



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. 12 OF 2020**

**VERONICA MICERE NDIGA (Suing on her behalf**

**and her capacity as the personal representative of the Estate of**

**JUSTUS NDIGA MACHARIA.....APPLICANT**

**VERSUS**

**JOEL MUTUGI NGARI (Sued on his behalf and in his**

**capacity as the Personal Representative of the Estate of**

**THOMAS NGARI KANYI.....1<sup>ST</sup> RESPONDENT**

**LUCY WAMBURA NGARI.....2<sup>ND</sup> RESPONDENT**

**JACINTA NJOKI NGARI.....3<sup>RD</sup> RESPONDENT**

**HENRY MWANGI MURAGE.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Background**

The Plaintiff, Veronica Micere Ndiga commenced this suit via an Originating Summons dated 6<sup>th</sup> April 2020 in which she sought the determination of the following questions:-

(1) Spent.

(2) That the Honourable Court do issue a temporary injunction restraining the Respondents from selling, charging, leasing or in any other way dealing or interfering with the Applicant's possession with land parcel Number MUTIRA/KANGAI/5445 – 5448 formerly MUTIRA/KANGAI/388 pending the hearing and determination of this application.

(3) That the applicant be declared to become entitled by Adverse possession of over 12 years to 3 acres out of that parcel of land registered under the Land Act No. 6 of 2012, the Land Registration Act No. 5 of 2012 and the Registered Land Act Cap. 300 (repealed) and comprised in MUTIRA/KANGAI/5445 – 5448 formerly known as Title No. MUTIRA/KANGAI/3881.

(4) That the said Applicant be registered as the sole proprietor of 3 acres of the said parcel land namely MUTIRA/KANGAI/5445 – 5448 and formerly land parcel Number L.R. MUTIRA/KANGAI/388.

(5) *IN THE ALTERNATIVE*, the subdivisions of land parcel No. MUTIRA/KANGAI/388 be declared void abinitio and the registers of the said parcels be rectified by cancellation of the sub-divisions and all entries affecting the defendants as proprietors be expunged and land do revert to MUTIRA/KANGAI/388 and the land to revert to Thomas Ngari Kanyi.

(6) That the Land Registrar Kirinyaga do register the Applicant as proprietor of 3 acres of the said parcel of land namely, L.R.

MUTIRA/KANGAI/388.

(7) That the Respondents be ordered to pay the costs of this suit to the Applicant.

(8) That such further orders be made as may be just and expedient.

The Respondent filed grounds of opposition and replying affidavit in response to the suit herein.

### **Summary of Facts**

When this matter came up for hearing, the parties agreed to dispose the same by affidavit evidence and written submissions. According to the plaintiff/applicant who is the wife of Justus Ndiga Macharia (deceased) her late husband entered into a sale agreement with one Thomas Ngari Kanyi (deceased) who was the registered owner of land parcel No. MUTIRA/KANGAI/388. The plaintiff stated that her late husband bought a portion of the said parcel of land measuring approximately 3 acres at a consideration of Ksh. 10,000/= per acre totaling to Ksh. 30,000/=. The plaintiff further contends that upon execution of the agreement, the vendor acknowledged receipt of the purchase price of Ksh. 14,500/= and took possession of the three acres where they made substantial developments. She also stated that on diverse dates, her husband paid to the vendor Thomas Ngari Kanyi (also deceased) the balance of the purchase price which was also duly acknowledged.

Sometime in the year 1990, the seller Thomas Ngari Kanyi (deceased) filed a case at the Principle Magistrates Court at Kerugoya being PMCC No. 130 of 1990 seeking an order of eviction but the Court ordered him to transfer the land to her husband and for her husband to clear the balance of the purchase price. Her husband thereafter paid the balance of the purchase price of Ksh. 14,450 on 28th May 1993 and the seller Thoma Ngari Kanyi (deceased) acknowledged receipt thereof. However, the seller did not transfer the 3 acres of the land parcel Number MUTIRA/KANGAI/388 to her husband. She stated that they have lived on the suit land together with her family openly uninterrupted and exclusively on 3 acres of the suit land from 1980 and that they have done extensive development on the 3 acres of land where they depend on for their livelihood.

