



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT 1912 OF 2007

MARGARET GATHONI.....PLAINTIFF

VERSUS

KINYANJUI MUKURIA.....DEFENDANT

JUDGMENT OF THE COURT

The Plaintiff filed an originating summons dated 20th June 2006 seeking the following orders:

1. That the Plaintiff be declared to have become entitled by adverse possession of over twelve (12) years of all that piece of land registered under the Registered Land Act (Cap 300) known as Kabete/Gikuni/T.218 and situated within Kiambu District.
2. That the said Plaintiff be registered as the sole proprietor of the said piece of land known as Kabete/Gikuni/T.218 in the place of Kinyanjui Mukuria in whose favour the said parcel of land is registered.
3. The Deputy Registrar of this Honourable Court do execute all the necessary instruments and documents to effect transfer of parcel of land known as Kabete/Gikuni/T.218 from the Defendant to the Plaintiff's names.

The said originating summons was filed on 20th June 2006, and was supported by the Plaintiff's affidavit sworn on the same date and annexures thereto.

After failing to get information on the whereabouts of the Defendants, the Plaintiff's Advocates filed an application dated 20th July 2006 under Order V Rules 17 and 32 of the Revoked Civil Procedure Rules, seeking the leave of this Court to serve the Originating Summons upon the Defendants, by way of advertisement in the *Daily Nation* newspaper. The said orders were granted by Honourable Justice Mbogholi Msagha on 25th February 2010, and substituted service of the Originating Summons on the Respondents was effected by way of advertisement published in the *Daily Nation* of 8th March 2010 with the Defendants, required to enter appearance within 21 days. The said service is attested to by the Affidavit of Service sworn by John Nyanjua Njenga on 14th April 2010, and filed in Court on the same date.

The Defendant failed to enter appearance or file any defence, and at the hearing of the Originating Summons on 2nd February 2012, the Plaintiff's Advocate asked to proceed by way of affidavit evidence, and sought judgement.

The Plaintiff in her supporting affidavit states that sometimes in the year 1960 her deceased father bought

a parcel of land known as KABETE/GIKUNI/T.218 (herein referred to as the suit property) from one Kinyanjui Mukuria who was by then the registered owner. Further, that the said Kinyanjui Mukuria thereafter moved to settle in the Burnt Forest Area in the Rift Valley Province before affecting the transfer of the suit property to her deceased father.

The Plaintiff further stated that her deceased father bequeathed the suit property to her as a gift *inter vivos*, and that she moved into the said property and assumed possession in 1977 together with her eight children. Further, that she has been continuously and exclusively in possession of the suit property since 1977 to date and has exercised ownership openly and without secret by undertaking the following acts on the property:

- a) Erecting a fence around the suit property.
- b) Planting seasonal crops like maize and beans over the years since 1977 to date.
- c) Planting trees on the land.
- d) Constructing a permanent homestead.
- e) Six of her children have also put up semi-permanent residential buildings thereon.

I have carefully read and considered the Applicant's pleadings and evidence. The Applicant has filed this Originating Summons pursuant to Order XXXVI Rule 3D of the revoked Civil Procedure Rules, section 3A of the Civil Procedure Act (Cap 21) and section 38 of the Limitation of Actions Act (Cap 22). The substantive provision is section 38 of the Limitation of Actions Act which provides for adverse possession.

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 been discontinued of 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 Plaintiff has been able to prove on a balance of probabilities that she has dispossessed or discontinued the Defendant's possession of the suit property for 12 years, to be entitled to adverse possession.

The Plaintiff has brought evidence by way of an extract of title that shows that the suit property was registered in the Defendant's name on 29/7/59. She has also testified that she has been in continuous exclusive and uninterrupted possession and occupation of the whole of the suit property with her family for over thirty (30) years since she assumed possession in 1977. The acts of ownership deponed to by the Plaintiff have also been undertaken without the Respondents' knowledge and/or permission, and are acts which are inconsistent with the Defendants' title to the suit property. It is this Court's finding that the Defendant's possession has thereby been discontinued by the Plaintiff.

Arising from the above-stated reasons, this Court enters judgment for the Applicant as follows:

1. That Margeret Gathoni, the Plaintiff herein, is hereby declared as entitled by way of adverse possession of over twelve (12) years of all that piece of land registered under the Registered Land Act (Cap 300 Laws of Kenya) known as Kabete/Gikuni/T.218 and situated within Kiambu District
2. That the said Plaintiff be registered as the sole proprietor of the said piece of land known as

Kabete/Gikuni/T.218 in the place of Kinyanjui Mukuria the Defendant herein, in whose name the said parcel of land is registered.

3. That the Deputy Registrar of this Honourable Court do execute all the necessary instruments and documents to effect transfer of parcel of land known as Kabete/Gikuni/T.218 from the Defendant's to the Plaintiff's names.

4. There will be no order as to costs.

Dated, signed and delivered in open court at Nairobi this ____23rd____ day of ____July____, 2012.

P. NYAMWEYA
JUDGE