



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC NO 26 OF 2019 (OS)

KAMAU GATHITU.....1ST PLAINTIFF
TERESIA NYOKABI MWANGI.....2ND PLAINTIFF
PETER GATHITU WAIHENYA.....3RD PLAINTIFF
BEATRICE MUTHONI NDUNGU.....4TH PLAINTIFF
DORIS WANJIKU MUIRURI.....5TH PLAINTIFF
JOHN MWANGI MUIRURI.....6TH PLAINTIFF
JAMES KARIUKI CHARAGU.....7TH PLAINTIFF
ALICE WAIRIMU CHARAGU.....8TH PLAINTIFF

VERSUS

DAVID HIUHU KAMAU.....1ST DEFENDANT
CATHERINE NYOKABI HIUHU.....2ND DEFENDANT

(being the personal & legal representatives of the estate of

WANYONI WAHIUHU alias WANYONI HIUHU)

JUDGMENT

1. By way of Originating Summons dated 25/6/19 and filed on 17/7/19 the Plaintiffs sought inter alia, the following orders;

a. That the 1st - 4th Plaintiffs are entitled to be registered as the proprietors of LOC4/MURUKA/133 (suit lands) whilst the 5th -8th Plaintiffs are entitled to be registered as the owners of 1.35 acres out of land parcel LOC4/NGARARIA/324 (suit land) in place of the Defendants on the grounds that they have been in open continuous peaceful and uninterrupted occupation in excess of 12 years.

b. That titles in respect to the suit lands have been extinguished under section 17 of the Limitations of Actions Act.

c. Costs of the suit be provided.

2. The Originating Summons are supported by the affidavit of the 1st Plaintiff sworn on 25/6/19. In it he deponed that the suit land LOC4/MURUKA/133 was registered in the name of Wanyoni Wahiuhu alias Wanyoni Hiuhu in 1965. He died in 1961. That his parents Gathitu Njoka and Wairimu Gathitu bought land parcel LOC4/MURUKA/133 from the deceased in 1950s and took possession. That he and his siblings have lived on the suit land since 1960s, cultivating the land as well as burying their kin thereon. That they have occupied the suit land openly, continuously and uninterrupted for a period in excess of 12 years. That the Defendants are sued as the administrators of the estate of the late Wanyoni Wahiuhu. That the 1st -3rd Defendants claim is in respect to parcel LOC4/MURUKA/133.

3. Doris Wanjiku Muiruri, the 5th Plaintiff deponed that parcel No LOC4/NGARARIA/324 was registered in the name of Wanyoni Wahiuhu on the 8/11/66. That her mother Ruth Wanja Muiruri purchased 1.35 acres of parcel LOC4/NGARARIA /324 from the said Wanyoni and took possession in 1960 and resided thereon until her death in 2015. That she and her co-Plaintiffs (6th -8th Plaintiffs) have lived on the suit land for over 55 years openly continuously and uninterrupted.

4. The Defendants were served with the summons but they failed to enter appearance nor file defence.

5. At the trial the 1st Plaintiff led evidence and stated that he and the 2nd -4th Plaintiffs have lived on parcel LOC4/MURUKA/133 for the last 60 years. That the land is registered in the name of Wanyoni who died in 1960s. That he was born in 1950. That he and his co-Plaintiffs live on 0.35 acres each. That Wanyoni gave them permission to live on the land but after his demise the Defendants have not asked them to vacate the suit land. Wanyoni died in 1961.

6. PW2 – Doris Wanjiku Muiruri stated that she and her son live on a portion of 0.2 acres out of LOC4/NGARARIA /324. That the 1st 2nd and 8th Defendants also live on a portion of about 0.35 acres each out of parcel LOC4/NGARARIA/ 324, making the total land occupied by the Plaintiffs 1.35 acres. That they entered the suit land during demarcation when their mother Ruth Wanja purchased 0.2 acres out of parcel LOC4/NGARARIA/324. That the land is demarcated on the ground and each of the parties are aware of the said delineations on the ground.

7. I have read and considered the submissions of the Plaintiffs.

8. In **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 the following terms;

“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”.

9. Guided by the above case law inter alia for one to succeed in a claim for Adverse Possession you must show the following; that he has been in continuous and uninterrupted possession of the land for 12 years or more; that such possession has been open and notorious to the knowledge of the owner; that such possession was without the permission of the owner and lastly that the Plaintiff has asserted a hostile title to the owner of the property.

10. Section 7 of the Limitations Act provide that an action may not be brought by any person to recover land after 12 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. It is on record that the family of the Plaintiffs were put in possession of the suit land in 1962 and their entry is pursuant to a purchase.

11. Chanan Singh J, in **Jandu v Kirpal [1975] E A 225, at p 237** and Simpson, J (as he then was), in **Wainaina v Murai and others [1976] Kenya L R 227 at p 231** were unanimous that the paper owner must have knowledge of the occupation of the adverse possessor and that he has been dispossessed. In this case the Defendants live in the same neighbourhood and have had knowledge of the open and exclusive possession of the suit land by the Plaintiffs.

12. From the undefended evidence led by the two witnesses they have been in open exclusive and uninterrupted possession of the suit lands. Evidence was led that the Plaintiffs were born and grew up on the suit land with their families. They exhibited photographs showing cultivation and developments on the land to evidence their utilization as of right and which are inconsistent with the enjoyment of the paper owner. There is no evidence to show that the Plaintiffs have been dispossessed nor that they have relinquished their possession in the suit land. They led evidence that they have buried their next of kin without any objection from the Defendants some of whom live on the portion of parcel LOC4/NGARARIA /324.

13. It is in evidence that the title owner passed away in 1961. The Defendants are appointed administrators of his estate on the 26/10/15. Under Section 16 of the Limitation of Actions Act, Chapter 22 Laws of Kenya, death of a registered owner of land does not stop time from running for the purposes of Adverse Possession. Section 16 of the Limitation of Actions Act, Chapter 22 Laws of Kenya provides as follows:

“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 letters of administration.”

14. The right of the administrator’s claim to the suit property dates back to the date of death of Wanyoni. For the purposes of limitation of actions, time started running against the Defendants from 1960 when the Plaintiff’s parents entered the suit lands. By the time the Defendants obtained grant of letters of administration in 2015, the right to title to the suit lands had been extinguished in 1972. Any claim by the Defendants over the suit property was already time barred, the Plaintiffs and their deceased mother having occupied the suit property continuously for over 55 years.

15. I am persuaded that the Plaintiffs have established title by way of Adverse Possession over the suit lands. The suit succeeds.

16. Final orders;

a. That the 1st - 4th Plaintiffs are entitled to be registered as the proprietors of LOC4/MURUKA/133 (suit lands).

b. The 5th -8th Plaintiffs are entitled to be registered as the owners of 1.35 acres out of land parcel LOC4/NGARARIA/324 (suit land) in place of the Defendants.

c. That titles in respect to the suit lands have been extinguished under section 17 of the Limitations of Actions Act.

d. I make no orders as to costs.

17. **It is so ordered.**

DATED, DELIVERED AND SIGNED AT MURANG'A THIS 27TH DAY OF JANUARY, 2020.

J.G. KEMEI

JUDGE.

Delivered in open Court in the presence of:

Ms Monje HB for Kanyi for the 1st -8th Plaintiffs

1st & 2nd Defendants – Absent

Irene and Njeri, Court Assistants