



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC NO. 12B OF 2019(OS)

ROSE WANGUI WANDERI(suing as the personal legal representative to the
estate of HEZRON GATHERU KURIA).....PLAINTIFF/APPLICANT

VERSUS

SAMUEL MWANGI GITHAMARO..... 1ST DEFENDANT/RESPONDENT

JUDGEMENT

1 The Plaintiff filed the Originating Summons dated 17/4/2019 seeking Orders THAT;

a. The Plaintiff is entitled to be registered as the proprietor of 0.8 acres in land parcel LOC16/KIMANDI/WANYAGA/373 in place of the Defendant on the ground that the Plaintiff has been in open, continuous, peaceful and uninterrupted occupations of the said respective land portion of 0.8 acres in land parcel since the 1989 that is to say for a period well over twelve (12) years preceding presentation of this originating summons in Court.

b. The title in the name of the Respondent herein SAMUEL MWANGI GITHAMARO in respect of 0.8 acres to excised from land parcel LOC 16/KIMANDI/WANYAGA/373 be distinguished under the limitation of actions ACT CAP 22 SECTION 17.

c. That the Applicant to be declared to be the bona fide and registered owner of 0.8 acres in land parcel LOC16/KIMANDI/WANYAGA/373 by way of adverse possession having lived in the said parcel of land for over 30 years without any interruption.

d. That the Land Registrar to rectify and order the excising of 0.8 acres from land parcel LOC16/KIMANDI/WANYAGA/373 and register the same in the Plaintiff's names.

e. Costs of this application be provided for.

2. The Summons are premised on the grounds stated as follows;

a. The Applicant has been living farming, developed a portion of 0.8 acres within land parcel LOC 16/KIMANDI/WANYAGA/373 since 1989 to date, a period exceeding 12 years as provided in the law.

b. That the said suit land measures about 1.8 acres and was the property the Plaintiff deceased father one HEZRON GATHERU KURIA who sold 1 acre to the Respondent herein way back in 1984.

c. That the Respondent and the Applicant are related in that the Respondent is a son in law to the deceased (HEZRON GATHERU KURIA) Plaintiffs father as he is married the Plaintiff's sister.

d. That by virtue of the aforesaid relationship and upon the purchase of the said 1 acre from the deceased, the Respondent was trusted by the deceased who gave him the original title to excise the 1 acre but instead the Respondent transferred the entire land in his name.

e. That the Applicant has buried her father and mother on the 0.8 and has been living thereon since 1989 to date.

f. That the said occupation has been open, continuous and uninterrupted for a period exceeding 12 years.

3. In the Supporting affidavit the Applicant deponed that she is the administrator of the estate of her late father, **Hezron Gatheru Kuria** and annexed copy of the limited grant. That the Defendant is the registered proprietor of parcel **LOC16/KIMANDI/WANYAGA/373 (hereinafter referred to as the suit land)** as evidenced by a copy of land certificate in his name annexed as RWW2. That the Defendant being a son in law of the late Hezron Gatheru Kuria, was given title of the suit land for him to excise his parcel of 1 acre but opted to transfer the entire land to his name.

4. The claim is defended. The Defendant filed his Replying Affidavit sworn on 28/10/2020. He averred that he is the registered owner of the entire suit land pursuant to his registration in 1984 through what he termed as 'transfer inter vivos upon sale without notice'. That the Plaintiff moved the High Court in Nbi ELC case No 554 of 2010 claiming adverse possession of the suit land. That he in turn filed Thika CMCC case no. 141 of 2014 accusing the Plaintiff of trespassing on the suit land. He contends that the suit is resjudicata in view of ELC No 554 of 2010. That the Plaintiffs claim was extinguished on the 12/4/2010 upon issuance of a decree in Land Dispute Tribunal Case No 49 of 2008.

5. Pursuant to the Plaintiff's application dated 6/5/2019, this Court ordered that Thika CMCC No. 141 of 2014 be transferred herein for consolidation purposes vide the orders of the Court of the 17/12/2019.

6. The Plaintiff testified as PW1 and relied on her Supporting Affidavit dated 17/4/2019. She produced the Court proceedings in CMCC No. 49 of 2008 as Pexh.1 and the letter of administration ad litem as Pexh. 2. He admitted that the Defendant is her brother in law and that he purchased one acre of the suit land from her late father.

