



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**E.L.C. SUIT NO OS E003 OF 2021**

**JOSEPH MACHARIA KAIRU.....APPLICANT**

**VERSUS**

**KENNETH KIMANI MUIRURI.....RESPONDENT**

**JUDGMENT**

The Applicant instituted the instant Originating Summons dated **12<sup>th</sup> May 2021**, against the Respondent herein for a claim of adverse possession over **LOC.3/GACHARAGE/ 712**, for orders:

- a) **THAT the Honorable Court do make a declaration that the Applicant has acquired by way of adverse possession an absolute title number LOC.3/ GACHARAGE/712.**
- b) **THAT an order be issued directing the Respondent to execute all documents and take all the necessary steps to effect transfer to the Applicant of land parcel No.LOC.3/GACHARAGE/712, and in default in whereof, the said documents be executed by the Deputy Registrar of this Honorable Court**
- c) **THAT the costs of this suit be granted to the Applicant**

It is the Applicant's claim that he has been in **continuous, open and exclusive uninterrupted occupation and possession** of the suit property for a period of over **12** years. That as a result of the said occupation, he has acquired proprietary rights over the said portion of land by dint of **Adverse Possession**. It is the Applicant's further averments that the Respondent got the land through a **public auction** carried out on **11<sup>th</sup> April, 2003**. That he has lived on the suit property **exclusively, openly and without** the Respondent's permission since **2003**.

Further that his **occupation** of the suit land **extinguished** the Respondent's title and the Respondent has been holding it in trust for the Applicant. The Applicant filed a witness statement to buttress his claim that he has built a permanent house thereon. Further that he has planted different species of plants and is therefore entitled to it. The Respondent was served with the pleadings but never entered appearance.

The Applicant was directed to canvass the Originating Summons by way of written submissions. It is the Applicant's submissions that he has satisfied the ingredients of **adverse possession** as was set out in the case **Munyaka Kuna Company Limited**. That he has been in **continuous, open, exclusive uninterrupted occupation and possession** of the land. He reiterated the averments contained in his Supporting Affidavit and urged this Court to grant the Orders sought. Further reliance was placed on the **Mtana Lewa and Kasuve Case**.

What flows from the pleadings and attachments is that the suit property was subject to a public auction held on **11<sup>th</sup> April, 2003**, in satisfaction of a Court Decree. The extract of a **Green Card** attached indicates under entries 3 & 4 that the Applicant herein was issued with title to the suit property in 1986. Further that there existed a suit being **Nairobi HC Civil Appeal No. 436 of 1998**, in which the Court gave orders dated **16<sup>th</sup> March 2012**, in favour of the Respondent herein. Also under entry 8, title deed was issued to one **Kairu Kugwa** on **29<sup>th</sup> March 2017**, circumstances which this Court is not versed with.

This Court has a duty to interrogate and evaluate uncontroverted evidence in order to determine whether the applicant is entitled to the prayers sought. This court has pronounced itself on uncontroverted evidence in **Murang'a ELCA No. 16 of 2017:- Gichinga Kibutha v Caroline Nduku [2018] eKLR** to the strength that *It is not automatic that in instances where the evidence is not controverted, the claimant's claim shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.*

The burden of proof is placed on the person alleging the occurrence of an event and where there is no evidence to challenge the allegations, the standard of proof automatically is higher. Undoubtedly, owing to the nature and extent of orders for **adverse possession** to wit extinction of right to property, the burden is higher. The burden squarely lies on the Applicant to demonstrate that he has met the requirements for the grant of an order of **adverse possession**. The Applicant is the one who has alleged and must proof. (*See Nairobi CoA App No. 95 of 2014*

The Court has considered the pleadings, attachments, submissions and authorities cited by the Applicant, the issues for determination are;

- a. Whether the Applicant is entitled to the orders sought**
- b. Who should bear costs**

The law on **adverse possession** is provided for under the **Limitation of Actions Act**. Section 7 of the Act 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. Section 13 “(1) 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*

*(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.*

*(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land”.*

Section 17 extinguishes the rights of a registered owner where there is a successful claim for adverse possession. Section 38 on the other hand provides;

*“ (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.”*

The Court of Appeal in **Kisumu Civ App. No. 110 of 2016 Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] eKLR** opined that a person claiming adverse possession must establish the following

- (a) On what date he came into possession.**
- (b) What was the nature of his possession?**
- (c) Whether the fact of his possession was known to the other party.**
- (d) For how long his possession has continued and**
- (e) That the possession was open and undisturbed for the requisite 12 years.**

The Applicant contends that he entered into the parcel of land in the year **2003**, and has been in occupation since then for a period of over 12 years. If that is the case, he has been in occupation of the suit land for a period of **18 years**, which is beyond the statutory claim.

