



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 143 OF 2016 (OS)**

1. JULIUS MWORIA M'NJOGU )
2. M'MARETE M'MWITARI )
3. PAUL MURIIRA M'NJOGU )
4. JULIUS MWITI )
5. JOHN MUTHOMO )
6. DANIEL MUTUA MUGWIKA )
7. KIJUKI KAIGA )
8. KAREMU M'ITUAMIKWA ).....PLAINTIFFS

**VERSUS**

**GRACE KARWIRWA MWANGI (Sued as the administrator**

**of the estate of GERALD MWANGI MUGO-deceased).....DEFENDANT**

**JUDGMENT**

1. The Plaintiffs filed an Originating Summons dated 24<sup>th</sup> August 2016, claiming to have become entitled to the whole of L.R NO. NTIMA/IGOKI/2007 measuring 2.62 hectares by adverse possession.

2. The Originating Summons is supported by the Affidavit sworn by Julius Mworja M'Njogu, the 1<sup>st</sup> plaintiff who avers that they have lived on the suit land all their lives, the same being their ancestral land. That sometime in 1970 the then Minister of Lands Jackson H. Angaine grabbed the land and obtained a title deed though he never evicted the plaintiffs. In 1998 the late Gerald Mwangi Mugo bought the land and wanted the plaintiffs to move out which they refused. In 1999 the new owner through his advocates issued a notice requiring them to vacate but they stayed put and in 2009 he sued the plaintiffs for eviction in Meru HCCC No. 85 of 2009 which suit was dismissed for want of prosecution.

3. On 21.8.2011, Gerald passed on and the defendant herein was appointed as his legal representative on 25/3/2013, and she issued another letter demanding the plaintiffs do vacate the suit land on 17/3/2016. Again the plaintiffs stayed put. The plaintiffs contend that they have been in open and uninterrupted occupation of the suit land for a period of over 12 years and have acquired a legal entitlement to the same under the doctrine of adverse possession, the suit land being the only home they know which also has their developments.

4. The defendant opposed the suit vide a replying affidavit and a counter-claim dated 2/3/2018. She averred that the suit is incompetent and defective and the plaintiffs are not related and have never been in open, exclusive, continuous and uninterrupted possession or occupation to entitle them to the prayers sought. She contended that her late husband has always asserted his rights over the suit land vide issuance of notices to the plaintiffs. He also went to court at least twice against the plaintiffs firstly to seek an order of protection from the plaintiffs to survey the suit land and secondly, for an order of eviction against the plaintiffs in MERU CM MISC. APP. NO.200 OF 1999 and MERU HCCC.N.85 OF 2009.

5. The defendant further states that the plaintiffs have never lived or constructed on the suit land and only trespassed on the same to cut bushes and fonder for their domestic animals. In her counter claim, the defendant is seeking an order of eviction against the plaintiffs as well as a permanent injunction restraining them from use and occupation of the suit land.

