



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL & LAND CASE 429 OF 2007

MARGARET WAMBUI MBURU.....PLAINTIFF

VERSUS

MWANIKI GITHIRWA.....DEFENDANT

JUDGMENT OF THE COURT

The Plaintiff filed an originating summons dated 2nd August 2001 seeking the following orders:

1. That the Plaintiff is entitled to be registered as proprietor of the whole of land reference number LIMURU/KAMIRITHU/T.192 in place of the currently registered owner, MWANIKI GATHIRWA pursuant to the provisions of Section 38 of the Limitation of Actions Act (Cap 22), on the ground that the Plaintiff and her family has been in occupation of the said land since 1958 and have built semi-permanent houses on the same and have remained in open, peaceful and uninterrupted occupation thereof to date which is for a period exceeding twelve (12) years preceding the presentation of these summons.
2. That an Order do issue registering the Plaintiff as the proprietor of the foresaid land reference number LIMURU/ KAMIRITHU/T.192 (hereinafter also referred to as the suit property), in place of the Defendant and/or succession in title thereof.

The said originating summons was filed on 2nd October 2001 and was supported by the Plaintiff's affidavit sworn on 13th August 2001 and annexures thereto. The Plaintiff thereafter by an application dated 13th September 2005 sought to substitute the Defendant with the Administrators of his Estate namely Gitau Mwaniki Gathirwa, Grace Nduta Gitau, David Muiruri Mwaniki and Charles Farae Mwaniki. The application was allowed by this Court (Aluoch J.- as she then was) on 13th November 2006.

The Defendants filed a replying affidavit on 10th November 2006, sworn on 6th November 2006 by Charles Farae Mwaniki, one of the Administrators of the Estate of Mwaniki Gathirwa. The hearing of the Originating Summons proceeded on 17th October 2011, 26th October 2011 and on 28th November 2011 by way of oral evidence. The Plaintiff testified and called two witnesses to give evidence on her behalf, and the Defendant called one witness. All the witnesses filed witness statements and gave oral evidence.

The Plaintiff (PW1) testified that she was born in the year 1939 at Kamirithu, Limuru, and that during the emergency period the local inhabitants in Limuru and the surrounding areas were moved by the colonial Government from their farms and taken to the villages set up in various centres. PW1 testified that her family was moved to Kamirithu where they settled until the end of the emergency period. PW1 further testified that after the emergency period her father left her in charge of the plot where the family had been residing, where she resided with her husband, and up to date.

PWI also testified she has letters from the then area chief known as Robert Kabiru showing that she was the owner of the suit property, which letters dated 13/10/92 and 11/8/93 she produced as exhibit 1A and 1B respectively. Further, that the issue of her ownership of the suit property was also discussed by the Municipal Council of Limuru, which recommended that she be issued with a title deed. She was issued with an allotment letter by the Council and paid for the plot and was issued with receipts which she produced as exhibits 3A and 3B. PWI also produced the allotment letter as exhibit 4. She testified that her husband became sick while she was in the process of seeking the issuance of the title deed, and she did not manage to follow up the process and collect title documents.

PWI claimed that when she finally went to seek registration of the plot in her name and issuance of the title deed at the land's office in Kiambu, she was told by the land registrar that that was not possible since one Mwaniki Gathirwa's interest on the said property had been noted therein though he had not been issued with a title deed. This prompted her to file the suit herein against him in the year 2001, and that she also placed a caution on the title which she produced in evidence as exhibit 5. She also instructed her lawyers to write to the Defendants, which letter dated 30/12/2003 was produced in evidence by PW1 as exhibit 6. PWI stated that the Defendants also filed Civil Case Number 46 of 2005 in Limuru Senior Resident Magistrate's Court, which was stayed pending hearing and determination of this case. She produced the pleadings in the said case as exhibit 7A, 7B, and 7C.

