



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 93 OF 2019 (O.S)

JANE NJOKI KIMEMIA.....PLAINTIFF

VERSUS

LOL DAIGA MEAT SUPPLIES LIMITED.....DEFENDANT

JUDGEMENT

By an Originating Summons dated **21st May 2019**, the Plaintiff herein brought this suit against the Defendant for orders that;

- 1. THAT the Plaintiff has for a period in excess of twelve years been in adverse possession of all that parcel of land comprised in Title Number Ruiru/Ruiru East Block 7/175, containing by measurement nought decimal four eight seven five (0.4875) of a hectare or thereabouts and consequently the Defendant 's title thereto in respect of the said parcel of land has been extinguished by virtue of section 17 of the Limitation of Actions Act, Cap 22 Laws of Kenya.***
- 2. THAT the Plaintiff be registered as the proprietor of the said parcel of land namely Title Number Ruiru/Ruiru East Block 7/175 in place of the Defendant who presently claims title to the land.***
- 3. THAT the Defendant do transfer at its own cost and expense the suit Title Number Ruiru/Ruiru East Block 7/175 to the Plaintiff forthwith and in the absence of the Defendant signing, executing or endorsing necessary documents of the transfer, the Deputy Registrar of this Honourable Court do undertake signing, execution or endorsement of the necessary documents of transfer.***
- 4. THAT the Defendant does pay the cost of this suit and interest thereon.***
- 5. Any other and further relief that this Honourable Court may deem fit and just to grant in the circumstances.***

The Originating Summons is supported by the Affidavit of **Jane Njoki Kimemia**. She averred that the suit property was initially registered in the name of **Francis Muroki Mwaura**, via a title deed issued on **1st July 1992**, and re issued on **19th August 1994**. She further averred that in the year **2000**, there were spates of land grabbing occurring around the Ruiru area and that the said **Francis Muroki Mwaura** approached her to assist him in salvaging the said parcels of land. She alleged that in exchange for her help to salvage the land, he gave her one share of his parcels of land in which she was to erect a fence and take possession. She further averred that he gave her possession of the suit property to which she took possession fenced it and developed it in readiness to construct a joint commercial slaughter house and housing project and the land was transferred to their joint names.

She further averred that subsequent to her taking possession, on **19th August 2009**, **Francis Muroki Mwaura** and herself incorporated the Defendant and subsequently the suit property was transferred from **Francis Muroki Mwaura**, to the Defendant and on **6th August 2010**, the suit property was transferred to the Defendant. It was her contention that she has lived on the suit property in excess of **12 years**, peacefully, quietly and uninterruptedly, where she has constructed kennels, put electricity, erected a gate, dug a borehole and erected a power house. She further averred that the said **Francis Muroki** has been away in the United States of America since **1980s**, lecturing and that she has been advised by her Advocates that she has a good claim for adverse possession with a high probability of success.

The Defendant was served by way of substituted service on **8th November 2019** vide the Nation Newspaper but did not enter appearance.

The matter proceeded by way of written submissions without its participation. The Plaintiff filed her written submissions through the Law Firm of **Musyoki Mogaka & Company Advocates** and submitted that the Plaintiff has been in occupation of the suit property for a period ranging 20 years which is a period of over **12 years**. It was further submitted that the Plaintiff has been in possession and occupation of the suit property openly and continuously and without interruption for all that period and that there is no evidence that has been availed to contradict the said assertions.

It was therefore the Plaintiffs submissions that she had demonstrated sufficient reasons for the honourable Court to allow the Application for adverse possession. The Plaintiff relied on various provisions of law and decided cases and urged the Court to allow the Application.

Having carefully read and considered the pleadings, the annexures attached as evidence and the written submissions, it is the Court's considered view that the issue for determination is whether the Plaintiff is entitled to the orders sought.

Despite service, the Defendant failed to enter appearance, file a Defence and hence failed to defend the suit. However, the Plaintiff is the one who has alleged and she has a duty to prove her case. As provided by **Section 107** of the **Evidence Act**, the Plaintiff has a duty to call evidence and prove her case on the required standard. The said Section 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.**

However, the court still has a duty to interrogate the evidence produced before it in order to arrive at as just determination since expert 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.”

It is not in doubt that the Plaintiff is seeking for orders of **Adverse Possession** by dint of **Section 7 of the Limitations of Actions Act**. The guiding provisions of the Law with regards to Adverse Possession are to be found in **Section 7 of the Limitation of Actions Act which provides;**

“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.”

Further the Court is guided by **Section 38 (1) and (2) of the 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.**

In determining whether or not to declare that a party has acquired land by adverse possession, there are certain principles which must be met as quoted by **Justice Sergon** in the case of **Gerald Muriithi ...Vs...Wamugunda Muriuki & Another (2010) eKLR**, while referring to the case of **Wambugu ...Vs...Njuguna (1983) KLR page 172** where the Court of Appeal held as follows;

“1. In order to acquire by statute of limitations title to land which has a known owner the owner must have lost his right to the land either by being dispossessed of it or by having continued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed of the suit land for a continuous period of twelve years as to entitle him, the respondent to title to the land by adverse possession.

