



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 565 OF 2017

**SIMON MUTUA KIHIRO (suing as the administrator of
the Estate of JOSEPH WANYORO (DECEASED)).....PLAINTIFF**

VERSUS

JOSEPH MBUGUA WAIRIMU.....1ST DEFENDANT

JANE WANGARI NJOROGE.....2ND DEFENDANT

**IN THE MATTER OF THE LAND ACT, THE LAND REGISTRATION ACT AND IN THE MATTER OF SECTIONS 37 AND 38
OF LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA**

JUDGMENT

Vide an *Originating Summons* dated 23rd June 2016, the Plaintiff has sought for the following reliefs against the Defendants herein:-

- 1. A declaration that the Plaintiff has acquired title to the whole of parcel of land No. Chania/Makwa/T.311, by way of Adverse Possession.**
- 2. An order that the Plaintiff be registered as proprietor of land parcel No. Chania/Makwa /T.311, in place of the 1st Defendant who is now registered as the proprietor.**
- 3. An order directing the 1st Defendant to execute transfer of the said parcel of and No. Chania/Makwa/T.311, in favour of the Plaintiff.**
- 4. Alternative to prayer 1 and 2 above a declaration that the 1st Defendant holds land parcel No. Chania/Makwa/T.311, in trust and on behalf of the Plaintiff.**
- 5. An order for costs of and incidental to this suit.**
- 6. Such other further relief as the nature of the case may require or this Honourable Court may deem fit.**

In his supporting Affidavit sworn on 23rd June 2016, the Plaintiff averred that he is the Administrator of the Estate of the late **Joseph Wanyoro Gitau**, who passed away on 10th April 2013. He further averred that around the year 1958, his father bought the suit property from one **Kanyi Njuguna** the 2nd Defendant's father and he took vacant possession in the same year. That their family has been in occupation to date. It was his contention that the said **Kanyi Njuguna**, died before he could transfer the suit property to his father. That after the death of his father, his family approached the family of the late **Kanyi Njuguna**, with a view of getting documents of ownership but they refused to acknowledge that his father had bought the property. He further averred that he found out that the 2nd Defendant was the Administrator of the Estate of the late **Kanyi Njuguna**, and she had fraudulently sold the suit property to the 1st Defendant and the transfer effected on 4th April 2016.

He contended that the said **Kanyi Njuguna**, and his family have never occupied, utilized and/ or cultivated the suit premises from 1958, to this date. He further contended that his father's Estate has exercised its right of ownership and occupation of the suit property openly, continuously and uninterrupted to the exclusion of all others and with the full knowledge of the 2nd Defendant and her family and the 1st Defendant must have known that there were people in occupation.

The suit is contested and the 2nd Defendant **Jane Wangari Njoro** swore a Replying Affidavit on 25th August 2016, and averred that the

Plaintiff has not proved that his father bought the suit property in the year **1958**, or at any other time. She averred that she has been advised by her Advocate which advise she believed to be true that the Plaintiff has no cause of action against them with his admission that the title deed of the suit property was sold to the 1st Defendant and transferred in the year 2016. Further that no documentary evidence has been presented to confirm the allegation of sale of the suit property which is registered in her father's name during the time of demarcation in the year **1958**. She alleged that neither the Plaintiff's father nor his legal representative has ever claimed ownership of the suit property and the allegation of fraud makes no legal basis, as she is the rightful personal representative of the deceased estate and the suit property was transferred to her as the personal representative to the Estate of the deceased and later to the 1st Defendant as a purchaser. She denied the allegations that she did not have the capacity to transfer the suit property.

She further averred that she has been advised by her Advocates on record. that the right to assert adverse possessions was extinguished the moment she exercised her right as the personal representative of the late registered owner of the suit property and had it transferred to herself. She further contended that it was too late in the day to purport to exercise the right to Adverse Possession.

The 1st Defendant filed a **Supplementary Affidavit** on the **27th of July 2018**, and averred that he is an innocent purchaser for value of the suit property having bought the same from the beneficiaries of the deceased and having all the documents executed by the Administrator of the Estate of **Kanyi Njuguna**. He alleged that it was strange to note that the Plaintiff alleges that his father bought the suit property in the year **1958**, but has not provided any sale agreement. He further averred that the exercise of demarcation of land in this specific region took place between **1959 and 1961**, and it was illogical that the Plaintiff's deceased's father could have bought the suit property in **1958**, and failed to have been registered as the owner during the land demarcation process. Further that he has been registered as the owner after purchasing the suit property in **2016**, and that he has been advised by his Advocates that the claim for **Adverse Possession** was extinguished and has been overtaken by events. He further averred that the allegations of fraud are fabrications as the transfer was transparently done after following due process. It was his contention that a good title was passed to him since the suit property was sold by the legal owners and therefore the Plaintiff's claim has no basis in law and should be dismissed.

