



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT EMBU**

**E.L.C. CASE NO. 104 OF 2015 (O.S.)**

**(FORMERLY KERUGOYA ELC NO. 93 OF 2013)**

**IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT AND**

**IN THE MATTER OF LAND PARCEL NUMBER NTHAWA/GITIBURI/1650**

**JOACHIM NJUGUNA MBUGUA.....1<sup>ST</sup> PLAINTIFF**

**JOHN NDUNG’U MBUGUA.....2<sup>ND</sup> PLAINTIFF**

**PAUL NJOROGI MBUGUA.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**GITONGA FRANCIS NJERU.....DEFENDANT**

**JUDGEMENT**

1. By an originating summons dated 7<sup>th</sup> May 2010 brought under **Section 38** of the **Limitation of the Action Act (Cap. 22)** and **Order XXXVI Rule 3D** of the retired **Civil Procedure Rules (1948)** the Plaintiffs sought the following reliefs against the Defendant:

- a) That the Plaintiffs be declared to have become entitled to 0.7 acres out of land parcel Nthawa/Gitiburi/1650 registered under the Registered Land Act (Cap 300) by having had adverse possession of the said land for over twelve (12) years.*
- b) That the Defendant’s title to the said land be declared extinguished and or invalid, null and void and the Plaintiffs be registered as proprietors of 0.7 acres out of the said land.*
- c) That the Defendant does execute the necessary documents to effect the transfer of 0.7 acres out of land parcel Nthawa/Gitiburi/1650.*
- d) That the costs be provided for by the Defendant.*

2. The Plaintiffs’ case was that they had acquired adverse possession of *Title No. Nthawa/Gitiburi/1650* (hereafter the *suit property*) under the **Limitation of Actions Act (Cap. 22)**. In a supporting affidavit sworn jointly by the 3 Plaintiffs, they contended that they had been in open, continuous and exclusive possession of the suit property since 1985. They further stated that they had developed the suit property by building rental houses and cultivating crops thereon.

3. The Defendant filed a replying affidavit sworn on 1<sup>st</sup> November 2013 in answer to the said originating summons. The Defendant denied that the Plaintiffs had ever been in possession of the suit property. He further stated that the suit property had been the subject of protracted legal proceedings which included *Civil Appeal No. 52 of 1996* whereby the Defendant’s clan was said to have prevailed against a rival clan. The Defendant, therefore, urged the court to dismiss the said originating summons with costs.

4. At the trial hereof, the Plaintiffs called 2 witnesses in support of their case. The 3<sup>rd</sup> Plaintiff testified as PW1. He adopted his witness statement dated 6<sup>th</sup> July 2017 as his sworn testimony and produced a copy of a surveyor’s report dated 15<sup>th</sup> November 2019 in support of the summons. The second witness was Benson K. Ireri (PW2) who adopted his witness statement dated 6<sup>th</sup> July 2017 as his evidence in chief.

5. The Defendant did not tender any evidence at the trial. His advocate had not filed any trial bundle and his application for adjournment was declined by the court. The court declined to adjourn the suit at the instance of the Defendant because the suit had been pending for over 9 years and the Defendant had been granted sufficient time in the past to prepare for trial.

6. The court has considered the pleadings, affidavits, documents and evidence on record in this matter. The court is of the opinion that the main issue for determination is whether or not the Plaintiffs have demonstrated their claim for adverse possession to the required standard.

7. The elements of adverse possession were summarized in the case of **Kasuve Vs Mwaani Investments Ltd & 4 Others [2004] 1 KLR 184** 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 Sakwa No. 2 [1984] KLR 284. A title by adverse possession can be acquired under the Limitation of Actions Act for part of the land...”**

8. The court has considered the evidence and submissions on record on the issue of adverse possession. The Plaintiffs' evidence was that they had been in open, continuous and exclusive possession of the suit property since 1985. They stated that they had developed the suit property by building rental houses and cultivating various crops thereon without interruption.

9. The Plaintiffs' evidence was not challenged at the trial since the Defendant did not call evidence in rebuttal. In the circumstances, the court accepts the Plaintiffs' evidence as true. See **Safarilink Aviation Limited V Trident Aviation Kenya Ltd & Another [2015] eKLR**. There was no evidence of interruption of the Plaintiffs' occupation since the Defendant did not tender any evidence on the nature of the previous suits involving the suit property and their effect, if any, on the instant claim for adverse possession.

10. The court is thus satisfied that the Plaintiffs have demonstrated their claim for adverse possession of the suit property against the Defendant to the required standard. Accordingly, the court is satisfied that the Plaintiffs are entitled to the orders sought in the originating summons dated 7<sup>th</sup> May 2010.

11. The upshot of the foregoing is that the court finds and holds that the Plaintiffs have proved their suit against the Defendant to the required standard. Accordingly, judgment is hereby entered for the Plaintiffs against the Defendant in the following terms.

*a) A declaration be and is hereby made that the Defendant's title to 0.7 acres out of Title No. Nthawa/Gitiburi/1650 has become extinguished under Section 7 of the Limitation of Actions Act (Cap. 22).*

*b) A declaration be and is hereby made that the Plaintiffs have become entitled to be registered as proprietors of 0.7 acres out of Title No. Nthawa/Gitiburi/1650 on account of adverse possession under Section 38 of the Limitation of Actions Act (Cap. 22).*

*c) The Defendant shall execute all necessary documents to effect the transfer of 0.7 acres out of Title No. Nthawa/Gitiburi/1650 to the Plaintiffs in default of which the Deputy Registrar of the court shall do so on his behalf.*

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

12. It is so decided.

**JUDGEMENT DATED** and **SIGNED** in Chambers at **EMBU** this **30<sup>TH</sup> DAY** of **APRIL 2020** in the absence of the parties due to the prevailing Covid-19 situation. The Judgement was transmitted to M/s J.K. Ngaruiya & Co. Advocates for the Plaintiffs and M/s Eddie Njiru & Co. Advocates for the Defendant through the email addresses which they provided.

**Y.M. ANGIMA**

**JUDGE**

**30.04.2020**