



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC. CASE NO 213 OF 2008 (O.S)**

**MARGARET WANGUI NJUGI.....1ST APPLICANT**

**ALLAN NJUGUNA NJUGI.....2ND APPLICANT**

**GRACE WACEKE NJUGI.....3RD APPLICANT**

(SUING AS ADMINISTRATORS OF THE

ESTATE OF NJUGI KAGUURA - (DECEASED)

**VERSUS**

**GEORGE KIMANI.....1ST RESPONDENT**

**JESEE NJOGU.....2ND RESPONDENT**

**JUDGMENT**

**Introduction**

1. On 7/5/2008, the applicants, as administrators of the estate of Njugi Kaguura ( the **deceased**) took out an originating summons dated 28/4/2008 under Section 38 of the Limitation of Actions Act seeking the following orders:

***1. That the applicants be declared to have become entitled by adverse possession of twelve (12) years to all that parcel of land known as LIMURU/KAMIRITHU/419 registered in the names of the respondents.***

***2. That the respondents being the registered owners of the parcel known as LIMURU/KAMIRITHU/419 holds (sic) the same as trustees for and on behalf of the applicants.***

***3. That the respondents do transfer the said parcel known as LIMURU/KAMIRITHU/419 to the applicants failing which the Deputy Registrar of this Honourable Court to execute the transfer forms and effect the transfer.***

***4. That costs of this suit be borne by the Respondents***

2. The originating summons was supported by the 3rd applicant's affidavit sworn on 29/4/2008. The originating summons was opposed by the respondents through a replying affidavit sworn by the 1st respondent on 9/6/2008. At the hearing, oral evidence was tendered by the 3rd applicant (PW1) who adopted her written statement as her sworn evidence in chief. The applicants led evidence by two other witnesses, George Kigamba Njugi (PW 2) and James Ngige Kimani (PW 3). The 1st respondent testified as DW 1. The 2nd respondent was reported to be aged over 90 years, bedridden and suffering from dementia, among other conditions. He did not therefore testify.

**Applicants' Case**

3. The case of the applicants is that they have acquired title to Land Parcel Number **Limuru/Kamirithu/419 (the suit property)** pursuant to the doctrine of adverse possession. They contend that they have been in continuous possession of the suit property for over 57 years. The 3rd applicant produced a copy of a translated sale agreement dated 20/3/1961 between the 2nd respondent and her late father Njugi Kaguura. Their position is that the land was purchased by their late father from the 2nd defendant. They state that the defendants have never lived on the suit land.

## Respondents' Case

4. The case of the 1st respondent is that he inherited the suit property from his grandmother who caused it to be registered in his name in 1958 when he was still a minor aged 6 years. He contends that the 2nd respondent did not have the capacity to sell the suit property to the deceased since it was registered in his name. He further contends that as soon as he attained the age of majority in the early 1970s, he asserted his title through civil litigation, hence the alleged adverse title has never crystallized. He adds that both the deceased and the plaintiffs herein have never had actual possession of the suit property or lived on the suit property.

## Applicants' Evidence

5. PW 1 - Grace Waceke Njugi adopted her witness statement filed on 14/6/2013. She testified that she is one of the administrators of the Estate of Njugi Kaguura. She stated that her father bought the suit property from the 2nd respondent. She contended that there were previous suits filed by the same parties in respect of the suit property but they were all dismissed without going to full hearing. She added that they have lived on the suit property for over 57 years. During cross examination, she stated that the suit property is neither developed nor occupied. She added that the original certificate of title is in the name of **G Kimani J Njogu**. She further stated that PExh.5 is a certificate of title issued under the Native Land Tenure Rules in 1958 in the name of **G Kimani J Njogu**. She further stated that the official search still reflects the proprietor as **G Kimani J Njogu**.