To determine the nature of possession, this Court is guided by the decision in **Kisumu Civil Appeal No. 27 of 2013 Samuel Kihamba v Mary Mbaisi [2015] Eklr**, where the court held:

*“Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, **nec vi, nec clam, nec precario**. The additional requirement is that of **animus possidendi**, or intention to have the land”*

The Applicant was the original owner of the suit property, information he has not out rightly stated in his pleadings. At the time the Respondent acquired ownership, the Applicant might have been in occupation of the same. Basing my mind on the annexed copy of **Green Card**, there was a Court Case surrounding the process of extinguishing the Applicant’s rights over the land. There was also a prohibitory order, entry 6 in the attached **Green Card**. The details have not been availed to ascertain the nature of the prohibition.

The Applicant has not led any evidence as to the nature of his occupation. He gained access to the land as he was the registered owner, and there is no way he would need the permission. The Applicant might have been in **an open and exclusive occupation** of the land, but as the registered owner. Adverse possession accrues on land and not title. While the Respondent might have acquired title, he did not acquire possession. The Respondent was the successful bidder in the auction, but he never took possession of the suit property because of an existing

suit, **Nairobi HCC No. 436 of 1998**, therefore there was no right that accrued.

Be that as it may, it is not enough for the Applicant to simply state that he has been in open, continuous and **uninterrupted occupation**. He ought to prove the said allegation. The Court concurs with the sentiments of Justice Kuloba J, (as he then was,) in **Nairobi Civ No. 283 of 1990 Gabriel Mbui v Mukindia Maranya [1993] Eklr**, where the Court held:

**“The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown”**

The Respondent would only be ripped off this right by dispossession or discontinuance. (See **Mombasa Misc No. 109 of 2009:- John Mwatela Shede VS Vitalilibhai Bhulabhai Patel [2010] Eklr**. No evidence has been adduced to the effect that the Applicant dispossessed or discontinued the right, the Applicant instead lost rights over the land. This Court has not been furnished with any evidence as to the current state of the land to determine whether the Applicant is in occupation or not. The mere averments cannot sustain a claim for adverse possession.

**Order 37 Rule 7**, requires an Applicant to attach an extract of a certified copy of title. The essence of the title is to point out with certainty the ownership and title of land. What is attached here is a **Green Card** extract which card gives details of the ownership.

Whether time begun running from **2003, 2010** or **2017**, is also an issue for consideration. The Court in **Gabriel Mbui (supra)** held:

**“Time does not begin to run unless there is some person in adverse possession of the land. It does not run merely because the land is vacant..... The rule that his entry must be followed by possession and appropriation to his use is founded on the reason that a right of action cannot accrue unless there is somebody against whom it is enforceable”** The Applicant’s rights on the suit land were extinguished by the public auction. The Respondent became the new owner in 2003 and the Applicant’s occupation of the land begun running from then.

Also the Court of Appeal in **Civil Appeal No 164 of 2011 Gachuma Gacheru VS Maina Kabuchwa [2016] eKLR**, when quoting **Maweu VS Liu Ranching & Farming Cooperative Society [1985] eKLR** held:

**“Lastly, on argument by the respondent that time in adverse possession can only begin to run once title is issued, we disagree and set out the sentiments of the Court in, MAWEU V LIU RANCHING & FARMING COOPERATIVE SOCIETY, [1985] eKLR: “What logic is there in saying that this concept of the absolute and indefeasible title may only be lost, after twelve years of suffering adverse possession from the time of registration, but not for shorter periods because the adverse possession commenced during the time of the owner’s predecessor. How is it lost at all?”**

**Adverse possession is a fact to be observed upon the land. It is not to be seen in a title, even under cap 300. Any man who buys land without knowing who is in possession of it risks his title, just as he does, if he fails to inspect his land for twelve years after he had acquired it. If such title can be lost at all, its absolute and indefeasible nature obviously refers to other matters than adverse possession.**

**The Plaintiff Society of course relies upon the decision of the earlier court, but no argument on the point of principle was pressed that I could see, with great respect to learned counsel. Certainly he was unable to advance any cogent argument from the reasoning in Alibhai’s case, or otherwise why absolute and indefeasible title interfered with the operation of the Limitation of Actions Act (cap 22).**

**There is nothing in the concept of an overriding interest which is new to the law; it is merely an acknowledgement of existing common law. No title which passed to a new owner before registration was provided for, curtailed the period of limitation. The reason lies in the public policy which underlies the Limitation of Actions Act (cap 22): namely, that a long period of possession should not be disturbed by the negligent owner or owners in succession.”**

Grounded by the above findings, this Court cannot compute time from **2017**, when title was issued. However, it has been held in various cases that a suit to regain possession of the land can stop time. Evidently, there was an order of prohibition attached to the land, facts of it not known to this Court. Prohibitory orders take the nature of injunction and bar interested parties from any dealings. It would be right to conclude that there was an order stopping parties from dealing with the suit property.

