



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MURANG'A**

**E.L.C NO. 391 OF 2017**

**MWANGI KARUGU MACHARIA alias**

**MWANGI KARUBU.....APPLICANT**

**VERSUS**

**JULIUS NJUGUNA MWANGI alias**

**NJUGUNA MWANGI.....DEFENDANT**

**JUDGMENT**

1. By an Originating Summons filed on 22/10/2012 the Plaintiff sought the following orders;

- a. That the Plaintiff be declared the owner by way of adverse possession of land parcel No Loc 8 /Matharite/101.
- b. That the Court be pleased to order that the title to the land parcel No Loc 8/Matharite/101 in the name of Njuguna Mwangi the Defendant herein be cancelled and another title to the land be issued in the name of the Plaintiff Mwangi Karugu Macharia.
- c. The costs of the suit be awarded to the Plaintiff

2. The Plaintiff's case is supported by the affidavit deponed thereon and filed on the 22/10/2012 together with his witness statement filed on the 12/2/2018. He stated that he is in possession of the suit land comprising 3.5 acres and registered in the name of the Defendant since 1962. He avers that he purchased the suit land from the Defendant's father one Mwangi Ngomi at a consideration of Kshs. 1800/-. He informed the Court that it was an oral agreement pursuant to which he was put in possession. That he has developed the suit land by planting 3000 tea bushes, Napier grass and other subsistence crops. That he built a house in 1962 which he has since rebuilt twice. He attached a copy of the official certificate of search indicating registered proprietor as the Defendant.

3. At the hearing he informed the Court that he was born in 1927. He reiterated his evidence as stated in the witness statement. He stated that the suit land was registered in the name of the Defendant. His father sold the land to him. He stated that at the time of purchase he was not aware that the land was registered in the name of a minor (Defendant). PW2- Elishipa Munjira Mwangi gave similar evidence to that of the Plaintiff and added that she was present during the purchase of the suit land. She stated that they planted the tea bushes in 1972. Though she lives elsewhere she clarified that she uses the house on the land to cook for her workers in the tea farm. She informed the Court that the Defendant lives in Kitale and has never taken possession of the land. She stated that she was unaware that the suit land was registered in the name of the Defendant at the time her husband purchased it from the Defendant's father.

4. In his defence filed on the 24/10/17, the Defendant denied the Plaintiff's claim and refuted selling his land to the Plaintiff. That he did not give any authority for the land to be sold. He stated that he was born in 1957 and therefore in 1962, he was 5 years old, hence as a minor he could not have sold the land. He faulted the Plaintiff for buying land that belonged to a minor. That his mother brought to his attention the fact that he was the registered proprietor of the suit land and that the Plaintiff was utilizing it unlawfully, upon attaining 18 years i.e. 1975. He stated that his father died in 1968 and mother died in 2014.

5. At the hearing he confirmed that he is the registered owner of the suit land from the 11/4/1960. That he inherited it from his father. He stated that he did not sue the Plaintiff upon attaining the age of 18 years. That he did not know that the Plaintiff was cultivating the land as his parents were in charge of the suit land. He lived in Kitale with his mother. He was not aware that the land had been sold to the Plaintiff. It is upon attaining the age of 18 years that he was given documents showing that the land was registered in his name. He informed the Court that he got to know that the Plaintiff was occupying the land in 1984 and that is when he filed a complaint with the area chief and later with the then District Officer of the area. He confirmed that the Plaintiff has planted tea on the land which he did without his consent.

6. Further he referred the Court to the LDT No 25 of 2001 where the case was heard and the elders ruled that the Defendant should pay the Plaintiff Kshs. 107,800/- and in return the Plaintiff to return the land to the Defendant. It is the Defendant's evidence that he deposited the cash as directed by the elders but the Plaintiff refused to collect the money and instead appealed to the High Court.