6. PW 2 - George Kigamba Njugi adopted his witness statement filed on 19/6/2015. He stated that their father bought the suit property from the 2nd respondent in 1961. He testified that he has continuously lived on the suit land since he was born and he has made improvements and developments on the land. In cross examination, he stated that he was born in 1968. He also testified that there have been no buildings on the suit property since 1961.

7. PW 3, James Ngige Kimani adopted his witness statement filed on 14/6/2013. He stated that he was not present when the land transaction between the 1st respondent and the deceased took place. He added that he was a nephew of Njugi Kaguura. He stated that the family of Njugi Kaguura had lived on the suit property for over 40 years. In cross-examination, he stated that he was born in 1939. He added that Jesse Njogu (2nd defendant) and Njugi Kaguura (the deceased) were cousins

## Respondents' Evidence

8. The 1st respondent, George Kimani also known as **George Kimani Jesse Njogu** and also known as **G Kimani J Njogu** testified as DW 1. He adopted his witness statement dated 2/9/2013. He stated that the 2nd respondent is his father who was 92 years old, bed ridden and suffering from dementia. He stated that the deceased (Njugi Kaguura) entered the suit property in 1959 when he (the 1st respondent) was 7 years old. He further stated that his grandmother allowed the deceased into the property because he was a minor and his father (the 2nd respondent) was in Tanzania. He added that his grandmother caused the land to be registered in his name in 1959 when he was 7 years and it has never been transferred to anyone else. He stated that in 1968, he asked Njugi Kaguura to get out of the suit property but Njugi Kaguura sued the 2nd respondent in 1971 seeking to enforce the purported sale contract. In cross examination, he stated that none of his parents is registered as proprietor of the suit property. He stated that his current ID card bears the name George Kimani but his original ID read George Kimani Jesse Njogu which was subsequently shortened and the name Njogu was omitted. He averred that his name is not in the sale agreement because he was still a minor when the alleged sale took place. He stated that the certificate of title bears his name and that it shows that his father signed it on his behalf. He confirmed that there have been several suits relating to the suit property. He added that he was a plaintiff in RMCC No. 236/1974, a suit he initiated against Njugi Kaguura as soon as he attained the age of majority. He stated that his father is not called George and that the applicants have never contested his identity. He further stated that he is the son referred to in the certificate of title issued under the Native Tenure Rules.

## Applicants' Submissions

9. The applicants filed their submissions on 22/8/2018. They submitted that a claimant seeking title under the doctrine of adverse possession must demonstrate that he has taken possession of the land either by dispossessing the owner, or by entering the land after the owner has discontinued his own possession. They argued that the 2nd respondent allowed the deceased and his family to cultivate the suit property which they did for a long time until the 1st respondent claimed possession. They relied on **Wambugu v Njuguna (1983) KLR172** where it was held that adverse possession entails **dispossession** and **discontinuance** of possession by the registered proprietor. They further submitted that they had met the requirements for adverse possession. Reliance was placed on **Mbira v Gachuhi (2002) EALR 137** and **Jandu v Kirplal and Another (1975) EA 225**.

## Respondents' Submissions

10. The respondents filed their submissions on 29/10/2018. They submitted that the applicants did not lead evidence on when their adverse possession began to run. They stated that the 1st applicant was a minor in 1961 when the alleged sale took place and could not assert any right over the property. They also stated that the applicants did not state the validity of the sale agreement; whether the sale contract had collapsed or not. They relied on the case of **M'mbaoni M'thaara v James Mbaka [2017]eKLR**.

11. They further submitted that a claim of adverse possession cannot succeed where consent or permission to occupy land has been given by the owner or in pursuance of an agreement for sale or lease. They relied on **Samuel Miki Waweru v Jane Njeri Richu[2007] eKLR**. They added that the applicants have not questioned the validity of the sale agreement as they have relied on it entirely. They stated that the deceased did not pay the full purchase price and that adverse possession has not commenced since the purchase price has not been completed. They relied on **Christopher Kioi & Another v Winnie Mukolwe & 4 Others [2018]eKLR where it was held that;**

## Determination

12. I have considered the originating summons, the rival affidavits and the parties' respective evidence and submissions. I have also considered the relevant legal framework and jurisprudence on the doctrine of adverse possession.

