



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 114 OF 2008**

**KIBANYU KIMANI.....PLAINTIFF**

**VERSUS**

**1. TABITHA NJAMBI KANGETHE**

**2. BEATRICE NJAHIRA KANGETHE**

**3. PETER MBURU KANGETHE**

**4. STEPHEN KIMANI KANGETHE**

**5. SAMUEL MBURU KANGETHE**

**6. KENNETH KIBURI MICHINO**

**7. TIRUS KIMANI MICHINO**

**8. JOHN KAMAU MICHINO**

**9. MARGRET NYOKABI MICHINO (sued either as the**

**registered proprietors of the suit land or as the administrators**

**and beneficiaries of the estate of Kangethe Gachuchu (deceased).....DEFENDANTS**

**JUDGMENT**

At all material times, all that parcel of land known as Githunguri/Nyaga/216 measuring 4.416 hectares was registered in the name of one, Kangethe Gachuchu alias Machino. Kangethe Gachuchu alias Machino was registered as the owner of the said parcel of land on 14<sup>th</sup> November, 1956. Kangethe Gachuchu alias Machino died on 20<sup>th</sup> September, 1974 and a grant of letters of administration in respect of his estate was issued to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants on 3<sup>rd</sup> April, 1997 by the Senior Resident Magistrate's Court at Githunguri in Succession Cause No. 2 of 1997. The said grant of letters of administration was confirmed on 5<sup>th</sup> February, 1998. The estate of Kangethe Gachuchu alias Machino consisted only of the said parcel of land, Githunguri/ Nyaga/216. The same was distributed among his heirs in accordance with the shares set out in the certificate of confirmation dated 5<sup>th</sup> February, 1998.

**The plaintiff's case:**

The plaintiff brought this suit by way of an Originating Summons dated 19<sup>th</sup> March, 2008 filed in court on 20<sup>th</sup> March, 2008. The plaintiff sought the determination of the following questions;

1) **THAT** the plaintiff, Kibanyu Kimani be declared to have acquired title by adverse possession to the suit premises being a portion measuring 0.28 acres out of L.R No. Githunguri/Nyaga/216.

2) **THAT** the registration of any of the defendants or any beneficiary of the estate of Kangethe Gachuchu (deceased) or anyone

deriving title from his estate on the portion measuring 0.28 acres of L.R No. Githunguri/Nyaga/216 be cancelled forthwith and the Land Registrar do rectify the register to enter the name of the plaintiff as the registered proprietor of the suit property.

3) The costs of these proceedings to be borne by the defendants.

The application was brought on the grounds set out on the face thereof and on the supporting affidavit and supplementary affidavit of the plaintiff sworn on 19<sup>th</sup> March, 2008 and 23<sup>rd</sup> May, 2008 respectively. In his supporting affidavit, the plaintiff averred that pursuant to a sale agreement made between him and Kangethe Gachuchu, deceased (hereinafter referred to only as “the deceased”) on or about 15<sup>th</sup> May, 1963, he purchased from the deceased a portion measuring 0.28 acres out of L.R No. Githunguri/Nyaga/216 (hereinafter referred to as “the suit property”) at a consideration of 10 goats or Kshs. 2,000/-. The plaintiff averred that the sale transaction was completed on 15<sup>th</sup> April, 1973, when he paid to the deceased Kshs. 800/- being the final balance of the purchase price. The plaintiff averred that the deceased died in 1974 before he could excise the suit property from the larger parcel of land, L.R No. Githunguri/Nyaga/216. The plaintiff averred that he took possession of the suit property in 1963. The plaintiff averred further that he cultivated and developed the suit property openly without interruption from the deceased or any member of the deceased’s family.

The plaintiff averred that after the death of the deceased, the beneficiaries of his estate acknowledged the agreement for sale that he had entered into with the deceased in 1963 as aforesaid but insisted on entering into a fresh agreement for sale with him. The plaintiff averred that on 2<sup>nd</sup> October, 1976 he entered into a fresh agreement for sale with the deceased’s beneficiaries under which the said beneficiaries of the estate of the deceased agreed to sell to him the suit property at Kshs. 4,500/- of which he paid Kshs. 1,310/- leaving a balance of Kshs. 3,190/- that was to be paid to the said beneficiaries after they had included him as a beneficiary of the estate of the deceased in the succession cause they were to institute in respect of the estate of the deceased.

