



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC CASE NO.28 OF 2020 (O.S)

IN THE MATTER OF THE LAND PARCEL NUMBER LOC.5/MARIAINI/1304

AND

IN THE MATTER OF SECTIONS 7, 37 AND 38 OF THE LIMITATION OF ACTIONS ACT AND ORDER 37 RULE 7 OF THE CIVIL PROCEDURE RULES

FRANCIS KAMAU GICHANE.....PLAINTIFF

VERSUS

JEMIMA MUTHONI MUIRURI.....DEFENDANT

JUDGMENT

By an Originating Summons dated **29th August 2019**, the Plaintiff herein filed this suit as against the Defendant for the determination of the following questions;

1. Whether the Defendant is the registered proprietor of land Parcel No. LOC.5/MARIAINI/1304.
2. Whether the Plaintiff has been in occupation of the said parcel of land adversely for a period of 12 years.
3. Whether the Defendant's title to the said parcel of land has been extinguished by virtue of the Plaintiff' Adverse Possession.
4. And if so whether the Plaintiff has acquired title to the said parcel of land and whether he should be registered as the proprietor thereto in place of the Defendant
5. What orders should be made as regards costs.

In his Supporting Affidavit, the Plaintiff **Francis Kamau Gichane** averred that **L.R 1304**, was registered in the name of the Defendant by way of transmission on **29th October 2018**. That he took occupation of the suit property in **1982**, during the lifetime of the Defendant's father which possession was open and with the Knowledge of the said **Muiruri Mithinga**. That he occupied the suit property adversely with his family to date without any interruption from anybody. Further, that he developed the said land by planting coffee, bananas and vegetables. That the occupation of the said parcel of land has been for a period in excess of **12 years** and he has acquired title to it.

The Originating Summons is opposed by the Defendant **Jemima Muthoni Muiruri** who swore a Replying affidavit on **30th September 2021**, and averred that **L.R 1304**, did not exist before **5th September 1988**, when it was registered in her father's name the late **Muiruri Mithinga** as a subdivision of **L.R 427**. That her father sold a portion of **L.R 427**, to the Plaintiff and the same was registered as **L.R 1305** and is registered in his name which he is in occupation of together with his family. That in **1993**, her father was in occupation of the entire **L.R 1304**, and he fell sick and since he was not able to till his land, he leased part of the portion that remained to different tenants. That the Plaintiff who was in occupation of **L.R 1305**, leased the said portion and continued to till it together with the portion he had bought, but he continued to pay seasonal rent. That her father died in **1993**, and she asked the Plaintiff to vacate the suit land and that is when he said that he had bought the land for **Kshs.12,000/=**. Further that despite repeatedly asking him to vacate, the plaintiff failed to do so. That the Plaintiff is using a very small portion of **L.R 1304**. that is registered in her name and that he has not been in occupation of the entire piece of land. Further, despite the Plaintiff having knowledge that she had filed a **Succession Cause**, he did not object to her inheriting the land.

The matter proceeded by way of viva voce evidence wherein the Plaintiff gave evidence for himself and called no witness and the Defendant gave evidence for himself and called two witnesses and closed her case.

PLAINTIFF'S CASE

PW1 Francis Kamau Gichane, testified that he occupies **L.R LOC 5/ Mariarini/1304**, since **1998**. That the owner of the said land was **Muiruri Mithanga** the father to **Jemimah Muthoni**. That he lives on the suit land and entered the this land after he was given the said land by **Muiruri Mithinga**, who gave him the land as he used to take care of him. Further that they went before the Chief and other elders who decided that he should move out of the land. He adopted his witness statement dated **8th October 2020**, as his evidence in Court. He further produced an extract of the title as Exhibit 1. That apart from the **1993** case before the elders, he has never been requested to leave the suit land. That he has acquired the suit property by virtue of Adverse Possession.

On cross examination, PW1 testified that he lives on the suit land together with his family and that **Muiruri** sold the land to him for **Kshs. 70,000/=**. That they had a sale agreement and they also obtained a Consent from the **Land Control Board** at Kandara and the transfer Form was signed in his name. That the original land was **LOC 5/ Mariarini /427**, and a portion that remained was **L.R 1304**. That he is not farming the whole portion of land as the other portion has been leased out by **Jemimah**. He denied leasing the land for **Kshs. 60/=** per season. That he took possession of the suit land in **1988** and the land was registered in the name of **Jemimah** in **2018**, as a beneficiary. That when **Muiruri** fell sick, his daughter took him away for treatment and that he paid him for the land to use for the medical bills. It was his further testimony that **Muiruri Mithinga** gave him the parcel of land and that he is claiming **0.5** acres from LR No. **1304**. Further that he occupied the land in **1988**, and it was the same time that **Muiruri** sold to him **L.R 1305**, and he got the title. That he did not have a Court Order to live on the suit property, but that he had been given the same by **Muiruri**. That **Ndunge** uses the portion that he leased but not the one he uses. Further that he did not object to the **Succession Cause** as he did not know about it. That he filed a caution in **1993** and indicated a purchaser's interest.

