



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO.84 OF 2017

(FORMERLY NAIROBI HCCC NO.661 OF 2005)

**EDITH NJOKI KARICU (Suing as a legal Representative of the
Estate of Gathuku Karicu).....PLAINTIFF**

-VERSUS-

JOSEPH MBURU NJOROGE.....1ST DEFENDANT

GITHUNGURI DAIRY CO-OPERATIVE SOCIETY...2ND DEFENDANT

JUDGMENT

By a *Plaint* dated **2nd June 2005**, the Plaintiff herein filed a suit against the Defendants and sought for the following orders:

- a) A declaration that the Plaintiff is the owner of the suit premises and should be registered as such.
- b) The 1st Defendant's name should be truck out of the register of title for the suit property.
- c) The 3 charges held by the 2nd Defendant on the suit property be declared null and void ab initio for all purposes against the Plaintiff
- d) The Defendants pay general damages to the Plaintiff.
- e) An injunction restraining the Defendants their agents, servants and or assigns from selling, alienating, leasing, mortgaging, transferring disposing off or in anyway wasting the suit premises pending the determination of this suit on merits.
- f) Costs of this suit.
- g) Interest on (d) and (f) above at the time of filing this suit and from the said day till payment in full.
- h) Any other or further relief this Honourable Court may deem fit and just to grant.

In his *Statement Of Claim*, the Plaintiff averred that he is the owner and in possession/occupation of **LR.NO.Githunguri/Kimathi/T.59**, having bought the same from three brothers namely **Karoki Kimani, Karugiro Kimani, and Kibuku Kimani**, and that at the time of the sale, it was registered in the name of their eldest brother **Karoki Kimani**, who held it in trust for the two other brothers and himself. He further averred that after the sale, he moved in and occupied and developed the land from **1962**, until his arrest in **2002**. It was then that he discovered that the 1st Defendant had made a complaint against him to the police. He further averred that the 1st Defendant holds three Charges registered against the Plaintiff's land. He alleged that the 1st Defendant purported title to the suit property and Charges are fraudulent transactions.

He further alleged that the parties live in the same village and he has developed the premises over the years and the 1st Defendant had never raised an issue and that he had registered himself as the owner of the suit property and therefore the 1st Defendant is not an innocent purchaser for value.

He further particularized fraud by the 1st Defendant as having charged the suit property with the knowledge of the Plaintiff's interest and without informing him. It was further averred that the 2nd Defendant ought to have known that it gave no consideration for the 3 charges.

The suit is contested and the 1st Defendant filed his Defence on **24th June 2005**, and denied the allegations made in the **Plaint** and averred that he is the **Registered proprietor** of the suit land, having bought the same from **Karoki Kimani**, for consideration in **1972**. He further averred that the Plaintiff has never been in possession of the suit property and that since he bought the land he has been in occupation and utilizing the said land without any interruption and that he complained at **Githunguri Police Station**, when the Plaintiff trespassed thereon. He further averred that being the proprietor of the suit land, he is entitled to utilize it as he deems fit. He further averred that all the transactions pertaining to transfer and subsequent issuance of the suit property in his favour was in no way fraudulent and having been in physical occupation, the claim for adverse possession is of no application in the suit. The court was therefore urged to dismiss the Plaintiff's suit.

The matter proceeded for hearing via viva voce evidence. The original Plaintiff **Gathuku Karicu**, gave evidence on **2nd February 2012**, before **Justice Osiemo** (as the then was) and thereafter called one more witness. The Defendant gave evidence for himself and called no witness.

This matter was initially filed in the **Civil Division** of the **High Court** in Nairobi in **2005**, but was transferred to **ELC Milimani** vide a **Ruling** of the court issued on **4th February 2015**. Further **Gathuku Karicu**, died during the pendency of the suit and an application for substitution was filed by his wife **Edith Njoki Karicu** on **1st April 2015**. The said application was not opposed and was allowed by the Court on **21st July 2015**. The Plaintiff therefore is **Edith Njoki Karicu**.

