



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT

MURANGA

ELC NO. 389 OF 2017(OS)

MARITHA WANJIKU NJOROGE.....PLAINTIFF

VERSUS

MWANGI MWAURA.....1ST DEFENDANT/RESPONDENT

JANIFER WANJIRU KABAYA.....2ND DEFENDANT /RESPONDENT

TIMOTHY NDUNGU3RD DEFENDANT/RESPONDENT

MICHAEL KAMAU NJOROGE4TH DEFENDANT/RESPONDENT

JUDGEMENT

1. The Plaintiff filed an amended Originating Summons dated 13/12/2019 against the Defendants and prayed for orders that;

- a. That the resultant Title Nos. MARAGUA/RIDGE 445,446,1032,1033 and 1034 be cancelled and consolidated back to the original No. MARAGUA/RIDGE/91.
- b. That after the said cancellation and consolidation the substituted Plaintiff be declared to have become entitled to 3.25 Ha of land parcel No. MARAGUA/RIDGE/91 measuring 6.5 Ha or thereabouts by Adverse possession.
- c. That the title, rights and interests over the aforesaid parcel No. MARAGUA/RIDGE/91 to the 1st Defendant be extinguished so that the 1st Defendant title can be recalled and cancelled.
- d. That the Land Registrar Murang'a County do register the substituted Plaintiff as the proprietor of a portion of 3.25 Ha out of land parcel No. MARAGUA/RIDGE/91 by Adverse possession.
- e. That costs of this Summons be borne by the Defendants.

2. The suit was initially filed by the late Njoroge Gitau and upon his demise, he was substituted by his widow and administrator of his estate, Maritha Wanjiku Njoroge. According to the Plaintiff, her family has been in open, exclusive and continuous occupation and possession of a half of the land parcel No. MARAGUA/RIDGE/91 (hereinafter referred to as the suit land) for a period of over 50 years. That the Defendants have not interrupted or interfered in any manner with the said Plaintiff's peaceful possession and occupation of the suit land alongside her deceased husband. That the Plaintiff has exclusively developed 3.25 Ha of the suit land and made extensive constructions thereon.

3. The Plaintiff claims that the 1st Defendant unlawfully subdivided the suit land to several Nos. viz MARAGUA/RIDGE/445,446,1032,1033 & 1034 to the 3 other Defendants in various portions. That the 1st Defendant's right over a portion of 3.25 Ha of the suit land has been extinguished by operation of law hence urge this Court to grant the orders sought.

4. The Plaintiff's claim is opposed.

5. The 1st Defendant avers that he was the younger brother of the late Njoroge Gitau. Vide his Replying Affidavit sworn on 7/11/2017, he

averred that he allowed the late Njoroge to occupy the original parcel no. MARAGUA/RIDGE/91 and a claim by adverse possession cannot therefore arise. That he subdivided the original land resulting in the subdivisions and sold the same without the late Njoroge's objection. He deponed that sometime in 1997, the Plaintiff had sued him at the defunct Land Disputes Tribunal where he was ordered to give the late Njoroge 4 acres of the suit land. That the 1st Defendant challenged the said decision, which decision was nullified vide Murang'a ELC Case No. 29 of 2017. He faulted the Plaintiff for abusing his hospitality and maintained that the Plaintiff's occupation is limited to the area he has allowed the Plaintiff to utilize.

6. On 8/12/2020, the Plaintiff withdrew her case against the 2nd Defendant with no orders as to costs.

7. The 1st Defendant did not defend the case. The undertaking of the 1st Defendants Counsel to substitute the 1st Defendant on trial was abandoned midair.

8. The 3rd and 4th Defendants aver that they are purchasers for value and oppose the Plaintiff's claim vide their Replying Affidavits sworn on 11/09/2017 and 21/08/2017 respectively.

The Plaintiff's case

9. The Plaintiff being the sole witness in her case testified as PW1. She admitted that the 1st Defendant is her brother in-law and informed the Court that she and her children have lived on the suit land for over 50 years. PW1 added that she tills the suit land and has even buried two of her kin thereon including her late husband Njoroge Gitau. PW1 told the Court that no one objected to the said burial nor asked her to vacate the land. She testified that the 1st Defendant became registered owner during demarcation after getting the land from his father to hold it in trust for the late Njoroge. That during demarcation, PW1's late husband paid Kshs. 1,000/= to the settlement fund and the two brothers allegedly agreed that the land would be shared in two halves for each of them.

