



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 228 OF 2013 (O.S)

IN THE MATTER OF LAND REFERENCE NO. 2787/325

SECTIONS 37 AND 38 OF THE LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA;

SECTIONS 54 AND 65 OF

THE LAND ACT NO. 6 OF 2012 AND THE LAND REGISTRATION ACT NO. 3 OF 2012 RESPECTIVELY

BETWEEN

KABUGI KINGORI.....1ST PLAINTIFF

GITONGA KINGORI.....2ND PLAINTIFF

-VERSUS-

KARTAR SINGH.....1ST DEFENDANT

MOHINDER SINGH.....2ND DEFENDANT

JUDGMENT

1. The plaintiffs herein, Kabugi Kingori and Gitonga Kingori, took up the summons dated **15th November, 2013** for determination of the issues raised therein which can be summarized to one to wit whether they have become entitled to be registered as the proprietors of the parcel of land known as Land Reference **No. 2787/325** (herein after referred to as the suit property) by adverse possession.
2. In support of the summons, the plaintiffs have deposed that sometime in 1972 they entered into negotiations with the defendants (registered proprietors of the suit property). Pursuant to the negotiations they signed a letter of intent dated 31st July, 1972.
3. It is the plaintiffs' case that despite having paid the full purchase price in respect of the transaction, they cannot recall having entered into a formal agreement with the defendants.
4. Owing to what the plaintiffs understood as misunderstandings between the defendants, the suit property was not transferred to the plaintiffs. That notwithstanding, the plaintiffs have been in uninterrupted, peaceable use and occupation of the suit property since 1972.
5. It is the plaintiffs' case that they developed the suit property with the knowledge of the defendants whom they lost touch with since 1972.
6. Pursuant to leave given to the plaintiffs to effect service of the summons herein to the defendants by way of substituted service (by advertisement in Daily Nation and Standard Newspaper), the defendants were accordingly served vide the Daily Nation of February, 2014 and the Standard Newspaper of even date.
7. Because the defendants neither entered appearance nor filed a statement of defence within the time notified or provided for in law for doing so, on request by the plaintiffs, interlocutory judgment was entered in favour of the plaintiffs and the matter set down for formal proof.
8. Before the matter was set down for formal proof, directions were taken to the effect that the originating summons be disposed of by viva voce evidence. The originating summons and supporting affidavit were treated as plaint and the documents annexed to the supporting

affidavit as the plaintiffs' documents.

9. When the matter came up for hearing, the 1st plaintiff, Kabugi Kingori, relied on the pleadings filed that is to say the originating summons, the supporting affidavit and the annexures thereto which he produced as **Pexbt 1 to 6**.

10. At close of hearing, the plaintiffs' counsel filed submissions which I have read and considered.

11. From the pleading and the submissions, I find the sole issue for the court's determination to be whether the plaintiffs have made up a case for being granted the orders sought.

12. This being a case for acquisition of title to land on account of adverse possession, the burden is on the plaintiffs to satisfy the court that their use and occupation of the suit property has been adverse to that of the defendants. To do so, the plaintiffs must satisfy the court that all the ingredients for acquiring land by adverse possession exist in their case. Those ingredients were espoused by the Court of Appeal in the case of **Wilson Kazungu Katana & 101 Others v. Salim Abdalla Bakswein & Another (2015) eKLR** thus:

"First, the parcel of land must be registered in the name of a person other than the applicant,

the applicant must be in open and exclusive possession of that piece of land in adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner."

13. Having carefully read and considered the uncontroverted evidence tendered in support of the plaintiffs case, which is to the effect that the defendants are the registered proprietors of the suit property and that the plaintiffs have been in exclusive, quiet and peaceable use and occupation of the suit property since 1972 (a period way beyond the twelve years stipulated in law for acquiring land by adverse possession), I entertain no doubt that the plaintiffs have made up a case for being declared as having become entitled to be registered as proprietors of the suit property on account of having acquired title to it by adverse possession.

14. Based on the ground that the defendants cannot be traced for purposes of executing transfer documents in favour of the plaintiffs, this court is urged to order the Registrar of Titles to register the suit property in the name of the plaintiffs and to issue the plaintiffs with a duplicate Grant or Certificate of title in respect of the suit property.

15. Although no such order is sought in the pleadings, the order is said to be necessary for giving effect to the court's judgment as the defendants are unlikely to be traced for purpose of signing the necessary transfer documents. In that regard reliance is made on the case of **Chevron (K) Ltd v. Harrison Charo Wa Chutu (2016)e KLR** where the Court of Appeal made an order for transfer of the suit property to the respondent despite the fact that the respondent had not in his pleadings sought an order for transfer of the suit property to him. The court made the order to give effect to its finding that the respondent had become entitled to be registered as the proprietor of the suit property on account of adverse possession. In giving the order, the court relied on the decision in the case of **Gulam Mariam Nordin v. Julius Charo Karisa, Civil Appeal No. 26 of 2015** where the Court of Appeal stated:-

"...We see no harm to make appropriate orders flowing from a finding that the respondent's occupation of the suit property was adverse to that of the appellants; and that the latter's was so extinguished".

16. Being of the view that the order sought is necessary for purposes of giving effect to the judgment herein and cognizance of the fact that the defendants may not be traced for purposes of signing transfer documents in favour of the plaintiffs, I order the Registrar of Titles to register the suit property in the name of the plaintiffs and issue the plaintiffs with a duplicate Grant or certificate of title in respect of the suit property; LR No. 2787/325, on the basis of the order issued pursuant to this judgment.

17. Orders accordingly.

Dated, Signed and Delivered in open at Nyeri this 5th day of March, 2019.

L N WAITHAKA

JUDGE

Coram:

Mr. Chweya h/b for Mwangi Kariuki for the plaintiff

N/A for the defendants

Court assistant - Esther