



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 583 OF 2013 (O.S)**

**PETER KARIUKI MWAURA.....1<sup>ST</sup> PLAINTIFF**

**MILKA WAMBUI MWAURA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**RICHARD NG'ANG'A KAMIRO.....1<sup>ST</sup> DEFENDANT**

**JOSEPH NJOROGE GITAU.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The two plaintiffs **PETER KARIUKI MWAURA** (1st plaintiff) and **MILKA WAMBUI MWAURA** (2nd plaintiff) are a mother and his son. They have moved this Court vide their Originating Summons filed herein on 15th May 2013 claiming to be entitled to the land parcel No. LOC 5/KABATI/890 by way of adverse possession and seeking the following orders against the defendants:-

- 1. A declaration that the title of RICHARD NGANGA KAMIRO (1st defendant) and JOSEPH NJOROGE GITAU (2nd defendant) to the land parcel No. LOC 5/KABATI/890 has been extinguished by the plaintiffs adverse possession thereof for a period of more than twelve (12) years in terms of the Limitation of Actions Act.***
- 2. That the plaintiffs have become entitled by adverse possession to that land comprised in title number LOC 5/KABATI/890 in Kabati Sub-location in Kandara Division within Muranga County and registered under the Land Act in the names of the defendants.***
- 3. An order that the District Land Registrar Muranga to register the plaintiffs as absolute proprietors of land parcel number LOC 5/KABATI/890 in place of the defendants.***
- 4. That the District Land Registrar Muranga be directed that the order herein shall be instrument of transfer of ownership of the whole land reference number LOC 5/KABATI/890 from the defendants to the plaintiffs.***
- 5. That the costs of this suit be provided for.***

In support of the said Originating Summons, the plaintiffs filed a joint supporting affidavit in which it is deponed as follows:-

- That land parcel number LOC 5/KABATI/890 is currently registered in the names of the defendants although it originated from a sub-division and transfer of family land registered***

*under the names of PAUL MWAURA WAMIRO (deceased) who was father to the 1st plaintiff and husband to the 2nd plaintiff.*

- That the deceased sub-divided the said land among his sons with each getting one acre but on 9th February 1989 the suit land was registered in the names of the 1st plaintiff's elder brother ONESMUS MUIRURI MUTUNE to hold in trust for the 1st plaintiff who was then a minor.*
- That on 30th September 1991 the suit land was registered in the joint names of ONESMUS MUIRURI MUTUNE and the defendants without their knowledge and on 7th June 1996, the suit land was transferred into the names of the defendants.*
- That the plaintiffs have been in possession of the said land parcel number LOC 5/KABATI/890 throughout their lives and have extensively developed and utilized it without interference.*
- That the plaintiffs have been in open, peaceful, continuous and uninterrupted use and occupation of the land comprised in title number LOC 5/KABATI/890 for over thirty (30) years and the defendants title has therefore been extinguished and vested in them.*
- That the defendants know about their occupation of the suit land and have never lived or utilized the same.*
- That under the Limitation of Actions Act, the defendants cannot remove them or challenge their right to acquisition of the title and it is therefore just that they be registered as absolute proprietors of the land parcel number LOC 5/KABATI/890.*

Annexed to the Originating Summons, as is required, is a copy of the Green Card and official search in respect to the said land parcel number LOC 5/KABATI/890 - annexure **PKW1** and **PKW2** respectively.

The 1st defendant **RICHARD NGANGA KAMIRO** an advocate of this Court filed a replying affidavit on his own behalf and also with the authority of the 2nd defendant **JOSEPH NJOROGE GITAU**. He deponed that land parcel number LOC 5/KABATI/890 measuring 1.2 acres (0.428 hectares) was in 1991 registered in the names of **ONESMUS MUIRURI MUTUNE** as the sole and absolute proprietor and in September 1991 he sold the defendants part of the land. In June 1996, the said **ONESMUS MUIRURI MUTUNE** sold to the defendants his share leaving them as the registered common proprietors of the said land. That it is not true that the said **ONESMUS MUIRURI MUTUNE** was holding the land in trust for the 1st plaintiff and neither was the 1st plaintiff a minor in 1989 and in any case, his father was still alive. That it is also not true that the 1st plaintiff's father had shared his land equally among his sons with each getting one acre. That it is not true that the transfer was not done with the knowledge of the plaintiffs as it was done with the consent of the Land Control Board.