The matter proceeded by way of *viva voce* evidence wherein the Plaintiff called three witnesses and the Defendant called two witnesses.

PLAINTIFF'S CASE

PW 1 Simon Mutua Kihiro testified that he is from Mwirigo Village Chania location, Gatundu South. He adopted his witness statement dated **18th May, 2018**. He also produced his list of documents as Exhibit 1. It was his testimony that the plot is **Chania/Makwa/T.311** and that his father purchased the land for **Kshs.300/=**, and took possession. That the said purchase was before the Plaintiff was born. That his father put his Aunt on the suit property from **1958**, and that his father died in **2015**, while in possession. He denied that the family of **Kanyi Njuguna** cultivated on the land and testified that his Aunt is in possession of the land. Further that the Plaintiff attempted to have the land registered in his name in **2016**, after he had talked to the Defendant through the Chief and the family of **Kanyi Njuguna** was carrying on with Succession Cause. However, the family of **Kanyi** did not agree to transfer the suit land to the Plaintiff's family. He urged the Court to declare that his father's Estate acquired the suit property since **1958**. He further acknowledged that he did not have a **Sale Agreement**, but alleged that there were witnesses to that effect. He also acknowledged that as per the grant of the Estate of **Kanyi Njuguna**, the suit property is part of his Estate. He further testified that they have not been living on the suit property, but that his **Aunt, Maria**, has been living on it after being given the land by his father. He further testified that he did not file any objection proceedings to the Succession Cause to the Estate of **Kanyi Njuguna**. It was his evidence that he put a caution on the suit property as it belonged to his late father. He told the Court that his family has always been in occupation of the land as his father had always had the ownership rights.

PW 2 Maria Njeri Wahihia, testified that she lives in Ruiru having been taken there by her daughter recently. It was her testimony that **Joseph Wanyoro** was her brother and that before he died he used to live in the suit property. She further testified that her brother gave her the suit property after buying it from Kanyi. That she was present when Kanyi sold the suit property to her brother for **Kshs. 300/=** She further testified that Kanyi sold the land and moved to Ithanga area. It was her further testimony that she built on the land and gave birth to seven (7) of her children on the suit property and that Kanyi never came to the land. That she has lived on the suit property since she was given the land and that her daughter brought her to Ruiru for treatment recently but that she normally use the land for her subsistence

PW 3 Magdalene Nyambura Wanyoro adopted her witness statement dated **18th June 2018**, and testified that her husband purchased the suit property from **Kanyi Njuguna** and since PW2 who is his sister had nowhere to go, he gave her the suit property. It was her evidence that they started to farm the land and when PW 2 came from her matrimonial home, her husband gave her the suit property and that **Kanyi Njuguna** had moved away from the suit property. It was her further testimony that the Children of **Kanyi Njuguna** came to claim the land recently. Further that she had lived on the suit land for long and that they have been utilizing the land through **Maria**, PW2. She further testified that she was married in **1959**, and the land was purchased in **1958**.

DEFENCE CASE

DW 1 Joseph Mbugua Wairimu adopted his witness statement as evidence in Court. He further testified that he bought the suit property from **Jane Wangare Njoro** in **2015**, for **Kshs. 500,000/=**. Further, that before he bought the suit property, he visited the land and that there was no house on the suit property. That when he bought the suit property from **Jane Wangare**, she told him that she was using the land and that she lived in Makuyu area. It was his testimony that he conducted a search before he bought the land and that **Kanyi Njuguna** was the registered owner and that **Jane Wangare** had power to sell the suit property.

