



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANGA**

**ELC NO 9 OF 2019 (OS)**

**KAMIRU KARIUKI**

**ELIS MWANIKI KARIUKI**

**RAHAB KABURA**

**(as legal representative of the Estate of KARIUKI GICHURU.....PLAINTIFFS**

**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. Vide Originating Summons dated 25/3/2019 the Plaintiff sought orders against the Defendant as follows:

- a) A declaration that the Plaintiffs are entitled to be registered forthwith as the owners of land title number LOC 16/ NDUNYU CHEGE/ 172 (suit land) measuring 2.06 acres
- b) A declaration that the title of the said land LOC 16/ NDUNYU CHEGE/ 172 measuring 2.06 acres has been extinguished by the Plaintiffs' adverse possession thereof for a period of more than 12 years in terms of section 17 and 38 of the Limitations of Actions Act
- c) A declaration that the Plaintiff has acquired the interest in land parcel number LOC 16/ NDUNYU CHEGE/ 172 measuring 2.06 acres by adverse possession therefore for a period of more than 12 years from 1982 to date
- d) THAT an order do issue requiring and directing the Land Registrar Muranga to register the Plaintiffs as the proprietors of land parcel number LOC 16/ NDUNYU CHEGE/ 172 measuring 2.06 acres in place of the Defendants who represent the estate of IBRAHIM RUIRIE KIMARI (Deceased) and in place of the other person succeeding the Defendant
- e) The cost of this suit be borne by the Defendants

2. The summons is anchored on ten grounds and the Supporting Affidavit deponed thereto by the 1<sup>st</sup> Plaintiff. It is the Plaintiffs' case that their deceased KARIUKI GICHURU bought cumulatively 2.06 acres from beneficiaries of the estate IBRAHIM RUIRIE KIMARI and upon purchase of the same, took occupation and use of the land upon purchase in 1982/83 till his demise in 2010. That he and his father farmed tea on the land and each obtained growers licences thereto. That his father was buried on the suit land with no objection from the Defendants. The matter is supported by a bundle of documents which seeks to buttress the Plaintiffs' case against the Defendants.

3. The Defendants in opposing the summons the disposition of Patrick Njoroge Ngaruiya that the parcel of land belonged to their deceased grandfather who never sold the land to the deceased KARIUKI GICHURU and asserts that if his father sold the land he did so devoid of consent from Land Control Board and legal capacity to sell. That Hellen Mukina, their aunt who is alive also did not have capacity to sell

1.06 acres of land to the Plaintiffs father. He further states that he and his brother the 2<sup>nd</sup> Defendant are the registered trustees of the suit land on behalf of other grandchildren of the deceased children. He maintains that the Plaintiffs are trespassers and the claim for adverse possession begun to run at the conclusion of the succession cause.

4. In response to the affidavit, the Plaintiffs rebutted the claim by the Defendant to the extent that their deceased father bought the land from the beneficiaries and/ or children of IBRAHIM RUIRIE KIMARI who were entitled to inherit from the estate. They contend that the Defendants acquired title to the property in 2018 notwithstanding that the Plaintiffs have been in occupation and use of the parcel of land for 37 years and have even buried their father thereon.

5. On the 5/11/2020 the Defendants did file a Notice of Preliminary Objection against the whole suit. On the 3/12/2020 by consent of the parties recorded in Court, the parties elected to have the Preliminary Objection be heard simultaneously with the suit.

6. Before delving into the issue of substantive summons therefore I shall first determine the said Notice of Preliminary Objection dated 4/11/2020. The Preliminary Objection raises 7 grounds predominantly that the suit that; according to the provisions of section 37(a), 38(1) and 39(b) of the Limitations of Actions Act the period of limitation does not run where there is a contract; the sale agreements produced are void for want of legal capacity to transact by the purported vendors; that where a claimant pleads the right to land, possession is deemed to have become adverse after the payment of the full purchased price; the occupation by the Plaintiffs was disrupted by CMCC No 493 of 2004; time only starts running against the Defendants from 2018 when they became registered title holders.

