



**REPUBLIC OF KENYA**

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

**ELC NO.59 OF 2018(OS)**

**SAMSON GITAU DANIEL KIRUME.....PLAINTIFF/APPLICANT**

**VERSUS**

**MUTHONI WAITARA** (sued as the Administrator of the estate of

**WAITARA GITHIGE).....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**VIRGINIA WAMBUI MUIRURE KAGAMBA..2<sup>ND</sup> DEFENDANT/RESPONDENT**

**NANCY NJOKI MWANGI.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**REGINA WAMBUI KAMAU.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**WALTER KARANJA NGURU.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**JUDGMENT**

1. By way of originating summons, the Plaintiff/Applicant sued the Defendants/Respondents seeking the orders as follows;

- a. That the Honourable Court do make a declaration that the Applicant has acquired by way of Adverse Possession an absolute title to land title number LOC.20/GITHURI/216(now 3893, 3894,3895,3896, 3897,3898,3899,3900,3901, 3902, 3903, 3904, 3905, 3906, 3907 and 3908.
- b. That an order be issued directing the Respondents to execute all documents and take all steps necessary to effect transfer to the Applicant land Parcel No. number LOC.20/GITHURI/216 (Now 3893, 3894,3895,3896, 3897,3898,3899,3900,3901, 3902, 3903, 3904, 3905, 3906, 3907 and 3908.
- c. That the costs of this suit be granted to the Applicant.

2. The summons are supported by the affidavit of the Plaintiff where he states that ; he acquired the suit land through purchase from Waitara Githige,the original owner in 1975 and has been in uninterrupted, open and exclusive occupation since;that he has established title by adverse possession; the 1<sup>st</sup> Respondents is the widow and administrator of the estate of Waitara Githige who sold the suit land to the 2<sup>nd</sup> Respondentswho then subdivided it into various plots, some of which she has sold to the 3<sup>rd</sup> – 5<sup>th</sup> Respondents.

3. The 1<sup>st</sup> Respondent denied the Applicant's claim and stated that the suit land was registered in the name of her husband for which she was an administrator of his estate. That she sold the suit land to the 1<sup>st</sup> Respondent and the title was transmitted to her vide the confirmation of grant issued in Succ Cause No 398 of 2016. That her husband died in 1982 and the land has since been bare, uncultivated, unoccupied and in her control all the years until she sold it to the 2<sup>nd</sup> Respondent.

4. The 2<sup>nd</sup> Respondent stated that he was a direct beneficiary of the suit land and acquired it through transmission vide succession cause No 398 of 2016 on account of purchase. That upon purchase she embarked on the subdivision of the land into various plots some of which she sold to the 3-5<sup>th</sup> Defendants. That upon taking over the suit land, she cleared the bushes and subdivided the land. She denied the Plaintiffs claim that the suit land was occupied by him or at all. That this is consistent with the valuation report that indicated that the suit land is unoccupied, uncultivated and that it has been bushy and bare for the longest of time.

5. The 3<sup>rd</sup> – 5<sup>th</sup> Defendants did not file any response to the suit.

6. The Plaintiff led evidence and reiterated the contents of his supporting affidavit. He stated that he bought the suit land from the late Waitara in 1975 and signed two hand written agreements which he adduced in evidence dated the 26/1/75 and 25/2/75. That he was put into possession and has been in occupation since then. In addition, he stated that he dug the borehole on the suit land in 1986 and that it is still in use. He refuted the site report that indicated the said borehole is in disuse. The he fenced the suit land on the left hand side, built the kiosk in 1985 which was operated by his daughter until she stopped some years back due to insecurity. That he used to raise tobacco seedlings on the suit land until he stopped in 1998 when his wife passed on/ when he bought another land. Further, he admitted that during the site visit none of his cows were grazing on the suit land. That he has not built any house as he lives on his farm parcel No. 258. That the land has natural bushy vegetation with no activity at all. He informed the Court that Felis Njeri Macharia fenced the suit land on the left hand side.

7. PW2 – Kamau Kimani testified that he does not know the suit land as he lives far away from it. That to his knowledge the Plaintiff had previously constructed a house but was demolished and that the kiosk on the edge of the suit land is non-operational. He also said he does not know the owners of the lands neighbouring the suit land.

