



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CASE NO. 434 OF 2015 (OS)**

**MARY NJOKI MUYA.....PLAINTIFF/APPLICANT**

**VERSUS**

**FRANCIS MUSUNDI OMARI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**MARY WANJIRU GITHATU.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

On the 15<sup>th</sup> April 2013, Francis Omusundi Omari, hereinafter referred to as the 1<sup>st</sup> defendant filed suit Eldoret ELC No. 248 of 2013 against Mary Njoki Muya now the plaintiff. On the other hand, Mary Njoki Muya filed an originating summons against Francis Omusundi Omari and Mary Wanjiru Githatu seeking orders that the plaintiff is in adverse possession of the suit land. The two matters were consolidated on 27.6.2018 with directions that proceedings to be conducted in Eldoret ELC No. 434 of 2015 (OS). The plaintiff in 248 of 2013 was deemed as the 1<sup>st</sup> defendant in 434 of 2015. Mary Wanjiru Githatu was deemed as the 2<sup>nd</sup> defendant whilst Mary Njoki Muya was deemed as the plaintiff. The plaint in 248 of 2013 was deemed as the defence and counterclaim in Case Number 434 of 2015. The originating summons was deemed as plaint and the defence in 248 of 2013 was deemed as reply to defence and defence to counterclaim.

**PLAINTIFF'S CASE**

Mary Njoki Muya, the plaintiff herein basically claims to be entitled to that parcel of land known as Eldoret Municipality Block 14/1402 by adverse possession and seeks for determination of the following issues:

- (i) Whether or not the Applicant has been in occupation, possession and use of that parcel of land known as Eldoret Municipality Block 14/1402 since 1976 and whether the rights of the respondent have been extinguished by effluxion of time.
- (ii) Whether or not the Applicant should be declared the owner of the said land parcel No. Eldoret Municipality Block 14/1402 and the same be registered in the Applicant's name, the Land Register be altered to reflect the Applicant's name and title do issue.
- (iii) Whether or not the 2<sup>nd</sup> respondent has and/or had any title and/or clean title to pass on to the 1<sup>st</sup> respondent and whether or not registration of the 1<sup>st</sup> respondent as the owner created a trust and/or was and is in trust of the Applicant.
- (iv) Who should pay the costs of this application?

The suit is based on the affidavit of Mary Njoki Muya who states that she bought land parcel ELDORET MUNICIPALITY BLOCK 14/1402 from one Paul Kemboi in 1976. That after the purchase, she took vacant possession of land known as ELDORET MUNICIPALITY BLOCK 14/1402 and that ever since 1976, she has lived and/or been in occupation of land parcel No. ELDORET MUNICIPALITY BLOCK 14/ 1402 and that this is the only land that her children and she know and have lived on for over three decades and continue to live on it.

The Respondents have been aware of her occupation of land parcel number ELDORET MUNICIPALITY BLOCK 14/1402 and the alleged purchase of the said parcel of land knowing very well that she was in occupation of the said land violates her interest in the subject land. The 1<sup>st</sup> Respondent is now registered as the owner of land parcel number ELDORET MUNICIPALITY BLOCK 14/1402. That she is informed by Mr. A. K. Nyairo, advocate which information she verily believes to be correct that the said registration in favour of the 1<sup>st</sup> Respondent is held in her trust as her right to the property already accrued long before the purported registration.

She is advised by Mr. A. K. Nyairo, Advocate which advise she verily believes to be correct that the mere fact that the 1<sup>st</sup> Respondent has obtained a title deed to land parcel number ELDORET MUNICIPALITY BLOCK 14/1402 does not water down and/or take away her

interest in the said parcel of land as provided for in section 28 (h) and (e) of the Land Registration Act, 2012 and that the Respondent has never been in occupation or use of that parcel of land known as ELDORET MUNICIPALITY BLOCK 14/1402.

She is informed by Mr. A. K. Nyairo Advocate which information she verily believes to be true that under the Limitation of Actions Act Cap. 22, Laws of Kenya, a claim to land by a registered proprietor becomes extinguished upon expiry of twelve (12) years from the date another person took possession and the land vests in the other person who has been in peaceful, open and uninterrupted occupation of the suit land. That her occupation and use of the land parcel ELDORET MUNICIPALITY BLOCK 14/1402 has been peaceful, uninterrupted and adverse to the rights of the Respondent. That 12 years have since lapsed since the inception of her occupation of the Respondent's land in 1976. That by adverse possession, the Respondent's right to the land she occupies has been extinguished.