7. The Preliminary Objection was dispensed with by way of written submissions, the Defendants submitted that the vendors, DAVID NJOROGE and HELLEN MUKINA did not have the legal capacity to sell the land as the same was registered in their grandfather's name, IBRAHIM RUIRIE. When submitting that the sale agreement was in breach of the Contract Act, the Defendants relied on the Court of Appeal case of **Christopher Kioi & Another V Winnie Mukolwe & 4 others [2018] eKLR** that it is trite law that a claim for Adverse Possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or is in pursuance of an agreement of sale or lease or otherwise". They further submitted that there being revocation of grant in 2002, the grant revoked all the actions by the vendors. Further that by operation of the Thika Civil Suit No. 493 of 2004, the Plaintiffs' continuous occupation was interrupted and time ought to run from the time the suit was dismissed.

8. The Plaintiffs in opposing the Preliminary Objection cited the **Mukisa Biscuit Manufacturing case as well as the Independent Electoral & Boundaries Case** where both Courts found that a Preliminary Objection should be based on pure points of law and should not seek to be validated by facts. Further that this being an adverse possession claim, the same calls for adducing evidence and facts and cannot be determined by way of a Preliminary Objection and relied on the **Renom Agency Limited**.

9. In the **Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696**, the Court found that a Preliminary Objection must be based on pure points of law and cannot be raised even where one fact has to be ascertained. To determine if it is a pure point of law, the Supreme Court in **Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others [2015] eKLR** held that "To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record." A perusal of the grounds of objection undoubtedly calls for investigation of facts, there is no ground whatsoever that raises a pure point of law.

10. In the main the Defendants assert that the sale agreement is void for lack of capacity to sell and that the claim of adverse possession is prematurely before the Court. These in my firm view are matters that require investigation by the Court. Resultantly a claim for adverse possession cannot be adequately dealt with by way of a preliminary objection as it requires investigation of facts.

11. In the end the Preliminary Objection must fail. I will then proceed to determine the matter on its merits.

12. At the hearing of the suit the Plaintiff called three witnesses while the Defendants called two.

13. PW1, KAMIRU KARIUKI relied on the various affidavits dated the 27/3/2019, 19/6/19, 9/10/19 and 8/11/19. In addition, he produced several documents in support of the Plaintiffs case and marked PEX Nos 1-16.

14. He led evidence that the Plaintiffs are the legal representatives of Kariuki Gichuru who died on 10/5/2010. He produced a copy of the letters of grant of administration issued to them and dated the 27/3/2017 in CMCC No 31 of 2017, Thika. That the deceased purchased a total of 2.06 acres from the children of Ibrahim Ruire Kimari in 1982, from David Njoroge he purchased 1 acre and from Hellen Mukina he purchased 1.06 acres out of the suit land. In support of the Plaintiffs claim he produced a number of sale agreements in Kikuyu language together with their English translations dated the 20/1/1982, 26/4/1982, 10/5/1982, 18/6/1982/, 4/7/1982, 16/7/1982, 30/7/1982 and 8/8/1982.

15. That upon purchase of the said land, his father took possession and settled his family and commenced the development of the suit land where he planted tea, coffee and avocados and even obtained a growers licence No 305574 dated 27/5/93 from Kenya Tea Development Authority (KTDA). That he too planted 1850 tea bushes vide tea plantation licence No 12603 dated 7/12/1992 on the suit land. The witness produced photographs of a permanent house (KK10) as part of the developments on the suit land. In addition, he also produced a photograph showing the grave of his father Kariuki Gichuru whom he states was interred in 2010 on the land with the knowledge of the Defendants. That the Defendants did not raise any protest at all to the burial.

16. Further he stated that his father has been in occupation of the suit land with his family from 1982 to his demise in 2010 leaving them still in occupation. That their occupation remains uninterrupted to date and that their claim of title by way of adverse possession is well founded having occupied the suit land for a period in excess of 12 years (39 years to be precise).

17. In cross examination he stated that he is aware that the suit land belonged to one IBRAHIM RUIRIE KIMARI. That he is aware that David Njoroge and Hellen Mukina, the children of Ibrahim sold their portions of inheritance to the suit land to his father in 1982. That he

was 14 years old then. That upon the death of Ibrahim David Njoroge obtained letters of representation to his estate which he later learnt were revoked in 1988. Many years down the line (1988 to be exact), Hellen was appointed the administrator of the estate of their father Ibrahim.

