



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MURANGA**

**ELC NO. 34 OF 2017(OS)**

**JANE NJERI MWANGI**

(suing as the administrator of the estate Of **JAMES MWANGI MUCHACHI**) - **PLAINTIFF**

**VS**

**JANE WARUINI GITHONGE**

- **DEFENDANT**

**JUDGMENT**

1. The Originating Summons taken out by the Plaintiff against the Defendant sought the following orders;

- a. That the court do make a declaration that the applicant has acquired by way of Adverse Possession an absolute title to the portion of land measuring 0.2 acres out of land parcel No LOC8/GATUYA/885.
- b. That an order be issued directing the Respondent to execute all documents and take all steps necessary to effect transfer to the applicant of the portion of land measuring 0.2 acres out of LOC8/GATUYA/885 in default whereof the said documents be executed by the Deputy Registrar of this honourable court.
- c. That costs of the suit be granted for

2. The summons are supported by the grounds adduced thereto and the supporting affidavit of the Plaintiff dated the 26/8/19. It is her case that she is entitled to title by way of Adverse Possession of 0.2 acres out of the suit land on grounds that she has occupied the said portion exclusively, continuous and uninterrupted since 1993 to date.

3. She averred that her husband the late James Mwangi Muchachi purchased 0.2 acres of LOC8/GATUYA/762 in 1993 and paid the full purchase price and took possession. In the year 2000, she stated that the land was subdivided into parcel No.s LOC8/GATUYA /884 and 885. That her husband purchased parcel LOC8/GATUYA 884 as well as 0.2-acre portion of parcel LOC8/GATUYA/ 885 and they took possession without interruption. In the year 2011 the Defendant became registered as owner of parcel LOC8/GATUYA /885 by way of a gift.

4. She annexed the copy of Agreement of Sale, the Letters of Grant of Administration together with the certificate of official search of the suit land.

5. The Defendant opposed the Summons and admitted that the Plaintiff's husband bought parcel LOC8/GATUYA /884 and that she was given parcel LOC8/GATUYA /885 as a gift in 2000 but only became registered in the year 2011. That upon being gifted with the land she did not take possession of the suit land until 2011 as she was working in a Kiambu farm. She admitted that on her return she found the Plaintiff has been cultivating 0.2 acres of her land but she did not take any steps to evict her. She was unsure for how long the Plaintiff had been cultivating the portion of 0.2 acres because she was not present.

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

7. The law on Adverse Possession is now settled. 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 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”.

8. In the case of **Wanyoike v Kahiri [1979]** KLR at page 239 Justice Todd (as he then was), held that in a purchase scenario, the period of limitation starts to run on the date of the payment of the last installment of the purchase. In the case at hand the Plaintiff pleaded that her husband purchased the suit land in 1993 and paid in full took possession upon payment of the consideration agreed.

9. Time therefore started running from 1993 and Adverse Possession accrued in the year 2005. The original owner therefore held the suit land in trust for the Plaintiff. The gift conveyed to the Defendant was encumbered with a trust in favour of the adverse possessor.

10. 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 Defendant admitted that she works in Kiambu and that the Plaintiff has been in possession of the suit land thus she had knowledge of the said possession and occupation.

11. The Defendant contended that she has tried to stop the Plaintiff from occupying the land through the intervention of the local administrators in vain. In the case of **Joseph Gahumi Kiritu Vs Lawrence Munyambu Kabura CA No 20 OF 1993** Justice Kwach JA (as he then was) stated as follows;

“The passage from Chesire’s Modern Law of Real Property to which Porter JA made reference in **Githu Vs Ndeete** is important and deserves to be read in full. ....Time which has begun running under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that mere formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. .... He must either make a peaceable and effective entry, or sue for recovery of the land.” (emphasis is mine).

12. The Defendant failed to lead evidence to show that she dispossessed the Plaintiff from the suit land nor that the Plaintiff has relinquished possession of the suit land. Summoning the Plaintiff to the local district officer’s office does not stop time from running. Time only stops in three instances; dispossession of the Plaintiff; Defendant retaking possession and or the Defendant filing suit to assert title. None of these instances have arisen.

13. On a balance of probability, it is the finding of the court that the Plaintiff has proved that her possession has been open, peaceful and continuous for the period of 21 years.

14. The suit is allowed and I enter judgement in favour of the Plaintiff. She will also get costs of the suit.

**15. It is so ordered.**

**DELIVERED, DATED AND SIGNED AT MURANG’A THIS 27<sup>TH</sup> DAY OF FEBRUARY 2020**

**J. G. KEMEI**

**JUDGE**

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

Plaintiff: Present in person. Advocate is Absent

Gacheru HB for Wangechi Munene for the Defendant

Irene and Njeri, Court Assistants