



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT 892 OF 2003 (0S)**

IN THE MATTER OF LAND PARCEL NO. LOC.17/SABASABA/T.86

AND

**IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS
ACT (CAP.22)**

MARGARET WANJIRU GUCHU PLAINTIFF

VERSUS

JAMES KAMUNDU MUIRURI DEFENDANT

JUDGMENT

By originating summons brought under Order XXXVI rule 3 D of the Civil Procedure Rules and filed on 25.08.03 the plaintiff prayed for orders that:-

- a) The said plaintiff be declared to have become entitled by adverse possession of over 12 years to ALL THAT piece or parcel of land registered under the Registered Land Act (Cap. 300) as L.R. No. LOC.17 SABASABA/T.86 and situate in the Murang'a District.**
- b) The said plaintiff be registered as the sole proprietor of the said land parcel LOC.17/SABASABA/T.86 in place of the defendant who is the present registered owner of the said land.**
- c) The Deputy Registrar of this honourable court be authorized to execute the transfer and other necessary forms in favour of the plaintiff.**
- d) The costs of this application be provided for.**

The plaintiff's claim is grounded on her affidavit sworn on 22.08.03 whose essence is as under. That the plot in question belonged to the plaintiff's father (now deceased) since the time of land consolidation and that the deceased fenced it and allowed the plaintiff jointly with her brother Joseph Gitau to cultivate it. That in 1986 the plaintiff's late father gave the land in question to the plaintiff who went into possession thereof, has built a house for herself plus another house for her sons thereon and has there and cultivated the land openly without interruption. It is the plaintiff's further evidence that her father died in 1990 before he could arrange for transfer of the land in her favour. Finally, the plaintiff maintains that the defendant knows about the plaintiff's user of the land all these years, that the defendant was under no disability but did not resist the plaintiff's user of the land and that the defendant's title was extinguished after 12 years, from 1986, of the plaintiff's adverse and uninterrupted possession of the land. It is the plaintiff's case that the defendant's title to the land was extinguished in or about 1998.

The defendant's rejoinder is basically that he has been the registered owner of the suit land since 1982. That the originating summons is incompetent and not properly before the court in that the plaintiff failed to annex a certified abstract of title to the suit land in support of her application.

It is the defendant's evidence that he purchased the land from one Francis Ndung'u Kamau who was the registered proprietor but that the said seller showed the defendant a different plot on the ground, i.e. land parcel No. **LOC.17/SABA/SABA/T.530 (T.530)** which the defendant then occupied in the belief that it was the suit land, parcel No. **LOC.17/SABASABA/T.86 (T.86)**. The defendant has added that in 1998 one Mwaura Kinuthia who was the registered owner of T.530 went to him (defendant) and informed him that he was wrongfully in occupation of his plot and it was then that the defendant discovered he was not occupying T.86 of which he was the registered owner and that it was then that he visited T.86 and asked the plaintiff to vacate T.86. It is the defendant's further evidence that prior to 1998 he did not know the physical location of T.86, so he did not know that the plaintiff was using T.86. the defendant maintains that sine he had no knowledge of the plaintiff's user of T.86, the plaintiff could not have been in adverse possession of T.86.

The defendant alluded to proceedings he initiated in 1999 before the Maragua District Land Disputes Tribunal seeking to have the plaintiff evicted; that the proceedings before the Land Disputes Tribunal were interrupted by a criminal case brought against him (defendant) regarding the same land T.86 at the instance of the plaintiff; and that the defendant was acquitted of the criminal charge. The defendant maintains that by his filing of the proceedings before the Land Disputes Tribunal in 1999, he was asserting his rights to the subject land as a registered proprietor and that this had the effect of interrupting the plaintiff's occupation or possession of the suit land since the plaintiff filed the present suit more than two years later, i.e. in 2003.

The defendant maintains that the plaintiff's late father had no proprietary rights over the suit land to transfer to the plaintiff and that the plaintiff is not entitled to the declaration and orders sought.

