



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. MISC. APPLN NO. 5 OF 2017 (O.S)

GLADYS MARY KYULU.....APPLICANT

VERSUS

MWENDWA WAMBUA.....RESPONDENT

JUDGMENT

1. In the Originating Summons dated 23rd January, 2017, the Applicant is seeking for the following orders:

a. That the Plaintiff herein be declared to be entitled by adverse possession for over twelve (12) years since 2001, to all that parcel of land known as Kyangwithya/Nduumoni/149, registered in the names of Mwendwa Wambua.

b. That the Plaintiff be registered as absolute proprietor in respect to title number Kyangwithya/Nduumoni/149 in place of the Respondent.

c. That the costs of these summons be awarded to the Plaintiff.

2. The Summons is supported by the Affidavit of the Plaintiff who has deponed as follows: that the Defendant is the registered proprietor of a parcel of land known as Kyangwithya/Nduumoni/149 (*the suit land*); that she has lived on the suit land continuously, peacefully and uninterrupted since the year 2001 and that she has acquired prescriptive rights over the said land.

3. Although the Respondent was served with the Originating Summons, he neither entered appearance nor filed an Affidavit in response to the Originating Summons. The Summons proceeded for hearing by way of *viva voce* evidence.

4. The Plaintiff (PW1) informed the court that the Defendant is her uncle; that the Defendant sold to her the suit land and that she has been on the land since the year 2001.

5. The Plaintiff's advocate submitted that at the time of filing this suit, the Plaintiff had been in possession of the land for sixteen (16) years; that her possession of the suit land was open and continuous and that she has a homestead on the suit land and cultivates it. Counsel submitted that the Respondent is barred by Section 7 of the Limitation of Actions Act from recovering the suit land from the Applicant and that the Respondent's title stands extinguished.

6. The evidence before me shows that the Respondent was registered as the proprietor of a parcel of land known as Kyangwithya/Nduumoni/149 on 19th November, 1985. According to the Applicant, she took possession of the suit land in the year 2001 after purchasing it from the Respondent, who is her uncle. The evidence by the Applicant was not controverted by the Respondent.

7. The law relating to adverse possession of land is captured in Sections 7, 17 and 38 of the Limitation of Actions Act. Section 7 of the Act provides as follows:

“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.”

8. Section 17 of the same Act provides that after the expiration of the prescribed period by the Act for a person to bring an action to recover land, the title of that person to the land is extinguished. However, the adverse possessor can only be registered as the proprietor of the land upon applying to the High Court (ELC) for an order that he be registered as the proprietor of the land or Lease in place of the person then registered as the proprietor of the land (*See Section 38 of the Limitation of Actions Act*).

9. The Applicant has shown by evidence that she has been in occupation of the suit land openly, continuously and uninterrupted for a period

of at least twelve (12) years. Having shown that she has used the land as of right, *nec vi nec clam, nec precario*, for twelve (12) years, I find and hold that the Applicant has proved her case on a balance of probabilities.

10. For the reasons I have given above, I allow the Originating Summons dated 23rd January, 2017 in the following terms:

a. The Applicant is hereby declared to be entitled by adverse possession to all that parcel of land known as Kyangwithya/Nduumoni/149.

b. The Land Registrar, Kitui, to register the Applicant as the absolute proprietor of parcel of land known as Kyangwithya/Nduumoni/149 in place of the Respondent.

c. Each party to bear his/her own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31ST DAY OF JANUARY, 2019.

O.A. ANGOTE

JUDGE