That it is not true that the plaintiffs have fully developed the land parcel number LOC 5/KABATI/890 and neither have they been in possession thereof throughout their lives and the 2nd plaintiff has her own land assigned to her by her late husband and which is the subject of **JUDICIAL REVIEW APPLICATION No. 289 of 2012 (NBI)** which is on-going.

That the defendants have always demanded from the plaintiffs not to interfere with the land as is manifested with the fact that they caused the plaintiffs to remove the caution on the said land and they (plaintiffs) were on 29th June 2005 summoned by the District Officer Kandara and were restrained from interfering with the said land parcel and on 16th December 2010 the plaintiffs undertook to cease interfering with the parcel No. LOC 5/KABATI/890 and requested to be given upto 10th January 2011. That the plaintiffs are very economical with the truth and curiously, the said **ONESMUS MUIRURI MUTUNE** who is alive is not a party to this suit. Annexed to the said replying affidavit are the sheet number showing the location of the land parcel number LOC 5/KABATI/890, a letter written by the 2nd plaintiff about her land being grabbed, a notice for the removal of caution, summons issued to the plaintiffs by the District Officer Kandara and a letter dated 16th December 2010 by the plaintiffs – annexures **KRN 1** to **KRN 5** respectively.

The hearing commenced before me on 14th April 2016 when both plaintiffs testified and adopted their supporting affidavits and witness statements.

The 1st plaintiff confirmed that land parcel number LOC 5/KABATI/890 (the suit land) is registered in the names of the two defendants and he produced the Green Card and Certificate of official search

(Plaintiff's Exhibits 1 and 2). He added that he was born on the suit land in 1970 although the defendants were registered as owners thereof on 7th June 1996 but prior to that, the suit land belonged to their deceased father **PAUL MWAURA** who died in 2001 after which it was registered in the names of his brother **ONESMUS MUIRURI** to hold in trust for him. He added that he lives on the suit land together with his family and the 2nd plaintiff but the defendants have never lived nor cultivated the same. When he discovered that the defendants were registered as proprietors of the suit land, he placed a caution on it. He then asked his brother how the land had been transferred to the defendants and his brother informed him that he had given the title to some people to hold as security.

The 2nd plaintiff testified that she has lived on the suit land since she got married which was after the Mau Mau war. She said she has a home on the suit land which she also cultivates and her late husband was also buried there and no one has ever removed her. She added that her other son **ONESMUS MUIRURI** is the one who sold the suit land to the defendants who however neither live there nor cultivate it.

The 1st defendant told the Court that the deceased **PAUL MWAURA** had ten acres of land at Kabati which he sub-divided among his sons including the 1st plaintiff and his brother **ONESMUS MUIRURI** who was allocated the suit land measuring 1.2 acres and was issued with a title deed. The defendants later bought the suit land from the said **ONESMUS MUIRURI** who moved to Narok. There was no house on the suit land which is in the Town-ship and the defendants had planned to sub-divide it into plots and put up residential houses. He said that from the time they bought the suit land, they had never developed nor cultivated it and it was only in 2000 that the plaintiffs moved there and so the defendants complained to the Chief and the plaintiffs were warned and also told to remove the caution. He referred the Court to the letters annexed to his replying affidavit.

The 1st defendant told the Court that if the 1st plaintiff wanted land, he should have got it from his father who was alive in 2001. He denied that **ONESMUS MUIRURI** was registered as owner of the suit land in trust for the plaintiff and added that no-one was living on the suit land when they bought it as it was only an empty plot. The 1st defendant wondered why the said **ONESMUS MUIRURI** had not been sued adding that they had tried to seek the assistance of the District Officer and the Chief to evict the plaintiffs adding that they could not file a case of trespass because the practice then was to refer such case to elders.

