



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC NO. 402 OF 2017

(FORMERLY NAIROBI ELC 420 OF 2016)

IN THE MATTER OF: AN APPLICATION UNDER SECTION 7, 37 & 38 OF THE LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF: L.R NO. NDUMBERI/NDUMBERI/787

BETWEEN

TERESIAH WAMBUI RUA.....PLAINTIFF

VERSUS

DAVID NJENGA MBUGUA (Sued As An

Administrator of the Estate Of Atanas Rigii).....1ST DEFENDANT

CATHERINE WAMBUI MBUGUA(sued as an

Administrator of the Estate of Atanas Rigii).....2ND DEFENDANT

JAMES KARIUKI MBUGUA.....3RD DEFENDANT

MARGARET WANJKU MBUGUA.....4TH DEFENDANT

PETERSON MACHARIA MBUGUA.....5TH DEFENDANT

MARY NYAMBURA MBUGUA.....6TH DEFENDANT

JUDGMENT

By an **Originating Summons** dated 26th April 2016, the Plaintiff herein filed this suit against the Defendants and sought for the following orders;

1. THAT the Applicant (Teresiah Wambui Rua) be declared and decreed the lawful owner and or beneficial owner of Land Title No.Ndumberi/Ndumberi/ 787 (0.09 ha) situated in Kiambu County and registered in the names of the Defendants and that the same be registered in her name by virtue of adverse possession as it has been extinguished.

2. THAT the Land Registrar, Kiambu be ordered to rectify lands register relating to the land title No.Ndumberi/Ndumberi/787 in such a manner as will reflect the Plaintiff herein as the registered owner of land title No. Ndumberi/ Ndumberi/ 787 (0.09ha)

3. The costs of this proceedings be provided for.

The summons are grounded on the fact that the plaintiff has been in actual, open physical and uninterrupted possession of the suit premises

for a period in excess of 12 years immediately preceding the filing of the instant suit and exercising all the right and privileges of ownership thereby acquiring title by adverse possession and any claims by the Defendants over the land has been extinguished by adverse possession.

In her **Supporting Affidavit**, the Plaintiff **Teresiah Wambui Rua**, averred that in the **1960's** her father **Albert Njau** entered into a written agreement with one **Atanas Rigii**, the Defendants father for the purchase of the suit property, but that her father inadvertently misplaced the agreement. She further averred that despite her father taking immediate possession and control of the suit property, the same was not transferred to his name as the Defendant's father shifted to **Rift Valley** and died before completing the whole process. That around **1976**, her father gave her the suit property and she immediately took possession of the suit land and she has been in possession since then and has since set up her matrimonial home wherein she brought up her family and has been in peaceful occupation without the permission and consent of the Defendants as they have labelled her a trespasser. It was her contention that all parties have always respected the arrangement between their deceased fathers and the Defendants have always acknowledged her beneficial interest and promised to include her in the Succession proceedings until they filed the Succession proceedings and secretly transferred the suit premises to themselves and issued a demand letter to her.

The suit is contested and **Catherine Wambui Mbugua** filed Replying Affidavit sworn on **10th May 2017**, and averred that all the Defendants were children of **Atanas Gachira Rigii** (deceased) who died on **22nd August 1983**. She averred that their father was the owner of the suit property having acquired ownership in **1958**, and that he never sold the suit property to anyone. She further averred that their father died in **1983**, and he could not have been promising to avail documents to the Plaintiffs and her parents in **1993**. Further that annexure **TWR1** could not have been in reference to the suit property as their father did not have a son called **Rigii Njonge**. It was her contention that before her father's death, he inspected the suit property regularly and at no time did he complain that the plaintiff was in possession. Further that upon the demise of their father, they also inspected the property and they did not find the Plaintiff in possession.

It was her contention that even if the Plaintiff took possession of the suit property in **1976**, as alleged it was not through hostile occupation if it is true that her father bought the suit property. She further averred that even if the Plaintiff was to rely on adverse possession to acquire the suit property, she cannot succeed as their father died in **1983**, 7 years after she alleged to have started residing on the land and she became a trespasser upon their father's passing. She further averred that the suit property is agricultural land and if the agreement existed, then the same was rendered null and void for failure to abide by the provisions of **Section 6** of the Land Control Act. Further that the Defendants got registered as proprietors on **29th February, 2016** and any claim against them can only start to run then. It was her contention that they did not know the Plaintiff until **7th March, 2016**, when they met to discuss her trespass. She contended that the House on the property was most likely built in the last five years. Further that the receipt attached ought to be rejected as it does not bear the Plaintiff's name and it cannot proof for construction of a whole permanent building and the photos exhibited by the Plaintiff show a fairly recently constructed house. She further averred that they applied for grant of confirmation and that the grant was confirmed on **27th November 2015** and the Plaintiff never came up with any claim to the Estate of their father. She averred that the Plaintiff did not have any document to support her claim and urged the Court to dismiss the suit.