This suit remained without any further action until **7th February 2017**, when **Notice to Show Cause** was issued for hearing on **15th March 2017**. On this particular date after a satisfactory explanation of the cause shown, the suit was transferred to this Court as the suit property is in **Kiambu County**.

When the advocates for the Parties appeared in this Court on **25th September 2017**, they consented to proceed with the matter from where it had reached. Since the Plaintiff had closed her case, this Court only took the Defence evidence after the proceedings were typed. The analysis of the adduced evidence is as follows;

PLAINTIFF'S CASE

PW1- Gathuku Karicu, testified that he has been living in the suit land ever since he purchased the same from one **Kimani Karoki**, and two of his brothers. He further testified that when he wanted to cut down the trees that are on the suit premises, he was arrested and locked up, but later released without being informed of who had complained. It was his evidence that no one has ever laid claim to the suit land since he occupied it and that he sued the 1st Defendant because he is the one who was interfering with his quiet possession of the suit land and after having conducted a search and he found out that it was 1st Defendant who was claiming the suit land as evidenced by the green card. It was his further evidence that the 1st Defendant had mortgaged his land to **Githunguri Dairy Farmers**, the 2nd Defendant herein.

Plaintiff further gave evidence that the 1st Defendant and the chief wanted him to vacate his land vide a letter dated **29th June 2000**, but he has never been sued for eviction. He testified that though he pleaded the purchase price to **Kshs.700/=**, he thought it was **Kshs.7,000/=** but later stated that it was **Kshs.700/=**. He also testified that he lives far from the 1st Defendant and that he did not know him before he was introduced to him by the Police. He also testified that the suit land is his and he produced his bundle of documents filed on the **9th March 2006**, as exhibits.

On cross examination, the Plaintiff testified that he has a sale agreement but its not part of the exhibits and that the people present at the transaction are deceased. He further testified that the title indicated **Karoki Kimani**, as the owner and that the said **Karoki Kimani** did not hold interest for anybody. He stated that he bought the land from the owners and has since subdivided the land. It was his further testimony that he did not go to the Lands office to have the same registered and he has not taken steps to attain registration. It was his further testimony that the trees he was cutting when he was arrested were planted by him and not the 1st Defendant. He further testified that he has not registered a **caution** or a restriction and that he came to court because the Chief told him to vacate his land. He further testified that the 1st Defendant fraudulently registered the Certificate of title to his name and the title is a forgery and illegally obtained. He also testified that there was another suit against the 1st Defendant by way of an **Originating Summons**, which was withdrawn.

On re-examination he reiterated that he has been on the suit land for a long time and the 1st Defendant has never sued him to vacate. It was his evidence that if the 1st Defendant had not taken action for over 20 years, then he does not acknowledge ownership. He testified that judgment was entered against the 2nd Defendant and that he filed the particular suit because of fraud allegations.

PW2 - Grace Njeri Karugiro, testified that she stays near the Plaintiff. She further testified that she knew the three brothers who sold land to the Plaintiff and that **Karugiro Kimani** was her husband. She further testified that the Plaintiff became the owner of the suit property having bought the same from the three brothers at **Ksh.700/=** and that she was present having received her husband's share and the Plaintiff took occupation. She also stated that she does not know the 1st Defendant and he does not live on the suit land. It was her evidence that **Kimani** did not challenge the Plaintiff's occupation as the three brothers sold the suit land to him.

On cross-examination, she testified that the father of the 3 brothers was the first registered owner of the suit land and that he gave his title to his elder son, **Karoki Kimani**. It was her further evidence that the sons then sold the suit land to the Plaintiff and that she was present in **1962**, at her home. She further testified that it was purchased for **Kshs.700/=** and that she took **Kshs.200/=** and that there was no written agreement. She further testified that they did not sell the property to the 1st Defendant.

On re-examination she testified that the 1st Defendant did not take **Karicu** to court and that her father in law was **Kimani Karoki** and that the eldest son held land in trust for all the other son.

