



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC NO.17 OF 2018

JOYCE WAMBUI KURIA.....1ST PLAINTIFF

DAVID MAINGI KARANJA.....2ND PLAINTIFF

VERSUS

JUJA FARM 1976 LIMITED.....DEFENDANT

JUDGMENT

By an Originating Summons dated 17th January 2018, the Plaintiffs herein brought this suit against the Defendants for the following reliefs;

- a) That the Plaintiffs as Administrators of the Estate of Micheal Karanja Kaniaru (deceased) have acquired Title Plot No. 12959/49 IR 43253/1 comprising 0.0413 Hectares by Adverse Possession after continuous adverse possession thereof for 26 years from 17th January 1987 when the deceased Mr. Michael Karanja Kaniaru, bought the plot Reference Number 12959/49 IR 43253/1, for Kshs. 35,000/= from the Defendant.*
- b) That the Defendant's title to the plot Reference Number 12959/49 IR 43253/1, comprising 0.0413 Hectares, has been extinguished in favour of the Plaintiffs under section 37 and section 38 of the Limitation of Actions Act.*
- c) That the Plaintiffs as Administrators of the Estate of Michael Karanja Kaniaru, deceased be registered as owners of L.R 1259/49 IR 42253/1.*
- d) That costs of the suit be awarded to the Plaintiff.*

The Originating Summons was premised on the grounds that the deceased **Michael Karanja Kaniaru** has been in possession of the suit property for 26 years since he bought it from the Defendant on 17th January 1991 for Kshs. 35,000/= and that the Plaintiffs are entitled to be registered as owners thereof for the benefit of the deceased's Estate under **Sections 37 and 38** of the **Limitation of Actions Act**.

In their supporting Affidavit sworn on 17th January 2018, by both Plaintiffs, it was averred that the Plaintiffs are the Administrators of the Estate of **Michael Karanja Kaniaru**, and that they are in immediate possession of the suit plot. They contended that the Deceased had been using the suit property to store and sell charcoal and firewood till his death. Further that they have occupied the suit property for a continuous period of **26 years** to the total exclusion of the Defendant whose title has been extinguished in their favour. Further that the Defendant has refused to transfer the plot to them after their father bought it. They contended that no consent from the Land Control Board was obtained under **Section 6** of the **Land Control Act** and the purchase of the property became void on 17th January 1991 and immediately thereafter the possession of the deceased became adverse to the Defendant.

Vide an Application dated 17th January, 2018, the Plaintiffs sought leave of Court to sever the Defendant by way of substituted source. On 5th April 2018, the Court allowed the Application and on 8th August 2018, the Defendant was duly served vide an advertisement made in the Standard Newspaper as per the Affidavit of service of **S.M.W Kinuthia** dated 12th October 2018 and filed on 18th October 2018.

Despite service, the Defendant failed to enter appearance and the suit proceeded for formal proof by way of viva voce evidence.

PLAINTIFF'S CASE

PW1 David Maingi Karanja testified that he is the Administrator of the Estate of **Micheal Karanja Kaniaru**. He produced the Letters of Administration as exhibit 1. He further testified that his father bought the suit property from the Defendant, but the transfer was never done despite his father following up on the issue. He further produced the sale agreement as exhibit 2 and testified that his father lived on the suit land and that they have continued to live there to date. He told the Court that the Defendants have never requested them to move out of the

suit property. He produced the title in favour of the Defendant as exhibit 3. He urged the Court to allow them have the transfer of the suit property in their favour.

The Plaintiff filed written submission which the Court has now carefully read and considered. The issue for determination is **whether the Plaintiffs have acquired the suit property by Way of adverse possession.**

The Defendant did not file its defence and therefore, there is no evidence to weigh as against the Plaintiffs evidence. However, the Plaintiffs are the ones who have alleged and they have a duty to call sufficient evidence to prove their case on the required standard of balance of probabilities. Such a duty is placed upon he who alleges by **Section 107** of the **Evidence Act** which states as follows:-

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Though the plaintiffs' evidence is not challenged, it does not mean that the Court will not interrogate the said evidence as *ex parte* evidence is not automatic prove of a case. The Court will rely on the finding in the case of **Gichinga Kibutha...Vs...Caroline Nduku (2018) eKLR**, where it was held:-

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

The Plaintiffs have averred that they have been in *open, uninterrupted and continuous* occupation of the suit property for over 26 years after their deceased father bought the suit property from the Defendant. The Court has seen a Certificate of Title that confirms that indeed the Defendants are the registered owners of the suit property. Further the Court has also seen the transfer dated **17th July 1991**, between the Defendant and **Michael Karanja Kaniaru(Deceased)** involving the suit property and acknowledging having been given the full consideration. It is therefore not in doubt that the Plaintiffs were in occupation of the suit property with the knowledge of the Defendant. Without any evidence to controvert the Plaintiffs evidence, the court finds and holds that the Plaintiffs have been in open, notorious, continuous and uninterrupted occupation of the suit property. In the case of **James Mina Kinya ...Vs...Gerald Kwendaka(2018) eKLR** in Quoting the Court in **Public Trustee...Vs... Wanduru**, the Court held that;

“that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the Limitation period can run.”

Therefore it is not in doubt as per the transfer that the Consideration was duly paid and without any evidence to controvert the Plaintiffs contention that they took immediate possession, then the Court finds and holds that the Plaintiffs have acquired the suit property by way of adverse possession.

Section 38 (1) and (2) Limitation of the Actions Act provides as follows:

(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

Having established that they have acquired the suit property by way of adverse possession, the Plaintiffs are entitled to the orders sought in the instant Originating Summons.

On the issue of costs, **Section 27 of the Civil Procedure Act**, gives the Court discretion to grant Costs. Costs normally follow the event and the Plaintiffs being the successful litigants are entitled to costs. See the case of **Peter Muriuki Ngure v Equity Bank (K) Ltd [2018] eKLR** where it was held:-

I have considered the submissions in this ruling. I find that, it is trite law that costs follow the event and are granted at the discretion of the Court. In this regard, Section 27 of the Civil Procedure Act, states as follows;

“subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court of judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

Provided that, the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.” (emphasis mine).

Having now carefully considered the pleadings and analysed the evidence adduced and the written submissions, the Court finds and holds that the Plaintiffs have proved their case on the required balance of probabilities. Consequently the Court finds the Originating Summons dated **17th January 2017**, is merited and the same is allowed entirely with costs to the Plaintiffs herein.

It is so ordered.

Dated, signed and Delivered at Thika this 14th day of May 2020

L. GACHERU

JUDGE

Court Assistant.....

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

By Consent of:

Mwicigi Kinuthia advocates for the Plaintiffs

..... for the Defendant

L. GACHERU

JUDGE