



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 347 OF 2011 (O.S)**

**1. MONICA WANJIKU W/O GEORGE WAIYO**

**2. GEORGE WAIYO.....PLAINTIFFS**

**VERSUS**

**LUCY WANJIKU NDUNGU**

**(Sued as the administrator of the estate**

**Of RUNO KIARIE).....DEFENDANT**

**JUDGEMENT**

The defendant is the administrator of the estate of RUNO KIARIE(deceased) (hereinafter referred to only as “the deceased”). The deceased died on 24<sup>th</sup> July, 1977. At all material times, the deceased was the registered owner of all that parcel of land known as Loc. 1/Mukurwe/140 measuring approximately 0.8 acres (hereinafter referred to only as “the suit property”). The deceased was registered as the owner of the suit property on 16<sup>th</sup> April, 1964. On 10<sup>th</sup> June, 1971, a caution was registered against the title of the suit property in favour of the 1<sup>st</sup> plaintiff. The suit property is still encumbered by the said caution.

What is before the court is the Originating Summon dated 5<sup>th</sup> July, 2011 brought by the plaintiffs in which they have sought the following orders:

- a) A declaration that the plaintiffs have been in adverse possession of the suit property for a period in excess of 12 years;
- b) A declaration that the deceased’s title in respect of the suit property has been extinguished by virtue of Section 17 of the Limitation of Actions Act, Chapter 22 Laws of Kenya;
- c) A declaration that the beneficiaries of the estate of the deceased are not entitled to inherit the suit property;
- d) A declaration that the plaintiffs are entitled to be registered as proprietors of the whole of the suit property;
- e) An order that the defendant does transfer to the plaintiffs the suit property and in default the Deputy Registrar to execute all documents necessary to effect the transfer of the suit property in favour of the plaintiffs; and
- f) An order that the defendant does pay the costs of the suit.

The application was premised on the grounds set out in the supporting affidavit sworn by the plaintiffs on 5<sup>th</sup> July, 2011. The plaintiffs averred that they purchased the suit property from the deceased on 31<sup>st</sup> January, 1967 and paid the purchase price in full after which they took possession thereof. They averred that after taking possession of the suit property, they developed the same by constructing their matrimonial home thereon and also carrying out cultivation on the same. They averred that in addition, they constructed a permanent house for their son, one, Samuel Ndungu on the property. The plaintiffs averred further that their occupation of the suit property was open, continuous and uninterrupted.

The Originating Summons was opposed by the defendant through a replying affidavit sworn on 11<sup>th</sup> April, 2013. The defendant denied that the suit property was sold to the plaintiffs by the deceased. The defendant averred that the plaintiffs were in occupation of only a small portion of the suit property which they were occupying illegally. The defendant averred that after the plaintiffs learnt that she had obtained a grant of letters of administration in respect of the estate of the deceased which entitled her to the suit property, the plaintiffs sought the revocation of the said grant and commenced development on the suit property despite her protests.

At the trial, the 2<sup>nd</sup> plaintiff, George Waiyo Ndungu gave evidence on his own behalf and on behalf of the 1<sup>st</sup> plaintiff who was his wife. In his evidence, the 2<sup>nd</sup> plaintiff adopted the contents of the affidavit which the plaintiffs had filed in support of the Originating Summons and their joint witness statement both dated 5<sup>th</sup> July, 2011 as part of his evidence in chief. He produced a copy of an agreement dated 31<sup>st</sup> January, 1967 between the deceased and the 1<sup>st</sup> plaintiff which was in Kikuyu language and its English translation as P Exh. 1 (a) and P Exh. 1 (b) respectively. He also produced a copy of certificate of official search dated 25<sup>th</sup> May, 2004 on the title of the suit property as P Exh. 2. The 2<sup>nd</sup> plaintiff told the court that the 1<sup>st</sup> plaintiff and he purchased the suit property which measured 0.8 acres from the deceased and took possession thereof in the same year of purchase. He stated that they had occupied the suit property peacefully over the years. He stated that they had planted Macadamia and avocado trees on the property and that their son Samuel Ndungu also had a house on the suit property. He stated that they were using the whole parcel of land comprised in the suit property.

