



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 708 OF 2013 (OS)**

**IN THE MATTER OF LAND PARCEL NO. MUTIRA/KANYEI/172 MEASURING 1.49 HECTARES**

**AND**

**IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT**

**CHAPTER 22 LAWS OF KENYA**

BETWEEN

FRANCIS MURIUKI GIKIGI ) .....

DAVID MUGO GIKIGI ) .....APPLICANTS

MISHECK MURIUKI MUTHIKE ).....

VERSUS

RICHARD MURIITHI TIRI )

TIMOTHY MURIITHI TIRI ) ..... RESPONDENTS

**JUDGMENT**

By their Originating Summons filed herein on 12<sup>th</sup> September 2013, the plaintiffs sought the following orders against the defendants:-

1. ***That the plaintiffs be declared to be entitled by adverse possession of over 12 (twelve) years to 1.5 Acres out of land comprised in parcel No. MUTIRA/KANYEI/172 measuring 1.49 Hectares registered under the Registered Land Act (now repealed) situated in MUTIRA/KANYEI in Kirinyaga County.***
2. ***That the plaintiffs be registered as the joint absolute proprietors of a portion of 1.5 Acres to be carved out of land comprised in parcel No. MUTIRA/KANYEI/172 measuring 1.49 Hectares***
3. ***That costs be provided for.***

The said Originating Summons was supported by an affidavit sworn by the 1<sup>st</sup> plaintiff on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs to which were annexed various documents. The gist of that affidavit and annexures as well as the statement of the 1<sup>st</sup> plaintiffs and his witnesses is that although the land parcel No. MUTIRA/KANYEI/172 (hereinafter the suit land) was originally registered in the names of the late TIIRI

MURIU, the father of the defendants in 1959, the said suit land was later inherited by the defendants and was registered in their names jointly. However, even before the registration of the suit land in the names of the late TIIRI MURIU, the plaintiffs parents have always occupied a portion of the suit land measuring 1.5 Acres and it is on that portion that the plaintiffs were born in 1961, 1962 and 1971 respectively and they have extensively developed that portion including planting coffee stems, trees, bananas and other crops. It is also on that portion measuring 1.5 Acres and which is clearly delineated from the other portion of the suit land that the plaintiffs parents were buried and which the plaintiffs have continued to occupy peacefully, openly, continuously and un-interrupted. It is on that basis that this suit was filed.

The 1<sup>st</sup> defendant filed a replying affidavit on behalf of the 2<sup>nd</sup> defendant in which he deponed, inter alia, that the suit land was originally registered in the names of their father TIIRI MURIU and following succession proceedings, they were the sole beneficiaries and the suit land was registered in their names and that although one JOSEPH MUTHIKE WANGOMBE who is the father of the 3<sup>rd</sup> plaintiff moved the Central Land Disputes Tribunal in Case No. 33 of 2000 seeking to be allocated one acre of the land, his prayer was rejected and the defendants had the suit land sub-divided among themselves. They added that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs do not solely depend on the suit land as they have a rice farm in Mwea where the 2<sup>nd</sup> plaintiff lives and only his wife lives on the suit land.

The two defendants also filed their statements and those of their witnesses.

Directions were taken in the matter on 14<sup>th</sup> July 2014 and although the parties had agreed to dispose off the suit by way of viva voce evidence, they later agreed on 5<sup>th</sup> November 2014 to have the whole suit disposed off by way of written submissions and the parties' statements on record.

Prior to that, this Court had, by a ruling dated 19<sup>th</sup> February 2014 issued orders injuncting the defendants from evicting, selling, charging, disposing, leasing or in any way interfering with the plaintiffs quiet possession and enjoyment of the said 1.5 Acres out of the said suit land.

Submissions were filed by the parties' advocates.

I have considered the pleadings in this Originating Summons, the rival affidavits and annexures as well as the respective statements by the parties and their witnesses.

**Section 38(1) of the Limitations of Actions Act** allows a person who claims to have become entitled to land by adverse possession to apply to the High Court for an order that he be registered as proprietor of the land in place of the registered proprietor. For a person to be entitled to an order that he has acquired the land in dispute by adverse possession, he must establish the following:-

- a. ***That he has been in continuous and un-interrupted possession of the land for twelve (12) years or more***
- b. ***That such possession was open, notorious and with the knowledge of the registered owner***
- c. ***That such possession must be without the permission of the registered owner and***
- d. ***That he has asserted a hostile title to that of the owner of the property.***

The above are a reiteration of the Court of Appeal's decision in **KASUVE VS MWAANI INVESTMENTS LTD & 4 OTHERS 2004 1 K.L.R 184** where that Court went on to add that a title by adverse possession can be acquired for only a part of the land. See also **WANJE VS SAIKWA 1984 K.L.R 284.**

In this matter, it is not in dispute that:-

1. ***The parties were born on the suit land in 1961, 1962 and 1971 respectively and continue to occupy a portion thereof measuring 1.5 acres***
2. ***The suit land was originally registered in the names of the defendants' father in 1959 but has since the year 1988 been registered in the names of the defendants jointly and a title deed was***

*issued in their names on 16<sup>th</sup> June 2000.*

3. *The plaintiffs have extensively developed the portion of the suit land that they occupy where they even buried their parents.*

The above were really not rebutted by the defendants in their statements or those of their witnesses.

