



**REPUBLIC OF KEYA**

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

**ELC 237 OF 2018(O.S)**

**JOHN MBURU NGURE.....PLAINTIFF**

**VERSUS**

**PAULINE NJOKI NGURE.....DEFENDANT**

**JUDGMENT**

Vide an **Originating Summons** dated **19<sup>th</sup> September 2018**, the Plaintiff herein brought this suit against the Defendant seeking for orders that:-

- a) The Honourable Court be pleased to make a declaration that the Plaintiff is entitled to a half portion of land parcel No.Kabete/Gikuni/T.91, by virtue of adverse possession.*
- b) The Plaintiff be registered as the proprietor of half portion of Land Parcel L.R No.Kabete/Gikuni/T.91.*
- c) The costs of this suit be borne by the Defendant.*

In his **Supporting Affidavit**, the Plaintiff averred that the Defendant is the daughter of his late sister one **Faith Wanjiru Ngure**. He averred that the suit property belonged to his father the late **Dishon Ngure Ndungu**. He further averred that his late father lived in the suit property until **2002** and that his house still stands. He contended that he has developed on the suit property and that the suit property was to be shared between him and his brother and that they have both developed it and constructed their houses.

It was his contention that in the year **1997**, his niece obtained the title to the suit property fraudulently as the caution that they had placed was removed without recourse or notifying them, that the transfer and the issuance of the title was hurriedly done in the absence of his late father and that the Defendant was not present when the caution was removed, the transfer effected and the title issued. He averred that no transfer can be effected in the absence of both the transferor and the transferee. That it is impossible to remove a caution, call for Land Control Board, effect transfer and issue a titled deed on the same day

He further averred that he has been in **continuous** and **uninterrupted** occupation of the suit property for a period of more than **12 years** to warrant his claim for adverse possession.

Despite service the Defendant did not enter appearance and the suit therefore proceeded by way of formal proof wherein the Plaintiff testified for himself.

**PLANTIEF'S CASE**

**PW1 - John Mburu Ngure**, adopted his witness statement dated **19<sup>th</sup> September 2018**. He further produced his list of documents as **Exhibit 1** in Court. He urged the Court to allow his claim.

The Defendant despite service failed to enter appearance, file a Defence and hence failed to defend the suit. However, the Plaintiff is the one who has alleged and he has a duty to prove his case. As provided by **Section 107** of the **Evidence Act**, the Plaintiff has a duty to call evidence and prove his case on the required standard. The said Section states:-

- (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.*

The Court still has a duty to interrogate the evidence produced before it in order to arrive at as just determination as exparte evidence is not automatic prove of a case. See the case of Gichinga Kibutha..Vs..Caroline

Carooline Nduku (2018) eKLR, where the Court held that:-

***“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 opponnet has not made a presence in the contest.”***

It is the Plaintiff’s contention that the suit property that he is claiming initially belonged to his father and that he had built on the suit property after his father gave him and his brother the said portion of land. However the Plaintiff has laid a claim of ownership by virtue of adverse possession. It is this Court’s duty to interrogate whether he is entitled to the grant of ownership of the suit property through adverse possession.

It is the Plaintiff’s claim that his niece fraudulently registered the suit property in her name in the year **1997**. The Court has seen a certificate of official search that indicates that **Pauline Njoki Ngure** was registered as the proprietor of the property on **19<sup>th</sup> February 1997**.

The Plaintiff has averred that he has been in **open, uninterrupted** and **continuous** occupation of the suit property even before his father had died and that was way before the Defendant was registered as owner of the suit property. The Defendant was registered as the owner in **1997**, and the Plaintiff filed the instant suit **21 years** later after her registration. The Plaintiff produced evidence of structures showing that he had been in occupation. The Court finds that in the absence of any evidence to controvert the Plaintiff’s evidence that he has been in continuous uninterrupted occupation of the suit property with the knowledge of the Defendant and to her adverse interests, his evidence is therefore believable.

It is the Court’ considered view that the Plaintiffs have been in open, notorious, continuous and uninterrupted occupation of the suit property. In the case of Wambugu ...Vs... Njuguna (1983) KLR 172, the Court of Appeal stated as follows 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”***

Therefore, the Court holds and finds that the Plaintiff has established the threshold for grant of an order of ownership by virtue of adverse possession. Consequently, his claim as sought in the instant **Originating Summons** is merited **Section 38 (1) and (2) of 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.***

It is the Court’s considered view therefore that the Plaintiff having established that he has acquired the suit property by way of adverse possession, then he is entitled to the orders sought.

On the issue of costs, the Court finds that **Section 27** of the **Civil Procedure Act**, gives it discretion to grant Costs. The Plaintiff being the successful litigant is entitled to costs of the **Originating Summons** herein.

Having now carefully read and considered the pleadings and evidence adduced and the written submissions, the Court finds and holds that the Plaintiff has proved his case on the required standard of balance of probabilities. Consequently the Court finds the **Originating Summons** dated **19<sup>th</sup> September 2018** is merited and the same is allowed entirely in terms of prayers No.(a) & (b), with costs to the Plaintiff.

It is ordered.

**Dated, Signed and Delivered at Thika this 15<sup>th</sup> 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:**

**None for the Plaintiff**

**None for the Defendant**

**L. GACHERU**

**JUDGE**

**15/6/2020**