### **1<sup>ST</sup> DEFENDANT'S CASE**

The 1<sup>st</sup> defendant in the replying affidavit states that the applicant herein MARY NJOKI MUYA is not the registered owner of the land parcel No. ELDORET/MUNICIPALITY/BLOCK 14/1402 as the same is registered under her name, FRANCIS MUSUNDI OMARI.

He bought 0.097 hectares of land parcel NO. ELDORET/MUNICIPALITY/ BLOCK 14/1402 through a sale agreement dated 24.01.2013 from one MARY WANJIRU GITHATU, the second respondent herein. That it is clear that the applicant herein is not telling the truth about the alleged sale agreement with Paul Kemboi as alleged in paragraph 2 of the supporting affidavit

The contents of paragraph 8 and 8A of the Supporting affidavit are misplaced as he purchased the suit land from Mary Wanjiru Githatu, who purchased the same from the said PAUL KEMBOI and obtained title to the suit land. He is advised by his advocate Mr. Ngigi Mbugua which he trusts as true that any other transaction thereof on the same parcel of land is deemed illegal, null and void.

He is further advised by his Advocate on record which advice he verily believes to be true that the applicant had ample time to sue the original owner of the head title, PAUL KEMBOI or the owner of the sub title MARY WANJIRU GITHATU, before he came into the picture but she chose to sleep over her right until PAUL KEMBOI died and MARY WANJIRU GITHATU took out her title and sold it to him. That a claim of adverse possession cannot lie against either himself or his predecessor in title as the requisite period of 12 years has not been attained since his registration in 3.3.2015.

### **2<sup>ND</sup> DEFENDANT'S CASE**

It is the 2<sup>nd</sup> defendant's case that the register was opened in 1983 with the property registered as Government land. The property was acquired by the 2<sup>nd</sup> defendant in 2011. The 2<sup>nd</sup> defendant attempted to evict the plaintiff but failed and therefore, the plaintiff's occupation was not peaceful.

### **EVIDENCE ON RECORD**

**PW1, Mary Njoki Muya** testified that she lives at Hill School at Eldoret. She is a farmer. She sued Francis Musindi and Mary Githatu in respect of Eldoret Municipality Block 14/1402 that she bought from Paul Kemboi. She started paying for the land in 1975 and paid all money. She paid for survey and produced the receipts No. 507 for Kshs. 2,075 for ¼ an acre. She has a receipt from Wareng Lands Ltd. She paid for survey. She has the receipts. It is No. 136 dated 16.8.1985 for Kshs. 1,500. Her husband also bought from Wareng Land Ltd. Advocate Anita was for Paul Kemboi. They paid all the money. Survey was done and they were shown the plots. She entered the land in 1986 and constructed. The land was in the wilderness and was a forest. She was shown her land by the surveyor. Kemboi never asked her to vacate the land and never evicted her from the land. She constructed 19 mud houses. No one has ever asked her to vacate the land. She lives on the land. She does not know Mary Wanjiru Githatu. Francis Omusundi Omari is not known to her. Paul Kemboi sold them land and died. Nobody has claimed from Paul Kemboi. Francis Omusundi has not come to the land to claim. She has never received any letter from the chief or any letter whatsoever. She has lived on the land from 1986.

**PW2, Mutheri Mbora** testified that he lives at Hill school. He knows the plaintiff, Mary Njoki Muya as neighbor at hill school estate. From his place, there is one plot in the middle before the plaintiffs' plot. No one has ever claimed her land. He does not know Francis Omusundi Omari. He has never seen him. He has never seen Mary Wanjiru Githatu. Mary Njoki constructed in 1986. There was no house before as it was an empty field. Mary Njoki has constructed mud houses. He has lived there since 1975. Njoki has been living on the land since 1986.

**PW3, Ronica Kobokhi Alwany** testified that her ID. Number is 0838004. That she lives at Hill School Estate. She is a housewife and she knows Mary Njoki as her neighbor since 1992. She has lived at Hill School for long. The land she lives is hers. It was given to her by her father. She entered in 1992. Mary Njoki has lived in her land since 1992. She has not seen anybody else. That she has never seen the 1<sup>st</sup> defendant, Mr. Francis Omusundi. The plots have no titles. She has never heard of any eviction of Mary Njoki Muya.