The plaintiff also averred that in concealment of material facts and making fraudulent statements, the 1st defendant/respondent filed a succession cause in an attempt to defeat her husband's interests in the suit land. She stated that the vendor's title to the suit land Number MUTIRA/KANGAI/388 was extinguished by operation of the law. Upon her husband acquiring title of the 3 acres by prescription on 29th May 2005, she contends that since 29th May 2005, the vendor Thomas Ngari Kanyi (deceased) was holding title of 3 acres out of land parcel No. MUTIRA/KANGAI/388 in trust for her husband and that the same was not available for distribution to his estate. The plaintiff stated that her husband had placed a caution on land parcel No. MUTIRA/KANGAI/388 and the respondents removed it unlawfully. She stated that the filing of the succession case, confirmation of the grant and subsequent subdivision of land parcel No. MUTIRA/KANGAI/388 did not in any way defeat her claim for adverse possession.

The plaintiff also stated that they have been in open continuous, exclusive and uninterrupted possession and occupation of the 3 acres out of the suit property land parcel No. MUTIRA/KANGAI/388 since 1980 where she buried her husband and that none of the respondents have lived or occupied the three (3) acres out of the suit property which she now seeks to be declared as the sole owner and be registered as such.

The 2nd respondent/defendant in her replying affidavit deposed that she is the eldest daughter of Thomas Ngari Kanyi (deceased) who owned land parcel No. MUTIRA/KANGAI/388 and after his demise, they filed Succession Cause No. 42 of 2018 (Wanguru) and thereafter subdivided the land and that she acquired land parcel No. MUTIRA/KANGAI/5446 by way of transmission.

The 3rd defendant on her part stated that she is the second born daughter of Thomas Ngari Kanyi (deceased) and after the demise of the father, they took out succession proceedings where she acquired land parcel No. MUTIRA/KANGAI/5447.

The 4th defendant/respondent stated that he agreed to finance the succession cause for the Estate of one Thomas Ngari Kanyi (deceased) where the family members promised to give him a quarter (1/4) acre of the land parcel No. MUTIRA/KANGAI/388. He stated that after the succession was completed, he was allocated land parcel No. MUTIRA/KANGAI/5448. There was also one Joel Mutugi Ngari who is not a party to these proceedings. However, he filed a replying affidavit and stated that he is one of the sons of Thomas Ngari Kanyi who was the registered owner of land parcel No. MUTIRA/KANGAI/388. He confirmed that they took out succession proceedings in respect of their late father whereby he was allocated land parcel No. MUTIRA/KANGAI/5445. In addition, the said Joel Mutugi Ngari stated that he knew his father had a case with Justus Ndiga Macharia being Kerugoya Civil Case No. 130 of 1990 which has never been concluded.

### **Submissions by the Plaintiff**

The plaintiff through the firm of Mwangi Kennedy & Co. Advocates submitted on the following four issues:-

#### **(1) Whether there was a sale agreement between Justus and Thomas and whether Justus paid the entire purchase price?**

On this issue, the advocate argued that indeed there was a sale agreement between Justus and Thomas which was produced as Plaintiff's Exhibits 3 (a), (b) and (c). From the said agreement, Justus bought 3 acres out of land parcel No. MUTIRA/KANGAI/388 for a consideration of Ksh. 30,000/= which the plaintiff in her evidence produced the acknowledgment receipt dated 28th May 1993. The plaintiff also called the Court administrator, Kerugoya Law Courts who produced a Court file for CMCC No. 130 of 1990 where the Court in a ruling delivered on 16th May 1995 held that Thomas had been paid the entire purchase price.

The plaintiff also called PW3 who stated that he was present when Justus paid Thomas the last instalment of Ksh. 14,450/=. The learned counsel cited the case of Public Trustee Vs Wanduru. The plaintiff also cited the decision by this Honourable Court in the case of *Vijay*

Ranchnod Morarji Vs Julius Kagoiya Kubai (2019) where the case of Peter Michuki Vs Samuel Mugo Michuki was cited with approval.