The attached Ruling for the year **2010**, intimates that the Court upheld the sale by public auction. The Filing of the application surrounded emphasis on the ownership of land also; the Applicant herein who was the Respondent therein filed an application challenging the said public auction. The said application went into the root of regaining ownership; The Respondent was listed as an interested party. In **Malindi CoA Civil Appeal No. 29 of 2016:- Peter Kamau Njau VS Emmanuel Charo Tinga [2016] eKLR** the Court held:

**“in order to stop time which has started running, it must be demonstrated that the owner of land took positive steps to assert his right by, for instance taking out legal proceedings against the person on the land or by making an effective entry into the land.**

While this Court finds that time started running in **2010**, after the Ruling, there is compelling evidence that there were orders of Court issued on **16<sup>th</sup> March 2012**. The Applicant was a party to the suit and it would only be just that he furnishes the Court with details. He opted not to do so, and this is against the maxim of equity. Applicant seeks equity and he must do equity. To this end, this Court is not properly guided as to determine when time begun running so as to find the proper computation.

The Applicant in paragraph 4 alleges that the Respondent has never set foot on the suit property after acquiring ownership. The Court has not had the benefit of knowing the reasons for the said Respondent not accessing the land. However, from the annexed **Green Card**, it is evident there was a pending suit. Be that as it may, the **Court of Appeal in Nyeri Civ. Appeal no 153 of 2017, Chairman Board of Governors Murang'a College of Technology Primary School VS Julius Ngigi Munjuga [2018] eKLR** quoted with approval the case of **Alfred Welimo VS Mulaa Sumba Barasa, CA No. 186 of 2011** and held:

**“It is trite that adverse possession is not established merely because the owner has abandoned possession of his land and ceased to use it; for as Robert Megarry aptly observed in his Megarry’s manual of the Law of Property, 5th ed. Page 490, the owner may have little present use for the land and that land may be used by others, without the users demonstrating a possession inconsistent with the title of the owner. So the mere fact that the appellant abandoned possession of the suit property and went to live at Ndalul scheme by and of itself does not establish adverse possession. The abandonment of possession must be coupled with the respondent taking possession of the land with *animus possidendi* (the intention to possess) and asserting thereon rights that are inconsistent with those of the appellant as the owner of the land. In such circumstances, the appellant would be said to have been dispossessed of the suit property by the respondent.”**

Similarly, the Court of Appeal in **Nairobi CoA No. 218 of 2017 Christopher Kioi & another v Winnie Mukolwe & 4 others [2018] eKLR** when dismissing an Appeal on a judgment that dismissed an Originating Summons held;

**“The appellants have laid great emphasis on the fact that Kituri did not use the suit property in his lifetime, but that in itself is not conclusive evidence of dispossession because where the owner has little use of his land, others may use it without that possession amounting to dispossession or being inconsistent with the owner’s title”.**

Based on the foregoing, and the fact that the Respondent has not visited the suit property does not mean he gave up his entitlements. From the attached extract of **Green Card**, the title deed was issued to one **Kairu Kugwa**, facts of this registration which are not within this Court’s domain. There are a lot of legal intricacies that emanate from this suit which the Applicant has opted not to furnish this Court with adequate evidence. This Court is therefore persuaded that the Applicant is attempting to usurp the effect of the **Orders in Nairobi Civ No. 436 of 1998**.

To this end, this Court finds that the Applicant has not discharged his burden of proving the case on the required standard of balance of probabilities and the Applicant’s claim has not been proved on the said required standard.

Consequently, the Court finds and hold that the Applicant’s claim as contained in the **Originating Summons** dated **12<sup>th</sup> May 2021**, is **not merited** and the same is dismissed entirely. Since the Respondent did not enter appearance or defend this claim, there are no orders as to costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 9TH DAY OF DECEMBER, 2021.**

**L. GACHERU**

**JUDGE**

**9/12/21**

Delivered online in the presence of:

Alex Mugo - Court Assistant

M/s Waititu H/B for Mr. Mwaniki Warima for Applicant

N/Appearance for Respondent

**L. GACHERU**

**JUDGE**

**9/12/21**