REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 66 OF 2012

MWANIKI KIBUI……..……..PLAINTIFF

VERSUS

JANE MUTHONI WAWERU…….....……1ST DEFENDANT

KARURI WERU…….……2ND DEFENDANT

MARY MUTHONI WAMBUGU….....3RD DEFENDANT

ANTONY GITHINJI WERU……..……..4TH DEFENDANT

FRANCIS MURUGA WERU……..…..……..5TH DEFENDANT

JAMLECK NDEGE WERU…….……6TH DEFENDANT

JUDGMENT

The plaintiff moved this Court by his Originating Summons dated 2nd June 2010 seeking determination of the following issues as against the defendants:-

1. ***That the plaintiff be declared to become entitled by adverse possession of over 12 years to half of that parcel of land registered under the Registered Land Act (Chapter 300 Laws of Kenya) – as it was then and comprised in the title numbers L.R INOI/KIAMBURI/1013, L.R INOI/KIAMBURI/1014, L.R INOI/KIAMBURI/1015, L.R INOI/KIAMBURI/1016, L.R INOI/KIAMBURI/1017, L.R INOI/KIAMBURI/1018 and L.R INOI/KIAMBURI/1019.***
2. ***That the said plaintiff be registered as the sole proprietor of half the said parcels of land namely L.R INOI/KIAMBURI/1013, L.R INOI/KIAMBURI/1014, L.R INOI/KIAMBURI/1015, L.R INOI/KIAMBURI/1016, L.R INOI/KIAMBURI/1017, L.R INOI/KIAMBURI/1018 and L.R INOI/KIAMBURI/1019.***
3. ***That the Land Registrar Kirinyaga do register the plaintiff as proprietor of the title numbers of half of L.R INOI/KIAMBURI/1013, L.R INOI/KIAMBURI/1014, L.R INOI/KIAMBURI/1015, L.R INOI/KIAMBURI/1016, L.R INOI/KIAMBURI/1017, L.R INOI/KIAMBURI/1018 and L.R INOI/KIAMBURI/1019 which was formerly known and registered as L.R INOI/KIAMBURI/172 before it was sub-divided by the defendants herein with the consent of the plaintiff.***
4. ***That the defendants be ordered to pay the costs of this suit to the plaintiff.***
5. ***That such further or other orders be made as may be just and expedient.***

The Originating Summons was, as required, accompanied with a supporting affidavit, copy of the green

card to land parcel No. INOI/KIAMBURI/172 as well as certificate of search in respect of parcels No. INOI/KIAMBURI/1013 to 1019. The plaintiff's claim, as per his supporting affidavit, is that he is the son to the deceased **WERU KARURI** who died in 1967 and who was the registered proprietor of the land parcel No. INOI/KIAMBURI/172 on which the plaintiff and his family have been living since 1959 and built a home therein in 1969. That in **EMBU RESIDENT MAGISTRATE'S COURT CIVIL CASE NO. 48 of 1980** the 1st defendant had been ordered to sub-divide the land in two portions and give the plaintiff ½ share. That the 1st defendant filed an appeal at **MERU HIGH COURT CIVIL APPEAL NO. 10 of 1991** which was dismissed and a further appeal to the **COURT OF APPEAL** which was struck off. That in **SUCCESSION CAUSE NO. 32 of 1992**, the 1st defendant was ordered to include the plaintiff's names as an interested party but this was not done and instead the defendants colluded and sub-divided the land and yet this is his only source of livelihood. That land parcel No. L.R INOI/KIAMBURI/1013 – 1019 should be reconstituted back to No. INOI/KIAMBURI/172 and he be given a half share of the same.

The defendants resisted the claim through a replying affidavit sworn by the 1st defendant on behalf of the others in which she deponed, inter alia, that on 8th July 2002, she was granted letters of administration in respect of the Estate of the deceased **WERU KARURI** notwithstanding the protest of the plaintiff which was dismissed and there was no appeal. That the transfer by way of transmission having been effected by virtue of a Court order validly obtained, there can never be a situation of adverse possession and on 21st February 2003, eviction orders against the plaintiff could not be effected as the Auctioneer died and the applicant refused to vacate. That the defendants were not owners of the suit land and therefore have no locus to defend this suit. That this Originating Summons is only filed as an appeal against the decision of **KERUGOYA PRINCIPAL MAGISTRATE SUCCESSION CAUSE NO.32 of 1992** after the appeal had been dismissed on 17th April 2008 and it should therefore be dismissed with costs for being mischievous and an abuse of the Court process. Annexed to the replying affidavit were the following documents:-

