REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Case 17 of 2006

MURAGURI GITHITHO ..... PLAINTIFF

VERSUS

MATHENGE THIONGO ..... DEFENDANT

R U L I N G

Through **Messrs Kagondu & Mukunya Advocates**, **Muraguri Githitho** hereinafter referred to as "*the applicant*" took out this originating summons and sought from **Mathenge Thiongo** hereinafter referred to as "*the respondent*" answers to six questions he had framed to wit:-

1. Whether the Defendant's title to Land Parcel Magutu/Ragati/459 has been extinguished by the Plaintiff's adverse possession thereof for a period of more than 12 years in terms of Section 38 of the limitation of Actions Act.

2. Whether the Plaintiff has acquired title to the said land by his adverse possession thereof for a period of more than 12 years i.e. from 1968 to date.

3. Whether the Plaintiff ought now to be registered as absolute proprietor of the said land.

4. Whether the Land Registrar Nyeri should now be ordered to register the said land in the name of the Plaintiff as absolute proprietor.

5. Whether the defendant should be condemned to pay the cost of this suit.

6. In all circumstances of this case which orders are just and expedient to make.

The Originating Summons was expressed to have been brought pursuant to section 38 of the Limitation of

Actions Act and Order XXVI rule 3D of the Civil Procedure Rules. The grounds upon which the application was brought were that the applicant entered land parcel **Magutu/Ragati /459** hereinafter referred to as "*the suit premises"* in 1968 and had since that date used the same as his own. That he had since carried out extensive developments thereon and his occupation had been open, without force and or interference from the respondent or his servants, agents or any other person claiming through or under him. In total he had occupied the suit premises in excess of 37 years and had therefore acquired title thereto by way of adverse possession. It was therefore meet and just that he be now registered as the absolute proprietor of the suit premises.

In support of the Originating Summons (O.S.) the applicant swore that on 22nd January 1968 he settled on the suit premises comprising 0.48 hectares which premises were registered in the name of **Gatiya Machira**. Since then he had put up a dwelling house and seven houses for rental. On or about 3rd May 1974, **Gatiya Machira** sold the suit premises to the respondent who never asked the applicant to vacate. Indeed he instead occupied land parcel **Magutu/Ragatin/458 (458)** on which he built rental houses as well. By virtue of the applicant's occupation of the suit premises since 1968, he had acquired title over the same. Further by 4th March 1986 a period of 12 years had elapsed and therefore the interest of the respondent in the suit premises had been extinguished. However on or about 4th August 2003 the respondent caused his advocates to give the applicant 30 days Notice to vacate the suit premises, by which time he had already acquired title to the same by adverse possession. He was therefore entitled to be registered as proprietor of the suit premises.

As I understand it, the applicant is saying that he is entitled to be registered as the proprietor of the suit premises in place of the respondent by virtue of adverse possession because he has been in exclusive, continuous and uninterrupted possession of the same for twelve or more years before he commenced this originating summons.

What was the respondent's take on these assertions? Through **Messrs Muthigani & Co. Advocates** then acting for him, he drew and filed a replying affidavit. Where relevant he deponed that he was the registered proprietor of the suit premises having purchased the same from **Gatiya Machira** in 1974 or thereabouts. The applicant on the other hand purchased **458** which abuts the suit premises from one, **Gakuu Ngaha**. The two had litigated over the issues raised in the O.S. before Mathira Land Disputes Tribunal in case number 12 of 2006 and in its award, the tribunal confirmed that the suit premises were his exclusive property. That if the applicant had any claim therefore the same ought to be directed against the proprietor of **458**, **Gakuu Ngatia**. For that reason, the respondent urged the court to dismiss with costs the O.S.

The case for the respondent in a nutshell is that the applicant's claim is misplaced. He should be pursuing **Gakuu Ngatia** from whom he bought his land. That time in terms of adverse possession stopped running in the applicant's favour when the dispute was referred to and arbitrated upon by Mathira Land Disputes the tribunal.

On 6th November 2006, the matter came for directions before **Khamoni J** pursuant to an application dated 12th February 2006 filed by the applicant. The application was by consent granted on terms that the hearing of the O.S. would be by way of viva voce evidence. However before the O.S. could come up for hearing the applicant passed on. That was on 23rd June 2007. Subsequent thereto his wife **Mumbi Murigo** successfully filed an application dated 16th January 2008 for substitution. On 2nd May 2008 the court allowed the application by consent whereupon **Mumbi Murigo** was substituted in the O.S. as the applicant in place of her deceased husband.

