



**REPUBLIC OF KENYA**

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

**E.L.C. CASE NO 8 OF 2018 (O.S)**

**LUCY WAMUGO NJERU.....PLAINTIFF**

**VERSUS**

**AMOS MUCEMI KIBOI.....DEFENDANT**

**JUDGEMENT**

1. By an originating summons dated 12<sup>th</sup> February 2018 and amended on 12<sup>th</sup> April 2018 expressed to be brought under **Sections 28(h) of the Land Registration Act, 2012, Order 37 of the Civil Procedure Rules, Sections 7, 17, 18, 37 and 38 of the Limitation of Actions Act (Cap. 22)** the Plaintiff sought an order for adverse possession of *Title No. Evurore/Nguthi/2253* (hereafter *the suit property*). The Plaintiff also sought an order for the Defendant to be ordered to transfer the suit property to him in default of which the Executive Officer of the court should be authorized to do so.

2. The Plaintiff also set out ten (10) questions for determination in the originating summons all of which boiled down to really three issues. The first is whether or not the Plaintiff had acquired adverse possession of the suit property. The second is whether the Plaintiff had acquired an overriding interest over the suit property under **Section 28 (h)** of the **Land Registration Act, 2012**. The third is on who shall bear the costs of the suit.

3. The material on record indicates that prior to the filing of the originating summons the Defendant had filed a suit seeking eviction of the Plaintiff from the suit property. That suit is *Embu CMCC No. 24 of 2014*. The record further shows that the said suit was transferred to this court on 22<sup>nd</sup> January 2019 and consolidated with the instant originating summons for trial and disposal. It was directed that the originating summons shall be treated as the main suit whereas the Defendant's suit for eviction shall be treated as a counterclaim.

4. When the suit was listed for hearing on 8<sup>th</sup> October 2019, the Plaintiff testified on her own behalf and called two other witnesses in support of her claim for adverse possession. The Plaintiff adopted her witness statement dated 12<sup>th</sup> February 2018 and the affidavit in support of the originating summons as her sworn testimony. It was her case that she had been in occupation of the suit property since 1973. She stated that she had some dwelling houses on the suit property and that she had planted various cash crops and food crops thereon. She conceded having received demand letters and a letter from the location Chief asking her to vacate the suit property.

5. The other two witnesses testified that the Plaintiff had been residing on the suit property for a very long time. PW2 was the local Chief of the area in issue whereas PW3 was the Plaintiff's own son. The evidence of the two witnesses simply corroborated the Plaintiff's evidence that she was the one in occupation of the suit property and that the Defendant had never resided thereon.

6. The Defendant testified at the trial as the sole defence witness. His case was that he was the registered proprietor of the suit property having inherited it from his late father. He, therefore, wanted to assert his property rights and to have the Plaintiff evicted. During cross-examination, he conceded that the Plaintiff is the one who had always been in possession and that neither he nor his late father had ever occupied or utilized the suit property. He also conceded that the Plaintiff had some dwelling houses thereon.

7. Upon conclusion of the hearing, the court granted the Plaintiff 30 days to file and serve her written submissions whereas the Defendant was given 30 days upon the lapse of the Plaintiff's period to file his. The record shows that the Plaintiff filed her written submissions on 19<sup>th</sup> January 2020. However, the Defendant's submissions were not on record by the time of preparation of the judgement.

8. The court has considered the pleadings, affidavits, and documents on record. The court has also considered the oral evidence of the parties in this matter. The court is of the opinion that the following issues arise for determination in the consolidated suits:

a) *Whether the Plaintiff in the originating summons has proved her claim for adverse possession.*

b) *Whether the Defendant is entitled to an eviction order sought in the counterclaim.*

c) Who shall bear the costs of the suit and counterclaim.

9. The court has considered the evidence and submissions on record on the 1<sup>st</sup> issue. There is abundant evidence to demonstrate that the Plaintiff had been in occupation of the suit property prior to the Defendant's suit for eviction being filed in 2014. The Defendant himself conceded that neither he nor his late father who was the previous registered proprietor had occupied or utilized the suit property. There is no doubt that the Plaintiff's occupation has been open, continuous and exclusive. There is no indication that it was with the consent or licence of the registered owner

10. In case of **Kasuve Vs Mwaani Investments Ltd and 4 Others [2004] 1 KLR 184** the elements of adverse possession were summarized as follows:

**“...and 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 and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, Wanja Vs Saikwa No. 2 [1984] KLR 284. A title by adverse possession can be acquired under the Limitation of Actions Act for part of the land...”**

11. The court is thus satisfied that the Plaintiff has demonstrated all the elements of adverse possession. There is no doubt that the Plaintiff had dispossessed the true owner by her actions of occupying the suit property, erecting houses thereon, and planting both cash crops and food crops. There is no doubt that those actions were inconsistent with the rights of the registered owner. Accordingly, the 1<sup>st</sup> issue is answered in the affirmative.

12. The 2<sup>nd</sup> issue is whether the Defendant is entitled to the order of eviction sought in his suit which has been treated as the counterclaim. Since the court has found and held that the plaintiff has demonstrated her claim for adverse possession then it would follow that the Defendant's right to recover the suit property has been extinguished by operation of law by virtue of **Sections 7, 37 and 38 of the Limitation of Actions Act (Cap. 22)**. The consequence of this is that the Defendant's counterclaim for eviction is statute-barred. Accordingly, the 2<sup>nd</sup> issue is answered in the negative.

13. The 3<sup>rd</sup> and final issue is on costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of the action unless the court, for good reason, directs otherwise. See **Hussein Jannohamed & Sons V Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court has considered the nature of the action herein and the fact that the Plaintiff shall acquire the suit property through adverse possession. Accordingly, the order which commands itself to the court is that each party shall bear his own costs of both the originating summons and the counterclaim.

14. The upshot of the foregoing is that the court finds and holds that the Plaintiff has proved her claim for adverse possession. The court further finds and holds that the Defendant's claim for an eviction order is statute barred under the Limitation of Actions Act. Consequently, the court makes the following orders for disposal of the consolidated suits:

a) *A declaration be and is hereby made under Section 38 of the Limitation of Actions Act (Cap. 22) that the Plaintiff has become entitled to be registered as proprietor of Title No. Evurore/Nguthi/2253 in place of the Defendant, Amos Mucemi Kiboi, on account of adverse possession.*

b) *The Defendant shall execute all documents and instruments to facilitate the transfer of the suit property to the Plaintiff in default of which the Deputy Registrar of the court shall do so on his behalf.*

c) *The Defendant's suit, formerly Embu CMCC No. 34 of 2014, be and is hereby dismissed in its entirety.*

d) *Each party shall bear his own costs of the suit and counterclaim.*

15. It is so decided.

**JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 13TH DAY OF FEBRUARY, 2020**

In the presence of Ms. Kithaka for the Plaintiff and the Defendant in person.

Court Assistant: Mr. Muinde

**Y.M. ANGIMA**

**JUDGE**

**13.02.2020**