a. ***Grant in KERUGOYA PRINCIPAL MAGISTRATE'S COURT SUCCESSION CAUSE NO. 32 of 1992***
b. ***Certificate of Confirmation of grant dated 12th February 2003***
c. ***Proceedings and judgment in Succession Cause No. 32 of 1992***
d. ***Notice dated 23rd September 2009 by the Kirinyaga District Land Registrar removing the caution of L.R INOI/KIAMBURI/172***
e. ***Order dated 21st February 2003 for the eviction of the plaintiff from L.R INOI/KIAMBURI/172***
f. ***Order dated 17th April 2008 by Justice Kasanga dismissing an application for extension of time to file appeal out of time.***

The plaintiff was the only witness in support of his case while the 1st defendant testified on behalf of the other defendants and called **MUNYI NJOKA (DW2**) as a defence witness.

In his evidence, the plaintiff testified that he has lived on a portion of the original land parcel No. L.R INOI/KIAMBURI/172 since 1959 which originally belonged to his father **GICHOYA KAGIO** and the 1st defendant started living on the land in 1967 having been given a portion by her late husband **WERU KARURI.** Following his father's death in 1980, the 1st defendant filed **EMBU RESIDENT MAGISTRATE'S COURT CIVIL CASE NO. 48 of 1980** but the Court ordered her to divide the land parcel No. INOI/KIAMBURI/172 into two equal portions and the 1st defendant's appeal in the High Court was dismissed and a further appeal to the Court of Appeal was struck off. There was also **KERUGOYA LDT CASE NO. 47 of 2001** in which it was ordered that the same land be divided into two portions. The plaintiff produced as evidence, the ruling in **EMBU RESIDENT MAGISTRATE'S COURT CIVIL CASE NO. 48 of 1980,** the Decree therein, the Judgment in **EMBU HIGH COURT CIVIL APPEAL NO. 10 of 1991**, the notice of Appeal in **COURT OF APPEAL CASE NO. 261 of 1999** and the decree in **KERUGOYA LDT CASE NO. 47 of 2001** – see plaintiff's Exhibits 1 to 5. The land was later sub-divided into several portions being L.R INOI/KIAMBURI/1013 to 1019 (the suit land herein) by the 1st defendant without giving him his half share as ordered. Certificate of searches in respect to those portions were produced (Plaintiffs Exhibit 6). He told the Court that his house is in the

middle of the suit land though he was not sure on exactly which portion it stands. He however produced a photograph of his house (Plaintiff's Exhibit 7). He testified further that he was charged in **WANGURU COURT CRIMINAL CASE NO. 563 of 2010** where the 3rd defendant was the complainant but was acquitted of the offence of forcible detainer (Plaintiff's Exhibit 8). He therefore filed this suit and seeks judgment as per the Originating Summons.

The 1st defendant **JANE MUTHONI WAWERU** (DW1) urged the Court to adopt the contents of her replying affidavit which I have already referred to earlier in this judgment.

Her witness **MUNYI NJOKA** (DW2) told the Court that the deceased **WERU KARURI** had bought the land from one **GICHOYA** whom the plaintiff claims to be his father. He confirmed that the plaintiff indeed has a home on the suit land.

Submissions have been filed both by the firm of Magee wa Magee Advocate and Karweru and Company Advocates.

I have considered the oral evidence by both parties including the documentary exhibits produced and the submissions by counsel.

Let me begin with an issue of jurisdiction raised by counsel for the defendants Mr. Karweru in his written submissions in which he has stated as follows:-

> ***"….. the plaintiff herein under Probate and Administration Rule 41 ought to have filed this current suit during the subsistence of the Succession Proceedings. He would then seek stay pending the determination of the said proceedings. Once he obtained judgment in the matter, he would then import the judgment in the succession proceedings for consideration at the transmission stage. His failure to abide by the procedure and the law on properly claiming his supposed entitlement under adverse possession clearly makes the proceedings before this Court untenable. It is like the plaintiff is seeking to set aside the succession proceedings in a civil litigant. This Court clearly lacks jurisdiction to grant the orders sought in the manner sought"***

That submission, though raised rather belatedly, questions the jurisdiction of this Court and it is important that I address it nonetheless because if this Court has no jurisdiction, then it must down its tools – ***OWNERS OF THE MOTOR VESSEL "LILLIANS' VS CALTEX OIL (KENYA) LTD 19.***

