

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

Civil Case 91 of 1981

JOSEPH MACHARIA MWANGI PLAINTIFF

Versus

JONAH KABIRU DEFENDANT

JUDGMENT

The plaintiff's claim is under originating summons for orders that the court do determine:-

1. *That the plaintiff has acquired by adverse possession title to 3 acres in land parcel no. KONYU/BARICHO/4 registered in the defendant's name.*
2. *That the defendant do subdivide and transfer to the plaintiff the said 3 acres out of land parcel on KONYU/BARICHO/4*

In the defendant's replying affidavit he stated that he purchased the suit property in 1962 and that he purchased the whole parcel from Mwangi Kimani. Since then he had been in sole possession and occupation of that whole parcel of land. As at the time of filing the affidavit in reply dated 3rd September 1991 he said that Mwangi Kimani was still alive and that he was sane contrary to the plaintiff's allegations in the affidavit in support of the originating summons. This cause was heard by way of viva voce evidence. In oral evidence the plaintiff said that the defendant was his uncle in that he was married to his father's sister. He knew the defendant in 1952. Defendant came from Nairobi and began to live with them. That they were brought up together on the suit property. In 1962 the defendant convinced his father Mwangi Kimani to sell to him two acres of the suit land. The defendant however took advantage of his mental illness and got registered as the owner of the whole portion of the suit property being 5.1 acres. Despite that registration however, the defendant cultivated only two acres whilst the plaintiff cultivated three acres. On the plaintiff's portion he had planted orange trees potatoes and maize. The plaintiff said that he did not however build a house on that land but built it on parcel no. KONYU/BARICHO/76 which belonged to his grandfather. That the defendant at one time began to release his animals on his crops on the suit land. As a result the plaintiff in 1986 stopped farming on the suit land. On being cross examined on what portion he was utilizing he said:-

"I knew defendant what he was utilizing was small portion and I the larger part".

He later admitted that he did not know the acreage he was using but that he knew his portion was bigger. PW 2 said that the defendant is his brother. He was related to the plaintiff in that the plaintiff was his cousin. He grew up with the parties in this action in Karidondo village. He got to know that the suit property was registered in the defendant's name when this suit was filed. He said that the total acreage of the suit property is five acres. That the plaintiff was occupying 3 acres of that land. The plaintiff was cultivating that land until he was chased away by the defendant. That the defendant was only occupying two acres. That the defendant had the transaction between him and Mwangi Kimani witnessed by people who were not members of the family. This witness then said that Mwangi Kimani was mentally sick and could therefore not transact the sale. In order to show his mental condition this witness said that Mwangi Kimani had been charged with murder of this witness grandmother but was later acquitted because of his mental illness. He said that Mwangi Kimani was known as "*stuka*" in the village. This witness contrary to what the plaintiff said stated that the plaintiff does not reside at Parcel No. 76. It will be recalled that the plaintiff had said that he had constructed a house on Parcel No. 76. DW 3 is also related to the parties in this action. He said that Mwangi Kimani was mentally sick. That the defendant was supposed to buy a

third of the suit property. He said that he is aware that the plaintiff from 1962 to 1986 had been cultivating 2/3 of the suit property. That on arbitration herein he had found that the plaintiff is entitled to 3 acres and the defendant 2 acres of the suit property. The defendant in evidence said that he bought from Mwangi Kimani the suit property in 1962. They went to the land control board and the whole parcel of land had been transferred to him. On being transferred he got possession. By that time Mwangi Kimani was residing on Parcel No. 76. That the plaintiff is a son of Mwangi Kimani. He denied that the plaintiff had ever utilized the suit property. He had heard Mwangi Kimani being referred to as 'stuka' but said that it was not as a result of his mental status. The defendant said that he had allowed an aunt of his called Rakeli to cultivate a small portion of the suit property. DW 2 was born in the area of the suit property. He was categorical that the plaintiff had never cultivated the suit property. On the suit property the defendant had coffee bushes, bananas, and maize.

The plaintiff's claim according the pleadings of this case is for adverse possession of 3 acres of the suit property. When however the plaintiff gave evidence he stated that he knew that he was using a bigger portion of the suit property whilst the defendant was using the smaller one. He however could not be certain on the acreage he was using. That statement in my view defeated the plaintiff's claim. In the case of KIMANI RUCHINE & ANOTHER vs SWIFT RUTHERFORD CO. LTD & ANOTHER (KLR) the court found as follows:-

"Certainly, where the cultivation of the land is the evidence put forward to support the claim by adverse possession then it should be definite as to area and to time."

The court of appeal in the case of KASUVE vs MWAANI INVESTMENTS LIMITED & OTHERS (2004)1 EA held as follows:-

"Any person who claims to have been entitled to land by adverse possession may apply to the High Court for an order that he be registered as the proprietor of the land. The claimant must prove that he has been exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or after the discontinuation of possession by the owner of his own volition (Wanje v Saikwa (number 2) (1984) KLR 284 followed). The mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such persons's adverse possession (Githu v Ndeete (1984)KLR 776 followed).

..... Further, the portions which the Appellant was claiming were not clearly demarcated. There was no concrete evidence that the appellant was in exclusive adverse possession of any definite and distinct land ascertained to be 40 acres, hence the claim for adverse possession would fail through uncertainty."

It was essential in the plaintiff's claim for him to state in the evidence the exact or definite and distinct land he was claiming out of the five acres of the suit property. Such identification is an integral part of proving a claim for adverse possession. Although in his originating summons plaintiff said he occupied 2 acres, in oral evidence he said that he did not know the exact acres he cultivated but he knew it was bigger than defendant's. The plaintiff's claim for that reason does fail. The plaintiff relied on the tribunal proceedings which had been set aside in this action. Those proceedings in my view cannot assist him in view of what is stated above and also because the testimonies therein were taken under oath. The evidence that his father was mentally sick does not assist him in his claim for adverse possession. The plaintiff's case therefore is hereby dismissed with costs to the defendant.

Dated and delivered this 18th day of December 2008

MARY KASANGO

JUDGE