



**REPUBLIC OF KENYA**

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

**ELC NO. 7 OF 2019**

**MILKA WANGUI NDUTHU..... PLAINTIFF**

**VERSUS**

**MWANGI NJUGUNA.....1<sup>ST</sup> DEFENDANT**

**SIMON PETER NJUGUNA.....2<sup>ND</sup> DEFENDANT**

**AGNES MWIHAKI KANGETHE.....3<sup>RD</sup> DEFENDANT**

**SAMUEL WAMBUA NZONZIWE.....4<sup>TH</sup> DEFENDANT**

**PETER NDIRANGU MWANGI..... 5<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

1. The Applicant instituted the instant suit vide Originating Summons dated 18/5/2010. The summons were subsequently amended to include additional Defendants who acquired title of the suit land during the pendency of the suit and at different times. The Applicant sought determination of the following questions;

- a) Has the Applicant acquired title by adverse possession?
- b) Is the first Respondent guilty of fraudulent misrepresentation of facts in succession cause 258 of 2009 (Murang'a)?
- c) Did the 1<sup>st</sup> Respondent have any title to pass to the 2<sup>nd</sup> Respondent?
- d) Should the title in respect of L.R. LOC.2/ KANGARI/ 128 to the 4<sup>th</sup> and 5<sup>th</sup> Respondents be cancelled by the Land Registrar Murang'a and the Applicant be registered proprietor?
- e) Who is to bear the costs of this Originating Summons?

2. The summons are supported by the Affidavit of Milka Wangui Mwangi. It is the Applicant's contention that her deceased father Benson Mwangi Koigi purchased the suit property from the 1<sup>st</sup> Respondent's father Philip Kangori in 1963. That her deceased father planted tea bushes thereon and upon his demise in 1994 she took possession of the land. That in 2010 the Respondent threatened to evict her and it is then that she learnt that the 1<sup>st</sup> Respondent had transferred the land to the 2<sup>nd</sup> Respondent. It is further her disposition that she was not aware of the succession proceedings involving the estate of Philip Kangori. That if she became aware she could have objected. That the land has since been transferred to the 4<sup>th</sup> and 5<sup>th</sup> Respondents, the current registered owners of the suit land.

3. In opposition, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a Replying Affidavit sworn by the 2<sup>nd</sup> Respondent. The Respondents averred that the suit land was registered in the name of Philip Kangori. The Respondents contend that the Applicant has neither given any explanation for the Applicant's father not to have sought the transfer of the land from Philip Kangori nor give reason for failure to notify the estate of the deceased. That the succession was procedurally done and there being no objection the assets of the deceased were accordingly distributed.

4. PW1 the Applicant herein testified that her deceased father bought the land from the 1<sup>st</sup> Respondent's father in 1963. That her father took possession of the land and lived thereon until his demise on 30/06/1996. It was her testimony that the 2<sup>nd</sup> Defendant brought surveyors who placed beacons on the land. This prompted her to inform the village elder who in turn notified the Chief and a meeting was called between herself in the company of her sister, Chief Kangari, Chief Kurere and the 2<sup>nd</sup> Respondent. That no agreement was arrived at as to the determination of the dispute. It was her testimony that the suit land is No. 128 Loc 2 Kangari which land is adjacent to her father's land No.

171/Loc 2 Kangari which was sub-divided after his death.

5. She further testified that the land changed hands during the pendency of the suit and is currently registered in the name of the 5<sup>th</sup> Respondent. She relied on the averments of her Affidavits dated 11/5/2010 and 7/2/2020 and added that she is in occupation of the land to date.

6. PW2, Samson Njoroge Kamau relied on his Affidavit dated 13/2/2020 and testified that the Applicant, his aunt, has been in occupation of the suit since 1984. It was his testimony that the land was bought by his grandfather who left the land to the Applicant. Further that in 2011 some person(s) claimed ownership of the land thereby uprooting tea leaves thereon. He testified that he got information concerning the land from his late grandfather. His testimony marked the close of the Applicant's case.

7. According to the report following the site visit, there is active occupation based on the extent of agricultural work. The report shows that there is active farming on the land including: tea plantation, beans, maize and potatoes. However, there are no structures on the land but the nature of the plantation showed active and actual occupation.

8. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents opposed the claim while the 3<sup>rd</sup> - 5<sup>th</sup> Respondents never put in any response. Their response notwithstanding, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not participate in the hearing thus the Applicant's evidence remained uncontroverted and their averments were mere allegations.

