REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Suit 35 of 2006 (OS)

MARIGI GACHEHA MACHARIA…..
…….PLAINTIFF

VERSUS

MIRIAM WANGUI KIMANI

SAMMY MAINA KIMANI(sued as the administrators of the estate of

JESSE KIMANI NYUKUI…….……...DEFENDANTS

RULING

In this Originating Summons (OS), **MARIGI GACHEHA MACHARIA** (the plaintiff) seeks a declaration under **Sections 37** and **38** of the **Limitation of Actions Act Cap 22** of the **Laws of Kenya** and **Order 37 Rule 3D** of the **Civil Procedure Rules** against **MIRIAM WANGUI KIMANI** and **SAMMY MAINA KIMANI** (the defendants), as the administrators of the estate of **JESSE KIMANI NYUKUI** (the deceased), that he has acquired title to a 5.2 hectares portion of the parcel of land situate in Nyandarua District and known as title number **Nyandarua/Ol'Kalou South/82** (the suit piece of land) by adverse possession and a determination of the following questions:-

1. "Whether the plaintiff is entitled under Section 38 of Limitation of Actions Act Cap 22 Laws of Kenya to be registered as the proprietor of 5.2 Ha of parcel No. Nyandarua/Ol'Kalou Sough/82?

2. Whether the defendant holds 5.2 Ha of parcel No. Nyandarua/Ol'Kalou South/82 in trust for the plaintiff?

3. Whether the defendant should excise from parcel No. Nyandarua/Ol'Kalou South/82 5.2 Ha and transfer the same to the plaintiff, failing which the Deputy Registrar High Court Nakuru be authorized to execute the transfer documents in favour of the plaintiff.

4. Who pays the costs of this suit?"

In both his affidavits in support of the OS and his testimony in court the plaintiff stated that in 1965 he jointly with the deceased applied to the Settlement Fund Trustees for allocation of Plot No. 82 comprising 28 acres in Ol'Kalou South settlement Scheme. They both contributed equally the required deposit of Kshs.5,000/-. As the regulations relating to Settlement Fund Trust pieces of land that time was that a piece of land could only be allocated to one person, they agreed and had the plot registered in the name of the deceased. Thereafter they settled on the suit piece of land until 1970 when the deceased started claiming the sole ownership of it. The matter was taken to the area elders who in 1975 subdivided it into

two equal portions and asked the parties to each settle on one portion. The plaintiff says he has since that time openly and without any interruption occupied, with his family, the 5.2 hectares portion that he now claims.

In 1974 the deceased had filed Nairobi HCCC No. 774 of 1974 and obtained an ex-parte decree to evict the plaintiff. He said that although he unsuccessfully tried to set aside that decree the same has never been executed against him. Later the suit piece of land was registered in the name of the deceased. He produced an extract of the title which confirms that. He also stated that on 8th December 1994 the deceased died and the defendants were subsequently granted letters of administration to his estate in Nyahururu RM Succession Cause No.103 of 2005. He produced a copy of the grant of letters of administration in that respect.

The plaintiff further testified that in 1982 he filed Nyahururu SRMCC No.73 of 1982 and in 1992 he filed Nakuru HCCC No.249 of 1992 against the deceased claiming in both the portion he occupies but those cases have, not todate, been decided. He concluded that having been in open and continuous occupation of that portion for all those years he has acquired title to it by adverse possession and he should therefore be registered as its owner.

The defendants did not call any evidence in opposition to this OS. Instead they relied on their joint affidavit in which they deposed that the deceased while alive used to tell them that the plaintiff's claim that he (the Plaintiff) jointly bought the suit piece of land with him were spurious and had no basis. According to them, and as confirmed by the decision in Nairobi HCCC No. 774 of 1974, the plaintiff has been trespassing on the suit piece of land since 1967. In that case the deceased had sued the plaintiff and obtained an order of eviction but the Plaintiff thwarted attempts to evict him. In the circumstances they concluded that this suit is one of the plaintiff's vain attempts to circumvent the decree in that suit and called for its dismissal.

In his submissions Mr. Juma Mburu, counsel for the defendants, contended that following the decision in the Nairobi case this matter is *res judicata.* He dismissed the submissions on behalf of the plaintiff that the decree in that case has been caught by limitation and is unenforceable. He said he "has never come across such a law."

