



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC. NO. 457 OF 2017 (O.S)**

**IN THE MATTER OF THE LIMITATION OF ACTIONS ACT, CAP 22 LAWS OF KENYA**

**AND**

**IN THE MATTER OF ADVERSE POSSESSION**

**BETWEEN**

**JOHN KAMANDE MARINGI**

**PETER GITAU MARINGI**

**THOMAS KANG'ETHE MARINGI.....PLAINTIFFS**

**-VERSUS-**

**JOSEPH NJOROGE KAMAU**

**PETER NGANGA KAMAU.....DEFENDANTS**

**JUDGMENT**

The Plaintiffs herein by an Originating Summons dated 14<sup>th</sup> March 2017, sought for determination of the following issues by the court:-

- a) Whether the Plaintiffs are entitled by adverse possession of ½ (half) of parcel number KAKUZI/ITHANGA/GITUAMBA BLOCK 1/103 also known as Plot number 96 in the agreement sale.*
- b) Whether the Defendants right to own ½ (half) of parcel number KAKUZI/ITHANGA/GITUAMBA BLOCK 1/103 also known as Plot number 96 in the agreement sale has been extinguished and the Defendants transfer ½ share of the said title to the Plaintiffs.*
- c) Whether the Defendant should pay the costs of the suit.*

The said Summons are supported by Supporting Affidavit of **John Kamande Maringi**, who is one of the Plaintiffs. He averred that their late father **Michael Maringi Kanyugi**, bought from the 1<sup>st</sup> Defendant half (½) of Parcel **No. Kakuzi/Ithanga/Gitumba Block 1/103** also known as **Plot No. 96** in the agreement of sale dated **8<sup>th</sup> October 1997** for **Kshs.100,000/=** which he paid in full. He annexed the said agreement as annexure **SKM 1**. He further averred that their father and themselves took possession of half (½) share of the suit property and built their homes therein and have extensively developed the same. He contended that both Defendants are the registered owners of the said title and that their father had bought the ½ share that belonged to 1<sup>st</sup> Defendant.

Further, that they have enjoyed quiet possession of the ½ share of the suit land exclusively and have been cultivating the said parcel of land and have built their homes and have lived on the said land uninterrupted since **1997**, which is a period of more than **12 years**. That the Plaintiffs who are all adults have acquired this right on their own merit irrespective of the fact that the land was originally bought by their father. He urged the court to declare that they are entitled to ½ share of the suit land by doctrine of **adverse possession** and that the Defendants ownership of the said ½ share has been exhausted.

The Originating summons is contested and the Defendants filed a statement of Defence dated **20<sup>th</sup> July 2011** and a Replying Affidavit sworn by **Joseph Njoroge Kamau** sworn on **1<sup>st</sup> November 2017**. They averred that the Plaintiffs claim for adverse possession cannot stand and the Plaintiffs are mere trespassers. That if there was any sale agreement between the late **Michael Maringi** and the 1<sup>st</sup> Defendant, then the same was frustrated and voided for want of **Land Control Board Consent** to transfer and Plaintiffs were put to strict proof. Further, that the suit is defective for want of capacity to sue by the Plaintiffs and the court was urged to dismiss the suit with costs.

In the Replying Affidavit, the 1<sup>st</sup> Respondent averred that the Defendants are the respective owners of all that parcel of land known as **Kakuzi/Ithanga/Gituamba Block 1/103** as per **annexture JKM1**. He further averred that the said sale agreement was frustrated and the same cannot be effective since no possession took place. That there was no consent to transfer or subdivide the land as per the **Land Control Act Cap 302**, and that the purchaser met his demise prior to taking possession. Therefore, the said agreement stands rescinded and the only remedy available is for the Plaintiffs to seek refund of the purchase price.

