

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NYERI**

**ELC CASE NO 140 OF 2014**

**DICKSON WARURU MUTAHI.....APPLICANT.**

**VERSUS**

**DORCAS WAMAITHA MATHENGE**

**ESTHER NJOKI**

**NDIGITHE.....RESPONDENTS.**

**(As Trustees of MWIHOTI WOEMN GROUP)**

**AND**

**GRACE NYAMBURA**

**WARURU.....APPLICANT**

**JUDGMENT:**

By way of an Originating Summons dated 1/7/2014, the Applicant prays for Orders under Order 37 Rule 7 of the Civil Procedure Rules and Section 35 of the Limitation of Actions Act seeking: -

1. THAT the ownership of L.R TETU/KIHUYO/287 vests in the Plaintiff by virtue of the fact that he has now been in continuous and uninterrupted occupation of the whole parcel of land for a period of over 12 years vide sections 13 and 35 of the Limitation of Actions Act.
2. THAT the Defendants forthwith transfer the suit land to the Plaintiff.
3. THAT a perpetual injunction do issue restraining the Defendants, their personal representatives, successors and

assigns from interfering with the Plaintiff's quiet enjoyment of the ownership and possession thereof.

#### 4. Costs of the suit.

In the Affidavit in support of the Summons sworn on even date, the Applicant, Dickson Waruru Mutahi, depones that he has lived on the suit land since 1976, a period well over 38 years by the time of filing the suit in 2014.

The land measures 0.30 Hectares where the Plaintiff said he has built a permanent house where he has lived for all this period with his family of 6 members and where he has also planted over 200 coffee bushes and some cypress trees which are the sources of his livelihood.

His 2 adult sons are married and live on the land where also he has buried some deceased members of his extended family.

The Applicant depones that he came to learn that the Respondents had the land registered in their respective names in 1996 without consulting him and in very unclear circumstances. He finally concluded that the Respondents have never been in possession nor occupation of the said premises.

The Respondents entered appearance on 14/7/2014 and through the 1<sup>st</sup> Respondent, Dorcas Wamaitha Mathenge, filed a Replying Affidavit on 28/7/2014 the same being sworn on the same date. She depones that it is not true that the Plaintiff has been on the suit property continuously and without interruption since 1976. Dorcas depones that up to 1995 the suit land was a quarry belonging to the County Council of Nyeri until the said year when the Respondent Mwihoti Women Group was allocated the same. They then employed earth movers to fill the quarry. Ms Mathenge depones that the land

next to the suit land belongs to the Applicant's father where he is buried and that the Applicant started encroaching and invading the suit land in 1994 by use of violence, threats and intimidation against the Respondents.

In 1994, the Respondents sued the Plaintiff in Nyeri Chief Magistrate's

Court in Civil suit No 249 of 1994 for an Order of Eviction from the suit land which was by then Plot No. 28 Nyarugumu County Scheme and for General Damages which matter was referred to the Land Disputes Tribunal in Tribunal Case No. 27 of 1998 which file has been missing, but which the Court register shows it was dismissed for want of prosecution. She finally depones that the group was lawfully registered. The owner of the land in dispute and the Applicant were given land at Solio Ranch by the then Nyeri District Commissioner. The Respondents therefore pray for the eviction of the Applicant from the suit land and further an Injunction against their entry into the said land.

Attempts at mediation could not yield any fruits since the Applicant was not agreeable to the mediator's (Lucy W. Mwai, Advocate's) proposal to buy off the Respondents at Kshs. 2,500,000/=. The said Mediator's Report is dated 29/7/2020. The matter was referred back to Court.

Before the case could be heard, the Applicant died on 15/11/2021 and the Respondents prayed for the suit to be dismissed on 24/10/2023 by which time the suit had abated by operation of law. Before the same could be heard, One Grace Nyambura Waruru, a beneficiary of the Applicant applied on 23/2/2024 to substitute the late Applicant.

The Court on 13/3/2024 ordered that both Applications be heard together. On 31/10/2023 the Respondents' Application dated 13/10/2023 was dismissed and the Application dated 22/2/2024 was allowed. In effect, Grace Nyambura Waruru was allowed to prosecute the suit on behalf of the late Dickson Waruru Mutahi.

The new Applicant gave evidence in line with her late husband's Witness Statement and/or Supporting Affidavit as presented above. She had also recorded a Witness Statement on 1/11/2024 that is similar to the late Dickson's. She said that she married the deceased in 1986 and has been on the said suit land since then. There are avocados, oranges, coffee and trees planted on the land.

There are timber homes and all her children have been born on the suit land starting with the firstborn in 1982. She finally said that the Respondents have never told her to move out at all. She then produced the following documents.

- a. Map for Tetu/Kihuyo (Nyarugumu)/287
- b. Bundle for receipts
- c. Caution dated 27<sup>th</sup> September, 2013.
- d. Letter dated 21<sup>st</sup> June, 2000.
- e. Certificate of official search dated 2<sup>nd</sup> June, 2006.

