



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND CASE NO. 274 OF 2013 (OS)**

**DAVID KIUNGA KITHINJI.....PLAINTIFF/APPLICANT**

**VERSUS**

**LIKA BUNDI KIUGU.....DEFENDANT/RESPONDENT**

**JUDGMENT**

**Background**

1. This suit was commenced by way of an Originating summons dated 10<sup>th</sup> October 2013 where by plaintiff is claiming entitlement to land parcel no ABOTHUGUCHI/IGANE/665 (the suit land) by way of adverse possession. He is the son of one Stephen Kithinji who apparently bought the suit land from one Ngutari Kathungu many years ago. The transfer was not effected. Ngutari passed on and his son, Peter Muthuku Ngutari took out letters of administration in respect of the estate of Ngutari Kathungu. Peter then sold the suit land to Luka Bundi Kugu who is now the registered proprietor of the suit land. Plaintiff claims that he has been in continuous occupation of the suit land for a period of over 12 years having moved onto the suit land in 1976. Defendant on the other hand claims that he lawfully bought the suit land from Peter in 2013. There is no dispute that defendant is the registered owner of parcel no ABOTHUGUCHI/IGANE/665 which measures 0.05 hectares.

**Evidence**

2. This suit was heard via *viva voce* evidence. The Plaintiff called two witnesses. **PW1, David Kiunga (plaintiff)** adopted his statement dated 30<sup>th</sup> March 2016 as his evidence. He reiterated what he had stated in his earlier affidavit sworn on 10<sup>th</sup> October 2013. He corrected himself and stated that it is his mother and father who moved on the suit land in 1976 and then he was born there in 1979. He further stated that in 2013 the son to Ngutari, one Peter Muthuku came and told him to purchase the Suit Land failure to which he would sell it. Muthuku later went and sold the land to the Defendant whom he came to know as the buyer.

3. PW1 further testified that on 23<sup>rd</sup> March 2016, Defendant came and put posts around the shamba with the intention of fencing it and also threatened his mother that he would cut her into pieces. She moved out and went to live with her sister. On 24<sup>th</sup> March 2016 he visited the land and found out that 2 of his goats were missing, and so were his 9 chicken, food stuffs (maize), iron sheets (10), kitchenware and beddings. The following day, PW1 found that defendant had erected a barbed wire fence and a gate and locked the place and they (plaintiff's family) could no longer access the suit land any more.

4. During cross examination, plaintiff stated that it is his grandmother, one M'Mutuo M'Itii who had bought the land and not his father but it was never transferred. Plaintiff further stated that he came to occupy the suit land with permission of his grandmother who in turn had been permitted to occupy the same by Ngutari.

5. In support of his case, plaintiff produced a copy of the official search showing that the suit land is registered in the name of defendant. He also produced a copy of the chief's letter.

6. **PW2 Muriithi M'ikian** adopted his statement dated 30<sup>th</sup> March 2016 as his evidence. He is a fellow villager at Gituri Village. He stated that he knows the purchaser as one M'Mutua, father of Kithinji, who bought the Suit Land from Ngutari and the money was given to the latter at the Chief's camp. M'Mutua is the grandfather of the plaintiff while Kithinji is his father. The son of Ngutari was the one receiving the money and passing it on to Ngutari. It is then that Ngutari asked M'Mutua to slaughter him a goat so that he could pass the land to him as he had become his son (according to Meru traditions). Before the slaughtering was done both passed on leaving the agreement pending. Later on Kithinji's wife went to M'ingiti (brother of Ngutari and uncle to Peter Muthuku), to inquire on how the transactions would be concluded. He said that he would take care of it and pass the Suit Land to Kithinji's family. However, he (M'ingiti) passed on. Thereafter, Muthuku kept silent with regard to the finalization of the agreement. PW2 avers that plaintiff had developed the land and he had planted coffee and miraa. However, the compound has now been locked.

7. Defence called two witnesses. **DW1 Luka Bundi Kiugu (defendant)** adopted his statement filed on 28<sup>th</sup> October 2013 as evidence. He told the court that after he obtained the title deed of the Suit Land he visited the said land and found houses of plaintiff's mother. He requested her to vacate the premises. She requested for two weeks to do so. He gave her a month instead and when she left, defendant fenced the land. Defendant avers that thereafter is when plaintiff filed this suit against him. He claims that he is an innocent buyer of the Suit Land and he bought the same free from any encumbrances. He also says that it is him who is now in occupation of the suit land.