The Defendants further filed a Notice of Preliminary Objection to the entire suit and on the following grounds:-

- 1) That the Plaintiffs lack locus standi to bring any cause of action against the Defendants as they are neither Administrators nor have they taken out any Grant of Letters of Administration Ad Litem to have capacity to lodge the claim herein.**
- 2) That the Plaintiffs are not privy to any contract signed in respect to the suit property and cannot claim to impose obligations or entitlements to a contract they were not a party to.**
- 3) That the suit has no basis and ought to be dismissed in its entirety with costs to the Defendant.**

The parties through their Advocates erected to canvass the Originating summons by way of written submissions.

The Plaintiffs in their submissions filed by **Karuga Wandai Advocates** on **29<sup>th</sup> April 2019**, submitted that their father bought ½ share of the suit premises being parcel **No. Kakuzi/Ithanga/Gituamba Block 1/103** from the 1<sup>st</sup> Defendant in an agreement which was executed on **8<sup>th</sup> October 1997**, for **Kshs. 100,000/=** which he paid in full. Further that the Plaintiffs, their father and the entire family took possession of the suit premises immediately after purchase and built themselves houses and have extensively developed the land. They also submitted that their father died in the year **2014**, and they have lived on the parcel of land on their right as adults for over **12 years**. Further, that neither the Defendants have made any effort to evict them and therefore they have acquired the suit premises by the doctrine of **adverse possession**. It was also submitted that the Plaintiffs do not need **Letters of Administration** of the estate of their father because the cause of action under what they claim is independent of their father's right and they have acquired the land not because of their father's right but because of the Law of Limitation. Further that the doctrine of **adverse possession** does not require a consent from Land Control Board as it is a right strictly acquired under the Limitation of Actions Act. It was their further submissions that the Defendants have relied extensively on technicalities that the Plaintiffs have no **locus standi** and that they have **no consent** from the Land Control Board, which technically does not apply to this kind of cases. They urged the court to allow the prayers sought in the Originating summons together with costs.

The 1<sup>st</sup> Defendant on his part filed his submissions on **3<sup>rd</sup> July 2019** through **Muturi Njoroge & Co Advocates**. They submitted that time has not run sufficiently to advance the Plaintiffs suit of a case of adverse possession against the Defendants. He submitted that the Plaintiffs father whose Estate they have not taken out letters of Administration purchased ½ of title **Kakuzi/Ithanga/Gituamba Block 1/103** from the 1<sup>st</sup> Defendant. Further, that since the said transaction was frustrated and neither possession was granted nor was grant of Land Control Board consent

issued, then the Plaintiffs cannot rely on the sale agreement. It was also submitted that the Plaintiffs' father and the Plaintiffs never took possession of the suit land nor entered onto it. However, the Plaintiffs attempted to take possession on **28<sup>th</sup> September 2016**, but they were repulsed and there is a criminal case proceeding being **Thika CMCR NO. 6763/2016**, which is yet to be determined. That the said criminal case was instituted almost one year ago, before the filing of this suit and therefore possession cannot be deemed to be adverse as there is no evidence of uninterrupted quiet possession.

It was also submitted that the Plaintiffs have not attached a certificate of abstract of the title to the land in question. Finally, it was submitted that the Defendants title has not been extinguished by effluxion of time. The Defendants urged the court to dismiss the Originating summons entirely with costs.

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.

From the annexture attached to the pleadings, there is no doubt that the Defendants being **Joseph Njoroge Kamau** and **Peter Nganga Kamau** are the proprietors of the suit property **Kakuzi/Ithanga/Gituamba Block 1/103**. This is evident from the certificate of official search attached to the Originating Summons by the Plaintiffs and also by the Defendants in their list of documents. From the certificate of search annexed by the Defendants, it is evident that there is a caution placed on the title by **John Kamande Maringi** one of the Plaintiff herein. The said caution was placed on **22<sup>nd</sup> September 2016**.