**(2) Whether Justus and his family has been in continuous and uninterrupted possession of 3 acres out of land parcel No. MUTIRA/KANGAI/388.**

The learned counsel submitted that Justus and his family have been in notorious continuous, uninterrupted possession of the suit land for 40 years. He argued that once Justus paid the deposit of the purchase price in 1980, they took possession of the 3 acres and build a permanent house, fenced and planted varieties of crops and upon the demise of Justus in 2018, he was buried in the same parcel of land. The counsel also referred to the testimony by PW3 who is the son-in-law to Justus and who stated that in the year 1990, they were residing in the suit land. The plaintiff's counsel also submitted that DW1 and DW2 in their evidence confirmed that the plaintiff and her family came into possession of the suit land in 1980 and are in possession upto date.

**(3) Whether confirmation of grant and transmission of the suit land to the defendants defeated the plaintiff's claim?**

The counsel submitted that the filing of the succession cause and the subsequent transfer of the land to the defendants did not affect the plaintiff's interest in the suit land. By operation of the law, the title of Thomas in 3 acres out of land parcel No. MUTIRA/KANGAI/388 was extinguished and that Thomas was holding the same in trust for Justus. He cited the case of Jacob Mwauto Wangora Vs Mary Waruga Wokabi & 3 Others (2018) e K.L.R.

**Defendants Submissions**

The defendants through the firm of Nduku Njuki & Co. Advocates submitted that under the *Land Registration Act*, a title can only be challenged by the Court if the same was obtained fraudulently or illegally. He cited *Section 26 (1) of the said Act* as the instructive law. He argued that in the instant suit, it was never alleged or proved that the 1st defendant or any of the defendants obtained his or their titles either fraudulently or through illegal or unlawful means. On the alternative prayer that the subdivisions of land parcel No. MUTIRA/KANGAI/385 be declared void ab-initio, the learned counsel submitted that the prayers cannot be available before this Court as the subdivision was pursuant to a succession process and that if the plaintiff wishes to challenge the process of succession, he should go to the relevant Court. He submitted that a confirmed grant can only be challenged under the provisions of the *Law of Succession Act*. On those grounds, the learned counsel submitted that the plaintiff is before the wrong Court and that the plaintiff's claim is without merit and should be dismissed with costs.

**Legal Analysis**

I have carefully considered the evidence adduced by the parties and their witnesses. I have also considered the submissions by their respective counsels and the applicable law. The plaintiff's claim is hinged on the doctrine of Adverse possession. The law on adverse possession has been discussed by Courts and the principles applicable are now well settled. In the case of Mbira Vs Gachuhi (2002) 1 E.A.L.R. 137, the Court held as follows:-

*"..... a person who seeks to acquire title to land by the method of Adverse possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious exclusive and Adverse use by him or those under whom he claims for the statutory prescribed period without interruption....."*

Again in the case of Jandu Vs Kirplal & Another (1975) E.A 225, the Court held:-

*"..... to prove title by Adverse possession, it is not sufficient to show that some acts of Adverse possession must be adequate in continuity, in publicity and in extent to show that it is Adverse to the owner. It must be actual, visible exclusive, open and notorious"*

Similarly in the recent case of Mtana Lewa Vs Kahindi Ngala Mwangandi (2005) e K.L.R., the Court of Appeal stated as follows:-

*"Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take an action against such person in assertion of his title, for a certain period, in Kenya, 12 years".*

This doctrine in Kenya is embodied in **Section 7 of the Limitation of Actions Act** which states 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 or, if it first accrued to some person through whom he claims, to that person".*

The **Limitation of Actions Act** makes further provision for Adverse possession at page 13 as follows:-

*"(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour 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 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.*

*(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and afresh right of action does not accrue unless and until some*

person again takes adverse possession of the land.

(3) For the purposes of this section, receipts of rent under a lease by a person wrongfully claiming, in accordance with Section 12 (3), the land in reversion is taken to be adverse possession of the land”.

The import of **Sections 37 and 38 of the Limitation of Actions Act** is that if the land is registered under one of the registrations Acts, then the title is 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.

**Section 37** provides thus:-

“(1) 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, 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”.

