



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL SUIT NO. 485 OF 2010(O.S)**  
**IN THE MATTER OF LR NO LOC4/GAKUI/328**

AND

**IN THE MATTER OF LIMITATAION OF ACTIONS ACT CAP 22, LAWS OF KENYA**

AND

**IN THE MATTER OF THE REGISTERED ACT, 300 LAWS KENYA**

AND

**IN THE MATTER OF ORDER XXXVI OF THE CIVIL PROCUDURE RULES**

**BETWEEN**

**PAULINA WANJIRU KIARIE.....PLAINTIFF**

**=VERSUS=**

**BENSON IRUNGU MBARIA.....DEFENDANT**

**JUDGMENT**

What is before this Court is the Originating Summons dated 24<sup>th</sup> September 2010 brought under **Order XXXVI Rule 1 of the Civil Procedure Rules (Repealed) Section 28 of the Registered Land Act Cap 300 (Repealed) and section 37 of the Limitation of Actions Act Cap 22** seeking for orders that:

1. *The Respondent's title to Land Reference Number **LOC4/Gakui/328** is deemed to have been extinguished through adverse possession of the applicant.*
2. *The applicant be registered as the proprietor of the Land Reference Number **LOC4/Gakui/328**.*

This application is premised on the grounds stated on the face of the application and the supporting affidavit of **Paulina Wanjiru Kiarie**, who stated that the land which is the subject matter of this suit namely **LOC4/Gakui/328**, situated in Maragua District and the same was her husband's ancestral land who was registered as proprietor for the said parcel of land in 1969. She averred that her family lived in the said parcel of land since the time of its registration. That her husband died in 1986 and left them occupying the suit property which they have constructed homes on the suit property without any disturbance for more than 60 years. She added that when she wanted to allocate the suit property to her

family a search revealed that the suit property had been registered in the name of the Defendant on **21<sup>st</sup> October 1983**, but the Respondent had never claimed possession of the suit premises and has never visited the same. She avers that she has never been in occupation of the suit property openly and as of right and never been challenged by the defendant or any other person. She stated that she honestly believes that her occupation of the suit property together with her children had extinguished the defendant's title to it and prays that this court declares that she has acquired title to the suit property through adverse possession and that the court makes an order that she be the registered rightful owner of the suit premises.

The defendant entered appearance through the firm of **Mereka & Company Advocates**, on 24<sup>th</sup> September 2012. He however did not file any reply to the claim made by the plaintiff. The defendant was served through advertisement on 24<sup>th</sup> September 2012. The plaintiff subsequently requested for summary judgment on 7<sup>th</sup> November 2012 which was entered on 15<sup>th</sup> February 2013 and the matter fixed for formal proof on 18<sup>th</sup> December 2013.

During the hearing, **PW1 Paulina Wanjiru Kiarie**, testified that she had been living on the suit land for about 40 years now but she was not the registered proprietor of the suit property. She added that her deceased husband, **Kiarie Mwai** was the registered proprietor of the suit property. She further testified that she had cultivated the suit property and had built structures on it and that they reside there. She said that when they did a search on the title to the suit land, they found the same registered in the names of **Benson Irungu Mbaria**, whom she did not know. She also added that she had not been told to move out of the land.

The plaintiff in her written submissions filed on 17<sup>th</sup> January 2014 she cited Section 37 (1) and 38 of the Limitation of Actions Act in making her claim for adverse possession. She also relied on the case of **Githu –vs- Ndeete 91984) KLR and Kairu –vs- Gacheri (1988) KLR** to prove her claim for adverse possession. She also added that they were living on the suit land without the consent of the defendant.

I have considered the pleadings filed, the evidence in court and the written submissions together with the annexed authorities. In determining whether or not to declare that a party has acquired land by adverse possession, there are certain principles which must be met. This court will therefore analyse and make a finding on whether or not the plaintiff has proved her claim for adverse possession.

Adverse possession is the process by which a person can acquire a title to someone else's land by continuously occupying it in a way that is inconsistent with the right of the owner. If the person in adverse possession continues to occupy land and the owner does not exercise his right to recover it by the end of the prescribed period of 12 years, the owner's remedy as well as his title to the land is extinguished by virtue of the provisions of the Limitation of Actions Act. Indeed Section 38(1) of the Act states 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, 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 a proprietor of the land.”***

On the other hand, Section 7 of the said Act provides that an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person. The requirements for adverse possession has been set out in the case of **Mbira v. Gachuhi (2002) 1 EALR 137**, where the Court held that,

***“... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption ....”***

Similarly, in **Jandu v Kirplal and Another(1975) EA 225** it was the court's finding that,

*“.....to prove title by adverse possession, it is not sufficient to show that some acts of adverse possession have been committed. The Possession must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner. It must be actual visible, exclusive, open and notorious. “*

Having stated so, has the plaintiff proved that she has been in possession of the disputed portion of land thereby making it adverse?

From the plaintiff's pleadings and testimony in court, it is evident that she had been living with her deceased husband on the suit land since 1969 and that the suit property had been registered in her husband's name but title changed from **Kiarie Mwau** to **James Kimemia Kamau** in 1981 then the defendant was issued with title in 1983, who is in possession of the title to date. The plaintiff testified that she has been on the suit land all this while. This means that the time for the claim for adverse possession started running on 21<sup>st</sup> October 1983 which adds up to 27 years of being on the suit land. For adverse possession to succeed, the possessor must show that the possession was adequate, continuous and exclusive. In other words, for such possession to be adverse, a claimant must be adequate in continuity, in publicity and in extent to show that the possession was adverse to the proprietor. In this case it is quite obvious that the possession of the plaintiff since 1983 was open, uninterrupted and adverse to the title of the defendant yet the defendant took no active steps to evict the plaintiff lawfully from the Suitland. The plaintiff has also shown that she has greatly invested on the suit property by putting up a cow shed, cultivation, a semi-permanent house and 5 permanent buildings which includes a store room and her children's house. The court of Appeal in **Benjamin K. Murima & others – Vs- Gladys Njeri CA NO. 213 of 1996** held that,

*“one needs only to look at the position of the occupier and if it is found that his occupation is derived from the proprietor of the said land in the form of permission or agreement or grant, then such occupation is not adverse, but if it is not so derived, then it is adverse”.*

In the end I enter judgment in favour of the plaintiff by declaring that she acquired the parcel of land known as Land Reference Number **LOC4/Gakui/328**, by adverse possession therefore the Defendants title to the land has been extinguished.

Consequently the Land Registrar Murang'a is directed to rectify the register relating to the aforesaid land by cancelling the name of **Benson Irungu Mbaria** and in its place substitute with the name of Paulina Wanjiru Kiarie who has acquired title to the property by adverse possession. The Plaintiff's claim succeeds to that extent. Plaintiff is entitled to costs of the suit.

Costs to the Plaintiff.

Dated, signed and delivered this 8th day of **October, 2014**

**L. GACHERU**

**JUDGE**

In the Presence of:-

M/s Gichumbi for the Plaintiff

None attendance for the Defendant

Kamau: Court Clerk

**L. GACHERU**

**JUDGE**