10. PW1 also relied on her Supporting Affidavit sworn on 13/12/2019 as her evidence in chief.

11. PW1 produced her exhibits Pexh. 1- 17 as listed in the two Lists of Documents dated 6/6/2017 and 13/12/2019 that included the Green card of the suit land, official searches of the resultant titles of the suit land, correspondence from District Land settlement officer Kiambu/Murang'a/Thika and a bundle of photographs.

12. On Cross-examination, PW1 was adamant that the 1st Defendant was registered as trustee on his own behalf and that of her late husband. That she was married in 1966 and found her late husband living on the suit land but she did not know how he gained entry thereof. She was categorical that her late husband had sued the 1st Defendant before the land tribunal which awarded him 4 acres. That the 1st Defendant Appealed against the said award. She further conceded that she did not occupy 3.7 acres of the suit land but about 2 – 2.5 acres though the 1st Defendant had given her son 1 acre of land.

13. PW1 maintained that her case was based on adverse possession having lived on the land for over 50 years. She clarified that she did not sue the 1st Defendant on trust basis while acknowledging that she did not know the 3rd and 4th Defendants. That she sought cancellation upon learning that the land had been sold. She denied occupying the 3rd and 4th Defendants' land nor cultivating or constructing their portions.

14. That marked the close of the Plaintiff's case.

The Defendants' case

15. The 1st Defendant took the stand as DW1. Due to his hearing problem the witness was stood down with his learned Counsel seeking time to file an application for appointment of a guardian for his substitution.

16. Accordingly, Michael Kamau Njoroge the 4th Defendant testified as DW1. He relied on his replying affidavit dated 21/08/2017 and the annexures thereto. DW1 denied knowing the Plaintiff and confirmed cultivating his portion of land being No. 1033. He claimed that he's wrongly enjoined in the suit as a Defendant. In his replying affidavit, DW1 averred that the Plaintiff's claim for adverse possession was defective and unfounded as he is a purchaser for value. He deponed that he carried out due diligence before purchasing his parcel of land and as such the Plaintiff does not have any registrable interest over his land. He annexed copies of the land Sale agreement dated 30/11/2016, certificate of official search and Title deed for MARAGUA/RIDGE/1033 in his name.

17. In Cross-examination, DW1 reiterated that he bought his land from Lucy Njoki Kariuki. DW1 was emphatic that he cultivates his land whereas the 1st Defendant occupies his own parcel of land.

18. That was the end of the 3rd and 4th Defendants' case. On 20/01/2021, the 1st Defendant's retracted his position to substitute his witness and prayed for further hearing date which was slated for 8/3/2021. On the said date, the 1st Defendant's Counsel opted to close his case without calling his witness.

19. Parties agreed to file their respective written submissions. The Plaintiff filed her submissions dated 22/03/2021 whereas the 1st Defendant and 3rd & 4th Defendants filed theirs dated 30/03/2021 and 29/03/2021 respectively.

20. On behalf of the Plaintiff, a recount of the case was given as captured in her pleadings above. It was submitted that she has been in occupation on the suit land since 1966 a period well in excess of the statutory 12 years' period crucial for a successful claim for adverse

possession. That evidence had been adduced to demonstrate that her husband had been litigating over the suit land since 1990's and the 1st Defendant has never sought to evict her from the suit land. Seemingly, the Plaintiff appeared to shift the burden of proof of her case to the Defendants for allegedly not disputing her occupation of the suit land.

21. According to her, time for calculating adverse possession started running in 1966 and the 1st Defendant's title was thus extinguished in 1978 and any subsequent sub-division to wit in 1994, the 1st Defendant's title had already been extinguished and he was holding the land in trust for the Plaintiff. That the Defendants had not adduced any evidence to show that they ever retook possession nor evicted the Plaintiff and her family from the suit land. Moreover, that despite the past litigations over the suit land, time for adverse possession was not stopped nor dislodged the Plaintiff from the suit land.