Upon cross-examination, PWI stated that her husband was named Robert Mburu Gichuru and is deceased. She confirmed that he had been allocated another plot LIMURU/KAMIRITHU/T194 which he later sold. PWI denied that she had occupied or cultivated on LIMURU/KAMIRITHU/T194, or that the Defendants father used to cultivate on the said plot. She denied knowing Mwaniki Gathurwa, the Defendants' father. She also denied knowing who the registered owner of the suit property was. PWI stated that in the letter she produced as exhibit 1B the chief may have been aware that the suit property was registered by mistake in someone else's name, but that she was not aware of the same as she does not know how to read.

The second witness who gave evidence for the Plaintiff was Peter Njuguna Mwangi (PW2), who stated that he lives in Kinangop in Nyandarua District, but used to live in Limuru from 1980 to 2008, and was a councillor of Limuru Central ward between 1997 to 2008. He also testified that he had served as chairman of the Town Planning Committee of the Municipal Council of Limuru, and knew the Plaintiff as the issue of her ownership had been raised and discussed by the said municipal council.

PW2 referred to the Plaintiffs exhibits 2A which were the minutes of the meeting of the Town Planning Markets and Housing Committee of the Municipal Council of Limuru held on 19th May 1999, that resolved to issue an allotment letter to the Plaintiff and also recommended that she be issued with a title deed to the suit property. PW2 confirmed that he was present at the said meeting, and that the said recommendations were adopted at a full council meeting held on 13th July 1999 at which he was also present, whose minutes were produced as the Plaintiff's exhibit 2B. He also produced as Plaintiffs exhibit 9 a letter dated 24th May 2001 written by the deputy town clerk of the Municipal Council of Limuru to the Commissioner of Lands, recommending that the Plaintiff be issued with a title deed. PW2 testified that he thought the Plaintiff had been issued with a title deed, but later heard that the title deed was issued to someone else.

Upon cross-examination, PW2 stated that he knew that the suit property to be trust land that was available for allocation, but he did not have any documents that showed so. He further stated that the council relied on a search undertaken by its clerk that showed the land was vacant. PW2 confirmed that the letters by the area chief exhibited as exhibits 1A and 1B were the basis on which the Plaintiff was allocated land by the Municipal Council of Limuru, and the said letters showed that the land was erroneously registered in someone else's name. He admitted that the municipal council was not recommending the cancellation of the said registration, and that only the courts had the powers to do so. He further testified that he did not know Mwaniki Gathurwa, and that neither the said Mwaniki Gathurwa nor his family members attended the aforesaid council meetings.

The third witness for the Plaintiff was Peter Ndungu Nganga (PW3) who stated that he was born in and

schooled in Kamirithu in Limuru, and has lived there all his life up to present day. He gave his year of birth as 1960, and he testified that he knew the Plaintiff, her family and her home. He further testified that he was like a son to the Plaintiff, as she had helped his grandmother look after him when his parents died, and had stayed with the Plaintiff's eldest son who was his age mate. PW3 testified that he did not know Mwaniki Gathurwa or his children, and had never seen anyone claiming the suit property from the Plaintiff

On cross-examination PW3 stated that when he started living with the Plaintiff she was married and living with her husband who later died. He stated that he knew the Plaintiff was looking for the title for the suit property as the Municipal Council of Limuru had advised the people living in Kamirithu to collect their documents of title. He stated that the Plaintiff owned only one plot of land.

The 3rd Defendant David Muiruri Mwaniki (DW1) testified on behalf of the Defendants, and stated that he lives in Limuru and has another home in Gilgil. DW1 also stated that Mwaniki Gathurwa was his father. He further testified that his father died on 3rd May 1977 and he produced the certificate of grant of confirmation and letters of administration issued to him and the other defendants as Defendants' exhibits 1 and 2 respectively. DW1 stated that only asset owned by their father was the suit property, which was registered in his father's name on 23rd March 1959, and he produced the title deed, extract of the title (green card) and search certificate of the suit property dated as the Defendants' exhibits 3, 4, and 5 respectively.