8. **DW2 Peter Muthuku Ngutari** adopted his statement filed on 28<sup>th</sup> October 2013 as his evidence. He told the court that his father, Ngutari Kathungu who died on 21<sup>st</sup> December 2003 was the owner of the suit land. After his death, DW2 filed Succession Cause No. **522/2004 at Meru High Court** where he obtained grant of letters of administration which were later confirmed. He then obtained title deed of the Suit Land. During the month of March 2013 he visited the suit land where he met the Plaintiff and he told him to vacate the Suit Land. Plaintiff apparently requested to buy the land but could not afford the purchase price of Kshs. 100,000/= which Muthuku was asking. Plaintiff then promised Muthuku that he would vacate the land. Thereafter, Muthuku sold the land to the defendant.

9. **DW2** denied that Plaintiff's grandfather bought land from his father, neither is he aware of any agreement between his father and Plaintiff's family.

10. In 2008, DW2 had found structures on the suit land. Plaintiff's mother was there and she chased him away with a panga but he did not report anywhere. He does not know when plaintiff's family started staying on the Suit Land.

11. In support of defence case, defence documents filed in the list dated 28/10/2013 were produced as defence exhibit 1-15.

### **Submissions.**

12. It was submitted for the Plaintiff that the claim for adverse possession had been proved. The case of **Gerald Muriithi v Wamugunda Muriuki & Another [2010] eKLR** was proffered where **Sergon J** had made reference to the court of appeal case of **Wambugu vs. Njuguna (1983) KLR** at page 172 where it was held that; **"In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. .... . The Limitation of Actions' Act, on adverse possession, contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years. Where a claimant pleads the right to land under an agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is: the claimant's possession is deemed to have become adverse to that of the owner after the payment of the last instalment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least twelve years after such payment"**.

13. Plaintiff submits that by the time the Suit Land was sold and transferred to the Defendant, no title could have passed to the defendant because the Plaintiff had already acquired the title through adverse possession.

14. On the other hand, it has been submitted for the Defendant that the evidence of the Plaintiff and his witness cannot and has not established a claim for adverse possession. Defendant contends that plaintiff has submitted that he has rented a house at Gitune Area where he lives and that it was his mother who used to live on the land but she moved out of the Suit Land when the Defendant fenced the whole land. It is further submitted that **PW1** was not able to state who bought the suit land, whether it was his father or grandmother. It is further submitted that Plaintiff was not in occupation of the Suit Land. It is also submitted that if any time could run against the Defendant it could only start on 21<sup>st</sup> march 2013 after the Defendant got registered as the owner. Defence relied on the case of **Titus Kigoro Munyi v Peter Mburu Kimani [2015] eKLR** whereby the Court of Appeal laid down the tests to be fulfilled by any person applying for an order of adverse possession.

### **Determination**

15. I have carefully analyzed the record, the evidence and submissions availed before this court. The question for determination is **whether Plaintiff has acquired L.R. NO.ABOTHUGUCHI/IGANE/665 through adverse possession?**. To this end, the court will determine **whether plaintiff been in exclusive use of the suit land openly and notoriously and without interruption for a period of 12 years?**.

16. Bryan A. Garner, *Black's Law Dictionary*, Ninth Edition, 2009, Thomson Reuters at page 62 defined adverse possession as:

**"The enjoyment of real property with a claim of right when that enjoyment is opposed to another person's claim and is continuous, exclusive, hostile, open, and notorious."**

17. Accordingly, to acquire land through adverse possession, a claimant must demonstrate that he has occupied the land openly, without force, without any secrecy, and without permission from the owner of the land. These ingredients are to be found in the Latin phraseology **nec vi, nec clam, nec precario and aminus possindedi**. There must be an exclusive, uninterrupted possession and occupation of the land for a period of at least twelve years. The Court of Appeal in **Kasuve -Vs- Mwaani Investment Limited & 4 Others [2004] 1 KLR 184** stated that:

**"In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition."**

18. In the case of **Gabriel Mbui v Mukindia Maranya [1993] eKLR** it was stated that:

**“The occupation of the land by the intruder who pleads adverse possession must be non permissive use, i.e. without permission from the true owner of the land occupied....”.**

19. From the evidence adduced, Plaintiff was born in 1976 on the suit land. The circumstances under which the family of the plaintiff came to be on the suit land are rather murky. However, the evidence of PW2, Muriithi M’Ikiome tends to shed light on how plaintiff’s family took over this land. Apparently, DW2’s father, one Ngutari is the one who sold the land to M’Mutua who was father of Kithinji who in turn was father of plaintiff. Ngutari, M’mutua and even Kithinji passed on. So later on PW2 and Kithinji’s wife went to see M’Ingiti, an uncle to Muthuku (DW2) to inquire about the land transaction, but sadly M’Ingiti also passed on.