DEFENCE CASE

DW1 Jemimah Muthoni Muiruri, the Defendant herein adopted her witness statement as part of her evidence. She further adopted her Replying Affidavit dated **30th September 2021**, as part of her evidence. A further Affidavit dated **15th November 2021**, was adopted as her evidence in chief. She produced her list of documents as Exhibits 1 to 4. That she acquired the suit property by transmission from her Father. Further that **Kamau** bought one care from her father and he was given the title deed and there was a balance of 1.2 acres. That when her father died, she asked **Kamau** to move out of her father's land and she reported the matter to the Chief and it was ruled that the land was hers. Further that **Kamau** entered **L.R 1304** through leasing and stayed for the seasons without paying. That she acquired the title in **2015**. That she got married in **1980** and her home is 2 kilometers from her maternal home. That they had a case before the elders in **1993**. That she let the Plaintiff stay on the suit land, but it was not her wish since **1993** to **2018** without her consent. That **Kamau** claimed that he bought the land and he refused to vacate without a Court Order and she had received a demand letter to stop disturbing him. That she used to ask **Kamau** the Plaintiff to move out and it is only that she had not obtained the grant.

DW2 Ndunge Kamande Njoroge adopted her witness statement as part of her evidence. She testified that Land Parcel No. **L.R 1304**, is a portion that was leased out to her. That she is in the upper side and **Kamau** had leased the lower side. That he refused to move out even after being told to move out. Further that **Kamau** used to pay **Kshs.1600/=** per season and he was never in occupation of the whole of the suit property. That **Kamau** refused to vacate the land as he alleged that he was given the land by **Muiruri**.

DW3 Samuel Gichira Kamau testified that **Kamau** had leased **Muiruri Mithinga's** land. He adopted his witness statement as part of his evidence. That **Kamau** bought **L.R 1305** from **Muiruri Mithinga** and he leased out **L.R 1304**, and he was to pay the leased portion to **Muthoni**. That he was to pay **Kshs. 1600/=** per season. **Muiruri** died in **1993**, and that **Kamau** does not pay any rent for the suit property.

Thereafter, the parties filed written submissions, which the Court has now carefully read and considered. The Court has also considered the Pleadings by the parties, the Affidavits, the relevant provisions of law and the written submissions and finds that the issue for determination is **Whether the Plaintiff has proved a claim of adverse possession and therefore entitled to the orders sought.**

The Plaintiff has sought for the determination of various questions all culminating to the issue of whether he has acquired Land Parcel **LOC.5/MARIAINI/1304**. As to whether the Defendant is the registered owner of the suit property, the same is not in doubt as evidenced in the title deed dated **29th October 2018**. It is the Plaintiff's contention that he has acquired the suit property by way of Adverse Possession. The guiding provision of law relating to Adverse Possession is **Section 7 of the Limitation of Actions Act which provides;-**

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

Further the Court is guided by **Section 38 (1) and (2) Limitation of the Actions Act that provides as follows:**

(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited 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 or lease in place of the person then registered as proprietor of the land.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

For a party to be declared to have acquired property by virtue of adverse possession, other principles must be met as cited by the Court in the case of **Gerald Muriithi ...Vs...Wamugunda Muriuki & Another (2010) eKLR** while referring to the case of **Wambugu ...Vs...**

Njuguna (1983) KLR page 172, where the Court of Appeal held as follows;

“1. In order to acquire by statute of limitations title to land which has a known owner the owner must have lost his right to the land either by being dispossessed of it or by having continued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed of the suit land for a continuous period of twelve years as to entitle him, the respondent to title to the land by adverse possession.

2. The limitation of Actions Act, on adverse possession contemplates two concepts: dispossession and discontinuance of possession. 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 the claimant has proved that he has been in possession for the requisite number of years. (Emphasis)”

For the Plaintiff herein to succeed in his claim for **Adverse Possession**, he must prove his **possession, dispossession and discontinuance of possession** by the Defendant herein for a continuous period of 12 years and that the same was done without interruption. See the case of Samuel Nyakenogo vs Samuel Orucho Onyaru Civil Appeal No. 24 of 2004 (2010) eKLR, where the Court held that:-

“The Limitation of Actions Act on Adverse Possession, contemplates two concepts; dispossession and discontinuance. The proper way of assessing proof of adverse possession will then be whether or not the title owner has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he had been in possession for the requisite period.”

