



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANGA

ELC NO 10 OF 2019 (OS)

**BEDAN MAINA NJOROGE.....PLAINTIFF**

VS

**PATRICK NGARUIYA**

**BARNABAS KIMANI(sued as legal representatives and as a trustee**

**for HELEN MUKINA, RACHAEL WANJIKU,MARGARET**

**NJOKI & HARRIETT WANJIKU.....DEFENDANTS**

#### JUDGMENT

1. The Plaintiff filed an Originating Summons dated 25/03/2019 against the Defendants seeking orders *inter alia* that a declaration be made that title of the land parcel number LOC.1/NDUNYU CHEGE/172 measuring 2 acres (*hereinafter referred to as the suit land*) has been extinguished by the Plaintiff through adverse possession thereof for a period of more than twelve (12) years in terms of the Limitation of Actions Act.
2. Additionally, the Plaintiff sought an order directed to the Murang'a Land Registrar to register him as the absolute proprietor of the suit land in place of the Defendants and any other person succeeding them. The Summons is premised on the grounds on the face of it and contents of the Plaintiff's Supporting Affidavit sworn on 27/03/2019.
3. The Plaintiff contends that he bought the suit land from the late Daniel Njoroge Ruirie, the Defendants' father and son of the late Ibrahim Ruirie Kimari in 1982 vide a Sale Agreement dated 31/08/1982. That at that time, the late Ibrahim Ruirie was the registered owner of the suit land which is currently registered under the Defendants' names and according to the Plaintiff, in trust for the late Ibrahim's children vide Court order issued on 04/10/2017 in **Nairobi HC Succession Cause No. 906 of 1988**. He is categorical that the late David Njoroge had been appointed as administrator of his late father's estate in **Thika RMCC Succ. Cause No. 173 of 1983** but the grant was later revoked in the **Nairobi Succ Cause No. 906 of 1988**.
4. The Plaintiff pointed out that the Defendants filed another suit **Thika CMCC No. 493 of 2004** against him and their late father, claiming that their late father illegally sold the suit land. The said case was dismissed on 28/07/2009 for want of prosecution. He avers that he has been in continuous and uninterrupted possession and exclusively used the suit land for over 37 years hence this suit.
5. The Defendants vehemently opposed the Plaintiff's claim vide a Replying Affidavit sworn by Barnabas Kimari Njoroge on 13/05/2019. Simultaneously, they filed a Notice of Preliminary Objection dated 24/05/2020. On 03/12/2021, both parties agreed to dispose the said Preliminary Objection concurrently with the main suit.
6. The Defendants admit that they are grandchildren of the late Ibrahim Kimari who owned the land parcel no. LOC 16/NDUNYU CHEGE/ 172 AND LOC 3/GITURU 154 measuring 4.06 and 7.8 acres respectively. That they are now the registered owners of their grandfather's estate and trustees of his grandchildren and not trustees of the late Ibrahim's children (i.e their uncles and/or aunts). They fervently deny any sale of land between their late father and the Plaintiff because their late father did not have any land or capacity to sell their grandfather's land. That in any event, such sale if at all, was null and void as the relevant Land Board consent was not obtained.
7. Further, that upon conclusion of the succession proceedings in 2017, they issued notices to the Plaintiff to vacate the suit land to no avail. They dismissed the Plaintiff's claim as premature because, according to them, the filing of Succession Cause No. 906 of 1988 effectively stopped the running of the statutory period of 12 years pertinent for such a claim to succeed.

## The Defendants' Preliminary Objection.

8. Before delving in to the merits of the claim, it is paramount to determine the Defendants Preliminary Objection dated 24/11/2020. This is because by the very nature of a Preliminary Objection if upheld, then it will summarily halt the suit before this Court.

9. A Preliminary Objection was described in the **Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696**, Law, that consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

10. The above position was affirmed by the Supreme Court Ruling in **Civil Application No. 36 of 2014 Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR** that a Preliminary Objection should be founded upon a settled and crisp point of law

11. The Preliminary is based mainly based on grounds *inter alia* that the Defendants herein are **not** the trustees for the beneficiaries and/or children of the late of Ibrahim Ruirie Kimani but are registered as the Administrators and beneficiaries of the estate of their late grandfather. That Helen Mukina, Racheal Wanjiku, Margret Njoki and Harriet Wanjiru are not beneficiaries of the estate of Ibrahim Ruirie Kimani. Moreover, that the Plaintiff's claim based on a sale agreement entered into by their late father is null and void for want of capacity to contract and such occupation vide sale agreement is deemed adverse after payment of the last installment of the purchase price. Last but not least, that the Plaintiff's suit is incompetent as he should have sued the initial deceased registered owner.