In a further affidavit, the plaintiff clarified that she could not obtain an abstract of title of the suit land from Muranga Land Registry because the Land Registrar has been missing and that this was acknowledged by the Muranga Land Registrar in his evidence during the criminal proceedings alluded to by the defendant. I pause here to observe that the proceedings in the criminal case, namely, Kigumo Resident Magistrate's Court Criminal Case No.326 of 2002, Republic -vs- James Kamundu Muiruri, which are part of the court record in the present case, do indeed show that the Land Registrar, Muranga acknowledged that the register in question was missing.

During hearing of the present suit the plaintiff was represented by learned counsel, Mrs. E. W. Gichomba while the defendant was represented by learned counsel, Mr. W. Gichuki. In essence the plaintiff's counsel poured cold water on the defendant's claim that he remained unaware of the plaintiff's physical occupation of the suit land (T.86) for the period the plaintiff remained in physical occupation of the land, i.e. 1986 up to 1998 when he (defendant) claims to have gone to tell the plaintiff to vacate, followed by the said defendant's initiation of proceedings in the Muranga Land Disputes Tribunal in 1999. Plaintiff's counsel drew attention to a map annexed as "MWGA" to the plaintiff's further affidavit sworn on 06.03.04 to make the point that the distance between the suit land, plot T.86 and T.530 is vast and that there is no excuse for the defendant's claim that he was occupying plot T.530 far away from plot T.86 unknowingly for all the years in question. Regarding the defendant's claim to have filed proceedings in the Land Disputes Tribunal in 1999 in an attempt to recover the suit land, plaintiff's counsel submitted that the said proceedings were statute-barred by virtue of section 7 of the Limitation of Actions Act (Cap.22), having been brought after 12 years from 1986 when the plaintiff went into occupation and possession of the suit land.

Plaintiff's counsel further submitted that the defendant's claim to have visited the plaintiff in 1998 to ask her to vacate the suit land was not sufficient for purposes of asserting his rights over the land. Plaintiff's counsel relied on Githu -vs- Ndeete [1984] KLR 776 in which the Kenya Court of Appeal held that giving notice to quit cannot be effective assertion of right for purposes of stopping the running of time under the Limitation of Actions Act. Plaintiff's counsel maintains that there was no interruption of the plaintiff's

possession of the suit land for the duration provided for in the Limitation of Actions Act and urged the court to grant the plaintiff's application.

For his part, defendant's counsel opposed the application. He said the basic facts as they emerge from the pleadings are not in dispute and that their interpretation and how the law relates to them is the issue. Defendant's counsel contended that the defendant bought plot T.86 but was wrongfully put in physical occupation of plot T.530 by the seller which he continued to occupy until 1998 believing it to be plot T.86. Counsel repeated the defendant's claim that it was not until the owner of plot T.530 told the defendant in 1998 that the defendant was on the wrong land that the defendant investigated about the physical location of plot T.86 and later filed proceedings in the Land disputes Tribunal in 1999 in an attempt to recover plot T.86 from the plaintiff.

Defendant's counsel submitted that mere possession by the plaintiff of the suit land for 12 years or over was not enough to amount to adverse possession and that such possession could not be adverse until the defendant knew of it. Counsel added that the defendant did not know of plaintiff's possession of the suit land until 1998 and that 12 years had not elapsed. He referred to the case of *Kimani Ruchine & Another - vs- Swift Rutherford Co. Ltd & Another* [1977] KLR 10 and submitted that the plaintiff's possession was interrupted in 1999 by the filing by the defendant of proceedings in the Land Disputes Tribunal. Defendant's counsel also submitted with regard to the map annexed to the plaintiff's further affidavit that plot numbers are not visible on the ground. Counsel also submitted that even if the court assumes that the plaintiff took possession of the suit land in 1986, she became the defendant's tenant-at-will in 1998 when the defendant became aware of her occupation of the suit land by virtue of section 12 of the Limitation of Actions Act; that the plaintiff's possession could not have been adverse for the first 12 months; and that since no date is given for the occupation, the court should assume the plaintiff's possession to have started on 31.12.86 which would mean that by 31.12.97 the plaintiff was the defendant's tenant-at-will. As I understand it, the defendants' case is that 12 years had not elapsed by the time the defendant filed his proceedings in the Land Disputes Tribunal on 25.08.99. Defendant's counsel urged this court to dismiss the plaintiff's application with costs.