Rule 41 (3) and (4) of the Probate and Administration Rules provided for under the ***Law of Succession Act*** and which are the relevant Rules for purposes of this judgment provides as follows:-

> ***41 (3) "When a question arises as to the identity, share or Estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or Estate which cannot at that stage be conveniently determined, the Court may prior to confirming the grant, but subject to the provisions of Section 82 of the Act, by order appropriate and set aside the particular share or Estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to Section 71(2) of the Act, proceed to confirm the grant"*** emphasis added

> ***41 (4) "In proceedings under sub-rule (3), unless the Court otherwise directs, the personal representative of the deceased shall be the applicant seeking determination of the question, and the person claiming so to be beneficially interested together with the residuary legatee or other person to be appointed by the Court to represent the residuary Estate shall be the respondent; and the Court in such proceedings shall give all necessary directions relative to the prosecution there of including the safeguarding of the share or Estate so appropriated and set aside and the provisions of costs***"

emphasis added

Order 37 of the Civil Procedure Rules (previously order ***XXXVI)*** identifies the category of persons who may take out such proceedings and these are the legal representatives, creditors, devisees, legatees heirs or cestui quo trust or any persons claiming to be one of them. My understanding of the above provisions as read together with ***Section 82 of the Law of the Succession Act*** is that firstly it is the responsibility of the Judge or Magistrate handling a succession cause in which issues arise as to the identity or share or any person interested in a share of the Estate to "***set aside the particular share***" awaiting determination of proceedings under ***Order 37 of the Civil Procedure Rules.*** Secondly, the Judge or Magistrate will only do so if that question cannot ***"be conveniently determined"*** at that stage and thirdly it is the personal representative of the deceased who shall be the applicant seeking the determination of that question.

In answer to Mr. Karweru's submission therefore, there was no obligation on the plaintiff to ***"stay"*** the succession proceedings and seek a determination of the question regarding his claim. It was the duty of the magistrate in **KERUGOYA PRINCIPAL MAGISTRATE SUCCESSION CAUSE NO. 32 of 1992** to invoke the provisions of ***Rule 41 of the Probate and Administration Rules*** and then, only if he thought that such question could not be ***"conveniently determined***" at that stage. Since that was not done, the only conclusion that this Court can arrive at is that the magistrate did not find it necessary to do so as the plaintiff's protest could be "***conveniently determined"*** in the said succession cause. Therefore, there can be no reasonable challenge to the filing of the Originating Summons by the plaintiff nor to this Court's jurisdiction to handle the same.

I shall now consider the Originating Summons on its merits.

The claim is for adverse possession and it is now well established that the combined effort of the provisions of ***Sections 7, 13 and 17 of the Limitation Actions Act*** is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of the adverse possession of that land – ***BENJAMIN KAMAU & OTHERS VS GLADYS NJERI C.A CIVIL APPEAL No. 2132 of 1996***. Similarly, the new ***Land Laws*** promulgated after 2010 recognize the doctrine of adverse possession. ***Section 28 (h) of the new Land Registration Act 2012*** recognizes some of the overriding interests as:-

> ***"rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription"***

Similarly, ***Section 7 (d) of the new Land Act 2012*** provides as follows:-

> "***Title to land may be acquired through:-***

a.
b.
c.
d. ***prescription"***

Finally, ***Section 38 (1) of the Limitation of Actions Act*** provides as follows:-

> ***'Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 of land comprised in a lease registered under any of these 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"***

It is not in dispute that the suit land is a resultant sub-division of the original land parcel No. INOI/KIAMBURI/172 which was registered in the names of the deceased WERU KARURI. It is also common ground as shown from the certificates of search that the suit land is now registered in the names of the six defendants herein. This was done after completion of the succession process when the grant of

letters of administration issued to the 1st defendant in **KERUGOYA PRINCIPAL MAGISTRATE'S COURT SUCCESSION CAUSE NO. 32 of 1992** was confirmed on 12th February 2003 also in **NAIROBI HIGH COURT SUCCESSION CAUSE NO. 32 of 1992** and shared out among the six defendants as shown therein. It is also clear from the evidence herein that the plaintiff's occupation of a portion of the suit land is not denied. In her replying affidavit filed on behalf of the other defendants, the 1st defendant did not deny the plaintiff's averment that he has been living on the suit land since 1959. Indeed, it was admitted by the 1st defendant in cross-examination when she said:-

> ***"The plaintiff only has a house there. He does not plough it"***

And the defendants' witness **MUNYI NJOKA** (DW2) said in his evidence in chief as follows:-