DEFENCE CASE

DW1 - Joseph Mburu Njoroge, the Defendant herein testified and gave evidence that the suit land is his and is registered in his name. He also testified that the land was initially in the name of **Karoki Kimani** and he transferred it to him in **1972**. It was his evidence that he bought the said suit land having confirmed that he was the owner and that the Chief gave them the consent to transact and he bought it for **Kshs,1000/-**. It was his further evidence that he then went to **Kiambu Lands Office** together with **Karoki Kimani**, where they filed the transfer forms and he later picked the title deed and obtained various loans with it. It was his evidence that he later met the Plaintiff who informed him that the suit land is his. The 1st Defendant produced an abstract of title as **exhibit 1** and a copy of an Originating Summons wherein the Plaintiff had filed as a previous suit. He further testified that he purchased the suit land in an open manner and he did not know the Plaintiff was living on the suit land and there was no encumbrance when he purchased the suit land. He also testified that he is utilizing the suit property to date.

On cross-examination he testified that he bought the land from **Karoki Kimani**, who never lived on the land and never built on the suit land. It was his further evidence that when he went to check the suit land, it was unoccupied but that there was a house and trees planted thereon. He further testified that he bought the land legally having done his due diligence and the **Assistant Chief** and the **District Officer** gave them a go ahead to sell and purchase the same. He further testified that he does not have the documents pertaining to the transaction and that he has not built on the suit land but only takes care of it. It was his evidence that the house built during the State of Emergency period is a temporary one and that it is not occupied. He further testified that though the Plaintiff was arrested by the Police, he was never charged and that the Plaintiff cut his trees that were in his land. He further testified that the Plaintiff does not live on the suit land and has never lived there. He urged the court to visit the disputed land and that the suit property is in **Mitahato Village** and he lives in **Githieko Village**.

On Re-examination, he confirmed that he did not have any sale agreement and that he has not built on the suit land. He further testified that he planted the Blue gum trees and used the title as security to obtain loans.

After the close of viva voce evidence, the Court directed the **Deputy Registrar** of this Court to visit the **locus quo** that is plot **No.Githunguri/Kimathi/T.59** and prepare a Report to that effect. The said visit was done on **16th February 2018**, in the presence of advocates for the parties and the parties herein. The **Deputy Registrar** observed as follows:-

- 1. The plot is fenced with live and a barbed wire fence.**
- 2. There are three houses on the property.**
- 3. The first house is a house made of timber. It is not occupied, it allegedly belonged to the deceased Gathuku Karicu.**
- 4. The second house is made of iron sheets, it is occupied by the Plaintiff's grandson one Sammy Mburu.**
- 5. The third house in the compound is made of iron sheets, it is occupied by the Plaintiff's son one Cucu Gathoko.**
- 6. Adjacent to the houses is the farm consisting of various crops to wit bananas, pawpaw trees, macadamia and few coffee bushes. There are also cut tree stumps and blue gum trees.**

There were photographs taken showing the different subsistence crops and trees on the suit land.

The parties thereafter filed written submissions and the Plaintiff through the **Law Firm of Nabutete & Co. Advocates**, filed his written submissions on **13th July 2018**, and submitted that there is only one **LR.Githunguri/ Kiamthi/T.59** and the plaintiff and his family has been in actual possession. It was further submitted that the Plaintiff's evidence is supported by **PW2** and the court was urged to dismiss the 1st Defendant's defence with costs.

The 1st Defendant through the **Law Firm of M/S G.K Gatere & Co. Advocates**, filed their submissions on the **5th July 2018**, and relied on various provisions of the law and decided cases. It was therefore submitted that the Plaintiff is simply **a tenant at will** and has been in possession with permission of the Landlord and that the Plaintiff has failed to prove her case and the court was urged to dismiss the suit with costs. He relied on various decided cases and several provisions of law specifically **Section 3(3)** of the **Law of Contract Act** which provides:-

“No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

The Court has now carefully considered the pleadings in general, the evidence produced in court and the exhibits thereto. The court has further read and considered the rival written submissions and the court finds as follow;-

The suit property in dispute herein is **LR.Githunguri/Kimathi/T.59**, which is registered in the name of **Joseph Mburu Njoroge**, the 1st Defendant herein. From the copy of **Green Card** produced in court, the first registered owner was **Karoki Kimani**, who got registered so on **13th November 1958**. It is also evident that the land was later registered in the name of **Mburu Njoroge** on **19th January 1972**, and a land certificate was issued. However, on **3rd September 1982**, the said land was later registered in the name of **Joseph Mburu Njoroge** the 1st Defendant herein. The 1st Defendant alleges that he is still the same person known as **Mburu Njoroge** who was registered so in **1972**.

