



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC CASE NO. 19 OF 2019**

**JOSEPH WERU NGURE.....PLAINTIFF**

**-VERSUS-**

**MAINA KIGERA.....DEFENDANT**

**JUDGEMENT**

1. By an Originating Summons dated 2<sup>nd</sup> July 2019, the Plaintiff herein who claims to be entitled to be registered as the sole absolute proprietor of Title No. LR Nyeri/Ndathi/571 by **adverse possession** seeks for determination of the following questions:

i. Has the Defendant's title to LR Nyeri/Ndathi/571 **been extinguished by the Plaintiff's continuous and uninterrupted occupation of the same for more than 12 years?**

ii. **Has the title to LR Nyeri/Ndathi/571 been vested on the Plaintiff by virtue of that occupation?**

iii. **Should the Honorable Court be pleased to determine the above two declarations?**

iv. **Should the Defendant be ordered to pay costs of the suit?**

2. The Originating Summons is premised on the grounds stated on the face of it as well as on the Supporting *Affidavit* sworn on the 2<sup>nd</sup> July 2019 by Joseph Weru Ngure, the Plaintiff herein.

3. Vide an application dated and filed on the 18<sup>th</sup> September 2019, the Plaintiff sought leave to serve his pleadings upon the Defendant through substituted service by advertisement in the local newspaper of National circulation since the Defendant's whereabouts was unknown to him.

4. Leave was granted on the 17<sup>th</sup> October 2019 wherein the advertisement was placed in the Daily Nation Newspaper of 31<sup>st</sup> October 2019.

5. There having been no response to the advertisement notice by the Defendant, to enter appearance, judgment was entered against him on the 4<sup>th</sup> March 2019 and Counsel for the Plaintiff then took directions to the effect that the Originating Summons be treated as the Plaintiff's plaint whereas the supporting affidavit therein be treated as his statements. The matter was set down for formal proof through viva voce hearing.

**Plaintiff's case.**

6. The Plaintiff while adopting his statement dated 2<sup>nd</sup> July, 2019 testified that he was a businessman in Nyeri County and that the suit land No. Nyeri Ndathi/571 was registered to somebody by name of Maina Kigera. That initially back in 1989, when he was a business person buying cattle and sheep in Chehe Sub County which is located within Mathira County, they used to graze the animals in the forest.

7. That in 1989 they were evicted by the Government from the forest wherein he had gone to Ndathi to visit his cousin by the name Gregory Mwai Muberi wherein he had requested him to keep for him his sheep and cows on his piece of land within Ndathi where the Government had settled him.

8. That together they used graze their animals during which period, the people who had been allocated land by the Government within Ndathi started developing and cultivating their land and the grazing area there reduced.

9. That in the year 1991, he had noticed a piece of land which had been abandoned and was bushy wherein he had then proceeded to put up a shed there and had started keeping his animals there. That after nobody claimed the piece of land which measured 2½ acre, he had started developing it with the purpose of negotiating with whoever would have claimed it.

10. He had proceeded to plant some trees and started cultivating on the land and as time went by, he built a temporally structure, and continued planting trees on the boarder before fencing the same off. He also installed piped water on the land and started full time farming.

11. That he had tried looking for the owner of the land wherein he had gone to the Ndathi scheme wherein he had found that the land was registered to Maina Kigera the Defendant herein. He then went to the office of the registrar of persons to get the particulars of Maina Kigera after which he had made all efforts including visiting the sub-chief, Nyumba Kumi to look for Maina Kigera but failed to trace him. That since then he had been in occupation of the land from 1991 wherein nobody had ever sought to evict him from thereon.

12. He produced a certificate of search dated the 7<sup>th</sup> November, 2018 as Plaintiff exhibit 1 and sought that the court grants him the orders sought

13. The next witness PW 2, Moses Mwai Mubiri, testified that he was a cousin to the Plaintiff and that he was aware of the suit land No. Nyeri/Ndathi/571, land upon which both of them used to graze their cattle in the year 1991. That his own land was No. 133/Nyeri/Ndathi.

14. He confirmed the evidence by PW1 that after sometime, they had built a shed on the suit land so that the animals could stay and graze there wherein later they had built a temporal house for the herd boy. Subsequently they had started cultivating on the land. That at first they had started cultivating on ½ acre, then proceeded to cultivate another ½ acre making it 1 acre wherein they had left the rest of the land for grazing the animals.

15. He also confirmed that the total acreage of the land was 2 ½ acres which they had utilized and that nobody had lay claim to it.

16. That it was at a point when the Plaintiff had thought of subdividing the land for his children that he has sought from the Land Registry a search wherein they had discovered that it had been registered to one Maina Kigera.

17. That he had gone to Magutu location in Mathira West to look for Maina Kigera as directed by the Chief, but they failed to trace him. Next they had gone to Konyo location with Charles Ndirangu, the court process server wherein they had found a person called Maina Kigera but when they went to his house they had found his brother who was younger and who had informed them that Maina Kigera had died during the emergency. That the Maina who was there was a son of the Maina who was not born at the time the land was being allocated. They concluded that he was not the person they were looking for.

18. His testimony was further that from the police (Registrar of persons) the Maina Kigera was about 80 years whilst the Maina Kigera they had found in the village was 25 years. That although they had similar names yet he had not been the proprietor of the land.

19. He confirmed that he lived on the suit land as he helped the Plaintiff to look after it and his animals and further that there was no road separating the suit land and his own land.

