



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL MISC. NO. 899 OF 1995

JOSEPH NJUGUNA NJOROGE.....PLAINTIFF

VERSUS

JAMES MUNGAI WAWERU.....1ST DEFENDANT

JULIUS KAAGU MUKINYA.....2ND DEFENDANT

J U D G M E N T

By an originating summons dated 4th August 1995 the plaintiff one **Rebecca Muthoni Njoro** seeks determination and orders that:-

- a. That the plaintiff be declared to have become entitled by adverse possession of over twelve years to a portion comprising one decimal point seven zero (1.70) acres or thereabouts comprised in land reference **Loc.4/Muruka/6** situate in Muranga District.
- b. That the plaintiff be registered as the proprietor of the said one decimal point seven zero (1.70) acres in place of the defendants who are registered proprietors in common in equal shares.
- c. That the costs of the application be provided for.

Though the record shows that the defendants filed a memorandum of appearance on 4th September 1995 through the law firm of **Kamiro R.N. & Co. Advocates** there is no evidence of a formal response to the originating summons but vide a filed consent by the parties dated 2nd April 1997, the parties dispensed with summons for directions as they had filed a statement of agreed issues. The issues as framed by the parties were as follows:-

1. Whether or not the defendants who are the registered proprietors of land parcel Number **Loc. 4/Muruka/6** are the sons of the plaintiffs brother in law **Waweru Kaagu** now deceased.
2. Whether or not **Waweru Kaagu** was the registered proprietor of land parcel Number **Loc. 4/Muruka/6** from 5/11/65 upto 1/2/1995.
3. Whether the Defendants got registered as proprietors of land parcel **Loc. 4/Muruka/6** after the court fully heard and determined who were the beneficiaries of the deceased **Waweru Kaagu**

which proceedings the present plaintiffs were the objectors and their claim of 1.70 acres from the Estate was found to have no merit and dismissed.

4. Whether or not the claim by the plaintiff is **res judicata** in view of the succession cause.
5. Whether or not the subordinate court in **Thika SPMCC Succession cause NO. 155 of 1991** had jurisdiction to deal with matters involving adverse possession and if not whether the above succession cause can bar a claim under adverse possession.
6. Whether or not **Njoroge Kaagu** the plaintiff's husband and his family was in possession and uninterrupted occupation of 1.70 acres out of land parcel Number **Loc.4/Muruka/6** from the time of land demarcation (i.e 1965) upto 28/6/1982 when he **Njoroge Kaagu** died.
7. Whether or not the death of **Njoroge Kaagu** the plaintiff and her children continued to occupy and utilize the aforesaid portion of 1.70 acres out of parcel Number **Loc.4/Muruka/6** without any interruption from **Waweru Kaagu** or the defendants upto 15/10/1990 when **Waweru Kaagu**.
8. Whether or not the death of **Waweru Kaagu** and the subsequent registration of the defendants as proprietors amounts to interruption in law.
9. Whether the plaintiff's quiet exclusive and continuous possession of 1.70 acres out of land parcel Number **Loc.4/Muruka/6** for over 12 years amounts to adverse possession.
10. Whether or not the defendants rights over 1.70 acres occupied by the plaintiff have been extinguished in law.
11. Whether or not the plaintiff is entitled to the orders sought.

The plaintiff, **Joseph Njuguna Njoroge**, was on 18th July 2002 by consent substituted in place of **Samuel Njogu Njoroge** who had substituted their mother, **Rebecca Muthoni Njoroge**, the original plaintiff who are both now deceased. After several abortive hearing dates the hearing of the originating summons finally commenced before the **Hon. Lady Justice Murugi Mugo** on 1st February 2005. Two witnesses including the plaintiff testified before **Mugo, J** whereupon the plaintiff closed his case. The Defence hearing proceeded before me on 18th November 2014 when the 1st Defendant testified. **Mr. Kamiro Advocate** for the Defendants had earlier on 22nd September 2014 notified the court that the 2nd Defendant had died way back in 2007 and had not been substituted and thus he reckoned the suit against the 2nd Defendant had abated.