From the pleadings and available evidence, the Plaintiff **Gathuku Karichu**, who was later substituted with **Edith Njoki Karicu** alleged that he purchased the suit land from **Karoki Kimani**, the initial registered owner in **1962**. However, he alleged that there was no **Sale Agreement** drawn then and that he took possession thereafter and has been using the land since then. It was his further evidence that after **Karoki Kimani** and his brothers sold the suit land, **Karoki Kimani** moved to the **Rift Valley** and has never been seen again. Therefore **Karoki Kimani** did not effect transfer and/or sign transfer documents in favour of the Plaintiff. His evidence was supported by **PW2 Grace Njeri Karugiro**, the wife to **Karugiro Kimani**, who confirmed that the suit land was an ancestral land and indeed **Karoki Kimani**, who was holding the land on his behalf and on behalf of his two other brothers sold the suit land to **Gathuku Karicu**.

However, the 1st Defendant on his part alleged that he bought the suit land from **Karoki Kimani** in **1972**, and that there was no **Sale Agreement**. The 1st Defendant however has certificate of registration (title deed) and he alleged that as provided by **Section 26(1)** of the **Land Registration Act**, then he is deemed to be the **absolute and indefeasible owner** of the said parcel of land.

It is also evident that the above Section has exceptions in **Subsection 1(a)&(b)** which provide that the said title can be challenged if it was acquired through **fraud, misrepresentation, illegally, irregularly** or through **corrupt scheme**.

It is also not in doubt that allegations of **fraud** are serious and have to be proved on the required standard. See the case of **Samuel Samita Namunyu...Vs...Philmon Machina Ndiwa & 3 Others (2014) eKLR**, where the Court held that:-

“Fraud is a very serious allegation and one that warrants and attracts serious consequences under the law. It is trite that for fraud to lie, the alleging party should prove the existence of that fraud not on a balance of probabilities but a much higher standard of proof albeit below beyond reasonable doubt.”

Further, it is trite that **‘he who alleges must prove’** as stated by **Section 107 & 109** of the **Evidence Act** which provide:-

107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

109 “The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.

Again even where a suit is registered in the name of another person, it can be granted to a claimant who claims the same through adverse possession. The Plaintiff herein has claimed that 1st Defendant acquired the suit land through fraud and in the alternative, he has alleged that he has acquired the said parcel of land by virtue of adverse possession having lived on the suit land openly and without interruption from **1962 upto 2002**, when the 1st Defendant caused him to be arrested. Further that from the year **2002**, the 1st Defendant has never served him with an **Eviction Notice**. The above are the undisputed facts. The issues for determination are:-

- i. Did the Plaintiff purchase the suit property No.Githunguri/ Kimathi/T.59 in 1962 from the three brothers Karoki Kimani, Karugiro Kimani and Kiburu Kimani.**
- ii. Has the Plaintiff been in occupation of the suit property openly and uninterrupted until September 2002?**
- iii. Did the 1st Defendant purchase the suit property from Karoki Kimani?**
- iv. Did the 1st Defendant obtain the title to the suit property fraudulently?**
- v. Is the Plaintiff entitled to the prayers sought?**
- vi. Who is to pay costs of the suit?**

i. Did the Plaintiff purchase the suit property No.Githunguri/ Kimathi/T.59 in 1962 from the three brothers Karoki Kimani,

Karigiro Kimani and Kiburu Kimani.