It is also evident that on **8<sup>th</sup> October 1997** one **Joseph Njoroge Kamau** entered into a sale agreement with **Michael Maringi Kanyuga**. It was alleged that **Michael Maringi Kanyuga** was the father to the Plaintiffs herein. The sale agreement was for the purchase of ½ share of **plot no. 103 Ithanga**, which the Plaintiffs have alleged is the suit property. However, the agreement was executed on **8<sup>th</sup> October 1997** and the plot was only describes as **103 Ithanga, Mavoloni**, whereas from the Certificate of official search, the Defendants became the proprietors of the suit property on **6<sup>th</sup> December 1988**. The court is left wondering why the sale agreement did not give full description of the suit property being **Kakuzi/Ithanga/Gitumaba Block 1/103**. However, the court has noted that the parties did not dispute the description of the

suit property.

In the sale agreement, though it is indicated that the purchaser paid the full purchase price of **Kshs. 100,000/=** at the execution of the said sale agreement, it was not clear whether the purchaser was put in possession

of the ½ share of land or not. The Plaintiffs claim is hinged on doctrine of adverse possession. Possession and that means uninterrupted quiet possession for a period of 12 years is one of the ingredients to be proved by a person claiming ownership through the doctrine of adverse possession. See the case of **Sarah Nyambura Kungu ...Vs... David Njoroge Thige, Civil Appeal No. 20 of 1988**, where the court the court of Appeal held:-

***“Adverse possession only arises in cases of continuous uninterrupted occupation of land for over 12 years,”***

Having pointed out the undisputed facts, the court finds the issue for determination are:

- i. Whether the Defendants Notice of Preliminary Objection is meritorious.***
- ii. Whether the Plaintiffs have proved a claim of adverse possession.***
- iii. Who should bear the costs of the suit.***

***D) Whether the Defendants Notice of Preliminary Objection is meritorious***

A preliminary objection was discussed in the case of **Mukisa Biscuits Manufacturing Co Ltd ...Vs...West End Distributors Ltd (1969) EA 697** to mean:-

***“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.***

It is therefore very clear that a preliminary objection raises pure point of law which is capable of disposing the matter preliminary without the court having to resort to ascertaining the fact from elsewhere apart from looking at the pleadings alone. See the case of **Quick Enterprises Ltd –...Vs... Kenya Railways Corporation, Kisumu HCCC No. 22 of 1999.**

The Defendants herein have alleged that the Plaintiffs lack ***locus standi***, to bring any cause of action against the Defendants. They further averred that the Plaintiffs are not privy to any contract signed in respect to the suit and cannot impose obligations to a contract that they were not privy to.

On ***locus standi***, the court finds this is the capacity of a party to bring up a suit against a Defendant. This means a place of standing. See the case of...**Law Society of Kenya ...Vs... Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000**, the Court held that:-

***“Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”.***

Further in the case of **Alfred Njau and others Vs City Council of Nairobi ( 1982) KAR 229**, the Court also held that:-

***“ the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.***

If a party lacks capacity to institute a suit, then the said suit cannot stand. The issue of capacity is a pure point of law and is capable of bringing a suit to an end at the preliminary state. Therefore, this point meets the criteria of which amounts to a Preliminary Objection

On the issue of whether the Plaintiffs were not privy to any contract signed in respect of the suit property, this calls for the court to ascertain facts by considering the contract in issue and who are the parties therein. Therefore, this is not a pure point of law and the court will not consider it in this Preliminary Objection.

On the issues of whether the Plaintiffs lacks ***locus standi*** to bring the cause of action against the Defendants, it was alleged that the Plaintiffs are neither the administrators of the purchaser’s estate nor have they taken letters of administration ***ad litem*** to have capacity to lodge the claim herein. However, the Plaintiffs alleged that they have brought this suit in their own capacity but not as beneficiaries or administrators of the estate of their deceased father.

Indeed the suit herein is a claim for adverse possession. The Plaintiffs have alleged that after their late father purchased ½ share of the suit property from the 1<sup>st</sup> Defendant, they took possession and have lived there from **1997** to date.

