



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 694 OF 2013**

**NATHAN MUNYAO MUTISO.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**WAYUWA NGETI GACANGI.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**SABAN SAID GATHURI.....1<sup>ST</sup> DEFENDANT**

**FRANCIS KARIUKI MARIRA.....2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR, KIRINYAGA.....3<sup>RD</sup> DEFENDANT**

**COUNTY COUNCIL OF KIRINYAGA.....4<sup>TH</sup> DEFENDANT**

**HON. ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT**

**MORRIS GIKURI KARIUKI.....6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

Vide a plaint dated 30/04/2009, the Plaintiff sought the following orders:

**(A) The 1<sup>st</sup> and 2<sup>nd</sup> and 4<sup>th</sup> Defendants be restrained by way of an injunction by themselves, their agents, servants or anyone claiming under them or on their behalf, from selling, disposing, transferring, leasing, charging or in any manner interfering with the quiet possession, and enjoyment by the plaintiffs herein of all those parcels of land Reference Kirinyaga/Gathigiriri/303 and Kirinyaga/Gathigiriri/304.**

**(B) The 3<sup>rd</sup> and 5<sup>th</sup> defendants be compelled to cancel the title deed issued fraudulently to the 1<sup>st</sup> and 2<sup>nd</sup> defendants on the 20<sup>th</sup> June 1975 and 13<sup>th</sup> April 2005 respectively and the same be declared null and void.**

**(C) The record be rectified by issuing title to the plaintiffs herein to the respective parcels of land i.e. Kirinyaga/Gathigiriri/303 and Kerugoya/Gathigiriri/304.**

**(D) Exemplary damages be awarded to the plaintiffs.**

**(E) Costs of the suit herein be provided for.**

**(F) Any other suitable relief this Honourable Court may deem fit and just to grant.**

The 2<sup>nd</sup> Defendant Entered Appearance and filed statement of defence on 19/10/2009 and 29/10/2009 respectively. The 4<sup>th</sup> Defendant filed her defence on 24/08/2009. The 6<sup>th</sup> Defendant also filed his defence and counter-claim on 24/08/2010. In his counter-claim, the 6<sup>th</sup> defendant is seeking for orders inter-alia for vacant possession and eviction of the plaintiffs from the suit property L.R. No. Kirinyaga/Gathigiriri/303. The 6<sup>th</sup> defendant is also seeking for costs.

**Plaintiffs Case**

The 1<sup>st</sup> plaintiff testified on oath adopted his witness statement dated 20/12/2017 and filed in court on 09/01/2018. According to the 1<sup>st</sup> plaintiff, they have lived on the suit land since his birth to date without interruption and that they are owners of the land. He said that the 2<sup>nd</sup> plaintiff is his mother who has since died. He testified that he was born in 1964. The 1<sup>st</sup> plaintiff further stated that they started living in the suit properties in 1961 and during land demarcation in 1974, his parents were allocated the suit lands. He said that sometimes in the year 2007, someone by the name Francis Kariuki Marera came and alleged that the suit land namely, Kerugoya/Gathigiriri/303 belonged to him. The said person had been accompanied by a Police from Wang'uru police station and threatened to arrest them. In fact, he was actually arrested with his late mother and taken to Wang'uru police station where he was remanded for 3 days. Again in the year 2009, he was arrested on accused with forceful detainer. However, he was not taken to court. He decided to conduct a search at the lands office and found out that the registered owner was one Kariuki Marera. He decided to file a case in Embu High Court in 2009. Before the dust settled, two other persons namely Mr. & Mrs Saban Said Gathuri came alleging that they were owners of land parcel No. Kerugoya/Gathigiriri/304. The two disappeared and came back in 2017. He decided to file this case because people kept disturbing him using Police officers. He said that he was arrested in 2015 and charged while this case was pending. He stated that his mother passed away in 2015 while this suit was pending. He said that before he was arrested, nobody had claimed the suit lands where they have lived for more than 40 years. That there is no surveyor who has come to conduct survey work on the ground except the one done during the adjudication period in 1974.