In reply, plaintiff's counsel submitted that there was no basis for the defendant's alleged belief that he owned plot T.530 instead of plot T.86. Counsel pointed out that the person who allegedly sold the suit land to the defendant was not called to give evidence. It was plaintiff's counsel's contention that the defendant had the means to establish he owned plot T.86, e.g. he could have purchased the area map or visit the Lands Office, but did not bother to do so. Counsel submitted that the defendant's mistake was not excusable and that he should not be believed when he claims not to have known about the plaintiff's occupation of the suit land as he (defendant) maintains.

I have given due consideration to the affidavit evidence tendered by the parties as well as the submissions made by their advocates.

Order XXXVI rule 3D of the Civil Procedure Rules under which the originating summons herein was brought provides that the summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed. Defendant's counsel made an issue of the absence of a certified extract of the title to the land in question. The plaintiff explained by affidavit that she could not have obtained a certified extract of the title as the Land Register was missing. This fact was acknowledged by the Land Registrar, Murang'a in his evidence in Kigumo Resident Magistrate's Court Criminal Case No.326 of 2002, Republic - vs - James Kamundu Muiruri to which both advocates referred this court. The plaintiff annexed to her originating summons only a photocopy of Land Certificate indicating that the suit land was allocated to James Kamundu Muiruri, defendant herein on 09.01.82. I hold that in absence of the requisite Land Register, the plaintiff's explanation that she could not obtain a certified extract of the title to the land is plausible and that absence of such extract does not contravene Order XXXVI rule 3D(2). The originating summons is, therefore, competently before this court.

I accept the plaintiff's evidence that the suit land was given to her in 1986 by her late father who was previously in possession and that she has been in occupation thereof and has utilized the land since as stated by her.

The map of Sabasaba Township annexed as “MWGA” to the plaintiff’s further affidavit sworn on 06.12.04 shows that plot T.530, which the defendant says he was made to believe to be plot T.86 by Francis Ndungu Kamau the alleged seller of plot T.86 to the said defendant, is 8 plots away from plot T.86. I find it incomprehensible that the said Francis Ndungu Kamau would sell plot T.86 to the defendant but physically show him plot T.530 some 8 plots away (if you take a straight light between the two plots). The alleged seller, Francis Ndungu Kamau should have been made to give evidence on this matter but the defendant did not deem it fit to do so. I draw adverse inference against the defendant for the omission. I find no valid reason for the defendant’s claim of ignorance about the plaintiff’s occupation of the suit land for the years in question. Kimai Ruchine’s case (supra) which defendant’s counsel sought to rely on in support of the defendant’s claim was decided by the High Court (Kneller, J) and is based on different circumstances from the preset case. It is distinguishable. In my respectful view, the relevant of the authorities cited in the present case is Githu’s case (supra), which happens to have been decided by the Court of Appeal. I hold that even if the defendant went to ask the plaintiff in 1998 to vacate plot T.86, that did not amount to asserting his (defendant’s) right for purposes of stopping the running of time under the Limitation of Actions Act. The defendant’s act of filing proceedings in the Maragua Land Disputes Tribunal in 1999 concerning ownership of the suit land was clearly after 12 years of the plaintiff’s occupation and possession of the land. Such proceedings were time/statute-barred.

I find that the plaintiff, by virtue of her occupation and utilization of the suit land for 12 years without interruption from the defendant, was in adverse possession of the suit land and has become entitled by adverse possession to the said land as stipulated by section 38 of the Limitation of Actions Act. Accordingly, I grant the declaration and orders sought at prayers (a), (b) and (c) in the originating summons filed on 25.08.03. Under prayer (d) I award the costs of the originating summons to the plaintiff.

Orders accordingly.

Delivered at Nairobi this 7th day of October, 2005.

B.P KUBO

JUDGE