7. In cross-exam, PW1 maintained that no decision was arrived at in CMCC No. 49 of 2008. That she took over the case after her father's demise. She confirmed that her late father sold one acre of the suit land to the Defendant. That her and her son were appointed as administrators of her late father's estate. PW1 was emphatic that she has no other land to claim as she lives and farms on the suit land. That in total, her father had 5 acres of land; that the 2 acres is apart of the 5 acres, she got one acre thereof; her sister was given one acre too which is registered in the Defendant's name.

8. Regarding her parents' demise, PW1 told the Court that her mother and father died in 1993 and 2003 respectively. That they were both buried on the suit land. PW1 said she has lived on the suit land since 1968/69 to date and no one had asked her to vacate the land albeit, in writing but conceded verbal demands. She admitted that the suit land is registered in the Defendant's name.

9. That marked the close of the Plaintiff's case.

10. On the other hand, the Defendant took the stand as DW1. He adopted his witness statement dated 11/3/14 filed in Thika CMCC 141 of 2014 and all annexures thereto. He also relied on his Replying Affidavit filed on 18/11/2020. He implored the Court to order the Plaintiff's eviction from the suit land which belongs to him.

11. In cross-examination, DW1 asserted that the suit land was transferred to him in 1984. That there was no sale agreement to that effect but he got the land pursuant to the Tribunal decision. That despite notices to vacate, he stated that the Plaintiff has refused to vacate the land. He however did not have copies of such notice in Court. DW1 confirmed filing Thika CMCC No. 141 of 2014 and the burial of his parents in law on the suit land. That the parents in law lived on the suit land with his permission. According to him, the Plaintiff's father died in 2010. He admitted that the Plaintiff too lived on the suit land with her parents. That she cultivates napier grass on the suit land.

12. In re-examination, DW1 said the Plaintiff occupies a ¼ of the suit land. That his father in law never raised any claim over the suit land and that he let his in-laws reside thereon out of respect.

13. Parties agreed to file their final submissions. Only the Plaintiff through the firm of **Kanyi Kiruchi & Co. Advocates** complied by filing submissions dated 10/9/2021.

14. The Plaintiff rehashed the background of the case and summary of evidence adduced in Court. She denied that this suit is res judicata on the basis of ELC No. 554 of 2010 that was quashed. That she is entitled to the 0.8 acres in the suit land having satisfied the requirements of adverse possession as set out in the case of **Mbira -v- Gachuhi (2002) IEALR 137** and in the Court of Appeal case in **Mtana Lewa -v- Kahindi Ngala Mwangandi (2005) eKLR**. She submitted that she been in occupation of the land for over 12 years without any interruption from his late father or the Defendant. Lastly, the Plaintiff stated that the Defendant was put in possession in 1984 and his action to recover the land in 2019 was over 30 years. That the 1 acre and 0.8 acres are well demarcated and implored the Court to allow her claim.

Analysis and Determination

15. The issues for determination are; whether the Plaintiff has proven her claim on adverse possession; what order should the Court make in light of Thika CMCC No. 141 of 2014, who bears costs?

16. The Legal provisions on adverse possession are contained in the Limitation Of Actions Act Cap 22 Laws of Kenya and relevant to this case in sections 7, 13, 16,17 and 38 that;

“7. Actions to recover land

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.

13. Right of action not to accrue or continue unless adverse possession

(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.

16. Administration dates back to death

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.

17. Title extinguished at end of limitation period

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.

38. Registration of title to land or easement acquired under Act

(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 or lease in place of the person then registered as proprietor of the land."

17. The Limitation of Actions Act however does not define what constitutes adverse possession. Nevertheless, there is a plethora of case law on what adverse possession is. The Court of Appeal in the case of **Mtana Lewa Vs Kahindi Ngala Mwangandi [2015] e KLR**, defined the concept as follows;

"Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner."

18. Earlier on the same Court in the case of **Wambugu -v-Njuguna (1983) KLR 173**, held that;

"Adverse Possession contemplates two concepts: Possession and discontinuance of Possession. It further held that the proper way of assessing proof of Adverse Possession would 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 or she has been in Possession for the requisite number of years."

19. Additionally in the Court of Appeal decision in **Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another [2015] eKLR** the Learned Judges highlighted the requirements for proving adverse possession as thus;

"First, the parcel of land must be registered in the name of a person other than the Applicant, the Applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner."