The plaintiff averred that when the family of the deceased commenced the succession proceedings at the Senior Resident Magistrate’s Court at Githunguri in Succession Cause No. 2 of 1997, they did not include him as a beneficiary of the estate of the deceased. The plaintiff averred that he lodged a claim against the said beneficiaries of the estate of the deceased at Githunguri Land Disputes Tribunal. The plaintiff averred that the tribunal heard his complaint and made a determination in his favour on 25<sup>th</sup> September, 1998. The plaintiff averred that the tribunal held that he was entitled to the suit property and that he should have been included among the beneficiaries of the estate of the deceased in the succession cause. The plaintiff averred that the tribunal also directed him to pay Kshs. 3,190/- being the balance of the purchase price that he had agreed to pay to the beneficiaries of the estate of the deceased under the agreement for sale dated 2<sup>nd</sup> October, 1976.

The plaintiff averred further that the beneficiaries of the estate of the deceased appealed against that decision of the tribunal to the Central Province Provincial Land Appeals Committee which allowed the appeal on 13<sup>th</sup> July, 2000 and reversed the decision of Githunguri Land Disputes Tribunal. The plaintiff averred that he was dissatisfied with the decision of the Provincial Land Appeals Committee and filed an appeal against the same at the High Court in Nairobi HCCA No. 407 of 2000. The plaintiff averred that the appeal was heard and dismissed by the High Court on 4<sup>th</sup> March, 2008. The plaintiff averred that the High Court held that the Githunguri Land Disputes Tribunal had no jurisdiction to hear his complaint against the beneficiaries of the estate of the deceased.

The plaintiff reiterated that he had been in open, uninterrupted and continuous possession of the suit property since 1963 and had developed the same extensively. The plaintiff reiterated that at no time did the deceased or the beneficiaries of his estate interrupt his occupation and use of the property.

In his supplementary affidavit, the plaintiff averred that the 1<sup>st</sup> defendant was a party to the agreement for sale dated 2<sup>nd</sup> October, 1976. The plaintiff averred further that the period between 1963 when he entered into the first agreement for sale and 1973 when he paid the final instalment of the purchase price, he was waiting for the deceased to transfer the suit property to him. The plaintiff averred further that there was no dispute over the portion of L.R No. Githunguri/Nyaga/216 that was sold to him and that the discrepancy in the measurement of the suit property arose as a result of a common mistake that was made by him and the deceased. The plaintiff averred that initially, the suit property was measured by an agricultural officer and later by the Department of Survey which came up with the measurement of 0.28 acres. The plaintiff reiterated that he was in possession of the suit property and had developed the same by planting trees thereon. He annexed to the affidavit photographs showing the trees he claimed to have planted on the suit property. He stated that the original agreement for sale was altered by the defendants who increased the purchase price to Kshs. 4,500/-. He reiterated that the defendants had agreed to include his name among the beneficiaries of the estate of the deceased in the succession cause.

#### The defendants’ case.

The Originating Summons by the plaintiff was opposed by the defendants through a replying affidavit sworn by the 1<sup>st</sup> defendant on 16<sup>th</sup> May, 2008. The defendants denied that the plaintiff had acquired a portion of L.R No. Githunguri/Nyaga/216 measuring 0.28 acres or any part of the said parcel of land by adverse possession. The defendants averred that they applied for grant of letters of administration in respect of the estate of the deceased at Githunguri Senior Resident Magistrate’s Court in Succession Cause No. 2 of 1997. The defendants averred that they were confirmed as the beneficiaries of the estate of the deceased in the said succession cause. The defendants averred that they were not aware of any agreement for sale in respect of the suit property. The defendants averred that the agreement for sale dated 8<sup>th</sup> April, 1973 that was annexed to the plaintiff’s replying affidavit had several discrepancies.

The defendants averred that the alleged agreement was neither signed by the plaintiff nor the deceased. The defendants averred that the plaintiff had never taken possession of the suit property and that the property was full of shrubs. The defendants averred that the plaintiff lied when he claimed that he had developed the suit property and had occupied the same continuously for a period of 45 years. The defendants averred that at no time did they meet the plaintiff over the sale of the suit property. The defendants averred that they did not include the name of the plaintiff in Succession Cause No. 2 of 1997 because they were not aware of his interest in the affairs of the deceased. The defendants averred that the plaintiff had not acquired title to the suit property by adverse possession and urged court to dismiss the Originating Summons.

