



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANGA

ELC NO 19B OF 2020

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MONIKAH WANGARI MUKABI.....PLAINTIFF

VS

AMOS NGUGI MUKABI.....DEFENDANT

JUDGMENT

1. The Plaintiff is the mother of the Defendant. The Plaintiff filed suit on the 21/7/2020 seeking the following orders;
  - a. A declaration that the Plaintiff has acquired the whole of LR LOC16/KIGORO/991 (suit land) by way of adverse possession.
  - b. A declaration that the Defendants title to the suit land has been extinguished in favour of the Plaintiff and that the Defendant holds the suit land in trust for the Plaintiff and that the said suit land be transferred to the Plaintiff.
  - c. A permanent injunction restraining the Defendant or his agents' servant's employee's wife or wives and or children from interfering with the Plaintiffs quiet and peaceful enjoyment of the suit land.
  - d. Costs of the suit.
2. On the 11/11/2020 the Defendant was duly served as demonstrated by the affidavit of service dated the 1/1/2021 on record. The Defendant failed to enter appearance nor file a defence. Consequently, the Plaintiff sought and obtained judgement in default on the 25/2/2021.
3. Thereafter the Plaintiff fixed the matter for formal proof hearing on the 15/7/2021.
4. The Plaintiff testified singly and relied on her witness statement dated the 21/7/2020. In support of her case she produced a copy of the title issued in the name of the Defendant on the 4/1/1994, official search dated 5/8/2020 and a photograph of a house on the suit land.
5. She stated that the Defendant is her son who lives in Naivasha with his family. That she has lived on the suit land since 1978 when she got married to Henry Mukabi Ngugi, the Defendants father. That her husband died leaving her on the land where he is buried.
6. That the suit land was registered in the name of the Defendant when he was still a minor to hold in trust for her and her family. That the Defendants' siblings being his unmarried sisters also reside on the suit land. That she previously kept the original title until the Defendant stole it from her house and she is apprehensive that he might sell the same rendering her homeless.
7. The Plaintiff filed written submissions which I have read and considered.
8. The key issues for determination are;
  - a. Whether the Plaintiff is entitled to the title by way of adverse possession.
  - b. Whether trust is founded.
  - c. Costs of the suit.
9. The object of Adverse Possession as enunciated in the case of **Adnam v Earl of Sandwich (1877) 2QB 485** are;

**“The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties.”**

10. Sections 7 and 17 of the Limitation of Actions Act, provide as follows;

**"7. 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.**

**17. Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action, to recover land (including a redemption action), the title of that person to the land is extinguished."**

11. The period of twelve years starts to run from the moment the trespasser takes Adverse Possession of the land and the registered proprietor is regarded as having been dispossessed or having discontinued his possession. In the case of **Wambugu Vs. Njuguna [1983] KLR 172** the Court held as thus;

**"1. The general principle is that until the contrary is proved, possession in law follows the right to possess.**

**2. In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to, the land either by being dispossessed of it or by having discontinued 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.....**

**3. 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 whether or not the claimant has proved that he has been in possession for the requisite number of years.**

**4. Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid sale agreement, the possession become adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence the occupation is not adverse but with permission. The occupation can only be either with permission or adverse; the two concepts cannot co-exist.....**

**5. The rule on "permissive possession" is that possession does not become adverse before the end of the period during which the possessor is permitted to occupy the land.....**

**6. Adverse Possession means that a person is in possession, in whose favour time can run. Not all persons in possession can have time run in their favour.....time cannot run in favour of a licensee. A licensee therefore has no Adverse Possession (*Hughes v. Griffin [1969] 1 WLR 23.*)"**

**Apart from the above, the following principles also apply when considering an application under Section 7 of the Limitation of Actions Act;**

**i) For the registered owner of land to be dispossessed, the party claiming ownership by Adverse Possession must demonstrate the existence of acts done on the suit property which are inconsistent with the registered owner's enjoyment of the land for the purpose for which he intended to use it. See *Ngati Farmers Co-operative Society Limited V. Councillor John Ledidi & 15 others, Nkr CA No. 94 of 2004.***

