



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 162 OF 2019 (OS)**

**KENNETH NYAKUNDI MAKORI.....PLAINTIFF**

**VERSUS**

**RUTH WANGARI MWANGI.....1<sup>ST</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR RUIRU.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

Vide an Originating Summon filed on 5<sup>th</sup> November 2019, the Plaintiff brought this suit against the Defendants seeking for the following orders;

- a) *An order that the Plaintiff/Applicant is entitled to a portion of the title possession, occupation and transfer of portion measuring approximately 0.06689 HA of a property known as RUIRU/RUIRU EAST BLOCK 2 NOW SUBDIVIDED UNDER TITLE NO.S 30912, 30913, 30914, 30915, 30916, 30917, 30918, 30919 (herein referred to as suit parcel) on account of having enjoyed continuous uninterrupted possession thereof for over 14 years.*
- b) *A Declaration that a portion measuring approximately 0.06689 HA of the suit parcel currently registered in the names of RUTH WANGARI MWANGI, is being held in trust for the said Plaintiff/applicant, KENNETH NYAKUNDI MAKORI.*
- c) *The Land Registrar Ruiru be compelled to cancel the resultant subdivision of titles number 30912, 30913, 30914, 30915, 30916, 30917, 30918, 30919 so that suit reverts to its former number RUIRU/RUIRU EAST BLOCK 2/4118 and rectify the register to reflect the land belonged to RUTH WANGARI MWANGI and proceed to register the plaintiff as owner of the portion measuring approximately 0.06689 HA of the suit parcel.*
- d) *An order that property RUIRU/RUIRU EAST BLOCK 2/4118 now subdivided under titles No.s 30912, 30913, 30914, 30915, 30916, 30917, 30918, 30919, be cancelled and transferred to the plaintiff's name, the plaintiff has acquired title to a portion of the suit parcel by way of adverse possession.*
- e) *An order that the Deputy Registrar of this Honourable Court execute all necessary documents of transfer of a portion of the property in favor of the said KENNETH NYAKUNDI MAKORI in respect of RUIRU/RUIRU EAST BLOCK 2/4118 now subdivided under titles No.s 30912,30913, 30914, 30915, 30916, 30917, 30918, 30919.*
- f) *A permanent injunction be issued restraining the Defendants either by themselves, agents, servants or otherwise howsoever from interfering with the Plaintiff KENNETH NYAKUNDI MAKORI and /or his agents, servants or family members access to quiet possession of accessing, advertising, offering for sale, leasing, mortgaging, charging, transferring or assigning, subdividing and/or otherwise dealing with property known as RUIRU/RUIRU EAST BLOCK 2/4118 now subdivided under titles No.s 30912,30913, 30914, 30915, 30916, 30917, 30918, 30919.*
- g) *An order directing the Land Registrar Ruiru to register a caution in favor of KENNETH NYAKUNDI MAKORI forbidding any registration or disposition of the parcel of land known as RUIRU/RUIRU EAST BLOCK 2/4118 now subdivided under titles No.s 30912,30913, 30914, 30915, 30916, 30917, 30918, 30919 pending determination of this Application.*
- h) *Costs of this summons to be paid by the defendants.*

In his **Supporting Affidavit**, the Plaintiff averred that on or around the year 2004, he began residing on the suit property with his wife and children. That he purchased parcel No. 4118 Plot Nos. 14, 15 &16 ballot no. 1508 from Matanya-Ndururumo Women Group. That once

he began making payments of the purchase price, the land was subdivided and he was allocated three plots of land and after taking possession, he erected a barbed wire fence and began cultivating the land and purchased and placed building materials thereon.

He stated that while constructing in the property, the representatives of **Matanya-Ndururumo Women Group** reassured him that the transfer of the mother title would be effected in their names and thus they made payments to facilitate the transfer. That he has occupied the suit land since **2004**, without any interference from anyone up until **October 2017**, when some people claiming to have purchased the land questioned his stay and others in the suit parcel and his attempts to trace the representative who had sold him the suit property to explain the conundrum, his efforts were futile.

He further averred that he reported the matter to **Juja Police Station**, and the representatives were arrested and charged after failing to provide genuine titles to the suit parcel. He conducted a search and discovered that the suit property was registered in the name of the 1<sup>st</sup> Defendant. That his advocate has advised him that at the time the 1<sup>st</sup> Defendant subdivided the parcel of land the title over the said suit parcel had long been extinguished and it was held in trust for him and therefore the demand letter had no legal consequence to his acquired interest over the title.

