



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 64 OF 2013**

**PHILIP KIPKORIR ROTICH.....PLAINTIFF**

**VERSUS**

**AGNES OMITI.....DEFENDANT**

**JUDGMENT**

*(Suit claiming land by adverse possession; applicant having taken possession in the year 1987 and respondent obtaining title in the year 1992; applicant suing respondent in the year 1993 seeking cancellation of title of the respondent; applicant's case dismissed in the year 1996; applicant now filing suit for adverse possession in the year 2006; question whether the time taken during the hearing of the previous suit should be taken into account in accumulating the years required to sustain a claim for adverse possession; court holding that the said time cannot be computed; time would only start running after judgment; applicant had not accumulated 12 years from the time of judgment to the time that he filed suit; suit dismissed with costs).*

1. This suit was commenced by way of an Originating Summons filed on 12 July 2006 through which the original applicant, one Jackson Kiprotich Cheruiyot, sought orders that he be declared the owner of the land parcel Miti Mingi/Mbaruk Block 3/1598 (hereinafter "the suit land") by way of adverse possession. The original applicant died on 20 November 2016, while the suit was still pending, and he was substituted with one Philip Kipkorir Rotich, who is his son.

2. The case of the applicant as presented in the supporting affidavit to the Originating Summons and in the oral evidence of the applicant, is that the original applicant (whom I will henceforth refer to as the deceased) was a member of Kalenjin Enterprises, a land buying company, and that by virtue of his shareholding, he was entitled to 5.4 acres of land. Instead, he obtained title to the land parcel Miti Mingi/Mbaruk Block 3/1597, which measured 4.9 acres and not the 5.4 acres that he expected. However, on the ground, the deceased occupied 5.4 acres, the extra 0.5 acres being comprised in the suit land. In essence, his occupation on the ground straddled both the land parcel No. 1597 and 1598, and it was said that the deceased fenced these two land parcels together and used them as one. It was averred that the deceased started occupying the ground on 26 April 1987, thus the contention that he is entitled to the 0.5 acres comprised in the suit land through the doctrine of adverse possession.

3. In the course of hearing the matter, it emerged that the respondent had obtained title to the suit land on 17 February 1992, about 5 years after the deceased had commenced possession, and following her acquisition of title, the deceased sued the respondent and Kalenjin Enterprises Limited, in the suit Nakuru HCCC No. 383 of 1993. In that case, the deceased sought orders that it be declared that he is the rightful owner of the suit land and further sought orders for the cancellation of the title of the respondent. Just as he has contended in this case, the deceased gave evidence that following his shareholding, he was entitled to 5.4 acres but only got title to land measuring 4.9 acres and alleged that the balance of 0.5 acres was unlawfully given to the respondent. In her judgment delivered on 20 September 1996, Ondeyo J, was not persuaded that the deceased had proved entitlement to 5.4 acres and had not proved on a balance of probabilities that he was entitled to the 0.5 acres comprised in the suit land. The suit of the deceased was thus dismissed. Following that judgment, a demand letter was written by the respondent on 23 May 2006, asking the deceased to vacate the suit land. The deceased did not vacate but instead filed this suit.

4. In her replying affidavit, the respondent argued that the time consumed by the case Nakuru HCCC No. 383 of 1992, ought not to be taken into account and thus the deceased had not clocked the required 12 years before filing suit so as to sustain a case for adverse possession.

5. In his submissions, counsel for the applicant rightfully presented the law on adverse possession, and it is trite that a person needs to have continuous uninterrupted and quiet possession for a period of 12 years to succeed in such claim. In addressing whether the suit Nakuru HCCC No. 383 of 1992 stopped the running of time, he submitted that it did not as the deceased was in occupation of the land and that the respondent did not use that case to assert her ownership rights over the same. In pressing this point, he referred me to the case of **James Maina Kinya vs Gerald Kwendaka, Muranga ELC No. 323 of 2017 (OS)**. He was of opinion that all that the respondent did was to write a demand letter which was not effective enough to assert her rights over the land.

6. I have gone through the case of **James Maina Kinya vs Gerald Kwendaka**, but the facts are very disparate to what is before me. In the said

case, the applicant had earlier successfully sued the respondent for specific performance over a land sale. The judgment was however unexecuted for a period of more than 12 years and it thus lapsed. The applicant then presented a case for adverse possession. Kemei J, while deciding the case, held the view that the 12 years after judgment was a period that could be computed in supporting the case.

7. In our case, the deceased failed in his suit for title to the suit land. I am not persuaded by the argument that the period taken when the previous suit was being heard could be taken into account in the applicant's claim for adverse possession. Assuming that he was indeed in possession, the respondent was entitled to wait and see if he would succeed or fail in his suit before asserting her right of occupation. If I am to buy the argument of the applicant, it means that if a person makes an entry into land and then sues for it, and assuming the case takes 13 years, but he loses the case, he would then succeed in a case for adverse possession and argue that he was in continuous possession for over 12 years while the case was running, and the respondent thus has no defence to his claim. That to me, would bring about an absurd result. The reasonable preposition is that the person after losing his case for title to the land, will need to now accumulate 12 years of quiet uninterrupted continued possession, after delivery of the judgment, so as to sustain his case for adverse possession. One cannot benefit from a delay in finalizing a case so as to buy time for a claim of adverse possession. It follows that the time taken when litigation on the same land is on-going, between the same parties, ought not to be computed in a subsequent claim for adverse possession. Indeed, the filing of the previous case by the deceased, interrupted the running of time, meaning that the deceased needed to clock a fresh period of 12 years after delivery of judgment to enable him succeed in a case of adverse possession.

8. Thus, in our case, the deceased had to clock 12 years of quiet, continued and uninterrupted possession, after the delivery of the judgment in the previous suit, which time must begin to be computed from 20 September 1996. This suit was filed on 12 July 2006, which is a period that is just about 10 years or so. The said period does not reach the required 12 years which is the period required for one to succeed in a case for adverse possession.

9. It is therefore my holding that the deceased and his successor in title cannot succeed in this suit for adverse possession. I have no option but to dismiss this suit and it is hereby dismissed with costs.

10. Following the dismissal, the applicant needs to vacate the suit land and give vacant possession within 3 months of this judgment. In default, the respondent is at liberty to apply for his eviction.

11. Judgment accordingly.

**Dated, signed and delivered in open court at Nakuru this 7th day of February 2019.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of :-**

Mr. Mutai for the applicant.

Ms. Wangari holding for Mr. Nyamwange for the respondent.

Court Assistant : Nelima Janepher.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**