6. A scene visit was conducted by the executive officer of the court with the consent of the parties of which a report dated 23.9.2019 was presented to court and was adopted (again by consent of the parties) as a proper record of the court on 9.2.2021.
7. During the trial, plaintiffs' case was advanced by **PW1, Julius Mworira M'njogu** who is the 1<sup>st</sup> plaintiff. He relied on the contents of his affidavit filed on 5/8/2016 as his evidence as well as the annexures. The same are a green card in respect of the suit parcel, a letter dated 11/8/1999, plaint dated 2/7/2009 in Meru Hccc.85 of 2009, a grant of letters of administration issued to defendant dated 25/3/2013 and a letter dated 17/3/2016.
8. On cross examination pw1 averred that they have always lived on the land as it is their ancestral home, that his father died in 1973 while his mother died in 1997 and were both buried on the suit land. Pw1 stated that the whole land is about 6 acres but he utilizes one acre. He stays on the suit land where he has built a house made of half stones and the other half timber. It is iron roofed.
9. He further stated that the other plaintiffs also utilize the suit land, whereby 2<sup>nd</sup> plaintiff uses 1/2 an acre and has a timber house, 3<sup>rd</sup> plaintiff uses 1/2 an acre and has a timber/stone house, 4<sup>th</sup> plaintiff uses 1/2 an acre and has a permanent house, 5<sup>th</sup> plaintiff uses 1/4 of an acre and has a timber/stone house, 6<sup>th</sup> plaintiff uses 1/2 an acre and has a permanent house, 7<sup>th</sup> plaintiff uses a 1/4 acre and has 3 permanent houses while 8<sup>th</sup> plaintiff uses 1/2 an acre and has a stone/timber house.
10. He averred that they are 3 children from his mother, 2 of whom are deceased and are buried on the suit land, while the other one is Paul Muriira (who was in court and stood up to be recognized when pw1 was being cross examined). Pw1 also stated that he has step siblings 2 of whom are alive and live on another parcel of land. He further stated that all the plaintiffs were born on the suit land, have built houses thereon and have families with whom they occupy the suit land with.
11. Pw 1 also stated that the deceased (Gerald) became registered as the owner of the suit land on 16/11/1998 and he sued them in the case Meru HCCC. No. 85 of 2009 but the same was dismissed for want of prosecution though he has no court order to that effect. He acknowledged receipt of the two letters exhibit 2 & 5. He contends that it was not true that they were snatching the land from the defendant as it was defendant's husband, Angaine and adjudication officer who were oppressing them. He denied that along Kaaga bypass, their land is on one side whereas the suit land is on the other side.
12. Upon cross-examination on the scene visit report, pw1 admitted that he was present during the visit and he has seen the report. He contended that even though the report says that they have not built on that land, they have indeed built on it and that the Executive Officer saw the houses.
13. On re-examination he averred that he did not know the actual boundaries but all the land that was pointed out is their land. That there is a natural feature on the land, a swamp which collects water and no one can build on the swamp.
14. Defendant's case was advanced by **DW1 Grace Karwiwa Mwangi**. She adopted the contents in her replying affidavit filed on 5.3.2018 as her evidence. She also produced the annexures there of as her exhibits 1-4 respectively. These are; The letters dated 17.3.2016 and 11.8.1999, an order dated 5.11.1999 in Meru CM. Misc app 200 of 1999 and the plaint in Meru HCCC no. 85 of 2009. She avers that she lives at Timau and is a farmer and wife of the deceased who died on 21.8. 2011. She does not know the 8 plaintiffs whom she found in 1999 on the suit land and they were sued by her husband in the High Court case and an order was issued against them and they left.
15. The suit land is 6.5 acres and her husband did not allow the plaintiffs to use the land and he did not even know them. It was her husband who instructed advocates in 1999 to write a letter to the plaintiffs, while she instructed advocates in 2016 to do the same, and none of those letters were ever responded to.
16. She contended that during the scene visit, it was found that no one was on the suit land and this was captured in the report.
17. On cross examination, she averred that her husband got title to the land in 1998 and at the time, the plaintiffs were not on the land and were on another land and only entered the land when he died in 1999. The letter dated 1999 was asking the plaintiffs why they had demolished the fence and they left via a court order which was given in regards to an application dated 2/11/1996. She contends that since year 2000, 16 years have passed by but the plaintiffs have not been on the land for those 16 years, it is 12 or 13 years.
18. In re-exam she averred that her exhibit 1 indicates when the plaintiffs entered the suit land and that no one is disputing the cases filed by her husband.
19. In their submissions, the plaintiffs recaptured the evidence tendered adding that attempts to have them evicted did not materialize. It was also averred that the counter claim of the defendant filed on 5.3.2018 is statute barred in line with the provisions of section 7 of the limitation of actions act.
20. The defendant submitted that one of the components to be proven by a claimant of adverse possession is exclusive possession of the suit land for a period of 12 years; exclusivity means that the whole of the suit land ought to have been in possession of the plaintiffs alone. However in his testimony, PW1 broke down each plaintiffs occupation acreage which totaled to 3.75 leaving a balance of 2.72 acres which the plaintiffs have not accounted, thus the plaintiffs have never exclusively been in occupation of the suit land and the title to the said land cannot be said to be extinguished. Further, the said evidence was not corroborated nor were any of the other plaintiffs called to testify.
21. That the plaintiffs have failed to meet the requirements of Order 4 Rule 3 of the Civil procedure Act as they have not given a full/detailed description of the suit land to sufficiently identify it as they have not stated where the suit land is situated or its acreage and as the said occupation does not stem from the pleadings it becomes irrelevant and the same ought to be disregarded. The defendant produced evidence to demonstrate that the plaintiffs' occupation has all along been interrupted and has not been peaceful which interruption the plaintiffs have not