18. That although the Defendants filed suit against his father and David Njoroge and another third party purchaser in CMCC No 493 of 2004-Thika, the suit was dismissed after 5 years for want of prosecution.

19. He stated that David Njoroge and Hellen Mukina had recognized their father as a beneficiary (purchaser) in their petition for succession of the estate of Ibrahim. That the vendors failed to transfer the land to their father and instead the land became registered in the names of the Defendants in 2018 in total disregard to their interests that have accrued by way of adverse possession.

20. PW2, SOLOMON NGUGI MWANGI testified that he is the Assistant Chief of Githiri sub-location since 2010. He adopted his Affidavit sworn on the 5/10/2020 as evidence in chief. He led his testimony in support of the Plaintiffs' occupation and use of the suit property. On cross-examination he testified that he did not know DAVID Njoroge. That he simply knew that KARIUKI Gichuru bought land from a third party called DAVID Njoroge. He also confirmed the developments done on the suit property but on re-exam he testified that he did not know the activities that took place in 1982 with respect to the acquisition of the land. He confirmed that he authored the letter dated the 20/8/2020 in support of the Plaintiffs claim.

21. PW3, MAINA CHUMA adopted his affidavit dated 8/11/2019 and testified that he was a witness to a sale agreements between Kariuki GICHURU and DAVID NJOROGE executed on the 4/7/1982 and 21/12/1982. That there were other witnesses to the transaction between Kariuki and Njoroge. That Gichuru occupied the suit land with his family until his demise and that his family including the Plaintiffs still live on the suit land todate. That Gichuru was buried on the suit land. That he visited the suit land about 3 years back and he confirmed that there are 5 houses on the land; one permanent and the rest are built of timber.

22. DW1, PATRICK NGARUYIA NJOROGE testified and relied on his replying affidavit dated the 13/5/2019 as his evidence in chief. He stated that the 2<sup>nd</sup> Defendant is his brother and that they are sons of David Njoroge Ruire. That Ibrahim is their grandfather who died in 1981. That though he was the registered owner of the land, Ibrahim was not buried on the suit land. That Hellen Mukina is their Aunt. That they are the registered owners of the suit land pursuant to a certificate of confirmation of grant issued on 4/10/17 in HCCC No 906 of 1988. That they hold the suit land in trust for the children of the beneficiaries of the estate of Ibrahim. See copies of grant and title dated 4/10/2017 and 29/8/2018 respectively.

23. That following the confirmation of grant the Plaintiffs through a letter dated the 26/1/2018 demanded that they transfer a portion of 2.06 acres to them. In their response vide latter dated the 6/2/2018, they emphatically denied that their grandfather sold any land to them or their predecessors and sought to put the Plaintiffs to strict proof on their claims.

24. That his father and Aunt sold the land to the Plaintiffs father in 1982. That neither his father nor Helen Mukina had capacity to sell the land to the Plaintiff's father because the land was registered in the name of their grandfather and his estate was yet to be succeeded. That the letters of administration issued to his father Njoroge in 1983 were revoked in 1988. That the Plaintiffs are occupying the suit land illegally as trespassers and should be evicted.

25. He confirmed that he came to know the Plaintiffs in 2001 having visited the suit property and found them leaving thereon. He also confirmed that the Plaintiffs have constructed houses and developed the land. He further testified that the Plaintiffs are the children of Kariuki Gichuru who purchased land from his father and Aunt in 1982. He conceded that the Plaintiffs live on the land and have done so for over 30 years. That his father who died in 2016 never evicted the Plaintiffs and that their father did not interfere with their occupation.

26. Further that he and his brother sued the Plaintiff's father and David Njoroge in 2004 but the suit was dismissed for want of prosecution. That none of his relatives live on the suit property.

27. DW2, BARNABAS KIMARI, testified that his father sold the suit land which was registered in the name of their grandfather but he objected to the sale, 23 years later after the fact, vide a suit in Thika, which was dismissed for want of prosecution. That the suit land is registered in his name and that of the first Defendant. He testified that neither his father nor grandfather were buried on the suit land. In cross-examination he testified that the Plaintiff's and their late father's occupation of the suit land has never been interrupted either physically or through any Court orders for over 30 years.