The Suit is contested and the 1<sup>st</sup> Defendant filed a Replying Affidavit dated **20<sup>th</sup> January 2020**, and averred that she has been the registered owner of parcel of land known as **RUIRU/RUIRU EAST BLOCK 2/4118 which she purchased from Nyakinyua Investments and was issued with a title deed in the year 1988. That she has subdivided the said suit property to buyers who purchased the same from her namely;-**

- a) Ruiru/Ruiru East Block 2/30912 belonging to Martin Gitau Kariuki**
- b) Ruiru/Ruiru East Block 2/30913 belonging to Pharis Macharia**
- c) Ruiru/Ruiru East Block 2/30914 belonging to John Thumbi Muriuki**
- d) Ruiru/Ruiru East Block 2/30915 belonging to Samuel Mugo Mwangi**
- e) Ruiru/Ruiru East Block 2/30916 belonging to Veronica Njeri**
- f) Ruiru/Ruiru East Block 2/30917 belonging to Florence Moraa**
- g) Ruiru/Ruiru East Block 2/30918 belonging to Joseph Kiragu Kamau**
- h) Ruiru/Ruiru East Block 2/30919 belonging to Zacharia Mwangi Nyungu**

Further that the Plaintiff and others have occupied plots identified for the legitimate purchasers above claiming to have bought the same from a party unknown to her. That it was the Plaintiff's obligation to undertake due diligence when purchasing the property and his failure to do so and resultant loss should not be visited upon her. That the Plaintiff has taken advantage of her advanced age to occupy the land and according to the purchasers, the Plaintiff has been a tenant in various areas in and around Murera area until he trespassed on to her property. Further that the Plaintiff has fenced off Sections of the property that do not belong to him with a view of illegally acquiring the same and should be enjoined from continued trespass. Further that the Plaintiff has commenced criminal proceedings against the persons who sold him the land and the seller being known to him, any damage occasioned may be quantified hence the Plaintiff will suffer no loss.

She contended that the Plaintiff and or their agents have without any authority trespassed and made developments on the suit property since her son passed away and she as unable to visit the property frequently. That the Plaintiff ought to pay for the period he has occupied the land. Illegally.

The Plaintiff Kenneth Nyakundi Makori swore a further Affidavit dated 22<sup>nd</sup> January 2020, and averred that the purported buyers ought to have known that the land they intended to purchase was not vacant. He reiterated that he was in open, peaceful and continuous occupation and possession of the suit property exceeding 14 years and he took possession when it was vacant. That it is in the interest of justice to grant the orders sought.

On the 23<sup>rd</sup> March 2021, the Plaintiff filed his written submissions dated 5<sup>th</sup> October 2020 through the Law Firm of Chimei & Company Advocates. The 2<sup>nd</sup> & 3<sup>rd</sup> Defendants filed their written submissions dated 22<sup>nd</sup> March 2021 on 23<sup>rd</sup> March 2021 through Fatma Ali State Counsel, the 1<sup>st</sup> Defendant also filed her written submissions dated 21<sup>st</sup> April 2021, through the Law Firm of Gichio & Company Advocates.

The Court has now carefully read and considered the Pleadings by the parties, the Affidavits, the provisions of law and the written submissions and finds that the issue for determination is whether *the Plaintiff has proved a claim of adverse possession and therefore entitled to the orders sought.*

*The Plaintiff has sought for an order that he is entitled to approximately 0.06689 ha portion of L.R Ruiru/Ruiru East Block 2/4118, by way of Adverse possession.* In deciding whether or not to grant the orders of adverse possession, the Court is guided by **Section 7 of the Limitation of Actions Act which provides;-**

***“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.”*

Further the Court is guided by **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 be declared to have acquired property by virtue of adverse possession, other principles must be met as cited by **Justice Sergon** in the case of **Gerald Muriithi ...Vs...Wamugunda Muriuki & Another (2010) eKLR** while referring to the case of **Wambugu ...Vs...Njuguna (1983) KLR page 172** where the Court of Appeal held as follows;

**“1. In order to acquire by statute of limitations title to land which has a known owner the owner must have lost his right to the land either by being dispossessed of it or by having continued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed of the suit land for a continuous period of twelve years as to entitle him, the respondent to title to the land by adverse possession.**

**2. 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 the claimant has proved that he has been in possession for the requisite number of years. (Emphasis)”**

For the Plaintiff herein to succeed in his claim for **Adverse Possession**, he must prove his possession, dispossession and discontinuance of possession by the 1<sup>st</sup> Defendant herein for a continuous period of 12 years. Thus, the Plaintiff needed to prove that the 1<sup>st</sup> Defendant was dispossessed of the suit land which literally means that she was out of possession. See the case of **Samuel Nyakenogo vs Samuel Orucho Onyaru Civil Appeal No. 24 of 2004 (2010) eKLR**, where the Court held that:-