Evidence by the Plaintiff

Pw1 Joseph Njuguna Njoroge testified that the Defendants are his cousins they being sons of **Waweru Kago** (deceased) who was a brother of the plaintiff's father **Njoroge Kaagu** (deceased). The plaintiff testified that his claim is to the portion of 1.7 acres out of parcel number **Loc. 4/Muruka/6** which he stated his family has occupied and has cultivated since 1958. Pw1 stated that his late father lived on the portion of land and was buried thereon when he passed away. The plaintiff also testified when his brother **Samuel Njogu** died he was also buried on the portion which his family occupied. The plaintiff testified he has developed the land and has built houses thereon where he and his family reside. The plaintiff testified the Defendants are registered as owners of the entire parcel of land and he seeks a partition of the land into two halves so that one half is transferred to him. It was the evidence of the plaintiff that he has been in possession of the land for 46 years and that there is a boundary that delineates the portion that he occupies. The plaintiff testified that they were altogether six (6) brothers though three (3) of them are deceased and are all buried on the suit property.

Pw1 under cross-examination stated that his mother was claiming the entitlement of her late husband who had died in 1982. The witness further claimed his late father had purchased the suit property together

with Waweru Kaagu who was his uncle and a brother of his father. PW1 further stated his mother had been enjoined to and participated in Thika.

The witness further admitted in cross-examination that his mother's claim of entitlement to a portion 1.7 acres of the suit property was dismissed by the Thika succession court after full hearing on the basis that the same lacked any merit.

The plaintiff maintained in cross examination that they had lived on the portion for a long time which entitled them to a share of the land. He denied the suggestion put to him that his late father was merely a "muhoi" o a tenant at will until he got his own land. The plaintiff further refuted the suggestion that the land was solely bought by **Waweru Kago** insisting that his late father also participated in the purchase justifying his occupation of a portion of the same. The plaintiff stated that he had apart from building houses on the portion he occupies, he had also planted 50 coffee plants.

Pw2 Ndungu Githinji testified that he knew the parties to the suit and affirmed that their fathers were brothers and lived on the suit property **Loc.4/Muruka/6**. He stated that the 2 brothers had purchased the land together and divided the same into two portions. The land was registered in the name **Waweru Kaagu** during demarcation as he was the one who was residing there while **Njoroge Kaagu** was working away in the settlers farms. The witness stated **Njoroge Kaagu** died in 1982 while **Waweru Kaagu** died in 1990. He further stated he knew the children of **Njoroge Kaagu** and they resided on the portion his father occupied until his death. **Samuel Njogu** a brother to the plaintiff had constructed a house on the portion and when he died he was buried there. He affirmed the plaintiff had built on the land and the Defendants equally had built and reside on the land with their families.

In cross-examination the witness affirmed that both the plaintiff's and defendants fathers had come from **Mugoiri** and did not have any ancestral land in **Muruka** and that the suit property was purchased. The witness stated the land had been bought from **Mwangi Mukuria** (2.7 acres) and **Bedan Mungai** (1.0acres). In further cross-examination the witnesses stated he was neither a party nor a witness in the sale transactions. The witness further stated in cross-examination that although **Njoroge Kaagu** was older than **Waweru Kaagu** he was not registered as the owner since he was not on the land at the time demarcation took place. He further stated he was aware that the two brothers **Njoroge** and **Waweru** initially were accommodated as tenants at will (**ahoi**) by **Machira Kaguanga** before they bought the suit land. The witness confirmed that up until the death of **Waweru Kaagu** who was registered owner the two families had no dispute over the land. The witness stated further that when **Rebecca Muthoni**, mother of the plaintiff died she was buried in her son's land in the Rift Valley and not at Muruka.

Evidence by the Defendant.

The 1st Defendant, **James Mungai Waweru**, testified as DW1 and called no other witness. He testified that he and his deceased brother, **Julius Kaagu Mukinya** the 2nd defendant are the registered owners of land parcel **Loc.4/Muruka/6** in equal shares having inherited the same from their deceased father. He stated that after their father passed away in 1990 they filed a **Succession Cause NO. 155 of 1991** at the Chief Magistrate's Court Thika where **Rebecca Muthoni** the original plaintiff herein objected to their inheritance of the suit property claiming she was entitled to half share of the suit property. After full hearing of her objection in the succession cause the magistrate ruled that the said **Rebecca Muthoni** (deceased) was not entitled to any share of the suit property and dismissed her claim. The proceedings and ruling in Thika **SPM succession Cause NO. 155 of 1991 (in the matter of the Estate of Waweru Kaagu(deceased))** were produced as D.EX1.

DW1 stated that after the determination of the Succession Cause **Rebecca Muthoni** (deceased) transferred from Muruka and went to live in Nyandarua with her son one **Josephat Waweru**. When she died she was buried in her said son's land at **Miharati Nyandarua**.

