



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC. CASE NO. 253 OF 2009**

**REGINA MWIKALI KITAVI.....PLAINTIFF**

**VERSUS**

**ONGATA WORKS LIMITED.....DEFENDANT**

**JUDGMENT**

The Plaintiff filed this suit by way of Originating Summons dated and filed on 29<sup>th</sup> May 2009 seeking for determination of the following questions:

1. Whether the Plaintiff has acquired title to and is entitled to be registered as proprietor of L.R. No. 209/10904 Embakasi (hereinafter referred to as the “suit property”) by way of adverse possession.
2. Whether the Plaintiff is entitled to an order that a certificate of title be issued in her name as the proprietor of the suit property.
3. Whether the Plaintiff is entitled to the costs of this suit.

The Originating Summons was premised on the Supporting Affidavit of the Plaintiff, Regina Mwikali Kitavi, sworn on 29<sup>th</sup> May 2009 in which she averred that she has been in peaceful, continuous and uninterrupted occupation of the suit property from 1989 to 2009 and has therefore acquired prescriptive rights over the suit property which is registered in the name of the Defendant. She averred further that she has developed the suit property with permanent houses which she rents out to tenants. She further stated that on 26<sup>th</sup> May 2009, the Defendant came to the suit property with hooligans and informed her to vacate the suit property claiming ownership thereof. She cited ignorance of the Defendant’s purchase of the suit property and contended that the title of the Defendant over the suit property was extinguished upon the expiry of 12 years from 1989 when she took possession of the suit property and that she has therefore acquired title thereto by adverse possession.

The Defendant opposed the Originating Summons by filing its Replying Affidavit sworn by its Director, Mary Wangui Wambugu, on 18<sup>th</sup> June 2009 in which she averred that she together with her husband jointly purchased the suit property from one David Kiprono Chesaigut on 18<sup>th</sup> December 1995. She further stated that they sold the suit property to the Defendant on 22<sup>nd</sup> December 1999. She averred further that when she and her husband initially purchased the suit property, it was a vacant plot and they accompanied the Government Valuer to the suit property to assess the stamp duty payable. She confirmed that the Defendant has been paying rates and land rent for the suit property since the purchase. She further stated that it was in the year 2008 that the Defendant noticed that two persons had encroached onto the

suit property and constructed illegal mabati structures for renting out, whereupon the Defendant sought the assistance of the Area chief. She disputed the Plaintiff's claim that she has occupied the suit property for over 20 years but encroached into it in the year 2008.

This matter proceeded by way of viva voce evidence as directed by Okwengu, J (as she then was) on 19<sup>th</sup> May 2011. The Plaintiff testified and called two additional witnesses. The Defendant called one witness.

PW1, the Plaintiff herein, confirmed her averments in her Supporting Affidavit to the Originating Summons. She confirmed that prior to moving into the suit property, she used to live near the railway at Mukuru but that she was subsequently resettled by the former Member of Parliament of Embakasi the Late David Mwenje on the suit property in the year 1989. She stated that she was issued with ownership documents thereto by the Provincial administration but that she gave hers to the former registered proprietor of the suit property one David Kiprono. She confirmed having built 58 rental units on the suit property using mabati which she rents out to tenants. She further testified that it was only in the year 2009 that she received summons from the Area chief when she came to learn that the suit property was being claimed by the Defendant. She confirmed having obtained a copy of the title deed for the suit property from the said chief. She prayed for the court to give her the suit property based on her continued occupation thereof for over 20 years.

PW2, Michael Nzila Malindi, stated that he had been a tenant of the Plaintiff and lived on the suit property House No. 44 from 1989 to 2001. He confirmed that he used to pay rent amounting to kshs. 800/- and that by the year 2001, he was paying Kshs. 1,500/-. He testified that while he resided on the suit property, he believed that the property belonged to the Plaintiff. During cross-examination, this witness indicated that he was 24 years old when he became the Plaintiff's tenant but later recanted that and stated that having been born in the year 1972, he was 17 years old when he became the Plaintiff's tenant in 1989. Apart from his oral evidence, he has not documentary proof of his occupation of the suit property.