It is very clear that the suit herein is for adverse possession. The averment by the Plaintiffs that their late father purchased ½ share of the suit

land from the 1<sup>st</sup> Defendant was to lay basis of how the Plaintiffs allegedly got into possession of the suit land. Their claim is not a claim on behalf of the estate of their late father but a claim on their own behalf.

Consequently, the court finds that the objection by the Defendants is not merited as the Plaintiffs do not need to take letters of administration in respect of the estate of their late father so that they can claim adverse possession. Therefore, the Notice of Preliminary Objection dated **4<sup>th</sup> April 2018** by the Defendants is not merited and the same is dismissed entirely with costs to the Plaintiffs.

## **II) Whether the Plaintiffs have proved a claim of adverse possession.**

The Plaintiffs allege in their pleadings and submissions that they entered into the suit property in **1997**, after their father had purchased ½ share of the suit property from the 1<sup>st</sup> Defendant. The Defendants denied that the Plaintiffs took possession of the suit property and that they only attempted to enter into the suit property in **September 2016** and they were repulsed. As a result a criminal case ensued and it has not been concluded by the date of filing the Defendants pleadings. It is very clear that a person who claims adverse possession must show possession which is uninterrupted for a period of **12 years**. See the case of **James Mwangi & Others ...Vs...Mukinye Enterprises Ltd, Nairobi HCCC No. 3912 of 1986** where the court held:

**“A person relying on adverse possession must show;**

- i. Clear possession;**
- ii. Lack of consent of the owner; and**
- iii. Occupation must be more than 12 years before action.”**

The Plaintiffs are the one who alleged and therefore they had a duty to prove their case on the required standard.

It was the Plaintiffs evidence that their father took possession of the suit land after signing the sale agreement produced in court. However, the Defendants allege that the said purchaser never took possession and since there was no consent received from the Land Control Board, then the sale was frustrated and the said transaction was **null** and **void**. The court has

considered the sale agreement and as observed earlier it does not indicate that the purchaser was to take possession of the purchased ½ share of land immediately.

Therefore, the Plaintiffs had an obligation to prove possession. They alleged that after they took possession, they built their houses where they live today. That they have also developed the said land. Since possession is denied, the Plaintiffs needed to prove such possession by production of photographs of their said houses and the alleged development. Such evidence was not available and there was no way this court could ascertain that indeed the Plaintiffs are in occupation of the suit property. From the certificate of official search, the Plaintiffs only placed caution on the title in the **year 2016**. That seems to give credence to the Defendants allegations that the Plaintiffs attempted to take possession in **September 2016**, but their attempt was repulsed and the said attempt resulted in criminal case at **Thika Law Courts** being **Criminal Case No. 6763 of 2016**.

For the above reasons, the court finds that the Plaintiffs have failed to prove that they are in possession of the suit property and that they have remained in possession of the suit property for a period of more **than 12 years**, which possession and occupation is uninterrupted and quiet. They also needed to prove that they have dispossessed the Defendants of the said land and they dispossessed them without their consents and have 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 relying on the decision in **Littledale v 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”**

Consequently, the court finds that the Plaintiffs have failed to prove a claim of adverse possession.

## **III) Who is to bear costs of the suit?**

**Section 27 of the Civil Procedure Act** grants the court 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 Plaintiffs herein have lost the suit and therefore the Defendants are the successful litigants and are 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 Plaintiffs have failed to prove their case on the required standard of balance of probabilities. For the above reasons the instant Originating summons is

dismissed entirely with costs to the Defendants. Further, the Defendants Notice of Preliminary Objection dated **4<sup>th</sup> April 2018** is found not merited and the same is dismissed entirely with costs to the Plaintiffs.

It is so ordered.

*Dated, signed and Delivered at Thika this 15th day of June 2020.*

**L. GACHERU**

**JUDGE**

**15/6/2020**

**Court Assistant – Jackline**

**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 **15<sup>th</sup> 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 :**

**No consent for the Plaintiffs**

**No consent for the Defendants**

**L. GACHERU**

**JUDGE**

**15/6/2020**