20. The Plaintiff closed its case and filed their written submissions dated the 19<sup>th</sup> October 2020 in which they submitted that although the suit land No. Nyeri Ndathi/571 was registered to somebody by name of Maina Kigera, evidence adduced in court was that sometime in 1991 the Plaintiff had entered upon the same and proceeded to graze his animals there, wherein he had then taken possession of the whole land and had started developing it by fencing it, planting trees, building a semi-permanent house, and installing piped water thereon. That the Plaintiff had thus lived on the suit land for 20 years uninterrupted and had therefore acquired prescriptive rights over it. That efforts to trace the proprietor had been futile.

21. The Plaintiff relied on the applicable law as anchored under Section 7, 17, 37 and 38 of the Limitation of Actions Act as well as on the decided case in **Celine Muthoni Kithinji vs Safiya Binti Swaleh [2018] eKLR** to submit that he had been in open, continuous, notorious and uninterrupted occupation of the suit land for a period of not less than 12 years. That he had also asserted a hostile title and dispossessed the Defendant of the suit land by engaging in acts that were inconsistent with the Defendant's enjoyment of the soil when he had planted trees, cultivated on the land and had been in exclusive possession for over 20 years.

22. That he had proved his case on a balance of probability as against the Defendant for adverse possession and therefore his suit should be allowed with costs to the Defendant.

#### **Analyses and Determination.**

23. This being a matter where the Plaintiff sought for orders that he be registered as proprietor of parcel LR No. No. Nyeri/Ndathi/571, having acquired the title by virtue of the doctrine of adverse possession, the court is mindful of the legal attribution to the doctrine of adverse possession in Kenya which is embodied in Section 7 of the Limitation of Actions Act, (Cap 22) in these terms:

24. Section 7 of the **Limitation of Actions Act** provides as follows:

**“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him...”**

25. Section 13 of the Limitation of Actions Act aforesaid further provides that:

**A right of action to recover land does not accrue unless the land is in the possession of some person in whose favor the period of limitation can run (which possession is in this Act referred to as Adverse possession) and, where under sections 9, 10, 11 and 12 (of the Act) a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.**

26. Sections 37 and 38 of the Limitation of Actions Act stipulate that if the land is registered under one of the registration Acts, then the title is not extinguished but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in him.

27. Section 37 of the Limitation of Actions Act provides that:

**Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, to land or easement or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”**

28. In terms of *Section 38 of the Limitation of Actions Act*, where a person claims to have become entitled by adverse possession to land, (s)he must apply to the High Court for an order that (s)he be registered as the new proprietor of the land in place of the registered owner. The elaborate procedure of moving the High Court is provided for in *Order 37 Rule 7 of the Civil Procedure Rules* as follows:

**i. An application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons.**

**ii. The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.**

29. On analyzing the above evidence, it is the Plaintiff’s case that he entered into the suit property in the year 1991 after finding that the same was unoccupied and had grown bushy. That they has set out to look for the Defendant upon discovering that he was the registered proprietor, in vain.

30. From the year 1991, he had been in uninterrupted occupation of the suit property and had thus become entitled to be registered as the legal owner thereof in place of the Defendant, whom he admits is the title holder of the suit property.

31. It is further the Plaintiff’s case that he has been in open, exclusive, peaceful and actual possession of the suit property without any interruption from the Defendant for more than 20 years since he entered upon the same. According to the Plaintiff, the said period is more than the 12 years required under the law for him to acquire title against the Defendant by way of adverse possession.

32. It is against this background, that the issue that arises for my determination is whether or not the Plaintiff has acquired the suit property by way of adverse possession.

33. I have looked at the official search certificate produced as exhibit 1, and the same confirms that indeed the Defendant herein had been registered as proprietor of the suit land on the 4<sup>th</sup> March 1991.

34. In the decided case of **Wambugu vs Njuguna (1983) KLR 173**, the Court of Appeal held as follows:

“For an order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his rights to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.

The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.”

35. The main the elements of adverse possession that a claimant has to prove include :

- i. actual,
- ii. open,
- iii. exclusive
- iv. and hostile possession of the land claimed.

36. As I have indicated herein, the rule in adverse possession is that the party claiming must have been in possession for over 12 years. To prove a claim under adverse possession, all that the Plaintiff had to do was to establish that he came into occupation and took possession exclusively and has lived on the suit property continuously without interruption for a period of over 12 years.

37. The Defendant in this matter had never taken any steps to enter onto the suit land or assert his right as the owner. It was the Plaintiff’s

evidence that he had been in open and notorious possession of the suit. An example of the Plaintiff's notorious use of the suit land was exhibited at the hearing when he testified that he had planted trees, put up a fence and cultivated the land and even installed piped water there.

38. I am satisfied from the Plaintiff's testimony and the document he produced in evidence that he had discharged this burden of proof. The Plaintiff further proved that he has been in open, continuous and uninterrupted occupation of the suit property since 1991.

39. The Defendant did not defend the suit and as such placed no material before the court to contradict the Plaintiff's evidence. It is therefore my finding that the Plaintiff has proved his case on a balance of probability. I enter judgment for the Plaintiff against the Defendant as follows;

i. The Plaintiff has acquired title deed by adverse possession over L.R No. No. Nyeri Ndathi/571

ii. The land LR No. No. Nyeri Ndathi/571 should forthwith be registered in the names of the Plaintiff and the Defendant be ordered to sign all the necessary transfer instruments in his favour and in default the Deputy Registrar of the court be authorized to sign the same.

iii. The County Land Registrar Nyeri to dispense with the production of the original title deed for the suit land while transferring the land to the Plaintiff.

iv. The Plaintiff shall have the cost of this suit at a lower scale since the same was undefended.

40. It is so ordered.

**Dated and delivered at Nakuru this 13<sup>th</sup> day of January 2021.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**