff elected to adopt his earlier evidence and rely on his statement and supporting affidavit as well as his list of exhibits. According to his statement filed on 28th May 2013, the plaintiff lives on land parcel No. EVURORE/NGUTHI/1624 registered in the names of the 1st defendant since 1972 and has built four houses where he lives with his family. He also utilizes land parcel No. EVURORE/NGUTHI/1625 registered in the names of the 2nd defendant on which he has planted 120 mangoe trees (grafted), another 20 mango trees (non-grafted), 200 Acacia trees and 200 Grevillia trees, 30 Avocado trees and 100 Banana stem and both defendants do not live on the said land parcels. He has therefore been in open, un-interrupted, exclusive and continuous occupation of the suit land for over 12 years and has therefore acquired both parcels by adverse possession.

The plaintiff's witness **EPHANTUS NJUE KIATHI** who is his nephew confirmed that the plaintiff lives on parcel No. EVURORE/NGUTHI/1624 and also occupies land parcel No. EVURORE/NGUTHI/1625 together with his wife, children and siblings. He added that the plaintiff was born on land parcel No. EVURORE/NGUTHI/1624 where his father previously lived and that the defendants do not live on the suit land.

In his defence, the 1st defendant asked the Court to adopt his statement and also his documents as part of his evidence. In his statement filed on 15th February 2015, he confirmed that he is the registered proprietor of land parcel No. EVURORE/NGUTHI/1624 which was given to him by his father **NAHASHON IKOU IRERI** who had a case with the plaintiff's father between 1992 – 2008. He denied that the plaintiff has acquired that land by way of adverse possession adding that an eviction order should issue directing the plaintiff to remove himself and his family from that land.

The 2nd defendant similarly stated in his statement filed on 5th February 2015 that land parcel No. EVURORE/NGUTHI/1625 is registered in his names but he denied all the averments in the plaintiff's Originating Summons adding that the Court should order the plaintiff to move out of that land. He stated in his oral evidence in Court that he bought the land in 2006 and the plaintiff filed this suit in 2008 and so the 12 years had not elapsed. He added that the plaintiff's brother vacated the land but he has been unable to access it because the plaintiff chased him away armed with bows and arrows and was even charged at Siakago Court with the offence of assaulting him.

The 1st defendant called as a witness **NAHASHON IKOU IRERI** (DW3), his father who confirmed that he gave the land parcel No. EVURORE/NGUTHI/1624 to his son adding that he had a land case with plaintiff's father which he won and the plaintiff's father moved from the land and therefore he does not understand why the plaintiff has come to Court.

The 2nd defendant's witness **JOHNSTON NYAGA NAMU** (DW4) told the Court that he sold him land parcel No. EVURORE/NGUTHI/1625.

Submissions have been filed by Mr. Okwaro for the plaintiff and the defendants who were acting in person.

I have considered the parties oral and documentary evidence and the submissions filed.

It is not in dispute that the suit land is registered in the names of the defendants. What this Court has to determine is whether the plaintiff has made out a case that would entitle him to be registered as the owner of the suit land by virtue of having acquired ownership thereof through adverse possession. That is what the plaintiff seeks from this Court and Section 38 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 in Section 37 of this Act, 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 in place of the person then registered as proprietor of the land”***

In law, adverse possession is the occupation of another person’s land against his wish and in opposition to his title and where such possession and occupation continues without any interruption of an eviction for a period of over twelve years, then the possessor can apply to the Court to be declared to have become legally entitled to the land. That is what the doctrine of adverse possession is all about and it is a doctrine well entrenched in our laws. It is now well established that the combined effect of the 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. **Section 7 of the Limitation of Actions Act** states:-

***“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 actions accrued to him or, if it first accrued to some person through whom he claims, to that person”***

The new Land Laws promulgated after the 2010 Constitution also recognize the doctrine of adverse possession. **Section 28 (h) of the new Land Registration Act** recognizes some of the overriding interests as:-

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

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

***“Title to land may be acquired through:-***

- a.
- b.
- c.
- d. prescription”***

In the case of **KASUVE VS MWAANI INVESTMENT LTD & FOUR OTHERS 2004 1 K.L.R 184**, the Court of Appeal re-stated what a party claiming land by adverse possession has to prove. The Court 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”***

The plaintiff’s case is that he was born on parcel No. EVURORE/NGUTHI/1624 in 1972 and has four houses there and has planted various trees on parcel No. EVURORE/NGUTHI/1625 and none of the defendants has been in occupation nor utilized the suit land. That would mean that by the time this suit was filed in 2008, the plaintiff had been in un-interrupted occupation of the suit land for 36 years well beyond the statutory period provided for in law for which he can be entitled to orders of adverse possession.