The hearing then commenced before me on the 1st April 2009. The substituted applicant testified that she had stayed on the suit premises since 2nd January 1968 when they purchased the same from **Gakuu Ngatia**. She tendered in evidence the original sale agreement between her husband and **Gakuu Ngatia**. The agreement did not however specify the exact piece of land that they were purchasing. She had constructed residential and rental houses on the suit premises. She also cultivates the suit premises and had planted trees and flowers. She also kept pigs on the same. She had never been evicted. However in

2003 they received a Notice of eviction. When they checked with the lands office, they discovered that the suit premises were registered in the respondent's name. Apparently the respondent had bought the suit premises from **Gatuya Machira**. That **Gakuuya Ngatia's** land was **458**. However they had stayed on the suit premises in 1968. The matter was arbitrated upon by land disputes tribunal which declared that 458 belonged to them. By the time the award was made, they had already filed this suit. Accordingly they moved and stayed the proceedings of the award in Karatina court. She prayed that since they had occupied the suit premises for over 36 years they should be registered as proprietors by way of adverse possession. They did not know that they had bought a parcel of land belonging to someone else.

Cross-examined by **Mr. Kahigah**, learned counsel now appearing for the respondent, she stated that the agreement did not refer to any specific land parcel. However it made reference to the fact that the said land was between **Kageni & Gatiiya's** parcels of land. The suit premises initially belonged to **Gatiiya Machira** which he sold to the respondent in 1974. Her husband used to stay at Ragati village until 1998 when he was evicted therefrom by A.I.P.C.E.A. pursuant to a court order. She was however staying on the suit premises. She denied that it was after the eviction aforesaid that they came to the suit premises. The tribunal awarded her husband, land parcel **458**. They were not happy with the award though. They therefore filed this suit. Though the award was made on 23rd March 2006 and this O.S. was filed on 3rd April 2006 she still maintained that they had filed the O.S. before the award was made. She conceded though that they did not disclose in this suit that there had been earlier proceedings in the tribunal.

The applicant called her daughter **Irene Wambui Muraguri** as PW2. She testified that her late father had told her that he bought the suit premises in 1968. They moved into the suit premises and have remained there since. Her evidence thereafter was similar to that of her mother, PW1.

Cross-examined, she stated that she was born in 1966 and in 1968 she was about 2 years old. She did not know the circumstances under which her father bought the land. She maintained however that they had entered the land in 1968 and have never looked back since. Prior to that her father was staying in Ragati village in a plot owned by the church. He left the village in 1968. She denied that her father was forced out of the church plot in 1998. Finally she conceded that she was aware of the tribunal's award.

The last witness called by the applicant was **Hellen Wangui Muriithi**. She had known the applicant for over 30 years. She also knew that the applicant had occupied the suit premises for the same period of time and put up a house and rental premises.

That marked the close of the applicant's case.

The respondent in his evidence stated that he bought the suit premises from **Gatiiya Machira** and planted napier grass. He resided on another parcel of land. The applicant moved into the suit premises after they had been chased from a plot owned by the church. He asked them to vacate and they refused. He then sued them in the land Disputes Tribunal. The verdict of the tribunal was in his favour. They were ordered to vacate the suit premises. The award was subsequently adopted as a judgment of the court. The applicant had been sued by the church for his eviction from its plot and an order to that effect was made. The applicant never entered the suit premises in 1968. He therefore prayed for the dismissal of the O.S. with costs to him.

Cross-examined by **Mr. Mukunya**, learned counsel for the applicant, he stated that he bought the suit premises from **Gatiiya Machira**. The suit premises were thereafter registered in his name. The case in the tribunal was filed in 2004 by which time the applicant had stayed on the suit premises for 30 years. That the award was self-explanatory. The applicant was ordered to vacate the suit premises. The applicant had developed the suit premises. Following those developments, he sued him in the tribunal.

That marked the close of the Respondent's case.

Parties thereafter agreed to tender written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them.

The issues for determination in this O.S. were succinctly set out on the face of the O.S. However, I think that issues 1 and 2 are core to the determination of this dispute. Once a decision on them is made, the other issues will fall into place.

The law on adverse possession is in my view well settled. It is anchored on sections 7, 13 and 38 of the Limitation of Actions Act.