The 2nd defendant testified that sometime in 1990 or 1991 the 1st defendant informed him that someone was selling land and so the two defendants decided to buy it together with the intention of sub-dividing it into plots. Later, the 1st defendant informed him that he was having difficulties accessing the land as the plaintiffs were abusing him. The matter was reported to the District Officer who summoned the plaintiffs to his office and after the defendants produced their title to the suit land, the plaintiffs were asked to vacate. Again on 16th December 2010 the plaintiffs were summoned by the Assistant Chief and pleaded for time upto February 2011 to vacate and even an agreement was signed to that effect. The defendants were then advised to file a suit but before they could do so, the 1st defendant informed him that the plaintiffs had already filed this suit.

After the hearing submissions were filed both by **Mr. KINUTHIA** advocate for the plaintiffs as well as the 1st defendant on behalf of both defendants.

I have considered the evidence by both parties and the submissions by counsel.

It is not in dispute that that the suit land is currently registered in the names of the defendants. The Green Card shows that in 1989, it was registered in the names of **ONESMUS MUIRURI MUTUNE** the brother and son to the 1st and 2nd plaintiffs respectively and on 30th September 1991, it was registered in the names of **ONESMUS MUIRURI MUTUNE** and the two defendants. On 7th June 1996 it was registered in the names of the two defendants. The defendants conceded that they have never developed nor cultivated the suit land which the plaintiffs claim was originally family land and was registered in the names of **ONESMUS MUIRURI MUTUNE** in trust for his younger brother the 1st plaintiff. This suit is however based on adverse possession and not in trust.

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 should 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 adverse possession to land registered under any of the Acts cited in ***Section 37*** 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 lease in place of the person then registered as proprietor of the said land. 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 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***. The new land laws promulgated after the 2010 Constitution also recognize the doctrine of adverse possession. ***Section 28 (h) of the Land Registration Act 2012*** recognize some of the overriding interest 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”***

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

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

***(a)***

***(b)***

***(c)***

***(d) Prescription”***

As indicated above, the plaintiffs’ case is that the suit land was family land on which the 1st plaintiff says he has been living since he was born in 1970 while the 2nd plaintiff said she has lived there since she was married after the Mau Mau war. The defendants concede that they have never worked nor lived on the land and their case is that when they bought the suit land from **ONESMUS MUIRURI** in June 1996, it was an empty plot which they intended to sub-divide and develop. It is the defendants’ case that the plaintiffs only moved into the suit land in 2000 whereupon the defendants reported the matter to the area District Officer and Assistant Chief with the intention of evicting them. However, the plaintiffs filed this suit.

Have the plaintiffs proved their case for adverse possession of the suit land as set out in the case of ***KASUVE*** (supra)? It is common knowledge, and again the defendants concede, that the plaintiffs had placed a caution on the suit land in 1991. Indeed part of the documents produced by the defendants is a letter dated 20th August 1991 (annexture **KRN 3**) addressed to the 1st plaintiff from the Land Registrar Muranga giving him notice that the caution placed on the suit land would be removed at the end of thirty (30) days unless written objection was received. The plaintiffs claim that they have lived on the suit land all along and it was only in 1996 that they discovered it had been registered in the names of the defendants. I am satisfied from the evidence before me that the only reason why the plaintiffs placed a caution on the suit land in 1991 was to protect it because they were living on it. That also means that by 1991 the defendants had knowledge of the plaintiffs’ occupation of the suit land. However, they did nothing to assert their ownership of the same by making an effective entry or suing for the same =

**GITHU VS NDEETE 1984 K.L.R. 776.** By 1991 therefore, both the 1st plaintiff, who was born on the suit land in 1970, and the 2nd plaintiff, who was married there after the Mau Mau war, had been in open, exclusive and uninterrupted possession or occupation of the suit land for a period well in excess of the statutory period provided in law. It must be remembered that the defendants were first registered as proprietors of the suit land on 30th September 1991 jointly with **ONESMUS MUIRURI MUTUNE**. Thereafter on 7th June 1996, the suit land was registered in the names of the two defendants. Before 1991, the suit land was registered in the names of **ONESMUS MUIRURI MUTUNE** but it is well settled that the mere change of ownership of land which is occupied by another under adverse possession does not interrupt such person's adverse possession – **GITHU VS NDEETE** (supra). Although the defendants claim that they bought the suit land as a vacant plot, the 1st defendant did admit in cross-examination that infact there are persons buried thereon. He said as follows under cross-examination by Mr. Kinuthia counsel for the plaintiffs:-