PW3, Kimeu Mutua, also testified that he was a tenant of the Plaintiff having occupied House No. 29 from 1996 to 2001 paying a rent of Kshs. 800/-. He testified that it is not true that the suit property was built by the Plaintiff in the year 2008. He further confirmed that the Plaintiff never used to issue them with receipts upon payment of rent.

The Defendant only called one witness namely Mary Wangui Wambugu, a director thereof. She testified that in 1995, she was looking for property to develop flats and identified the suit property. She testified having conducted all the necessary due diligence thereon including having the beacons of the suit property identified to her by a surveyor. She confirmed that at that time, the suit property was vacant. She confirmed that the suit property was transferred into the joint names of herself and her husband after which they transferred the suit property to the Defendant in 1999. She confirmed that she would visit the suit property every 6 months and never saw any structures on the suit property. She further confirmed that the Defendant was ready to develop the suit property and for this purpose they commissioned a firm of architects to come up with drawings of the proposed development, which was done. She confirmed that the architects went to the suit property to conduct their necessary assessments and that the suit property was still vacant. She testified further that it was only in the year 2008 that she noticed some developments taking place on the suit property which she reported to the area chief. She testified further that the chief summoned someone called "Chairman" or Baba Issack and the Plaintiff. She confirms having been present when the said Baba Issack appeared who agreed that he was sitting on someone's property and further agreed to vacate the suit property. She testified further that the Plaintiff did not appear but instead filed this suit.

The issue arising for my determination is whether the Plaintiff has proved that she is entitled to have the suit property transferred to her on the basis of adverse possession. The burden of proof lies with the person asserting adverse possession. Has the Plaintiff shown in her evidence that she is entitled to the prayers sought in her Originating Summons? According to the case of **James Mwangi & Others – v- Mukinye Enterprises Ltd. Nairobi Civil Case no. 3912 of 1986**, a person relying on adverse possession must show clear possession, lack of consent on the part of the owner and an uninterrupted occupation for more than 12 years. It is common ground that the suit property is registered in the name of the Defendant.

It is also common ground that the Plaintiff is in possession of the suit property. The main question is the period of time that the Plaintiff has been in possession of the suit property. The Plaintiff has testified that she came to be in possession of the suit property in the year 1989. PW2 testified to having entered the suit property in the same year 1989. PW3 testified to having become a tenant of the Plaintiff in the suit property in the year 1996. Apart from their word, there is no way to verify whether these assertions are true or not. Both PW2 and PW3 did not produce any documentary evidence such as receipts for payment of rent which could be relied on to arrive at a finding that their testimonies were true. The Plaintiff too did not have any documentary evidence to support her assertion of having entered into the suit property in the year 1989. The Plaintiff's case comes under scrutiny mainly by the assertion of the Defendant that as at the time the suit property was bought from the previous owner one David Kiprono in 1995, the suit property was vacant. I am inclined to agree with this position for the reason that anyone buying a parcel of land is bound to want to view the same prior to making any financial commitment. The Defendant's director, Mary Wambugu, testified that at the time of purchasing the suit property from the said David Kiprono, she visited the suit property in the company of a surveyor who identified the suit property on the ground and pointed out its beacons. Further, I am inclined to believe that the architects commissioned by the Defendant to come up with drawings of the development to be made on the suit property could have notified the Defendant if they found any illegal occupants on the suit property. They did not. In this regard, I am inclined to doubt the oral testimony of the Plaintiff and her witnesses that she entered into the suit property in the year 1989.

In light of the foregoing, I hereby dismiss this suit. Each party shall bear their own costs.

**DELIVERED AND SIGNED AT NAIROBI THIS 10<sup>TH</sup>**

**DAY OF APRIL 2015.**

**MARY M. GITUMBI**

**JUDGE**