



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 35 OF 2017**

**MARGARET WAGICHUGU KAMAU.....PLAINTIFF**

**VERSUS**

**JANE WANGARU GICHOBİ.....1<sup>ST</sup> DEFENDANT**

**MILTON WACHIRA NYINGI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

The plaintiff vide an Originating Summons dated 22<sup>nd</sup> March 2017 sought orders that the registration of the current registered owner in respect of land parcel No. KABARE/NYANGATI/2973 be cancelled and that the land be registered in the name of the plaintiff. The plaintiff's contention is that she has been on the suit land openly without permission and without interruption for a period of over 12 years. The 1<sup>st</sup> and 2<sup>nd</sup> respondent filed separate affidavits denying the plaintiff's claim.

**PLAINTIFF'S CASE**

The plaintiff in her evidence stated that she is the one utilizing the suit land. She stated that the suit land is a resultant sub-division of L.R. No. KABARE/NYANGATI/260 which belonged to her step-mother in-law and on 10<sup>th</sup> July 1996, the same was transferred to the 1<sup>st</sup> respondent and on 14<sup>th</sup> September 2005, the 1<sup>st</sup> defendant transferred the same to the 2<sup>nd</sup> defendant. A copy of the green card was produced in evidence.

**1<sup>ST</sup> RESPONDENT'S CASE**

The 1<sup>st</sup> respondent testified on oath and stated that she bought the suit land from Waruguru Kithaka. She stated that the plaintiff is the wife of one of the sons of the family who sold her the land. After she purchased the land, she visited the same but the plaintiff's husband told her that anybody who was going to step in the suit land will be taken to the mortuary. She visited the suit land three times but whenever she went there, she was told not to step on the land. She decided to sell the land to Milton Wachira (2<sup>nd</sup> defendant).

**2<sup>ND</sup> DEFENDANT'S CASE**

The 2<sup>nd</sup> defendant on his part testified on oath and stated that he bought the suit property from Jane Wangaru Gichobi and was issued with a title deed on 29<sup>th</sup> September 2015. On 4<sup>th</sup> November 2015, he decided to go and cultivate but he was told by the plaintiff to leave. A portion of the suit property is planted with sweet potatoes, maize and beans. He decided to report the matter to Wanguru Police Station. The Police took his report and went and picked the plaintiff and charged her with the offence of forcible detainer. The case was heard and was convicted and sentenced to two years probation.

**ISSUES FOR DETERMINATION**

The plaintiff's claim is hinged on adverse possession. The issues for determination are as follows:

***(1) Whether the plaintiff has established the principles for adverse possession?***

***(2) Who is liable to pay costs?***

The Court of Appeal in the case of *Mistry Valji Vs Janendra Raichand & 2 others C.A. No. 46 of 2015 (MSA)* observed as follows:

*“The following principles among others,*

*regarding adverse possession are now settled:*

*(i) Adverse possession is not available to a party who is on the registered owner’s land with his consent or where the entry and occupation was lawful and based on some agreement. In other words, where the title of the owner is admitted, there can be no claim for adverse possession. See Samuel Miki Vs Jane Njeri Richu Civil Appeal No. 122 of 2001.*

*(ii) The adverse possessor must prove that through his occupation, the owner has been dispossessed or his possession discontinued. See Wambugu Vs Njuguna (1983) K.L.R 172.*

*(iii) It is equally established that adverse possessor does not arise merely by occupation and use. See Alfred Warimo Vs Mukia Sumba Barosa, Civil Appeal No. 186 of 2011 (KSM).*

*(iv) The filing of a suit for recovery of land or other recognized assertion of title to the land by the owner stops time from running for purposes of Section 38 of the Limitation of Actions Act. See William Gatuhi Murathe Vs Gakuru Gathumbi Civil Appeal No. 49 of 1996.*

The plaintiff’s claim for adverse possession is said to run between 10<sup>th</sup> July 1996 and 18<sup>th</sup> June 2013.

According to the green card annexed to the affidavit in support of the Originating Summons, the records indicated that a prohibitory order in the High Court at Nyeri being Civil Suit Miscellaneous Succ No. 89 of 1996 was registered on the suit land as entry No. 5. The said orders lasted until 18<sup>th</sup> June 2013 when the same was removed vide another Court order in the High Court at Nyeri being Misc. Appl No. 82 of 2007 (formerly Nyeri Appl. No. 59/1996). Looking at the pleadings produced by the 1<sup>st</sup> defendant in her evidence, it shows that the suit property was a subject of a Succession Cause before a Senior Magistrate’s Court in Kerugoya being Succession Cause No. 282/1994. In the said cause, the letters of grant were issued to one Waruguru and confirmed on 12<sup>th</sup> January 1996. Upon confirmation, some of the beneficiaries who were not satisfied with the distribution of the estate moved to the High Court in Nyeri vide Succession Cause No. 59/1996 for an application for revocation of grant. In the same matter, the same parties also sought a prohibitory order which was granted Ex-parte on 18<sup>th</sup> March 1997. On 3<sup>rd</sup> July 2007, the file was transferred to the High Court in Embu for hearing and determination. In her ruling delivered on 16<sup>th</sup> May 2013, Lady Justice H.I. Ong’udi observed as follows:

