



**REPUBLIC OF KENYA**  
**IN THE ENIRONMENT AND LAND COURT**  
**AT MOMBASA**

**ELC CASE NO. 215 OF 2020**

**ELIZABETH WANJIRA NJIRU.....APPLICANT**

**VERSUS**

**PETER W. MBURU.....RESPONDENT**

**JUDGMENT**

This is the application of Elizabeth Wanjira Njiru who claims to have acquired by way of adverse possession of Land Parcel No. Mombasa/Mwembelegeza/756 seeking the following orders;

1. That the Respondent's interest in Mombasa/Mwembelegeza/756 measuring 0.05 ha has been extinguished.
2. That the Applicant be registered as the proprietor of all that parcel of land Mombasa/Mwembelegeza/756 measuring 0.05 ha which said piece of land is comprised in a Certificate of Title in the District Land Registry at Mombasa in place of Respondent reason of the fact that the Applicant has become entitled to the said land by adverse possession.
3. That the orders referred to in paragraph 1 and 2 above be registered against the title Mombasa/Mwembelegeza/756 measuring 0.05 ha which said piece of land is comprised in a Certificate of Title in the District Land Registry at Mombasa in terms of Section 38 (2) of the Limitation of Actions Act, (CAP 22) Laws of Kenya.
4. That the costs of this Originating Summons be provided for.

The application is based on the grounds that the Applicant has been in uninterrupted exclusive physical occupation of Mombasa/Mwembelegeza/756 measuring 0.05 ha for a continuous period of over 12 years which is more than the 12 years required by the law. That the Respondent has shown no interest in this plot neither has he given any notice to vacate from the suit land to the Applicant. That the Respondent's rights and/or interest in all that parcel of land known as Mombasa/Mwembelegeza/756 measuring 0.05 ha vis-a-vis those of the Applicant have been extinguished. That it is fair and just that the Applicant be registered as the owner of land known as Mombasa/Mwembelegeza/756 measuring 0.05 ha so she together with her family members can live in peace without fear of losing the said land, which is their only home. That the Applicant has peacefully exercised proprietary rights over the suit property for over 12 years and lay claim to it by law to acquire a legal right over the suit property. That the applicant has no other place to call home but the suit property.

The plaintiff/applicant testified that the respondent/defendant is the registered owner of all that parcel of land known as Mombasa/Mwembelegeza/756 measuring 0.05 ha PEx1 is a copy of Certificate of Title and PEx2 is a copy of Official Search. That at all material time to the suit, together with her entire family have lived in the parcel of land Mombasa/Mwembelegeza/756 measuring 0.05 ha for a period of more than 12 years. That she peacefully and openly occupied, developed, raised a family and conducted other activities in the suit land over the years without any interruption and it is the only place she can call home. That the suit land is her family's only source of livelihood having occupied and utilized it for the past over 12 years. That she does not have any other home other than the suit land. That she is legally entitled to the land since the owner has been absent and she has have lived in the said land for a period of over 12 years, which is more than 12 years as required by the Limitation of Actions Act (Cap 22). The plaintiff testified that she moved onto the suit land in 2006 when it was bear and uninhabited.

This court has carefully considered the evidence therein. The defendant was served through the daily newspaper but failed to attend court or file any defence. The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

Section 26 (1) of the Land Registration Act states as follows:

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

This court in considering this matter referred to the case of Elijah Makeri Nyangw’ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The court in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

It is not in dispute that the defendant is the proprietor of parcel of Land No. Mombasa/Mwembelegeza/756. The issue is whether or not he holds a good title by virtue of the plaintiff’s claim of adverse possession. Be that as it may, in determining whether or not to declare that a party has acquired land by adverse possession, there are certain principles which must be met as quoted by Seron J in the case of Gerald Muriithi vs Wamugunda Muriuki & Another (2010) eKLR while referring to the case of Wambugu vs Njuguna (1983) KLR page 172 the Court of Appeal held as follows;

“1. In order to acquire by statute of limitations title to land which has a known owner the owner must have lost his right to the land either by being dispossessed of it or by having continued 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. The respondent could and did not prove that the appellant had either been dispossessed of the suit land for a continuous period of twelve years as to entitle him, the respondent to title to the land by adverse possession.

2.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 the claimant has proved that he has been in possession for the requisite number of years.

3.Where a claimant pleads the right to land under an agreement and in the alternative seeks adverse possession, the rule is: the claimant’s possession is deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least 12 years after such payment.”

The court was also guided by the case of Francis Gicharu Kariri - v- Peter Njoroge Mairu, Civil Appeal No. 293 of 2002 (Nairobi) the Court of Appeal approved the decision of the High Court in the case of Kimani Ruchire -v - Swift Rutherfords & Co. Ltd. (1980) KLR 10 where Kneller J, held that:

“The plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion)”.

So the plaintiff must show that the defendants had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it. In applying these principles to the present case, the plaintiff states that she has lived on the suit premises with her family since 2006. She claims that she peacefully and openly occupied, developed, raised a family and conducted other activities in the suit land over the years without any interruption and it is the only place she can call home. That the suit land is her family’s only source of livelihood having occupied and utilized it for the past over 12 years. That does not have any other home other than the suit land. That she is legally entitled to the land since the owner has been absent and I have lived in the said land for a period of over 12 years, which is more than 12 years as required by the Limitation of Actions Act (Cap 22). Her evidence was not controverted and remains unchallenged. In the absence of any evidence to the contrary, I find that the plaintiff has been in exclusive, continuous and uninterrupted possession, occupation and open use of the said portion of land for a period in excess of 12 years from 2006 to date. I find that the plaintiff has established that her possession of the suit land was continuous and not broken for any temporary purposes or any endeavours to interrupt it for a period of 12 years. I find that the plaintiff has established her case on a balance of probabilities against the defendant and I grant the following orders;

1. That the Respondent's interest in Mombasa/Mwembelegeza/756 measuring 0.05 ha has been extinguished.
2. That the Applicant be registered as the proprietor of all that parcel of land Mombasa/Mwembelegeza/756 measuring 0.05 ha which said piece of land is comprised in a Certificate of Title in the District Land Registry at Mombasa in place of Respondent

reason of the fact that the Applicant has become entitled to the said land by adverse possession.

3. That the orders referred to in paragraph 1 and 2 above be registered against the title Mombasa/Mwembelegeza/756 measuring 0.05 ha which said piece of land is comprised in a Certificate of Title in the District Land Registry at Mombasa in terms of Section 38 (2) of the Limitation of Actions Act, (CAP 22) Laws of Kenya.

4. No orders as to costs as the suit was undefended.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 8<sup>TH</sup> DECEMBER, 2021**

**N.A. MATHEKA**

**JUDGE**