22. The Plaintiff cited **Sections 13, 16,17, and 26 of the Limitation of Actions Act** in support of her claim and cited the case of **Joseph Mwangi Munga –vs- Duncan Kimani Njoroge [2020] eKLR** for important elements to be proven in such a case namely; entry to the suit land must be non-permissive, non-consensual; active, open, notorious, exclusive and adverse to the true owner's use of the land for the statutory period prescribed.

23. The Plaintiff pointed out that no evidence had been adduced to controvert her assertion that she has lived on the land since 1966. That in fact she had tendered evidence to show that she had extensively developed the land and that her stay had been open and non-permissive thereby extinguishing the 1st Defendant's title. The case of **Wilson Njoroge Kamau –vs- Nganga Muceru Kabura [2020] eKLR** was cited in support. The Court was urged to allow the prayers as drawn in the amended Originating summons dated 13/12/2019.

24. On the other hand, the 1st Defendant begun by pointing out that the Plaintiff failed to annex copy of the title of land she has been in occupation as required under **Order 37 Rule 7(2)** of the Civil Procedure Rules to prove that the disputed land is actually in existence. As a result, he termed the omission fatal rendering the suit incompetent. The cases of **Kiprono Arap Soi vs Peter Murmumet Tompoi & Anor. [2016] eKLR** and **Titus Mutuku Kasuve v. Mwaani Investments Limited & 4 Others [2004] eKLR** were cited in support.

25. The 1st Defendant argued that the Plaintiff's entry was permissive by virtue of her marriage and in any event he had expressly allowed the Late Njoroge to occupy a portion of the suit measuring approx. 2 acres. Therefore, he submitted a claim for adverse possession cannot arise in line with the requirements set in the case of **Mbira –v- Gachuhi (2002) IEALR 137** and **Jandu –v- Kirpal & Another EA 225**. He added that the Plaintiff's occupation has never been peaceful as alleged and his attempt to evict them prompted the late Njoroge to file a suit at Maragua Land Tribunal. The 1st Defendant concluded that he has never been dispossessed or discontinued from initial possession for such a claim to succeed as was held in the Court of Appeal cases of **Wambugu vs. Njuguna Civil Appeal No. 10 of 1992** and **Samuel Miki Waweru vs Jane Njeri Richu, C.A No. 122 of 2011(UR)**. He denied that the Plaintiff has been in actual occupation of the land since he had subdivided and sold the land to third parties and therefore the suit ought to be dismissed with costs.

26. The 3rd and 4th Defendants largely submitted they are purchasers of their respective parcels without notice following valid sale agreements with Mwangi Mwaura and Lucy Njoki Kariuki. They maintained that the Plaintiff has no cause of action against them as they were wrongly joined in a suit since the Plaintiff had admitted not knowing them and never having occupied/utilized their parcels of land. They urged the Court to dismiss the Plaintiff's suit with costs for want of proof.

Issues for Determination

27. From the pleadings and submissions on record, the core issue for determination is;

- a. Whether the Plaintiff has proved her claim for title of the suit land by adverse possession.

Analysis and Determination

28. The Plaintiff based his claim on adverse possession pursuant to **Sections 13, 16, 17 and 26** of the Limitation of Actions Act. For avoidance of doubt the sections 7 and 17 provide; -

7. Actions to recover land

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.

17. Title extinguished at end of limitation period

Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.

29. The law on adverse possession is now settled. Adverse possession has been defined as a way of acquiring legal title to real property by the actual, open, hostile and continuous possession of it to the exclusion of its true owner for the period prescribed by law. The period prescribed by the Limitation of Actions Act, Cap 22 of the Laws of Kenya for one to acquire legal title over land in Kenya by way of adverse possession is twelve (12) years. According to **Halsbury's Laws of England, 4th Edition Volume 28, paragraph 768** (equivalent of section 7 of the Limitation of Actions Act)

“No right to recover land accrues unless the land is in the possession of some person in whose favour the period of limitation can

run. What constitutes such possession is a question of fact and degree. Time begins to run when the true owner ceases to be in possession of his land.”