*“The grant here has become in operative. Evenif the grant were to be revoked, there would benothing to distribute. The property was distributed in February 1996 and some of it isin the hands of 3<sup>rd</sup> parties who bought themfrom the beneficiaries. Therespondent/applicant overslept on his rightsand even tried to drag his brother Simon Kithaka into the matter but Simon refused. The law will not assist the indolent.*

*It is also noted that the applicant also benefited from the distribution. He has his ownshare. The above being the position, I do findfor the applicant/interested parties and allowthe application dated 15<sup>th</sup> October 2009 anddismiss Miscellaneous Application No. 82/2007.The prohibitory orders issued against the titlesresulting from land KABARE/NYANGATI/260 arehereby lifted”.*

The plaintiff and her group were dissatisfied with the distribution of the estate of Githaka Nyaga and filed an application for revocation before the High Court. They also obtained prohibitory orders which were registered on the suit land from 7/4/1997 until 18/6/2013 when the said application was dismissed and the prohibitory orders removed. The plaintiff who is a beneficiary of the same estate cannot have her cake and eat it. She was among the group who filed the application for revocation of the grant and the issuance of the prohibitory orders. The application took more than 12 years to be determined. The fact that there was a case filed by some of the parties seeking to determine the ownership of the suit would genuinely have prevented the actual proprietor from exercising his right over the suit land. The distribution of the estate of Githaka Nyaga which affected several titles including the suit property had been challenged by way of revocation through High Court Succession Cause No. 89 of 1996 (Nyeri). The applicants in that case also filed another case seeking prohibitory orders against the beneficiaries and purchasers of the subject of the distribution of the estate of the said Githaka Nyaga (deceased) which was also issued. The prohibitory order in a way restricted the defendants from doing anything on the suit land including asserting their right over the same. It was only after those cases were dismissed and/or the prohibitory order removed that the defendants moved to Court to assert their rights.

I find and hold that the application for revocation filed in Nyeri being Misc Application Succession Cause No. 89 of 1996 and Misc Application No. 82 of 2007 (formerly Misc Application No. 59 of 1996 (Nyeri) stopped time running for purposes of **Section 38 of the Limitation of Actions Act**. I also note that after the two cases were heard and determined on 18<sup>th</sup> June 2013, the defendant asserted their right over the suit property by filing a complaint at Kianyaga Police Station where the plaintiff was arraigned in Court and charged with forcible detainer. She was subsequently convicted of the offence. This is a clear indication that the plaintiff has had no quiet and peaceful possession of the suit property. The suit property is also subject of succession where she also benefited from the estate of the late Githaka Nyaga and refused to surrender where she is living to the rightful beneficiary but instead wanted to take it in addition to what she was given. When the application for revocation was dismissed and the prohibitory order removed, the defendants were confirmed as the actual proprietors. They could not have filed a separate suit since there were existing suits seeking to determine the ownership of the suit property. The said applications took more than twelve years and the plaintiff cannot therefore seek to benefit from such a delay. I therefore find and hold that when the suit for revocation of the grant and the prohibitory order was issued, the ownership of the suit property and other titles issued pursuant to the Succession Cause No. 282/1994 (Kerugoya) became necessary to have those cases determined before the proprietor (s) can assert any right over the same.

I find and hold that the defendants cannot be blamed for failing to assert their right (s) since the issue of distribution and acquisition of the suit properties had to be determined. The period between 1996 and 2013 when the applications were concluded cannot be considered for

purposes of **Section 38 of the Limitation of Actions Act**. As such, the existence of those cases stopped time from running and the plaintiff therefore failed to prove her claim for adverse possession on the required standard. When the two cases were finally heard and determined in favour of the defendants, they moved swiftly and asserted their rights by reporting the plaintiff for forcible detainer where she was arrested, charged and convicted of the same. That in my view explains why they could not proceed and assert their rights during the subsistence of the prohibitory order and the application for revocation of the grant.

My parting shot is that this suit fails and the same is hereby dismissed with costs.

**READ, DELIVERED and SIGNED in open Court at Kerugoya this 11<sup>th</sup> day of October, 2019.**

.....

**E.C. CHERONO**

**ELC JUDGE**

**11<sup>TH</sup> OCTOBER, 2019**

*In the presence of:*

1. M/S Githaiga holding brief for Maina Kagio
2. M/S Waweru holding brief for A.P. Kariithi for 1<sup>st</sup> Defendant
3. Ms Makworo holding brief for Wangechi Munene for 2<sup>nd</sup> Defendant.