REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 41 OF 2013

HARRISON WAWERU KARIUKI……..…….PLAINTIFF

VERSUS

GICHUHI GITHUMBI NYAMU……..…DEFENDANT

JUDGMENT

The plaintiff filed this Originating Summons on 26th January 2010 seeking the following orders against the defendant:-

> ***1. That the plaintiff be declared to have become entitled to a portion approximately 0.075 hectares (30x60 feet) of all that parcel of land known as L.R No. MWERUA/KAGIO/2636 measuring about 0.83 hectares or thereabout by virtue of adverse possession thereof having been in open, exclusive and continuous and/or uninterrupted possession or occupation of the same for a period of over 12 years.***
>
> ***2. That the aforesaid portion 0.075 hectares now part of L.R No. MWERUA/KAGIO/2636 be excised therefrom and the plaintiff be registered as the proprietor thereof free from all encumbrances.***
>
> ***3. That costs of this application summons be borne by the defendant.***

The Originating Summons is supported by the affidavit of the plaintiff **HARRISON WAWERU NYAMU** in which he has deponed, inter alia, that he has been in open, exclusive and/or uninterrupted possession and occupation of approximately 0.075 hectares (30 x60 feet) of land being a portion of all that property known as L.R MWERUA/KAGIO/2636 for over 12 years having purchased it on 12th June 1997 from one **LEONARD MUNENE KANYA** who had been allocated the same by the then County Council of Kirinyaga designated as lock up number 108 B. The plaintiff took possession of the said plot on or around 17th November 1997 and the Kirinyaga County Council approved his building plans and he has extensively developed the plot by constructing a permanent building thereon. That the defendant has at all material times been aware of the plaintiff's possession, occupation and development of the plot and has not challenged it for over 12 years thus giving rise to this suit. Annexed to the said Originating Summons is a copy of the title deed in respect of L.R MWERUA/KAGIO/2636 (the suit land), certificate of search, minutes of Kirinyaga County Council Works, Town planning, Markets and Housing Committee held on 12th June 1997 approving the transfer of lock-up No. 108 B from **LEONARD MUNENE KANYA** to the plaintiff, authority to develop the plot, receipts for approval for the said development and a photograph of building – annexture **HWK 1** to **7**.

In opposing the Originating Summons, the defendant filed a replying affidavit in which he deponed, inter alia, that the plaintiff is infact in actual possession of 0.075 hectares of lock-up No. 108 B and not in

actual possession of the suit land and therefore his claim is misplaced. That the County Council of Kirinyaga had no title to pass to the plaintiff or the original allottee of lock-up No. 108 B and the plaintiff is therefore a trespasser who has not acquired any adverse title against his property and the building constructed thereon ought to be removed and the plaintiff should pay mesne profits. That time started running from the time notice was given and this Originating Summons should therefore be dismissed with costs.

The plaintiff filed a supplementary affidavit on 23rd November 2015 in which he added that the suit land arose from a sub-division in 1996 of land parcel No. MWERUA/KAGIO/646 giving rise to parcels number MWERUA/KAGIO/2636, 2637 and 2638 registered in the names of the defendant, **JACINTA WAIRIMU MUBARI** and **PATRICK CHABAI GICHUHI** respectively. That he took possession of lock-up No. 108 B on 12th June 1997 and immediately thereafter started constructing a permanent house thereon in November 1997 where he resides with the knowledge of the defendant and no attempt has been made by the defendant to re-claim it.

In a reply to the supplementary affidavit, the defendant deponed that he was involved in **EMBU HIGH COURT CIVIL CASE No. 42 of 1999** with one **JOHN CERERE** a fact known to the plaintiff. That **LEONARD MUNENE KANYA** and the plaintiff could not get a good title from the County Council of Kirinyaga since the said Council had no title to the suit land to give any person.

Following the transfer of this case and others from the High Court Embu after the establishment of the Environment and Land Court in Kerugoya, it was agreed by counsel for the parties that this case and **KERUGOYA ELC Case No. 37, 39** and **40 of 2013** be consolidated and **KERUGOYA ELC No. 37 of 2013** be the test case. However, upon perusal of the said files, I found it prudent to write separate judgments for each case. It was further agreed that the Court determines the cases on the basis of the parties' affidavit and submissions by counsel.

I have therefore considered the parties respective pleadings, the annextures thereto and the submissions by counsel.

It is conceded that the defendant is the registered proprietor of the suit land. The plaintiff seeks orders that he has acquired through adverse possession a portion measuring 0.075 hectares (30x60 feet) having been in occupation thereof since 1997 without any interruption by the defendant who has knowledge of the said occupation. The title deed to the suit land (annexture **HWK 1**) indicates that the defendant was registered owner thereof on 29th December 1998. The defendant's case however is that the plaintiff is infact in occupation of plot designated as lock-up No. 108 B Kagio and not the suit land.