12. The preliminary objection was opposed and canvassed by a way of submissions.

13. It is noteworthy to state here that there was a similar to this suit namely Murang'a ELC Cause No. 9 of 2019 which parties sought to consolidate on 29/07/2019. The Plaintiff therein is one Kariuki Gichuru who seeks similar orders to acquire title for 1.06 acres in LOC/NDUNYU CHEGE/172 by adverse possession having bought the same from Helen Mukina, the Late Ibrahim's daughter.

14. On behalf of the Defendants, they submitted that both their late father and Helen Mukina lacked capacity to sell the suit properties registered in the late Ibrahim's name in 1982. That by virtue of filing Thika suit No. 493 of 2003, the Defendants interrupted the Plaintiff's continuous occupation on the suit land hence statutory period for A.P stopped running. They disputed the sale agreements relied on by the Plaintiff as incompetent under the Law of Contract. Reliance was placed on the Court of Appeal case of **Christopher Kioi & Another V Winnie Mukolwe & 4 others [2018] eKLR** that a claim for adverse possession cannot succeed if the Plaintiff is in possession with the owner's permission or is in pursuance of an agreement of sale or lease.

15. The Plaintiff argued that the Defendants raised factual issues in the Preliminary Objection that did not constitute pure points of law as required in the case of **Mukisa** Supra. That for the Court to determine those issues, for instance the validity of the impugned Sale Agreement, there was need to call for and analyze evidence in support or opposition. As such the preliminary objection was termed a non-starter and ought to be dismissed. They cited the cases of **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR** and **Renom Agency Limited v Muthoga Gaturu & Company Advocates & 3 others [2016] eKLR**.

16. It is true that the issues raised by the Defendants are not pure points of law that can be determined without calling for evidence. Additionally, the grounds are not premised on admitted facts and to decide the same, there is need to call for and analyze evidence. For instance, the issue of whether the Defendants are trustees for their siblings or the children of the late Ibrahim cannot be determined without calling for evidence.

17. For that reason alone, the Preliminary Objection is unmerited and the same ought to be dismissed with costs.

## The Plaintiff's case

18. The Plaintiff testified as PW1 and called two witnesses in support of his claim. He relied on his Affidavits sworn on 27/03/2019, 9/10/2020 and 19/06/2019 and annexures thereto as his evidence in chief. He testified that he bought the suit land from David Njoroge son of the late Ibrahim in 1982 and paid the purchase price in three installments per the sale agreement dated 31/08/1982. That he immediately took possession and cultivated it by planting tea bushes and nappier grass. That he has utilized the land and live on it since 1982 without any interruption.

19. On cross-examination PW1 explained that certainly the Defendants filed **Thika CMCC Case No. 493 of 2004** against him which suit was dismissed for want of prosecution. He admitted knowing Hellen Mukina and Racheal Wanjiru as sisters of David Njoroge. He explained that the total suit acreage was 4 acres; he bought 2 acres whilst Kariuki Gichuru bought 1 acre in addition to 1.6 acres sold to him by Hellen Mukina totaling 2.6 acres for Kariuki.

20. PW2, Solomon Ngugi Mwangi – Assistant chief & Acting Chief Ndunyu Chege Location relied on his Affidavit sworn on 23/11/2020 and produced the letter annexed therein. He testified that he had not dealt with any dispute concerning the suit land. He confirmed that the Plaintiff lives on the suit land with his children. On the contents of the letter attached to his Affidavit, he clarified that he was requested to write by PW1's children and that he was not present in 1982.

21. PW3, Samuel Mwangi Waithaka also relied on his Affidavit sworn on 15/01/2021. He stated that he knows that the suit land was sold by Njoroge to the Plaintiff who has been in occupation ever since and has never been evicted. He added that he witnessed the payment of the first installment of the purchase price being Kshs. 1,000/=.