9. Even if the Applicant's testimony is uncontroverted, the Court has the duty to interrogate the evidence and determine whether the Applicant is entitled to the prayers sought. This Court has pronounced itself on uncontroverted evidence in ELCA No. 16 of 2017 **Gichinga Kibutha v Caroline Nduku [2018] eKLR** to the strength that;

“It is not automatic that in instances where the evidence is not controverted, the claimant's claim shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.

10. The law on adverse possession is provided for under the Limitation of Actions Act. Section 7 of the Act 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. Section 13;

“(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 of this Act 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) of this Act, the land in reversion is taken to be adverse possession of the land”.

Section 17 extinguishes the rights of a registered owner where there is a successful claim for adverse possession.

Section 38 on the other hand provides;

“(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”;

11. The Court of Appeal in Kisumu Civil Appeal No. 110 of 2016 **Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] eKLR** opined that a person claiming adverse possession must establish the following;

- a) On what date he came into possession?
- b) What was the nature of his possession?
- c) Whether the fact of his possession was known to the other party?
- d) For how long his possession has continued; and
- e) That the possession was open and undisturbed for the requisite 12 years?

12. The Applicant testified that her father bought land from the 1<sup>st</sup> Respondent's father in 1963. The Applicant relied on her Affidavit of

7/2/2020 together which there is an annexed sale agreement. The agreement of sale was entered into on 3/ 6/1963 where the balance was completed on 10/4/1964.

13. According to the said agreement of sale the Applicant's father bought the suit land disclosed as parcel LOC2/KANGARI/128 on the 3/6/1963. The purchase price was Kshs 300/- , 5 goats and 3 ewes and beer. He paid the first installment of Kshs 100/- and the balance later. According to the agreement, the purchaser acknowledged the full purchase price on the 10/4/1964. The agreement is witnessed by Gathu son of Wanyororo on the part of the seller and Kuna Kanini on the part of the buyer.

14. The suit land was registered in the name of Philip Kangori on the 22/5/1962 as per the certified copy of the green card on record.

15. As to whether the Applicant had proved that there was a sale, it is the finding of the Court that the same is undisputed. The Applicant led undisputed evidence that the Applicant's father entered into the suit land in 1963 and commenced the development of the land by planting tea. That he continued picking the tea directly or through his children and agents until his demise on the 30/6/1994.

16. In the case of **Public Trustee – v- Wanduru, (1984) KLR 314 at 319** Madan, J.A. stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run.

17. It therefore follows that adverse possession started running from 1963 in favour of the Applicant's father and by the time of his death in 1994 the right to the title by way of adverse possession had crystalized so much so that the title held by Philip Kangori was held under trust for the said Applicant's father. In other words, the late Kangori held the title as a paper owner.

18. The Applicant has filed this case on her own right and she has sought title by way of adverse possession. This leads me to discuss the first question posed to the Court for determination under the originating summons. Which is has the Applicant acquired title by way of adverse possession?

19. The starting point is the pleadings and the evidence of the Applicant as led before the Court. Under para 4 of the supporting affidavit the Applicant stated as follows;

“upon the death of Benson Mwangi Koigi I took possession of the land and have been picking the tea leaves either by myself and or my children or agents upto the time the 1<sup>st</sup> and 2<sup>nd</sup> Respondents uprooted the tea leaves but I remained in possession of the suit premises.”

20. The Applicant led evidence that she and her father were in possession of the land from 1963 -1981. She did not explain if she left in 1981 and came back later. However according to paragraphs 3 and 4 of her Supporting Affidavit she took over possession of the land in 1994 after the death of her father. PW2 stated that the Applicant has been in possession of the land after the death of his grandparents todate.

21. During the hearing she informed the Court that she always believed that the transfer of the suit land from Philip Kangori to her father had been completed but she was jolted into action in 2011 when the 2<sup>nd</sup> Respondent brought some people to the suit land and threatened to evict her. That he brought a surveyor to reconfirm the beacons. It was her evidence that she then started investigating the title and noticed that the same was registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. This agrees with entry No 2 in the green card that shows that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents became registered as owners of the suit land through transmission vide succession cause No 258 of 2008 on the 21/12/2009.

22. The Applicant led evidence that she sought the intervention of the local Chief and finally filed suit in 2010 to advert her interests in the suit land.