> ***"The plaintiff has been living on a portion of the land. He had put up a house on the land where he used to live. I found him there. His house is still on the land to-date"***

Indeed this was reinforced by the submissions of the defendants' counsel when he stated as follows:-

> ***"The claim in the plaint if for half of the land. However, at the hearing, the plaintiff and the defendants evidence was in unison that he only occupied the part that his house was"***

Possession and occupation having been conceded, the plaintiff also has the duty to prove that such possession and occupation amounts to adverse possession as known in law. To do so, the plaintiff has to establish what was re-stated by the Court of Appeal in the case of ***KASUVE VS MWAANI INVESTMENT LIMITED & FOUR OTHERS 2004 1 K.L.R 184*** where the Court said:-

> "***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 dispossessing the owner or by discontinuation of possession by the owner on his own volition"***

As indicated above, the plaintiff has pleaded and led evidence, which was not rebutted, that he has been in possession of a portion of the suit land since 1959 and has a house thereon. Photographs of the same were produced (Plaintiff's Exhibit 7). Looking at the defendant's pleadings, it seem to be their case that following the finalization of the succession process and the confirmation of the grant, the plaintiff cannot have any claim to the suit land as the sub-division of the land was done by a Court order. The answer to that is that the succession proceedings did not involve the plaintiff's claim in adverse possession which in any case could not have been litigated in that case. While it is not within the mandate of this Court to question the confirmation of grant issued by the High Court in Succession Cause No. 32 of 1992 on 12th February 2012, a few issues stick out like a sore thumb:-

1. ***That both the KERUGOYA PRINCIPAL MAGISTRATE SUCCESSION CAUSE NO. 32 of 1992 and the NAIROBI HIGH COURT SUCCESSION CAUSE No. 32 of 1992 both bear the same number***
2. ***That both the grant issued by the Kerugoya Principal Magistrate's Court on 8th July 2002 and the confirmation of grant issued by the High Court in Nairobi on 12th February 2003 bear the names of the same Resident Magistrate (S.A. OKATO now deceased) but the signatures thereon would not require an expert witness to confirm that their differences are miles apart.***

As I have indicated above, that strange twist of events is not a matter for my determination and neither does it have a bearing on the decision that this Court will make. However, I could not avoid noticing them.

The plaintiff's possession of a portion of the suit land has clearly been with the knowledge of the defendants. That the original land parcel No. INOI/KIAMBURI/172 has since been sub-divided and the ownership of the resultant sub-divisions changed hands does not defeat a claim founded on adverse

possession for as was held by the Court of Appeal in ***GITHU VS NDEETE 1984 K.L.R 776:-***

> *"**The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession"***

The plaintiff's possession of a portion of the suit land has also certainly been without the permission of the defendants. That explains why the suit land, and before that, the original land parcel No. INOI/KIAMBURI/172 has been the subject of several Court cases. The earliest of those cases appears to be **EMBU RESIDENT MAGISTRATE'S COURT CIVIL CASE No. 48 of 1980** in which the 1st defendant had filed a suit against the plaintiff and in which a decree was issued ordering the sub-division of land parcel No. INOI./KIAMBURI/172 into two equal portions between the 1st defendant (as plaintiff) and the plaintiff (as defendant). The significance of that litigation, however, is that it came too late to interrupt the plaintiff's possession of a portion of the suit land which commenced in 1959 and therefore the 12 year period expired in 1971 and so by the time the suit in the **EMBU RESIDENT MAGISTRATE'S COURT** was being filed in 1980, the plaintiff's right to the suit land through adverse possession had crystallized some nine (9) years earlier. The subsequent litigation post 1980 including the criminal trial in **WANGURU SENIOR RESIDENT MAGISTRATE CRIMINAL CASE NO. 563 of 2010** did not do much to defeat the plaintiff's claim to the suit land other than to confirm that the plaintiff's occupation of a portion of the suit land was hostile and without the consent of the defendants which is a requirement before one can claim the land of a registered owner through adverse possession. From the evidence herein, I am satisfied that the plaintiff has proved that he is entitled to a portion of the suit land on which he lives and is therefore entitled to the orders sought in his Originating Summons with respect to that portion.