2. The limitation of Actions Act, on adverse possession contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not the claimant has proved that he has been in possession for the requisite number of years.

The question then that the Court must answer in making its determination is whether the Plaintiff has been able to prove dispossession, discontinuance of possession for a continuous period of 12 years, and further that the dispossession occurred and the Defendant had knowledge of such dispossession.

It is the Plaintiff's contention that one **Francis Muroki Mwaura**, who was the initial owner of the suit property approached her to help him in salvaging his parcels of land after a spate of land grabbing occurred in the area. It is also her contention that the said **Francis Muroki Mwaura**, gave her possession of the suit property to which she took possession and fenced. Therefore, there is no doubt that the Plaintiff took possession of the suit property with the consent and or permission of the owner of the suit property in the year **2000**.

It is also not in doubt that the said **Francis Muroki Mwaura** and the Plaintiff incorporated a Company on **19th August 2009**, and subsequently the suit property was transferred to the said Company the Defendant herein. Further on **6th August 2010**, the suit parcel was registered in the name of the Defendant. Though the Plaintiff contended that she has in excess of **12 years** from the year **2000** lived quietly and uninterruptedly on the suit land, it is the Court's considered view that from the **2000** to **2009** when the Company was incorporated, she was in possession of the suit property with the permission of the said **Francis Muroki Mwaura**. Since the said **Francis Muroki Mwaura** had in the Plaintiff's words sought her assistance to avoid land grabbing of the suit property, her possession of the suit property, cannot and

was not adverse to the rights of the said **Francis Muroki**. In the case of Samuel Miki Waweru ...Vs... Jane Njeri Richu, C.A. NO.122 OF 2011 (UR) which was quoted with approval in the case of Wambo...Vs... Njuguna, KLR 172, the Court held that;

“It is trite law that a claim for Adverse Possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement of sale or lease or otherwise. Further as the High Court correctly held in JANDU VERSUS KILIPAL [1975] EA 222 possession does not become adverse before the end of the period for which permission to occupy has been given?”

For a party to claim Adverse Possession, the party must have taken possession of the suit property and must have been in possession in excess of **12 years** and the said **possession** must be **continuous open** and **uninterrupted** and the **adverse possessor** must over the period engaged in acts with regards to the property which are inconsistent with the rights of the true owner as rightly submitted by the Plaintiff.

As already held by the Court above, it is not in doubt that between **2000** until **6th August 2010**, when the suit property was registered in the name of the said **Francis Muroki Mwaura**, the Plaintiff was in possession of the suit property with the consent of the said owner. It cannot therefore be said that she engaged in acts that were inconsistent with his interests, but rather she was in fact safeguarding his interest by ensuring that the suit property was not grabbed as she submitted that she fenced the suit property to avoid invasion from land grabbers. 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”

Further in the case of Muchanga Investments Ltd ...Vs... Safari Unlimited (Africa) Ltd & 2 Others [2009] e KLR. The Court made reference to the case of Wambo ...Vs...Njuguna 1983 KLR 172 where the Court held:-

“The occupation can only be either with permission or adverse, the two concepts cannot co-exist.”

From the period between **2010 to 2019**, It is not in doubt that the suit property wherein had been registered in the name of the Defendant. It was the Plaintiff's submissions that she had developed the land in readiness to construct a joint commercial slaughter house and housing project but that she has lived peacefully, quietly and uninterrupted on the suit property where she has constructed kennels, put electricity, erected a gate, dug a borehole and erected a powerhouse. The Court is unsure whether the said kennels, gate and borehole were for the benefit of the Plaintiff alone as she had submitted that the developments were done in preparation of constructing of joint slaughter house. The plaintiff has also not submitted on when or whether the said acts were done to the adverse interests of the Defendants wherein she is one of the Director and Shareholder. Further the Court notes that the period from when the Defendant was registered as the owner to when the suit was filed has only been **9 years** that is from **2010 to 2019**. Therefore, the Defendant has not been dispossessed of the suit property for the required time of 12 years as provided under the **Limitations of Actions Act**.

From the above analysis, this Court holds and finds that the Plaintiff has not established the threshold for grant of an order of ownership by virtue of adverse possession. Consequently, her claim as sought in the instant **Originating Summons** is **not merited and for the above reasons, the Plaintiff is not entitled to the order sought in the Originating Summons**.

Having now carefully read and considered the pleadings and evidence adduced and the written submissions, the Court finds and holds that the Plaintiff has not proved her case on the required standard of balance of probabilities. The end result is that the Court finds the **Originating Summons** dated **21st May 2019**, **not merited** and the same is dismissed entirely, with no orders is to costs.

It is ordered.

Dated, signed and Delivered at Thika this **1st** day of October, 2020

L. GACHERU

JUDGE

1/10/2020

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 **15th March 2020**, this **Judgement** 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 of and virtual appearance via Video Conference – Microsoft Teams Platform

No appearance for the Plaintiff (though aware of the judgement date)

No appearance for the Defendant

L. GACHERU

JUDGE

1/10/2020