30. This definition has been adapted in numerous decisions locally to refer the notion of adverse possession as hostile occupation and use of land in a manner inconsistent with the rights of the registered owner and amounting to dispossession of the owner for a period of twelve years. See the Court of Appeal decision in **Christopher Kioi & another v Winnie Mukolwe & 4 others [2018] eKLR** whereby the Learned Judges dismissed the appellants Appeal against the trial Court finding that a claim for adverse possession was not proven as occupation was based on a sale agreement.

31. For a claim of adverse possession to succeed, certain requirements must be proven by the claimant besides the statutory occupation/possession period of 12 years. In the case of **Z F Stoffberg NO & others v City of Cape Town (1325/2017) [2019] ZASCA 70**, the Supreme Court of Appeal of South Africa stated; -

... the physical detention of the thing (*corpus*) with the intention of an owner (*animus domini*). In addition, that possession must be *nec vi, nec clam, nec precario*. *Nec vi* means peaceably. *Nec precario* postulates the absence of a grant on the request of the possessor. *Nec clam* means openly, particularly ‘so patent that the owner, with the exercise of reasonable care, would have observed it.’

32. The same conditions were reiterated in the Court of Appeal Judgment in **Grace Wairimu Sorora v Chaka Limited & 6 others [2017] eKLR**. In that case, the Court affirmed the trial Court judgment dismissing the Appellant’s claim for adverse possession on account of interruption of her occupation of the suit land from 1985 to 1995. The Court cited with approval the case of **Kimani Ruchire v. Swift Rutherford & Co. Ltd. [1980] KLR. 10** at page 16 Letter B, **Kneller J** (as he then was) said: -

“The Plaintiffs have to prove that they have used this land which they claim as of right. *Nec vi, nec clam, nec precario* (No force, no secrecy, no permission). So the Plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it or by way of recurrent consideration.”

33. Before delving into the merits of the Plaintiff’s claim, it is important to address the issue of the omission of extract of title in the Plaintiff’s Originating Summons as alleged by the 1st Defendant. This issue was raised for the first time in his written submissions.

34. **Order 37 Rule 7 (2)** of the Civil Procedure Rules mandates a claimant for adverse possession to attach a copy of the extract of title to his Supporting Affidavit alongside the Summons. The essence of the title is to identify the distinct land such claimed with certainty. See the case of **Githu v Ndeete [1984] KLR 776**.

35. The Court of Appeal in the case of **Johnson Kinyua v Simon Gitura Rumuri [2011] eKLR** held that a search certificate under the Registered Land Act (now repealed by the Land Registration Act) duly signed by the registrar constitutes evidence of the entries set out in the certificate. I have looked at the Supporting Affidavit sworn by the Plaintiff on 13/12/2019 and note that there are annexures mentioned thereon namely copy of Green card at paragraph 3. Indeed, the same is attached and marked ‘NG-1’ alongside photographs of extensive developments on the land. The copy of green card was produced as **Pexh. 1**.

36. The 1st Defendant cited the cases of **Kiprono Soi** and **Titus Mutuku** supra which are distinguished as follows. The Plaintiff in the **Soi** case failed to annex a copy of the title extract and the Court agreed that such an omission rendered the summons fatally defective.

37. The Appellant in **Mutuku** case was challenging the trial Court decisions dismissing his claim for Adverse Possession among other reasons that he failed to annex an extract of any document relating to land No. 1756/8 and in any event failed to disclose the location of his distinct acreage. The Court of Appeal upheld the high Court decision. In this case the Plaintiff produced a copy of the green card for the suit land before subdivision and copies of official search after subdivision. It follows therefore that the 1st Defendant objection is unfounded.

38. According to the Plaintiff, she was married and entered the suit land in 1966. The 1st Defendant maintained that the Plaintiff’s entry was permissive and a claim for adverse possession cannot be sustained. The copy of the green card shows that the suit land belonged to Settlement Fund Trustee as at 15/5/90 (Entry 1). It is trite that a claim for adverse possession cannot be claimed against Settlement Fund Trustee which essentially belongs to government. Consequently, computation of time for purposes of determining adverse possession could not be in 1966. See the case of **Samuel Kipngeno Koech vs Agnes Wambui Gitonga [2016] eKLR**. The Learned Judge in dismissing summons for want of a copy of title cited with approval the Court of Appeal in the case of **Gitu vs Ndungu & 2 Others (2001) KLR 149** that land under the Settlement Fund Trustees is Government Land, and therefore one cannot claim adverse possession over such land. The time which the Settlement Fund Trustees holds a charge over such land cannot be computed to sustain a claim for adverse possession. See also Section 41 of the Limitation of Actions Act that deals with exclusion of government land in a claim for adverse possession.

