



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 42 OF 2020 (OS)

BEATRICE WANGARI KIMANI.....PLAINTIFF/APPLICANT

VS

SOPHIA WAMBUI KIURIRE.....DEFENDANT/RESPONDENT

JUDGEMENT

1. The Plaintiff moved the Court by way of Originating Summons dated the 10/12/2020 and urged the Court for orders;
 - a. That the title of the Defendant in LOC8/MATHARITE/652 (suit land) has been extinguished by way of adverse possession in favour of the Plaintiff.
 - b. That the name of the Defendant in the said register be deleted to pave way for the registration of the suit land in the name of the Plaintiff.
2. Vide her supporting affidavit annexed to the application, the Plaintiff averred that she and her husband Anthony Kimani Kagure have been in sole possession of the suit land since 1961. That she carries out farming on the suit land through agents in the open and without the permission of the registered owner.
3. The Defendant in urging the Court to dismiss the suit opposed the summons and deponed that the suit land was registered in the name of her late husband Luka Kiurire Mucheru who purchased it from Kaguri Chege in 1971. That upon successful succession of the estate of her late husband she became registered as owner of the suit land on the 16/9/2020. That the Plaintiff has never occupied the suit land and all her averments are strange and untrue. In addition, that she and her husband have planted about 900 tea bushes on $\frac{1}{2}$ of the land.
4. At the hearing the Plaintiff testified and informed the Court that she is the wife of Anthony Kimani Kiguri. That they were given the land by KIGURI Chege who became registered in the name of Kiguri Chege, her father in law in 1962. He died in 1979. That they left the land in the hands of Elijah Karobia Kaguri Chege, his brother in law to plant tea, cultivate and generally manage it on their behalf as she and her husband lived in Kipkelion in the then Kericho District. That later Elijah relinquished the land to them and they embarked on changing the tea delivery number to GB634 in the name of her husband. That Hezekiah Maina Njoroge assisted them to do so. That she hired Faith Njoki Gichuki to pick the tea and deliver through their delivery No GB 634 on their behalf. Thereafter they hired James Gichuru Kariuki in 2011 to manage the farm on their behalf.
5. That Karobia planted tea on half of the land. That the coffee trees dried up. She added that Luka Kiurire was a surveyor and had himself registered as owner in unclear circumstances.
6. PW2- Faith Njoki Gichuhi testified and stated that in 2001 she and her husband Stephen Kaguri cultivated the suit land on behalf of the Plaintiff and her husband Anthony Kimani. That upon the death of her husband in 2005 she continued managing the farm until 2011 when the Plaintiff handed over the management to James Gachuru. That while she managed the farm the bonus was paid to the Plaintiff and she kept the monthly payments for her as compensation for the managing the farm. She produced pay slips from Gathambo Tea Factory in the name of Anthony Kimani Kagure in support. That she delivered the tea to the factory under GB 634 in the name of the Plaintiff's husband. She also presented a farm visit during her tenure as the manager of the farm which indicated the farm belonged to Anthony Kimani Kagure. Further she added that during her management of the farm, the Defendant did not interfere at all.
7. In addition, she stated that the tea covered $\frac{1}{2}$ of the suit land and that the little coffee tried up by 2011. That her husband was the son of Elijah Karobia and Gladys Gachamba.
8. PW3- Hezekiah Maina Njoroge stated that the Plaintiff is his sister. That he and an Agricultural Officer namely Samuel Kimani Kanyari assisted her and her husband to get a growers card No GB 634 from Githambo tea Factory in the name of Anthony Kimani. That he knows as a fact that the suit land belongs to the Plaintiff and that she managed it through several agents over time and that the land does not belong to the Defendant.