The matter proceeded by way of viva voce evidence wherein the Plaintiff called two witnesses and closed her case while the Defendant called one witness.

PLAINTIFF'S CASE

PW1 Teresiah Wambui Rua adopted her witness statement dated **11th August 2016**, and produced her bundle of documents dated **9th August 2016** as exhibit 1. She testified that she has been on the suit land for more than **42 years** having entered onto the suit land in the year **1976** when her father allowed her to enter.

She further testified that she did not have any sale agreement and that Atanas died before the sale agreement was written. She further testified that she did not know how much her father bought the suit land for. It was her testimony that the Defendants took the title deed in **2016** without her knowledge and that she lived on the suit property with her children and the original owner knew that she was living on the land. Further that Catherine too knew that she had been living on the land and promised to include her in the succession cause. She confirmed that her father is the one who gave her permission to utilize the land.

PW2 Teresia Wanjiru Nganga adopted her witness statement dated **11th August 2016** and testified that the Plaintiff entered the suit land in **1976**, and that she has built thereon and has lived on the suit land for more than 40 years. She acknowledged that she did not see any

sale agreement and further confirmed that she did not talk to one **Atanas** but that she knew Albert's wife. She further testified that the property was purchased by **Muchiri** but that she did not know at how much.

DEFENCE CASE

DW1 Catherine Wambui Mbugua, adopted her witness statement dated **5th December 2017** and produced her list of documents as exhibit 1. She testified that she lived in Njoro and that she had lived there since **1980** and that her father stopped living in the suit property in **1979** and that she had never gone to the suit property. She further testified that she went to inspect the land in **2016** and that that is when she found the Plaintiff had built on the land after her father's death in 1983. She further testified that they had not left anyone on the land and that the Plaintiff had built a permanent house on the land without their consent. It was her testimony that they filed the succession cause in the year **2014** and that they had asked her to move in the year **2000**. That further they called her for a roundtable in the year **2016**, but she stormed out without them coming to a conclusion. She told the Court that the Plaintiff did not have any document to show that she had bought the land from their father.

The court has now carefully considered the pleadings on record and the written submissions. The court too has considered the relevant provisions of the law and makes the following findings.

The court finds the issue for determination are:

i. Whether the Plaintiffs have proved a claim of adverse possession.

ii. Who should bear the costs of the suit.

i. Whether the Plaintiffs have proved a claim of adverse possession.

The guiding provisions of law with regards to Adverse possession is **Section 38 (1) and (2) Limitation of the Actions Act** that provides as follows:

(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.

For a party to succeed in a claim of adverse possession, the person must satisfy the Court that he/ she has been in **Continuous and uninterrupted** possession without the consent of the owner of the land; that his/her interests were **inconsistent** to the interests of the true owner of the land. The possession has to be **Open and notorious**, The possession has to be **actual**, to enable the owner have a cause of action which if he/she fails to act on within the required legal period then he/she will be estopped by the law of Limitation to claim back the land, The possession has to be **Exclusive**, to avoid confusion on who is entitled to obtain the title to the suit land once the limitation period lapses.

The Court must then establish whether the above principles have been met by the Plaintiff in order to ascertain whether she has met the threshold for adverse possession. The Plaintiff has claimed that she has been in possession of the suit property from the year **1976** and that she had even built permanent structures in the property and she has lived there and built her matrimonial home together with her children and grandchildren. Further the Plaintiff has alleged that her father bought the suit property having obtained it from the Defendants' father in the **1960's** however she had not obtained the sale agreement from the same.

It is not in doubt that the **Law of Contract, Section 3(3) requires** that all contracts that appertain to land must be in writing. However, the Plaintiff in this instant suit is not claiming the suit property by reason of the contract in place but by reason of adverse possession and therefore the lack of the sale agreement in the instant suit does not really carry too much weight.

With regard to the issue of whether the Plaintiff has been in actual and continuous possession of the suit property for a period of over **12 years**, the Court notes that her evidence of having occupied the property from the year **1976** has been corroborated by PW2 who in her evidence testified that she has been the Plaintiff's neighbour and that she had seen the Plaintiff move in the suit property in the year **1976**. The Defendants have denied the allegations by the Plaintiff that she has been in occupation of the suit property since the year **1976**, It was their contention that the Plaintiff had been in occupation of the property for only five years. DW1 in her pleadings had pleaded that they had been visiting the suit property regularly after their father's death and that before her father's death, he also used to visit the suit property and the Plaintiff was not in the property. However in her testimony before this Court, DW1 testified that she had gone to inspect the suit property in the year **2016** and that is when she found that the Plaintiff had built on the suit property. Further in her testimony DW1 also acknowledged that they had asked the Plaintiff to move from the suit property in the year **2000**. It has also been the Defendant's contention that the permanent buildings built on the suit property had only been in the property for five years.