20. It is common ground that the Defendant purchased 1 acre of the suit land from his father in law way back in 1984. I say so because the Plaintiff herself acknowledges as much in the Originating Summons and the tribunal proceedings produced as P.exh 2 are in support of this position. DW1 in his cross examination stated that he got the land pursuant to the decision of the Tribunal a fact that is unverified. He also insisted that he bought one acre of the suit land from his late father in-law.

21. The Plaintiff avers that she has resided on the suit land specifically on the 0.8 acres claimed since sometime in 1968 or thereabouts. It is her position that her late father sold **one acre** of land to the Defendant whom she accuses of fraudulently registering the entire land in his name. Be that as it may, the Plaintiff contends that her adverse occupation started in 1984 when the purported registration was done in the Defendant's name. That she and her late parents peacefully and openly lived on the said land without interruption from the Defendant. Her claim is specifically for **0.8 acres** as the administrator of her late father's estate.

22. It is trite that the period of limitation or prescription begins to run against the owner of land, from the date when the owner was entitled to immediate possession and the squatter occupied the land under some colour of right. In the case of registered land, adverse possession dates from the granting of the certificate of title, for that is when the title holder is prima facie entitled to possession and, therefore, entitled to take action against any intruder to the land.

23. Accordingly, it is my view that in the instant case, time started running in 1984 when the Defendant was registered as the owner. The Plaintiff testified that she has openly lived on the suit land and in particular in her father's house for over 20 years. That she buried her

parents thereon and has never been asked to vacate in writing.

24. The Defendant corroborated the Plaintiff's claim. He also informed the Court that the Plaintiff had refused to vacate the suit land he did not have the demand letters in Court to substantiate his averments. He confirmed filing the Thika case CMCC No. 141 of 2014 after **20 years**. That he permitted his parents in law to live on the suit land and allowed their burial on it. He conceded that the Plaintiff lived on the suit land with her parents and after their demise, she refused to vacate. The Defendant however could not recall when the Plaintiff entered the land.

25. The Defendant contended that the parents and the Plaintiff lived on the suit land with his permission. This position remains untenable because during his lifetime, Hezron Gatheru Kuria, the Plaintiffs father sued the Defendant at the Land Dispute Tribunal where the Defendant admitted having purchased one acre of the suit land from his father in law. He further admitted that Kuria lived on the suit land. It therefore shows that the occupation of the Plaintiff and that of the deceased was not with the permission of the Defendant.

26. Notably on re-exam, the Defendant again acknowledged that the Plaintiff lived on $\frac{1}{4}$ of the suit land and that he never evicted his in-laws out of respect. In line with Section 7 of Limitation of Actions Act above, it is my view that the Defendants right of action expired in the **year 1996**, being 12 years since his registration as the owner of the land. So that even before his father in-law's demise, the Defendant's rights of ownership to the suit land (if any) had been extinguished on the said parcel of land in favour of the Plaintiff's father. Being an administrator of the estate of her father adverse is founded as it crystalized in 1996 during the lifetime of her father. By the time of the land dispute tribunal case in 2005, adverse possession had accrued to her late father.

27. The Plaintiff maintained that her occupation has been open, continuous and uninterrupted. She adduced evidence of her occupation and farming on the land that the Plaintiff conceded, hence firming her animus possidendi on the suit land. I find that the Plaintiff has proven her claim on a balance of probabilities.

28. Final orders and disposition;

a. The Plaintiff is entitled to be registered as the proprietor of a portion of 0.8 acres in land parcel LOC16/KIMANDI/WANYAGA/373 by way of adverse possession.

b. The title in the name of the Respondent, SAMWEL MWANGI GITHAMARO in respect of a portion of 0.8 acres to be subdivided forthwith and 0.8 acres be registered in the name of the Plaintiff.

c. The subdivision to adhere as much as practicable to the settlement of the parties on the ground.

d. The Defendant is ordered to execute all the appropriate documents and avail the original title to the Plaintiff for purposes of effecting the orders within 15 days from the date of this judgement, in default the Land Registrar is authorised to execute the said documents and dispense with the original title thereto.

e. Parties being related, each to bear their own costs.

29. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 9TH DAY OF DECEMBER, 2021 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Warutere holding brief for Kanyi for Plaintiff

Ms. Mwangi holding brief for Muturi for Defendant

Ms. Phyllis – Court Assistant