



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Miscellaneous Civil Suit 245 of 2011**

**IN THE MATTER OF THE REGISTERED LAND ACT (CAP 300) LAWS OF KENYA**

**AND**

**IN THE MATTER OF KIGANJO/KIAMWANGI/T.128**

**AND**

**IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA**

**JENNIFFER GIKUI KIONI.....APPLICANT**

**VERSUS**

**SOLOMON NDOTONO.....1<sup>ST</sup> RESPONDENT**

**DAVID WAIGANJO NDOTONO.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

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1. This is an Originating Summons brought under Sections 37 and 38 of the Limitation of Actions Act Cap 22, Laws of Kenya and section 133 of the Registered Land Act (Cap 300) and Order 37 Rule 7 of the Civil Procedure Rules. The application is supported by the affidavit of the applicant and seeks adverse possession on the grounds that:-

1. The applicant has for a period of Twelve years been in adverse possession of all that parcel of land comprised in Title Number Kiganjo/Kiamwangi/T.128 in Gatundu, Thika comprising by measument Naught Decimal Naught Nine six (0.096) Ha and consequently the 1<sup>st</sup> Respondent's title thereto in respect of the said parcel of land has been extinguished by virtue of section 17 of the Limitation of Actions Act Cap 22 Laws of Kenya.

2. That the applicant be registered as the proprietor of the said parcel of land namely LR No. Kiganjo/Kiamwangi/T.128 in place of the 1<sup>st</sup> Respondent in whose favour the land is currently registered.

3. That the 1<sup>st</sup> Respondent do transfer at his own costs and expense the land comprised in LR No. Kiganjo/Kiamwangi/T.128 to the applicant forthwith and in default of the 1<sup>st</sup> Respondent signing, executing or endorsing the necessary documents or the transfer, the Deputy Registrar of this Honourable Court do sign execute and or sign and or execute such papers /documents to effect the transfer.

4. That the caution lodged by the 2<sup>nd</sup> Respondent be removed
5. That the inhibition order to issue against the Respondents prohibiting any transfer, transmission, alienations or any disposition of any interest or dealing in any other manner in the land comprised LR No. Kiganjo/Kiamwangi/T.128
6. That the Respondents pay costs of this suit.

2. The supporting Affidavit of the applicant Jennifer Gikuii Kioni states that she has been in occupation of the Land parcel No LR No. Kiganjo/Kiamwangi/T.128 measuring approximately 0.096 Ha, now for the last 41 years, that is to say since sometimes in 1970. She deposes that she does not know the registered owner of the said property who is the 1<sup>st</sup> Respondent and only came to know about him by name when she conducted a search at the Thika Land Registry. She further states that she started farming and has constructed a small structure to accommodate her farm workers and has occupied the same property uninterrupted for 41 years without any claim from the 1<sup>st</sup> and 2<sup>nd</sup> Respondents who had lodged a caution over the same in 1977. She states that it was when she wanted to write a will to distribute her property among her dependants that she realised that she did not have any documents over the subject land and that is when she started to find out the true identification of the property. The search results identified the 1<sup>st</sup> Respondent as the registered owner of the property who is unknown to her. She says she cannot remember how she got onto the land since she has been in occupation on the land since the demise of her husband 30 years ago. She therefore believes that she has a valid claim of adverse possession against the 1<sup>st</sup> Respondent and prays that the caution lodged be removed since the 2<sup>nd</sup> Respondent is unknown to her.

3. Service of pleadings was done by way of an advertisement in the Daily Nation. No appearance was made by the Defendants. The hearing was by way of written submissions and the case was undefended.