22. That marked the closure of the Plaintiff's case.

### The Defendants' Case

23. On the other hand, Patrick Ngaruiya Njoroge took to the stand as DW1. He adopted his Affidavit dated 24/06/2019 as his evidence in chief. He stated that alongside his siblings, they filed Thika CMCC 493 of 204 against their late father David Njoroge for selling land registered in their grandfather's name without their consent. That his father had three sisters who are alive; Racheal Wanjiru, Hellen Mukina and Harriet Wanjiku. That the suit land is now registered under his and Barnabas Kimari's names in trust for their siblings. That upon being so registered they demanded vacant possession from the Plaintiff.

24. In Cross—examination, DW1 admitted that in 1981 he was barely 11 years old and that the Plaintiff lived on the land since 1983 to date. He candidly detailed that;

“... He [Plaintiff] planted tea, fenced the land; built a house. Since 1983 I have not utilized the land. I know that he occupied the land for that long....”

25. DW2 - Barnabas Kimari Njoroge a banker by profession based in South Sudan relied on his Affidavit dated 13/05/2019. He stated that he was the son of David Njoroge who died in 2016. That his father was never registered as the owner of the suit land which belonged to his late grandfather Ibrahim who died in 1981. He acknowledged that his father sold his grandfather's land. DW2 rehashed DW1's evidence about their late father's siblings and the details of the Thika suit. However, on the Plaintiff's use of the suit land he said;

“I know the Plaintiff. He cultivates the land. I do not live there. There are tea bushes on the land. We planted part of the tea bushes. Others were planted by the Plaintiff. In 2018 I gave notice to the Plaintiff to vacate the suit land. There are 3 houses on the land. I do not know who built them...’

26. In Cross-examination, he admitted that since his childhood the suit land has been occupied by the Plaintiff and Gichuru but denied knowing when they entered the land. He said he was entitled to the land by way of inheritance. He admitted that the Thika case was dismissed for want of prosecution and confirmed that the Plaintiff has never been evicted from the suit land. He also confirmed that his late father did file succession cause no 173 of 1983 and acknowledged the Plaintiff as a buyer in the said proceedings.

27. That was the end of the Defendants' case.

28. Parties agreed to file their respective written submissions. The Plaintiff filed his submissions dated 23/02/2021 whereas the Defendants filed theirs dated 01/03/2021.

29. On behalf of the Plaintiff, it was submitted that the ingredients for a claim of adverse possession as laid out in the cases of **Samuel Kihamba vs. Mary Mbaisi [2015] eKLR** and **Mate Gitabi vs Jane Kabubu Muga alias Jane Kaburu Muga & 3 Others [2017] eKLR** were wholly satisfied. That the Plaintiff has been in open, continuous occupation of the land and utilized it in a manner that is hostile to the interests of the true owner. Conspicuously, the Plaintiff has fenced off the premises, built his home and exclusively cultivated the land.

30. On the other hand, the Defendants were insistent that their late father's sale of the suit land was null and void as he lacked capacity to transact. They termed his actions as intermeddling despite acknowledging that time for adverse possession where the same is predicated on a sale agreement starts to run after payment of the Plaintiff's last installment. Interestingly, they submitted that if at all such time would run, then it was against the late Ibrahim and that the same was interrupted in 2010 when the Thika suit was dismissed.

31. The Defendants highlighted that adverse possession cannot lie against the late David. This is because he was never registered as a true owner and that his grant of administration had been revoked resulting to their appointment in 2018. They cited a number of cases including **Wanyoike v Kahiri [1979]**, **Gabriel Mbui v Mukindia Maranya [1993] eKLR**, **Kasuve vs Mwani Investments Ltd & 4 others IKL** and **Wambugu vs Njuguna (1993) LCR 173**.

32. Having considered the Pleadings, the evidence adduced on trial, the written submissions and all the documents placed before me the issues for determination are; Whether the Plaintiffs have proved title by way of adverse possession; Whether the title issued to the Defendants should be cancelled; who meets the cost of the suit.

33. The Limitation of Actions Act does not expressly define adverse possession. Nevertheless, case law is awash with what adverse possession entails and generally it 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 action against such person in assertion of his title for a certain period, in Kenya 12 years. See Court of Appeal decision in **Mtana Lewa –v Kahindi Ngala Mwangandi (2005) eKLR**. It is also a well settled principle that a party claiming Adverse Possession ought to prove that this Possession was “nec vi, nec clam, nec precario,” that is, peaceful, open and continuous. The Possession should not have been through force, no in secrecy and without the authority or permission of the owner. These doctrines are internationally accepted and were specifically reiterated by the South Africa Supreme Court in the case of **Z F Stoffberg NO & others v City of Cape Town (1325/2017) [2019] ZASCA 70**.