The Plaintiff alleged that **Gathuku Karicu** purchased the suit property from **Karoki Kimani**, in **1962**. That the said **Karoki Kimani** was holding the suit land in trust for himself and his brothers **Karugiro Kimani** and **Kibuku Kimani**. **Gathuku Karicu** had alleged that he purchased the suit land for **Kshs.700/=** from the said three brothers. He however alleged that there was no **Sale Agreement** drawn then and that he has always been in occupation of the suit property since then. His evidence was supported by **PW2 Grace Njeri Karugiro**, who confirmed that he was the wife of **Karugiro Kimani** and that the suit land was owned by the three brothers but was registered in the name of **Karoki Kimani** as a trustee. It is evident that the suit property was registered in the name of the said **Karoki Kimani** in **1958**, during the land consolidation and demarcation in **Central Province**. The Court takes **Judicial Notice** that indeed during the said period, most ancestral lands used to be registered in the name of one person especially the elder son to hold it in trust for himself and his other siblings. It is therefore probable that the said **Karoki Kimani**, was registered as a registered owner of the suit property in **1958**, to hold it for himself and as a trustee for his other siblings. **PW2** confirmed that she was present when the said **sale** and **purchase** transaction took place. She testified that the purchase price was **Kshs.700/=** and that she took

Kshs.200/= that was meant for her husband **Karugiro Kimani**.

The 1st Defendant has disputed the Plaintiff's claim and alleged that there was no written **Sale Agreement** and the suit herein is contrary to **Law of Contract Act** specifically **Section 3(3)** which provides:-

“No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

However, it is noteworthy that this is a transaction that allegedly took place in **1962** and it is probable that the Agreement was verbal and not written one. The 1st Defendant too has not produced any written Agreement though he alleged he purchased the suit land in **1972**.

It is not in doubt that **“he who alleges must prove”** but the Court has taken Judicial Notice of the fact that the alleged transaction herein was in the early **1960s**, and probably the Sale agreement was done orally and no written agreement was drawn.

The Plaintiff has alleged that he has been in occupation of the suit property since **1962**, and his evidence was given credence by **PW2**, the wife of one of the brothers of **Karoki Kimani**. If the Plaintiff had not purchased the suit property and was not related to **Karoki Kimani**, how could he have taken possession of the suit land if he had not purchased it from the owners?

The Court has not seen any reason to doubt that the late **Gathuku Karicu**, purchased the suit property from the three brothers in **1962**, but the suit property was never officially transferred to him and he did not obtain a certificate of title. He however took possession and has been in occupation since then.

ii. Has the Plaintiff been in occupation of the suit property openly and uninterrupted until September 2002?

The Plaintiff has testified that he took possession of the suit property in **1962**. The Court has found so and has found no reasons to doubt that bit of evidence. The 1st Defendant on his part alleged that he brought the parcel of land in **1972**. It is evident that the 1st Defendant lives in **Githieko area**, whereas the suit property is in **Mitahato area** both in Githunguri. However, there was no evidence that at any given time since **1972**, the 1st Defendant ever requested the Plaintiff to give him vacant possession. Though the 1st Defendant alleged that he utilized the suit property by planting bluegum trees thereon, when the Court visited the **locus quo**, or the suit property, it was observed that the parcel of land has a live and barbed fence which the 1st Defendant never mentioned to have been erected by him. There were three houses on the suit property which were related to the Plaintiff and not the 1st Defendant. There were various crops on the suit property which confirmed continuous farming activities and a few blue gums trees. The suit land was not only consisting of blue gum trees as alleged by the 1st Defendant. The various crops on the suit property were consistent with a continuous occupation by the Plaintiff and his family. It is evident from the various letters produced by the Plaintiff that the Plaintiff's occupation of the suit property was interrupted in the year **2002**, specifically in the month of **September 2002**, when he was arrested by the police on allegation of having cut down the 1st Defendant's blue gum trees. However the Plaintiff was never charged or even sued in a Civil suit seeking for his eviction. Even after the said arrest, the Plaintiff continued to occupy the suit property and the 1st Defendant has never sought for his eviction.

Therefore this Court finds and holds that the Plaintiff had been in open and uninterrupted occupation of the suit property until **September 2002**, when he was arrested by the police. However he remains in occupation to date though the 1st Defendant has certificate of title over the suit property, he has never lived thereon. Though in his pleadings the 1st Defendant alleged that he lived on the suit property when the Court

visited the said suit property, there was no evidence of the 1st Defendant occupation of the same.

iii. Did the 1st Defendant purchase the suit property from Karoki Kimani?