### **2<sup>nd</sup> and 6<sup>th</sup> Defendants Case**

The 6<sup>th</sup> Defendant testified on his behalf and that of the 2<sup>nd</sup> Defendant who is also his father aged 90 years of age. He was referred his witness statement recorded on 12/05/2015 which he adopted in his evidence. He was also shown a list of documents containing 4 items dated 04/12/2014 and filed on 05/12/2014. He produced the same as D-exhibit No. 1,2,3 &4 respectively. According to the 6<sup>th</sup>

defendant, the suit land was registered in the name of his father Kariuki Marera on 20/06/1975. His father later changed his name and caused the land records to be corrected in tandem with the change of name on 13/04/2005. On 16/09/2009, the suit land was transferred to him by his father. On 17/09/2009, he was issued with a Title Deed. He stated that his father acquired the suit land as compensation by the then County Council of Kirinyaga for the expansion of Sagana Township. He said that the County Council took his father's land in exchange for land parcel number Kirinyaga/Gathigiriri/303 Measuring approximately 2.0Ha. M (5 Acres). He further stated that in the year 2000, he relocated from Nairobi to Mwea after he was asked by his father to take care of the suit property as well as a Rice Holding No. 3478 within Mwea Irrigation scheme. Despite the instructions given by his father, the 6<sup>th</sup> defendant was not able to take over the control and management of the suit land as there was a man who was hostile grazing on the land whom he

identified as the 1<sup>st</sup> plaintiff herein. He then reported to Wang'uru Police Station.

### **7<sup>th</sup> and 8<sup>th</sup> Defendants Case**

The 8<sup>th</sup> Defendant, Asha Shabaani Gathuri also testified on her behalf and that of the 7<sup>th</sup> defendant. In her evidence, the 8<sup>th</sup> defendant said that she lives in Nairobi and that the 1<sup>st</sup> defendant, Saban Said Gathuri (now deceased) passed away on 13/05/1983. As regards the suit land parcel No. Kirinyaga/Gathigiriri/304, she

stated that the same was acquired by his father as compensation after the County Council of Kirinyaga took away his land parcel No. Kiine/Sagana/409. She was referred to her list of documents dated 04/02/2020 which she produced as D-exhibit No. 1. The document is a green card indicating that her father was registered as proprietor on 20/06/1975. She stated that initially, they were cultivating the suit land with her mother but they are no longer utilizing the land now but is being utilized by the 1<sup>st</sup> plaintiff.

### **Plaintiffs Submissions**

The Plaintiffs through the firm of Osoro Juma & Co. Advocates submitted they have proved their claim in respect of the suit properties to the required standard. They referred to the following case law; *Richard Wafwafwa Songoi Vs Ben Munyifwa Songoi (2020) e KLR, Mbira Vs Gachuhi,(2002) I EALR 137, Alfred Welimo Vs Mulaa Sumba Barasa C.A.No. 186 of 2011.*

### **2<sup>nd</sup> and 6<sup>th</sup> Defendants Submissions**

The firm of KIGURU KAHIGAH & CO. ADVOCATES submitted on behalf of the 2<sup>nd</sup> and 6<sup>th</sup> defendants that the plaintiffs' suit is based on fraud. However, they submitted that the issue of adverse possession never arose throughout the pleadings and even in their testimony and that it was only in during re-examination that the plaintiff had a change of mind when he stated that he was claiming the suit land in his capacity for having lived therein for more than 40 years. This they submitted is an afterthought. They also submitted that a claim cannot legally be introduced at the submission stage. It was the 2<sup>nd</sup> and 6<sup>th</sup> defendants' submission that the issue of impeaching a title is not a casual process but the burden of proof is one above the ordinary standard of proof in civil cases. They also submitted that the 2<sup>nd</sup> plaintiff lack the legal capacity to institute this suit as he is not the administrator of his deceased parents. They cited the following cases: *Alfred Sagero Omweri Vs Kennedy Omweri Ondieki Kisii ELC No.266 of 2012 (2015) e KLR*, In the matter of the Estate of Kithogu Charii (Deceased) Kerugoya High Court P & A Succession Cause No. 101 of 2016 (UR).