denied. She added that it need not matter that the 2 cases filed were successful or not, what matters is that they were filed by the registered owner as against the plaintiffs and the said filing constitutes an interruption of the plaintiffs trespass and encroachment of the suit land. Further, if indeed the plaintiffs had filed a suit in 1986 as against the registered owner, which evidence they did not provide, this suit would then be res judicata.

22. That the plaintiffs occupation has also not been continuous as PW1 testified that at some point his parents moved out of the suit land, also the 5<sup>th</sup> plaintiff relocated to makutano only to move back to the suit land later thus the defendants averment that the plaintiffs have been entering and leaving the suit land cannot be faulted. PW1 in his testimony went as far as being specific as to the nature of each plaintiff's house, the acreage and asked the court to ascertain that their loved ones have been buried in the suit land. However, from the E.O's scene visit report there are no houses on the land as alleged by the plaintiffs and instead it showed that the plaintiffs reside on other parcels of land, nor were there any graves on the land, thus plaintiff lied on oath.

23. The plaintiffs have also not given this Honorable Court any reason as to why they did not sue the registered owner during his lifetime only to wait and sue the widow. The fact that they were also aware of the previous suits against them puts them out of the purview of claimants of adverse possession.

24. The defendant's time for the purposes of filing a counterclaim does not start running at a particular time, it is not enough for the plaintiffs to claim it is time barred without stating when time started running. She submitted that she had proven her case to the required standard while the plaintiffs have not and are out to reap what they have not sowed, unjustly disinheriting the registered owner's widow. She prays that the plaintiffs claim be dismissed and the counterclaim be allowed with costs. She relied on the cases of; **Stephen Muthamia Marete & 2 Others V Patrick Kinyua Iringo, Wambugu vs. Njuguna (1983)KLR 173.**

### **Analysis & Determination**

25. The key issue for determination is whether the Plaintiffs have acquired title to the suit land by way of adverse possession or whether the defendant is entitled to the prayers in the counter-claim.

26. In **Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR**, the court stated that:

***“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force nor stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”***

27. In **Kasuve Vs Mwaani Investments Limited & 4 others 1 KLR 184**, the Court of Appeal restated what a Plaintiff in a claim for Adverse Possession has to prove;

***“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 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”.***

28. In **Ramco Investment Limited vs. Uni-Drive Theatre Ltd [2018] eKLR** the Court stated that:

***“The principles that guide the court when determining whether a claim for adverse possession against the respondent met the legal threshold or not required the appellant as the claimant for adverse possession to demonstrate existence of exclusive possession and control over the disputed portion and to have dispossessed the respondent as the undisputed legal owner.”***

29. The first criteria for determination relates to plaintiffs' exclusive occupation of the suit land. The plaintiffs claim to have acquired title by way of adverse possession to land, averring that they were born on the suit land which has roots in ancestry, that their kinsmen have been buried on that land, that they have built houses on that land and they cultivate the same. The scene visit report compiled by the executive officer of this court and whose contents were admitted as part of the courts records with consent of the parties indicate that none of the parties reside on the land, and no built up houses were found on that land. Thus Pw1 lied on oath when he gave minute details of how each plaintiff has built a house on that land.

30. However, residing on the land is not the threshold of exclusive use. What matters boils down to control of the land. Who is utilizing the suit land to the exclusion of others? The plaint filed by defendant's husband in case Meru HCCC. 85 of 2009 indicates that Gerald Mwangi Mugo had sued the current plaintiffs seeking their eviction as at 2.7.2009. This means that by then the plaintiffs were in occupation or use of the said land. The letters availed by both parties dated 11.8.1999 and 17.3.2016 also indicate that plaintiffs have been utilizing the suit land. In defendant's counterclaim, she is also seeking an order of eviction of the plaintiffs. The scene visit report also confirms that the suit land is utilized by the plaintiffs and their families. All this evidence points to one fact, that the suit land is under the use and control of the plaintiffs, notwithstanding that the plaintiffs do not reside on that land.