Section 7 provides interlia:-

"**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 is first accrued to some person through whom he claims, to that person".**

Whereas section 13 of the same act is in these terms:

""**(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession and ....."**

Finally section 38 is as follows:-

"**38. (1) where a person claims to have become entitled by adverse possession to land registered under any of he 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 he land or lease in place of the person then registered as proprietor of the land."**

The onus is on the person claiming adverse possession to prove, in the words of **Kneller J** (as he then was) in **Kimani Ruchine v/s Swift**, **Rutherford & Co. Ltd (1980) KLR 10** that:-

"**The plaintiffs have to prove that they have used this land which they claim as of right:** *Nec vi, nec clam, nec precario* (No force, no secrecy, no evasion). **So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration; see Wanyoike Gathure v/s Berverly (1965) EA 514, 519, per Miles J.**

No right of action to recover land accrues unless the lands are in the possession of some person in whose favour the period of limitation can run. The possession is after all adverse possession, so the statute does not begin to operate unless and until the true owner is not in possession of his land. Dispossession and discontinuance must go together; See section 9(1) and 13 of the Limitation of Action Act. So where the use and enjoyment of the land are possible there can be no dispossession if the registered and rightful owner enjoys it. Also, if enjoyment and use are not possible (See generally paragraphs 481 and 482 on pages 251, 252 of 24 Halbury's Laws of England (3rd Edition).

More recently, **Kariuki J** restated the law on the subject in the case of **Omukaisi Abulitsa v/s Albert Abulista, Kakamega HCCC No. 86 of 2005** (UR) in these terms:-

"*Section 38 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya entitles a person to be registered as proprietor instead of the registered proprietor where such person establishes by evidence that he or she has become entitled to be registered on account of his or her occupation of the land, openly and continuously and without interruption and with the knowledge of the registered owner for a period of twelve years or more adversely to the title of the registered owner. In other words, where a person trespasses on the land of another with the knowledge of the latter who does not assert his right to the title to the land by evicting the trespasser or by suing him or her in court for eviction or ejectment but instead lets the trespasser openly occupy the land for a continuous and uninterrupted period of not less than twelve years, the trespasser is entitled to apply under section 38 (supra) to be registered as the proprietor of the land. This is what the doctrine of adverse possession means. Where the period of 12 years is not continuous or is interrupted, the period of adverse possession is broken and must start all over again. But where one trespasser removes another trespasser who is in adverse possession to the owner and continues to occupy the land, the period of adverse possession is not broken and the second trespasser is entitled to combine the period of trespass of the first trespasser to his own. The land claimed by adverse possession need not be all the land comprised in the title; it may be a portion of it providing that the portion claimed is demarcated well enough to be identifiable. And as regards assertion of title, it is not enough for a proprietor of the land to merely write to the trespasser. A letter by the proprietor, even if it be through an advocate or the chief of the area does not amount to assertion of title in law and cannot therefore interrupt the passage of time for the purpose of computing the period of adverse possession. For there to be interruption, the proprietor must evict or eject the trespasser but because eviction is not always possible without breach of peace, institution of suit against the trespasser does interrupt and stop the time from running. For these propositions of law, see* ***Gatimu Kinguru v/s Muya Gathangi (1976) KLR 253, Hosea v/s Njiru (1974) E.A. 526, Sospeter Wanyoike v/s Waithaka Kahiri (1979) KLR 236, Wanje v/s Saikwa (No. 2) (1984) KLR 284, Githu v/s Ndeete (1984) KLR 778, Nguyai v/s Ngunayu (1984) KLR 606, Kisee Waweu v/s Kiu Ranching (1982-88) 1KAR 746****, – "see* ***Amos Weru Murigu v/s Marata Wangari Kambi & District Land Registrar, Nyahururu (NBI HCCC 33 of 2002) ".*** On this I would also add **Kasuve v/s Mwaani Investments Ltd & 4 others (2004) KLR 184**, **Samuel Miki Waweru v/s Jane Njeri Richu (2007) eKLR**.

I need not add anything as far as this elucidation of the law is concerned. The applicant according to his evidence entered the suit premises in or about 22nd January 1968. However his entry it would appear was not hostile or adverse to the owner's title. Rather he entered the same as a purchaser from **Gakuu Ngatia**. That being the case, then his entry to the suit premises was with the permission of the owner and was thus not adverse to the respondent's title to the suit premises. Possession can only be adverse if it is inconsistent with and in denial of the title of the owner in form of want of permission. By claiming therefore that he bought the suit premises, the applicant has failed to prove that he had no colour of right to be on the suit premises other than his occupation and possession by permission of the vendor who in this case was Gakuu Ngatia. In the cases of **Waweru v/s Richu (2007) EALR 403** and **Wanje v/s Saikwa** (supra) it was held that a claim for adverse possession cannot succeed if the person asserting it is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise. This is the situation obtaining herein.

