



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 975 OF 2001

**WAMUITA KAMAU ..... PLAINTIFF**

**VERSUS**

**MILKA WANJIRU MATHU ..... DEFENDANT**

**JUDGMENT**

By Originating Summons filed in court on 14th June 2001, the applicant Wamuita Kamau sought various orders from the court, as against Milka Wanjiru Mathu, the respondent. These were in respect of land Reference No. L.R Githunguri/Githiga/T370, which the plaintiff claimed she had acquired title by adverse possession. She therefore wanted to be registered as the owner.

The respondent's replying affidavit gave the history of this land and stated at para 23,

**“That I was registered as the owner of the land parcel in question on 16th December 1981 after the death of my husband as stated in para 7 of my affidavit and the plaintiff cannot therefore count time from any date prior to 16th February 1981 as I was not the registered owner of the suit premises but my late husband”.**

On the day of the hearing of the originating summons, the applicant gave evidence on oath to the effect that her late husband Kamau Karanja bought the suit premises from one Kariuki Mathu, for Kshs.150/= during demarcation. That unfortunately, Kariuki died before the land was registered, but they were already living on the land, which was vacant. That the land then became registered in the Kariuki Mathu's name, and the respondent Milka, filed succession to the estate of Kariuki Mathu, and got the land registered in her name, but she never moved into the land to date. The applicant recalled that the respondent once called her to Kiambu court and asked her to move out, but she refused and she said she had lived on the land for many years, nearly 50 years.

The applicant placed a caution on title to the land. She is now very old, about 77 years old according to her identity card, which shows that she was born in 1928. Several questions were put to the plaintiff by counsel for the respondent to which she replied that it was her husband who purchased the land and then died about 5 years later. The applicant was the administrator of her late husband's estate, but she did not obtain any Grant from court. She just came to claim the land which she believes belonged to her husband. She recalled that her family moved into the land in 1959 and she has lived on the land to date.

The respondent's counsel sought an adjournment to enable him to get the respondent, who was not in court. I allowed the application and granted the adjournment for one week.

When the hearing resumed after one week, counsel for the respondent addressed court saying that he had not found his client. He opted to close his case as he said he had no evidence to offer.

The fact of the plaintiff's family moving into the land immediately upon purchase, and remaining in possession to date was not challenged. Further, evidence not challenged was that the defendant got herself registered on the land upon the death of her brother, the original owner of the land. This was upon succession. A copy of the green card shows this. Both advocates agreed to file written submissions. Counsel for the applicant (plaintiff), repeated more or less what the plaintiff said in her oral evidence, i.e. the purchase of the land by the plaintiff's late husband who unfortunately died before the land was transferred and registered in his name, that she got registered in February 1979. The plaintiff placed a caution on the title a year after that in September 1980.

According to the plaintiff, her family moved into the suit premises in 1959, a year after her late husband had purchased it. The family has lived there to date. The evidence by way of the replying affidavit shows that some civil suits have been filed by the parties herein over this land.

As already stated the defendant/respondent was registered as the proprietor on 16.12.1981; this followed an order by the D.M's Court in Land Succession Cause no. 44/80. The plaintiff challenged this. The replying affidavit shows the litigations which followed until 1984, when the defendant got an order to evict the plaintiff from the suit premises. That order was not executed by the defendant, as the plaintiff continued living in the suit premises uninterrupted.

The defendant went to back to court in the year 2001 in an attempt to execute that order, and the Principal Magistrate's Court at Kiambu said, "That the time for execution of the decree herein issued in 1984 has lapsed and the decree expired and no execution can now issue". The application was therefore dismissed with costs. From 1984, when the defendant obtained a court order in Kiambu Court to evict the plaintiff, to March, 2001, when the same court dismissed her application for execution, declaring that the time for execution had "lapsed", was a period of 17 years! The plaintiff filed this Originating Summons on 14.6.2001, after the Kiambu court had refused to effect execution of the order for evicting the defendant from the suit premises.

**In the submissions filed on behalf of the defendant/respondent, counsel contended that the claim for "adverse possession" is time barred, by virtue of Section 7 of the Limitation act Cap 22, Laws of Kenya, as the defendant became the registered proprietor in 1971, and thereafter the plaintiff had 12 years to sue, which period ended in 1983. That the plaintiff was therefore time barred by limitation when she filed the suit in 2001, for adverse possession.**

**With respect to Counsel for the defendant, his client's replying affidavit details the litigation which went on between these 2 parties, from 1981 until the defendant got an order to evict the plaintiff in 1984.**

**I find that these were interferences with the plaintiff's occupation of the suit premises and cannot therefore be counted towards the limitation period. I find further that the period for adverse possession started to run in 1984, when the court cases were over and a final order for eviction issued against the plaintiff.**

Another point which came out in the written submissions is the matter of the plaintiff not having taken out Letters of Administration to the estate of her late husband who was the purchaser of the suit premises and the only person who could have sued for title to the land. Here again I turn to the replying affidavit sworn by Milka Wanjiru Mathu, the defendant. Paragraphs 8,9,10,11,12,13 and 14 of the same affidavit show the litigation by the filing of various suits by both the plaintiff and the defendant. At no time in that affidavit does the defendant say that she could not deal with the plaintiff because she was not the legal representative of her late husband who purchased the land. The defendant successfully defended the appeal which the plaintiff filed against the Magistrate's order to register her (the defendant) as the owner of the land. Soon after that in July 1990, the defendant filed a suit for eviction against the plaintiff. This too was successful because the orders were granted.

I find therefore that the defendant by conduct accepted the plaintiff's position in which she was suing and being sued – i.e. as the wife of the purchaser. To bring this point so late in the suit by way of submissions

is in my view an afterthought! Besides, the defendant herself did not appear in court for the hearing to contest the matter of the plaintiff not having obtained letters of administration to the estate of her late husband who was the purchaser of the suit premises. I have considered the plaintiff's evidence in this suit, evidence which was not challenged as the defendant failed to appear in court even after I had granted an adjournment for that purpose.

I have also read and considered the originating summons itself, the supporting affidavit and the replying affidavit. The written submissions by both learned counsel which form part of the records of this case, have also been considered. All in all I find that from 1984, when the court ordered the plaintiff's eviction from the suit premises, to 2001, when she (plaintiff) filed a suit to get title by adverse possession, she enjoyed open and exclusive use of the suit premises with no further interference by the defendant. This was a period of 16 years, which according to my considered opinion, entitles her to the declaration sought by her in the originating summons, that she is,

**“entitled to be registered as proprietor of the whole land Ref Number GITHUNGURI/GITHIGA T.370 in place of the currently registered owner MILKA WANJIRU MATHU.....”**

**I formally grant the plaintiff the above declaration.**

**Secondly, I proceed to issue an order directing the relevant Land Registrar, to register GITHUNGURI/GITHIGA/T.370, in place of the defendant MILKA WANJIRU MATHU, and her successors in title thereof.**

**Finally I award the plaintiff the costs of the originating summons.**

**Dated at Nairobi this 28th day of July, 2005.**

**JOYCE ALUOCH**  
JUDGE