



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC. CASE NO. 804 OF 2017(O.S)**

RAPHAEL NJOROGE WARARI.....1<sup>ST</sup> PLAINTIFF  
PETER MUNGAI KARUA.....2<sup>ND</sup> PLAINTIFF  
MOSES MATHENGE GIKONYO.....3<sup>RD</sup> PLAINTIFF  
JOYCE WANGECHI WAIYIGO.....4<sup>TH</sup> PLAINTIFF  
GEORGE KAMAU NYOKABI.....5<sup>TH</sup> PLAINTIFF  
HENRY NDUNG’U WARARI.....6<sup>TH</sup> PLAINTIFF  
SAMUEL GACHIGI CHEGE.....7<sup>TH</sup> PLAINTIFF  
MAGDALINE NJAMBI WANDUI.....8<sup>TH</sup> PLAINTIFF  
JOHNSON NDIRANGU MWANGI.....9<sup>TH</sup> PLAINTIFF  
SIMON KINUTHIA KURIA.....10<sup>TH</sup> PLAINTIFF  
GEORGE NJUGUNA WANJIRU.....11<sup>TH</sup> PLAINTIFF  
MOSES KAGIKAIKINYA.....12<sup>TH</sup> PLAINTIFF  
JANE MUTHONI NJOROGE.....13<sup>TH</sup> PLAINTIFF

**-VERSUS-**

JECINTA NYAKINYUA KARANJA.....DEFENDANT

**JUDGMENT**

By an Originating Summons dated 19<sup>th</sup> October 2017, the Plaintiffs herein filed this suit against the Defendant seeking for orders that;

1. THAT the Plaintiffs have acquired title by Adverse Possession to the whole of L.R. No. RUIRU EAST BLOCK 2/3319 measuring 0.3319 Ha (00.983 acres) situate in Ruiru Sub-County, Kiambu County.
2. THAT the said RUIRU/RUIRU EAST BLOCK 2/3319, be subdivided and be transferred to the Plaintiffs in plots of 40 by 60 feet each (save for the 7<sup>th</sup> Plaintiff who is entitled to three (3) plots of 40 by 60 and 12<sup>th</sup> Plaintiff who is entitled to two (2) plots of 40 by 60 each) in place of the Defendant and the Defendant do sign all necessary forms of subdivision, consent and transfer and in default the Deputy Registrar of this Honourable court do sign the same.
3. That the costs of this suit be provided for.

The Originating Summons is supported by the affidavit of **Raphael Njoroge Warari**, the 1<sup>st</sup> Plaintiff, sworn on **21<sup>st</sup> October 2017**, and sworn on his behalf and on behalf of the other Plaintiffs. He further averred that his Co-Plaintiffs were his immediate neighbors in the parcel of land and that they each separately, have lived on the land occupying a portion of **40 by 60** feet, since the year **2003** and have developed each of the said plots.

He averred that the plots have been developed as follows; he has built permanent three bedroom house, **Peter Mungai Karua**, built three bedroom semi-permanent house. **Moses Mathenge Gikonyo** built a permanent three bedroom house. **Joyce Wangechi Waiyigo** a permanent three bedroom house, **George Kamau Nyokabi** a permanent three bedroom house, **Henry Ndung'u Warari** has been cultivating his plot planting maize, beans and potatoes. **Samuel Gachigi Chege** has been cultivating his plot planting maize, beans and potatoes. **Magdaline Njambi Wandui**, built a permanent three bedroom house, **Johnson Ndirangu Mwangi** built a permanent three bedroom house with a shop and hotel, **Simon Kinuthia Kuri** conducts a charcoal and wood business on his plot, **George Njuguna Wanjiru** built a permanent three bedroom house, **Moses Kagika Ikinya**, a permanent house comprising four portions, **Jane Muthoni Njoroge** has been cultivating subsistence crop such as maize, potatoes and beans.

He averred that they entered into the land in the year **2003**, after the same was sold to them by one **Samuel Njuguna Gatu t/a Gatu Properties**, who gave them vacant possession as evidenced by sale agreements and the share certificate from Gatu Properties. It was his contention that the said **Samuel Njuguna Gatu**, had bought the land from **Jonhson Martin Warui Ngari**, who had initially bought it from the Defendant herein vide a sale agreement dated **11<sup>th</sup> June 2003**, as evidenced by the two sale agreements dated **11<sup>th</sup> June 2003** and **23<sup>rd</sup> September 2010** marked as annexure **R/153/XVII** and **R/153XVIII** respectively.

He further averred that they have constructed homes thereon and live with their families and that they have been in exclusive, continuous and interrupted occupation and possession of the land and the individual plots they occupy for more than thirteen (13) years. He contended that their occupation and possession have been adverse to the title of the Defendant and they have therefore acquired the land by Adverse Possession.

Despite being served with the suit papers, the Defendant did not enter appearance and therefore did not participate in the proceedings. The matter proceeded by way of *viva voce* evidence wherein the Plaintiffs called one witness and closed their case.