**ii) The mere change of ownership of land which is occupied by another person under Adverse Possession, does not interrupt such person's Adverse Possession.**

**iii) Time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his rights or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes an effective entry into land. See *Githu V. Ndeete [1984] KLR 776.* Running of time will not be interrupted by sending a notice or letter from the true owner to the claimant.**

**iv) Exclusive physical control of the land must depend on the circumstances of each case, the nature of the land and the manner in which land of that nature is commonly used or enjoyed. See *Powell V. McFarlane [1977] 38 P & Cr. 452.*"**

12. The Plaintiff led uncontroverted evidence that she entered the land in 1978 when she got married to her late husband. That she has lived there since 1978 to date, developing the land and constructed a permanent house. That her late husband was buried on the suit land. This demonstrates her animus possidendi to hold and utilize the land in a manner inconsistent with that of the Defendant.

13. She informed the Court that the Defendant retrieved the title from her and that he lives in Naivasha with his family. In the absence of evidence to the contrary, it is evident that the Defendant is aware of the Plaintiffs occupation and possession of the suit land and he has done

nothing to repossess or reenter the land neither has she relinquished her possession.

14. The Plaintiff was emphatic that she has lived on the land since 1978, a period in excess of 12 years. In the absence of evidence to the contrary the Plaintiff's occupation is adverse to the title of the Defendant. Consequently, adversity crystallized and a title vested in her.

15. It is the conclusion of the Court that on a balance of probabilities the Plaintiff has proven her claim of adverse possession.

16. Is a claim under customary trust founded? Section 28 of the Land Registration Act states that unless the contrary is expressed in the register, all registered land shall be subject to such overriding interest as may for the time being subsist and affect the land without the necessity of the overriding interests being noted thereon. Customary trust is an overriding interest in registered land. In the case of **Isack M'Inanga Kieba Vs Isaaya Theuri M'Lintari & Isack Ntongai M'Lintari SCOK Petition 10 of 2015**, the apex Court stated that occupation and possession are not necessary for a trust to be established.

17. The **Kieba** case supra held as follows;

**“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in Kiarie v. Kinuthia, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding were for the benefit of other members of the family, then a Customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are: the land in question was before registration, family, clan or group land; the claimant belongs to such family, clan, or group; the relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous; the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; the claim is directed against the registered proprietor who is a member of the family, clan or group”.** (Emphasis mine).

18. Going by the **Kieba** case above the following are critical in proving the existence of a trust ;

- a) The land in question was before registration, family, clan or group land.
- b) The claimant belongs to such family, clan, or group.
- c) The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
- d) The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
- e) The claim is directed against the registered proprietor who is a member of the family, clan or group.”

19. Customary trust are rights that attach to the land and move or subsist on the land. In the case of **Peter Gitonga Vs Francis Maingi M'Ikiara Meru HC.CC NO. 146 of 2000**- it was stated that:-

**“A “trust” can be created under customary law and the circumstances surrounding registration must be looked at to determine the purpose of the registration. This was what led Muli J. to say this; “Registration of titles are a creation of law and one must look into the considerations surrounding the registration of titles to determine whether a trust was envisaged”.** (Emphasis is mine).

20. It is not in dispute that the parties are related. The title is registered in the name of the Defendant. According to the Plaintiffs evidence the land was registered in the name of the Defendant when he was a minor to hold trust for her and her family. The Court did not receive any evidence to support acquisition by purchase by the Defendant. Evidently the registration of the land in the minor's name demonstrates that the Defendant did not purchase the land for himself. He held it for the family of the Plaintiff.

21. In the end the Court finds that customary trust has been proven.

22. Having considered the pleadings, the evidence the submissions and all the material before me I find that on a balance of probabilities the Plaintiff has proven her case.

23. I order judgment in favour of the Plaintiff as prayed

24. I make no orders as to costs.

25. It is so ordered.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 15<sup>TH</sup> DAY OF NOVEMBER, 2021 VIA MICROSOFT TEAMS.**

**J. G. KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Mugo Moses for the Plaintiff

No appearance for the Defendant

Ms. Phyllis Mwangi – Court Assistant