



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC MISC. APPLICATION NO. 36 OF 2019

IN THE MATTER OF AN APPLICATION BY FRIDAH MUTHONI

KARANJA AND AYUB KARANJA MWAHUKI:

AND

IN THE MATTER OF TITLE NO. MUGUGA/JET SCHEME/587;

AND

IN THE MATTER OF SECTIONS 7,9,10,11,12,13,37 & 38 OF

THE LIMITATION OF ACTION ACT:

AND

IN THE MATTER OF ARTICLES 40, 64, 65, AND A62 (2) (A) OF

THE CONSTITUTION OF KENYA 2010;

AND

IN THE MATTER OF SECTION 7(1) D OF THE LAND ACT 2012;

AND

IN THE MATTER OF SECTION 28 OF THE REGISTRATION OF LAND ACT

BETWEEN

FRIDAH MUTHONI KARANJA.....1ST PLAINTIFF/APPLICANT

AYUB KARANJA MWAHUKI.....2ND PLAINTIFF/APPLICANT

VERSUS

ALICE NJERI WAWERU.....1ST DEFENDANT/RESPONDENT

IBRAHIM MWITHUKIA WAWERU.....2ND DEFENDANT/RESPONDENT

MOSES KAMAU WAWERU.....3RD DEFENDANT/RESPONDENT

MARIAM WANGU WAWERU.....4TH DEFENDANT/RESPONDENT

(Sued as the Personal Representatives of the

JUDGMENT

By an Originating Summons dated **18th July 2019**, the Plaintiffs sought for the following orders against the Defendants: -

- 1. That this Court be pleased to issue and grant a vesting order on a portion of land measuring approximately 0.5 acres of thereabout to be excised from land Title No. Muguga/Jet Scheme/587, situate in Kiambu County currently registered in the name of Mohamed Waweru Mwithukia and in possession and actual occupation of the Plaintiffs herein.**
- 2. That the Court be pleased to issue an order that the Plaintiffs herein have acquired prescriptive rights over a portion measuring approximately 0.5 acres or thereabout in Title No. Muguga/Jet Scheme/587 under the doctrine of Adverse Possession.**
- 3. That a portion measuring approximately 0.5 acres be excised from in Title No. Muguga/Jet Scheme/587 and be registered in the names of the Plaintiffs herein.**
- 4. That the cost of this Application be provided for.**

The grounds upon which the Originating Summons was premised are; - that the Plaintiffs have been in occupation and quiet possession of the said portion for a period of more than 30 years and they have acquired prescriptive rights under the doctrine of Adverse Possession. That **Mohammed Waweru Mwithukia** became the registered owner of **L.R Muguga/Jet Scheme/587** in the year **1987** when the Plaintiffs were already in the suit property and he died in **2015**. That they have enjoyed quiet and peaceful possession and occupation of **0.5 acres** with full knowledge of the Deceased and the Defendants who are his personal representatives and Administrators of the Estate.

Further that the Plaintiffs constructed a permanent house and cultivated crops and reared livestock and several members of their family have been buried inside the portion. That they have occupied the said portion without permission or license of the Deceased or his Estate.

In her Supporting Affidavit, **Fridah Muthoni Karanja** averred that the original owner of the suit property died in 1983. That upon allocation of the suit property, the Deceased invited her husband who was his nephew and **Mohamed Waweru Mwithukia** his brother to live with him on the property. That prior to his death, the Deceased had allowed her husband to build on the suit property and cultivate. That they have constructed a permanent house and the said portion is in the exclusive control of her family members. That upon the death of the original owner, his brother the late **Mohamed Waweru Mwithukia**, took out letters of Administration of the Estate of the Deceased without the knowledge of her husband or any other person in the family and was subsequently registered as the owner of the suit property in **1987** and her husband applied for annulment of the grant, but he died before conclusion but the same was subsequently dismissed.

That the occupation and possession of the suit property has been without the permission or license of the said **Mohamed Waweru Mwithukia** or his estate from **1987**, when he became the registered owner. That the Plaintiffs having been in possession for more than **12 years** are entitled to be registered as owners under the doctrine of **Adverse Possession**.