34. It is also trite and rightly so as submitted by the both parties that a claim for adverse possession can be founded on sale agreements for land. In such instances, the period for adverse possession starts to run after payment of the last installment of the purchase price. See the case of **Wanyoike supra**.

35. **Section 7** of the **Land Act, 2012** recognizes prescription as a method of acquiring land.

36. Sections 7, 17, 18 and 38 of the Limitation of Actions Act provide as follows;

#### 7. Actions to recover land

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.

#### 17. Title extinguished at end of limitation period

Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.

#### 38. Registration of title to land or easement acquired under Act

(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.

37. These provisions are highlighted to demonstrate the legal recourse for a claimant who has satisfied the requirements for extinguishing a true owner's title by way of adverse possession. Upon such acquisition, a title obtained or due for obtaining by Adverse Possession is recognized as an overriding interests under Section 28 (h) of the Land Registration Act, 2012.

38. To this end, the Defendants contend that for a claim for Adverse Possession can only lie against the late Ibrahim who was the registered owner until 2018. In determining whether adverse possession can lie against a deceased owner, Section 16 of the Limitations of Actions Act states; -

#### 16. Administration dates back to death.

For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration

39. Equally, Section 7 of the Limitation of Action Act above, envisages Adverse Possession if it first accrued to some person through whom a claimant claims, in this case the late Ibrahim. I rely on the Court of Appeal decision in **Titus Kigoro Munyi v Peter Mburu Kimani Nyeri CA No. 28 of 2014 [2015] eKLR** where the Court cited with approval the case of **Peter Thuo Kairu – v- Kuria Gacheru, (1988) 2 KLR 111** that the law relating to prescription affects not only present holders of the title but their predecessors.

40. Further, the Court in the case of **Samuel Kariuki Mwangi & another v Njuru Mwangi [1986] eKLR** adverse possession relate to interests arising from actual occupation without legal title and thus are equitable rights which are binding on the land. This means Adverse Possession would suffice in respect to land where the registered owner is deceased and such occupation meets the threshold for proving it i.e. actual open, notorious, continuous, exclusive and hostile to the owner.

41. The Defendants relied on the case of **Sisto Wambugu v Kamau Njuguna CA NO. 10 OF 1982 [1983] eKLR** where the Court of Appeal held that a claimant for adverse possession must prove that the owner lost his rights to the land either by being disposed of it or by having his possession of it in a manner that is hostile to the owner's enjoyment. The Plaintiff has, on balance of probabilities proven possession and continuous use of the suit land contrary to the Defendants' use. The Defendants conceded this fact and testified that they had notified the Plaintiff to vacate the land which notice did nothing to interrupt accrued adverse possession.

42. The Plaintiff's occupation was non-permissive as regards to Ibrahim and the period for calculating adverse possession started running in 1982. The period was uninterrupted for at least 12 years until 1994 when title by adverse possession accrued. So that by the time the Defendants purported to file the Thika suit, their title to land by way of inheritance was already extinguished. Indeed, the Court in **Francis Mungai Kimani v Ngendo Kibogoro [1988] eKLR** held that filing of cases does not necessarily stop adverse possession. I highlight this because the Defendants submitted that the Plaintiff's father (*sic*) occupation was interrupted in 2010 and the law requires the Plaintiff to file such a claim in 2022 after expiry of 12 years. This is not the correct interpretation of the law of Adverse Possession.

43. Accordingly, it is my finding that the Plaintiff has proved his claim for title over the suit land by way of adverse possession and the summons dated 25/03/2019 be and are hereby allowed.

44. Cost as of the suit shall be in favour of the Plaintiff against the Defendants.

45. It is so ordered

DATED, SIGNED & DELIVERED ONLINE THIS 26<sup>th</sup> DAY OF MAY, 2021.

J. G. KEMEI

JUDGE

**Delivered online in the presence of:**

Ongeri for the Plaintiff

Mugambi for the Defendant

Court Assistants: Kuyaki/Alex