23. The evidence of the Applicant that she took over the suit land in 1994 upon the demise of her father was not challenged. She led evidence that she continued picking tea directly and through her children and her agents. This evidence is supported by the site report dated the 29/3/2021 which stated as follows;

“the land is well occupied. There was active occupation evidence by the extent of the agricultural work done on the suit land. the 1<sup>st</sup> half of the land contained tea plantation. The 2<sup>nd</sup> half contained beans maize and some potato plants. The land is well tilled. There is a live fence reinforced by posts. The fence is well trimmed and tended to. .... There are no structures but from the observation of the Court there is active full occupation evidenced by the extent of the agricultural work done on the land. the works are precise neat and organized.”

24. The nature of possession was settled in **Kisumu Civil Appeal No. 27 of 2013 Samuel Kihamba v Mary Mbaisi [2015] eKLR** as;

“Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land **openly**, that is, **without force, without secrecy, and without license or permission of the land owner**, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, *nec vi, nec clam, nec precario*. The additional requirement is that of *animus possidendi*, or intention to have the land”

25. The above evidence goes to show that the title owner was dispossessed and that the Applicant was using the land in a manner inconsistent with that of the title owner ( *animus possidendi*). There was no evidence led by the Respondents to show that they are in occupation of the land or that the Applicant is not in possession of the land. The site report demonstrates that she indeed is in possession and carrying out farming activities which supports the evidence led by the PW1 and PW2.

26. In her evidence she testified that the 2<sup>nd</sup> Respondent brought in surveyors in 2011 and other than the threat to evict her, she is still on the land. The import of that is that none of the Respondents managed to dispossess her from the land and that neither has she relinquished possession of the suit land.

27. Going by the evidence led, the Court makes the following findings; the Applicant occupied the suit land openly, exclusively peacefully; time started running in favour of the Applicant in 2008 and by the time she filed suit, she had been on the land as of right for a period of 16 years.

28. I have reviewed the replying affidavit of the 2<sup>nd</sup> Respondent filed on record in 2010 and 2014. He has claimed that he and or his co-Respondents are in occupation of the land at all. All he says is that he is the registered proprietor of the land.

29. Section 16 of the Limitation of Actions Act is to the effect that an Administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration.

30. That may be so. However, in the case of **Public Trustee – v- Kamau Wanduru, (1984) KLR 314 at 324**, the Court stated that in adverse possession, the title of a registered proprietor is not extinguished but is held by him in trust for the person who, by virtue of the Limitation of Actions Act, has acquired title against the proprietor.

31. It therefore follows that by the time that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent acquired the land in 2009, the same was encumbered by a trust in favour of the Applicant. The title transferred all through from the 2<sup>nd</sup> Respondent to the 3<sup>rd</sup> and finally the 4<sup>th</sup> and 5<sup>th</sup> Respondents had an overriding interest in form of adverse possession in favour of the Applicant. In other words, the 4<sup>th</sup> and 5<sup>th</sup> Respondents have not acquired a good and better title in the suit land. They are simple paper owners holding the real title in trust for the Applicant.

32. The question whether the Respondents got a good title has been answered in the negative.

33. The Applicant has invited this Court to determine whether there was fraud in Succession Cause No. 258 of 2008. The jurisdiction of this Court flows from Section 13 of the Environment and Land Court Act. Issues of succession are within the ambit of the high Court and this Court declines any invite to entertain the matter. That said, the succession Court's mandate is to ascertain the beneficiaries and assets of an estate and attend to its distribution.

34. In the end the Plaintiff has proven her claim and to meet the ends of justice I enter judgement in her favour in the following terms;

- a. The Applicant be and is hereby declared to have acquired title by way of adverse possession.
- b. That it is hereby ordered that she be registered as owner pursuant to Section 38 of the Limitation of Actions Act.
- c. The title held by the 4<sup>th</sup> and 5<sup>th</sup> Respondents be and is hereby cancelled and or revoked.
- d. The Land Registrar is ordered to cancel and or revoke the title held by the 4<sup>th</sup> and 5<sup>th</sup> Respondents and register the title in the name of the Applicant.
- e. Costs of the suit shall be in favour of the Applicant.

35. **It is so ordered.**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 30<sup>TH</sup> DAY OF JUNE 2021**

**J. G. KEMEI**

**JUDGE**

**Delivered in the presence of;**

Wangari for the Plaintiff

Mwangi Kamau for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

3<sup>rd</sup> and 4<sup>th</sup> Defendants: Judgement in default

Court Assistant: Alex