The Originating Summons was opposed and **Moses Kamau Waweru**, swore a Replying Affidavit on **26th August 2019**, and averred that he had the authority of the other Defendants to swear the Affidavit. He further averred that the Plaintiffs are licensees and not trespassers on the suit property and their entry is not **non permissive** and the same has been admitted by the Plaintiffs. That the entry of the 1st Plaintiff's husband was sanctioned by the Deceased and the Plaintiffs cannot acquire rights under **Adverse Possession**. He also contended that the Plaintiffs are precluded from claiming adverse possession by operation of **Section 7** of the **Limitation of Actions Act** given that a period of 12 years has long lapsed since the cause of action accrued. Further, that ownership of the suit property has since passed through a Certificate of grant dated **1st August 2019**, to ten beneficiaries of the Deceased Estate thereby making the current suit bad in law. That by dint of the Certificate of **Confirmed Grant**, the period claimed under Adverse Possession begins to run from the point of change of Title which is **1st August 2019**. Further that the claim for Adverse Possession is made against the Estate of **Mohammed Waweru Mwithukia**, being the registered owner of the suit property. However, the Claim cannot be urged against the Estate of the Deceased if the claim had not been filed prior to his death as the right **accrues personam**.

That the Defendants live on the suit property and have established permanent structures of occupation and residence and they have depended on the land and buried their kin and the Plaintiffs have therefore not dispossessed them. Further that the Plaintiffs do not live on the suit property and they have leased it out to third parties and their claim is ambiguous as it does not relate to any defined parcel of land. It was contended that the Plaintiffs have not demonstrated how they came about the **0.5 acres** and the supposed house sits on about **0.1 acres** of land. That the 1st Plaintiff 's Deceased husband was never allowed to cultivate on the land, but was to only build a house thereon and the same was confirmed in the elder award and the Ruling delivered on **29th July 1996**. That the Plaintiffs have illegally leased the suit property and they have never reared any livestock or any animal on the suit land. That there is a common gate put up by the Defendants and it is used by all of them. Further, that the Plaintiffs deceased relatives were only allowed to be buried on a designated graveside after the Plaintiffs pleaded with **Mohamed Waweru** to allow the same. That the Defendants stand to be prejudiced if the Application is allowed.

The parties chose to call **viva voce** evidence. The Plaintiffs called two witnesses and the Defendants called one witness.

PLAINTIFFS' CASE

PW1 Fridah Muthoni Karanja adopted her Supporting Affidavit SWORN on **12th July 2019**, as part of her evidence in chief and also produced the annexures attached thereto as her Exhibits. She testified that she is claiming

0.5 ha from the suit property as she had been staying there since she got married to her husband who had lived on the suit land since **1962**. She denied moving out of the suit property or being a licensee. That her husband and her daughter were buried on the suit property and she did not ask for permission from the Defendants to bury them. That the Defendants did not oppose the said burials. Further that she moved from the premises to live near her businesses and has leased her house on the suit property and she is in possession of the suit property.

That in her Originating Summons, she is making a claim against **Mohamed Waweru Mwithukia**, who is now deceased. That she was not aware that the property had already devolved to the beneficiaries. Further, that she was in possession of the suit property for **30 years** and she seeks a portion of **0.5 acres**, and there are no beacons or survey on the portion of land that she was seeking. That the said land has no separate title. It was her further testimony that one **Erick** resides on the suit property as her tenant and the Defendants also reside on the suit property. That she filed a protest in the Succession Cause and, the same was dismissed and they were referred to the Environment and Land Court. That she was allowed to stay on the suit property. That the original owner was her husband's Uncle and they were given the suit property by the original owner.

PW2 Ayub Karanja Mwahuki, adopted his Supporting Affidavit as his evidence in Court. He further testified that the 1st Plaintiff is his mother and he was brought up on the suit property. That the land is fenced and there is a house where they were brought up and her father and sister are buried on the suit property. That he was born in **1980** and they are claiming **0.5 acres** where their house is situated. Further, that they have lived and utilized the said portion of land. That there are not licensees and are in possession and have leased it to **Erick Kimani**. That they have not surveyed the land and what they are seeking is an approximation.