At the trial, the plaintiff gave evidence and called one witness. The plaintiff Kibanyu Kimani (PW1) testified that the deceased, Kangethe Gachuchu was his uncle and that he was residing on a parcel of land adjacent to the land that was owned by the deceased namely, Githunguri/Nyaga/216. He stated that the deceased died in 1974. He told the court that when the deceased was alive, he sold to him the suit property which sale was disputed by the defendants who were registered as the owners of Githunguri/Nyaga/216 after undertaking succession in respect of the deceased's estate. The plaintiff stated that initially, the deceased's parcel of land and his parcel of land, Githunguri/Nyaga/248A were separated by Ruiru-Githunguri Road. He stated that his parcel of land had a road frontage of 440 feet. He stated that in 1957, Ruiru-Githunguri Road was re-designed and widened with the result that the part of the road that had separated their two parcels of land was moved towards the plaintiff's land away from his land thereby cutting through the plaintiff's land. As a result of this exercise of re-designing and widening of the Ruiru-Githunguri Road, his land remained with a road frontage of 56 feet only. The plaintiff told the court that he approached the deceased and asked him to sell to him the deceased's portion of land that remained on the plaintiff's side after the re-designing of the road which portion was fronting the road and the deceased agreed to the request. The plaintiff told the court that the said portion of land which measured 0.28 acres was the suit property. The plaintiff produced a survey map showing his parcel of land, Githunguri/Nyaga/248A and Githunguri/Nyaga/216 that was owned by the plaintiff and how the road passed through them, and the suit property that was sold to him by the deceased.

The plaintiff stated that he entered the suit property on 16<sup>th</sup> May, 1963 and that was when he planted the trees on the property. He stated that he had also constructed a house on the suit property. He told the court that he had occupied and used the suit property peacefully since 1963. The plaintiff referred the court to his supplementary affidavit sworn on 23<sup>rd</sup> May, 2008 to which he had annexed photographs showing the trees he had planted and the houses he had on the suit property. He stated that he entered into a written agreement with the deceased in 1973 after the deceased had already sold the suit property to him and he was in possession. He stated that the fact that the agreement was not signed did not matter. He stated that when he had a disagreement with the defendants in 1976 he complained against the defendants to the Assistant Chief and that it was before the Assistant Chief that the defendants demanded additional sum of Kshs. 4500/- which he accepted and the agreement reduced into writing.

The plaintiff stated that the 1976 agreement was drawn by the deceased's son, Samuel Mburu Michino who is the 5<sup>th</sup> defendant. He stated that the 5<sup>th</sup> defendant's mother and step mother were present. He told the court he had never been sued by the defendants over the suit property neither had he received a demand from them to vacate the suit property. He stated that by the time he brought this suit in 2008, he had occupied the suit property for over 45 years. He urged the court to allow his claim with costs to be paid by the defendants.

The plaintiff's witness was, Solomon Kangethe Githuki (PW2). PW2 adopted his witness statement dated 26<sup>th</sup> September, 2016 as his evidence in chief and was cross-examined on the same. In his statement, PW2 stated that the plaintiff and the deceased, Kangethe Gachuchu were known to him. He stated that he was present in 1973 when the plaintiff and the deceased entered into an agreement dated 8<sup>th</sup> April, 1973 under which the plaintiff agreed to pay to the deceased additional sum of Kshs. 300/- for the suit property. He stated that he was also present at the meeting on 2<sup>nd</sup> October, 1976 at which the family of the deceased requested the plaintiff to pay more money for the suit property in addition to what had been agreed between him and the deceased. He stated that the plaintiff acceded to the request and agreed to pay Kshs. 4,500/- inclusive of the payment he had made to the deceased. He stated that the plaintiff was using the suit property and had been in possession since he purchased the same. PW2 stated that he was the one who measured the suit property and came up with 0.44 acres that was not accurate.

The defendants' first witness was the 2<sup>nd</sup> defendant, Beatrice Njahira Kangethe (DW1). DW1 told the court that she was a widow of the deceased Kangethe Gachuchu and that the 1<sup>st</sup> defendant who was her co-wife was deceased. DW1 stated that Githunguri/Nyaga/216 on which she was residing belonged to the deceased and that the plaintiff was not staying on the suit property. DW1 stated that the deceased did not inform her that he had sold the suit property to the plaintiff and that the defendants had never entered into any agreement with the plaintiff in relation to the suit property. She told the court that the suit property was bushy after the court ordered that they should not use the same pending the determination of this suit. DW1 stated that the suit property was already divided amongst the heirs of the deceased. DW1 produced the documents attached to the affidavit of the 1<sup>st</sup> defendant, Tabitha Njambi Kangethe sworn on 16<sup>th</sup> May, 2008 as exhibits. She also produced a certificate of official search dated 27<sup>th</sup> November, 2018 as an exhibit. DW1 stated that the dispute with the plaintiff over the suit property had been in court for several years and that the court had already determined that the suit property belong to the defendants. DW1 stated that the plaintiff had no right over the suit property and that the plaintiff should remove a caveat that he had registered against the title of the property.

