

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Civil Case 50 of 2004

JAMES GITHUI KARURIPLAINTIFF

Versus

WERU KINYUA *alias* JAMES WERU KINYUADEFENDANT

J U D G M E N T

By originating summons dated 19th May, 2004 and filed in court on 27th May, 2004, the applicant, **James Githui Karuri** has sued the respondent, **Weru Kinyua *alias* James Weru Kinyua** claiming to have acquired title to land parcel **No.Ruguru/Kiamariga/551** by way of adverse possession. In support of the originating summons, the applicant swore an affidavit which in the main he deponed that the respondent was the registered owner of land parcel number **Ruguru/Kiamariga/551**. That since 1967, however, the applicant has been in occupation of the subject piece of land, the respondent having left it to him in order to settle in Kitale. That he has since extensively developed the parcel of land by planting coffee trees and tea bushes. Finally the applicant depones that for more than 36 years he has occupied the parcel of land peacefully uninterrupted and continuously. Accordingly he deems it that the respondent's title to the said land has been extinguished by his continued and uninterrupted occupation of the same. He now prays that the title to the suit land should be vested in him having acquired the same by way of adverse possession.

When the application was served on the respondent, he did not at all bother to oppose the same by either filing any grounds of opposition or indeed a replying affidavit.

On the 2nd March, 2007, the applicant obtained a default judgment against the respondent, the respondent having failed to enter appearance or file defence within the stipulated period. The matter was then listed before me for hearing by way of formal proof.

The applicant in his oral testimony in support of the originating summons testified that when the respondent left to settle in Kitale in 1967, he left his land **Ruguru/Kiamariga/551** measuring 1.4 acres or thereabout to the applicant on the understanding that if he did not come back then the subject land should become the applicant's. It has been 40 years since the respondent has been gone. He has never come back to reclaim his land. Accordingly and in terms of the agreement between the applicant and the respondent he wishes to have the land formally transferred to him. He has been to Kitale severally to have the respondent transfer the land to him albeit unsuccessfully. No other person has laid any claim to the land which he has developed by planting coffee as well as tea bushes, trees and napier grass.

Section 38 of the Limitation of Actions Act allows a person who claims to have become entitled by adverse possession to land registered under the *Registered Land Act* to apply to the High Court for an order that he be registered as the proprietor of the land in place of the person then registered as the proprietor of the land. This is what the applicant has done in the circumstances of this case. Accordingly this application is properly before me. However before the respondent can bring his action within the ambit and or purview of this provision of the law, his entry to the suit premises must be adverse to the interest of the owner of the parcel of land. He must also remain on the piece of land continuously and uninterrupted albeit adversely for a period in excess of 12 years. From the testimony of the respondent, it would appear that the applicant's entry on the suit premises was not adverse at all as the respondent gave him permission and or consent to enter the land as he was leaving for Kitale. It was understood that in the event that he did not come back then the subject piece of land would revert to the applicant. So when then did the applicant's possession become adverse. Based on the unchallenged and uncontroverted

evidence of the applicant, I would imagine that the occupation of the land by the applicant became adverse the moment the applicant went looking for the respondent in Kitale to demand that the land be transferred and registered in his name. This was over 30 years ago. Accordingly it would appear therefore that the applicant has been in continuous and uninterrupted occupation of the suit premises adversely for a period in excess of 12 years. He is therefore entitled to come to this court and lay a claim that he has acquired title to the parcel of land **No.Ruguru/Kiamariga/551** by way of adverse possession. This being my view of the matter, I would answer the two questions framed in the originating summons for the determination of this court in the positive. That is to say that the plaintiff is now entitled to the suit land by virtue of the fact that he has acquired it by way of adverse possession and secondly, that the respondent's title to the suit land has been extinguished because of the applicant's long and uninterrupted stay therein. The applicant should now be registered as the proprietor of land parcel number **Ruguru/Kiamariga/551**. I make no order as to costs. Orders accordingly.

Dated and delivered at Nyeri this 5th day of November 2007.

M.S.A. MAKHANDIA

JUDGE