



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC ORIGINATING SUMMONS NO. 4 OF 2019

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT CAP 22

AND

IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION IN RESPECT OF L.R. KIBIRICHIA/NTUMBURI/357

JULIAH KARIMI RUTERE

GRACE WANJIKU

BEATRICE WAIRIMU

(Suing as the legal representatives of the estate of

SALOME GACHERI MAGIRI).....1ST PLAINTIFF

PAULINE KITHINJI GIKUNDA

(Suing as the legal representative of the estate of

JOSEPH GIKUNDA M'RIMBERIA).....2ND PLAINTIFF

FLORENCE KARIMI M'RINYIRU).....3RD PLAINTIFF

M'MURITHI M'NKOROI).....4TH PLAINTIFF

VERSUS

PATRICK MWIRIGI M'RUTHIRI (Sued as the legal representative of the estate of

M'KIRERA M'MUKIRA).....DEFENDANT

JUDGMENT

A. PLEADINGS

1. Through an amended originating summons dated 1.11.2021 under **Order 37 of the Civil Procedure rules and Section 37 and 38 of the Limitation of Actions Act** as read together with **Sections 38 and 101 of the Land Registration Act**, the plaintiffs urges this court to declare each of them to have equivalent entitlement and ownership of 3 acres each out of the defendant's **L.R No. Kibirichia/Ntumburi/357** by virtue of adverse possession and hence entitled to be registered as such by the Land Registrar Meru Central.

2. The court is asked to answer 7 framed questions on the face of the originating summons namely: if the suit land is registered in the name of the deceased K'Kirerta M'Mukira represented by the legal representative, the defendant; if the plaintiffs have been in open notorious, exclusive and continued physical occupation which has not been interrupted; if the plaintiffs have made any developments thereon and lastly if the plaintiffs' rights as provided by law have vested in them.

3. The originating summons is supported by an affidavit sworn on 15.2.2018 by Salome Gacheri M'Magiri.

B. DEFENCE ON ADMISSION

4. The respondent made a response to the originating summons through an affidavit sworn on 21.10.2021 stating he was aware the plaintiffs' had purchased each three acres from the defendant, paid the entire purchase price and took vacant possession since 1987 hence they have been in total control and have enjoyed peaceful, quiet and open possession. He averred he was not opposed to the claim.

C. TESTIMONY

5. PW1 testified she was a daughter of the late Salome Gacheri M'Magiri, the initial plaintiff in this matter who passed on during the pendency of the suit but now her legal representative. She adopted her mother's initial affidavit sworn on 15.2.2018 together with her witness statement dated 28.10.2021 as her evidence in chief.

6. PW1 produced a copy of green card for **L.R Kibirichia/Ntumburi/357**, a limited grant to represent the estate, sale agreement dated 13.6.1987 and an acknowledgment receipts for the purchase price as **P exh 1 – 4 (a) and (b)** respectively.

7. Similarly, PW1 produced photographs indicating the developments on the suit land together with the deceased sworn affidavit of 15.2.2018 as **P exh 5 and 6** respectively. She confirmed each of the plaintiffs was in occupation of the suit land comprising of 3 acres each.

8. The defendant did not cross examine the witness.

9. PW2, 3 and 4 adopted their witness statements dated 28.10.2021 confirming each of them had been on their respective portions since 1987 as alluded to by PW1.

10. In his defence DW1 adopted his response to the originating summons sworn on 21.10.2021. He confirmed the plaintiff had indeed bought the portions as pleaded and hence he was not opposed to the suit since they deserved the parcels of land.

D. WRITTEN SUBMISSIONS

11. The plaintiffs through written submissions dated 4.11.2021 urge the court to find that they have through testimony and documentary evidence proved their claim on a balance of probabilities on a claim based on adverse possession.

12. On the ingredients of what constitutes adverse possession, the plaintiff rely on ***Mbira –vs- Gachuhi [2002] 1 EALR 137*** on the proposition that there must be abandonment by the true owner; the adverse possessor had no colour of right to be there other than his entry on occupation; it was open and without the consent of the true owner acts inconsistent with the enjoyment by the true owners; there was sufficient animus to dispossess and that 12 years have elapsed with no interruption at all from the registered owner.