31. From the evidence tendered by both sides particularly the court cases and the letters issued to the plaintiffs, it is apparent that the occupation of the land by the plaintiffs was without permission of the registered owner who was certainly aware of such occupation. The defendant has also stated that; *“I have not used that land as I am usually chased away”* which means that the defendant was dispossessed of the suit land by the plaintiffs. For dispossession to occur, the registered owner must lack enjoyment and use of the useable land see; **Daniel Ruchire & Another vs. Swift Rutherfords & co. Ltd & Another (1976-80)1KLR**. To this end, I find that there is a manifestation of animus possidendi which is a clear intention of dealing with the land to the exclusion of the defendant. Thus the plaintiffs have met the

criteria known as nec vi, nec clam, nec praeiudicium (without force, no secrecy and without permission).

32. The final criteria relates to the uninterrupted statutory period of occupation of 12 years and above. What then constitutes interruption? In the case of *e of Githu –vs- Ndeete [1984] KLR 776*, the Court of Appeal held that: -

***“Time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land; Giving of notice to quit cannot be an effective assertion of right for purposes of stopping running of time under the Limitation of Actions Act.”***

33. The defendant avers that plaintiffs’ occupation has all along been interrupted and has not been peaceful. She contended that the filing of the suits by the registered owner and the issuance of the letters constituted an interruption of the plaintiffs trespass on the suit land. However it is clear that the issuance of the two letters did not amount to interruption for purposes of calculating the period of occupation.

34. The registered owner (the deceased) did however take action against the plaintiffs by filing the suit Meru HCCC no. 85 of 2009 of which even the plaintiffs have availed a copy of the plaint to that effect. Thus the action taken by the registered owner did amount to an assertion of his title to the suit land and this amounted to an interruption. The plaintiffs have averred that the suit was dismissed for want of prosecution while the defendant claims that she obtained an order of eviction of the plaintiffs. However, none of the parties have given any cogent evidence to show how this suit ended if indeed it was finalized.

35. **Section 108 of the Evidence Act** provides that;

***“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side”.***

While **Section 109** thereof provides that;

***“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.***

36. The plaintiffs are the ones who initiated this suit. It was not enough for them to simply state that the case against them was dismissed for want of prosecution. They ought to have given tangible evidence as to how the case was concluded so as to commence the computation of time all over again. Once time begins to run for purposes of limitation, it will continue to do so unless the true owner brings an action to recover the disputed land. The action must be brought to recover the disputed land. The true owner must seek to retake possession or specifically raise the claimant’s right to possession. In this case the registered owner filed the suit in 2009 asserting his title. It is trite law that time stops running, the moment a suit is filed by the title owner, in this case time stopped running when the defendant filed the suit.

37. However, even if this court was to compute the time as from when the suit no 85 of 2009 was filed in year 2009. This would only give a tally of 7 years up to year 2016 when the current suit was filed. In the circumstances therefore, I find that plaintiffs claim for adverse possession must fail owing to the fact that they have not been in possession of the suit land for the statutory period of or exceeding 12 years.

38. As to whether the defendant is entitled to reliefs sought in her counter-claim, it is not in dispute that her late husband was the registered owner and having found that the plaintiffs are not entitled to the suit land, it follows that the registered owners title and ownership must be protected to allow them to enjoy and utilize their property.

39. For the reasons stated, the plaintiffs claim must fail and the defendant’s counter claim succeeds. As such the originating summons dated 24<sup>th</sup> August 2016 is consequently dismissed, the defendant’s counter-claim is allowed as to prayer (a) & (b). Each party is to bear their own costs of the suit.

**DATED, SIGNED AND DELIVERED VIA EMAIL AT MERU THIS 21<sup>ST</sup> DAY OF JULY, 2021**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**