#### **PLAINTIFFS' CASE**

**PW1 Raphael Njoroge Warari**, the 1<sup>st</sup> Plaintiff herein testified that he had authority to plead on behalf of the other Plaintiffs. He adopted his Supporting Affidavit dated **21<sup>st</sup> October 2017**, in support of the Originating Summons and his witness statement dated **19<sup>th</sup> October 2017**, as part of his evidence, He further produced the list of documents as exhibits 1 to 17 in Court.

It was his testimony that since he entered the property in **2003**, he has put up various structures and that the whole land that has been occupied by the 13 of them is **0.398ha**, which is approximately **0.983 acres**. He further testified that the Defendant has never interrupted their occupation. That the 7<sup>th</sup> Plaintiff owns 3 plots of the same size and the 12<sup>th</sup> Plaintiff owns two plots and he urged the Court to make a finding that they have acquired the suit property by way of Adverse Possession and order that the land be transferred to their respective names.

After close of *viva voce* evidence, the Plaintiffs filed written submissions which the Court has carefully read and considered.

Despite service, the Defendant failed to enter appearance, file a Defence and hence failed to defend the suit. The Plaintiffs are the ones who have alleged and they have a duty to prove their case on the required standard as provided by **Section 107** of the **Evidence Act**. Therefore, it was upon the Plaintiffs to call sufficient evidence and prove their case on the required standard. Section 107 of the Evidence Act 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.*

Even though the suit is undefended, 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 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 opponent has not made a presence in the contest.”*

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 finds the issues for determination are:

*i. Whether the Plaintiffs have proved a claim of Adverse Possession.*

*ii. Who should bear the costs of the suit.*

**i. Whether the Plaintiffs have proved a claim of Adverse Possession.**

The guiding provisions of law with regards to Adverse Possession is **Section 38 (1) and (2) Limitation of the Actions Act** which 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 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*, and that the possession has to be *actual*, to enable the owner to 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 Plaintiffs in order to ascertain whether they have met the threshold for proving ownership through Adverse Possession.

The Plaintiffs have claimed that they have been in possession of the suit property from the year **2003**, and that while some of them have built structures in the suit property, some of them have cultivated and used the said land. The Court has seen the photographs produced as evidence and in the absence of any evidence to controvert the same, then the Court is satisfied that the Plaintiffs have been in occupation of the suit property. .

On whether the Plaintiffs have been in actual and continuous possession of the suit property for a period of over **12 years**, the Court notes that their evidence has not been controverted. Further the Plaintiffs have averred that they took possession of the suit property in **2003**, after buying the suit property from one **Samuel Njuguna Gatu**. This suit was filed in **2017**, It is there not in doubt that from the year **2003 to 2017**, **12** years had since lapsed and therefore the Plaintiffs have been in possession of the suit land for a period exceeding **12** years. Having proved that they are in possession of the suit property, and given that the Plaintiffs evidence is uncontroverted, the Court finds and holds that the Plaintiffs have been in actual and continuous occupation of the suit property for a period of 12 years.

The Plaintiffs also needed to prove that they had dispossessed the Defendant of the said land and that the Defendant had been dispossessed without her consent and that the Plaintiffs further 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...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 Court has seen the certificate of official search dated **1<sup>st</sup> September 2016**, confirming that the Defendant is the registered owner of the suit property. The Plaintiffs have testified that the Defendant has never interfered with their occupation. The Court having held that the Plaintiffs have been in occupation of the suit property for over 12 years, and given that the Plaintiffs evidence have not been controverted, it is therefore not in doubt that the Plaintiffs have enjoyed quiet possession over the suit property and that their occupation has been **adverse** to the rights of the Defendant. Without any evidence to controvert the Plaintiffs’ evidence the Court further finds and holds that the Defendant who is the registered owner of the suit property was dispossessed off the suit property by the Plaintiffs as the Plaintiffs have been in continuous and uninterrupted occupation and that they have used the property to the adverse interests of the owner, even if there is a claim that they had bought the suit property. 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 15<sup>th</sup> June, 1999 did not interrupt the respondent’s adverse possession of the portion he bought from the deceased.”***

Consequently, the court finds and holds that the Plaintiffs have proved their Claim of Adverse Possession.

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

**Section 27 of the Civil Procedure Act** grants the Court discretion to either 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 are the successful litigants and are therefore 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 proved their case on the required standard of balance of probabilities. For the above reasons the instant Originating Summons dated **19<sup>th</sup> October 2017**, is allowed entirely with costs to the Plaintiffs.

It is so ordered.

**Dated, signed and Delivered at Thika this 9<sup>th</sup> day of July 2020.**

**L. GACHERU**

**JUDGE**

**9/7/2020**

**Court Assistant – Lucy**

**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.

**With consent and virtual appearance of:**

**Mr. Wahome Gikonyo for the Plaintiffs**

**No consent for the Defendant**

**L. GACHERU**

**JUDGE**

**9/7/2020**