The plaintiff in this case has stated in his evidence that they have been in the suit land from the year 1980 after they bought 3 acres of the suit land parcel No. MUTIRA/KAGUYU/388 (now subdivided) from the original owner Thomas Ngari Kanyi (deceased). The evidence adduced also indicates that the agreed purchase price for the three acres was Ksh. 30,000/= at Ksh. 10,000/= per acre and the plaintiff’s husband Justus Ndiga Kiringiti paid a down payment of Ksh. 17,350/= leaving a balance of Ksh. 14,450/=. In a suit filed before the lower Court No. SRMCC No. 130 of 1990, the vendor Thomas Ngari Kanyi sued (the purchaser) Justin Ndiga Kiringiti for eviction from the suit land and the refund of the down payment of Ksh. 17,350/=. In one of the Exhibits which is an acknowledgment slip contained in the lower Court Case No. 130/1990 (Kerugoya), the seller of the suit land Thomas Ngari Kanyi was acknowledging receipt of a sum of Ksh. 14,450/= being the balance of the purchase price paid by the purchaser Justus Ndiga Macharia.

By a Chamber Summons application brought by the plaintiff dated 22/4/1993, the vendor was seeking to have the Court to allow him file objection out of time. The award of the Elders had been forwarded before the Magistrate’s Court for adoption but the seller was objecting to the same and in a ruling delivered on 23/5/1993, the application for objection out of time was dismissed. The Court subsequently dismissed the plaintiff’s suit and directed the defendant to pay the outstanding balance to the plaintiff which he did and the plaintiff/vendor acknowledged on 28/5/1993. In a ruling delivered on 16/5/1995, the trial Court observed as follows:-

“The Court file reveals that the judgment was entered against plaintiff/respondent. He was paid all the monies that were owing. He made an appeal that was dismissed in Court. He has now refused to sign the documents to have the land parcel transferred to the defendant (Emphasis mine). I do therefore order the Executive officer of this Court to sign all the necessary documents to enable the plaintiff acquire the relevant piece of land as per the Court order”.

The plaintiff has clearly demonstrated that she bought a portion of the suit land parcel No. MUTIRA/KANGAI/388 (now sub-divided) from the then registered owner Thomas Ngari Kanyi (deceased) at a consideration of Ksh. 30,000/=. The purchaser paid a deposit of Ksh. 17,350/= and the balance completed on 28th May 1993 which was duly acknowledged. The seller Thomas Ngari Kanyi (now deceased) even took the seller Justus Ndiga Macharia (deceased) to Court vide SRMCC No. 130 of 190 for eviction and refund of the down payment but the case was dismissed and the Executive officer of this Court was ordered to execute all the necessary statutory documents to effect the orders of the Court and to transfer the three acres to the purchaser.

On the face of all these glaring evidence, the defendants filed a succession cause for the estate of Thomas Ngari Kanyi and even had the audacity to transmit the land to themselves. While doing all these, the defendants have never lived or occupied the three acres which are in dispute. The plaintiff has shown that beside occupying the three acres in dispute, she has also done extensive development on the portion of land. The evidence on record also shows that the plaintiff paid the full purchase price to the portion of land she bought. It is trite law that a purchaser in possession of the purchased land or portion of land after paying the purchase price in full is a person in whose favour the period of limitation can run. In this case, I am satisfied that the plaintiff is such a person whose period of limitation started to run from 28th May 1980 and by the year 2005, the defendant had lost ownership to the portion of the suit property by dint of **Section 38 of the Limitation of Actions Act Chapter 22 Laws of Kenya**. The period started to run from the time the plaintiff paid the balance of Ksh. 14,450/= on 28th May 1993.

In the case of **Public Trustee Vs Wanduru** which was cited by counsel for the plaintiff which is applicable to the circumstances of this case, the Court held as follows:-

“..... that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run”.

Again in the case of **Vijay Ranchhold Morarji Vs Julius Kagoiya Kubai (2019) e K.L.R**, this Honourable Court faced with a similar dispute cited with approval the case of **Peter Michuki Vs Samuel Mugo Michuki** where it was held:-

“The plaintiff/applicant paid the respondent the full purchase price and was given vacant possession of the suit property on 6th February 1998. A purchaser in possession of the purchased land after paying the purchase price is a person in whose favour the period of limitation can run. The period of limitation therefore started to run from the said 6th February 1998 and on 5th February 2010, the defendant had lost ownership to the suit property by dint of Section 38 of the Limitation of Actions Act Cap. 22 Laws of Kenya”.

