



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**Misc Civ. Appli. 508 of 2006**

**BONIFACE K. GITAHU .....PLAINTIFF**

**VERSUS**

**JOHN NDEGWA MACHARIA .....DEFENDANT**

**JUDGMENT**

The title of this judgment is misleading. The suit ought to have been given a number of an ordinary civil suit instead of being registered as a miscellaneous application. The civil registry staff were probably misled by the title on the plaintiff's suit. The plaintiff mistakenly titled his suit as a miscellaneous application instead of a normal civil suit. The plaintiff filed an Originating Summons under the provisions of **Order XXXVI rule 3D** of the **Civil Procedure Rules** and **Section 38 (1)** of the **Limitation of Actions Act** seeking an order of the court to declare that he had acquired, by adverse possession, the title in respect of the parcel of land known as Gilgil/Karunga Block 5/171 (*hereinafter referred to as the suit property*) by virtue of having cultivated and been in actual possession, peacefully, openly and uninterrupted for a period of over twelve (12) years. The plaintiff further prayed for an order of the court seeking to compel the defendant to execute the transfer documents in respect of suit property to his favour or in default thereof the Deputy Registrar of the court be empowered to execute the said transfer documents on behalf of the defendant.

The Originating Summons was supported by the annexed affidavit of Boniface Kariuki Gitahi, the plaintiff. He swore that he was registered owner of the suit property and had been so registered since 30<sup>th</sup> January 1990. He annexed a copy of the title of the suit property as an exhibit in his affidavit. He deponed that he purchased the suit property from Gatundu Farmers' Co-operative Society Ltd which was later renamed Mukinyi Farmers' Co-operative Society Ltd. He deponed that he had balloted for the suit property and was subsequently issued with the title in respect of the same. He deponed that he had been in occupation of the suit property being issued with the title in respect of the same. He swore that the defendant was trying to evict him from the suit property through the District Officer, Gilgil. He sought the protection of the court and craved for its declaration that he was the owner of the suit property by virtue of having been in adverse possession of the same.

The suit was opposed. John Ndegwa Macharia, the defendant, filed a replying affidavit in opposition to the suit. He deponed that the plaintiff's suit was misconceived, bad in law, inept and an abuse of due process of the court. He deponed that the plaintiff had laid claim over the ownership of the suit property since 1990 and had subjected the defendant to numerous litigation. He swore that the subordinate court heard and resolved the dispute vide **Nakuru Principal Magistrate's Court Civil Case No.32 of 1990**. The said suit had been determined in his favour. He urged the court to dismiss the plaintiff's suit with costs.

At the hearing of the suit, the plaintiff called two witnesses: he testified as PW1 while Christopher Kiguru Kiambuthi testified as PW2. It was the plaintiff's case that he had purchased the suit property with the assistance of his late father who was a member of Mukinyi Farmers' Co-operative Society Ltd. The plaintiff produced twelve receipts which he claimed were in respect of the money that was paid on his behalf by his late father. It was his further testimony that during balloting in 1987, he successfully balloted and was allocated parcel No.171. He produced the ballot paper as PExh.2. He was issued with the title deed in respect of the said parcel of land in 1990. Upon being allocated the suit property, it was

the plaintiff's case that he took possession of the suit property and developed it. He also successfully balloted for the adjoining parcel of land i.e. parcel No.170.

The plaintiff reiterated that he was in occupation of the suit property until 1997 when he was evicted from the same by the defendant. The plaintiff insisted that the defendant took occupation of the suit property without any legal right after he was assisted by the local District Officer to obtain possession. He reiterated that the various suits that had been filed in respect of the suit property at the Co-operative Society and before the subordinate court were determined in his favour. He conceded that he had not been in occupation of the suit property since 1997 when he was evicted. He testified that he had developed the suit property by planting trees and citrus fruits (oranges). The plaintiff's testimony was corroborated by PW2 regarding the circumstances under which the suit parcel of land was allocated to the plaintiff by the co-operative society. He however testified that he learnt of the dispute between the plaintiff and the defendant when he settled in Karunga area in 1999. He testified that during that time, he found the defendant already in occupation of the suit land.