In cross examination, the 2<sup>nd</sup> plaintiff stated that he had a house on the suit property which he built in 1967. He stated that the title number was not indicated in the agreement for sale because although the land had been adjudicated, the titles had not been issued to the land owners. The 2<sup>nd</sup> plaintiff denied that he entered the suit property after the death of the deceased. He reiterated that the 1<sup>st</sup> plaintiff and he entered the suit property after purchasing the same from the deceased. In examination by the court, the 2<sup>nd</sup> plaintiff stated that he had his homestead on the suit property and that some of his sons live in his homestead while one of his sons had built his own house on the suit property. He stated that there were a total of 6 houses on the suit property which belonged to him and his sons.

In her evidence, the defendant admitted that she was the administrator of the estate of the deceased. She stated that the suit property belonged to the deceased and that the deceased was using the suit property when he was alive. She stated that the plaintiffs started using the suit property after the death of the deceased. She stated that her deceased mother also cultivated the suit property after the death of the deceased. The defendant stated that the deceased who had no son left the suit property to her and her siblings who were all girls. She stated that it was when she applied for grant of letters of administration in respect of the estate of the deceased that she discovered that the 1<sup>st</sup> plaintiff had registered a caution against the title of the suit property. With regard to the agreement for sale dated 31<sup>st</sup> January, 1967, she stated that the agreement was not signed by the deceased. The defendant stated that there was only one house on the suit property which was put up after the death of the deceased. She stated that the suit property was her share of the deceased's estate. The defendant reiterated that the deceased did not sell the suit property to the plaintiffs and that the plaintiffs entered the suit property after the death of the deceased.

In cross-examination, the defendant stated that the suit property was being used by the 1<sup>st</sup> plaintiff. The defendant stated further that when she learnt that the plaintiffs were using the suit property, she reported the matter to the village elders and the area chief. The defendant stated that it was the plaintiffs who were using the suit property. In examination by the court, the defendant stated that according to the documents that she filed in the succession cause, the deceased died on 24<sup>th</sup> July, 1977 and that her mother died 5 years after the deceased. The defendant stated further that neither her siblings nor she had used the suit property.

#### Submissions:

After the close of evidence, the parties were directed to make closing submissions in writing. The plaintiffs filed their submissions on 5<sup>th</sup> December, 2017 while the defendant filed her submissions on 30<sup>th</sup> April, 2018. The plaintiffs submitted that they had established that they took possession of the suit property from the deceased in 1967 and that they had since then occupied and used the suit property to the exclusion of the deceased. The plaintiffs submitted further that their occupation and use of the suit property had been uninterrupted for a period in excess of 12 years. The plaintiffs submitted that they had acquired the suit property by adverse possession and as such they were entitled to the reliefs sought in the Originating Summons.

In her submissions in reply, the defendant termed the agreement for sale that was produced by the plaintiffs in evidence as fraudulent. The defendant submitted that the plaintiffs were only in occupation of a small portion of the suit property and that no evidence was placed before the court to prove that the plaintiffs were in occupation of the entire parcel of land. The defendant submitted that the plaintiffs had failed to prove their adverse possession claim.

#### Determination:

I have considered the Originating Summons together with the evidence that was tendered by the plaintiffs in support thereof. I have also considered the defendant's replying affidavit and the evidence that she adduced in her defence. In the case of Salim v Boyd and Another (1971) E.A 550, it was held that for a claimant of land by adverse possession to succeed, he must prove that he has been in open, continuous and uninterrupted occupation of the land for a period of 12 years or more. In the case of Kimani Ruchine & Another v Swift, Rutherford Co. Ltd. & another (1977) KLR 10 Kneller J. stated as follows at page 16:

**“The Plaintiffs have to prove that they have used this land which they claim as of right, necvi, nec clam, nec plecario (no force, no secrecy, no evasion).....The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”**

On the evidence before the court, I am convinced that the plaintiffs have established their claim over the suit property. Weighing the evidence adduced by the plaintiffs as against that of the defendant as to when the plaintiffs entered the suit property, I find the evidence of the plaintiffs more persuasive. The plaintiffs led evidence that they acquired the suit property from the deceased in 1967. The plaintiffs placed before the court a hand written document which they claimed to be an agreement for sale which they entered into with the deceased on 31<sup>st</sup> January, 1967 in respect of the suit property. Although the document was not a valid agreement for sale for want of the 1<sup>st</sup> plaintiff's signature, the document looked at together with the subsequent events left no doubt that there was indeed an agreement for sale of the suit property between the plaintiffs and the deceased in 1967 or thereabouts. In addition to the said document, the plaintiffs produced in evidence as Pexh. 2, a certificate of official search on the title of the suit property which showed that on 10<sup>th</sup> June, 1971, the 1<sup>st</sup> plaintiff registered a caution against the title of the suit property claiming purchaser's interest. If what the plaintiffs referred to as an agreement for sale was a

fraudulent document created by the plaintiffs after the death of the deceased in 1977, there was no way the 1<sup>st</sup> plaintiff could have used it to register a caution against the title of the suit property in 1971. The plaintiffs who are a husband and wife established in my view that they entered the suit property on the basis of the said document dated 31<sup>st</sup> January, 1967. I found the plaintiffs evidence that they took possession of the suit property in 1967 after paying the full purchase price uncontroverted.