What has agonized this Court is the size of the suit land that the plaintiff is entitled to. In his Originating Summons; he claims half of the suit land. It is clear from his evidence, however, that he does not infact occupy half of the suit land. he said the following in cross-examination:-

> ***"There are trees that I have planted. I live in the house. The house is still intact. I wish to clarify that I live on the land in that house but I do not cultivate the land. The only part I occupy is the house where I live in"***

In the course of his evidence, the plaintiff also stated that his house is in the middle of the suit land. Therefore, while it is true that the plaintiff occupies part of the suit land, the size that he occupies cannot be half of the said land. In trying to confirm the exact acreage of the suit land, I have looked at the confirmation of grant issued in **NAIROBI HIGH COURT SUCCESSION CAUSE NO. 32 of 1992** which shows that the suit land was shared among the six defendants in the following manner:-

1. **JANE MUTHONI WAWERU - 2 ½ Acres**
2. **FRANCIS MURUGA WERU - 2 Acres**
3. **MARY MUTHONI WAMBUGU - 1 Acre**
4. **KARURI WERU - 1 ½ Acre**
5. **ANTHONY GITHINJI WERU - 1 ½ Acre**
6. **JAMLICK NDEGE WERU - 1 ½ Acre**

The whole suit land therefore measures 10 acres. The certificate of search in respect to the original parcel No. INOI/KIAMBURI/172 shows the acreage as 4.0 Hectares. It is the submission of the defendants that if the plaintiff is to get any land, it can only be the portion on which his house stands. In his submission, counsel for the defendants stated as follows:-

> ***"Stretching this Court's hand to do justice, he can only obtain this portion not any more. But again that is not what he has claimed. This Court cannot give that which he has not asked for"***

It is of course true that a party is bound by his pleadings. But that is not the same thing as saying that a party cannot be given less than what he has asked for. The mischief intended to be addressed is not to

award a party more than he has bargained for. In this case, the plaintiff seeks half of the suit land which measures 4.0 Ha (as per the certificate of search in respect of land parcel No. INOI/KIRIAMBURI/172 or 10 acres as per the confirmation of grant). A half of that would translate to 2.0 Ha or 5 acres. It is not clear on what size of the suit land his house stands or what portion is occupied by his trees. But it must be appreciated that this is not a plot in town. It is agricultural land and no doubt the plaintiff would need to grow food for the sustenance of himself and his family. In the photograph that he produced, he was posing with his family. If this Court awards him only the land on which his house stands and no more (as suggested by counsel for the defendant) that would not be in keeping with the principles of ***Land Policy*** enshrined under ***Article 60 (1) of the Constitution*** which provides as follows:-

> "***Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles***
>
> a. ***equitable access to land***
> b. ***security of land rights***
> c. ***sustainable and productive management of land resources***
> d. -
> e. -
> f. -
> g. ***"***

Among the principles that guide this Court is the principle of intergenerational and intragenerational equity provided for under ***Section 18 of the Environment and Land Court Act***. This Court cannot also lose sight of the cultural and traditional principles applied by the Community in the management of land the main one of course being that of utilizing land to produce food. The plaintiff should therefore have sufficient land to use now and also leave some for his future generation including the child appearing with him in the photograph (Exhibit 7). Doing the best I can in the circumstances of this case, I think that awarding the plaintiff two (2) acres out of the suit land would meet the ends of justice.

I accordingly enter judgment for the plaintiff against the defendants by determining the issues raised in his Originating Summons in his favour in the following terms:-

1. ***The plaintiff be declared to become entitled by adverse possession of over 12 years to two (2) acres of that parcel of land registered under the Registered Land Act and comprised in the title numbers No. L.R INOI/KIAMBURI/1013 to 1019.***
2. ***That the plaintiff be registered as the sole proprietor of 2 acres out of the said parcels of land No. L.R INOI/KIAMBURI/1013 to 1019.***
3. ***That the Land Registrar Kirinyaga do register the applicant as proprietor of two (2) acres out of the said land parcel No. L.R No. INOI/KIAMBURI/1013 to 1019.***
4. ***That in surveying and registering the said two (2) acres in the plaintiff's names, the District Surveyor and Land Registrar do take into account the portion now occupied and utilized by the plaintiff and an which his house stands.***
5. ***That the plaintiff shall meet the costs of the sub-division and registration.***
6. ***Each party shall meet their own costs of this suit.***

It is so ordered.

B.N. OLAO

JUDGE

12TH MAY, 2016

Judgment delivered, dated and signed in open Court this 12th day of May, 2016

Ms Kiragu for Mr. Magee for the Plaintiff present

Mr. Karweru for the Defendants absent

Right of appeal explained.

B.N. OLAO

JUDGE

12TH MAY. 2016