DEFENCE CASE

DW1 Moses Kamau Waweru adopted his Replying Affidavit dated **26th August 2019**, and testified that he resides on the suit property. That the Plaintiffs are widow and son of **Patrick Mwahuki** who had been invited on the suit property by **Mbugua Mwithukia** who was his late uncle. That the late **Patrick** was invited to the suit property in **1980** and his father got title to the land in **1987** through transmissions after the death of **Mbugua Mwithukia**. Further, that their father passed on in **2015**, and the suit property passed on to them as beneficiaries. That the Plaintiffs did not file any objection to the Succession matter. That the Plaintiffs do not live on the suit property, but there is a small house which they have leased out. That the house was constructed in **1981 to 1982**. That the Plaintiffs stopped living in the premises in **2015** and the Defendants do not collect rent from the Plaintiff's house.

The parties filed written submissions which the Court has carefully read and considered. The Court has also carefully read and considered the pleadings by the parties, the evidence adduced and the relevant provisions of law and renders itself as follows: -

It is not in doubt that the Plaintiffs are seeking to be registered as owners of **0.5 acres** out of the suit property, claiming that they have acquired the same by way of Adverse Possession. The Law on Adverse Possession is found under the provisions of **Section 38 of the Limitations of Actions Act** which provides that;

“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, 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.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

The concept of Adverse Possession was defined by the Court of Appeal in the case of **Wilson Kazungu Katana & 101 othersVs... Salim Abdalla Bakshwein & another [2015] eKLR** where it held that:

“From all these provisions, what amounts to adverse possession? First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.....”

Have the Plaintiffs therefore proved the principles of Adverse possession so that they can be entitled to the prescriptive orders?

From the evidence adduced by the parties, it is not in doubt that the Plaintiffs have built a house on the suit property and that they have since rented it out to a tenant. It is further not in doubt that the Plaintiffs have been in occupation of the suit property well beyond the **12 years** and their occupation and possession has been open. It is the Defendants contention that the Plaintiffs entered the suit property as Licensees as they had acknowledged that the 1st Plaintiff's late husband was invited to the suit property by the late **Mbugua Mwithukia**.

A licensee has been defined in law as **merely someone who has the permission of the owner to be in the property**, but does not necessarily have the right to exclude others from the premises or the right to assign or sublet the accommodation.

Were the Plaintiffs therefore licensees? It is not in doubt that the Plaintiffs had the consent of the original owner to enter the suit property. However, the suit is against the Defendants as the legal representative to the estate of **Mohamed Waweru Mwithuka**, who became the registered owner of the suit property, upon the demise of the original owner. It is not doubt that the Deceased **Mohamed Waweru**, became the registered owner on **16th December 1987**, as per the certificate of official search dated **8th May 2019**, which was adduced in Court and

further as per the evidence of the witnesses. The Court is not satisfied that the Plaintiffs had permission from the Deceased to enter the suit property. While consent was initially granted, the same lapsed upon demise of the original owner, but the Plaintiffs continued to stay on the suit property beyond the demise of the original owner. In the case of **Peter Okoth ...Vs... Ambrose Ochido Andajo & Benedict Odhiambo Oketch [2021] eKLR** the Court held that;

“....It is also possible to enter the land with the consent of the owner, but if the owner at some point terminates the consent and the applicant does not leave but continues to occupy the land and the owner takes no steps to effectuate the termination of the consent for a period of twelve years after then, such applicant would be perfectly entitled to sue on account of adverse possession.....”

“.... So that a claim of adverse possession would not succeed if the entry to the land was with the permission of the owner and remains that way throughout, or before the permission is terminated or if before the expiry of the period, the owner of the land takes steps to assert his title to the land. In the case of Samuel Miki Waweru v Jane Njeri Richu, Civil Appeal No. 122 of 2001, (UR), this Court delivered the following dictum:

“...it is trite law that a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in Jandu v Kirpal [1975] EA 225, possession does not become adverse before the end of the period for which permission to occupy has been granted...”

The Court therefore finds and holds that while the Plaintiffs had the consent of the late **Mbugua Mwithukia**, the same terminated upon his demise and when the late **Mohamed Waweru**, became the owner of the suit property, there is no evidence that he gave the Plaintiffs consent to continue residing on the suit property. On the contrary there is evidence that he sought to be registered as the sole owner of the suit property to the exclusion of the Plaintiffs but never asserted his rights over the suit property. The Plaintiffs continued to stay on the suit property which actions were adverse to the Defendants' rights. Consequently, the Court finds and holds that the Plaintiffs did not have the permission of the owner of the suit property to continue staying on the said suit property.