### **7<sup>th</sup> & 8<sup>th</sup> Defendants Submissions**

The firm of C.S MACHARIA & CO. ADVOCATES submitted and referred to the Notice of Preliminary Objection dated 24/08/2017 where they sought to have this suit dismissed as against the 1st defendant was sued in person long after his demise and that the plaintiffs' claim was time barred. They also argued that the cause of action herein as against the

1st defendant occurred on the 20/06 1975 when the 1st defendant got registered as the sole proprietor of land parcel No. Kirinyaga/Gathigiriri/304 and that the suit herein was instituted in 2009, 34 years later without leave of court. They also submitted that during trial and at the submission stage, the plaintiffs attempted to bring in a claim for adverse possession on the suit land which are not raised in their pleadings. On that note, they submitted that the rule of procedure is that a party is bound by his pleadings. They referred to *Sections 24 and 25 of the Land Registration Act, No. 3 of 2012 as well as Section 7 of the Limitation of Actions Act.*

### **Legal Analysis and Decision**

I have considered the pleadings by the parties, their evidence and legal arguments through submissions. I have equally considered the applicable law. The plaintiffs have instituted this suit claiming the suit properties registration No. Kirinyaga/Gathigiriri/303 & 304. According to the evidence adduced, the plaintiffs were allocated the suit properties by the then County Council of Kirinyaga (defunct). However, they were visited by strange people and upon conducting an official search realized that the defendants had obtained titles to the suit properties fraudulently. They set out particulars of fraud under paragraph 7 of their plaint dated 30/04/2009. The following distil as issues for determination:

- (1) Whether the plaintiffs have proved the allegations of fraud for cancellation of the defendants' titles to the suit properties to the required standard?**
- (2) Whether the plaintiffs have lived in the suit premises openly without interruption and without the registered owners' consent continuously for a period not less than 12 years?**
- (3) What appropriate orders to issue?**
- (4) Who will bear the costs of the suit?**

### **Whether the plaintiffs have proved the allegations of fraud for cancellation of the defendants' titles to the suit properties to the required standard**

It is trite law that title deed or a certificate of title as an instrument of ownership of property is jealously protected in both the Constitution and statute law. *Section 26(1) of the Land Registration Act, No. 3 of 2012* provides as follows:

*“The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances easements, restrictions, and conditions contained or endorsed in the certificate, 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”.*

In their pleadings, the plaintiffs have alleged that the defendants acquired titles to the suit properties fraudulently. Fraud is a serious matter which a party must demonstrate that the proprietor was a party in the commission of the alleged fraud. The standard of proof in allegations of fraud is usually higher than the balance of probabilities required in civil claims but lower than beyond reasonable doubt. Other than the averments in plaint, the plaintiffs did not prove the commission of fraud by the defendants in the acquisition of the suit properties.

### **Whether the plaintiffs have lived in the suit premises openly without interruption and without the owner's consent continuously for a period not less than 12 years**

The plaintiffs at paragraph 8 of the plaint averred as follows;

*“(8) The plaintiff came to realize that their parcels of land where they have lived for more than 20 years now have been registered in the 1<sup>st</sup> and 2<sup>nd</sup> defendant's names without their knowledge and therefore claim for an injunction to restrain the defendants from further transferring the properties to any third parties till the suit is fully heard and determined by this Honourable Court”.*

Though the plaintiffs did not specifically plead for a claim of the suit properties under the doctrine of adverse possession, the averment under paragraph 8 of the plaint leaves no doubt in the mind of this court that the plaintiffs are seeking a declaration that they have acquired the suit properties by way of adverse possession. In his testimony, the 1<sup>st</sup> plaintiff stated that he was born in the suit properties in the year 1964 where they have lived openly without interruption and permission from the defendants. The 1<sup>st</sup> plaintiff further testified that it was not until the 16<sup>th</sup> July 2007 when one in the company of the Area O.C.S a Mr. Karigwi Mwangi went to the suit premises where him and his mother were arrested on complaints of forceful detainer.