13. The plaintiffs submit that time begun to run on 13.6.1987 after purchasing the suit land and that by the time they filed the suit on 21.2.2019, 12 years had elapsed.

14. As concerns the documentary evidence, the plaintiffs submits the same points at adverse possession and not the enforcement of a sale agreement. Reliance is also placed on ***Peter Mbiri Michuki –vs- Samuel Mugo Michuki [2014] eKLR***.

E. ISSUE FOR DETERMINATION

15. Having looked at the plaintiffs' evidence and submissions, the issues for determination are:-

a) If the plaintiffs have proved adverse possession based on the evidence tendered.

b) If the plaintiffs are entitled to the prayers sought.

F. THE THRESHOLD AND PRINCIPLES APPLICABLE

16. For a claim on adverse possession to be proved, the plaintiffs have to discharge the burden that the land in issue is in the name of the registered owner, they have been in open, notorious, uninterrupted occupation and possession for a period of 12 years and that they did not enter the land with the consent of the registered owner.

17. In the instant case, the plaintiffs pleaded and have tendered evidence they purchased 3 acres each from one M'Kirera M'Mukira (deceased) for value on 13.6.1987 and took vacant possession with effect from 31.8.1987 from which they dispossessed the owner. This fact is admitted by the defendant both in the response to the originating summons and in testimony before court.

18. **P exh 1** indicate the suit land was registered in favour of the seller M'Kirera M'Mukira on 30.7.1991. The sale agreement and acknowledgments produced as **P exh 3, 4(a), (b) and (c)** confirm the suit land at the time of purchase was still undergoing the land adjudication. The deadline to seek for the transfer and or completion of the transaction was set in the sale agreement as not later than 3 months from 31.8.1987. None of the plaintiffs have testified what became of the set deadline and the transfers since the duty as per the agreements was on the vendor to seek for and pay for the same.

19. Be that as it may, evidence shows the seller became a registered owner of the suit land under the **Registered Land Act Cap 300** now

replaced with the **Land Registration Act 2012** on 30.9.1991. My finding therefore is that the land control board consent was not applicable since the suit land at the time was not covered by the Registered Land Act **Cap 300**.

20. Coming to the issue of adverse possession, the plaintiffs aver they took vacant possession on 31.8.1987 and have been on the suit land till the filing of the suit. Whereas they took vacant possession with the consent of the seller, he only came to be a registered owner on 30.7.1991. In line with the law on adverse possession, the time starts to run as against a registered owner of the land. Therefore, the time of 12 years could not run before 30.7.1991. See **Public Trustee –vs- Wanduru [1984] KLR 319**.

21. My finding is that with effect from 30.7.1991, the plaintiffs were on the land not as purchasers of the land but as adverse possessors. See **Wambugu –vs- Njuguna [1983] KLR 172 and Mwinyi Hamisi Ali –vs- Attorney General & Another [1997] eKLR**.

22. The registered owner passed on 10.10.1998 as per P exh 2. By the time he passed on, time was still running as against him in so far as the adverse rights of the plaintiffs were concerned. The defendant took out letters of administration ad litem on 24.5.2017. By that time, 12 years had elapsed since 1991.

23. In my considered view therefore, there was no interruption on the adverse rights of the plaintiffs and consequently my finding is that the plaintiffs adverse rights continued to run against the defendant as the legal representative of the estate of the late M’Kirera M’Mukira in line with **Sections 16 and 18 of the Limitation of Actions Act Cap 22 Laws of Kenya**. See **Mwangi & Another –vs- Mwangi [1986] KLR 328**. The plaintiffs have been using the land as of right and with full knowledge of the defendant who did not interrupt it at all as admitted in the response to the originating summons and the oral testimony in court.

24. The possession continued. Looking at **P exh 5**, it is evident the possession is not only actually physical but open given the plaintiffs permanent structure’s thereon. See **Peter Mhuri Michuki –vs- Samuel Mugo Michuki [2014] eKLR**.

25. In the circumstances, my finding is the plaintiffs have proved their case to the required standard hence deserve the prayers sought. The claim is herein allowed with no order as to costs given the admission by the defendant.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 2ND DAY OF FEBRUARY, 2022

In presence of:

G. Anampiu for plaintiff

Respondent in person- absent

Court Assistant – Kananu

HON. C.K. NZILI

ELC JUDGE