On cross-examination, Mrs. Waruru said that she did not have a Title Deed to the land, but that she found her late husband on the land. She admitted that it is true the Respondents had gone to the Court over the ownership of the suit land and that the Title Deed for the 0.3 Hectares land is in the name of the Respondent on which they have been for over 40 years and nobody has ever told them to vacate. She said she did not know whether her late husband had approvals for the homes built thereon.

On re-examination, the Applicant said that the then District Commissioner, Mr Peter Kiilu had given them a letter of ownership and she presented to the Court the coffee delivery receipts.

Peter Kahiga Waruru, son to the Applicant said he has lived on the suit land since he was born in 1982 and still lives there with his wife and children some of who are in college. His father did not get to the land forcefully and that the Respondents have never been on the suit land.

On cross-examination by Mr Gichuki Gatumbo for the Respondents, Peter Waruru said that the Provincial Commissioner did not know whether he had powers to allocate land and that the letter dated 27/3/1996 from the County Council of Nyeri indicates that he and the family of his late father were illegal occupants on the suit land, since the same had already been allocated to the Respondents and that he did not know any other land belonging to his late father. He admitted that he was aware of Tribunal case No 27 of 1998 between his late father and the Respondents in which the Tribunal decided that the land belonged to the Respondents on 24/5/2000.

On re-examination by the Plaintiff's Advocate Mr Obongi, Mr Waruru said that the Respondents got Title to the suit land unprocedurally and unlawfully using their influence in the County Council Government of Nyeri and that the land belonged to him since even his firstborn son was buried there in 2004.

PW3 Samwel Muriu Kariru , a neighbor to the Applicant testified that the Applicant's late husband has been on the suit land since 1970 and that he has no other land elsewhere yet the Respondents have land all over.

On cross-examination, Mr Kairu said that his land is separated from that of the Applicant by an access road and that Dickson was given the land by the County Council of Nyeri.

On re-examination he said that the late Dickson and his family have had no land elsewhere where they can re-locate to

After the close of the Applicant's case, it was the time for the Respondents to tender their evidence where Dorcas Wamaitha Mathenge, the first Respondent adopted her Supporting Affidavit and the similar Witness Statement dated 24/11/2015. She says that the women group applied for the suit property in 1970 when it was murram site for the County Government and had been left hollow. There was nobody on site and they paid Kshs. 500/= for site visit. They then got a machine to cover up the place before fencing off the property and filled the place with hardcore. She testified that the Applicant (deceased) left his plot to move to the suit land in the neighbourhood, belonging to the Respondents. His father was not buried on L.R TETU/KIHUYO/287 but elsewhere and the County Council did ask the Applicant to vacate the suit land. she said that the Land Disputes Tribunal had determined the ownership of this land. She said that no influence was ever exerted on the County Council. She produced the following documents to buttress the Respondents' case:

- a. Letter dated 3<sup>rd</sup> October, 1988.
- b. Extract of minutes for Nyeri County Council Special Education Housing and Social services Committee.
- c. Letter dated 27<sup>th</sup> March, 1990.
- d. Receipt dated 7<sup>th</sup> August, 1990.
- e. Letter dated 5<sup>th</sup> March, 1992.
- f. Letter dated 20<sup>th</sup> March, 1992.

- g. Survey fees Receipts (Bundle).
- h. Letter dated 17<sup>th</sup> November, 1992.
- i. Proceedings and Award of the Provincial Land Disputes Tribunal Appeals Committee, Central Province in Nyeri 27 of 1998.
- j. Letter dated 9<sup>th</sup> March, 2004.
- k. Letter dated 25<sup>th</sup> September, 2013.

On cross-examination, Dorcas admitted her husband was chairman of the County Council of Nyeri for about 3 years since independence and later remained a Councilor till 1990 or thereabout. She, being the chairlady of the Respondent, said they tried to develop the suit land but the Applicant frustrated their efforts to do so. There are 3 homes on the suit land but the coffee is on the neighbouring land, belonging to the late Applicant's late father. The Applicant's sons have also put up 2 homes on the said land.

DW2, Mary Wangari Mugo the Group's Vice Secretary said that the suit land was allocated to the Respondents when it was vacant. It had murrum and was uninhabitable. They levelled it, fenced it with posts and barbed wire because they intended to keep poultry. Dickson was buried at Solio and that's where PW1 lives to date. It is her children who live on the suit land where they have planted bananas, trees and coffee (though not much coffee). Only about 20 coffee trees. The Applicant was difficult to remove and at one time he threatened and wrestled Mary with a knife.

On cross-examination by Mr Ombungi, the witness said he had known Dickson since 1976 and the latter had always threatened to beat them up. The suit land used to be plot No. 84 and she knew that this case is suit No 140, but she couldn't remember the current plot number. She said that the suit land has electric power connected to it and that the 3<sup>rd</sup> house is incomplete since its owner, son to the

Applicant, went to live in their land in Solio. But she was not sure whether the suit land is connected with water. Dickson's wife has not lived on the suit land at least for the past 4 - 5 years and that the late Dickson was so hostile and energetic that he could not be moved out of the suit land since body wise he was so big and masculine.

That being the close of the Respondents' case and of course the entire

case and having invited Counsel to put in written submissions, it is now

my duty to write the judgment.