28. Parties filed and exchanged submissions as per their election. It is the Plaintiffs' submissions that they have satisfied the requirement of the grant of the orders sought. In seeking to convince the Court, they relied on the case of **Mate Gitabi vs. Jane Kabubu Muga alias Jane Kaburu Muga & 3 Others {2017}**. As to establishing that the possession has this far been adverse, the Plaintiffs relied on the case of **Wilson Njoroge Kamau vs Nganga Muceru amau {2020}**, in the end the Plaintiffs submitted that having satisfied the ingredients of adverse possession the prayers be granted.

29. The Defendants submitted that a claim for adverse possession time begins to run against the registered proprietor relying in the case of **Wanyoike vs Kahiri {1979}**. It was thus their submission that the Plaintiffs claim for adverse possession begun running from 2018 after conclusion of the succession cause. It was their submission also that their deceased father died before he concluded his father's succession cause thus invalidating the sale agreement as he was not a legal representative within the meaning established in **Trouistik Union International & Anor vs Jabe Mbeyu & Anor**. It was further their submission that the property having never been registered in the name of DAVID NJOROGE the Plaintiffs do not have a valid claim. It is the Defendants' submission that occupation does not confer ownership as established in **Gabriel Mbui vs Mukinda Maranya {1993}**. The Defendant relied on several cases in seeking to have the Plaintiffs' suit dismissed.

30. I have read and considered the submissions on record.

31. 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.

32. It is clear from the evidence on record that the following facts are undisputed; the suit land belonged to IBRAHIM RUIRIE KIMARI who died in 1981; He was the father of among others David Njoroge and Hellen Mukina; He was also the grandfather of the Defendants; The suit land measures 4.6 acres; the subject land under claim (2.06 acres) was sold by HELEN MUKINA and DAVID NJOROGE, the children of the Estate of IBRAHIM to Kariuki Gichuru, the father of the Plaintiffs in 1982 after the death of Ibrahim, the registered owner; Kariuki Gichuru took possession of the suit land and settled his family until his death in 2010; he was buried on the suit land; his family including the Plaintiffs still currently live on the suit; the suit land is now registered in the names of the Defendants pursuant to the certificate of confirmation of grant dated the 4/10/2017.

33. **In the case of Mbira –v- Gachuhi, (2002) IEALR 137** where it was held that:

“..... 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....”

34. Un controverted evidence was led by the Plaintiffs and their witnesses that their father purchased the suit land in 1982 from the children of Ibrahim. Upon completion of the purchase the said Kariuki took possession of the land and commenced developments including cultivation of tea and construction of houses. PW2 led evidence that he visited the suit land and confirmed the said developments. The Defendants too confirmed the occupation and developments on the land upon their visit. There is no doubt that the Kariuki Gichuru occupied the said land openly exclusively and without any secret at all.

35. It is imperative to note that by the time Kariuki Gichuru purchased the land in 1982, after the death of Ibrahim, the registered owner in 1981. His entry therefore was without the consent of the registered owner. It is the undisputed fact that Kariuki Gichuru took possession and occupied the land openly, exclusively and without any force. His occupation had such notoriety for all to see.

36. When did time start running for purposes of calculating adverse possession. The Defendants have argued that time started running only in 2018 when they were became registered as owners of the suit land. The answer is found in the case of **Public Trustee – v- Wanduru, (1984) KLR 314 at 319** where Madan, J.A. stated 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.

37. I have perused the agreements of sale between Kariuki Gichuru on the one hand and Hellen and David on the other hand. As per the agreements Kariuki paid the purchase price in 1982 and was put in possession. Payment has not been disputed. Time therefore started running from 1982 for purposes of calculating adverse possession.

38. One would argue, as the Defendants have, that time cannot run against the estate of a deceased person until an administrator is appointed. It is on record that following the death of Ibrahim in 1981, his son David was appointed administrator in 1983. In his petition he disclosed the Plaintiffs father Kariuki Gichuru as a purchaser and a beneficiary. In 1998 his sister Racheal challenged the said grant vide Succ cause No 906 of 1988 on the grounds inter alia that the grant was obtained on non disclosure of beneficiaries and inclusion of non beneficiaries. The Court agreed with her and revoked the grant on the 26/4/2002. See the judgment of Hon Mr. Justice J M Khamoni.