With respect this submission is misconceived. Mr. Mburu must obviously be unaware of several decisions of this court and the Court of Appeal interpreting the provisions of **Section 4(4)** of the **Limitation of Actions Act Cap 22** of the **Laws of Kenya** which have held that a decree lapses if it is not executed within a period of 12 years. **Section 4(4)** states:-

"**An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due."**

In **Malakwen Arap Maswai Vs Paul Kosgei, Civil Appeal No.230 of 2001**, the Court of Appeal relying on the definition of the term "action" in **Section 3** of the Interpretation and **General Provisions Act Cap 2** of the **Laws of Kenya** and **Section 2** of the **Civil Procedure Act** said that the term "action" "in the context of Section **4(4) of Cap 22** is not to bear a restricted meaning and embraces all kinds of civil proceedings including execution proceedings." **Section 3** of the Interpretation and **General Provisions Act Cap 2** of the **Laws of Kenya** defines the term "action" as meaning:-

"**any civil proceedings in a court and includes any suit as defined in section 2 of the Civil Procedure Act."**

Section 2 of the **Civil Procedure Act** on its part defines the term "action" as meaning:-

"…**all civil proceedings commenced in any manner prescribed"**

In **Public Trustee Vs Wanduru [1984] KLR 314,** Kneller JA stated at page 325 that a suit by a proprietor of land "to keep alive his right to recover possession and even a decree establishing his right without successful execution would not interrupt … adverse possession." In this case, following those decisions, I hold that the deceased and/or the defendants having not successfully executed the decree in the Nairobi case, it does not avail them and the plaintiff's adverse possession was not interrupted by that case.

The other point raised by Mr. Mburu is that this suit is not tenable as the matter, being the same as that in the Nakuru HCCC No. 246 of 1992 and Nyahururu SRMCC No. 73 of 1982, is *sub judice*. With respect that submission has also no basis. *Sub judice* is no bar to a subsequent suit being decided if its hearing is not stayed. At any rate those are not suits by the deceased or the defendants. They were brought by the plaintiff in an attempt to establish his interest over the portion he claims. Even if they had been brought by the deceased or the defendants and even decided in their favour, they would still not avail the defendants unless and until the plaintiff was successfully evicted in execution of the decrees therein.

Mr. Mburu further argued that a claim for adverse possession can only succeed against the registered proprietor of a piece of land. As the land is still registered in the name of the deceased he saw this suit as an exercise in futility. He further argued that the suit against the defendants cannot succeed as the grant to them of letters of administration of the estate of the deceased has not been confirmed.

A legal representative steps in the shoes of a deceased person and can sue or be sued on behalf of the deceased person he represents. I know of no law that until a grant is confirmed legal representatives of the deceased's estate cannot sue or be sued. I am certain that Mr. Mburu is not serious with this submission as, in his practice, he must have obtained limited letters of administration for purposes of filing suits.

The last point raised by Mr. Mburu is that the plaintiff, with the knowledge of the deceased, is and has been in occupation of the suit piece of land as a buyer. In his view, this contradicts the Plaintiff's claim for adverse possession. In support of that submission he cited the case of **Mzee Wanjie & Others Vs Saikwa & Others (1982-88) 1 KLR 462**.

This submission is also misconceived for two reasons. First, adverse possession was not pleaded in that case and when raised on appeal the Court of Appeal dismissed it. Secondly, the claim in this suit is not based on any agreement or land transaction. It is based on the plaintiff's long and uninterrupted occupation (adverse possession).

What is adverse possession? In **Kweyu Vs Omuto [1990] KLR 709 at 716,** the Court of Appeal said:-

"**By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor. (Colour of title is that which is a title in appearance, but not in reality). Adverse possessionis made out by the co-existence of two distinct ingredients; the firs, such a title as will afford colour; and, second, such possession under it as will be adverse to the right of the true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms ("claim or colour of title") mean nothing more than the intention of the disseisor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land for the period required to form the bar is not sufficient. In other words, adverse possession must rest on *de facto* use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant's use, done publicly and notoriously."**

On the uncontroverted evidence of the plaintiff, I am satisfied that he has been in open and uninterrupted possession of the 5.2 hectares portion of the suit piece of land since 1965 or at least since 1975 when the elders subdivided the suit piece of land into two equal portions and asked the parties to each occupy one portion. The Plaintiff's occupation of the portion he claims denied the deceaseds and/or the defendants' right of its ownership and has therefore been adverse.

Section 38 of the **Limitation of Actions Act** states:-

"**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 Acts, 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 the proprietor of the land."**

The land in this suit is registered under the **Registered Land Act** which is one of the Acts referred to in **Section 37** of the **Limitation of Actions Act**.

I agree with the submissions by counsel for the plaintiff and find that the plaintiff is, by virtue of the provisions of this **Section 38** of the **Limitation of Actions Act,** entitled to the orders sought.

For these reasons I answer the issues raised in the OS in the affirmative and grant the plaintiff's prayers as prayed with costs of this suit.

DATED and DELIVERED at Nakuru this 25th day of September 2008.

D. K. MARAGA

JUDGE