The defendant testified as DW1. It was his case that he had instructed the plaintiff to ballot on his behalf in 1987. He recalled that instead of the plaintiff balloting on his behalf, the plaintiff procured the registration of the suit property in his name. He testified that upon discovering what the plaintiff had done, he instituted a suit before the subordinate court which suit was eventually determined in his favour. He testified that upon the conclusion of the suit (*being Nakuru PM's court case No. 32 of 1990*), the title which was issued to the plaintiff in respect of the suit land was ordered cancelled. The court ordered the suit land to be registered in the name of the defendant. The defendant testified that pursuant to the court order, he was issued with the title in respect of the suit land i.e parcel number Gilgil/Karunga Block 5/171 in 1996. The defendant produced a copy of the gazette notice No. 3291 of the 14<sup>th</sup> August, 1992 issued by the Land Registrar Nakuru which enabled him to be issued with a new title after the plaintiff had declined to surrender the title which was earlier erroneously issued to him. The defendant testified that he had taken possession of the suit land in 1997 and has been in occupation of the same since. He denied the assertion by the plaintiff that he (the plaintiff) had developed the suit land by planting trees on the same. He testified that upon taking possession of the land, the same was undeveloped. He urged the court to disallow the plaintiff's case and dismiss the same with costs.

I have carefully considered the evidence adduced by the plaintiff and the defendant in support of their respective cases. The issue for determination by this court is whether the plaintiff established that he is entitled to be declared the owner of the suit parcel of land by virtue of having been in adverse possession of the same. To establish his case, the plaintiff was required to prove, to the required standard of proof on a balance of probabilities, that he had an open and uninterrupted occupation of the suit land for a period of twelve (12) years. He must also establish that his act of occupying the suit land had dispossessed ownership of the same of the registered owner. As was held by the Court of Appeal in **Wanje –vs- Saikwa (No. 2) [1984] KLR 284** at page 288:

*“As stated in **Megarry's Manual of the Laws of Real Property 5<sup>th</sup> Edn p490**:- “If the owner has little present use for the land, much may be done on it by others without demonstrating a possession inconsistent with the owner's title.” In **Littledale –vs- Liverpool College [1900] 1 CL 19** at p21, Lindley MR put it correctly that in order to acquire by the statute of limitations a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it, and, in answering the question “what constitutes dispossession of proprietor?” Bramwell LJ said in **Leigh –vs- Jack (1879) Ex D 264** at p273:- “To defeat a title by dispossessing the former owner ‘acts must be done which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.” See also **Sisto Wambugu –vs- Kamau Njuguna Civil App. No. 10 of 1982 (unreported)**” per Chesoni JA (as he was then).*

In the present suit, it was clear that although the plaintiff claims that he has been in occupation of the suit land from 1978, the reality on the ground is that he was evicted from the suit land in 1997 pursuant to a court order. The defendant took occupation of the suit land in 1997 and has been in possession of the same since. It was evident from the testimonies of the plaintiff and defendant that the two have had a longstanding dispute in respect of the suit land. The genesis of the dispute arose during the balloting of

the various parcels of land by the co-operative society which previously owned the land. According to the defendant, he had in 1987 authorized the plaintiff to pick the ballot on his behalf. Instead of the plaintiff collecting the ballot on his behalf, the plaintiff had the suit land registered in his name. On his part, the plaintiff insisted that he was duly allocated the suit parcel of land after having purchased two shares from the co-operative society.

It was clear from the evidence adduced that the plaintiff took advantage of the trust that was bestowed upon him by the defendant and had himself registered as the owner of the suit property. Upon discovering the plaintiff's duplicitous conduct, the defendant filed suit before the Principal Magistrate's Court. The suit was determined in his favour. The said court ordered the title issued to the plaintiff cancelled and instead a new title be issued to the defendant. It was apparent that the plaintiff did not appeal against the decision of the said subordinate court. When the plaintiff refused to surrender the title that was issued to him to the Land Registrar for cancellation, the Land Registrar duly issued a gazette notice notifying the public that he would cancel the title and issue a new one in the names of the defendant. It was evident that since 19<sup>th</sup> February 1996, the defendant has been the registered owner of the suit property.

Has the plaintiff established to the required standard of proof on a balance probabilities that he is entitled to the prayers sought in this suit? I do not think so. The plaintiff conceded that he is no longer in possession of the suit land. He was evicted from the same in 1997 pursuant to a valid court order. According to the evidence adduced, the plaintiff could have in possession of the suit land from 1978 to 1997. However, once a court of competent jurisdiction declared that he was an illegal occupant of the suit land, his right of claiming that he is in adverse possession of the suit land was extinguished. The plaintiff cannot succeed in his claim of adverse possession since he has been out of occupation of the suit land for a period of over eleven years. Further, since the plaintiff did not challenge the decision of the subordinate court which determined in favour of the defendant the ownership of the suit land, the plaintiff cannot file another suit in another court to validate what was denied to him by a court competent jurisdiction.

The plaintiff has failed to establish his case to the required standard of proof. His suit lacks merit and is hereby dismissed with costs.

DATED at NAKURU this 17<sup>th</sup> day of SEPTEMBER 2008

**L. KIMARU**

**JUDGE**