7. Parties filed written submissions which I have read and considered.

8. The Plaintiff submitted that the Defendant maintained that he came to know of the Plaintiff's possession of the land in 1984 when the matter was taken to the chief. However, at the LDT No 25/2001 proceedings held on the 2/8/2001 the Defendant that the Plaintiff had been in cultivation of the suit land since 1962. The import of the evidence is that he had knowledge of the occupation and it is only in 1984 that he came to Muranga District to actively seek the removal of the Plaintiff from the land. In cross examination he stated that he left the land in the hands of his parents and that means he had constructive knowledge that the Plaintiff was in occupation since 1962. The possession of the land was therefore not in secrecy. The trespass was open. It therefore follows that when the Defendant acted in 1984, the right to title by way of adverse possession had vested to the Plaintiff.

9. In response to the issue whether the suit is resjudicata, the Plaintiff argued that the Land Dispute Tribunal cannot be said to be a Court of competent jurisdiction since it acted in excess of its mandate as provided for by the Land Dispute Tribunal Act under Section 3. The Plaintiff contends that according to section 38 of the Limitation of Actions Act it is the High Court that can determine title by way of adverse possession and not the Land Dispute Tribunal. That the decree arising from the Land Dispute Tribunal is irrelevant to the suit except for the determination of when adverse possession was interrupted in 1984. Even then it was 22 years, long after adverse had vested. The Plaintiff relied on various case law on jurisdiction of a Court to support the position.

10. In furthering the point in respect to minority of the Defendant in 1962, the Plaintiff argues that if indeed the Defendant was a minor in 1962, there is every chance that he was not privy to the purchase agreement of the land between the Plaintiff and the Defendant's father. The entry therefore of the Defendant onto the land was without permission from the Defendant, the registered proprietor of the suit land, and therefore was an outright trespass. He argued that in any event section 38 of Limitation of Actions Act does not distinguish whether the registered proprietor is a minor or an adult. It only refers to the person then registered as proprietor of the land.

11. The Defendant in a rather brief rendition submitted and reiterated the evidence already on record and urged the Court to evict the Plaintiff.

12. Having considered the pleadings, the rival affidavits and annexures, thereto as well as the written submissions it is not in doubt that the suit land is registered in the name of the Defendant having become so registered in 1960. A copy of the green card for the suit land to support the above facts was annexed. On the 10/8/1972 the Plaintiff filed a caution on the land claiming a purchaser's interest.

13. The essence of adverse possession under the Limitation of Actions Act, cap 22 Laws of Kenya, is that the registered proprietor of land is prohibited from bringing an action to recover land after 12 years from the date when the cause of action accrued. Upon the expiry of that period the proprietor's title to the land is extinguished by operation of the law and any person who has been in occupation of the land peacefully, openly and as of right for the prescribed period is entitled to bring an action in the High Court (read ELC) to be declared the owner of the land. The relevant provisions in sections 7, 13 and 38 of the Limitation of Actions Act apply.

14. For one to succeed in adverse possession he has to prove the following; See **Kasuve vs Mwaani Investments Ltd Vs. 4 Others 2004 IKLR 184:**

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly and as of right 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”.

15. Similarly in the case of **Kimani Ruchire vs. Swift Rutherfords & Co. Ltd (1980) KLR 10** where it stated;

“...the Plaintiff s have to prove that they have used this land which they claim, as of right, nec vic, nec clam, nec precario.....show that the company had knowledge of possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavors to interrupt it or by way of recurrent consideration.’

16. In the case of **Kweyu v Omuto, Court of Appeal, Civil Appeal No. 8 of 1990**

‘...In deciding the issue of adverse possession, the primary function of a Court is to draw legal inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of fact, the question whether that possession is adverse or not is a matter of legal conclusion to be drawn from the findings of acts.’

17. The Plaintiff has claimed that he purchased the suit land in 1962 from the father of the Defendant. He states that he had no knowledge that the title was registered in the name of the Defendant. That notwithstanding he was put in possession by the Defendant's father and commenced developments on the land to wit; planting 3000 tea bushes, trees, maize and subsistence crops. He also built a house which he has rebuilt twice since then. He maintains that he has not been dispossessed or handed over possession to the Defendant since he took over occupation in 1962. The evidence of PW2 was consistent with that of the Plaintiff in that she informed the Court that she witnessed the purchase of the suit land. She told the Court that she utilizes the land openly by carrying out the farming activities cited above.