I agree with the above decisions and have nothing useful to add. Suffice to add that the filing of the succession case for the Estate of Thomas Ngari Kanyi (deceased) and the subsequent transmission of the subdivisions of the suit property to the defendants did not in any way affect the plaintiff's right in the suit land. By operation of the law, the title of the seller Thomas Ngari Kanyi (deceased) in regard to the three acres sold to the plaintiff out of land parcel No. MUTIRA/KANGAI/388 was extinguished in the year 2005 and the seller, Thomas Ngari Kanyi was a trustee holding the same in trust for the buyer Justus Ndiga Macharia alias Kiringiti.

Faced with a similar conundrum, in the case of *Jacob Mwauto Wangora Vs Mary Waruga Wokabi & 3 Others (2018) e K.L.R*, the respondents had filed a succession cause where a disputed land was transmitted in their names. The learned Judge rendered itself on the succession cause and the transfer of the land and observed as follows:-

*“It is against the foregoing and in relying on the judicial authorities cited above, I find that from 1990, the deceased coromeeti's rights to the suit land were extinguished and he was hence holding the land in trust for the plaintiff. Further, that the defendant's act of applying for letters of administration intestate over the suit land and obtaining the certificates for confirmation of Grant in which deceased estate was distributed, cannot defeat the plaintiff's claim for Adverse possession because by the time they petitioned for it, the deceased rights over the suit land had extinguished in 1990”.*

I entirely agree with the decision in the above case. When the defendants in the current suit filed for letters of administration, they knew that there was someone in actual occupation of the deceased's land and should have made efforts to establish his interests before listing the suit property for distribution. The defendants' actions of applying for succession of the Estate of Thomas Ngari Kanyi (deceased) and finally distributing the suit property amongst the beneficiaries of his estate was intended to defeat the overriding interest of the plaintiff for Adverse possession. The suit land was not available for distribution to the beneficiaries of his estate. Having said that, I am of the view that the certificate of title transmitted pursuant to the purported distribution of Grant in respect of the suit property is null and void and of no legal effect. **Lord Denning M.R.** described an act that is void succinctly in the case of *Macfoy Vs United Africa Co. Ltd (1961) 3 All ER 1169 at page 1172* as follows:-

*“..... if an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot pout something on nothing and expect to stay there. It will collapse”.* (Emphasis added).

The certificates of title issued pursuant to the Grant of letters of administration in respect of the suit property are in my view a nullity and of no legal effect. The suit land was not available for distribution. These titles in my view are null and void liable to be cancelled. The upshot of my findings are that the plaintiff has proved his claim against the defendants on a balance of probabilities. I therefore enter judgment against the defendants in the following terms:-

**(1) A declaration that the plaintiff is entitled to three (3) acres out of land parcel Number MUTIRA/KANGAI/388 (now subdivided) by Adverse possession.**

**(2) Land parcel Number MUTIRA/KANGAI/5445, 5446, 5447 and 5448 being sub-divisions of land parcel Number MUTIRA/KANGAI/388 be and are hereby cancelled and reverted to the original title No. MUTIRA/KANGAI/388.**

**(3) The District Land Registrar and the District Surveyor Kirinyaga County are directed to subdivide the said land parcel No. MUTIRA/KANGAI/388 into two portions, one measuring 3 acres in the name of the plaintiff Josphat Muthee Kimunyi and the second in the name of Thomas Ngari Kanyi (deceased) to be subjected to the Law of Succession by his administrators.**

**(4) The costs of this suit shall be borne by the defendants jointly and severally.**

**JUDGMENT READ, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT KERUGOYA THIS 24TH DAY OF MARCH, 2021.**

.....

**E.C. CHERONO**

**ELC JUDGE**

*In the presence of:-*

1. Mr. Mwangi Maina for Plaintiff

2. Ms Nyangati holding brief for Nduku Njuki for Defendants

3. Kabuta – Court clerk.