Considering all the above together with the case law as set out in the cases of **KASUVE** and **WANJE** cited above, I am satisfied that the plaintiffs are entitled to the orders sought in their Originating Summons filed herein on 12<sup>th</sup> September 2013. Firstly, it is not in doubt, even from a reading of the defendant's replying affidavit and statements including those of their witnesses, that the plaintiffs were born on the suit land in the 1960's and 1970's. That period is well beyond the twelve (12) years provided in law that entitles one to be declared to be registered as owner of land by adverse possession. It is also clear from the material placed before me that the 1.5 Acres occupied by the plaintiffs is clearly delineated from the rest of the suit land. In paragraph 11 of the replying affidavits of the two defendants, it is suggested that since the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs also utilize their father's rice farm in Mwea, they should not be granted their prayers in this Originating Summons. That paragraph reads as follows:-

**11: "That the 1<sup>st</sup> and 2<sup>nd</sup> applicants' father has a rice farm in Mwea and therefore they do not depend solely of (sic) L.R No. MUTIRA/KANYEI/172 since they have alternative residence. Infact the 2<sup>nd</sup> applicant lives in the said farm in Mwea and only his wife resides on the suit land"** emphasis mine.

And with respect to the 3<sup>rd</sup> plaintiff, the defendants have deponed in paragraph 12 of their replying affidavit as follows:-

**12: "That the 3<sup>rd</sup> applicant lives in the village and not on L.R No. MUTIRA/KANYEI/172 and therefore it is not his only home and livelihood"** emphasis mine,

The suggestion in the above two paragraphs is that since the plaintiffs "**do not depend solely**" on the suit land and that "**it is not his only home and livelihood**" should dis-entitle them to the orders sought herein. However, I do not think that the mere fact that a party has other land elsewhere would in itself be sufficient reason to deny him orders in adverse possession where such a party satisfies the requirements in law to warrant such an order. Indeed a reading of **Section 38 of the Limitation of Actions Act** does not suggest that persons owning land elsewhere cannot be the beneficiaries of orders to be registered as proprietors of land in place of the registered owners. The defendants, as is clear from the paragraphs above, have conceded that the plaintiffs occupy part of the suit land notwithstanding that they may have other land elsewhere.

Has the plaintiffs' occupation of part of the suit land been continuous, un-interrupted, open, notorious and with the knowledge of the defendants? From the evidence placed before me, the answer is in the affirmative. Nowhere in the replying affidavit of the defendants or in their statements or those of their witnesses have they denied knowledge of the plaintiffs' presence on the suit land. At no time has the plaintiff's occupation been interrupted. In paragraph 3 of the defendants' replying affidavit, it is deponed that one JOSEPH MUTHIKE WANGOMBE who is the father of the 3<sup>rd</sup> plaintiff filed a dispute in the Tribunal being Case No. 33 of 2000 on 28<sup>th</sup> September 2000 seeking to be allocated one acre out of the suit land but his plea was rejected. The defendants filed Civil Appeal No. 70 of 2001 which was however stayed. The record placed before me shows that the said appeal was infact allowed by a consent recorded before K. BIDALI Deputy Registrar on 24<sup>th</sup> October 2008. That suit, however, did not involve the plaintiffs herein and no evidence was placed before me to show that there has been any suit with regard to the suit land involving the plaintiffs and the defendants herein. In any event, the defendants, as I have indicated above, were registered as the owners of the suit land on 14<sup>th</sup> June 1988 and a title deed issued in their joint names on 16<sup>th</sup> June 2000 (see their **annextures RMT 3**) and nothing was placed before this Court to indicate that there has been any litigation between the plaintiffs and the defendants

over the suit land since then. This suit having been filed on 13<sup>th</sup> September 2013, it is clear that whether the period is computed from 1988 or 2000, the twelve (12) years period stipulated in law had expired by the time this suit was filed. It cannot therefore be true, as submitted by the defendants' counsel, that the plaintiff's occupation was interrupted as there have been disputes between the parties over the land. The plaintiffs having been born in the 1960's and 1970's were all adults by 1978 and 1988 and if there was any litigation over the suit land, it ought to have been in their names more so in view of their own assertion that they have lived on and developed the 1.5 Acres of the suit land. I am persuaded, therefore, that the plaintiffs' occupation of the 1.5 Acres of the suit land has been continuous, un-interrupted, open, notorious and with the knowledge of the defendants.

Ultimately therefore, upon considering all the evidence before me, I am satisfied that the plaintiffs have proved as required in law that they are deserving of an order declaring them to be entitled by adverse possession of 1.5 Acres out of the parcel of land No. MUTIRA/KANYEI/172. I accordingly enter judgment for the plaintiffs as against the defendants as prayed in the Originating Summons filed herein on 13<sup>th</sup> September 2013 and order as follows:-

- 1. 1.5 Acres out of parcel No. MUTIRA/KANYEI/172 be registered in the joint names of the plaintiffs herein*
- 2. The Deputy Registrar at this Court is authorized to sign any documents that will be required to be signed by the defendants to facilitate that registration should the defendants refuse to do so*
- 3. The plaintiffs will meet the costs of such survey as may be required to curve out the 1.5 acres which should, as much as possible take into account the portion that the plaintiffs currently occupy*
- 4. As the parties appear to have some relationship, each shall meet their own costs.*

It is so ordered.

**B.N. OLAO**

**JUDGE**

**24<sup>TH</sup> APRIL, 2015**

24/4/2015

Before

B.N. Olao – Judge

Gichia – CC

Mr. Rurigi for Mr. Kahigah for Plaintiff – present

Mr. Chomba for Defendant – absent

COURT: Judgment delivered this 24<sup>th</sup> day of April 2015 in open Court.

Mr. Rurigi for Mr. Kahiga for the Plaintiff present

Mr. Chomba for the Defendant absent

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**24<sup>TH</sup> APRIL, 2015**