Again it does appear that the suit premises which the applicant bought and thought that they had settled onwas **458** and not **459** that she currently occupies and which is the subject of these proceedings. It is common ground that the land that the applicant bought was **458**. However the vendor **Gakuu Ngatia** whether deliberately or inadvertently showed them **459** on which they settled. If that is the case how can the applicant claim adverse possession for a parcel of land she occupied in the mistaken belief that it was the land she had bought. In other words how can she claim adverse possession against herself then? From the copies of green cards tendered in evidence it is clear that land parcel **Magutu/Ragati/459** was on 7th July 1958 registered in the name of **Gatiiya Machira**. On 3rd May 1974 it was transferred and registered in the name of the respondent. As for **Magutu/Ragati/458**, it was on 7th July 1958 registered in the name of **Gakuu Ngatia**. It remains that way to date. Now according to evidence of the applicant he purchased his land from **Gakuu Ngatia**. **Gakuu Ngatia** was not the registered proprietor of the suit

premises but of **458**. He could not therefore have sold the suit premises to the applicant. He could only have sold his land which is **458**. According to the applicant it is **Gakuu Ngatia** who showed them the suit premises and they occupied it thinking that it was the land they had purchased which was not the case. In those circumstances the applicant cannot claim adverse possession.

Even if we were to accept that their entry to the suit premises was adverse to the interests of the respondent and which I have already held was not, then time started running from 1968 until 1974 when the suit premise were bought by the respondent. Time for purposes of adverse thereafter started running again in her favour afresh from 3rd May 1974. That being the case, the applicant would have been in continuous and uninterrupted occupation of the suit premises for a total of 32 or so years by the time he lodged the O.S. That is way above the threshold of 12 years required for adverse possession to attach. In law therefore she would be perfectly entitled to the orders sought in the Originating Summons.

However has the occupation been continuous and uninterrupted? I do not think so. The respondent asserted his claim to the suit premises when on 4th August 2003 he issued a Notice to the applicant through **Messrs Muthigani & Company Advocates** requiring her to vacate the suit premises. He followed up that Notice with a claim which he lodged in Karatina (Mathira) Land Disputes Tribunal. On 23rd March 2006, the tribunal returned a verdict in terms "**..... We Mathira Land Disputes Tribunal have unanimously agreed that the Plaintiff Mathenge Thiongo to settle in his parcel Magutu/Ragati/459 and Muraguri Githitho to settle in his parcel Magutu/ Ragati/458 .....**" By those very actions, the respondent asserted his claim to the suit premises thereby curtailing and bringing to an end the applicant's claim to the same by way of adverse possession. In other words, time stopped running in favour of the applicant in terms of adverse possession again the moment the respondent took the aforesaid steps to assert his title to the suit premises. It then started running all over again when the applicant refused to vacate the suit premises in obedience to the award. This O.S. was filed on 3rd April 2006, 10 days or so after the award of the land Disputes tribunal had been made known to the parties. That being the case, the threshold of 12 years had not been attained. Time had only run in favour of the applicant for a couple of days as already stated.

In the case of **Githu v/s Ndete** (supra), it was held thus:-

"**.... Time ceases to run under the Limitation of**

Actions Act either when the owner takes or

asserts his right or when his right is admitted

by adverse possessor. Assertion occurs when

the owner takes legal proceedings or makes an

effective entry into the land. Giving notice to

quit cannot be effective assertion of the right

for the purpose of stopping the running of time

under the limitation of Actions Act..."

See also **Omukaisi Abulitsa** (supra).

If I got the applicant's argument right, he is saying that he has been in adverse possession of the suit premises in excess of 12 years as stipulated by law and the respondent's actions of asserting his title to the

suit premises by commencing legal proceedings aforesaid did not affect the right which had already accrued to him as aforesaid. That argument may have held him in good stead had he taken steps by filing this suit ahead of the respondent's actions aforesaid. As it is, the applicant had not taken steps under the limitation of Actions Act to assert his claim to the suit premises by way of adverse possession by filing this suit before the award of the tribunal was made. Instead he only rose to the occasion when the respondent beat him to game. That would have shown that the applicant as person in possession of the suit premises he had taken steps under the Limitation of Actions to assert his claim. Time ceased to run in favour of the applicant the moment the respondent asserted his title to the suit premises before the applicant filed the instant application. Thereafter time for purposes of adverse possession started to run all over again. So that by the time this O.S. was lodged the threshold of 12 years had not been attained. If anything a couple of days had only gone by.

The upshot of the foregoing is that the answers to question numbers 1 and 2 in the O.S. are in the negative with the consequence that the O.S. is dismissed with costs to the respondent.

Dated and delivered at Nyeri this 19th day of November 2009

M. S. A. MAKHANDIA

JUDGE