



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 303 OF 2018

(FORMERLY NRB 1270 OF 2004)

SILAS WAWERU.....PLAINTIFF

VERSUS

ERASTUS MWAI NJOROGE.....1<sup>ST</sup> DEFENDANT

NGOINGWA COMPANY LIMITED.....2<sup>ND</sup> DEFENDANT

JUDGMENT

By an Originating Summons dated 23<sup>rd</sup> November 2004, the Plaintiff herein filed this suit and sought for the determination of the following questions;

1. Whether the Plaintiff should be declared to have become entitled by Adverse Possession of 0.0720 ha comprised in land title No. Thika Municipality/ Block xx/xxx, registered under the Registered Land Act Cap 300, of the Laws of Kenya and situate in Thika District.
2. Whether the Plaintiff be registered as the absolute proprietor of 0.0720 ha of land comprised in the title L.R Number Thika Municipality/ Block xx/xxx.
3. Whether the costs of this originating summons should be awarded to the Plaintiff.

In his Supporting Affidavit, the Plaintiff averred that he is a member of the 2<sup>nd</sup> Defendant. That in the year 1984, he balloted and was allocated Plot No. xxx in the original Company's lands L.R No. xxxx and xxxx, which particular parcel was subsequent to a subdivision named L.R xx/xxx. That he took possession of the suit property in 1984, and started constructing and cultivating on the said land, and he has constructed a permanent residential structure and he cultivates on the said property. That he has lived on the suit property with his family uninterrupted and with both the Defendants' Knowledge and he is however not a licensee nor is he under any lease.

Further, that he has cultivated a clear boundary on the suit premises and he is known as the owner of the suit property in the area. That the 1<sup>st</sup> Defendant has never occupied the premises nor has he demanded that he vacates the suit property, save for his belated action in instituting Thika CMCC No. 1363 of 2003. That he has had the exclusive use and possession of the suit property and exercised all tenets of a hostile title against the Defendants. Further that he is informed by his Advocate on record, which information he believes to be true that he is the owner of the suit land having purchased the same from 2<sup>nd</sup> Defendant, and he has further acquired title by way of Adverse Possession, as against the Defendants, and he is thus entitled to the enjoyment of the same.

The suit is opposed and the 1<sup>st</sup> Defendant Erastus Mwangi Njoroje, swore a Replying Affidavit on 21<sup>st</sup> March 2006, and averred that he is the duly registered owner of the suit property, and he got the same by virtue of being a shareholder of Ngoingwa Company Limited. That initially the plot was described and known as 964. That he had registered a dispute with Ngoingwa Company Limited, who ruled that he is the actual owner of the suit property and that the Plaintiff is the owner of Plot No. xxx and his is No. xxx. That he lodged a dispute with Ngoingwa Company Limited, who lodged a complaint with the District Officer Thika, who ruled that Plot xxx, belonged to the Plaintiff and 1<sup>st</sup> Defendant was Plot No. xxx. That he filed suit No. 1363 of 2003, at Thika which was pending before Court and the Plaintiff intends to delay his suit.

That the Plaintiff started interfering with his property in 2001, and has not been in possession. That the receipts produced by the Plaintiff only confirm payments made to Ngoingwa Company Limited, and cannot be proof for ownership of Plot No. xxx. That to date, he has

paid rates. That the Plaintiff only put up his structure in **2001**, and cannot therefore legally gain entitlement to the suit property by Adverse possession.

The 2<sup>nd</sup> Defendant filed its Relying Affidavit on **27<sup>th</sup> April 2006**, sworn by **Damaris Njoki Kamamu** its Secretary who averred that the Plaintiff and the 1<sup>st</sup> Defendant are shareholders of the Company. That they both did ballot for the plots sometimes about **1984**. That the Company procedure is once a shareholder cast a ballot, he or she must surrender the ballot paper to the officials of the Company for recording and subsequent issuance of title document. That the 1<sup>st</sup> Defendant did submit ballot for **964**, which the Company duly recorded and subsequently caused Certificate of lease to be issued in his favour. That after the ballot, the Plaintiff started claiming ownership of the 1<sup>st</sup> Defendant's plot and encroached on to the same and the 1<sup>st</sup> Defendant lodged a complaint with the Company. Further, that the Company discussed the matter and the Plaintiff was allocated **Plot No. xxx**. to resolve the dispute but he thanked the Company for allocating him another plot which was not the case.

That the Company reported the matter to Thika District Officer, who advised the Plaintiff to vacate the suit property. That it is not true that the Plaintiff was allotted **Plot xxx**, nor has he been cultivating the suit property since **1984**, and neither did he ever construct any building until 2001.