The 1st Defendant alleged that he purchased the suit property from **Karoki Kimani** in **1972**. He did not produce any **Sale Agreement** just like the Plaintiff. He further said that he obtained **Consent** from the **area Chief**, the **District Officer** and later signed transfer documents. It should be noted that the 1st Defendant did not avail any evidence of such purchase or transfer as alleged by him. It is trite that **'he who alleges must prove'**. Though the 1st Defendant alleged that he purchased the suit property from **Karoki Kimani**, he did not produce any evidence of such purchase or call a witness to support his allegations. At least the Plaintiff called **Grace Njeri Karugiro** as his witness to support his allegation.

The fact that 1st Defendant has a certificate of title is not a confirmation of such purchase since a title can be acquired **illegally, irregularly** or through **fraud**. The 1st Defendant acquired the said title in the year **1972** while the Plaintiff was still in occupation of the suit property but did not bother to alert the Plaintiff of such acquisition. Since the Plaintiff and 1st Defendant are from the same village, the Court finds that there is unexplained silence or secrecy on the part of the 1st Defendant on why he never brought to the attention of the Plaintiff that he had acquired proprietorship of the suit property in **1972**. Therefore the Court finds that even if the 1st Defendant is in possession of a certificate of title, there is no cogent evidence that the 1st Defendant did purchase the suit land from **Karoki Kimani** given that the said **Karoki Kimani** moved to the Rift Valley after selling the suit land to the Plaintiff herein. In any event the Plaintiff purchased the suit land in **1962**, and therefore the Plaintiff had taken possession of the same.

iv. Did the 1st Defendant obtain the title to the suit property fraudulently?

'**Fraud**' is described as:-

"A false representation of a matter of fact – whether by words or conduct, by false or misleading allegations or by concealment of what should have been disclosed – that deceives and intends to deceive another so that the individual will act upon it for her or his legal injury."

Allegations of fraud are serious and which must be proved on the required standard. See the case of **Njuwangu Holdings Limited...Vs...Langata KPA, Nairobi & 5 Others(2014) eKLR**, where the Court held that:-

"The standard of proving fraud in Civil Cases, the Courts have consistently held, is higher than on a balance of probability. An allegation of fraud is a serious indictment against a party to whom it is made and though the standard of proof is not beyond a reasonable doubt as in Criminal Cases, it is no doubt near there but is certainly higher than on a balance of probability and thus when a party in a Civil matter makes an allegation of fraud against a party, he should be prepared to tender and adduce evidence to prove the allegation to the required standard"

The Plaintiff alleged that the 1st Defendant acquired the suit property fraudulently. However the said allegations were never strictly proved as required by law. However it is trite that a certificate of title can also be acquired **irregularly** or through **misrepresentation** and it is not sufficient to wave a certificate of title as the root of the title must be traced. See the case of **Munyu Maina...Vs...Hiram Gathiha Maina, Civil Appeal No.239 of 2009**, where the Court held that:-

"We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register."

The Plaintiff has alleged that he is the owner of the suit property and has been in occupation since **1962**. The 1st Defendant has never been in occupation of the suit property but he is in possession of the certificate of title. The root of his title is questionable since he did not produce any evidence of the said purchase and transfer. Though there is no evidence of acquisition of the title fraudulently, it is not clear how the 1st Defendant acquired the said certificate of title herein and this Court is of the humble opinion that it is not sufficient to wave a certificate of title without tracing its root.

v. Is the Plaintiff entitled to the prayers sought?

The Plaintiff has sought for various prayers in his claim among them a declaration that he is the owner of the suit premises and should be declared so.

The Court has found that it is indeed more probable that the Plaintiff purchased the suit property from **Karoki Kimani** and his brothers and it is doubtful whether the 1st Defendant purchased the said parcel of land from **Karoki Kimani** though he is in possession of a title deed.