**PW4, David Mwaura Gicheru** testified that he is a Mason and he lives at Hill School, Eldoret. He knows Mary Njoki Muya. She is his landlady. She has been his landlady at Eldoret Hill School estate. She has been his landlady almost 30 years. The plaintiff owns almost 22 houses on the suit land. He has never heard of anybody claiming the land. He does not know Francis Omusundi Omari. He does not know Githatu. He has never seen the 1<sup>st</sup> defendant.

**PW5, Alice Mokeri Kimani** testified that She is a farmer. That she lives at Hill School at the back of Hills School. She knows Mary Njoki Muya. She has been at Hill School since 2011. She has known Mary Njoki Muya since 1985. She lived at the village at Hill School at Mathare. That she has visited her several times. The plaintiff has iron roofed mud houses on the land. The houses have been there for long. She knows Francis Musundi Omari. She knows Mary Githatu. She knows Mary Wanjiru Githatu. Monica Njoki has always been on the land.

**PW6, Dorothy Kipkogei Letting** testified that she lives in Eldoret. She is the County Land Registrar. She received summons on 20.7.2018. The summons was in respect of Eldoret Municipality Block 14/1402. She has the records. The first registered owner was Mary Wanjiru Githatu at Entry No. 1 opened on 1.4.1983. In 1983, the registered owner was Mary Wanjiru Githatu. The current owner is Francis Musundi Omari. He was registered on 3.3.2015. The title was issued on 3.3.2015 in form of a certificate of lease. She produced the certificates of lease in favour of Mary Wanjiru Githatu as PEx3. There is the transfer of lease from Mary Wanjiru Githatu to Francis Musundi Omari as PEx4. There is the letter of consent dated 27.2.2013 as PEx.5.

**1<sup>st</sup> defendant, Francis Omusundi Omari** testified that he stays in Busia, Emauko village and knows Mary Wanjiru Githatu. She sold him the land Eldoret Municipality no 14/1402 Eldoret in 2013. It is one quarter of an acre. The land is at Hill School estate. He paid Kshs. 460,000 and was registered as the proprietor. He was given the original title deed. He produced the certificate of lease as DEX.1. Mary Njoki Muya is occupying his land without his consent. She has constructed mud houses. The houses were constructed after he bought. He did not find the defendant on the land. He prays that she be evicted from his land. He has tried to write to her but she does not listen. He has been the proprietor since 2015. They did a search and bought the land. He prays for an order of eviction. Mary Njoki Muya should pay costs. He further prays for permanent injunction and mesne profits.

**2<sup>nd</sup> defendant, Stephen Mwangi testified that** he lives at West Indies. He knows Mary Wanjiru Githatu. He has a power of Attorney to testify on behalf of his mother who is sick. He produced the power of Attorney as 2DEX.1. He states that his mother was registered as lease on 1.11.2011. The lease was to run from 1.4.1983 for 99 years. He was doing the follow up of the lease between the government and his mother. He paid the National Bank. He paid land rent, Ministry of Lands. He produced the pay slip dated 27.7.2011 as 2DEX.2. He does not know Mary Njoki Muya but he heard that she had a quarrel with his mother. She has been summoned by the court but has refused to turn up. He produced the summons of the chief as 2DEX.3.

### **RIVAL SUBMISSIONS**

The **gravamen** of submissions by **M/s Odwa, learned counsel for the plaintiff** is that the plaintiff has demonstrated that he bought the suit land in 1976 based on an oral agreement. He took vacant possession of the land in 1986 and put up a semi-permanent house where she lives and his 19 rental houses. Paul Kemboi never sought to evict her. submits that the plaintiff's occupation of the suit land has been open and notorious and has been continuous, exclusive and actual.

The **gravamen** of the submissions by **Mr Ngigi Mbugua learned counsel for the 1<sup>st</sup> defendant** is that a claim of adverse possession must be brought to court not earlier than 12 years since it accrued. The 1<sup>st</sup> defendant acquired the leasehold interest on 3.3.2015. His predecessor in the title, the 2<sup>nd</sup> defendant was registered on 1.11.2011 and therefore, on 4 years had lapsed when the originating summons was filed. The originating summons was filed 9 months after the transfer in favour of the 1<sup>st</sup> defendant.

The 1<sup>st</sup> defendant submits further that for a claim of adverse possession to succeed, there must be existence of a parcel of land capable of being discerned with certainty or registered under any law. There must be open possession of the suit land for a period of more than 12 years. He submits that adverse possession does not accrue on government land and or against the government or its agencies.