In **CMCC 1363 of 2003**, by a Further Amended Plaint dated **7<sup>th</sup> March 2006**, the 1<sup>st</sup> Defendant filed a suit against the Plaintiff, and the 2<sup>nd</sup> Defendant and sought for orders that;

- a. An injunction to restrain the 1<sup>st</sup> defendant, its servants and or agents from interfering, trespassing selling or otherwise parcel No. L.R No. Thika Municipality/ Block xx/xx.**
- b. A Declaration that the parcel of land known as L.R No. Thika Municipality Block xx/xxx solely belongs to the Plaintiff**
- c. In the alternative to prayer (a) &(b) above the 2<sup>nd</sup> Defendant to allocate the Plaintiff another similar piece of land for the same measurements and value.**
- d. The 1<sup>st</sup> Defendant be ordered to give vacant possession of land parcel No. L.R No. Thika Municipality Block 20/365 and or be evicted therefrom**
- e. Costs of this suit**
- f. Any other relief as this Honourable Court may deem fit.**

In his statement of Claim the 1<sup>st</sup> Defendant averred that he is the registered owner of the suit property. That the Plaintiff had illegally occupied the suit property and started excavating a foundation with the intention of erecting a permanent structure, the same being done with the Knowledge of the 2<sup>nd</sup> Defendant, who had caused double allocation of the suit property to both parties. That the Plaintiff's action could not be justified in law.

The suit was contested and the Plaintiff filed his statement of Defence and Counter Claim dated **3<sup>rd</sup> November 2003**. That he has always been in possession of the suit property and the 1<sup>st</sup> Defendant's interest was acquired fraudulently. Further, that the acts of excavation of foundation and erection of permanent structure had already taken place prior to the institution of the suit. That he has acquired prescriptive rights to the suit property and claims Adverse Possession,

In his Counter Claim, he averred that his occupation of the suit property since **1984**, has been uninterrupted and his development, Occupation and possession has been with the 1<sup>st</sup> Defendant's knowledge.

The matter proceeded by way of viva voce evidence wherein the Plaintiff called 3 witnesses and the Defendants called witnesses.

#### **PLAINTIFF'S CASE**

**PW1 Silas Waweru Muturi** adopted his Affidavit dated **23<sup>rd</sup> November 2004**. He testified that the 2<sup>nd</sup> Defendant was the owner of **L.R Block xx/xxx**. That he is member **No. xxx** and his ballot **No. is 964**. Further that he was member **No. xxx** and he was given the same by the Surveyor. He produced the survey and ballot receipts dated **5<sup>th</sup> February 1984**, as **exhibit 1a and 1b**. That after balloting, he was shown where the land was, and he has built his house on the said land as he did not have any other home.. He produced the photos of the house as exhibit 2. Further that he started living there in **1984**, and has been living there since then with his children.

That though he was employed in a school by **Ngoingwa Company Limited** and used to live there, he moved to his land in **1984**. That no one has ever tried to remove him from the suit property, but in the year **2000**, he was summoned by the D.O as the 2<sup>nd</sup> Defendant had indicated that he had been given **Plot No. xxx**, and they wanted him to vacate plot No. **xxx**. That **Plot No. xxx**, was given the numbers **L.R Block xx/xxx**. That he used to cultivate **plot No. xxx**, until he found his fence removed, and the banana plants were uprooted. Further that he received summons in respect of a case filed in Thika, in which he required him to vacate **Plot No. xxx in 2003**. He produced the Plaint as Exhibit 3. That he has never vacated the suit property, but that someone built a house on **Plot No. xxx**. That they uprooted his maize, banana plants and fence.

That he was a shareholder of **Ngoingwa Company Limited** and, that he got **ballot No. xxx**, and kept his ballot in the house to await the title deed. That no one told him to register the land now known as **Block xx/xxx**. That he was not told that the title document came out in the name of the 1<sup>st</sup> Defendant. That he was not aware of the requirements to register his ballot card and that the D.O did not make any decision that he takes **Plot No. xxx**. That he wrote to the Company seeking for his title deed. It was his further evidence that one person got more than one Plot. That he paid all the monies and he has no debt. That they did the balloting in **1984**, and he was not served with Court **Summons in 2003**, when he commenced construction on plot No.964.

That the 1<sup>st</sup> Defendant's title was issued after his. That after balloting, they were shown by the Surveyor where to build and he built immediately.

**PW2 Lucia Nyokabi** testified that she was a member of **Ngoingwa Company Ltd** since **1984**, and Plaintiff has a **Plot No. xxx**. That they have been neighbours since then and the Plaintiff has been living on the suit property since **1984**. That she heard about the dispute over the suit land when the Plaintiffs fence was demolished. That when she picked her ballot card, she registered it and she was issued with a title deed. That when the Plaintiff took his ballot, he put it in his pocket and did not register it That she had 3 plots and the Plaintiff was given 3 plots.