**“The Limitation of Actions Act on Adverse Possession, contemplates two concepts; dispossession and discontinuance. The proper way of assessing proof of adverse possession will then be whether or not the title owner has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he had been in possession for the requisite period.”**

The 1<sup>st</sup> Defendant **Ruth Wangari Mwangi**, is the registered owner of the suit property. She got registered as such on **26<sup>th</sup> August 1988**, under the **Registered Land Act, Cap 300 (now repealed)**. As provided by **Section 27(1)** of the said Cap 300 (now repealed) the registration of the 1<sup>st</sup> Defendant is deemed to vest to her **absolute** ownership of the said land with all rights and privileges appurtenant thereto.

Further under **Section 28(1)** of the said Cap 300(repealed) and now replicated in **Section 25(1)** of the **Land Registration Act**, such rights cannot be defeated except as provided in the Act.

However, under **section 38(1) and (2)** of the **Limitation of Actions Act**, a person can acquire title to someone else land by virtue of **adverse possession** after continuously occupying the said land in a way that is inconsistency with the owner’s rights. Such entry or possession must be **non-permissive, open and notorious, exclusive adverse** and with the **lapse of the statutory period of 12 years**. See the case of **Kimani Ruchine vs Swift Ruthford & co. Ltd (1980)**, where the Court held that:-

**“The plaintiff’s have to proved that they have used this land which they claim as of right; *nec vi, nec clam, nec precario* .....”**

The said possession must be continuous and it must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent considerations. This was the same position held in the case of **Celine Muthoni vs Safiya Binti Swaleh & others ELC No. 248 of 2016**, where the Court held also that:-

**“It is also a well settled principle that a party claiming Adverse Possession ought to prove that this possession was *nec vi, nec clam, nec precario*; that’s peaceful, open and continuous. The possession should not have been through force, not a secrecy and without the authority on permission of the owner”.**

The above are the principles that needed to be satisfied before the Court can declare that the Plaintiff has acquired the property by virtue of **adverse possession**. This Court will then consider the available evidence, juxtapose it with the above principles and then determine whether the Plaintiff herein has proved his case on the required standard.

The Plaintiff alleged that he bought the suit property from **Matanya Ndururumo Women Group** in **2004**, and upon such purchase, he took possession of the property and has been living on it since then. He attached photographs of structures thereon which he claimed were his residential houses, and that he has lived thereon with his family since 2004, exclusively and without any interruptions.

However, the 1<sup>st</sup> Defendant in her Replying Affidavit has averred that she was registered as the owner of the suit property in **1988**, and that Plaintiff has been renting and living in various other properties in the vicinity of **Murera area** before settling on the 1<sup>st</sup> Defendant suit property. Therefore, the Plaintiff's occupation and possession of the suit property for a period that is over **12 years** has been disputed and challenged by the 1<sup>st</sup> Defendant.

The Plaintiff is the one '**who has alleged**' and it was incumbent upon him to call sufficient evidence to prove his case. From the Plaintiff's pleadings, he claims **0.06689 Ha** from the 1<sup>st</sup> Defendant's parcel of land being **Ruiru/Ruiru East Block 2/4118**. Further from the title deed attached to the Plaintiff's claim, the 1<sup>st</sup> Defendant parcel of land is approximately **0.4 ha**. The Plaintiff is claiming **0.06689 Ha**. However, in prayer no (D) of the Originating Summons, the Plaintiff has sought for "**an order that the property Ruiru/Ruiru East block 2/4118, now sub-divided into No. 30912 – 30919 be cancelled and transferred to the Plaintiff's name, the Plaintiff having acquired a portion of the suit property by way of adverse possession.**" In essence the Plaintiff is claiming the whole title, that is registered in the name of the 1<sup>st</sup> Defendant.

One of the principle that the Plaintiff needed to prove is that he entered into the suit property **without permission** of the registered owner. In his claim, he has alleged that he entered the suit property after having purchased the said parcel of land from **Matanya Ndururumo Women Group** in **2004**.

He did not attach any sale agreement to confirm that he indeed purchased the three plots which were part of title **No. Ruiru/Ruiru East Block 2/4118**, which title is registered in the name of 1<sup>st</sup> Defendant. The Plaintiff has attached Certificates of ownership for plots **No. 14, 15 and 16**, issued by **Matanya Ndururumo Women Group**. However, the said Certificates of Ownership do not identify **Ruiru/Ruiru East Block 2/4118**, as the mother title. Infact the Certificates of ownership give plot numbers and which Plots are in **Block No. 3**. It is not clear Block three represents which land parcel, and certainly it is not clear that Block 3 is **Ruiru/Ruiru East Block 2/4118**, the suit property herein.

