



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT EMBU**

**E.L.C. CASE NO. 43 OF 2018 (O.S.)**

**JULIANA KAIRU GATUMO.....PLAINTIFF**

**VERSUS**

**PHILIP GITHONGO WAINAINA.....DEFENDANT**

**JUDGEMENT**

1. By an originating summons dated 1<sup>st</sup> November 2018 brought under **Section 38** of the **Limitation of Actions Act (Cap. 22), Order 37 Rule 7** of the **Civil Procedure Rules, and all other enabling provisions of the law**, the Plaintiff sought determination of eight (8) questions in relation to the *Title No. Nthawa/Riandu/881 (the suit property)*. The Plaintiff also sought the following orders in her favour:

- a. That the Defendant's title to land parcel No. Nthawa/Riandu/881 that is occupied by the Plaintiff and his family has been extinguished.
- b. That land parcel No. Nthawa/Riandu/881 be registered in the name of the Plaintiff, Juliana Kairu Gatumo, by way of adverse possession.
- c. That the Plaintiff be issued with a Title deed to land Parcel No. Nthawa/Riandu/881.
- d. That the production of the original Title deed, Land Control Board consents, and transfer over land parcel No. Nthawa/Riandu/881 to the Land Registrar be dispensed with at the time of registration of the Plaintiff as the proprietor by adverse possession.
- e. That costs be awarded to the Plaintiff.

2. The said originating summons was grounded upon the Plaintiff's supporting affidavit sworn on 6<sup>th</sup> November 2018 and the annexures thereto. The Plaintiff contended that she had been in open, exclusive and uninterrupted possession of the suit property since 1980. She contended that she and her children had developed the suit property by erecting dwelling houses thereon and cultivating various crops thereon such as bananas and mangoes. It was further contended that such occupation was with the knowledge of the Defendant who had never attempted to evict her.

3. The Defendant as registered owner of the suit property was served through substituted service by advertising the institution of the originating summons in the Standard Newspaper on 18<sup>th</sup> April 2019. He did not, however, enter appearance within the stipulated time or at all hence the suit proceeded in his absence.

4. When the suit was heard on 2<sup>nd</sup> July 2020, only the Plaintiff and her witness testified. The Plaintiff adopted her witness statement dated 21<sup>st</sup> June 2019 as her evidence-in-chief and produced the documents contained in her list of documents dated 21<sup>st</sup> June 2020 as exhibits. She prayed for her originating summons to be allowed on account of adverse possession. The Plaintiff's second witness, Njuki Rubia, supported the Plaintiff's evidence that she had been in possession of the suit property since 1980 and that she had developed it over the years.

5. Although the Plaintiff framed several questions for determination in the originating summons, the court is of the opinion that they may be condensed into the following two questions:

- a. Whether the Plaintiff has demonstrated her case for adverse possession with respect to the suit property.
- b. Who shall bear costs of the suit.

6. The elements of adverse possession were summarized in the case of **Kasuve Vs Mwaani Investments Ltd & 4 Others [2004] 1KLR 184** as follows:

**“...and in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, Wanja Vs Sakwa No. 2 [1984] KLR 284. A title by adverse possession can be acquired under the Limitation of Actions Act for part of the land...”**

7. The court has considered the pleadings, documents, photographs and evidence on record on the issue of adverse possession. The court has noted that the Plaintiff's evidence was not challenged at the trial since the Defendant did not appear. Accordingly, the court is inclined to accept the Plaintiff's evidence that she has been in open, exclusive and continuous possession of the sit property for a period exceeding the statutory period of 12 years. The court also accepts the Plaintiff's evidence that she has developed the suit property over the years by constructing dwelling houses and planting perennial crops. The court is thus satisfied that the Plaintiff has satisfied all the legal requirements of adverse possession as set out in the case of **Kasuve V Mwaani Investments Ltd & 4 Others (supra)**.

8. The second issue is on costs of the suit. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. Accordingly, a successful litigant should ordinarily be awarded costs of the suit unless, for good, reason the court directs otherwise. The court has noted that the Respondent did not defend the Applicant's claim for adverse possession. In the circumstances, the court is of the opinion that there should be no order as to costs.

9. The upshot of the foregoing is that the court finds merit in the Plaintiff's originating summons dated 1<sup>st</sup> November 2018. The court finds and holds that the Plaintiff has proved her claim for adverse possession with respect to the suit property. Accordingly, the court makes the following orders for disposal of the suit:

- a. That the Defendant's title to land parcel *No. Nthawa/Riandu/881* that is occupied by the Plaintiff and her family has been extinguished.
- b. That land parcel *No. Nthawa/Riandu/881* be registered in the name of the Plaintiff, Juliana Kairu Gatumo, by way of adverse possession.
- c. That the Plaintiff be issued with a Title deed to land Parcel No. *Nthawa/Riandu/881*.
- d. That the production of the original Title deed, Land Control Board consents and transfer form over land parcel *No. Nthawa/Riandu/881* to the Land Registrar be dispensed with at the time of registration of the Plaintiff as the proprietor by adverse possession.
- e. There shall be no order as to costs.

10. It is so decided.

**JUDGEMENT DATED** and **SIGNED** in Chambers at **EMBU** this **30<sup>TH</sup> DAY** of **JULY, 2020** and delivered via Microsoft Teams platform in the presence of Ms. Kiai holding brief for Mr. Ndolo Kalamu for the Plaintiff and in the absence of the Defendant.

**Y.M. ANGIMA**

**JUDGE**

**30.07.2020**