It was DW1's testimony that the his father and family had mistakenly cultivated the plot adjacent to the suit property, namely LIMURU/KAMIRITHU/T.194, which they thought was their father's plot, and only discovered the true state of affairs when they had a family dispute on or about the year 1993 involving the said land. DW1 testified that they reported the matter to the Assistant Chief of Kamirithu and went to see the suit property, which they found occupied by the Plaintiff and her husband. He produced as exhibit 6 a site plan showing the location of the two plots – LIMURU/KAMIRITHU/T192 and LIMURU/KAMIRITHU/T194, and that they are adjacent to each other.

DW1 further testified that he visited the Plaintiff and her husband with a friend in 1993, and informed them that they were occupying his father's land. However, because of the family dispute the Defendants had amongst themselves, they did not take any action on the suit property until the suit property was changed into their names in 2001, whereupon they took the title documents to the Assistant Chief of Kamirithu and also met with the Plaintiff and her husband after being summoned by the said Chief. The parties were not able to settle their dispute and the Defendants then filed a suit in the Limuru Magistrates Court seeking eviction orders. DW1 produced as exhibit 10 a demand letter dated 22nd December 2003 sent by the Defendants' Advocate to the Plaintiff seeking her to vacate the suit property. DW1 further testified that this was also after his brother had written a letter to the Municipal Council of Limuru dated 2/9/1999 about the suit property and no action was taken by the said Council, which letter was produced as exhibit 11.

Upon cross-examination, the DW1 stated that the green card for LIMURU/KAMIRITHU/TI92 showed that the first entry on 23/3/59 was in the name of Mwaniki Gathurwa, while that of LIMURU/KAMIRITHU/T194 showed the first entry on 23/3/59 to be in the name of the Native Land Trust Board, and the second on the same date to be in the name of Mburu Gichuru. He explained that the difference in the entries in the two green cards was because LIMURU/KAMIRITHU/T192 is registered as a freehold property. He also confirmed that the Defendants did not pay any rates on the suit property because it was held on freehold.

The parties' Advocates were given leave by the court after the close of the Defendants' case to file written submissions. Various authorities were cited in the Plaintiff's submissions dated 20th January 2012 as laying the basis for their claim. The first were relevant sections of the Limitation of Actions Act (Cap 22) namely sections 7 and section 38. Section 7 provides thus:

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.

Section 38 (1) and (2) on its part provides thus:

(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 Act, 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) shall on registration taken effect subject to any entry on the register which has not been extinguished under this Act.

The Plaintiff also relied on the definitions provided in ***The Black's Law Dictionary 8th Edition*** which defines possession as “*the fact of having or holding property in one's power, the exercise of dominion over property*”. Adverse possession is defined as “*the use or enjoyment of real property with a claim of right when that use or enjoyment is continuous, exclusive, hostile, open and notorious or the doctrine by which title to real property is acquired as a result of such use or enjoyment over a specified period of time.*”

It was contended by the Plaintiff that she has satisfied this Court from her evidence that she has lived on the suit property for a continuous and uninterrupted period of over twelve years having taken possession of the same in the 1950s, and is still in possession to date. Further, that the Plaintiff was at all times in possession of the suit property and the Defendants have never occupied nor cultivated the same. It is thus the case that the Defendants lost their right to the suit property since the late 1950s.

The Plaintiff relied on the decisions in **Wanjiku Kinuthia & Another vs Stephen Kinooro Kamau & Another. H.C. Civil Case No. 2360 of 1995** where this Court held that as long as one was in use of the land there is possession, even if that person has not constructed any structures thereon. Also relied on in support of her case was the Court of Appeal decision in **Wanje vs Saikwa, Civil Appeal No. 72 of 1982**, where it held that for one to acquire title to a land which has a known owner, the owner must have lost his right to land either by being dispossessed of it or by having discontinued his possession of it, and it was stated that dispossession refers to acts that are inconsistent with the known owner's enjoyment of the soil for the purpose for which he intended to use it.

