REPUBLIC OF KENYA
IN THE HIGH COURT
AT MERU
Civil Case 122 of 2003

M'RUKUNGA M'ARUA ..... PLAINTIFF

VERSUS

MIMWERA M'MBUI alias IMWERA MBUI .....DEFENDANT

JUDGEMENT

The plaintiff's claim in this matter is for a declaration that he became entitled by adverse possession to parcel number *Nyaki/Munithu/84, (*suit property). That property is registered in the name of the defendant. It should be noted that during the subsistence of this case, the defendant passed away. He was substituted by his two sons. In his defence, the defendant denied the plaintiff's claim. He further pleaded that the plaintiff entered the suit property with his express consent as a licensee. He pleaded that the plaintiff was his cousin. The defendant counterclaimed for the plaintiff's eviction. The plaintiff in evidence stated that he lives on the suit property which he considers to be his own but stated that the title was in the defendant's name. The defendant got registered in 1970. The plaintiff entered on the land in 1963. He said that he entered that land during the period of consolidation and demarcation of lands. The plaintiff said that he got married whilst in occupation of that land. He constructed 6 houses, planted bananas, pawpaw, avocado, *miraa*, macadamia trees and 247 coffee bushes. He planted the coffee in 1972. He has continually resided on the suit property with his wife and 7 children. One of those children and his own mother passed away and he buried them on the suit property without any protest from the defendant. The plaintiff confirmed that indeed he was the cousin of the defendant. The plaintiff in examination in chief finally stated:-

"He (defendant) had no issue when I entered the land and he neither allowed me into it nor did he stop me from going into it. I have now lived on the land for 48 years. I had gone to look for my title and found that the defendant had title (sic). I discovered these facts in 2003. I want this court to award me whole parcel of land as I have 3 married sons who live on the same parcel of land."

On being cross examined, the plaintiff said that the defendant had never cultivated the suit property. PW2 was the wife of the plaintiff. She got married to him in 1966. From that date, she begun to reside at the suit property with the plaintiff. They have remained on the suit property since then. She was categorical that she did not obtain the defendant's consent to reside on the suit property. She and the plaintiff have had 7 children whilst being resident on the land. When one of those children died he was buried on the suit property. On being cross examined, she also confirmed that the plaintiff had built some structures on the suit property. PW3 is a cousin both to the plaintiff and the defendant. He said that he together with another person he named as M'Twerandu had done the gathering and demarcation of the suit property. When it was demarcated, it was occupied by the plaintiff. He said that the plaintiff entered the suit property after Kenya gained its independence. It was him who guided the plaintiff where to put the fence around the suit property. He also confirmed that the plaintiff and his wife had built 6 houses on the suit property. He said that the defendant had lied in his pleadings where he stated that it was him who allowed the plaintiff to occupy the suit property. Rather he said that it was him (PW3) who showed the plaintiff the land and it is the same land that the plaintiff occupies together with his grand children todate. He was categorical that the defendant and his children have not lived on the suit property. That the defendant lived far away from the suit property. The defendant's counsel in cross examining this witness dealt mainly with the issue of ownership of the suit property. That cross examination therefore was not relevant to the issue before court, that is, the plaintiff's claim for adverse possession. PW4 was a retired chief and was at one time employed by Nyaki farmers Co-operative Society. Whilst he worked for that Co-operative, his duties entailed measuring holes where coffee would be planted by its members. He confirmed that the plaintiff planted coffee on the suit property. That the defendant did not object to the plaintiff's planting of that coffee. Whilst he served as an assistant chief, the defendant referred to him a case relating to the suit property. The defendant wanted the plaintiff to apportion some of the suit property to him. The case was referred to the clan. The clan failed to reach an agreement. This witness also confirmed that the plaintiff had built his house on the suit property. In defence, the son who substituted the defendant gave evidence and stated that the defendant died in 2007. He confirmed that the plaintiff was their relative. At the time when he gave evidence before court, he was 39 years old having

been born in 1970. He said that the suit property was registered in his late father's name. He finally stated in evidence thus:-

"Parcel number 840 (suit property) we do not reside there. That shamba has been used by M'Rukunga M'Arua (plaintiff). He begun to use it along time ago. When I was born, he was using the shamba."

He then proceeded to say that their father had a shamba; *"on that side"*. In 1992, their father wanted to subdivide the suit property amongst his children and to facilitate this, their father called a clan meeting. The plaintiff at that clan meeting said that the suit property did not belong to his father the defendant. The plaintiff, according to this witness, was not requested to vacate the suit property since his father wanted to have an amicable solution. Whilst giving evidence in chief, this witness said:-

"I cannot say where the shamba (the suit property) belonging to my father came from."