Dw1 further testified the late **Rebecca Muthoni** had 3 other sons apart from the plaintiff who had land elsewhere and unlike the plaintiff do not make any demand on the defendant's land. The witness stated that the plaintiff does not reside on the suit property but resides at **Kangagu** in **Kandara Investments**

where he has two parcels of land. The witness further testified that his late father had solely purchased the suit property and had allowed his brother to occupy a portion as he had no land elsewhere at the time his father purchased the property and that as at the time of his death **Rebecca, Muthoni** was utilizing a portion of about 0.3 of an acre and after the determination of the Thika succession case she vacated and went to reside with her son in Nyandarua.

The witness further testified that at the moment it was only his family and the family of the 2nd Defendant who were residing on the suit property. Dw1 stated that by the time his father passed on he had no dispute with either his late brother, **Njoroge** and or his wife, **Rebecca Muthoni**.

In cross-examination by the plaintiff DW1 maintained that **Rebecca Muthoni** had only been allowed to cultivate a portion of the suit land by his father since her husband did not have land of his own by the time he died. The witness further stated that the plaintiff had not built on the suit land and that while the suit at Thika (succession Cause) was going on it was only **Rebecca Muthoni**, the plaintiff's mother who was residing on the suit land and that the plaintiff was not residing with her. Dw1 maintained that it is only the widow of his deceased brother who had built on the suit property. The witness further stated after **Rebecca Muthoni's** objection and claim in the Thika Succession Cause was rejected she vacated the parcel of land and went to live with her son in Nyandarua and that at the time the present suit was filed in 1995 she was not residing in the parcel of land.

The parties filed written submissions as directed by the court. The plaintiff filed his submissions on 22nd January 2015 while the Defendants filed their submissions dated 18th December 2014 on 20th January 2015. The submissions reiterated the facts as adduced in evidence and the issue is whether the plaintiff's claim for adverse possession given the facts and circumstances is sustainable. The Defendant through his submissions further raises the issue whether the plaintiff's claim can be sustained against the 2nd Defendant who died during the pendency of the suit and was not substituted as required under the law. The Defendants also raise the issue whether or not the plaintiff's claim for adverse possession is sustainable following the death of **Rebecca Muthoni** who filed the case claiming adverse possession rights can only accrue to the adverse possessor and not to the beneficiaries. The plaintiff submits he is by reason of being in adverse possession for over 12 years entitled to have the ½ (half) portion of the suit property decreed to him.

Analysis and determination matters not in dispute

The 1st, 2nd and 3rd issues as framed by the parties cannot really be disputed issues. There is no dispute that the land the subject of the suit is registered in the names of **James Mungai Waweru** and **Julius Kaagu Mukinya** as per the certificate of official search dated 3rd April 1995 and the abstracts of title produced in evidence. It is not disputed that the Defendants are the sons of **Waweru Kaagu** who was the brother of the plaintiff's father **Njoroge Kaagu**. The plaintiff in his evidence confirmed the Defendants were his cousins being the son's of his father's brother. There is further no dispute that there was a succession suit namely Thika **SPMCC Succession Cause NO. 155 of 1991** where the Defendants sought to be declared the beneficiaries of the suit property following the death of their father who was the registered owner. There is also no dispute that **Rebecca Muthoni Njoroge**, the mother of the plaintiff filed an objection in the succession cause where she sought to be declared as a beneficiary to one half (1/2) of the suit property on the basis that the land was owned by her late husband and the Defendants deceased father jointly. The objection was dismissed by the court. The court at Thika after evaluating the evidence tendered by the parties including **Rebecca Muthoni** held in its ruling as follows:-

“from this account from both sides it comes out clearly that the 2 brothers Waweru and Njoroge did not inherit any land from their father Kaagu as there was no ancestral land. From both accounts my view is that the more likely version is that of the petitioner Julius Kaagu. His account supported by evidence of Jesse Kamau strikes me as the more truthful one. The objector did not convince the court on a balance of probability that her husband bought land jointly with Waweru. Her witnesses introduced evidence which she did not even mention and this court cannot believe it.

In conclusion therefore I hold that there is no evidence that the objector has a share or is entitled to any share from deceased's estate. There is no proof at all. This being the case objector is not entitled to a grant of letters of administration intestate in respect of deceased's estate nor is she a beneficiary".