39. Additionally, Entry 2 shows the 1st Defendant registration on 9/7/71 which in my view is erroneous as the entries cannot be retrospective. This is supported by Pexh. 12 letter from District Settlement Officer dated 5/7/1999 confirming that the suit land transfer documents were given to the 1st Defendant on 13/11/1991 on condition that he gave Mr. Njoroge Gitau a portion of the land.

40. In her statement, the Plaintiff was clear that it is in the late 1990s that the 1st Defendant became hostile and attempted to evict them from the suit land. It is the finding of the Court therefore that no adverse possession could accrue from 1966 – 1991 when the suit land was under the Settlement Fund Trustee.

41. Evidence was led by the Plaintiff that the dispute was submitted to the Land Dispute Tribunal in 1997. This suit was litigated with vigour

through the Provincial Land Dispute Tribunal (LDT) by way of Appeal in 2000 whose decision was challenged in the ELC Court ending in recording of a consent by the parties to compromise the Appeal in 2017. Shortly thereafter the parties filed this suit.

42. The import of the Land Dispute Tribunal cases cited above is that they stopped time from running from 1997. It therefore follows that time for adverse could only be calculated from 1991 when the suit land was registered in the name of the 1st Defendant to 1997 when the LDT case was filed. The 6 year period therefore falls short of the threshold of 12 years provided for by our statutes. Consequently, no adverse possession has accrued in favour of the Plaintiff.

43. Thirdly, the Plaintiff failed to ascertain the acreage of land that she claims to occupy and for which title by way of adverse possession would be adjudged in her favour. In her claim she sought title for a portion of the suit land measuring

3.25 Ha. Her evidence on Cross-examination on this issue was as follows;

“I occupy a smaller portion of the land and it is about 2-2.5 acres....

I do not occupy the land of the 3rd and 4th Defendants. I do not cultivate on the portion of the 3rd and 4th Defendants. I have not constructed on their portions too...”

44. It is trite that the acreage of the land being claimed must be specifically ascertained. The burden of proof is on the person claiming adverse possession. In the case of **Gerishon Muindi Baruthi -Vs.- Willays Gatinku Mukobwa & another CA No. 98 of 1998** the Court held that the Plaintiff/ claimant has a duty also to prove that the land he was claiming was definite and identifiable. It was held thus:

“Exclusive possession of a portion of parcel of land which is definite would entitle the Appellant to establish his claim on ground of adverse possession provided the period of 12 years has run”.

45. Moreover, whilst the Plaintiff’s claim from her pleadings is largely on adverse possession, she attempted to testify that the claim was hinged on customary trust held that the 1st Defendant held as trustee for himself and her late husband. It cannot be gain stated that parties are bound by their pleadings and any attempt to deviate from the same is abhorred and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded. See the Court of Appeal case of **Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others [2014] eKLR**.

46. The 3rd and 4th Defendants argued that they are *bona fide* purchasers for value and the registered owners of their respective portion. The Plaintiff has not tendered any evidence to impeach their titles that are held as conclusive evidence of proprietorship in line with **Section 26 of** the Land Registration Act that provides for instances when a title can be impeached; on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

47. In view of the foregoing, it is my finding that the Plaintiff has failed to prove her claim for adverse possession on a balance of probabilities.

48. The Plaintiffs case is dismissed.

49. I order costs in favour of the 3rd and 4th Defendants.

50. It is so ordered.

DATED, SIGNED & DELIVERED ONLINE AT MURANG’A THIS 17TH DAY OF JUNE 2021

J.G. KEMEI

JUDGE

Delivered online in the presence of;

Waweru Wanjiru Ms. for the Plaintiff

Ms Waititu HB for Mwaniki for the 1st Defendant

T M Njoroge for the 2nd – 3rd Defendants.

Court Assistant: Alex