The 6<sup>th</sup> defendant stated that the suit land parcel No. Kirinyaga/Gathigiriri/303 was given to his father as compensation after the County Council of Kirinyaga compulsorily acquired his land in the year 1970 or thereabouts. He produced a green card, a certificate of search as well

as a title deed. However, the 6<sup>th</sup> defendant admitted that he was not in possession of the suit land and that explains why they want the plaintiffs evicted from the suit lands.

The 8<sup>th</sup> defendant lays claim to land parcel No. Kirinyaga/Gathigiriri/304 which

she claims is registered in the name of her late father, Saban Said Gathuri. She stated that the suit land was given to him after the County Council of Kirinyaga compulsorily acquired his land parcel in Sagana area being No. Kiine/Sagana/409. The 8<sup>th</sup> defendant also admitted that they are not utilizing the suit property. The 8<sup>th</sup> defendant produced a copy of green card showing that the suit land parcel No. Kirinyaga/Gathigiriri/304 was registered in favour of the 1<sup>st</sup> defendant on 20/06/1975.

I am satisfied that the plaintiff has proved and brought himself within principles of adverse possession. The principles of adverse possession have been discussed in a number of cases. In the case of **Wambugu Vs Njuguna (2004) 2 KLR 309**, the Court of Appeal stated as follows;

*“(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 or the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title (is an act)... inconsistency 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 been 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”.*

Similarly, in the case of **Samuel Miki Wawru Vs Jane Njeri Richu, Civil Appeal No. 122 of 2001(U.R)**, it was held;

*“..... It is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in (accordance with) provisions of an Agreement of sale or lease or otherwise. Further, as the High court correctly held in JANDU VS KIRPAL(1975)E.A225, possession does not become adverse before the end of the period for which permission to occupy has been granted”.*

The same principles have also been applied in the Supreme Court of India in the case of **Karuataka Board of Wakf Vs Government of India & Others (2004) 10 Sc 779** where the essentials of adverse possession were discussed as follows:

*“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion - Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well settled principle that a party claiming adverse possession must prove that his possession is “necvi, nec clam, nec precarious”, that is peaceful, open and continuous. The possession must adequately in continuity, in publicity, and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and confirmed over the statutory period.”*

Now turning to the evidence tendered, it is clear the plaintiffs dispossessed the defendants herein who are the true and rightful owners and have lived in the suit land openly and continuously without interruption from 1975 to date. The transfer of land parcel No. Kirinyaga/Gathigiriri/303 from the 2<sup>nd</sup> defendant to the 6<sup>th</sup> defendant in 2009 did not interrupt the plaintiffs' hostile occupation of the suit properties.

### **Conclusion**

In view of the matters aforementioned, I find the plaintiffs suit has been proved to the required standard on Adverse possession and do hereby enter judgment as follows:-

**(A) That the plaintiffs have become entitled to be registered proprietors of the suit properties namely, Kirinyaga/Gathigiriri/303 and Kerugoya/Gathigiriri/304 by virtue of the doctrine of Adverse possession.**

**(B) That the County Land Registrar, Kirinyaga is directed to rectify the register by cancelling the names of the MORRIS KARIUKI and SABAN SAID GATHURI and replacing with that of the Plaintiffs as owners.**

**(C) The Deputy Registrar of this Honourable Court do execute all necessary documents to facilitate registration of the Plaintiffs as proprietors of the suit properties namely; Kirinyaga/Gathigiriri/303 and Kirinyaga/Gathigiriri/304.**

**(D) The Land Registrar to dispense with the production of copies of National Identity Cards, Personal Identification Number(PIN) Passport size photographs for SABAN SAID GATHURI and MORRIS KARIUKI.**

**(E) Each party to bear their own costs.**

**JUDGMENT READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 3RD DAY OF DECEMBER, 2021.**

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**HON. E.C. CHERONO**

**ELC JUDGE**

*In the presence of:*

1. *Mr. Osoo for the Plaintiff*
2. *Mr. F.M. Muchira holding brief for C.S. Macharia for the Interested parties*
3. *3<sup>d</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants/Advocate – absent*
4. *Kabuta, Court clerk.*