The defendants’ defences are basically to deny this occupation which they also refer to as illegal. But that is what adverse possession is all about. It allows a party who is on another’s land without the owner’s consent for un-interrupted continuous period of twelve years to claim ownership of the same. The defendants have also referred to various notices issued to the plaintiff and his father to vacate the land and also the **EMBU PRINCIPAL MAGISTATE’S COURT CASE No. 62 of 1992** and **EMBU HIGH**

**COURT CIVIL APPEAL No. 82 of 1994** and argued therefore that the plaintiff's occupation has not been continuous and un-interrupted for the requisite statutory period of twelve years. Those are the issues that I now wish to interrogate because if they are correct, then the plaintiff has not made out a case for adverse possession of the suit land.

I start by examining when the plaintiff entered the suit land. His case is that he was born there in 1972 and looking at the evidence on record, that is not really in dispute. It is clear from the pleadings herein and also the evidence on record that by the time the defendants were acquiring their rights as registered owners of the suit land, the plaintiff's family was already in occupation of the suit land. In his replying affidavit, the 1st defendant confirms that by the time he was gifted land parcel No. EVURORE/NGUTHI/1624 by his father, the plaintiff and his family were on the suit land and that is why in paragraph 7 thereof, he states:-

***"The plaintiff should vacate forthwith from the said land"***

His father **NAHASHON IKOU IRETI** is more explicit and in paragraph 4 and 5 of his affidavit which is part of the 1st defendant's annexures, he has deponed as follows:-

***4 "That on 9th July 1993 or thereabout I transferred the parcel No. EVURORE/NGUTHI/1624 as a gift to my son the 1st defendant herein"***

***5 "That the plaintiff's father Edward Ireti Kiathi and his family were unlawfully living on my land"***

On his part, the 2nd defendant while denying that the plaintiff has been in occupation of land parcel No. EVURORE/NGUTHI/1625 he goes on to depone in paragraph 10 as follows:-

***"The plaintiff was issued with a notice to vacate and desist from utilizing the parcel in September 2008 (annexed is a copy of the notice marked 'GIN 4')"***

Such notice to vacate could only be issued to one who is in occupation of the land in dispute. In cross-examination by Mr. Okwaro advocate for the plaintiff, the 1st defendant said:-

***"I am the registered proprietor of parcel No. EVURORE/NGUTHI/1624 since 1993. It is true that the plaintiff was born on that land and so he was there in 1993. I don't know if he has a crop there. I have no access to it so I would be misleading if I said he had a crop. But I know he has put up a building"***

On his part, the 2nd defendant in his evidence in chief confirmed that after he obtained title to land parcel No. EVURORE/NGUTHI/1625, he visited it and found the plaintiff and his brother utilizing it. He said:-

***"Between 2006 and 2010, I did not make any attempt but I was preparing to get the title which I got in 2008 and that was when I visited the land and found the plaintiff on the land with his brother"***

What comes out clearly from the evidence by the defendants is that when the plaintiff's father was given notice to vacate, he did so but the plaintiff did not vacate and remains on the suit land to-date. The plaintiff, it must be remembered, has brought this claim in his own right as the person in occupation of the suit land. He is not suing on behalf of his father and therefore, any notices issued to his father to vacate are really inconsequential. The plaintiff's occupation of the suit land was further confirmed by the 2nd defendant's witness **JOHNSTON NYAGA NYAMU (DW4)** who said as follows in cross-examination:-

***"I know the plaintiff has been on the land since I gave his father notice to vacate. The plaintiff used to live there with his father but when his father vacated, the plaintiff remained on the land"***

Further, on, the same witness said:-

***“It is true that the plaintiff has been living on that land since he was in primary school”.***

It is clear from both the replying affidavits and the oral evidence herein that the plaintiff’s occupation of the suit land has not been rebutted and has in fact been confirmed by the defendants and their witnesses. Occupation or possession simply means the physical control of the suit land and from the evidence before me, the suit land is registered in the names of the defendants but the physical control thereof is in the hands of the plaintiff who was born on land parcel No. EVURORE/NGUTHI/1624 in 1972 and has utilized and continues to utilize land parcel No. EVURORE/NGUTHI/1625 on which he has a crop of various fruits. Photographs of the plaintiff’s home and his crops were part of the exhibits produced herein. It is instructive that in a ruling delivered by **Bwonwonga J** on 30th January 2015, dismissing the 2nd defendant’s application seeking to restrain the plaintiff from harvesting the mango fruits on the land parcel No. EVURORE/NGUTHI/1625, the Judge made the following comments:-

***“It is common cause that the plaintiff/respondent is in occupation of the suit land reference number EVURORE/NGUTHI/1625 in addition to land parcel number EVURORE/NGUTHI/1624. I find that the plaintiff/respondent has done extensive developments on the suit land on which he has constructed houses and planted many food crops. I also find that the orders sought by the 2nd defendant/applicant cannot be granted because they will amount to evicting the plaintiff/respondent from the suit land”***

I am therefore satisfied that not only was the plaintiff born on parcel No. EVURORE/NGUTHI/1624 in 1972 and has put up a home but also that he has remained in occupation of both that parcel and parcel No. EVURORE/NGUTHI/1625 since then even after his father vacated.

