



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. 48 OF 2018 (O.S)**

**JOSEPH MURIITHI KANUMBI Alias**

**JOSEPH MURIITHI WARUTERE.....PLAINTIFF/APPLICANT**

**VERSUS**

**TERESIAH WAIRIMU.....DEFENDANT/RESPONDENT**

**JUDGMENT**

The plaintiff/Applicant vide an Originating Summons dated 13<sup>th</sup> August, 2018 is seeking the following orders:

- 1. Whether the Plaintiff/Applicant has had quiet possession of that parcel of land known and described as land parcel NO. MWEA/MUTITHI/SCHEME/235 comprising of 0.42 Ha. since 1969.**
- 2. Whether the plaintiff has had quiet possession of that parcel of land known and described as land NO. MWEA/MUTITHI/SCHEME/235 since 13<sup>th</sup> August, 2002 when the defendant became registered owner thereof.**
- 3. Whether the said land parcel NO. MWEA/MUTITHI/SCHEME/235 should be transferred to the plaintiff who has had quiet possession of the same since 1969 and indeed since 13<sup>th</sup> August, 2002 when the defendant became registered owner thereof.**
- 4. The costs of the application be provided for.**

The suit was filed contemporaneously with a Notice of Motion dated the same date. When the said Application was placed before the duty Court, the duty Judge certified the same urgent and issued temporary injunction orders pending hearing of the application inter-parte. By a Notice of Motion dated 13/12/2018, the plaintiff/applicant sought to effect service of the Originating Summons and all court processes upon the Respondent by way of advertisement in the Daily Nation Newspapers. The reasons for seeking to serve the summons and other court processes by substituted service through advertisement is that he has attempted to effect service upon the respondent personally but has been unable to trace the respondent. Upon hearing the said application ex-parte, the Court was satisfied that the application was merited thereby allowing the applicant to effect service of the Originating Summons and all other court processes upon the respondent by way of advertisement.

The suit was then set down for hearing after the court confirmed that pre-trial directions had been complied with. When this case came up for hearing on 22/09/2021 and after satisfying itself that the respondent who was absent was properly served, the case was allowed to proceed ex-parte.

**PLAINTIFF'S CASE**

The plaintiff alone testified on oath and stated that sometime in 1969, he was allocated five (5) acres and (1) acre of land in Wamumu black cotton soil by the Kirinyaga County Council (defunct). He produced a letter dated 9<sup>th</sup> October, 1970 in support of the same.

That the five acre of land was meant for cultivating and registered as L.R NO. MWEA/MUTITHI/SCHEME/17. He produced the green card as P-exhibit No. 2. The one acre parcel of land was meant for constructing a house. The plaintiff also produced a green card showing that the one acre land comprising of 0.42 Ha. described was registered as MWEA/ MUTITHI/235. The two parcels of land were given according to clans. He produced a copy of register indicating that he was allocated the two parcels as a member of AGACIKU CLAN. The plaintiff also produced a copy of minutes from the Town Planning, Markets and Housing Committee of the County Council of Kirinyaga held in 1969. Due to some pressing school fees obligation, he sold the five acre land parcel but constructed a family house on the one acre parcel of land

described as MWEA/MUTITHI/SCHEME/235. He also took possession since he was allocated the land in 1971 to date. However, he was not given the title deed. The plaintiff further stated that some time in 1980, he saw a lady on his land and when he asked

what she wanted, she said the land belonged to her. He asked her how she acquired it but she immediately left. Again in 2002, the same lady came back with three young men and asked him why he had not vacated her land. She came back the third time in 2010 and asked him why he was still living on her land. He decided to check in the Lands office. After conducting an official search, he found that the land was registered in the name of one Teresiah Wairimu and was issued a title deed on 13/08/2002. He stated that despite having been registered as proprietor and even issued with a title deed, the said Teresiah Wairimu has never occupied or evicted him from the suit land. He produced a copy of the green card as an exhibit in this case. Beside his house constructed on the suit property, the plaintiff averred that he is also doing farming on the suit land.

### **LEGAL ANALYSIS AND DETERMINATION**

I have carefully considered the viva-voce evidence given by the plaintiff ex-parte and the documents produced in support thereto. The plaintiff's claim is for a declaration that he has acquired the suit land parcel number MWEA/MUTUTHI/235 comprising of 0.42 Ha by way of Adverse possession. The principles for Adverse possession were discussed by the Court of Appeal in the case of **Mistry Valji Vs Janendra Raichand & 2 Others, C.A. No. 46 of 2015 (2016) e KLR** where it was held:

“

(i) ***Adverse possession is not available to a party who is on the registered owner's land with his consent or where the entry and occupation was lawful and based on some agreement. In other words, where the title of the owner is admitted, there can be no claim for adverse possession***

(ii) *The occupation of the land must be nec vi, nec clam, nec precario.*

(iii) *The adverse possessor must prove that through his occupation, the true owner has been dispossessed or his possession discontinued.*

(iv) *It is equally established that adverse possession does not arise merely by occupation and use.*

(v) *The filing of a suit for recovery of land or any other recognized assertion of title to the land by owner stops time from running for purposes of Section 38 of cap 22”.*

It is the evidence of the plaintiff that after he was allocated the suit land by the then County Council of Kirinyaga (defunct), he constructed his house in 1971 and thereafter took occupation with his family to date. The green card produced for the suit property indicates that the defendant, Teresiah Wairimu was registered as proprietor of the land on 13/08/2002 and a title deed issued on 21/10/2004. I am satisfied that the plaintiff has brought himself within the principles for the grant of the orders sought.

The upshot of my finding is that the plaintiff has proved his claim for adverse possession to the required standard. Consequently, I enter judgment for the plaintiff as follows:-

(a) ***A declaration that the plaintiff has acquired title to land parcel No. MWEA/MUTITHI/SCHEME/235 measuring approximately 0.42 Ha. by way of Adverse possession.***

(b) ***The County Land Registrar, Kirinyaga County is hereby directed to rectify the register to reflect the plaintiff, Joseph Muriithi Kanumbi Alias Joseph Muriithi Warutere as the registered owner.***

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

Judgment READ, DELIVERED in open Court at Kerugoya and SIGNED this 19<sup>th</sup> day of November, 2021.

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**HON. E.C. CHERONO**

**ELC JUDGE**

In the presence of:-

1. Mr. Asiimwe holding brief for Wangechi Munene for Plaintiff

2. Defendant – absent

3. Kabuta, Court clerk – present.