***“It is true that there are persons buried there. It is however not true that the 1st plaintiff's father was buried on that land”***

The 1st plaintiff on his part testified as follows in his evidence in chief:-

***“The 2nd plaintiff is my mother. We all live on that land together with my wife and other family members. My sister Njeri also lived there until she died. I also grow maize and other crops on the land. My mother as well”***

The totality of all the above evidence is that the defendants certainly did not buy the suit land as an empty plot as they claim. This is further reinforced by the fact that when the defendants reported to the Assistant Chief on 16th December 2010 to assist them in removing the plaintiffs from the suit land, the plaintiffs pleaded for time to remove their crops and houses. The said letter which is annexure **KRN 5** produced by the 1st defendant and which was written by the Assistant Chief Kabati and signed by both the 2nd defendant (as complainant) and the 2nd plaintiff (as defendant) reads in part as follows:-

***“Defendant pleads to complainant to allow her demolish the house at the time of harvest of crops (time February end 2011)”***

The same letter also reads as follows:-

***“She requests legal action to be taken to her on 1st March 2011 if she fails to comply”***

It is further captured as follows in the same letter:-

***“Complainant disagreed with defendants pray (sic). He allowed defendant to stay in the premises until 10th January 2011 failure to which legal action will be taken. Defendant admits to transfer the houses before or on 10th January 2011 without fail”***

It cannot therefore be true, as alleged by the defendants, that there was nobody living on the suit land which was an empty plot. There would have been no need to report the plaintiffs to the District Officer and the Assistant Chief to direct them to remove their houses and crops from an empty plot. By 2010 when the defendants were trying to evict the plaintiffs from the suit land, the plaintiffs' occupation and possession thereof had long surpassed the twelve (12) year statutory period provided for by the law. And although the 2nd plaintiff (the 1st plaintiff did not sign the said letter which was only signed by the 2nd plaintiff and 2nd defendant) agreed to vacate and remove her house and crops from the suit land, it was rather late in the day to interrupt the plaintiffs' adverse possession of the suit land. Unfortunately for the defendants, they did not assert their ownership to the suit land in good time and from the evidence before me, it is clear that the plaintiffs claim to have acquired the suit land by way of adverse possession is well merited and must be confirmed by this Court. It is clear from paragraph 11 of the 1st defendants replying affidavit that he and the 2nd defendant knew of the plaintiffs occupation and possession of the suit land as far back as 1991 and it cannot therefore be true, as alleged by the 1st defendant in his oral evidence, that the plaintiffs only moved into the suit land in 2000. In paragraph 11 of his affidavit and in response to

the averments by the plaintiffs in their supporting affidavit, the 1st defendant depones as follows:-

**11: “That averments in paragraph 11, 12 and 13 of the affidavit are false. Ever since the defendant purchased this land and got registered, we have always demanded from the plaintiff NOT TO INTERFERE with the whole or any part of land parcel LOC 5/KABATI/890 as manifested by the following”**

The import of the above is that the defendants were aware about the plaintiffs occupation of the suit land in 1991 and all that they did was to “**demand from the plaintiffs not to interfere**” with the suit land. That was not sufficient to stop time running. In MEGARRY & WADE, THE LAW OF REAL PROPERTY 6<sup>TH</sup> EDITION, it is stated as follows at page 1309:-

**“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”**

That passage was followed by the Court of Appeal in JOSEPH MUTAFARI SITUMA VS NICHOLAS MAKHANU CHERONGO C.A CIVIL APPEAL No. 351 of 2002 (KISUMU).

Ultimately therefore, and after considering the evidence by both parties, I find that the plaintiffs have established their case against the defendants as required in law. They are therefore entitled to the orders sought in their Originating Summons.

Judgment shall therefore be entered for the plaintiffs against the defendants in terms of paragraphs 1, 2, 3 and 4 of the Originating Summons. With regard to costs, I direct that each party meets their own costs. It is so ordered.

**B.N. OLAO**

**JUDGE**

**30<sup>TH</sup> SEPTEMBER, 2016**

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

Mr. Mwangi for Mr. Kinuthia for the Plaintiffs present

1st Defendant present

2nd Defendant present

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**30<sup>TH</sup> SEPTEMBER, 2016**