DW 2 Jane Wangare Njuguna adopted her witness statement. She produced her list of documents as **Exhibit 1 to 5**. She further testified that she lived in **Kambiti** area and that her father moved to **Kambiti** in **1981**. Further that the green card shows that her father became the owner of the suit property in **1957**. That in **2016**, the land was registered in her name and she sold it to the 1st Defendant. It was her testimony that **Wanyoro's** family did not buy the land from her father, but that they have been using the said land since **1958**, but that she was taking care of the land. It was her further testimony that the Plaintiff stopped using the land a long time ago. She testified that she asked **Maria (PW 2)**, to move out in **2014**, but she never asked the Plaintiff to move out of the land. She further acknowledged that her father never asked **Wanyoro** to vacate the land. That **Wanyoro** was her father's friend and that he was allowed to use the land but that her father

never asked him to buy the land.

It was her evidence that she used to visit the land and check on it and that when the Plaintiff filed the instant suit, he had built a temporary structure and that PW 2 used to carry out subsistence farming on the land.

The court has now carefully considered the pleadings on record and the written submissions. The court too has considered the relevant provisions of the law and makes the following findings.

The issue for determination are:

i. Whether the Plaintiff has proved his claim of Adverse Possession.

ii. Who should bear the costs of the suit.

(i) Whether the Plaintiff have proved his claim of Adverse Possession.

In deciding whether or not to grant ownership by virtue of Adverse possession, the Court is guided by **Section 38 (1) and (2) of Limitation of the Actions Act that 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.

For a party to succeed in a claim of Adverse Possession, the person must satisfy the Court that he/ she has been in **Continuous and uninterrupted** possession of the land without the consent of the owner of the land; that his/her interests were **inconsistent** to the interests of the true owner of the land. The possession has to be **Open and notorious**, the possession has to be **actual**, to enable the owner have a cause of action which if he/she fails to act on within the required legal period then he/she will be estopped by the law of Limitation to claim back the land. The possession has to be **exclusive**, to avoid confusion on who is entitled to obtain the title to the suit land once the limitation period lapses.

The Court must then establish whether the above principles have been met by the Plaintiff herein in order to ascertain whether he has met the threshold for adverse possession. It was the Plaintiff's claim that his father took possession of the suit property in the year **1958**, having bought it from the 2nd Defendants' father. However, he contended that the suit property was never transferred to his father but that they took possession of the suit property and thereafter the same was given to his **Aunt, PW 2**, who has been living in the suit property ever since.

However, it is the Defendants contention that the Plaintiff's father did not buy the suit land from the 2nd Defendant's father. The Defendants have also contended that the Plaintiff did not have actual possession that was uninterrupted for a period of more than **12 years**, and even so their right to claim the land by way of Adverse possession was extinguished when the 2nd Defendant sold the suit property to the 1st Defendant.

Though the Plaintiff has alleged that his father bought the suit land, there is no sale agreement to confirm the same. **Section 3(3) of the Law of Contract**, requires that all contracts that appertain to land must be in writing. However, the Plaintiff in this instant suit is not claiming the suit property by reason of the contract in place, but by reason of adverse possession which does not require a sale agreement.

The Plaintiff has alleged that his father took possession of the suit property in **1958** and gave it to his Aunt (PW 2) who has been in possession since then. PW2 **Maria Njeri Wahihia**, corroborated PW 1's evidence and averred that she has always been in occupation and only moved out when she went to seek for medical care. PW1 evidence was further corroborated by the evidence of DW2 who indeed confirmed that the Plaintiff's family had taken possession of the suit land in the year **1958**. She acknowledged that her father knew of their occupation of the suit property and that she also knew of their occupation and that the same was never interrupted until the year **2014**, when she asked PW 2 to move out of the suit property.

Though DW1 testified that when he bought the suit land, there was no one on the land and that DW2 informed him that she was the one that was using the land, this contradicted the evidence of DW2, who testified that the **Wanyoro** family had always been using the land and that they cultivated it and further that they had built a temporary structure even by the time the instant suit was being built on the suit property. It is hard for the Court to believe that from the year **1958 to 2014**, when DW2 alleges to have asked PW2 to move out, the same being a period of **56 years** that the Plaintiffs family was only given the land as friends of the family. It is clear that the suit property was being used to the adverse rights of the owner.

Therefore, it is not in doubt that the 2nd Defendant knew that the Plaintiff's family were in occupation of the suit property as she testified that she visited the suit property regularly. Further there is no evidence that the Plaintiff's father was only given the suit property to cultivate. The Court therefore finds and holds that the occupation of the said property has been *continuous, open and uninterrupted* and with the knowledge of the Defendants which is adverse to their rights.