The next issue is whether that occupation has been exclusive, un-interrupted and for a period of twelve years and with the knowledge of the defendants who have been dispossessed of the suit land.

That the defendants knew of the plaintiff’s presence on the suit land is not in dispute. That is why notices were issued both to him and his father. The law, however, is that giving of a notice to quit cannot be an effective assertion of right for the purposes of stopping the running of time under the law of Limitation of Actions – see ***GITHU VS NDEETE 1984 K.L.R 777. Similarly, in MEGARRY & WADE, THE LAW OF REAL PROPERTY 6th Edition*** it is stated at **page 1309** that:-

***“Once factual possession has been established, it will not be terminated merely because the true owner sends a letter to the squatter requiring him to vacate the premises. Time will continue to run in favour of the squatter unless and until he vacates the premises or acknowledges the true owner’s title”***

It is of course common ground that notices were issued to the plaintiff’s father as far back as 13th December 1982 and from the 1st defendant’s replying affidavit (paragraph 5), the plaintiff’s father vacated in 2004 but the plaintiff refused to vacate. That notice however, and the subsequent notices did not, on the authority of ***GITHU VS NDEETE*** (supra), interrupt the plaintiff’s occupation of the suit land and as I have already indicated above, the plaintiff has filed this Originating Summons in his own right as the party in occupation of the suit land.

I have also considered whether the filing of **EMBU PRINCIPAL MAGISTRATE’S COURT CASE NO. 62 of 1992** interrupted the plaintiff’s occupation of the suit land because, as was held in the ***GITHU VS NDEETE*** case (supra), time stops running when the registered owner asserts his right through legal proceedings or makes an effective entry onto the suit land. **EMBU PRINCIPAL MAGISTRATE’S COURT CIVIL CASE No. 62 of 1992** was, as is clear from the plaint and citation, filed in 1992. By that time, the plaintiff had been on the suit land for 20 years having been born there in 1972. Besides, that suit was filed against his father **EDWARD IRERI KIATHI** and not against the plaintiff. That suit therefore does not help the defendants because firstly, it came too late and secondly, it sought orders against one who is not a party in these proceedings. By 1992 the plaintiff was aged well over 18 years and could sue or be sued in his own names. It is my finding therefore that the **EMBU PRINCIPAL MAGISTRATE’S COURT CIVIL CASE No. 62 of 1992** did not interrupt the plaintiff’s occupation of

the suit land because by then, his prescriptive rights over the same had already crystallized and all that he needed was an order recognizing those rights which orders he now seeks by this Originating Summons. Although the defendants acquired their rights to the suit land from other parties – the 1st defendant as a gift from his father in 1993 and the 2nd defendant through purchase in 2004 – the position in law, again as per the **GITHU VS NDEETE** case (supra), is that such change of ownership of the suit land did not interrupt the plaintiff's adverse possession.

The 2nd defendant's attempt to enter the suit land was, by his own oral evidence, frustrated when plaintiff and his brothers repulsed him while armed with bows and arrows and this resulted in a Criminal Case at Siakago Court where the plaintiff was charged with assault. Among the documents produced by the 2nd defendant herein is the charge sheet in **SIKAGO MAGISTRATE'S COURT CRIMINAL CASE No. 1014 of 2014** in which the plaintiff was charged with having assaulted him on 26th September 2014. That must be the time when the 2nd defendant was attempting to assert his ownership by entering the suit land.

Unfortunately again, as was the case with the filing of the **EMBU PRINCIPAL MAGISTRATE'S COURT CIVIL CASE No. 92 of 1992**, this came too late because by 2014, the defendant's right to the suit land had long been extinguished by operation of the law.

Ultimately therefore, after considering all the evidence herein, I am satisfied that the plaintiff is entitled to the orders sought in his Originating Summons filed on 19th December 2008 having proved his case against the defendants. I accordingly enter judgment for the plaintiff against the defendants in the following terms:-

***1. That the plaintiff has acquired land parcels No. EVURORE/NGUTHI/1624 and EVURORE/NGUTHI/1625 by way of adverse possession.***

***2. That the 1st and 2nd defendants title to the suit land are extinguished and the plaintiff be registered as the proprietor of land parcels No. EVURORE/NGUTHI/1624 and EVURORE/NGUTHI/1625.***

***3. Each party to 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 the Plaintiff present

Defendants absent

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

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