



**REPUBLIC OF KENYA**

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

**E.L.C. CASE NO. 213 OF 2014**

**(FORMERLY KERUGOYA ELC CASE NO. 812 OF 2013)**

**EZEKIEL KAGOYA WAKAGWI.....PLAINTIFF**

**VERSUS**

**SAMUEL NGAHU MUNDUI (Sued as legal representative**

**of the estate of WANJOHI NGAHU).....DEFENDANT**

**JUDGEMENT**

1. By an originating summons dated and filed on 15<sup>th</sup> July 2010 brought under **section 38 of the Limitation of Actions Act (Cap. 22), Section 126 of the Registered Land Act (Cap. 300), Order XXXVI Rules 3D & 3F of the Civil Procedure Rules, Section 3A of the Civil Procedure Act (Cap. 21) and all other enabling provisions of the law**, the Plaintiff sought the following reliefs;

*a) That the honourable court do declare that the Plaintiff herein, Ezekiel Kagoye Wakagwi has become entitled to ownership of land parcel No. Nthawa/Gitiburi/1904 measuring approximately 4.8 hectares against the Defendant by virtue of section 7 of the Limitation of Actions Act on the ground that since 1978, the Plaintiff has openly, peacefully and of right been in occupation of the said parcel of land, that is to say, for a period exceeding 12 years preceding the presentation of this summons.*

*b) That in the alternative, there be a declaration that the Defendant was registered as proprietor of parcel of land No. Nthawa/Gitiburi/1904 on behalf of and in trust for the Plaintiff herein.*

*c) That costs of the suit be awarded to the Plaintiff.*

2. The said originating summons was based upon the grounds set out in the supporting affidavit sworn by the Plaintiff on the date of filing. The Plaintiff contended that he had occupied *Title No. Nthawa/Gitiburi/1904* (hereinafter *the suit property*) openly and without disturbance since 1978 and as such had acquired adverse possession thereof. He attached a copy of the land register for the suit property which indicated that the Defendant was as registered proprietor thereof on 28<sup>th</sup> May 1984.

3. The Defendant filed a replying affidavit sworn on 24<sup>th</sup> November 2011 in response to the said originating summons. It was denied that the Plaintiff had ever lived on the suit property even for a single day. The Defendant contended that the Plaintiff was simply his neighbor and that he had previously sued the Plaintiff in *Siakago Miscellaneous Application No. 107 of 1980* for cutting down his trees on the suit property.

4. It would appear from the record that during the pendency of the said suit the original Defendant died in consequence of which he was substituted with his son Samuel Ngahu Mundui in his capacity as administrator of his estate.

5. When the suit was set down for hearing on 12<sup>th</sup> February 2019 the Plaintiff called three witnesses whereas the Defendant testified on his own behalf. The Plaintiff's case was that he bought the suit property in 1975 and that he settled thereon in 1978. He stated that he planted trees and food crops thereon and that he had ever since resided thereon.

6. The Defendant testified that he was the personal representative of the estate of his late father who was the original Defendant in the suit. He stated that the person from whom the Plaintiff bought the suit property was not the owner thereof at the material time. He testified that it was his father who was the legitimate owner. He denied that the Plaintiff had been in occupation of the suit property for more than 12 years or at all.

7. When the hearing was concluded the Plaintiff was granted 30 days within which to file and serve his written submissions whereas the Defendant was given a similar period to file and serve his submissions upon the lapse of the period granted to the Plaintiff. The record

shows that the Plaintiff filed his submissions on 5<sup>th</sup> April 2019 whereas the Defendant filed his on 21<sup>st</sup> May 2019.

8. The court has noted that the parties did not file any agreed statement of issues in this matter. However, it is clear from the pleadings and affidavits filed herein that there are only two issues raised in the originating summons dated 15<sup>th</sup> July 2010. The first is whether the Plaintiff has demonstrated his claim for adverse possession. The second issue is whether the Plaintiff has demonstrated that the Defendant was registered as proprietor of the suit property in trust for him. The second issue is not, of course, a legitimate issue for determination in an originating summons seeking adverse possession under **section 38 of the Limitation of Actions Act (Cap. 22)**.