Under section 38(1) and (2) of the **Limitation of Actions Act**, a person can acquire title to someone else land by virtue of **adverse possession** after continuously occupying the said land in a way that is inconsistency with the owner’s rights. Such entry or possession must be **non-permissive, open and notorious, exclusive adverse** and with the **lapse of the statutory period of 12 years**. See the case of **Kimani Ruchine vs Swift Ruthford & co. Ltd (1980)**, where the Court held that:-

“The plaintiff’s have to prove that they have used this land which they claim as of right; nec vi, nec clam, nec precario.....”

The said possession must be continuous and it must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent considerations. This was the same position held in the case of Celine Muthoni vs Safiya Binti Swaleh & others ELC No. 248 of 2016, where the Court held also that:-

“It is also a well settled principle that a party claiming Adverse Possession ought to prove that this possession was nec vi, nec clam, nec precario; that’s peaceful, open and continuous. The possession should not have been through force, not a secrecy and without the authority on permission of the owner”.

The above are the principles that needed to be satisfied before the Court can declare that the Plaintiff has acquired the property by virtue of **adverse possession**. This Court will then consider the available evidence, juxtapose it with the above principles and then determine whether the Plaintiff herein has proved his case on the required standard.

The Plaintiff has contended that he has acquired the title to the suit property by way of Adverse Possession having occupied the suit property for a period of over 12 years. Initially, in his Affidavit, the Plaintiff indicated that he entered the suit property in **1982**, but has since submitted that he took possession of the suit property in **1988**. It is not in doubt that the Defendant acquired proprietorship of the suit property by way of transmission from her father. Though ownership has changed, it however does not mean that time stopped running at any time.

The Defendant has also challenged the **continuous and uninterrupted possession** of the suit property by the Plaintiff and has averred that the Plaintiff entered the suit property as a leasee and that he was to lease part of the suit property and pay rent per **season**, but he refused to pay and has remained on the suit property despite her calls to have him vacate the said land. From the evidence adduced by the witnesses, and from the Plaintiff’s evidence it is not in doubt that the Plaintiff is not in possession of the whole of the suit property which he has claimed **Adverse Possession**, but only a portion of the same, as he has in his testimony claimed **0.5acre**.

One of the principle that the Plaintiff needed to prove is that he entered into the suit property **without permission** of the registered owner. The Plaintiff testified that he entered the suit property with the Defendant’s father permission and that he has never been asked to vacate the suit property. The Plaintiff has claimed **adverse possession** having been in continuous possession since **1993**. The Court has seen the elders’ proceedings that confirm that the Defendant indeed had asked the Plaintiff to vacate the suit property. The Court has further considered the witnesses’ evidence and the documents adduced in evidence and it is clear that the Plaintiff initially entered the suit property with permission. However, it is not clear whether or not he was leasing the same. Further it is clear to the Court that his possession post **1993** was **not** without interruption. The same is buttressed by the letter dated **11th July 2005**, to the Defendant from the Plaintiff’s Advocates asking the Defendant to abstain from interfering with the Plaintiff’s peaceful possession of the land. It is thus not in doubt that his possession was not peaceful nor was it uninterrupted. It is further not in doubt that the Plaintiff was occupying the suit property **with force**, as he **refused** to vacate the suit property despite being asked to vacate by the Defendant. Being in occupation in itself is **not dispossession**, and the Plaintiff needed to prove that he has lived thereon **continuously** without any **interruption** and **without force or secrecy which the Court holds he has failed to do**.

Further the Plaintiff has sought to be registered as the owner of L.R No. LOC.5/MARIAINI/1304. From the evidence adduced, it is not in doubt that the Plaintiff was not in possession of the whole suit property as he claim, but only part of the same as **DW2** testified that she

has leased part of the **suit property** and the Plaintiff acknowledged that he is claiming **0.5acre** .

Parties are bound by their pleadings, and the Plaintiff has claimed the whole of the suit property while he has not proved that he has been in possession of the whole of the suit property herein. It is not clear that the Plaintiff herein is claiming a **definite** and **clear** portion of land from the suit property that is owned by the Defendant.

Having carefully considered the available evidence, the Court finds and holds that the Plaintiff herein did not avail **sufficient** evidence to prove on a balance of probabilities that he indeed **dispossessed** the Defendant of the suit property. For the above reasons, the Court finds and holds that the Plaintiff has failed to prove his claim as contained in the Originating Summons dated **29th August 2019, on the required standards**, and consequently the said Originating Summons is **dismissed entirely** with costs to the Defendant herein.

It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 28TH DAY OF APRIL, 2022

L. N. GACHERU

JUDGE

Judgment delivered virtually in the presence of:-

Kuiyaki - Court Assistant

Mr. Butany for Plaintiff

M/s Ngugi for Defendant