8. DW1- Muthini Waitara testified and stated that the Plaintiff is the step brother of Waitara Githinge , her late husband who died in 1982. That the land has been unoccupied, virgin and bare land until she sold it to the 2<sup>nd</sup> Respondents after succeeding the estate of the late Waitara. She stated that the kiosk was put there recently by the plaintiff, just before the site visit by the court. That the suit land is not fenced and she did not see any borehole. She denied that her husband sold the suit land to the Plaintiff.

9. DW2- Virginia Wamboi Mururi testified that she is the purchaser for the suit land. That she subdivided the suit land into several plots and sold some to the Respondents. That when she took over possession of the suit land the same was bare uncultivated and bushy and cleared the bushes and subdivided the land and affixed the beacons. That the borehole on site is disused as well as the kiosk at the edge of the property. The fence on the left hand side was done by Felis Macharia and the other end was done by Gichohi, both being owners of the neighbouring land. That two sides of the suit land are not fenced. That there were traces of sand harvesting on one part of the property which must have taken place several years ago.

10. DW 3 – Peter Gitau Ngugi led evidence on behalf of the Defendnats and produced a valuation report marked DEX No. 13.

11. The parties have filed written submissions which I have read and considered .

12. The key issue is whether the Applicant has established title by adverse possession.

13. The doctrine of adverse possession is one of the ways of land acquisition in Kenya. I will highlight some of the statutory provisions that underpin the doctrine as set out in sections 7, 13, 16, 17 and 38 of the Limitations of Actions Act Cap 22 and section 28(h) of the Registration of Land Act No 6 of 2012. Section 7 of the Land Act, 2012 provides that prescription is one of the ways of acquisition of land. The combined effect of these sections is to extinguish the title of the proprietor of the land in favour of the adverse possessor at the expiry of 12 years of occupation of the adverse possession on the suit land.

14. In the case of **Kasuve Vs Mwaani Investments Limited & 4 others 1 KLR 184**, the Court of Appeal restated what a Plaintiff in a claim for adverse possession has to prove;

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

15. The key test in assessing adverse possession is that the owner of the land must have been dispossessed or have discontinued possession of the property. In the case of **Francis Gacharu Kariri v Peter Njoroge Mairu, Civil Appeal No. 293 of 2002 (UR)**:

“...the possession must not be broken, or any endeavours to interrupt it.”

16. According to the evidence led by the Plaintiff, he stated that he used to cultivate the land until 1998 when his wife died, inter alia, he also stated in evidence that he cultivated tobacco seedlings until 1990 when he stopped. He also stated that he ceased operating the kiosk some time back through his daughter due to in security in the area. During the site visit the Court noted that the borehole was disused as well as the kiosk. That sand harvesting may have been done many years later. That the land was generally bushy except for the cleared areas for which beacons were affixed.

17. The totality of the evidence above is that the Plaintiff has not established on a balance of probabilities that he has been in possession continuously uninterrupted and for the duration of the statutory period of 12 years. He admitted that he relinquished possession in the 1990s and going by the test that one must meet to qualify for title under adverse possession, the Plaintiff must not relinquish possession. He must demonstrate that he is in control of the suit land continuously, while having dispossessed the registered owner.

18. In this case, the Court is of the view that the Plaintiff failed to meet this test.

19. The site report agrees with the evidence of DW1 and DW2 that there was no evidence that the Plaintiff fenced the suit land. Evidence adduced on record shows that the two sides that were fenced were done by Felis Njeri and Gichohi who are the owners of the neighbouring land. Fencing denotes control of the suit property and it is clear that the Plaintiff never took full control of the property and therefore occupation and possession is in doubt.

20. There is no evidence of the Plaintiff having used the land in manner inconsistent with that of the registered owner. The Plaintiff did not establish any animus possidendi on the suit land.

21. Based on the evidence adduced and on a balance of probability the Court concludes that the Plaintiff failed to prove his case and the suit is dismissed.

22. The costs of the suit shall be met by the Plaintiff in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

**23. It is so ordered.**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 30<sup>TH</sup> DAY OF JANUARY 2020.**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Mwaniki for the Plaintiff

Kirubi for the 1<sup>st</sup> – 5<sup>th</sup> Defendants

Irene and Njeri, Court Assistants