In ***KASUVE VS MWAANI INVESTMENTS LTD & 4 OTHERS (2004) 1 K.L.R 184***, the Court of Appeal set out what a person claiming to be entitled to land by adverse possession must prove. It said:-

> ***"In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of 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 also ***WANJE VS SAIKWA 1984 K.L.R 284.***

Section 38 of the Limitation of Actions Act entitles a person who claims to have become entitled by way of adverse possession to land registered under any of the Acts cited in ***Section 37 of the Limitation of Actions Act*** or land comprised in a lease, to apply to the High Court for an order that he be registered as the proprietor of the land or a lease in place of the person then registered as proprietor of the said land. It is now well settled 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 – ***BENJAMIN KAMAU & OTHERS VS GLADYS NJERI C.A CIVIL APPEAL No. 2136 of 1996***.

Similarly, the new land laws promulgated after the 2010 Constitution recognize the doctrine of adverse possession. ***Section 28 (h) of the Land Registration Act 2012*** identifies 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"***

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

> "***Title to land may be acquired through***
>
> ***(a)***
>
> ***(b)***
>
> ***(c)***
>
> ***(d) Prescription"***

The Supreme Court of India has declared the doctrine of adverse possession to be archaic and recommended to the Government to immediately consider and seriously deliberate either abolition of the law of adverse possession and in the alternative, make suitable amendments in the law on adverse possession – ***STATE OF HARYANA VS MUKESH KUMAR & OTHERS (2012) A.I.R SCW 276.*** However, the position in this country with regard to the doctrine of adverse possession is as was held by the Court of Appeal in the case of ***MTANA LEWA VS KAHINDI NGALA MWAGANDI C.A CIVIL APPEAL No. 56 of 2014 (MALINDI***) when it stated that the doctrine of adverse possession is neither an arbitrary nor an un-Constitutional limitation of the right of property. That will remain the position until the Supreme Court of Kenya decides to follow the route taken by the Supreme Court of India.

Possession of the land being claimed by the adverse possessor is a matter of fact to be observed on the land itself – ***MAWEU VS LIU RANCHING & FARMING CO-OPERTIVE SOCIETY LTD 1985 K.L.R 430***. See also ***KIM PAVEY & 2 OTHERS VS LOISE WAMBUI NJOROGE & ANOTHER 2011 e K.L.R*** where the Court said:-

> ***"Thus to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also necessary to prove that the possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances".***

To develop the land or a portion thereof that is claimed through adverse possession is perhaps the best evidence of possession or occupation. The claimant's case is made even stronger where he is actually living on the land with his family as is the position in this case. The plaintiff has pleaded that he has been living on a portion of the suit land since 1997 having purchased it from one **LEONARD MUNENE KANYA** when it was designated as lock-up No. 108 B. The defendant claims that infact the plaintiff is not occupying a portion of the suit land but instead occupies lock-up No. 108 B and therefore this claim is mis-placed. In my view, therefore, the issue to be determined by this Court is whether the plaintiff occupies lock-up No. 108 B which is not part of the suit land (as the defendant alleges) or whether infact the portion of land occupied by the plaintiff is indeed part of the suit land which is registered in the defendant's names and designated as land parcel No. MWERUA/KAGIO/2636 (as the plaintiff alleges). The occupation and possession of some land by the plaintiff since 1997 is not disputed and it is also common knowledge that the defendant is the registered proprietor of the suit land. Since the parties elected to prosecute their respective cases through their affidavits, this Court can only rely on those affidavits. In paragraph 2 of his supporting affidavit, the plaintiff has deponed as follows:-

> "***That I have been in open, exclusive and/or un-interrupted possession and occupation of approximately 0.075 hectares (30x60 feet) of land being a portion of all that property known as***

L.R No. MWERUA/KAGIO/2636 for over 12 years. Annexed hereto and marked HWK 1 and HWK 1A respectively are copies of the Title deed and official search"

In reply thereto, the defendant has deponed in paragraph 2 of his replying affidavit that the plaintiff is infact in possession of 0.075 hectares of lock-up 108 B and not the suit land. The defendant goes on to plead in paragraph 4 and 5 of his replying affidavit as follows:-

4*: **"That I am advised by my advocate on record which advise I verily believe to be true that the plaintiff/applicant is nothing but a trespasser who has not acquired any adverse title against me hence whatever building and or development on that portion ought to be removed forthwith"***

