



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Suit 237 of 2010

PETER THUU KARANJA.....APPLICANT

VERSUS

KIGATHI WAMAGATA

NDINGURI WAMAGATA

NYOTA WAMAGATA

WARIOKO WAMAGATA

MAGWA WAMAGATA.....RESPONDENTS

JUDGMENT OF THE COURT

The Applicant filed an originating summons dated 14th May 2010 seeking the following orders:

1. That Peter Thuu Karanja has been in adverse possession of the 0.384 Hectares and 0.092 Hectares in land parcel Numbers Dagoretti/Kinoo/203 and Dagoretti/Kinoo/T.62 respectively, since birth in 1965 and through 1983 when he attained the age of adulthood to date, consequently that he be declared the absolute owner thereof and the same be registered in his name of Peter Thuu Karanja.
2. That Kigathi Wamagata, Ndinguri Wamagata, Nyota Wamagata, Warioko Wamagata and Magwa Wamagata the Respondents herein who are the registered owners of LR Numbers Dagoretti/Kinoo/203 and Dagoretti/Kinoo/T.62, do transfer the said parcel of land to Peter Thuu Karanja as the beneficial owner thereof by virtue of adverse possession from birth in 1965 and through 1983 when he attained the

age of majority to date.

3. That the Deputy Registrar of this Honourable Court be authorized to sign all the requisite documents/papers on behalf of the Respondents herein to facilitate the transfer of Dagoretti/Kinoo/203 and Dagoretti/Kinoo/ T.62 (hereinafter also referred to as the suit plots) to Peter Thuu Karanja.

The said originating summons filed on 19th May 2010 was supported by the Applicant's affidavit sworn on 14th May 2010 and annexures thereto.

After failing to get information on the whereabouts of the Respondents, the Applicant's Advocates filed an application dated 14th May 2010 under Order V Rule 17 of the Revoked Civil Procedure Rules, seeking the leave of this Court to serve the court process upon the Respondents by way of advertisement in one of the newspapers. The said orders were granted by Honourable Okwengu J. (as she then was) on 18th June 2010, and substituted service of the Originating Summons on all the Respondents was effected by way of advertisement in the *Daily Nation* of September 13, 2010 with the Respondents required to enter appearance within 15 days. The service is attested to by the Affidavit of service sworn by Susan Maira on 17th October 2010, and filed in Court on 21st October 2010.

The Respondents failed to enter appearance or file any defence, and interlocutory judgment was entered against them on 27th January 2011 by the Deputy Registrar of this Court. The hearing of the Originating Summons proceeded on 13th December 2011 by way of oral evidence and two witnesses gave evidence.

The Applicant (PW1) was the first witness and he testified that he resides in Kinoo, and that his father and grandfather were Samuel Karanja Thuu and Thuu Karanja respectively, who are both deceased. The witness testified that his grandfather had only one son who was his father, and that the witness was also the only son of his father. He stated that he was born in Kinoo in 1965 on plot Dagoretti/Kinoo/203 and that at that time it is only his parents and grandparent living on the said plot. The Applicant produced a copy of his identity card as Plaintiff's Exhibit 6.

The witness also testified that he has been living on the two plots namely Dagoretti/Kinoo/203 measuring 0.384 hectares and Dagoretti/Kinoo/T62 measuring 0.092 hectares since he was born, and has been in continuous possession. According to the witness, his grandfather's elder brother, one Wamagata Kigathi was once registered as owner of the suit plots, and he produced as evidence Plaintiff Exhibit 1, a letter from the Land Registrar dated 24th April 1969 to the Chief of Dagoretti, requesting confirmation that the said Wamagata Kigathi is registered owner of Dagoretti/Kinoo/203 & T62.

The Applicant further testified that after conducting a search he found that the title to the suit plots bore the names of persons unknown to him, who are registered as beneficiaries of Wamagata Kigathi. He produced copies of the certificate of official search, as well as certified copies of the green card for Dagoretti/Kinoo/T62 and for Dagoretti/Kinoo/203 as Plaintiff's Exhibits 2, 3, 4 and 5 respectively. The said certificates of official search and green cards show that the two properties were first registered in the name of Wamagata Kigathi, and were both transferred on 18.2.76 by way of succession to Kigathi Wamagata, Ndungiri Wamagata, Nyota Wamagata, Warioko Wamagata and Magwa Wamagata to hold in equal shares.

