



**REPUBLIC OF KENYA**

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

**ELC NO. E005 OF 2019**

**SUSAN NYAMBURA MBURU.....APPLICANT**

**VERSUS**

**AGNES MUTHONI KARAYA.....RESPONDENT**

**JUDGMENT**

1. By an origination summons dated 14<sup>th</sup> February, 2019 brought under **Section 38 of the Limitation of Actions Act (Cap. 22) and Order 37 Rule 7 of the Civil Procedure Rules, 2010**, the Applicant sought determination of the following questions:

*(i) Whether the Plaintiff has acquired title deed by adverse possession over L.R. NO: NYANDARUA/KIRIITA MAIRO INYA BLOCK 2 NDEMI AND NGAI NDEITHIA/579.*

*(ii) Whether the Land Ref: NYANDARUA/KIRIITA MAIRO INYA BLOCK 2 NDEMI AND NGAI NDEITHIA/579 should forthwith be registered in the names of the Plaintiff and the Defendant be ordered to sign all the necessary transfer instruments in her favour and in default the Deputy Registrar of the court be authorized to sign the same.*

*(iii) Whether the County Land Registrar Nyandarua should dispense with the production of the original title deed for L.R. NO. NYANDARUA/KIRIITA MAIRO INYA BLOCK 2 NDEMI AND NGAI NDEITHIA/579 while transferring the land to the Plaintiff.*

*(iv) Who should bear the costs of the suit.*

2. The gist of the Applicant's case was that she had been in open, continuous and peaceful occupation of the suit properties since 1974 without interruption from the Respondent hence she had acquired title thereto by virtue of adverse possession. The originating summons was supported by an affidavit sworn by the Applicant on 14<sup>th</sup> February, 2019 and the exhibits thereto. She contended that even though the Respondent obtained registration of the suit properties in 1994 she had never made any attempt to evict her therefrom.

3. The material on record shows that the Respondent was, with leave court, served with the originating summons through substituted service. When she failed to enter appearance the Applicant obtained interlocutory judgment against her on 18<sup>th</sup> February, 2020.

4. When the suit was listed for formal proof the Applicant opted to rely entirely upon the originating summons, supporting affidavit and the exhibits thereto. The Applicant was accordingly granted 21 days to file her written submissions. The record shows that the Applicant filed her written submissions on 2<sup>nd</sup> September, 2021 in support of her case.

5. The Applicant submitted that since the Respondent obtained registration of the suit properties on 11<sup>th</sup> August, 1994 then time for purposes of limitation should be computed from that date. It was submitted that by the time of filing suit the Applicant had been in exclusive occupation of the suit properties for at least 25 years. It was further submitted that the Applicant's affidavit evidence had not been controverted and that the court should accept her evidence and hold that she had proved her case for adverse possession. The Applicant relied upon the case of **Wambugu v Njuguna [1983] KLR 173** **Celina Muthoni Kithinji v Safiya Binti Swaleh & 8 Others [2018] eKLR** and the case of **Wilson Njoroge Kamau v Nganga Muceru Kamau [2020] eKLR** in support of her case.

6. The elements of adverse possession were summarized in the case of **Kasuve v Mwaani Investments Ltd & 4 Others [2004] 1KLR 184** as follows:

**“...and 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 and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, Wanja v Sakwa No 2.[1984] KLR 254...”**

7. Similarly, in the case of **Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR**, the Court of Appeal held, *inter alia*, that:

**At the expiration of the twelve-year period the proprietor's title will be extinguished by operation of the law and section 38 of the Act permits the adverse possessor to apply to the High Court for an order that he be registered as the proprietor of the land. Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it. See *Littledale v Liverpool College (1900)1 Ch.19, 21.***

8. The material on record shows that the Applicant had constructed structures on the suit properties and settled thereon. She had also buried her deceased husband on the suit properties. There is no doubt that she had the requisite *animus possidendi* and that her acts were inconsistent with the proprietary rights of the true owner. The court is thus satisfied that the Applicant has proved her case against the Respondent to the required standard.

9. The upshot of the foregoing is that judgment be and is hereby entered for the Applicant in the following terms:

**(a) A declaration be and is hereby made that the Applicant has become entitled to be registered as proprietor of L.R No. Nyandarua/Kiriita Mairo inya Block 2 Ndemi and Ngai ndeithia/579 on account of adverse possession.**

**(b) The Deputy Registrar of the court is hereby authorized to sign and execute all necessary forms and documents to facilitate transfer of the suit properties to the Applicant.**

**(c) The County Land Registrar Nyandarua shall dispense with the production of the original title deeds for Nyandarua/Kiriita Mairo inya Block 2 Ndemi and Ngai ndeithia/579 during the transfer.**

**(d) There shall be no order as to costs.**

**JUDGMENT DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 28TH DAY OF OCTOBER, 2021 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

**In the presence of**

Ms. Wanjiru Muriithi for the Plaintiff

No appearance for the Defendant

CA- Carol

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**Y. M. ANGIMA**

**JUDGE**