



**REPUBLIC OF KENYA**

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

**E.L.C. CASE NO. 213 OF 2015**

**(FORMERLY E.L.C. KERUGOYA NO. 173 OF 2014)**

**1. ALICE WAMUGO NYAGA**

**2. JANE MUTHONI OBADIAH**

**3. MARY MURUGU OBADIAH**

**4. MERCY NJOKI NDWIGA.....APPLICANTS**

**VERSUS**

**CHELESTE MBOGO NJERU.....RESPONDENT**

**JUDGEMENT**

1. By an originating summons dated 8<sup>th</sup> November 2011 brought under **section 38** of the **Limitation of Actions Act (Cap. 22)** and **Order 37 Rule 7 of the Civil Procedure Rules**, the four Applicants sought the following orders;

*a. That this honourable court be pleased to declare that the applicants have become entitled to parcel of land Gaturi/Nembure/8874 by virtue of adverse possession pursuant to the provisions of section 38 of the Limitation of Actions Act (Cap. 22).*

*b. That an order do issue that the entry of the Respondent as the proprietor of parcel land Gaturi/Nembure/8874 made on 28<sup>th</sup> August 2011 be and is hereby extinguished.*

*c. That the Applicants be registered as the proprietors of the title Gaturi/Nembure/8874 in the ratios stated in the affidavit of Alice Wamugo Nyaga annexed herewith.*

*d. That costs of this application be awarded to the Applicants.*

2. The said summons was supported by an affidavit sworn on 21<sup>st</sup> September 2011 by Alice Wamugo Nyaga, the 1<sup>st</sup> Applicant, on her own behalf and on behalf of her co-applicants. It was contended that the Applicants had lived on *Title No. Gaturi/Nembure/8874* (hereinafter the *suit property*) since they were born and that they had resided thereon for periods ranging between 41 and 51 years.

3. The Applicants' further contended that the suit property was initially registered in the name of their late father, Obadiah Ndwiga (hereinafter *the deceased*) until 8<sup>th</sup> September 2011 when the Respondent obtained registration thereof in unclear circumstances. They stated that the Respondent had never taken possession of or utilized the suit property and that they had already acquired adverse possession thereof prior to the Respondent's registration as proprietor.

4. The Respondent filed a replying affidavit sworn on 20<sup>th</sup> December 2011 in response to the said originating summons. He contended that the Applicants were all married daughters of the deceased and that they were not resident on the suit property. The Respondent further stated that he was registered as proprietor on 25<sup>th</sup> August 2011 hence the filing of the claim for adverse possession was premature.

5. The Respondent's further response was that he had lawfully bought the suit property at a public auction conducted on 19<sup>th</sup> March 2011 by Giant Auctioneers prior to his registration as proprietor. It was his case that the Applicants could not mount a legitimate claim for adverse possession since the suit property was in the possession of the deceased who was their father.

6. At the trial hereof the 1<sup>st</sup> Applicant testified on her own behalf and on behalf of the other Applicants. She adopted the contents of her

supporting affidavit sworn on 21<sup>st</sup> September 2011 and witness statement dated 19<sup>th</sup> June 2018 as her sworn testimony. The 1<sup>st</sup> Applicant maintained that the suit property was initially registered in the name of the deceased and that she only came to know of the change of ownership after the death of the deceased. During cross examination by the Respondent's advocate, the 1<sup>st</sup> Applicant conceded that she was married and that she was residing with her husband elsewhere. She also conceded that her co-applicants were married. She denied being aware of any court case to which the deceased was a party during his lifetime.

7. The Respondent called two witnesses at the trial hereof. He relied upon the contents of his replying affidavit sworn on 20<sup>th</sup> December 2011 and his witness statement dated 13<sup>th</sup> July 2018. He adopted their contents as his sworn testimony. The total sum of his evidence was that he was a purchaser for value at a public auction. The relevant documents which facilitated the transfer of the suit property to him were signed by the Executive Officer of the court since the auction was conducted in execution of a decree. He contended that the suit property was in the possession of the widow of the deceased and that in any event a period of 12 years had not lapsed since his registration as proprietor.

8. When the hearing was concluded on 7<sup>th</sup> February 2019 the Applicants were given 30 days to file their written submissions whereas the Respondent was given 30 days upon service to file his. The record, however, shows that none of the parties had filed submissions by the time of preparation of the judgement.

9. The court has considered the pleadings, affidavits, and the oral and documentary evidence on record. The court is of the view that the main question for determination is whether or not the Applicants have demonstrated their claim for adverse possession.

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 carefully considered the entire evidence on record on the issue of adverse possession. Whereas the Applicants may have been born and brought up by their parents on the suit property their period of occupation could not be said to be adverse to the interests of the deceased who was their father. They must have been residing on the suit property as children with the consent and not against the will of the deceased during his lifetime. In the case of **Situma V Cherongo (2007) 2 KLR 84** the Court of Appeal dealt with a situation where a son who was living with his father sought to urge an independent claim for adverse possession. The court held, *inter alia*, that;

**“... indeed, it seems that before the death of his father, the land was communally occupied by members of the deceased's family who believed that the land legally belonged to the deceased. In the circumstances, we are of the view that the appellant did not have independent possession of the land from that of his father and that the appellant's possession of the land was through his father in his capacity as his son. Moreover, the appellant did not demonstrate that he had the requisite intention to possess the land to the exclusion of all persons including the respondent during that period.”**

13. The copy of the land register tendered in evidence showed that the deceased was registered as proprietor of the suit property on 11<sup>th</sup> September 1997 when the register was opened. He lost ownership to the Respondent on 24<sup>th</sup> August 2011 when the latter was registered as proprietor. The court is of the opinion that time for purposes of adverse possession could only start running with effect from 24<sup>th</sup> August 2011 and not earlier. Time could not run in favour of the Applicants against their own father during his lifetime.

14. The record shows that the originating summons dated 8<sup>th</sup> November 2011 was filed in court on the same date. That was less than three (3) months after the registration of the Respondent as proprietor. The suit was therefore filed prematurely. In the circumstances, the Applicants have failed to demonstrate that their possession of the suit property was adverse to the interests of the owner and for the minimum statutory period of twelve (12) years as stipulated by law.

15. The court is aware that at the trial hereof, the Applicants appeared to challenge the legality or propriety of the Respondent's registration as owner of the suit property. They contended that they were not aware of any public auction at which the suit property was sold or of any civil proceedings to which the deceased was party. The court shall not venture into a determination of the legality or propriety of the Respondent's acquisition of the suit property. That was not challenged in the originating summons filed in court. Indeed, it could not be a legitimate matter of inquiry in a claim for adverse possession. See **Wasui Vs Musumba (2002) 1 KLR 396.**

16. The upshot of the foregoing is that the court finds and holds that the Applicants have failed to demonstrate their claim for adverse possession as required by law. Consequently, the originating summons dated and filed on 8<sup>th</sup> November 2011 is hereby dismissed in its entirety with no order as to costs.

17. It is so decided.

**JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 23<sup>RD</sup> day of MAY 2019.**

In the presence of Mr. Mureithi holding brief for Mr. Morris Njagi for the Applicants; Ms Magara for the Respondent.

Court Assistant Mr. Muinde

**Y.M. ANGIMA**

**JUDGE**

**23.05.19**