The Applicant also testified that he tried to inquire about the said registered owners or their whereabouts from elders but they had no knowledge of them, and the Applicant produced as evidence his application for substituted service on the Respondents, and the advertisement effecting service published on 13th September 2010 in the *Daily Nation* newspaper as Plaintiff's Exhibits 7 and 8 respectively.

The Applicant gave testimony that he has put up his residential house in Dagoretti/Kinoo/203 and has also planted maize, potatoes, napier grass and trees therein. With regard to Dagoretti/Kinoo/T62, the Applicant stated that he had constructed a nursery school and an incomplete permanent house thereon, and produced photographs showing the said developments on the two properties as Plaintiff's Exhibit 9. The Plaintiff stated that he has lived on the said plots for over 40 years, and having been in possession for more than 12 years had acquired ownership of the same.

The second witness (PW2) was Mr. James Nganga Kiarie who testified that he lives in Kinoo and was born in 1957 in Kinoo. He stated that he knows the Applicant and that they were brought up together in Kinoo and used to graze cattle on the Applicant's grandfather's land together. He further testified that he used to see the Applicant's mother and father living on the suit plots, and that he also knew the Applicant's grandfather called Thuo Kigathi. The witness averred that other than the Applicant's parents and grandparents, he has never seen anyone else living on the suit plots, and that he does not know the Respondents, and has not seen them or anyone else farming on the suit plots. He reiterated that the Applicant was born on the said plots and has lived there with his family for over 30 years. Further, that there is a *shamba* on the said plots where the Applicant undertakes farming, and that he has planted trees and put up sheds for his cows and pigs on the plots. PW2 testified that the Applicant has also started building a permanent commercial building on the said plot.

The Applicant's Advocate was given leave by the court after the close of the Applicant's case to file written submissions, which submissions dated 13th February 2012 were duly filed on 15th February 2012. The Plaintiff's Advocate relied on the Court of Appeal decision of **Johnson Kinyua –vs- Simon Gitura Rumuri Nyeri Civil Appeal 265 of 2005** wherein it was held that the respondent therein who had been in uninterrupted occupation of the suit land for more than 31 years openly had proved the right to ownership and relied on the following passage in the said decision:

“With regard to extent of adverse possession, we think that possession of 8 acres of land for a period exceeding twelve years has been clearly established and that the respondent was in exclusive possession of the piece of land openly and as of right during all this time. With respects, this is all that a claimant is required to establish. In the face of the nature of the possession as described above including dwelling houses permanent plants.... It is quite evident to us that the respondent used the land which he claims as of right: *nec vi, nec claim, nec precario* (no force, no secrecy, no evasion). It follows from the foregoing the applicant is deemed to have had either actual knowledge of the possession or had the means of knowing of the possession or occupation but did nothing about it by way of asserting the right of ownership (constructive knowledge). It is also not in dispute that possession was never interrupted and was continuous for the entire period”.

The Advocate argued that in the present case it was clear from the oral and documentary evidence that the applicant has been in continuous and uninterrupted use, occupation and possession of the said land parcels No. Dagoretti/Kinoo/203 and Dagoretti/Kinoo/T.26 since 1965 and through 1983 when he became an adult, and even after the death of his father, grandfather and grandfather's brother. It was also submitted that the Applicant's said occupation has been active and open, and that he has made substantial developments on the parcels of land, having built several residential houses, animal sheds and planted

food crops and trees. Further, that in one parcel he has a commercial building that has a running nursery school and another which is incomplete.

The Advocate also argued that the Respondents have done nothing to interrupt the said possession and have never been in possession of the suit plots, and that the Respondents knew of the said parcels of land as they registered themselves as the proprietors thereof in equal shares 1976 in succession to Wamagata Kigathi, the first registered owner. The Advocate contended that in law the Respondents had actual knowledge of the possession and use the suit land by the Applicant, or had the means of knowing that he had the possession or occupation of the suit land, but did nothing to assert their right of ownership up to the present time.