From the evidence adduced in Court, it is not in dispute that the Respondents are the registered proprietors of the suit land, L.R NO. TETU/KIHUYO/287 since 26/1/1996. The said group applied for the suit property from the County Council in 1970 when it was murrum site and which had been left hollow for some time. The same was allocated to them. By then there was nobody on site. They then got a machine to cover up the land before fencing off the property and filling the place with hardcore. However, the Applicant, her late husband and her family got into the land and started occupying it since 1976. The Court has been shown minutes of Nyeri County Council Special Education Housing and Social services Committee held in 1989 whose last paragraph confirms the allocation of  $\frac{1}{4}$  Acre plot at Nyarugumu settlement scheme, several receipts for payment of survey fees and correspondences confirming ownership of the land by the Respondents.

There is one issue that once decided would dispose of this suit without even going into the other ingredients of Adverse Possession.

That is, Has the Plaintiff lived on the suit land uninterruptedly for a period of over 12 years prior to the filing of this case? This is maturity of Adverse Possession. Interruption of possession is significant in that it stops time from running under the **Limitation of Actions Act**.

Although it is true indeed that the late Dickson Waruru Mutahi lived on the suit land from 1970 until he died on 15/11/2021 and his family continued living thereon to date and that this occupation has been **continuous, uninterrupted and unbroken, it is not true that the same has been peaceful and uninterrupted.**

In the case of Mwangi **Githu** vs Livingstone **Ndeete** [1980] eKLR the court addressed the issue of interruption as follows:

**“.....Time ceases to run under the Limitation of Actions Act either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. See Cheshire’s Modern Law of Real Property, 11<sup>th</sup> Edition at p. 894.....”**

This position at common law was also espoused in the case of **AMOS WERU MURIGU v. MARATA WANGARI KAMBI and another** [NBI H.C.C. SUIT NO.33 OF 2002 (O.S.) where Justice G. B. M. KARIUKI (as he then was) had the following to say with regard to Adverse Possession and interruption of time: -

*“.....he (the Respondent’s) bases his claim, inter alia, on section 38 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya which entitles a person to be registered as proprietor instead of the registered proprietor where such person establishes by evidence that he or she has become entitled to be so registered on account of his or her occupation of the land, openly and continuously and without interruption*

*and with the knowledge of the registered proprietor for a period of 12 years or more adversely to the title of the registered owner. In other words, where a person trespasses on the land of another with the knowledge of the latter who does not assert his right to the title to the land by evicting the trespasser or by suing him or her in court for eviction or ejectment but instead lets the trespasser openly occupy*

*the land for a continuous and uninterrupted period of not less than twelve years, the trespasser is entitled to apply under section 38 (supra) to be registered as the proprietor of the land. This is what the doctrine of Adverse Possession means. Where the period of 12 years is not continuous or is interrupted, the period of Adverse Possession is broken and must start all over again. ....”*

Earlier, the **Court of Appeal in Gabriel Mbui V Mukindia Maranya (1993) eKLR** held that: -

**“..... The possession must be continuous, uninterrupted, unbroken for the necessary statutory period. The possession by the adverse possessor must continue without significant interruption for a solid block of time at least so long as the period of limitation being at the moment 12 years before filing of the suit... .. There are a number of ways in which Adverse Possession which has begun to grow may be interrupted. Possession may be interrupted: -**

- a) By the physical entry upon the land by any person claiming the land in opposition to the person in actual possession with the intention of causing interruption.**
- b) By the institution of legal proceedings by the rightful owner to assert his right to the land; or**
- c) By any acknowledgement made by the person in possession, to any person claiming to be the**

**rightful proprietor, that such claim is admitted or otherwise recognized.**

A lot has been said about Nyeri Tribunal Case No. 27 of 1998. Peter Kahiga Waruru, son to the Applicant, admitted that he was aware of Tribunal case No. 27 of 1998 between his late father and the Respondents in which the Tribunal decided that the land belonged to the Respondents. This was on 24/5/2000. The claim for adverse possession diminishes or is stopped as soon as a suit is filed in Court against a party claiming adverse possession. In this instant case, the claim for adverse possession evidently was by law stopped on 17<sup>th</sup> September 1998 when the suit was filed and referred to the Tribunal. That suit was determined on 24/5/2000 in favour of the Respondents. Since 24/5/2000 to 2014, the time of filing this Suit, 14 years had lapsed. Unfortunately, Adverse Possession has not crystalized because there have been disquiet and battles between the Applicant and the Respondents with the latter trying to unsettle the Applicant and his family. The element of peaceful **and uninterrupted occupation has been lacking for the last 21 years.** This then negates the concept of Adverse possession. Accordingly, the late Applicant and/or his family cannot benefit from the doctrine of adverse possession any further. The Applicant's Suit is accordingly dismissed with costs.

**Judgment dated and delivered at Nyandarua virtually this 16th Day of October 2025.**

**MUGO KAMAU**

**JUDGE**

**In the presence of:**

**C/A: Samson.**

Applicant's Counsel.....Ms Nanjala Simiyu.

Respondent's Counsel.....Mr. Gichuki.