



**REPUBLIC OF KENYA**

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

**E.L.C. NO. 109 OF 2015**

**(FORMERLY ELC KERUGOYA NO. 84 OF 2013)**

**1) JOACHIM NJUGUNA MBUGUA**

**2) JOHN NDUNG’U MBUGUA**

**3) PAUL NJOROGE MBUGUA.....PLAINTIFFS**

**VERSUS**

**SAMUEL NJAGI.....1<sup>ST</sup> DEFENDANT**

**SAMUEL GICHANGU.....2<sup>ND</sup> DEFENDANT**

**FAUSTINO NJERU NJOKA.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

1. By an originating summons dated 7<sup>th</sup> May 2019 brought under **section 38 of the Limitation of Actions Act (Cap. 22) and Order XXXVI Rule 3D of the retired Civil Procedure Rules 1948** (Revised Rules) the Plaintiffs sought the following reliefs;

- a) *That the Plaintiffs be declared to have become entitled to 1.2 acres out of land parcel Nthawa/Gitiburi/1832 registered under the Registered Lands Act (Cap. 300) by having had adverse possession of the said land for over twelve (12) years.*
- b) *That the Defendant’s title to the said land be declared extinguished and or invalid, null and void and the Plaintiff’s be registered as proprietors of 1.2 acres out of the said land.*
- c) *That the Defendants do execute the necessary documents to effect the transfer of 1.2 acres out of land parcel Nthawa/Gitimburi/1826.*
- d) *That the costs be provided for by the Defendants.*

2. The said originating summons was supported by an affidavit sworn jointly by the Plaintiffs on 7<sup>th</sup> May 2010. The Plaintiffs contended that they had been in possession of 1.2 acres out of *Title No. Nthawa/Gitiburi/1826* (hereinafter the *suit property*) since 1985. They stated that they had planted maize and built rental houses on the suit property. They further stated that they had been in exclusive, open, continuous and uninterrupted possession thereof since 1985 hence had acquired adverse possession thereof.

3. The 3<sup>rd</sup> Defendant filed a replying affidavit sworn on 7<sup>th</sup> February 2019 in answer to the said originating summons. Although the Defendant conceded being the current registered owner of the suit property he stated that he obtained registration of the suit property in 1996 after a lengthy court battle pitting members of his Nditi clan against Mbuya clan.

4. It was further contended that during the process of land adjudication Mbuya clan had filed *Appeal No. 340 of 1985* before the Minister for Lands which was determined in favour of Nditi clan. Although he was to be the beneficiary of the suit property, the 3<sup>rd</sup> Defendant was not so registered until 20<sup>th</sup> February 1996 after obtaining a court order to that effect in *Siakago SRM’s Civil Application No. 1 of 1996*. It was further stated that the suit property was subject of litigation in various other suits which were all determined in favour of Nditi clan.

5. When this suit was listed for hearing on 12<sup>th</sup> February 2019, the advocates for the parties consented to have the suit determined on the basis of the affidavits, statements and documents on record as well as written submissions to be filed on behalf of the parties. The Plaintiffs

were to file and serve their written statements within 30 days whereas the 3<sup>rd</sup> Defendant was to file and serve his within 30 days upon service. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not participate in the proceedings.

6. The record shows that the Plaintiffs filed their submissions on 16<sup>th</sup> May 2019 whereas the 3<sup>rd</sup> Defendant filed his on 24<sup>th</sup> May 2019. The court has noted that the Plaintiffs also purported to annex copies of unmarked photographs to their written submissions. It is not clear if those photographs are related to the suit property in dispute. The introduction of such photographs was not part of the consent of the parties recorded on 12<sup>th</sup> February 2019.

7. The court has perused the material on record and noted that the parties did not file an agreed statement of issues for determination. It is, however, evident that the main issue for determination is whether or not the Plaintiffs have demonstrated their claim for adverse possession.

8. The requirements of 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.**

9. 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 Sakwa No. 2 [1984] KLR 284. A title by adverse possession can be acquired under the Limitation of Actions Act for part of the land...”**

Such possession must, of course, be without force, without secrecy and without evasion as expressed in the *Latin* rendition *nec vi, nec clam, nec precario*.