20. By the time Ngutari died, all that Muthuku knew regarding the land was what his father (Ngutari) had told him, that there was a parcel of land at Igane. Muthuku then did a search in 2004 and found that indeed his father was the registered owner of the suit land. If the family of plaintiff had only been given a licence to occupy the land, then Ngutari could have given such particulars of the licence to his son Muthuku. He did not, and the logical conclusion to make is that the land was in the hands of plaintiff’s family even before the death of Ngutari. There is no evidence to show that plaintiff’s occupation of the suitland was with consent of the owner of the land. What is apparent is that the original owner of the land, Ngutari must have been dispossessed or discontinued the use of this land.

21. With regard to the issue of occupation, I have found the evidence of Muthuku to be wanting in credibility. In his evidence in chief, Muthuku told the court that he had never seen plaintiff on that land. However, in his statement which he adopted as evidence, he stated that; **“during the month of March 2013, I visited the land and I met David Kiunga Kithinji and told him to vacate from my said parcel”**. While being cross examined on this issue, he admitted that this was the true position that he had found plaintiff on the suit land and the latter had offered to buy the land, whereby DW2 had put the price at shs. 100,000. During re-examination, DW2, Muthuku made an about turn and stated that **“when I found Kiunga in March, he came to my house and it is not true that we met in the suit land”**.

22. It appears that even in 2008, DW2 had tried to take over the suit land in vain. In his own words, he was chased away with a panga by a woman who happens to be plaintiff’s mother.

23. Defendant has also admitted that when he bought the land and he visited the same, he found structures there. Plaintiff’s mother was also there.

24. From the fore going, I am inclined to believe that plaintiff and his family are the ones who were in physical control of the suit land for many years, certainly more than 12 years. Both Muthuku and his father Ngutari had been dispossessed of this land.

25. Defendant, is however now in control of the land, and he has managed to fence the same. Interruption has taken place. But the question is, **when did this interruption occur?** Plaintiff has given minute details of when the interference occurred. It was on 23/3/2016 when plaintiff defendant came and put posts around the land and he threatened to cut plaintiff’s mother into pieces. The following day, plaintiff’s property was all gone. And a day there after on 25/3/2016, defendant put up barbed wire and fenced the land. He also put up a gate.

26. Defendant on the other hand is vague on when he took over the land. In his Replying affidavit filed in response to the Originating Summons, he simply says that he took possession after the sale agreement. In his statement, defendant avers that the suit was filed after plaintiff’s mother promised to vacate the land. Again defendant doesn’t mention when interruption occurred. I am inclined to find that defendant’s takeover of the suit land occurred in 2016. It is not lost to this court that plaintiff’s application for injunction was dismissed on 3:11:2015 and this buttresses plaintiff’s claim that interruption occurred in March 2016. I find that defendant’s takeover of the suit land has come a little bit too late in 2016 as by then, this case had been filed. It follows that plaintiff had already asserted his claim under section 38 of the limitation of actions act which allows a claimant to apply to the High Court (ELC) for an order that he be registered as the proprietor of the land.

27. All in all, I find that plaintiff has proved his case on a balance of probability.

**Final orders:**

28. 1) An order is hereby issued declaring that plaintiff has become entitled to the land parcel no ABOTHUGUCHI/IGANE/665 by way of adverse possession.

2) An order is hereby issued for the cancellation of the title ABOTHUGUCHI/IGANE/665 which is in the name of LUKA BUNDI KIUGU and instead DAVID KIUNGA KITHINJI to be registered as the owner of land no ABOTHUGUCHI/IGANE/665

3) The deputy Registrar of this court is hereby authorized to sign all requisite documents to give effect to the implementation of this Judgment.

4) As to costs, it would be rather harsh to condemn defendant when in essence, it is Peter Muthuku who put in him in this mess. I therefore direct that each party bears their own costs of the suit.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 3<sup>RD</sup> OCTOBER, 2018 IN THE PRESENCE OF:-**

Cc: Janet/Galgalo

Rimita for plaintiff

Plaintiff

Mbijiwe holding brief for Mwirigi for defendant

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**