The defendants' next and last witness was the 9<sup>th</sup> defendant, Margret Nyokabi Michino (DW2). DW2 told the court that land parcel, Githunguri/Nyaga/216 belonged to her deceased father, Kangethe Gachuchu alias Michino who died in 1974. DW2 told the court that the 1<sup>st</sup> defendant was also deceased having died in 2015. She produced copies of the death certificates for Kangethe Gachuchu alias Michino (deceased) and the 1<sup>st</sup> defendant as exhibits. DW2 stated that after the death of the deceased, the defendants obtained grant of letters of administration in respect of his estate. She stated further that as at the time of the death of the deceased, the suit property was not occupied and the deceased did not tell them that he had sold a portion of his land in dispute. DW2 stated that it was when they applied for grant of letters of letters of administration that the plaintiff came up to claim a portion of Githunguri/Nyaga/216. She told the court that it was after the plaintiff lost an appeal that he had lodged in the High Court against the decision of Central Province Land Appeals Committee that he lodged the present suit for adverse possession. She stated that the plaintiff was not in occupation of the suit property and that the trees on the property were planted by her deceased father and brothers. She stated that the plaintiff was lying that she had used the suit property for several years.

#### The submissions:

After the conclusion of evidence, the parties made closing submissions in writing. The plaintiff filed his submissions on 3<sup>rd</sup> May, 2019 while the defendants filed their submissions on 24<sup>th</sup> July, 2019. The plaintiff submitted that he had established that he took possession of the suit property in 1963 and had occupied the same continuously since then. The plaintiff submitted further that he had demonstrated that his occupation of the suit property was adverse to the interest of the deceased. The plaintiff submitted that there was uncontroverted evidence that he had occupied and used the suit property since the same was sold to him. The plaintiff submitted that the evidence he tendered about

his occupation and use of the suit property was consistent in all the proceedings the parties have had over the suit property. The plaintiff submitted that the defendants did not dispute his occupation and use of the suit property in the proceedings before Githunguri Land Disputes Tribunal. The plaintiff submitted that his occupation and use of the suit property was not only adverse to the interest of the deceased but also to that of the defendants who derive their title from the deceased. The plaintiff submitted further that he had occupied the suit property for more than 12 years without interruption before the filing of the present suit and that the previous proceedings before the High Court did not determine the rights of the parties. The plaintiff cited a number of authorities in support of his submissions. The plaintiff submitted that he had proved his case against the defendants and urged the court to grant the reliefs sought in the Originating Summons dated 19<sup>th</sup> March, 2008.

In their submissions in reply, the defendants submitted that the plaintiff could not have purchased the suit property and occupied the same before making payment of the full purchase price. The defendants submitted that if there was any agreement for sale between the plaintiff and the deceased which was denied, the plaintiff had never occupied the suit property and as such he had not acquired rights adverse to the interest of the deceased in the suit property. The defendants submitted that the plaintiff's Originating Summons had no basis and that the plaintiff had failed to prove any right over the suit property which belongs to the defendants. The defendants urged the court to dismiss the plaintiff's suit.

I have considered the plaintiff's Originating Summons together with the affidavits filed in support thereof. I have also considered the defendants' affidavit filed in opposition to the Summons. Finally, I have considered the evidence tendered by the parties and the submissions of counsels. The only issue that the court has been called upon to determine is whether the plaintiff has acquired title to the suit property by adverse possession. In the case of Gabriel Mbui v Mukindia Maranya [1993] eKLR, it was held that a person claiming land by adverse possession must establish the following;

- 1) He has made physical entry and he is in actual possession or occupation of the land for the statutory period.**
- 2) The entry and occupation must be with, or maintained under some claim or colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.**
- 3) The occupation of the land by the intruder who pleads adverse possession must be non-permissive, i.e without permission from the true owner of the land occupied.**
- 4) The non-permissive actual possession hostile to the current owner must be unequivocally exclusive and with the evinced unmistakable *animus possendi*, that is to say, occupation with clear intention of excluding the owner as well and as other people.**
- 5) Acts of the user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter, unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.**
- 6) The possession by the person seeking to prove title by adverse possession must be visible, open, and notorious, giving reasonable notice to the owner and the community, of the exercise of dominion over the land.**
- 7) The possession must be continuous, uninterrupted, unbroken for the necessary statutory period.**
- 8) The rightful owner or paper title holder against whom adverse possession is raised, must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period.**
- 9) The rightful owner must know that he is ousted. He must be aware that he had been disposed, or he must have parted and intended to part with possession.**
- 10) 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.**