4. The applicant filed her submissions in which it was submitted that the applicant was 90 years old and had lived on the property for over 30 years uninterrupted and now sought declaratory orders that the registered owner's rights have been extinguished by the principle of adverse possession. Reliance was placed on section 38 of the Limitation of Actions Act Cap 22 Laws of Kenya which states,

**“(1) Where a person 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 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.”**

5. It was submitted that at the time the Plaintiff occupied the land the same had not been defined and registration in the name of the 1<sup>st</sup> Respondent was obtained while she was still in occupation and the registered proprietor did not seek to identify himself or take possession. The applicant relied on the case of **Muthuita – vs- Wanoe [1982] KLR** where the Court of Appeal held that,

***“It is not a mandatory requirement in adverse possession that the applicant be in possession of definable portion of land. Section 101 of the Registered Land Act impliedly accepts the notion of ownership of undefined portion of land “and that “a legal owner being registered in respect of the whole of the land had throughout the twelve year period the right to resume possession and to bring an action for that purpose but if the respondents prove that they have held possession for the twelve years or more and that they have been entitled to a beneficial interest in it the period of limitation would run in their favour”***

She further relied on the case of **Wambugu –vs- Njuguna [1983]KLR** where the court of appeal held,

***“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 disposed or has discontinued his possession for the statutory period and not whether the claimant has proved that he has been in possession for the requisite number of years.”*

**6. The first issue for this court's determination is whether the Applicant has been able to prove on a balance of probabilities that she has dispossessed or discontinued the Respondent's possession of the suit property for 12 years so that she can be entitled to adverse possession.**

In the instant suit the applicant by her evidence has shown that she has been in occupation and possession of the suit land openly and continuously and without interruption for a period upwards of twelve (12) years immediately preceding the institution of this suit. There was no contrary evidence availed.

**In Maweu v. Liu Ranching & Farming Cooperative Society Ltd [1985] KLR 430, 434 the Court of Appeal observed as follows:**

*“Adverse possession is a fact to be observed upon the land. It is not to be seen in title, even under Cap.300. Any man who buys land without knowing who is in possession of it risks his title, just as he does, if he fails to inspect his land for twelve years after he has acquired it. If such title can be lost at all, its absolute and indefeasible nature obviously refers to other matters than adverse possession.”*

Further in the case of **PARKLANDS PROPERTIES LTD –vs- PATEL (1981) KLR 52**, *Madan J (as he then was in 1970) held:-*

*“The issue whether a party's possession of a piece of land is adverse is a matter for evidence, and a decision thereon depends upon whether the party alleging adverse possession successfully establishes the particular of adverse possession pleaded”.*

The applicant states to have been in uninterrupted possession for over 40 years and has met the threshold for adverse possession to apply. She has proved her case for adverse possession. The registered proprietor has title but his rights over the suit land have been extinguished pursuant to the doctrine of adverse possession.

**7. The 2<sup>nd</sup> Issue this court has to consider is the effect of the entry on the register of the suit premises with regard to the caution registered on 22<sup>nd</sup> December 1977 by the 2<sup>nd</sup> Respondent.**

The registered proprietor retains the right to assert his rights over the land for a period of twelve years and he/she cannot bring action for recovery after the expiry of that time. This assertion of right occurs in two instances, one by taking legal proceedings or two, by making effective entry into the land – See **GITHU -VS- NDEETE CA NO. 24/1979 (1984) KLR at Page 776.**

It follows therefore that the placing of the caution against the title in 1977 did not affect the running of time and the same is by no means an interruption or an assertion of right.

8. Considering the totality of the availed evidence in this case it is clear that the Applicant has proved her case on a balance of probability and brought herself within the limits of the doctrine of adverse possession. In the result the application by way of Originating Summons filed herein on 31st May, 2011 is allowed in terms of prayers 1,2,3 and 4 thereof with costs.

**DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF JANUARY, 2013.**

**P.M. MWILU**

**JUDGE**

**DELIVERED ON 30TH JANUARY, 2013 BY P. NYAMWEYA, JUDGE.**

In the presence of:-

..... Advocate for Applicant  
..... Advocate for 1st Respondent  
..... Advocate for 2nd Respondent  
..... Court Clerk

**P. NYAMWEYA**

**JUDGE**