Rebecca Muthoni the original plaintiff in this suit gave evidence in the succession suit at Thika and her evidence before the court was simply that she was claiming half portion of the suit land because her husband was a brother to **Waweru Kagu** and they were living and cultivating the land together although she acknowledged she was utilizing a much smaller portion than the Defendants were. Although the said **Rebecca Muthoni** stated her husband and **Waweru Kagu** purchased the land jointly no evidence of any contribution by the plaintiff's husband towards the purchase was tendered. **Waweru Kaagu** was younger than **Njoroge Kaagu** and customarily the elder brother would have taken precedence in being registered. The plaintiff stated that **Njoroge Kaagu** was not registered because at the time of registration in 1965 he was working away in the plantations. There is however no explanation why from 1965 to 1982 when **Njoroge Kaagu** passed on he never requested for a partition of the land if it was true they had purchased the land together. It is also noteworthy that the plaintiff did not raise any claim to any portion of the land before the death of **Waweru Kaagu**, who was the registered proprietor, in 1990. The evidence that **Rebecca Muthoni**, the plaintiff's mother left the suit premises to go and live with her son in Nyandarua after she lost her bid to be declared a beneficiary of the suit land in the Thika Succession Cause has not been rebutted and/or denied. I in the premises make a finding that by the time she instituted the present suit she had yielded possession of the suit property to the defendants and in my view this was an acknowledgement of the Defendants right and title to the land. There is in the premises a possibility that the present suit was instigated not by her but her children.

Whether the plaintiff was in adverse possession

In the Thika Succession Cause the plaintiff's claim was not one of adverse possession but rather that she was entitled as a beneficiary to inherit one half portion of the suit property on account of her husband having purchased the suit property together with the defendants father who was his brother. The Thika court did not find any credible evidence to support the assertion by the plaintiff and in my view properly held there was no evidence of joint purchase and thus the plaintiff's family were not entitled to a share of the suit property as beneficiaries. The plaintiff did not appeal against the decision of the Thika Succession court and hence the court findings in that regard were final and as a consequence the defendants were registered as the proprietors of the suit property as the beneficiaries of the estate of the late **Waweru Magu**.

The plaintiff's and the defendants fathers, it is admitted originated from **Mugoiri** and that they did not have any ancestral land. The 1st defendant testified that it was his deceased father who purchased the suit land and that he gave **Njoroge Kaagu** a portion of half ½ acre to live on and that this was the portion where he had built and the plaintiff was residing. The 1st Defendant testified that in 1977 the late **Njoroge Magu** had lodged a claim before the elders to be given a share of the land but the elders determined he was not entitled to a share of the land but could continue living on the land. The 1st Defendant at the Thika called one **Jesse Kamau Kinuthia** one of the elders who had participated in the deliberations relating to the dispute between his father and the plaintiff's father in 1977. This witness confirmed that the elders found the plaintiff's father had not participated in the purchase of the land and that the suit land belonged to **Waweru Kagu** who had purchased the same. The trial Magistrate accepted the evidence of **Jesse Kamau Kinuthia** and held that the land was solely owned by **Waweru Kagu** (deceased) and that **Njoroge Kaagu** (deceased) was not entitled to a share of it.

While the Thika Succession Court would have had no jurisdiction to determine whether or not the plaintiff was in adverse possession of the portion she occupied with her family, the court nonetheless had jurisdiction to determine issues of succession as it did. In determining whether or not the plaintiff was entitled to inherit the parcel of land the court was entitled to determine how the plaintiff came into possession and that included determining whether the plaintiff's deceased husband was a co-purchaser of the land with **Waweru Kaagu** (deceased) as was claimed. The court came to the finding that the plaintiff's deceased husband was not a co-purchaser of the land and was therefore not entitled to a share

of the same. This finding of the Thika Succession court dispelled the notion that **Waweru Kagu** (deceased) was holding the subject property as trustee for himself and the said **Njoroge Kago**. To the extent that no appeal was preferred against the finding of the Thika Succession Court, the plaintiff is stopped from disputing those findings. Thus on the issue whether or not Njoroge Kagu had participated in the purchase of the suit property with his brother the issue was determined by the Thika Court and the same is res judicata.

Was the possession by plaintiff adverse?

It is evident that when the plaintiff's bid to be declared a beneficiary and therefore entitled to a share of the suit land failed she changed gears and commenced this suit claiming her deceased husband and herself and family were entitled to a share of the suit land by virtue of having been in adverse possession for a period in excess of 12 years. It is at this point necessary to determine what constitutes adverse possession. **Black's Law Dictionary, 9th Edition** defines adverse possession thus:-

“the enjoyment of real property with a claim of right when that enjoyment is opposed to another person's claim and in continuous hostile, open and notorious”.

