



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Civil Case 68 of 2005**

**GERALD WARUI MWANIKI.....PLAINTIFF**

*Versus*

**HARRISON MWANGI MANGURU.....DEFENFANT**

**JUDGMENT**

The dispute in this matter relates to the property LAIKIPIA/TIGITHI MATANYA BLOCK 3/1018 (MATANYA CENTRE). The Plaintiff's claim is that he is the owner of that suit property since 1980. That he was issued with a title deed in 1994. That the Defendant started to fence the property claiming ownership. The Plaintiff prayed for a permanent injunction to restrain the Defendant from transferring, leasing or in any way dealing with the property. The Defendant filed a defence and counter claim. He denied that the Plaintiff is the actual owner of that property and that in the contrary it was he who has been in occupation since 1980. That he has constructed a house on that property and has therefore been in uninterrupted occupation now for 25 years. He admits that the property is registered in the Plaintiff's name but that that registration was, according to him, an error.

In his counter claim the Defendant claimed to have acquired title over the suit property by adverse possession. He therefore seeks a declaration to that effect and that the property be registered in his name. In evidence before court the Plaintiff stated that he was allocated the suit property by virtue of the share he had purchased from a land buying company. At the time of that transaction some disagreement occurred between the land buying company and the Government administration. The District Commissioner who intervened declared that the land would be allocated by means of balloting. Through that balloting the Plaintiff said that he picked No. 230. He produced in evidence a card bearing that number. Thereafter the Plaintiff obtained clearance from the land buying company and from the District Officer. That the Plaintiff realized the Defendant was also claiming the same property in 1990. That he presented his case before the District Commissioner's office and the District Commissioner requested both the Plaintiff and the Defendant to produce documents of ownership at his office. That the Defendant failed to present his documents. He said that he took possession of the property on 29<sup>th</sup> July 1994. The Defendant made a report to the Police claiming that the Plaintiff had caused malicious damage to his barbed wire. He, however, stated that he had been in occupation since being allocated with the property to date. In what perhaps was probably a slip of the tongue the Plaintiff said he is seeking from the Defendant damages for not cultivating the property. In being cross- examined he stated that although the property was owned by Matanya Estate Company his ballot had been signed by the District Officer of Central Province who was not a director of that company. On being asked about his evidence of being a shareholder of Matanya Estate Ltd., he said that he had failed to bring the same before court. He denied that he had demolished the Defendant's house on the suit property. Again in what may have been a slip of the tongue, he stated that after the High Court case in Nairobi he had been barred from entering the suit property by an injunction granted thereof. He stated that the Defendant did however, remain on the property. Later he stated that the Defendant obtained possession as a result of that court order.

The Defendant in his evidence stated that he was a shareholder of Matanya Estate Ltd. He produced receipts for his share in that company. He said that he was allocated plot umber 230 in 1980. The property is over three acres. On allocation of that property he constructed a house for his care taker and a cow shed. He fenced the property with barbed wire. He kept on the property 40 sheep and five cows. The defendant exhibited photographs taken of his animals and also photographs of the house on that

property. Those photographs showed the barbed wire and the house had been destroyed. He said that they were destroyed by the Plaintiff. The Plaintiff also came on the suit property and dug the same with a tractor and people that were following the tractor were planting. As a result of that action he filed a case in Nairobi High Court Case No. 3794 of 1994 whereby he obtained interim orders to stop the Plaintiff interfering with his property. The Defendant said that he is in the property to date and has been in exclusive possession since 1980. That Matanya Estate Ltd. had informed its shareholders that if after balloting one was to find on the property allocated to them that there was another person, they were to return that ballot to the company. The Defendant confirmed that he has been in possession now for 27 years on that property.

D.W. 2 confirmed that he is a neighbour of the Defendant on the suit property. He confirmed that the Defendant had animals and that it was he who constructed for the Defendant the caretaker's house. D. W. 3 was the Defendant's herd man. He was employed by the Defendant in 1982. On being employed he found on the property cows and goats and a house. He also found that the property was fenced by barbed wire. Whilst he was on that property in the year 2004 the Plaintiff came on the property, demolished the fence and the house. He confirmed that he is still employed by the Defendant. D.W. 4 described himself as a freelance photographer. He confirmed that he had taken photographs of the Defendant's property. These were the photographs that were exhibited by the Defendant.

The Plaintiff has proved that he is the registered owner of the suit property and in that regard relied on the title issued to him which title can be found in his affidavit in support of an interlocutory injunction. The Defendant on his part on the basis of his evidence and his witnesses evidence has proved on a balance of probability that he was in an uninterrupted occupation of the property since 1980. That being the case the Defendant has proved that he has acquired a title by adverse possession of the suit property. In the case of **WANJE V SAIKWA (No 2 [1984] KLR** the Court of Appeal held as follows:

*“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.*

*What constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.”*

The occupation by the Defendant of the suit property cannot be said to have been with the permission of the Plaintiff. There is clear evidence that the Plaintiff in an attempt to remove the Defendant from the suit property destroyed the house and the fence. Accordingly the Defendant has made out a case of acquiring the title by adverse possession.

Accordingly the judgment of this court is that this court does hereby declare that the Defendant has acquired title over the property **LAIKIPIA/TIGITHI MATANYA BLOCK 3/1018 (MATANYA CENTRE)** by adverse possession. The court does hereby order that that property be forthwith registered in the name of the Defendant and the Plaintiff do sign all the necessary documents to enable that transfer to take place. In default of the Plaintiff signing all such necessary documents, the Deputy Registrar of this court is hereby authorized to sign the same. The Defendant is awarded the costs of this suit.

**MARY KASANGO**

JUDGE

*Dated and delivered at Nyeri this 16<sup>th</sup> day of November 2007.*

**By: M. S. A. MAKHANDIA**

JUDGE