The Plaintiff further submitted relying on the text by Kevin Gray titled ***Elements of Land Law, 2nd Edition*** at page 297 that adverse possession operates as an essentially objective process of law and stated that a title may be acquired through adverse possession even though the claimant, through fraud or mistake, was unaware of the true ownership of the property. A plea of adverse possession can therefore succeed even though both parties mistakenly but genuinely believed that the claimant was the true owner of the land and that his entry on that land was therefore “as of right”.

The Defendants' Advocate in submissions dated 22nd February 2012 examined various definitions and explanations of adverse possession as stated in various authorities, and submitted that the Plaintiff has not set out a case that falls within the parameters of the requirements for title to land by way of adverse possession as set out in law for two reasons. Firstly, that there was no adverse possession on the part of the Plaintiff as neither party had ever settled in its correct parcel of land, and the parties erroneously and by virtue of unfortunate oversight settled on and/or occupied each other's plot. The Plaintiff therefore took possession by mistake and it cannot be said that her possession was “adverse”.

It was argued by the Defendants that computation of the period of adverse possession would therefore run from the time the Plaintiff ascertained the true state of affairs, and time would thus only run from the year 1993. The Defendants relied on the decision in **Sisto Wambugu –Vs- Kamau Njuguna, Civil Appeal No. 10 of 1982** at page 55 is to the following effect:

“It is in my judgment evident that a person must have an effective right to make entry and to recover possession of the land in order that the statute may begin to run. He cannot have that effective right if the

person in occupation is there under valid permissions or license, which has not been determined”

The second reason proffered by the Defendants’ Advocate was that there was no dispossession or discontinuance of possession against the Defendants, and the decision in **Sisto Wambugu –Vs- Kamau Njuguna, Civil Appeal No. 10 of 1982** was again relied on at pages 62 and 63 as follows:-

“In order to acquire by the statute of limitations title to land which has a known owner, must have lost his right to the land either by being disposed of it or having discontinued his possession of it...

...Two things appear to be contemplated by that enactment, dispossession and discontinuance of the possession. If this is the right way to approach the problem the question becomes “has the claimant proved that the title holder has been disposed or has discontinued his possession of the land in question for the statutory period” rather than “has the claimant proved that he (through himself or others on whose possession he can rely) has been in possession for the requisite number of years. it certainly makes it easier to understand the authorities if one adopts the first formulation...

...the next question therefore is what constitutes dispossession of the proprietor. Bramwel L. J. in **Leigh – VS- Jack** said at page 273 that to defeat a title by dispossessing the former owner, acts must be done which are inconstant with his enjoyment of the soil for “The purposes for which he intended to use it...”

The Defendants submitted that the Plaintiff neither “dispossessed” the Defendants of the suit premises at all times material to this suit and neither was the Defendants in actual physical possession of the suit premises at the material time in question, for the Plaintiff to be capable of discontinuing their possession.

I have carefully read and considered the parties’ pleadings, evidence and arguments. The two issues before this court is whether the Plaintiff’s possession was adverse, and if so, when time began to run for purposes of the threshold required of 12 years possession. On the first issue, the parties gave various definitions of what adverse possession means, and it has been held by the Court of Appeal in **Wambugu v Njuguna (1983) KLR 172** that adverse possession contemplates two concepts: dispossession and/or 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 he or she has been in possession for the requisite number of years. This is also the decision in **Wanje –vs- Sakwe Civil Appeal No. 72 of 1992**, that was relied upon by both parties, and in **Sisto Wambugu –vs- Kamau Njuguna, Civil Appeal No. 10 of 1982** that was extensively relied upon by the Defendants. From the said definitions it is my considered opinion that dispossession and discontinuance of possession have three main ingredients for adverse possession to attach.