The Court has further found that the Plaintiff had been in occupation of the suit property since **1962 upto 2002** uninterrupted. The 1st Defendant though in possession of a title deed and who is a village mate of the Plaintiff has never sought vacant possession of the suit land from the Plaintiff. There was no evidence produced at all to relate the suit property to the 1st Defendant. Courts have found that the rights of an equitable owner of a suit property should be upheld in some instances even if there could be in existence a registered owner. See the case

of *Macharia Mwangi Maina & 87 others..Vs..Davidson Mwangi Kagiri (2014) eKLR* the Court cited the case of *Mwangi & Another ...Vs... Mwangi (1986)KLR 328* where the Court held that:-

“Rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights. The absence of any reference to the existence of a trust in the title documents does not affect the enforceability of the trust.....”

Further, the Court finds that the Plaintiff has alleged that in the alternative he should be registered as the owner of the suit premises by virtue of adverse possession. It is trite that a person can claim ownership of a parcel of land registered in favour of another person by virtue of adverse possession as provided by **Section 38 of Limitation of Actions Act** which provides;-

38. (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, 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.”

See the case of *Mtana Lewa Kinya...Vs...Gerald Kwendaka (2015)* the Court described ‘*Adverse Possession*’ in the following terms:-

“Adverse Possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of its title for a certain period in Kenya it is 12 years.....The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the license of the owner.”

The Court had found that though the 1st Defendant is in possession of a certificate of title, the root of the said title is questionable. It is also evident that the Plaintiff has been in possession of the suit land from **1962 to 2002** when he was briefly arrested by the police and never charged. Thereafter his family has remained on the suit land to date. The 1st Defendant did not file a Counter-claim for eviction. The 1st Defendant has never been in possession of the suit land. It is therefore evident that the Plaintiff has been in **open, uninterrupted occupation** of the suit property for a long time which is over 50 years.

Even if the 1st Defendant acquired title deed in **1972**, he did not seek possession of the suit land from the Plaintiff though he saw the Plaintiff utilizing the suit land. Therefore the Plaintiff dispossessed the 1st Defendant of the use and occupation of the suit land and is entitled to be declared the owner of the same by virtue of adverse possession. See the case of *Sisto Wambugu ...Vs... Kamau Njuguna [1983] eKLR* where the court held that;

“The Respondent could not and did not prove that the appellant had either been dispossessed or had continued possession of the suit land for a continuous statutory period of twelve years , as to entitle him, the respondent , to title to that land by adverse possession.”

The Court therefore finds that the Plaintiff is entitled to be declared the owner of the suit property by virtue of adverse possession and that the 1st Defendant’s name should be struck out of the register as provided by **Section 80(1)** of the **Land Registration Act** which provides:-

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

The 2nd Defendant did not defend the claim against it by the Plaintiff and since the Plaintiff is declared the owner of the suit property, the 3 changes if they are still in existence are declared null and void against the Plaintiff.

The Plaintiff has sought for general damages. However the Plaintiff has always been in occupation and possession of the suit property. The Plaintiff has not suffered any loss to warrant award of damages. The Court finds that the Plaintiff is entitled to prayers sought in the Plaintiff in terms of **prayers No.(a), (b) & (c)**. **Prayer No.(d)** is disallowed and **prayer No.(e)** has been overtaken by events since the Defendant is not utilizing the suit property but the Plaintiff is.

vi. Who is to bear costs of the suit?

Costs ordinarily follow the event. The Plaintiff is the successful litigant and she is entitled to costs of the suit.

Having now carefully considered the available evidence, the exhibits thereto and the written submissions plus the cited authorities, the Court finds that the Plaintiff has proved her case on the required standard of balance of probabilities. For the above reasons, the Court enters Judgment for the Plaintiff against the Defendants herein jointly and severally in terms of **prayers No.(a), (b) & (c)** of the **Plaint** plus costs of the suit and interest at courts rate from the date of filing of the suit until payment in full.

It is so ordered.

Dated, Signed and Delivered at Thika this 31st day of May 2019.

L. GACHERU

JUDGE

31/5/2019

In the presence of

Mr. Cherongis holding brief for Mr. Nabutete for Plaintiff

M/S Mathia holding brief for Mr. Gatere for Defendant

Lucy - Court Assistant

Court – Judgment read on open court in the presence of the above stated advocates.

L. GACHERU

JUDGE

31/5/2019