39. It would appear from the record that the estate remained without an Administrator until the year 2011 when Hellen Mukina petitioned the Court for letters of grant of administration. She was appointed on the 22/10/2014. See letters of grant of administration dated even date. Thereafter the administrator and the beneficiaries vide a consent recorded in Court on the 8/12/2017 to register the Defendants as owners of the suit land to hold in trust for the beneficiaries of the estate of Ibrahim.

40. In answering this issue, I rely on section 16 of the Limitations of Actions Act which provides that in actions for the recovery of land, an Administrator of the estate of a deceased person could be 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. This means that when the letters of administration were granted to Hellen in 2017, the administration of the estate of Ibrahim dated back to 1981 when he died. The law does not permit an interval and this is the crux of Section 16 aforesated.

41. It therefore follows that at the time the Defendants became registered as owner of the suit land, the interest in the land had been extinguished in favour of Kariuki Gichuru and his successors in title and effectively the Defendants held the title as paper owners in trust for the Plaintiffs, Kariuki Gichuru’s successors.

42. Was possession interrupted by the suit in CMCC No 493 of 2004, Thika? It is the contention of the Defendants that it did. In this case the Defendants sued Kariuki Gichuru and their father for fraudulently selling the suit land to Kariuki Gichuru. Evidence was led by both parties that the suit was dismissed for non-prosecution. In my view the Defendants had no legal basis to mount the case as they were neither beneficiaries nor legal representative so the estate of their grandfather then. Indeed the Defendants admitted in evidence that nothing has interrupted the continued occupation of the Plaintiffs on the suit land.

43. It is trite that rights arising from adverse possession are overriding interest as set out in Section 28 of the Land Registration Act and need not be noted on the register. In the case of **Peter Mbiri Michuki v Samuel Mugo Michuki [2014] eKLR** the Court held that rights of a person in possession or occupation of land were equitable rights which were binding on the land and the land was subject to those rights. It is therefore the conclusion of the Court that the claim for adverse possession had arisen, accrued and vested as of 1994 and any registered

title was being held in trust for the Plaintiffs.

44. Having established that the Plaintiffs have an equitable rights binding on the land, it will follow suit therefore that any registration to the land other than that of the Plaintiffs should be cancelled and land registered in favour of the Plaintiffs.

45. In the end I am persuaded that the Plaintiffs have proved their claims and I therefore enter judgement in their favour as follows;

a. A declaration be and is hereby made that the Plaintiffs are entitled to be registered forthwith as the owners of land title number LOC 16/ NDUNYU CHEGE/ 172 (suit land) measuring 2.06 acres

b. A declaration be and is hereby made that the title of the said land LOC 16/ NDUNYU CHEGE/ 172 measuring 2.06 acres has been extinguished by the Plaintiffs' adverse possession thereof for a period of more than 12 years in terms of section 17 and 38 of the Limitations of Actions Act

c. A declaration be and is hereby made that the Plaintiff has acquired the interest in land parcel number LOC 16/ NDUNYU CHEGE/ 172 measuring 2.06 acres by adverse possession therefore for a period of more than 12 years from 1982 to date.

d. THAT an order do issue requiring and directing the Land Registrar Muranga to register the Plaintiffs as the proprietors of land parcel number LOC 16/ NDUNYU CHEGE/ 172 measuring 2.06 acres.

e. The cost of this suit be borne by the Defendants

46. **It is so ordered.**

**DATED, SIGNED & DELIVERED ONLINE AT MURANG'A THIS 26<sup>TH</sup> DAY OF MAY 2021**

**J.G. KEMEI**

**JUDGE**

**Delivered online in the presence of:**

Ongeri for the 1<sup>st</sup> – 3<sup>rd</sup> Plaintiffs

Mugambi for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

Ms. Kanja HB for Karanja for the Respondent

Applicant: Absent

Court Assistants: Kuiyaki/Alex