18. The Defendant resisted the Plaintiff's claim and states that he was 5 years old when the alleged transaction took place and that he had no knowledge of the possession and occupation of the land by the Plaintiff until 1984. He therefore could not have given his consent to the sale. It is trite law that permission or consent invalidates a claim for adverse possession.

19. In respect to when the Defendant got knowledge of the occupation of the suit land by the Plaintiff, the Defendant has given two contracting scenarios. Firstly, he maintained that he got to know upon turning 18 years that is to say 1975 when he was given documents of title that showed that he is the registered owner. He states that his mother had asked the Plaintiff to vacate the suit land before and upon attaining the age of majority she handed over the case to him and informed him that the Plaintiff was occupying the land unlawfully. The second scenario is 1984 when he came to Muranga. In his evidence he stated as follows;

“I became 18 years in 1975. I did not sue the Plaintiff for eviction upon attaining the age of 18 years. ...I did not know that the Plaintiff was cultivating the land as my parents were in charge of the land. I was in Kitale with my mother. I did not know that the land had been sold. I was given documents showing the land is registered in my name upon attaining the age of 18 years. I got to know that the Plaintiff was occupying the land in 1984 when I and my mother went to complain to the chief. Upto 1984 I did not know that the Plaintiff was in occupation of the land.”

That evidence was given against the background of his statement when he stated that the Plaintiff has been in occupation from 1962. From the above it shows that the Plaintiff was in open exclusive and uninterrupted occupation of the suit land. That his parents, that is to say, the mother was aware of the occupation. She did confirm that in her evidence at the hearing. It also shows that his parents who he admits were the caretakers of the land had knowledge of the occupation of the suit land by the Plaintiff. The Defendant therefore had constructive knowledge of the occupation.

20. From the evidence on record there are two instances that time for purposes of calculating adverse possession could be said to start running. Firstly, as admitted by the Defendant in his evidence as 1962. It follows that by 1984, rights to title by way of adverse possession had crystalized in the name of the Plaintiff. I would agree with the arguments made by the Plaintiff in that regard.

21. However, if it is taken that the age of minority of the Defendant ended in 1975, then time started running from 1975 but got interrupted in 1984/85 when the Defendant filed a case with the Land Dispute Tribunal and the High Court. The Defendant adduced evidence to the effect that the High Court advised the parties to file the case afresh with the Land Dispute Tribunal. This was not done until August 2001 when the LDT No 25/2001 was filed. The Defendant then asserted his title before the Land Dispute Tribunal. One would say that time was halted by the Land Dispute Tribunal case. However, by the time the Defendant was filing this case in 2001, adverse possession had not only crystalized but the title by way of adverse had vested in the Plaintiff. It was 16 years down the road from 1985- 2001. The effect of the Land Dispute Tribunal in my considered view did not impact adversely of the title that had crystalized in 1997.

22. From the totality of the evidence analyzed above this Court is satisfied that the Plaintiff has been in possession of the suit land for over 12 years which is more than adequate in continuity, publicity and in extent that it has established an adverse interest against the registered owner, namely the Defendant.

23. The upshot is that Judgement is entered in favour of the Plaintiff against the Defendant as follows;

- a. The Plaintiff is declared as owner of the Loc 8/Matharite/101 by way of adverse possession.
- b. The Defendant is ordered to transfer No Loc 8 /Matharite/101 to the Plaintiff within 30 days from the date of this judgement and in default the Deputy Registrar of this Honourable Court be and is hereby authorized to execute all documents necessary to effect the registration of the title in the name of the Plaintiff .
- c. The costs to be borne by the Defendant.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 4<sup>TH</sup> DAY OF OCTOBER, 2018.**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Mwangi HB for Mbutia for the Plaintiff

Defendant – Absent

Irene and Njeri, Court Assistants