I have carefully read and considered the Applicant's pleadings and evidence. The Applicant has filed this Originating Summons pursuant to sections 7, 17 and 38(1) of the Limitation of Actions Act (Cap 22). The law on adverse possession is settled. Where a person has been in continuous, uninterrupted occupation or possession of land for a period of 12 years or more, he may apply to the High Court to be registered as the proprietor thereof in place of the owner of the suit premises under section 38(1) of the Limitation of Actions Act. The Court of Appeal in **Wambugu v Njuguna (1983) KLR 172** held that adverse possession contemplates two concepts: dispossession and discontinuance of possession. The Court of Appeal further held that the proper way of assessing proof of adverse possession is 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 that he or she has been in possession for the requisite number of years.

The issue before this court therefore is whether the Applicant has been able to prove on a balance of probabilities that he has dispossessed the 1st Respondent for 12 years to be entitled to adverse possession. The Applicant has given evidence that he has been in continued and uninterrupted possession of the suit premises from the since 1983 when he became an adult to date, and that the Respondents has never come to the suit premises to assert their rights to the property. The acts of physical possession of the suit plots, and of use and development of the same by the Applicant has been shown by the photographic evidence produced by the Applicant. These acts having been undertaken without the Respondents' knowledge and/or permission are all acts which are inconsistent with the Respondents' title to, and peaceful and quiet enjoyment of the suit property. It is this Court's finding that the Respondents have thereby been dispossessed by the Applicant.

For the Applicant to prove his case, he is also required to bring evidence of the date of the Respondents' dispossession or discontinuance, which is the date when the statutory period of 12 years starts running. The provisions of section 9(1) of the Limitation of Action Act state as follows as to the accrual of the right of action in adverse possession in the case of a present interest in land:

“Where the person bringing an action to recover land, or some person through whom he claims, has been in possession of the land, and has while entitled to the land been dispossessed or discontinued his possession, the right of action accrues on the date of the dispossession or discontinuance...”

Since the Applicant claims that the Respondents have never been in occupation of the suit property, the date of dispossession in this suit can only be the date the Respondents became registered owners of the suit property. The Applicant has brought evidence by way of certificates of official search as well as certified copies of the green card for Dagoretti/Kinoo/T62 and for Dagoretti/Kinoo/203 which show that

the two properties were both transferred to the Respondents on 18th February 1976, which is the date time began to run for purposes of adverse possession. By the time of the filing of the Originating Summons on 19th May, 2010 the Applicant had been in possession of the suit plots for 34 years from the said date of transfer, and it is the finding of this Court that the Plaintiff has met the statutory threshold of 12 years for adverse possession to attach.

The Applicant has therefore discharged his burden of proof and arising from the above-stated reasons, this Court enters judgment for the Applicant as follows:

1. That Peter Thuu Karanja is hereby declared as entitled by way of adverse possession to the parcels of land known as Land Reference Numbers Dagoretti/Kinoo/203 and Dagoretti/Kinoo/T.62 measuring the 0.384 Hectares and 0.092 Hectares respectively.
2. That Kigathi Wamagata, Ndinguri Wamagata, Nyota Wamagata, Wairioko Wamagata and Magwa Wamagata the Respondents herein who are the registered owners of Land Reference Numbers Dagoretti/Kinoo/203 and Dagoretti/Kinoo/T.62 do transfer the said parcels of land to Peter Thuu Karanja as the beneficial owner thereof by virtue of adverse possession.
3. That the Deputy Registrar of this Honourable Court to sign all the requisite documents/papers on behalf of the Respondents herein to facilitate the transfer of Dagoretti/Kinoo/203 and Dagoretti/Kinoo/T.62 to Peter Thuu Karanja.

There will be no order as to costs.

Dated, signed and delivered in open court at Nairobi this 18th day of May, 2012.

P. NYAMWEYA

JUDGE