It is this Court's considered view that the Defendants are not being wholly truthful. The fact that they had asked the Plaintiff to move from the suit property in the year **2000**, would only mean that they knew that the Plaintiff was in occupation of the suit property. It is therefore the Court's view that the Plaintiff has been truthful and as her evidence has been corroborated by PW2 then indeed she has been in possession of the suit property from the year **1976**. Further this Court finds that the occupation of the said property has been continuous, open and uninterrupted and with the knowledge of the Defendants.

The Plaintiff also needed to prove that she had dispossessed the Defendants of the said land and they had been dispossessed without their consents and has enjoyed such quiet possession for a period of **12 years**. See the case of **Wambugu ...Vs... Njuguna (1983) KLR 172** where the Court of Appeal stated as follows relying on the decision in **Littledale...Vs... Liverpool College (1990) I Ch. 19**:

“The next question therefore is what constitutes dispossession of the proprietor. Bramwell LJ in Leigh v Jack said at 273, that to defeat a title by dispossessing the former owner acts must be done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it”

The Defendants have submitted that the Plaintiff occupation of the suit property was not adverse to their interests as it was not hostile as it was in form of a sale agreement. In order for a party to prove adverse possession, the party need to show that the owner had been dispossessed of it or the owner's possession had been discontinued and the party had used the property to the adverse interests of the owner even if the same had been bought. See the case of **Samwel Nyakenogo ...Vs... Samwel Orucho Onyaru [2010] eKLR**, where the Court of Appeal held as follows:

“For about 19 years, the respondent was in exclusive possession of the portion of the land bought from the deceased openly and as of right, and during all this time, the respondent's said possession was not interrupted by the registered proprietor, the deceased. In our view, the purported application for letters of administration in respect of the deceased land West

Kitutu/Mwakibagendi/28 which was confirmed on 15th June, 1999 did not interrupt the respondent's adverse possession of the portion he bought from the deceased.'

Further the Defendant has also submitted and contended that the property has already changed hands and that the Defendants became registered owners of the suit property on **29th February 2016** and from that date which the Defendants had been registered as owners to the date which the instant suit had been filed, 12 years had not lapsed. However this Court notes that at the time to which the Defendants acquired proprietorship of the suit property by way of transmission. , the Applicant had already been in continuous and uninterrupted occupation of the suit property and in the Defendants applying for certificate of confirmation of grant and getting the property transferred to them, did not extinguish the Plaintiffs rights to claim adverse possession over the suit property. See the case of **Jacob Mwanto Wangora... Vs... Mary Waruga Wokabi & 3 others [2018] eKLR where the Court held that:**

“It is against the foregoing and in relying on the judicial authorities cited above, I find that from 1990 the deceased Soromeeti's rights to the suit land were extinguished and he was hence holding the land in trust for the Plaintiff. Further, that the Defendants' acts of applying for letters of administration intestate over the suit land and obtaining the Certificate for Confirmation of Grant in which deceased estate was distributed, cannot defeat the Plaintiff's claim for adverse possession because by the time they petitioned for it, the deceased rights over the suit land had extinguished in 1990.

I find that the Plaintiff has proved his case on a balance of probabilities that his right of action as against the Defendants for adverse possession over the suit land had started running in August 1978 and accrued as at August 1990. Insofar as the Defendants' have transferred the resultant subdivisions of the suit land namely NGONG/NGONG/62257;NGONG/NGONG/62258;NGONG/NGONG/ 62259 and NGONG/ NGONG/62260 and transferred it to themselves, this cannot defeat the Plaintiff's claim as espoused in section 38 (1) of the Limitation of Actions Act.”

Consequently, the court finds that the Plaintiff has proved her claim for Adverse Possession.

ii) Who is to bear costs of the suit?

Section 27 of the Civil Procedure Act grants the Court discretion to award or not to award costs of the suit. Ordinarily, costs do follow the event and is normally awarded to the successful litigant. The Plaintiff being the successful litigant is entitled to costs of the Originating Summons .

Having now carefully considered the pleadings herein, the annexures thereto and the written submissions, the court finds that the Plaintiff has proved her case on the required standard of balance of probabilities.

For the above reasons, the instant Originating Summons dated **26th April 2016**, is allowed entirely with costs to the Plaintiff.

It is so ordered.

Dated, signed and Delivered at Thika this 7th day of May 2020

L. GACHERU

JUDGE

7/5/2020

Jackline - Court Assistant

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

By Consent of :

Mr. Kimani for the Plaintiff

No appearance for the 1st Defendant

No appearance for the 2nd Defendant

No appearance for the 3rd Defendant

No appearance for the 4th Defendant

No appearance for the 5th Defendant

No appearance for the 6th Defendant

L. GACHERU

JUDGE

7/5/2020