Although in cross examination, this witness said that the plaintiff was allowed to occupy the suit property a long time ago, he could not say the year and he did not also say who gave the plaintiff permission to use the suit property. He finally said that he had never entered the suit property in his lifetime. DW2 was also a relative of both the plaintiff and the defendant. He confirmed that the plaintiff had occupied and used the suit property since 1966. He said that the suit property was ancestral land. That it came from the father of the fathers of the plaintiff and the defendant. When it was sub divided for reasons unknown to him, the plaintiff was not given a portion. As a result, the defendant allowed the plaintiff to use the suit property. This witness said that the defendant allowed the plaintiff to use the suit property on the basis that when the defendant would require to sub divide that land, the plaintiff would get a portion of it. He said that the defendant allowed the plaintiff to enter the land when the title was issued. The title, according to the green card annexed to the originating summons was issued to the defendant as a first registration on 12th August 1970. It is clear that this witness contradicted himself because he had earlier said that the plaintiff had occupied the suit property from 1966. Under cross examination, he confirmed the defendant and his children had not constructed on the suit property. He also confirmed that that the plaintiff had planted coffee on the property. He said that the defendant had requested the plaintiff to look after the suit property until his return. He did not elaborate where the defendant was to return from. On being cross examined about the use of the suit property, he again contradicted himself and said thus:-

"I don't know about defendant allowing plaintiff to reside on the suit property."

In re-examination, on being prompted by defence counsel he again contradicted himself by saying that the defendant had put the plaintiff on the suit property. The evidence of DW2 and 3 was not reliable in my view. It was evidence that was well choreographed and rehearsed to suit the defendant's defence. As much as it was well choreographed, both witnesses did confirm that the plaintiff had occupied the suit property for more than 40 years. They also confirmed that the plaintiff had built on the land and had planted crops. DW1 confirmed that the plaintiff had been on the suit property for a very long time. The witnesses in presenting their evidence before court fell in error and spent much time debating on who owned the land and its origins through their ancestors. The plaintiff's evidence that he had built houses, planted crops had married on the land and was a grandfather with his married sons on the land was not subjected to cross examination. It therefore follows that that evidence was not contested. The evidence presented by the plaintiff therefore and even accepted by defence witnesses proves that the plaintiff has been in possession of the suit property well beyond 12 years thereby well meeting the condition for declaration of acquiring title over the suit property by adverse possession. The plaintiff met the conditions well set out in the case of **Kimeu V. Syina** Civil Suit No. 1402 of 1986. The court held as follows:-

"As for the claim based on adverse possession, the plaintiff was duty bound to adduce inter alia that he had been in possession of the suit land, that his occupation was exclusive, was adverse to the defendant's rights as owner and that his occupation had been continuous and uninterrupted or unchallenged for a period in excess of twelve years since the possession commenced."

The plaintiff also met the conditions set out in a House of Lords decision that is, Case **J.A. Pye (Oxford) Ltd Vs. Graham** [2002] UKHL 30. The House of Lords made the following decision in that case:-

"Many of the difficulties with these sections are due to a conscious or subconscious feeling that in order for a squatter to gain title by lapse of time he has to act adversely to the paper title owner. It is said that he has to oust the true owner in order to dispossess him; that he has to intend to exclude the whole world including the true owner; that the squatters use of the land has to be inconsistent with any present or future use by the true owner. In my judgment much conclusion and complication would be avoided if reference to adverse possession were to be avoided so far as possible and effect given to the clear words of the Acts. The question is simply whether the defendant squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner."

The plaintiff dispossessed the defendant of the suit property, from the date the defendant got the title over

the suit property up to the year 2003, when this case was filed. That dispossession entitles the plaintiff for the prayer that he seeks. The volume 24 of Halsbury's Laws of England 3rd Edition Page 252, it is stated:-

"To constitute dispossession, acts must have been done inconsistent with the enjoyment of the soil by the person entitled for the purpose for which he had a right to use it. Fencing off is the best evidence of possession of surface land; but cultivation of the surface without fencing off has been held sufficient to prove possession."

The plaintiff proved he had fenced the suit property and had always cultivated it. The judgment of this court therefore is as follows:-

1. ***A declaration is hereby made that M'Rukunga M'Arua, the plaintiff herein has become entitled by adverse possession to the whole of parcel known as L.R. No.Nyaki/Munithu/840.***

2. ***The land registrar is hereby ordered to register the parcel known as Nyaki/munithu/840 in the name of M'Rukunga M'Arua and in so doing leave is hereby granted to the land registrar to dispense with the need of the original title.***

3. ***The plaintiff is awarded costs of this suit.***

Dated and delivered at Meru this 21st day of May 2010.

MARY KASANGO
JUDGE