**PW3 Peter Maina Waweru** testified that the Plaintiff is his father. That he was born in **1967** and that he lives on the suit property with his father and that they have built thereon. That in the year **2000**, his father was summoned by the District Officer and he was told that he had been allocated **Plot No. xxx**. That they fenced Plot **No.xxx** and cultivated and planted bananas. Further, that in **2003**, his father was issued with Summons. That they did not know the 1<sup>st</sup> Defendant nor did he go to the suit property.

That he was present when his father balloted. That people would queue and pick a ballot then have it registered. That his father was a member of **Ngoingwa Company Limited**. That someone built a house on **plot xxx** in the year **2009**, and the suit was filed in **2004**. That in **1984**, he was seventeen years and they have loved on the suit property.

## **DEFENCE CASE**

**DW1 Damaris Njoki Kamamu** testified that she is the Secretary of **Ngoingwa Company Limited**. She adopted her witness statement dated **13<sup>th</sup> July 2011**. She produced the bundle of documents as Exhibit 1 & 2. That they did the balloting along time but they did not do it at the same time. That she could not recall the parcel of land for each of the parties. That plot **No. xxx**, was given to **Silas** and that they also gave it to **Erastus** by mistake. That they gave Silas the plot in **2011**.

**DW2 Erastus Mwangi Njorge** adopted his witness statement dated **18<sup>th</sup> July 2011**, and produced his list of documents as Exhibits **1, 2 & 3** in Court. He further adopted the bundle of documents as his Exhibits.

That as per his witness statement, he started visiting his Plot in the year **2000**. That he used to live in **Mary Hill High School** and the plot was not occupied and he could see structures coming up. That he went to **Ngoingwa Company Limited** and he was told that there was a mistake of double allocation and they had plans of allocating the other person a different plot. That the Company had the responsibility of allocating the plots. Further that in **1996**, he was attacked by thugs at the plot and he sent an emissary to the Mayor of Thika. That he realized that there was a structure in **2000** and in **2004** there was balloting.

Further that he wanted to develop the plot, in the year **2004** and that is when he realized there was a development. That he used to pass by the Plot while going to Mary Hill School and there was no one using the plot.

Thereafter, the Plaintiff filed written submissions which the Court has carefully read and considered. Despite being given a chance to file their written submissions, the Defendants failed to do so. The Court has also read and considered the pleadings by the parties, the evidence adduced and the relevant provisions of law and renders itself as follows;

It is not in doubt that both the Plaintiff and the 1<sup>st</sup> Defendant lay claim to the suit property. It is further not in doubt that both the Plaintiff and the 1<sup>st</sup> Defendant are shareholders and members of the 2<sup>nd</sup> Defendant and they both balloted for the Plots. The Plaintiff alleges to have balloted for **Plot No. xxx** in **1984**, and took possession of the said suit property and has been living in the said property ever since. He has therefore sought to be declared as the owner, having acquired prescriptive rights over the said property and sought an order to be declared as having acquired the suit property by way of **Adverse Possession**. The Court must therefore determine whether the Plaintiff has proved the claim 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.**

In determining whether or not to declare that a party has acquired land by adverse possession, there are certain principles which the person claiming such rights must meet, as quoted 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* the 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.**

For the Plaintiff herein to succeed on a claim of **adverse possession**, he must be able to prove dispossession, discontinuance of possession for a continuous period of **12 years**, and further that the dispossession occurred and the Defendants had knowledge of such dispossession.

The Plaintiff has averred that he has been in continuous possession of the suit property for a period of over **12 years**. The Plaintiff testified that he balloted for the suit property in **1984**, and took possession of the same and has been in quiet and exclusive possession over the suit property. Further, PW2 also testified that she has been the Plaintiff's neighbor since **1984**, and that the Plaintiff has lived on the suit property since that time and has been cultivating the same. Though the 1<sup>st</sup> Defendant has alleged that the Plaintiff sought to occupy and build on the suit property in the year **2000**, the Court concurs with the Plaintiff's submissions that indeed there are correspondences that show or prove that he was in the suit property prior to the year **2001**. This coupled with the fact that in his witness statement DW 1 acknowledged that the 2<sup>nd</sup> Defendant found out that there were two ballot cards in respect of the same suit property, the Court is satisfied that indeed the Plaintiff has been in occupation of the suit property for a continuous period of over 12 years.

Be it as it may, the Plaintiff is also required to prove that he has been in occupation of the said suit property with the knowledge of the title holder.

Has the Plaintiff therefore proved this?