5: ***"That I am advised by my advocate on record which advise I verily believe to be true that the plaintiff must pay me mesne profits for the period starting 27th August 1992 till he vacates and removes all his belongings from the plot"***

Since the defendant is the registered proprietor of the suit land, he can only claim mesne profits from one who is illegally occupying that land. In paragraph 4 of his replying affidavit, the defendant seeks the removal of ***"whatever building and or development***" the plaintiff has made on the portion that he is occupying. The only reasonable conclusion that this Court can arrive at from those pleadings is that the portion of land which the plaintiff occupies and has developed since 1997 and which he claims to have acquired by adverse possession can only be a portion of the suit land. If that portion was initially designated as lock-up No. 108 B is therefore not of any consequences. What is of significance is that the plaintiff has trespassed onto a portion of the suit land registered in the defendant's names since 1997 and has been in possession thereof without any interruption and with the knowledge of the defendant. There is no evidence that the defendant has made any attempt to evict the plaintiff from the portion which he occupies. That is what the law on adverse possession is all about. The defendant was registered as the proprietor of the suit land on 29th December 1998. It is clear to me from the defendant's own replying affidavit that even if the portion occupied by the plaintiff was originally lock-up No. 108 B, the portion developed and occupied by the plaintiff is infact a portion of the suit land which the plaintiff has been in open, exclusive, and un-interrupted occupation since November 1997. This suit was filed on 26th January 2010 which means that the plaintiff has been in occupation of a portion of the suit land measuring 0.075 hectares (30x60 feet) for 13 years. In his response to the plaintiff's supplementary affidavit, the defendant has deponed to the fact that he filed **EMBU HIGH COURT CIVIL CASE No. 42 of 1999** against one **JOHN CERERE.** Indeed part of the plaintiff's own documents are a notice issued by the High Court in **EMBU CIVIL SUIT No. 42 'A' of 1999** addressed to one **WAWERU NGATIA** directing him and his family to vacate from land parcel No. MWERUA/KAGIO/2636. The parties in that case are the defendant suing as the plaintiff while the defendant was one **JOHN CERERE MWANGI**. That order which was issued on 5th August 2009 cannot be said to have interrupted the plaintiff's occupation of a portion of the suit land for two reasons. Firstly, the order is addressed to one **WAWERU NGATIA** and there is nothing to suggest that **WAWERU NGATIA** and the plaintiff herein are one and the same person. Secondly, **EMBU HIGH COURT CIVIL SUIT No. 42'A' of 1999** did not involve the plaintiff herein and there is no evidence to show that the plaintiff is an agent, family, employee or servant of **JOHN CERERE MWANGI** (the defendant in that case) or **WAWERU NGATIA** (the person against whom the order to vacate was directed). The only way the defendant could have interrupted the plaintiff's occupation of a portion of the suit land would have been by taking legal action against the plaintiff or making an effective entry. The defendant did neither. It is also clear from paragraph 3 of the plaintiff's supporting affidavit that the suit land is a sub-division of land parcel No. L.R MWERUA/KAGIO/646. Change of ownership of land does not defeat a claim founded on adverse possession. Similarly, it is now well established that a party can claim ownership of a portion of land registered in the defendant's names so long as that portion is clearly identified – ***GITHU VS NDEETE 1984 K.L.R 776***. In the case now before me, the plaintiff claims a portion of land clearly identified as measuring 0.075 hectares (30x60 feet) which he has developed and lives on with his family since 1997.

From the evidence above, it is my finding that the plaintiff has proved his case against the defendant and is therefore entitled to the orders sought in his Originating Summons filed herein on 26th January 2010.

The up-shot of the above is that there shall be judgment for the plaintiff against the defendant in the following terms:-

1. The plaintiff is declared to have become entitled to a portion measuring approximately 0.075 hectares (30x60 feet) of all that parcel of land known as L.R No. MWERUA/KAGIO/2636 by virtue of adverse possession thereof having been in open, exclusive and continuous and un-interrupted possession and occupation of the same for a period of over 12 years.

2. That the aforesaid portion of 0.075 hectares and part of L.R No. MWERUA/KAGIO/2636 be excised therefrom and the plaintiff be registered as the proprietor thereof free from all encumbrances.

3. Each party shall meet their own costs of this suit.

B.N. OLAO

JUDGE

30TH SEPTEMBER, 2016

Judgment dated, delivered and signed in open Court this 30th day of September 2016.

Plaintiff absent

Mr. Mwangi for Mr. Munene for the Defendant present

Right of appeal explained.

B.N. OLAO

JUDGE

30TH SEPTEMBER, 2016