The Defendants have contended that the title to the suit property has already changed hands and the Plaintiffs claim for **Adverse Possession** cannot be maintained as **12 years** have lapsed. The passing of a Certificate of title from one person to another does not stop time from running, so that the claim for **Adverse Possession** does survive a Deceased, and even when passed to a third party, time does not stop running and the Plaintiffs can claim **Adverse Possession**. See the case of: **Karuntimi Raiji ...Vs... M'Makinya M'itunga (2013)eKLR** where the Court of Appeal held that;

Under the doctrine of Adverse Possession, a claimant's claim to the land runs against the title and not necessarily against the current holder of the title. The respondents' submission that he renewed the lease when he filed a succession cause and therefore the applicant's rights had expired does not hold any water.

Further in the case of **Titus Mutuku Kasuve ...Vs...Mwaani Investments Limited & 4 others Civil Appeal No. 35 of 2002 [2004] eKLR** the Court of Appeal held;

“A title by adverse possession can be acquired under Limitation of Actions Act for a part of the land and the mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such person's adverse possession – (see Githu v Ndeete [1984] KLR 776)”.

The Plaintiffs have claimed a portion of the suit property being **0.5 acres**, being the portion to which they have built their house. The Court has perused the photographs and finds that though the said portion has not been ascertained by a valuer, the same is ascertainable as there is clear demarcations from the photographs adduced in Court. See the case of **Gabriel Mbui ...Vs... Mukindia Maranya [1993] eKLR** where the Court held that; -

“The land, or portion of the land, adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. For this purpose, that which can be ascertained is certain; that which is definitive is positive. It must at least be so plotted that if not certain it can be made certain. The absence of a plot or title number need not present any difficulty; nor should it be a bar to establishing a claim of adverse possession (Madan, J (as he then was) in Kinguru v Gathangi op cit, at p 260). On the other hand, however, the adverse occupation of a disputed portion of a large piece of land under one title, for twelve years does not, in law, constitute adverse occupation of the rest of the land to which adverse acts do not extend during the statutorily prescribed time (Harris, J, in Matheri v Kanji [1976] Kenya L R 140 at 141).”

From the above analysis, it is not in doubt that the Plaintiffs have been in continuous and uninterrupted possession of the suit property in this instance since **1987**, when the Deceased who was the registered owner of the suit property was registered as the owner. It is further not in doubt that they have used the suit property in **open** and to the **exclusion** of the Defendants. Further, the Court finds that the portion claimed by the Plaintiffs is **identifiable** and though the Plaintiffs had the consent of the initial owner to build and stay in the suit property, the consent lapsed upon his demise and when the late **Mohamed Waweru** became the registered owner. He needed to assert his rights which he failed. Consequently, the court finds and holds that the Plaintiffs have satisfied it that they are entitled to the portion of the land by way of **Adverse Possession**.

The Court finds that that Plaintiffs have proved their case against the Defendants herein on the required standard of balance of probabilities. Consequently, the Court enters judgment for the Plaintiffs against the Defendants jointly and severally in the following terms:

1. That a vesting order be and is hereby issued that a portion of land measuring approximately 0.5 acres of thereabout to be excised from land Title No. Muguga/Jet Scheme/587 situate in Kiambu County currently registered in the name of Mohamed Waweru Mwithukia and in possession and actual occupation of the Plaintiffs herein.

2. That an order be and is hereby issued that the Plaintiffs herein have acquired prescriptive rights over a portion measuring approximately 0.5 acres or thereabout in Title No. Muguga/Jet Scheme/587 under the doctrine of Adverse Possession.

3. That an order be and is hereby issued that a portion measuring approximately 0.5 acres be excised from Title No. Muguga/Jet Scheme/587 and be registered in the names of the Plaintiffs herein.

4. That each party to bear its own cost of the suit.

It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 2ND DAY OF FEBRUARY 2022.

L. GACHERU

JUDGE

Delivered online:

In the presence of

Mr Kagura for the 1st & 2nd Plaintiffs/Applicants

Mr Kariuki Kagunda for the 1st – 4th Defendants/Respondents

Kuiyaki – Court Assistant

L. GACHERU

JUDGE