**Mr Aceso learned counsel for the 2<sup>nd</sup> defendant** submits that the plaintiff has no claim against the 2<sup>nd</sup> defendant as the 2<sup>nd</sup> defendant transferred the land to the 1<sup>st</sup> defendant on 3.3.2015 and the suit was filed on 10.12.2015. 12 years had not lapsed to give the plaintiff the right of adverse possession. The court visited the suit land and found the plaintiff in actual possession and occupation of the suit land.

### **ANALYSIS AND DETERMINATION**

The suit parcel of land in dispute is known as Eldoret Municipality Block 14/1402. According to Dorothy Kipkosgei Leting, the County Land Registrar Uasin Gishu, as she then was, the suit parcel of land is Eldoret Municipality Block 14/1402. The register was opened on 1.4.1983. the registered owner was Mary Wanjiru Githatu. The current owner is Francis Musundi Omari. He was registered on 3.3.2015. This was a government leasehold. Though the property was registered in the name of Mary Wanjiru Githatu on 1.4.1983, the certificate of lease was issued to Mary Wanjiru Githatu on 1.11.2011.

The doctrine of adverse possession in Kenya is embodied in **Section 7** of the Limitation of Actions Act, which is in these terms: -

***“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.”***

The Limitation of Actions Act makes further provision for adverse possession at **Section 13** that:

***“(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.***

***(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.***

***(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3), the land in reversion is taken to be adverse possession of the land.”***

Sections 37 and 38 of the Limitation of Actions Act stipulate that if the land is registered under one of the registration acts then the title is not extinguished, but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in him.

Section 37 provides that: -

***“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, to land or easement or land comprised in a lease registered under any of those Acts, 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.”***

Section 41 of the Act provides for exclusion of public land from the application of Limitation of Actions Act thus: -

***This Act does not—***

***(a) enable a person to acquire any title to, or any easement over—***

***(i) Government land or land otherwise enjoyed by the Government;***

***(ii) mines or minerals as defined in the Mining Act (Cap. 306);***

***(iii) mineral oil as defined in the Mineral Oil Act (Cap. 307);***

***(iv) water vested in the Government by the Water Act (Cap. 372);***

***(v) land vested in the county council (other than land vested in it by section 120(8) of the Registered Land Act (Cap. 300)); or***

***(vi) land vested in the trustees of the National Parks of Kenya; or***

***(b) affect the right of Government to any rent, principal, interest or other money due under any lease, licence or agreement under the Government Lands Act (Cap. 280) or any Act repealed by that Act.***

In this matter, the court is of the considered view, and finds, that the period between 1983 and 1.11.2011 when the government began processing title for the 2<sup>nd</sup> defendant cannot be computed as the suit land remained government land and therefore, adverse possession did not apply pursuant to the provisions of section 41.

Time starts running when the lease is registered and the certificate of lease is issued. The rights and privileges of a registered owner accrue on the date the lease is registered and the certificate of lease issued. The lease document was forwarded on the 26.9.2011 by Commissioner of Lands to the District Land Registrar through the Chief Land Registrar. The period between 1983 and 1.11.2011 cannot be computed in the time for adverse possession as the government, who are the lessees of the land were still processing title for the 2<sup>nd</sup> defendant.

Time cannot run against the government of Kenya in adverse possession but against the person who becomes ultimately registered as the owner of the land.

Ultimately, I do find that the plaintiff has failed to establish a claim in adverse possession.

I do find that the 1<sup>st</sup> defendant is the registered proprietor of the suit land.

Section 24 of the Land Registration Act provides that subject thereto: —

***a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and***

***b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of lease.***

Section 25 of the Land Registration Act states as follows: -

***“(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an Order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject: —***

***(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and***

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee”.

Section 26 states as follows; -

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original”.

Having found that the claim on adverse possession is not sustainable in this matter, I do find that the 1<sup>st</sup> defendant’s claim ought to succeed as he is the registered proprietor of the suit land and therefore has to enjoy all rights and privileges appurtenant thereto. I do grant prayers that the plaintiff to vacate the suit land within 60 days of this judgment, failure of which, she be forcefully evicted. The plaintiff to pay costs of the suit. Orders accordingly.

**Dated and delivered at Eldoret this 11<sup>th</sup> day of July, 2019.**

**A. OMBWAYO**

**JUDGE**