13. The common law doctrine of adverse possession connotes possession which is inconsistent with and in denial of the title of the true owner of land. To establish adverse possession, a claimant must prove that he has both the factual possession of the land and the requisite intention to possess the land [*animus possidendi*]. Secondly, the claimant must prove that he has used the suit land without force, without secrecy, and without persuasion [*nec vi, nec clam, nec precario*] for the prescribed limitation period of twelve years. Third, he must demonstrate that the registered owner had knowledge [or the actual or constructive means of knowing] that the adverse possessor was in possession of the suit property. Fourth, the possession must be continuous; it must not be broken or interrupted. In **TITUS KIGARO MUNYI v PETER MBURU KIMANI, CA NO 28 OF 2014**, the Court of Appeal held that computation of time starts from when there is actual or constructive knowledge by the registered proprietor.

14. The doctrine of adverse possession has its statutory underpinnings in **Sections 7, 9, 13, 37 and 38 of the Limitation of Actions Act**. The Court of Appeal examined the constitutionality of the doctrine of adverse possession in the context of the Constitution of Kenya 2010 in **MTAMA LEWA v KAHINDI NGALA MWAGANDI, [2015] eKLR** and found that the doctrine does not offend the spirit and letter of the Constitution of Kenya 2010 on protection of the right to property.

15. The applicants took out the present originating summons under Section 38 of the Limitation of Actions Act which provides as follows:

**38. Registration of title to land or easement acquired under Act**

**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.**

**3) A proprietor of land who has acquired a right to an easement under Section 32 of this Act may apply to the High Court for an order vesting the easement in him, and may register any order so obtained in the register of the land or lease affected by the easement and in the register of the land or lease for whose benefit it has been acquired, and the easement comes into being upon such registration being made, but not before.**

**4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.**

**5) The Minister for the time being responsible for Land may make rules for facilitating the registration of titles to land or to easements acquired under this Act.**

16. There is common ground that the suit property is registered in the name of the 1st respondent. Indeed, a certified copy of the parcel register presented by the applicants as evidence shows that it was opened on 28/8/1958 in the name of **G Kimani J Njogu** and remains in that name. Secondly, it is not in dispute that the 1st respondent was born in 1952 and was only about six years when his grandmother caused the said land to be registered in his name in 1958.

17. The tenor and import of the framework in Section 38 of the Limitation of Actions Act is that an order of adverse possession only issues against the registered proprietor of land. The essence of an order of adverse possession under Section 38 is that it directs the Land Registrar to alter the land register by registering the adverse possessor as the new registered proprietor in place of the hitherto existing registered proprietor. For this reason, a claim of adverse possession under Section 38 of the Limitation of Actions Act would not lie against a person other than the registered proprietor. On that ground alone, the suit against the 2nd defendant who is not a registered proprietor of the suit property collapses and falls by the wayside.

18. Secondly, the plaintiffs brought this suit in their capacity as administrators of the estate of the late Njugi Kaguura. They regrettably appear not to draw a distinction between the estate of Njugi Kaguura and themselves. This being a suit by the estate of Njugi Kaguura, they were obligated to lead evidence to demonstrate that prior to his demise, the late Njugi Kaguura had acquired adverse title to the suit property under the doctrine of adverse possession.

19. The evidence on record however shows that the land was registered in the name of the 1st defendant by his grandmother in 1958. In 1961, while the 1st respondent was still a minor aged about 9 years, the late Njugi Kaguura and the 2nd respondent purported to enter into a sale agreement pursuant to which the 2nd respondent purported to sell to Njugi Kaguura the suit property. There is no evidence that the 1st respondent was privy to that irregular deal. For obvious legal reasons, the 2nd respondent could not convey the title to the late Njugi Kaguura and has never conveyed it.