The Plaintiff also needed to prove that he had dispossessed the Defendants of the said land and they had been dispossessed without their consents and has enjoyed such quiet possession for a period of **12 years**. See the case of **Wambugu ...Vs... Njuguna (1983) KLR 172**

where the Court of Appeal stated as follows while relying on the decision in Littledale...Vs... Liverpool College (1990) I Ch. 19:

“The next question therefore is what constitutes dispossession of the proprietor. Bramwell LJ in Leigh v Jack said at 273, that to defeat a title by dispossessing the former owner acts must be done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it”

The Defendants have submitted that the Plaintiff occupation of the suit property was not adverse to their interests as it was not hostile and the same was done with their permission to use for only a period of time. In order for a party to prove adverse possession, the party need to show that the owner had been dispossessed of it or the owner’s possession had been discontinued and the party had used the property to the adverse interests of the owner even if the same had been bought. See the case of Samwel Nyakenogo ...Vs... Samwel Orucho Onyaru [2010] eKLR, where the Court of Appeal held as follows:

“For about 19 years, the respondent was in exclusive possession of the portion of the land bought from the deceased openly and as of right, and during all this time, the respondent’s said possession was not interrupted by the registered proprietor, the deceased. In our view, the purported application for letters of administration in respect of the deceased land West Kitutu/Mwakibagendi/28 which was confirmed on 15th June, 1999 did not interrupt the respondent’s adverse possession of the portion he bought from the deceased.”

In the instant suit the Plaintiff’s Aunt had been using the suit property without the Defendant’s permission which is adverse to their rights. Further though the Defendants have alleged that the Plaintiff had only cultivated the land for a small period of time, DW2 confirmed that they had possession since **1958**, and that she is the one who asked PW2 to move out of the suit premises. The Court therefore finds that the contention by the Plaintiff’s witnesses that they have been in possession and that PW2 has been living on the suit property has not been controverted

Further the Defendants have also submitted and contended that the property has already changed hands and that the 1st Defendant became registered owners of the suit property on **4th April 2016**. That from the date which the Defendants had been registered as owners to the date which the instant suit had been filed, **12 years** had not lapsed. However this Court notes that by the time the 2nd Defendant was acquiring proprietorship of the suit property by way of transmission and further passing it on, to the 1st Defendant, the Plaintiff had already been in continuous and uninterrupted occupation of the suit property and the transfer, did not extinguish the Plaintiff’s rights to claim adverse possession over the suit property. See the case of Jacob Mwanto Wangora...Vs... Mary Waruga Wokabi & 3 others [2018] eKLR where the Court held that:

“It is against the foregoing and in relying on the judicial authorities cited above, I find that from 1990 the deceased Soromeeti’s rights to the suit land were extinguished and he was hence holding the land in trust for the Plaintiff. Further, that the Defendants’ acts of applying for letters of administration intestate over the suit land and obtaining the Certificate for Confirmation of Grant in which deceased estate was distributed, cannot defeat the Plaintiff’s claim for adverse possession because by the time they petitioned for it, the deceased rights over the suit land had extinguished in 1990.

I find that the Plaintiff has proved his case on a balance of probabilities that his right of action as against the Defendants for adverse possession over the suit land had started running in August 1978 and accrued as at August 1990. Insofar as the Defendants’ have transferred the resultant subdivisions of the suit land namely NGONG/NGONG/62257; NGONG/NGONG/62258; NGONG/NGONG/62259 and NGONG/NGONG/62260 and transferred it to themselves, this cannot defeat the Plaintiff’s claim as espoused in section 38 (1) of the Limitation of Actions Act.”

Consequently, the court finds that the Plaintiff has proved his claim of Adverse Possession.

ii) Who is to bear costs of the suit?

By dint of **Section 27 of the Civil Procedure Act**, the Court has discretion to award or not to award costs of the suit. Ordinarily, costs do follow the event and is normally awarded to the successful litigant. The Plaintiff herein being the successful litigant is entitled to costs of the Originating Summons.

Having now carefully considered the pleadings herein, the annexures thereto and the written submissions, the court finds that the Plaintiff has proved his case on the required standard of balance of probabilities and consequently, the instant Originating Summons dated **23rd June 2016** is allowed in terms of **prayers No 1, 2, 3** with costs to the Plaintiff.

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 **Judgement** 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:

M/S Ndungu Mwaura advocates for the Plaintiff

..... for the **1st Defendant**

..... for the **2nd Defendant**

L. GACHERU

JUDGE