The defendant claimed that the plaintiffs entered the suit property after the death of the deceased in 1977. The defendant placed no evidence before the court in proof of this contention. Although the defendant claimed that she reported the plaintiffs' entry onto the suit property to the village elders and the area chief, no evidence was placed before the court to prove these assertions. The plaintiffs contended that they occupied the entire parcel of land while the defendant contended that they were only occupying a portion of the suit property. The caution that was registered against the title of the suit property was registered against the whole land. The plaintiffs led evidence that they purchased and occupied the whole land. If the plaintiffs purchased the whole land which they have established to be the case, I cannot see the reason why they would only occupy a portion of it. The defendant did not produce evidence to rebut the evidence that was given by the plaintiffs to the effect that they were in occupation of the entire land.

It was not disputed that the plaintiffs were in occupation of the suit property. What was disputed was when they entered the suit property and the extent of their occupation. I have already made a finding that the plaintiffs entered the suit property in 1967 and that they occupied the entire parcel of land. This means that as at the time of coming to court, the plaintiffs had occupied the suit property for over 44 years. The plaintiffs contended that their occupation had been continuous and uninterrupted. This evidence was not controverted. Although the defendant claimed that the plaintiffs entered the suit property after the death of the deceased in 1977, no evidence was placed before the court of any action she took to remove the plaintiffs whom she termed as illegal occupants from the suit property. I am satisfied from the evidence before the court that the plaintiffs entered the suit property in 1967 and occupied the same continuously and peacefully until 2011 when they filed this suit.

Section 7 of the Limitation of Actions Act, Chapter 22 Laws of Kenya provides that an action to recover land cannot be brought after the end of 12 years from the date when the right of action accrued. Section 17 of the same Act provides that at the expiration of the said period of 12 years, the title of the person who was entitled to bring an action in respect of the land in question is extinguished.

As I have observed above, the plaintiffs had occupied the suit property for about 44 years as at the time when they filed this suit. No action had been brought against the plaintiffs by the defendant to recover the suit property. I am in agreement with the plaintiffs that the title that was held by the deceased in respect of the suit property has been extinguished by operation of law and that the plaintiffs have acquired the property by adverse possession. Section 38 of the Limitation of Actions Act gives the court power to order that the person who has acquired land by adverse possession be registered as the owner of the land in place of the person whose interest in the land has been extinguished.

Due to the foregoing, I am satisfied that the plaintiffs have proved their case against the defendant to the required standard. Consequently, I hereby enter judgment for the plaintiffs against the defendant as follows:

1. I declare that the title held by the deceased, RUNO KIARIE , in all that parcel of land known as Loc. 1/Mukurwe/140 measuring approximately 0.8 acres has been extinguished by operation of law.
2. I declare that the plaintiffs have acquired all that parcel of land known as Loc. 1/Mukurwe/140 measuring approximately 0.8 acres by adverse possession.
3. The defendant shall transfer to the plaintiffs all that parcel of land known as Loc. 1/Mukurwe/140 measuring approximately 0.8 acres within sixty (60) days from the date hereof failure to which the Deputy Registrar of this court shall be at liberty to execute all documents necessary to transfer the said parcel of land to the plaintiffs.
4. The plaintiffs shall meet all the expenses and costs associated with the transfer of all that parcel of land known as Loc. 1/Mukurwe/140 measuring approximately 0.8 acres into their names.
5. Each party shall bear its own costs of the suit.

**Delivered and Signed at Nairobi this 28<sup>th</sup> day of March 2019**

**S. OKONG'O**

**JUDGE**

Judgment read in open court in the presence of:

Mr. Omollo h/b for Mr. Kimani for the Plaintiffs

Mr. Okoth h/b for Ms. Waithira Mwangi for the Defendant

C. Nyokabi - Court Assistant