20. The applicants have not led evidence to establish the exact point in time when time started running in favour of Njugi Kaguura under the doctrine of adverse possession. What is clear from the papers presented as exhibits is that in 1971, Njugi Kaguura sued the 2nd respondent in **Kiambu RMCC No 69 of 1971**, contending that the 2nd respondent had sold to him the suit property. He sought to compel the 2nd respondent to transfer the suit property to him. In his statement of defence, the 2nd defendant denied ever selling the suit property to Njugi Kaguura and averred that he had never been registered as proprietor of the suit property. By consent of the parties, the said suit was withdrawn on 3/4/1973 before Hon R M Kapila, RM.

21. There is also evidence that in 1974, the 1st defendant sued Njugi Kaguura in **Nairobi RM CC 236 of 194** contending that Njugi Kaguura

had trespassed onto his land. The suit was withdrawn and the dispute was referred to arbitration by elders. None of the parties availed the elder's award. In 1993, the 1st defendant filed a second suit against Njugi Kaguura, **Kiambu RMCC 138/1993** seeking, *inter alia*, removal of the caution lodged against the suit property by Njugi Kaguura. It is not clear what came of this particular suit. In 2000, the late Njugi Kaguura filed **Nairobi HCCC 170/2000** against the two respondents herein. The said suit was dismissed by Ang'awa J on 1/3/2007 on a preliminary objection. Subsequently, the present suit was filed in 2008.

22. I have belaboured to outline the above chronology of litigation over the suit property because it has evidential bearing on the essential ingredients of adverse possession. What emerges from the chronology of litigation and the totality of the evidence before court is that upon attaining the then age of majority (22 years) in 1974, the 1st respondent immediately asserted his title to the suit property through **Nairobi RMCC 236 of 1974**. This was followed with **Kiambu RMCC 138 of 1993**. This was in turn followed with **Nairobi HCCC 170 of 2000** by the late Njugi Kaguura which was resisted by the 1st respondent leading to its dismissal in 2007. And in 2008, the applicants took out the present originating summons. The 1st respondent has similarly resisted it.

23. In my view, time did not run against the 1st defendant until 1974 when he attained the then age of majority (22 years). What followed thereafter was litigation after litigation between the 1st respondent and Njugi Kaguura. There is conclusive evidence that between 1974 and 2008 when the present originating summons was taken out, the 1st respondent had been steadfast in asserting his title to the suit property. Indeed, he successfully prosecuted a preliminary objection and caused the preceding originating summons to be dismissed in 2007.

24. The applicants have completely failed to state the precise point when time started running and the precise point when the adverse title crystallized. Significantly, the applicants presented written statements by witnesses who stated that they had been living on the suit property since they were born. However, under cross examination, they conceded that the suit property has never had dwelling houses and has never been occupied by them.

25. It is most unfortunate that the 1st respondent has been engaged in legal battles for the last 45 years on account of an illegal agreement allegedly entered into by Njugi Kaguura and the 2nd respondent; a transaction whose import was to dispossess a minor land which the minor's caring grandmother had given to the minor and caused to be registered in the minor's name. The duo were close relatives of the minor. As a court of both equity and law, I disapprove of the conduct of the 2nd respondent and the late Njugi Kaguura.

26. In light of the foregoing, it is the finding of this court that the applicants herein have failed to satisfy the criteria for grant of an order of adverse possession under Section 38 of the Limitation of Actions Act. It is also the finding of this court that the suit property, Land Parcel Number **LIMURU/KAMIRITHU/419** still belongs to the registered proprietor, **G Kimani J Njogu** whom the applicants contend is the 1st respondent herein.

Because of the history of this dispute, each party shall bear their own costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF JANUARY 2019**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Kitheka for the Respondents

Grace Waceke Njugi - 3rd Applicant present in person

June Nafula - Court Clerk