10. The court has fully considered the evidence on record on the question of adverse possession. There is no doubt that the Plaintiffs have been in possession of the suit property for a considerable period of time. It is, however, not altogether clear whether the Plaintiffs have developed the suit property, and, if so, whether those developments are inconsistent with the title of the true owner. This is so because the court is aware that the Plaintiffs have numerous pending suits for adverse possession in which they claim to have occupied and developed the various properties the subject of those suits.

11. The court is also satisfied that the Plaintiffs' occupation was open and notorious. There is no indication that it was secretive or clandestine. It was, of course, without the consent or permission of the true owner.

12. The only aspect of adverse possession which appears to be in contention is the computation of the statutory period of 12 years. The court is of the view that the mere prosecution of civil suits between Mbuya clan and Nditi clan could not, without more, stop time from running for purposes of the **Limitation of Actions Act (Cap. 22)**, unless the suits involved assertion of property rights. It has been held that time for purposes of adverse possession should run not from the date of first registration but from the date that the owner had either actual or constructive knowledge of occupation by the adverse possessor.

13. In the case of **Kimani Ruchine V Swift Rutherfords & Co. Ltd** (supra) Kneller J (as he then was) held, *inter alia*, that;

**“The plaintiffs have to prove that they have used this land which they claim as of right *nec vi nec clam, nec precario* (no force, no secrecy, no evasion). So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous ...”** (emphasis added)

14. That dictum concerning actual or constructive knowledge by the registered owner was approved by the Court of Appeal in **Nyeri Civil Appeal No. 28 of 2014 Titus Kigoro Munyi Vs Peter Mburu Kimani [2015] e KLR**. The court stated as follows on the issue of knowledge;

**“26. Guided by the dicta as stated by Kneller J herein above and as adopted by this Court in Francis Gicharu Kariri Vs Peter Njoroge Mairu – Civil Appeal No. 293 of 2002 (Nairobi), we are of the considered view that in a claim for adverse possession, actual or constructive knowledge of adverse possession by a third party on the part of the registered proprietor must be proved. The trial court established as a fact that actual knowledge on the part of the registered proprietor that the appellant was in possession of the suit property was established to exist either from the year 2004 or 2010. We see no reason to interfere with this finding of fact by the trial court.”**

15. In the circumstances, the court is of the view that time for purposes of adverse possession cannot be computed as from 1984 when the land register was opened because then the 3<sup>rd</sup> Defendant had no means of knowing about the Plaintiff's occupation and possession. The 3<sup>rd</sup> Defendant had no proprietary interest in the suit property in 1984 hence had no opportunity of knowing about the Plaintiffs' possession. The operative date must be with effect from 1996 when the 3<sup>rd</sup> Defendant acquired proprietary interest in the suit property through a court order. A computation of time from 1996 to 2010 when the originating summons was filed would mean that time had run for about 4 years only by the time of filing which falls far short of the statutory minimum period of 12 years.

16. The court is aware that a mere change of ownership of land does not necessarily stop time from running for purposes of adverse possession. See **Githu V Ndeete** (supra). However, the change of ownership in this suit was not a normal *inter vivos* transfer from one person to another. The 3<sup>rd</sup> Defendant's registration was as a result of a court order after legal proceedings were instituted. The court is of the view that the legal proceedings pursuant to which the Defendant was registered as proprietor could legally interrupt possession. The

proceedings were for purposes of vindicating the 3<sup>rd</sup> Defendant's property rights and he appeared to have been successful.

17. The upshot of the foregoing is that even though the Plaintiffs have been in possession of the suit property, they have failed to demonstrate all the elements of adverse possession. The court is not satisfied that the Plaintiffs have proved possession for the statutory minimum period of at least 12 years. The Plaintiffs' claim shall consequently fail. Accordingly, the Plaintiffs' originating summons dated 7<sup>th</sup> May 2010 is hereby dismissed with costs to the Defendant.

18. 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. Njoka for the Plaintiffs and Ms. Rose Njeru holding brief for Eddie Njiru for the Defendants.

Court Assistant Mr. Muinde

**Y.M. ANGIMA**

**JUDGE**

**30.05.19**