The Court answers this question in the **negative** and this is so as the 1<sup>st</sup> Defendant became the title holder vide a Lease agreement dated **10<sup>th</sup> August 1999**. The instant suit was filed in **2004**. Even if he knew of the Plaintiff's occupation, he had not been a title holder for a period of 12 years and therefore the Limitation of time cannot have run against his title. On the other hand, the 1<sup>st</sup> Defendant had been the title holder since 1999. DW1 gave evidence that after a party had picked a ballot, the party was then required to register the same with the Company. That the Plaintiff failed to register the Plaintiff's ballot and the Defendants only became aware of the existence of his ballot when the instant dispute arose. The Court is thus not satisfied that the Plaintiff was in the suit property with the Knowledge of the 1<sup>st</sup> Defendant who was the title holder.

If the 1<sup>st</sup> Defendant was not aware of the Plaintiff's occupation and possession. Limitation of time could therefore not run as against the Defendants. In the circumstances, the Court finds and holds that the Plaintiff has not proved his claim to be entitled to a Claim of **Adverse Possession** and therefore the same is not merited

However, the Court is still mandated to make determination of who is the lawful owner of the suit property as there are two suits involved. Both parties have laid claim to the suit property and that is not in doubt. In his statement of Claim, the 1<sup>st</sup> Defendant averred that the 2<sup>nd</sup> Defendant carried out double allocation, actions which brought forth the dispute. It is not in doubt that both parties are members and shareholders of the 2<sup>nd</sup> Defendant.

Further both parties produced in evidence a ballot card that indicates that they balloted for **Plot No. xxx**. The only issues then became that though the parties were required to register their ballots, the Plaintiff failed to register his ballot. In her witness statement dated **13<sup>th</sup> July 2011**, DW1 who is the representative of the 2<sup>nd</sup> Defendant stated as follows:-

**“During the hearing in our offices the plaintiff produced a ballot paper and for plot No. 964 and the 1<sup>st</sup> Defendant produced one for the same Plot 964. It is at this time we discovered we had two ballot papers for the same plot, but on checking our register we found only 1<sup>st</sup> Defendant had registered his ballot and lease had already been processed in the same.”**

It is thus quite clear that the two parties both hold valid ballot card and the Plaintiff's ballot card is genuine and his only shortcoming being that he did not register the same. The Court therefore finds that both the Plaintiff and the 1<sup>st</sup> Defendant are lawful owners of the suit property. However it is quite clear that the two cannot exist in the same space as both cannot have the same title to the said land as each must get his own.

Equity dictates that the first in time must prevail. DW1 testified that the procedure is that once a person ballots for his or her parcel of land, then the party must register their ballot card. The Plaintiff failed to do thus. The 1<sup>st</sup> Defendant however registered his ballot and he was issued with a Lease and subsequently title deed over the said parcel of land and naturally he ought to be the one to get the land as he was able to follow the procedure as laid out and has the title document. However, this is a Court of Justice and the Court recognizes that the Plaintiff has been on the suit property since **1984**, and his family and himself have built on the suit property and therefore to move him would not be in the interest of justice.

The Court notes this as it acknowledges that the 1<sup>st</sup> Defendant in his Defence has also sought for a prayer to be given an alternative land, and which land should be of the same in value as the suit property. Therefore, the 1<sup>st</sup> Defendant is amenable to be given alternative parcel of land and Justice would best be observed if the Court could order that the 1<sup>st</sup> Defendant be given an alternative land.

In the circumstances the Court finds that it would only be best if the Plaintiff who has been in actual and physical possession of the suit property is allowed to remain on the suit property as he has the same rights as the 1<sup>st</sup> Defendant over the said property, only that the 1<sup>st</sup> Defendant being the first in time naturally would have prevailed.

Having analysed the evidence as above, the Court finds and holds that the Originating Summons dated **23<sup>rd</sup> November 2004**, by the Plaintiff is **not** merited. Further, the Court finds and holds that both parties are lawful owners of the suit property, but in the interest of justice makes the following orders;

- 1. The Plaintiff will retain ownership and possession of land parcel No. L.R No. Thika Municipality Block xx/xxx.**
- 2. The 1<sup>st</sup> Defendant's title in respect of the land parcel No. L.R No. Thika Municipality Block xx/xxx be and is hereby cancelled and the same to be registered in the name of the Plaintiff.**
- 3. The Plaintiff to relinquish any interest that he has over Plot 688.**
- 4. The 2<sup>nd</sup> Defendant be and is hereby ordered to allocate the 1<sup>st</sup> Defendant another similar parcel of land of the same measurements and value to the suit property.**
- 5. Each party to bear its own costs of the suit.**

**It is so ordered.**

**DATED, SIGNED AND DELIVERED AT THIKA THIS 24<sup>TH</sup> DAY OF SEPTEMBER, 2021**

**L. GACHERU**

**JUDGE**

**Court Assistant – Lucy**