From the evidence on record, I am not satisfied that the plaintiff has established his adverse possession claim over the suit property. It is not clear from the evidence adduced by the plaintiff as to when he purchased the suit property. In his affidavit in support of the Originating Summons, the plaintiff claimed that he purchased the suit property on 15<sup>th</sup> May, 1963. In the same affidavit, the plaintiff also claimed that he entered into another agreement with the deceased on 8<sup>th</sup> April, 1973. If that was not all, the plaintiff claimed that he entered into a third agreement for sale with the defendants on 2<sup>nd</sup> October, 1976. In evidence, the plaintiff produced what he claimed to be the agreements dated 8<sup>th</sup> April, 1973 and the one dated 2<sup>nd</sup> October, 1976. The plaintiff did not produce the agreement that he allegedly entered into with the deceased in 1963. The alleged agreement dated 8<sup>th</sup> April, 1973 was not signed by the deceased and the plaintiff. It does not also give the particulars of the land that was being sold. It is therefore not a valid agreement. The agreement dated 2<sup>nd</sup> October, 1976 that was allegedly made with the defendants is also not signed by the plaintiff and any of the defendants. It is therefore not an agreement. In any event, the defendants had at that time not obtained a grant of letters of administration in respect of the estate of the deceased and as such they had no capacity to sell the suit property.

From the evidence on record, I am in agreement with the defendants that neither the deceased nor the defendants entered into any agreement for sale with the plaintiff in respect of the suit property. In the circumstances, it is not clear on what basis the plaintiff would have entered the suit property and when he made such entry. There is also no evidence that the plaintiff entered the suit property and was in actual possession or occupation of the same. The photographs produced by the plaintiff in evidence show a bushy area with trees, shrubs and homesteads. The plaintiff claimed to have planted the trees on the said photographs. The plaintiff did not however say anything about the homesteads. The

plaintiff did not state whether the homesteads are on his own land which is adjacent to the suit property or on the suit property. There is no evidence that the homesteads are on the suit property and when they were constructed. There is also no evidence that the plaintiff is the one who planted the trees in question that the defendants claimed to have been planted by the deceased and some of the defendants.

The burden of proof was upon the plaintiff and he did not in my view discharge it as regards his occupation of the suit property. Even if the plaintiff had planted trees on the suit property, I do not think that that act alone without more would amount to actual possession or occupation of the suit property. In any event there is no evidence as to when the trees were planted. The plaintiff did not also demonstrate that his occupation of the suit property if at all was non-permissive. The evidence led by the plaintiff was that he entered and occupied the suit property under various agreements for sale that he entered into with the deceased and the defendants. This means that he entered and occupied the suit property if at all with the permission of the deceased and subsequently with the permission of the defendants. The plaintiff led evidence that a dispute between him and the defendants over the suit property arose when the defendants refused to include him as a beneficiary of the estate of the deceased in the succession cause that they filed at the Senior Resident Magistrate's court at Githunguri in 1997. If this is the case then, the plaintiff's occupation of the suit property if at all only became non-permissive in 1997. This suit was filed in 2008. This means that as at the time the plaintiff brought the suit, he had not been in non-permissive occupation of the suit property for the statutory period of 12 years. Until 1997, the plaintiff continued acknowledging the interest of the deceased and that of the defendants in the suit property.

When the plaintiff went to the Land Disputes Tribunal in 1998, the plaintiff was seeking to enforce the various agreements for sale that he had entered into with the deceased and the defendants. Time could not run against the deceased for the purposes of Limitation of Actions Act, Chapter 22 Laws of Kenya when the plaintiff continued to acknowledge him as the owner of the suit property and sought the transfer of the suit property to his name pursuant to the agreements for sale aforesaid. With these acknowledgments of the deceased's interest in the suit property, there was no evidence that the deceased and subsequently his successors in title knew that they had been ousted from or dispossessed of the suit property. There was no evidence therefore that the deceased parted with or intended to part with the suit property to the plaintiff.

In the final analysis and for the foregoing reasons, I find the plaintiff's claim not proved to the required standard. The Originating Summons dated 19<sup>th</sup> March, 2008 is therefore without merit. The same is accordingly dismissed with costs to the defendants.

**Delivered and Dated at Nairobi this 5<sup>th</sup> Day of May 2020**

**S. OKONG'O**

**JUDGE**

**Judgment read through Microsoft Teams Video conferencing platform in the presence of;**

Mr. Kingara for the Plaintiff

N/A for the Defendants

C.Nyokabi-Court Assistant