



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**ELC MISC. APPLICATION NO. 42 OF 2017**

**JANE WAKARINDI MWANGI..... APPLICANT**

**VERSUS**

**JOTHAM KAMAU MWANGI.....1<sup>ST</sup> RESPONDENT**

**THE ESTATE OF WINNIE**

**WAIYEGO MWANGI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Applicant filed a Notice of Motion on the 15.6.2016 seeking the following orders;

a) That this application be certified urgent and service hereof be dispensed within the first instance.

b) That this Court do issue eviction orders against the Respondents being that they are trespassing on the Applicant's land.

c) That pending the hearing of this application, this Honourable Court be pleased to issue a Permanent Injunctive order restraining the Respondents by themselves, servants, employees, agents or any other persons acting under his instructions or his interests from entering, interfering with the Applicants entry, occupation and possession, otherwise dealing, entering, remaining, trespassing or in any other manner interfering with all that parcel of land known as Loc.13/Kirunge/1794.

d) That pending the hearing of this suit, this Honourable Court be pleased to issue an injunctive order restraining the Respondents by themselves, servants, employees, agents or any other persons acting under their instructions or their interests from entering, interfering with the Applicant's entry, occupation and possession, otherwise dealing, entering, remaining, trespassing or in any other manner interfering with all that parcel of land known as Loc.13/Kirunge/1795.

e) That the cost of this application be provided for.

2. The application is premised on the grounds *inter-alia* that the Applicant became registered as the owner of the suit lands vide a Court order dated the 28.5.16 and thus entitled to exclusive occupation and possession of the suit lands; that the Respondent has entered occupied and taken possession of the suit lands without any consent nor color of right. The application is supported by the affidavit of the Applicant sworn on the 15.6. 2016 reiterating the contents of and the grounds set out in the Notice of Motion.

3. The application is opposed by the 1<sup>st</sup> Respondent dated the 15.5.2017 on his behalf and that of the 2<sup>nd</sup> Respondent in which he averred that he is the legal representative of the estate of the 2<sup>nd</sup> Respondent. That vide a Court order dated the 28.5.1985 HCCC NO 2461 of 1979, the Court ordered Lilian Nyawira and Winnie Waiyego Mwangi (deceased) to transfer 8 acres of the suit lands to the Applicant. That notwithstanding, the Applicant has not executed the orders to-date. That his family has been in occupation of the suit lands before the issuance of the order to-date. Further that his mother's estate (2<sup>nd</sup> Respondent) has acquired title by way of adverse possession on account of long occupation and possession in excess of 12 years.

4. Parties elected to file written submissions which I have read and carefully considered.

5. The Applicant in her submissions gave the history of the suit lands. The original suit land was Loc 13/Karunge/1060 and Loc 13/Karunge 1038 measuring 8 and 4 acres respectively. Both parcels were registered in the name of Lilian Nyawira. Loc 13/Karunge/1060 was subdivided into two parcels to wit; Loc 13/Karunge/1794 and Loc 13/Karunge/1795 each measuring 4 acres which became registered in the name of Winnie Waiyego Mwangi and Lilian Nyawira respectively. That Lilian Nyawira had prior contracted a levirate marriage to the Applicant whereupon she had promised her 8 acres of the suit lands in exchange of her hand in marriage. That the transfer of Loc 13/Karunge/1794 to the late Winnie Waiyego Mwangi was contrary to the promise made to the Applicant by Lilian Nyawira.

6. That aggrieved by the state of things the Applicant filed a case at the Kangema District Magistrates Court which granted orders in her favour. However, aggrieved by the said orders, Lilian Nyawira appealed to the High Court HCCC No. 2461 of 1979 where the High Court directed the said Lilian Nyawira and Winnie Waiyego Mwangi to transfer the suit lands to the Applicant. It would appear that subsequently multiple cases have since been filed by the parties. Nevertheless, the rulings and judgments of the said cases were not tabled before the Court for the Court to appreciate the import of the same.