How then would this Court confirm with certainty that the plots that the Plaintiff alleged purchased in **2004**, were plots in **Ruiru/Ruiru East Block 2/4118**? How would the Court ascertain that the Plaintiff took possession of these plots in **2004** and the said plots were indeed portions of the suit property? The court asks these question because the 1<sup>st</sup> Defendant has alleged that the Plaintiff was a tenant in various other plots within the vicinity of **Murera area**, but not on the suit property. That he only trespassed on the suit property in the recent past, taking advantage of the 1<sup>st</sup> Defendant advanced age.

From the available evidence herein which evidence was availed through affidavits, it is not clear that the Plaintiff occupied a **definite** portion of land from the property registered in the name of the 1<sup>st</sup> Defendant from the year 2004. The Plaintiff should at least have called evidence from other persons who could have confirmed that they had indeed witnessed and seen the Plaintiff after taking possession of this suit property from the **year 2004**, and that he has lived thereon continuously without any **interruption** and **without force** or **secrecy**.

Further the Plaintiff needed to prove that the registered owner of the suit property herein who is the 1<sup>st</sup> Defendant was dispossessed of the said property, since being in occupation of the suit property from **2004** itself is not proof of dispossession.

It is evident from the Plaintiff's affidavit that he allegedly entered into the suit property by virtue of purchase of the same from the **Matanya Ndururumo Women Group** in **2004**, and he did not know of the 1<sup>st</sup> Defendant's ownership. When he entered into the suit property, the Plaintiff did not know that it belonged to the 1<sup>st</sup> Defendant and could certainly not have dispossessed and discontinued her possession. Could the Plaintiff have dispossessed an unknown owner? See the case of **Gabriel Mbui vs Mukundi Maranya (1993) eKLR** where the Court held:-

***"The rightful owner must know that he is ousted. He must be aware that he has been dispossessed or he must have parted and intended to part with possession. Just as the adverse possessor cannot succeed, if he did not know he was in actual possession of another's land ....."***

It is evident from the available evidence that the Plaintiff did not know that the suit property belonged to the 1<sup>st</sup> Defendant before **2018**, when he received a demand letter to vacate from the said property. Certainly the Plaintiff cannot claim to have dispossessed an owner that he did not know of. See the case of **Gabriel Mbui Mukindia Maranya (1993) eKLR**, where the Court held that:-

***"Discontinuous consists in the owner giving up, ceasing to use and abandonment of the land; a cessation of occupation. The fact that nothing is done to improve or work a piece of land is not evidence that a person has abandoned the possession of it or that he has otherwise been eliminated from the land."***

Having carefully considered the available evidence, the Court finds and holds that the Plaintiff herein did not avail sufficient evidence to prove on a balance of probabilities that he indeed dispossessed the 1<sup>st</sup> Defendant of the suit property. That he occupied the suit property in **2004** and that the 1<sup>st</sup> Defendant knew of this dispossession and that the said possession by the Plaintiff had been for a period of over **12 years**. The Plaintiff has further failed to prove how he ascertained that the portion that he occupies is approximately **0.06689 Ha**, as his three Certificates of ownership did not give the acreage of the plots purchased. It is not clear that the Plaintiff herein is claiming a **definite** and **clear** portion of land from the suit property that is owned by the 1<sup>st</sup> Defendant.

As submitted by the Defendants, the Plaintiff should have pursued the persons who sold non-existent land to him, but not to claim **adverse possession** from the 1<sup>st</sup> Defendant's parcel of land, as there was no clear evidence that the 1<sup>st</sup> Defendant had been dispossessed of the said parcel of land from the year **2004**.

For the above reasons, the Court finds and holds that the Plaintiff has failed to prove his claim as contained in the Originating Summons dated

5<sup>th</sup> November 2019, and consequently the said Originating Summons is **dismissed entirely** with costs to the Defendants.

It is so ordered.

**Dated, signed and Delivered at Thika this 6<sup>th</sup> day of May 2021.**

**L. GACHERU**

**JUDGE**

**6/5/2021**

**Court Assistant – Phyllis**

**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 **15<sup>th</sup> 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.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**Mr. Kegode for the Plaintiff**

**No appearance for the 1<sup>st</sup> Defendant**

**No appearance for the 2<sup>nd</sup> Defendant**

**No appearance for the 3<sup>rd</sup> Defendant**

**L. GACHERU**

**JUDGE**

**6/5/2021**