Courts have set out in various judicial decisions and pronouncements what constitutes adverse possession. The case of **Wambugu –vs- Njuguna (1983) KLR 172** laid the principles necessary to be considered in determining whether or not adverse possession has been established by a party in a litigation. The court of Appeal in the case held that adverse possession contemplates two concepts namely dispossession and discontinuance of possession. The court held that the proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years. **Hon. Lady Justice Nyamweya** in the case of **Ramco Investments Ltd –vs- Uni-Drive in Theatre Ltd (2014 eKLR)** considered what constitutes adverse possession and in the case stated thus:-

“certain qualities are therefore required for possession by a claimant to amount to adverse possession as described in the “Elements of Land Law, 5th Edition” by Kevin Gary and Susan Francis Gary at paragraphs 9.1.44 to 9.1.52. These are that there must be a complete and exclusive physical control over the land in dispute, the possession should be open, meaning not secret, it must be peaceful and not by force and lastly it must be adverse and not by consent of the owner”.

The court in the case of **Mbira –vs- Gachui (2002) IEALR 137** also in considering what constitutes adverse possession held thus:-

“-----a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non permissive or non consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption”.

From the above cited authorities it is clear that in cases of adverse possession a claimant is required to prove exclusive possession and control of the land claimed, and to have dispossessed the true or legal owner of the said land. Where possession is pursuant to permission granted and or with the consent of the owner, possession cannot be adverse however long one occupies or possesses the land.

The circumstances under which the plaintiff's deceased father entered the parcel of land are disputed. The plaintiff avers that his late father purchased the suit land with the 1st Defendant's father but unfortunately no evidence of any agreement to purchase the land or any contribution to the purchase was tendered either before this court or before the Thika Succession Court. As observed earlier, **Rebecca Muthoni Njoroge**, the original plaintiff testified before the Thika Court and adduced no evidence in support of the purchase. The court in Thika did not find any evidence of joint purchase and dismissed the claim by **Rebecca Muthoni**. Before this court equally no tangible evidence of any joint purchase was

tendered and I equally hold there is no basis to find there was any joint purchase of the suit property.

The Defendants evidence both in the Thika Succession Court and before this court is that their deceased father after having purchased the suit property gave his deceased brother a place of abode to live with his family until they found alternative land. It is the defendants evidence therefore that the entry and possession of a portion of the land by the plaintiff's father was with the permission of the Defendants late father and could not in the premises be adverse.

It is admitted that both the plaintiff's and defendants father did not have ancestral land at **Mugoiri** where they came from and were infact accommodated as "**ahoi**" when they came to **Muruka**. I find it natural that when the Defendant's father acquired a parcel of land of his own he would invite his brother to live there as he sought alternative land. Considering the Defendant's father acquired the land and it was not ancestral land where it was usual and/or normal for one of the children to be registered to hold as trustee for the other children, it would have been expected if indeed the plaintiff's father was a co-purchaser as was alleged that he would have sought a partition of the land so that his portion could be registered in his name. The plaintiff's father attempt to lay claim to a portion of the defendant's father land in 1977 before the elders was unsuccessful with the elders holding that he was not entitled to a share of the land but he nevertheless should be allowed to stay on the land. In my view the elders then as was the finding of the Thika succession court, found the plaintiff's father was residing on the parcel of land as a "**muhoi**" or "**tenant at will**" and could not be entitled to a share of the land. I make a similar finding that the plaintiff's father was in occupation as a "**Muhoi**" or a "**tenant at will**" who could not accrue rights of ownership adverse to the real owner.

In the premises and having regard to all the evidence and the circumstances it is my finding that the plaintiff's father was in possession of the portion of the parcel of land as a tenant at will having entered into possession with the permission or consent of the owner and could in the circumstances not accrue rights as an adverse possessor.

The plaintiff and his deceased mother were on the parcel of land courtesy of the permission and/or consent given to **Njoroge Kaagu** and could not acquire rights of adverse possession which their principal could not acquire. I therefore hold and find that the plaintiff has not established and proved adverse possession of the portion of the suit property.

Having determined that adverse possession has not been proved that disposes of this matter and I need not consider the other issues raised by the parties which I consider to be dependant on the finding whether or not the possession of the parcel of land by the plaintiff was adverse.

The net result is that I find the plaintiff has not proved his case on a balance of probabilities and I hereby dismiss the plaintiff's suit. As the matter involved virtually a family that lived together for many years I will not burden any party with costs and I accordingly direct that each party will meet their own costs of the suit.

Orders accordingly.

Ruling dated, signed and delivered this **29th** day of **May** 2015.

J. M. MUTUNGI

JUDGE

In the presence of:

JOSEPH NJUGUNA..... Plaintiff in person

N/A For the Defendants