7. It is the Applicants' submission that the Respondents have trespassed onto the suit lands despite the Court orders issued in 1985. That the continued occupation and trespass of the suit lands of the Respondents is illegal and is in flagrant violation of the aforesaid Court order. Relying on Section 152 B, E F and G of the Land Act, the Applicant urged the Court to order for eviction and grant damages for trespass in the sum of Kshs 5,000,000/-. The Applicant maintains that the Court order issued in 1985 is yet to be vacated, set aside or appealed against.

8. Further submission filed by the Applicant on the 2.3.2018 largely dwelled on adverse possession and how the Respondent has not proved title by way of adverse possession. That the Respondent in disobeying a Court order and the absence of exclusive possession of the suit land disentitles the Respondents to a claim of adverse possession. That the Court order estops the Respondents from claiming adverse possession. The Applicant urged the Court to exercise its unfettered discretion to extend the period of the life of the judgment to enable the Applicant to reap the fruits of the said judgment. That the said order has not lapsed by dint of section 4(4) of Limitation of Actions Act.

9. The Applicant annexed a number of legal authorities which I have carefully reviewed and considered.

10. In his submissions the Respondents stated that the Applicant has not executed the Court order and has been caught up by section 4(4) of the Limitations of Actions Act since 12 years has expired since the said orders were issued in 1985.

11. In addition, the Respondents submitted that they have been in continuous occupation and possession of the suit lands and in accordance to section 7 of the Limitations of Actions Act urged the Court to so find. Further that at no time has the Applicant been in possession of Loc 13/Kirunge/1794.

12. Having considered the Notice of motion, the affidavits and the rival submissions the issues for determination are; whether the judgment of this honorable Court issued on the 28. 5. 1985 is statute barred by dint of Section 4(4) of the Limitations of Actions Act; whether the Respondents have established title by way of adverse possession; who pays the costs of the application.

13. In the instant case the Honourable Court in HCCC No 2461 of 1979 issued an order on 28.5.1985 as thus;

“It is ordered by consent that;

The Defendants (Lilian Nyawira and Winnie Waiyego) do transfer to the Plaintiff (Jane Wakarindi Mwangi) eight acres from LoC 13/Kirunge/1794 and Loc 13/Kirunge/1795.

The 1<sup>st</sup> Defendant (Lilian Nyawira) do remain with 4 acres from parcels LoC 13/Kirunge/1794 and Loc 13/Kirunge/1795 and can give the 2<sup>nd</sup> Defendant (Winnie Waiyego) if she so wishes”.

14. Further to the above orders, the Honourable Court on 6.6. 1986 directed the Deputy Registrar of the High Court Nairobi or any other authorized officer to sign all transfer documents and consents necessary to obtain the transfer of undivided shares in LoC 13/Kirunge/1794 and Loc 13/Kirunge/1795 respectively to the Plaintiff (now Applicant herein).

15. The Applicant has disclosed that she became registered as owner of LoC 13/Kirunge/1794 and produced a copy of the title issued on the 24.10.1988. There is no evidence that she became registered owner of LoC 13/Kirunge/1795 though she has pleaded as such and the Respondents have not denied it.

16. This application seeks orders for eviction of the Respondents for alleged trespass on the Applicant's land, namely LoC 13/Kirunge/1794. It is common ground that the Applicant became registered of LoC 13/Kirunge/1794 pursuant to the court order referred to above. The said order of the court relied in this application did not direct any eviction of the Respondents or any other persons.

17. Both parties have made submissions on the meaning and effect of section 4(4) of the Limitations of Actions Act. The law states as thus;

“ An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due”.

Going by the prayers sought by the Applicant, this is a claim based on trespass to LoC 13/Kirunge/1794 reliance being placed on the court order referred to above. The court does not find that the provisions of the law stated in the preceding paragraph would aid the Applicant's case. In any event the parties should and ought to satisfy the provisions of the Land Act Sections 152E, 152F & 152G as may be applicable.

18. In respect to whether or not the Respondent has a claim under adverse possession, the Court has not considered the claim on account that the Respondents have filed a case by way of originating summons as stated in para 12 of his affidavit. It is not necessary for the Court to forestall the originating summons. In any event no evidence was adduced by the Respondent on that account.

19. In the end the court finds that this application is not merited and is dismissed with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 2<sup>ND</sup> DAY OF JULY 2018**

**J.G. KEMEI**

**JUDGE**