9. PW4- James Gachuru Kariuki stated that he knows both parties in this case. That he leased the suit land from the Plaintiff and her husband and that the Defendant has never occupied the suit land. He adduced lease agreements dated the 7/3/2011, 18/6/2020 and 3/7/2021. That he has been in occupation since 2011 and is utilizing the suit land exclusively with the permission of the Plaintiff. That the tea occupies about $\frac{3}{4}$ of the land while the coffee tried up sometime. That Anthony Kimani died in 2013.
10. DW1- Sophia Wambui Kiurire testified that she is the registered owner of the suit land having inherited it from her late husband Luka Kiurire Mucheru. That Mucheru purchased the land from Kaguri Chege in 1971. That together with her husband they planted about 900 tea bushes in 1971 covering $\frac{1}{2}$ of the suit land and left them in the hands of Elijah Karobia and his wife Gladys to manage on their behalf since she lives about 7 kilometers from the suit land. That on her authority Elijah delivered the tea to the factory.
11. Asked whether she had a growers licence she responded that she did not get one as those days it was not available. That she had no management or grower's agreement with Karobia. That she has never harvested the tea herself and instead was harvested by Karobia and his wife with her permission. That in return she is paid some money though she did not produce any evidence in support.
12. She further stated that since they had another land they did not utilize the suit land as much. That she is not aware that the agents of the Plaintiff are harvesting the tea on the land.
13. DW2 – Gladys Gachambi Karobia stated that she and her husband Elijah Karobia assisted the Defendant to plant tea on the suit land. That she currently picks the tea and supplies through No 106 to the factory in the name of Elijah. That there are about 900 bushes on the land. She stated that she has no contract to manage the tea farm and she picked the tea on casual basis. That she and Elijah have their own teas that she picked and sells to the factory through grower's number 106.
14. DW3 – Josephat Kibathi Karobia stated that he is the son of Elijah and Gladys Karobia and that he picks tea for the Defendant on the suit land. He testified that the Plaintiff has never lived on the land.
15. The parties have filed written submissions which I have read and considered.
16. The key issue is whether the Plaintiff has proved title by way of adverse possession.
17. According to the green card on record the suit land was registered in the name of Kagure Chege in 1962. He was the father of Anthony Kimani Kaguri and Elijah Karobia. The Plaintiff led unchallenged evidence that the suit land was given to them by Kagure as an inheritance. That she and her husband lived in Rift valley and had to look for someone to take care of the land in Murang'a. That in 1979 she got Elijah Karobia, her brother in law to plant the tea and manage it on their behalf. With their permission he also picked the tea and that later they obtained a grower's number GB634 allowing them to deliver tea in the name of Anthony Kimani Kaguri, her husband. Successively that the suit land was managed by Faith Njoki and later James Gichuru who is still managing the tea on their behalf to date.
18. The Defendant on the other hand opposed the suit and argued that her husband Luka bought the land from Kaguri Chege in 1971 and upon his death the land devolved to her in 2020 after successfully petitioning for succession. Coincidentally it is her case that Elijah Karobia and her husband have been in occupation tending to the tea on her behalf.
19. In the case of **Kweyu v Omutut [1990] KLR 709** the Court held as follows:
- “By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period of 12 years, it confers an indefeasible title upon the possessor. (Colour of title is that which is a title in appearance, but in reality).
20. In the Court of Appeal decision in **Mtana Lewa –v Kahindi Ngala Mwangandi (2005) Eklr** the Court held that it is also a well settled principle that a party claiming Adverse Possession ought to prove that his possession was “*nec vi, nec clam, nec precario,*” that is, peaceful, open and continuous. The possession should not have been through force, no in secrecy and without the authority or permission of the owner.
21. The doctrine is anchored in inter alia Sections 7, 17 and 38 the Limitation of Actions Act Chapter 22 Laws of Kenya.
22. Further Section 7 of the Land Act, 2012 recognizes prescription as a method of acquiring land. Section 28(h) Land Registration Act recognizes adverse possession as an overriding interest protected under the said Act.
23. In the Court of appeal case of **Sisto Wambugu –v-Kamau Njuguna [1983] eKLR**, the Court held that adverse possession contemplates two concepts; possession and discontinuance of possession and that further whether the claimant proved that the title holder has been dispossessed, or has discontinued his possession of the land in question for the statutory period.
24. The Plaintiff led evidence that she has successively occupied the suit land through relatives and agents from 1979 to date. First was Elijah Karobia, Faith Njoki and currently through James Gichuru. Elijah Karobia was not called to testify and the evidence of the Plaintiff having not been challenged is taken as the true position. Faith Njoki led documentary evidence to show that she picked the tea and delivered to the factory through grower's number GB634 belonging to Anthony Kimani. She led unchallenged evidence that she was paid through monthly receipts and the bonus went to the Plaintiff and her husband. James Gichuru supported the Plaintiffs case through the lease agreements on record showing that he has been leased the suit land to date.
25. The Defendants were not successful in explaining how they are in occupation. The Defendant stated that she lives about 7 kilometers away from the land. That she did not have any agreements with Elijah Karobia to pick the teas. Gladys explained that she did not have any agreement to show that she was tending the farm on behalf of the Defendant nor evidential documents to support any payments to her.

26. In the end the Court concludes that the Plaintiff has been in occupation through her agents and relatives.

27. Is the possession adverse to the Defendant? Section 13 (1) of the Limitation of Actions Act states that 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.

28. There was no evidence led to show that the Plaintiff occupied the suit land with the permission of the Defendant or her husband. The Defendant has not explained why she and her husband did not take possession of the suit land even after the alleged purchase.

29. It is not disputed that the Defendant's husband became registered as owner of the suit in 1971. On the account of the Plaintiff, by this time she and her father in law were in occupation of the land and upon his death, Elijah was in possession of the land, planting and tending to the tea bushes. Thereafter they handed over the management and possession to Faith Njoki. The Defendant led evidence that she did not take possession of the land because she had another land which she was also taking care and could not be in the two farms at the same time.

30. From the evidence on record the Court is persuaded that the Defendant has not had possession and occupation of the suit land. It is clear that the Plaintiff has never been dispossessed of the land nor relinquished possession of the land to anyone let alone the Defendant.

31. Going by the evidence on record the Plaintiff has therefore been in possession of the land since 1962, a period of over 12 years.

32. Section 16 of the Limitation of Actions Act states that for the purposes of the provisions of this Act relating to actions for the recovery of land, 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. It therefore follows that adversity run from 1971 and to the full cycle of 12 years and by the year 1983 adverse possession had accrued, crystallized and vested to the Plaintiff. The estate of Luka Kiurire therefore held the title in trust for the Plaintiff as its title had been extinguished in favour of the Plaintiff.

33. From the evidence led and the analysis above, it is my finding that the Plaintiff has proved her case on a balance of probabilities and I enter judgement in her favour as prayed.

34. The costs of this suit shall be borne by the Defendant in favour of the Plaintiff.

35. **It is so ordered.**

DATED, SIGNED AND DELIVERED ONLINE AT MURANG'A THIS 14TH DAY OF SEPTEMBER 2021

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Mbuthia for the Applicant

Mwangi Ben HB for Kimani for the Respondent

Court Assistant: Kuyiki/Alex