9. In **Wasui V Musumba [2002] 1 KLR 396**, the court rejected a claim for an overriding interest over the Respondent's property in an originating summons for adverse possession. Ringera J (as he then was) held, *inter alia*, that;

**“Lastly, I desire to say that the applicant’s claim that he may have an overriding interest over the respondent’s land under the provisions of the Registered Land Act cannot be a matter for adjudication in this originating summons as the only relief sought and indeed the only relief which could be sought in an originating summons of this nature was the registration of the applicant as proprietor of the suit land by virtue of adverse possession. I will therefore express no opinion on the merits or otherwise of that claim.”**

10. The legal requirements for proving adverse possession were restated in the following cases: **Wambugu Vs Njuguna [1983] KLR 172; Githu Vs Ndeete [1984] KLR 776; Kasuve Vs Mwaani Investments Ltd & 4 Others [2004] 1KLR 184 and Kimani Ruchine Vs Swift Rutherfords & Co Ltd [1980] KLR 10.**

11. In the case of **Kasuve Vs Mwaani Investment Ltd (supra)** the elements of adverse possession were summarized as follows;

**“...and in order to be entitled to land by adverse possession the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, Wanja Vs Saikwa No. 2 [1984] KLR 284. A title by adverse possession can be acquired under the Limitation of Actions Act for part of the land...”**

12. The court has fully considered the entire evidence on record on the issue of adverse possession. The court has also considered the written submissions filed on behalf of the parties. The Plaintiff appeared to put emphasis on the fact that he lawfully bought the suit property from PW2 whereas the Defendant appeared to emphasize that the Plaintiff may have bought the suit property from the wrong person who was not the legitimate owner thereof. The court will not be concerned with such matters since different considerations apply in claims for adverse possession.

13. On the basis of the material on record, the court is reasonably satisfied that the Plaintiff has been in occupation of the suit property at least since the late 1970s. The court is satisfied that the Plaintiff has developed the same and that he has all along been cultivating the suit property to the knowledge of the Defendant. That much was confirmed by the Plaintiff's witnesses. The court is further satisfied that such possession was adverse in that it was not with the consent or permission of the true owner.

14. When the Defendant testified at the trial he conceded that he and his siblings were resident in Nairobi and that he did not know who was cultivating the suit property. He stated that although he found some crops on the suit property when he last visited the suit property in 1990, he did not know who had planted them. He also conceded that during that last visit 29 years ago, the suit property appeared to have a fence or hedge around it.

15. The court was informed that the Defendant's father had filed *Siakago Miscellaneous Application No. 107 of 1980* against the Plaintiff. It turned out at the trial that the suit was in respect of alleged damage to trees. It was claimed that the Plaintiff had cut down some trees belonging to the original Defendant. It was not a claim for recovery of the land. In those circumstances, the court does not find that the Plaintiff's possession of the suit property was interrupted in the legal sense.

16. In the case **Githu Vs Ndeete (supra)** the court addressed the issue of interruption of possession 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. In my view the giving of notice to quit cannot be an effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act...”**

17. The court is thus satisfied that in the circumstances of this case the Plaintiff has demonstrated his claim for adverse possession against the Defendant. The material on record indicates that the original Defendant was registered as proprietor of the suit property on 28<sup>th</sup> May 1984. So, by the time the originating summons was filed on 15<sup>th</sup> July 2010 a period of at least 26 years had lapsed. That period satisfies the statutory minimum period of 12 years stipulated under the **Limitation of Actions Act (Cap. 22)**.

18. The upshot of the foregoing is that the court finds and holds that the Plaintiff has proved his claim for adverse possession against the Defendant and the same shall accordingly be allowed. The prayer for a declaration of trust is, however, declined. Consequently, the court makes the following orders;

a. A declaration be and is hereby issued that the Plaintiff, *Ezekiel Kagoye Wakagwi*, has become entitled to be registered as proprietor of *Title No. Nthawa/Gitiburi/1904* on account of adverse possession under **section 38 of the Limitation of Actions Act**

(Cap. 22) in place of the current registered owner.

b. The prayer for a declaration that the Defendant was registered as proprietor of *Title No. Nthawa/Gitiburi/1904* in trust for the Plaintiff is hereby declined.

c. Each party shall bear his own costs.

19. It is so decided.

**JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 30<sup>TH</sup> day of MAY 2019.**

In the presence of Ms. Rose Njeru for the Plaintiff and in the absence of the Defendant.

Court Assistant Mr. Muinde

**Y.M. ANGIMA**

**JUDGE**

**30.05.19**