The first is that of actual possession by the claimant. The nature of this actual possession must be open, visible and continuous for the statutory period of twelve years. The actual possession that is material is that of the claimant and not the owner’s. That claimants may take actual possession by removing the true owner which is the what is referred to as dispossession, or by taking possession of the property in the owner’s absence which is what is referred to as the discontinuance of possession. It is therefore not a requirement as submitted by the Defendants that the owner must always be in possession.

The second requirement is that of exclusive possession, where the claimant uses the land in question as if it were his or her own and to the exclusion of the true owner. The Plaintiff’s actual and exclusive possession of the suit property since the 1950’s is not contested, and as the Defendants have admitted that they have never been in possession of the same, it is the finding of this Court that there was discontinuance of the Defendants’ possession by the Plaintiff.

Finally, the possession must be hostile in the sense that it is without the permission or consent of the owner, and inconsistent with true owner’s rights. I agree with the Plaintiffs submissions that the requirement of hostile possession must be viewed objectively, as it is the act of possession which is

material, and not the motives or knowledge of the claimant or owners of the land in question. The only state of mind that is relevant in adverse possession is the intention to possess exclusively.

It is this last requirement that is contested by the Defendants in their submission that the possession by the Plaintiff was not hostile by virtue of the mistaken beliefs by the parties that they were each occupying their respective properties. This mistaken belief as explained in the foregoing is irrelevant, so long as the Plaintiff was in possession without the Defendants' permission or consent. It is also immaterial for the same reason that the Plaintiff did not know until 1993 that the property was registered in the Defendants' father's name, and it is my finding that her possession of the suit property was hostile and therefore adverse.

The second issue for consideration is that of the date of the Defendants' discontinuance of possession, 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 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..."

The two determining factors from the aforesaid section as to when time starts to run in terms of dispossession or discontinuance of possession, is the time the owner was last in possession, and if an owner has never been in possession, one must look at the time he or she became entitled to the land and therefore to possession. Legal entitlement to land is conventionally established by the issue and registration of the owner's title or transfer as the case may be. The claim by the Defendants that time begins to run when the Plaintiffs becomes aware of their title is therefore not correct in light of the provisions of section 9(1) of the Limitation of Action Act.

The parties have brought evidence by way of copies of title, green cards and certificates of official search for LIMURU/KAMIRITHU/T.192 which show that the suit property was first registered in the name of Mwaniki Gathurwa on 23/3/59, and subsequently in the Defendants' names on 1/12/2003 as a result of Kiambu SPMC Succession Cause 219 of 1992. The date time began to run for purposes of adverse possession is the date of first registration on 23/3/59 as the Defendants are registered as proprietors of the suit property in their capacity as administrators of the estate of Mwaniki Gathurwa. At the time of the Defendants' notice and claim of ownership in 1993, the Plaintiff had been in adverse possession of the suit property for 34 years, and it is the finding of this Court that the Plaintiff has met the statutory threshold of 12 years for adverse possession to attach.

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

1. That Margeret Wambui Mburu, the Plaintiff herein, is hereby declared as entitled by way of adverse possession to the parcel of land known as LIMURU/KAMIRITHU/T.192
2. That Gitau Mwaniki Gathirwa, Grace Nduta Gitau, David Muiruri Mwaniki and Charles Farae Mwaniki, the Defendants herein and registered owners of Land Reference Number LIMURU/KAMIRITHU/T.192, do transfer the said parcel of land to Margeret Wambui Mburu as the beneficial owner thereof by virtue of adverse possession, and in default the Deputy Registrar of this Honourable Court to sign all the requisite documents/papers on behalf of the Defendants herein to facilitate the said transfer.
3. There will be no order as to costs.

Dated, signed and delivered in open court at Nairobi this ____18th____ day of

____July____, 2012.

P. NYAMWEYA

JUDGE