



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. 166 OF 2016**

EUNICE NYAMBURA MUTHUCCI.....1<sup>ST</sup> PLAINTIFF  
EVANS GITONGA KIMENDERO.....2<sup>ND</sup> PLAINTIFF  
MOSES MURIITHI WACHIRA.....3<sup>RD</sup> PLAINTIFF  
JAMES KARIUKI MUTHUCHI.....4<sup>TH</sup> PLAINTIFF  
MARGARET WANGARI WARUI.....5<sup>TH</sup> PLAINTIFF  
JANE NJOKI MUTHUSI.....6<sup>TH</sup> PLAINTIFF

**VERSUS**

KENNETH KINYUA WABETTA.....1<sup>ST</sup> DEFENDANT  
IRENE NYAWIRA WABETTA.....2<sup>ND</sup> DEFENDANT  
PAUL WACHIRA WABETTA.....3<sup>RD</sup> DEFENDANT  
EDWIN TITUS MWAURA WABETTA.....4<sup>TH</sup> DEFENDANT  
ERIC GIBSON WABETTA.....5<sup>TH</sup> DEFENDANT  
DANSON KIMANI WABETTA.....6<sup>TH</sup> DEFENDANT

**JUDGMENT**

The plaintiffs instituted this suit by way of Originating Summons under **Section 38 of the Limitation of Actions Act, Order 37 Rule 7 C.P.R, Section 28 (h) and 29 of the Land Registration Act** seeking the following orders:

- (1) That the registration of the current owners of parcel No. KIINE/SAGANA/30 be cancelled from their register and the said parcel of land be registered in the names of the plaintiffs herein.***
- (2) The plaintiffs be awarded costs of this suit.***

The plaintiffs in a supporting affidavit sworn by the 3<sup>rd</sup> plaintiff stated that they entered into the suit property in the year 1962 and have in occupation of the same openly un-interrupted, continuously and exclusively. They also aver that they have done extensive developments on the suit land with storey buildings and other developments without consent and that none of the defendants or the original owner has ever stepped into the suit land or occupied the same. The plaintiffs now want this Court to make a declaration that they have now become entitled to the suit property and that the register be rectified to reflect them as the owners of the suit property.

On 19<sup>th</sup> December 2016, the defendants filed a replying affidavit sworn by the 3<sup>rd</sup> defendant denying the plaintiff's claim. In particular, the defendants stated that the suit property is registered in the name of their mother one Mirium Wambui Wabetta (deceased). The defendants further averred that the plaintiffs have not occupied the suit property without interruption as their late father Geoffrey Gathitu Wabetta

(deceased) who was the previous registered owner had filed a case in Nairobi being Civil Case No. 1481 of 1972 (Nairobi) against one Muthusi Muinde who is the 1<sup>st</sup> plaintiff's husband. The defendants further stated that the case was heard and determined in favour of the said Geoffrey Gathitu Wabetta and judgment was delivered on 14<sup>th</sup> November 1991 where the defendant was ordered to vacate from the suit land. The defendant averred that the plaintiffs' claim of the suit property on adverse possession is not available.

#### PLAINTIFFS CASE

The first witness to testify was the 3<sup>rd</sup> plaintiff who referred to his supporting affidavit sworn on 18<sup>th</sup> October 2016. The witness asked the Court to have the same adopted in his evidence.

PW2 was the Margaret Wangari Warui. She is the 5<sup>th</sup> plaintiff. She stated that her husband was one George Kimani (deceased) who was the original owner of the suit property. She married him in 1985 and lived in the suit property registration No. KIINE/SAGANA/30 and were blessed with four (4) children. She referred to her witness statement dated 12<sup>th</sup> May 2017 which the Court adopted in her evidence. On cross-examination, the witness stated that she never heard that the 1<sup>st</sup> plaintiff's father had a land case with the defendants father. She has not been told about a dispute between the parties over the suit land. She is not also aware about any eviction notice issued against the 1<sup>st</sup> plaintiff's father.

#### DEFENDANTS CASE

The defence called Paul Wachira Wabetta who stated that the suit property No. KIINE/SAGANA/30 was initially registered in the name of his late father Wabetta Gathitu. He stated that in 1981, he started hearing about the suit land which had a dispute. He stated that the plaintiffs' father used to occupy a portion of the land near the railway line. He stated that he heard the plaintiffs' father was to purchase the land but was unable to do so and that his father filed a case in Nairobi being HCCC No. 1481 of 1972 (Nairobi). The said dispute was finally determined in his favour in 1981 after his father had passed on. In 2006, his mother took out succession proceedings but did not enforce the eviction orders since she was busy educating them. He stated that he is utilizing 5 acres of the suit land while the plaintiffs occupy and utilize 2 acres. He stated that the suit land is approximately 7 acres.

#### SUBMISSIONS BY PLAINTIFFS

The plaintiffs submitted that the doctrine of adverse possession in Kenya is embodied in the ***Limitation of Actions Act Chapter 22 Laws of Kenya*** which stipulates that a person who takes possession of land, albeit wrongfully, acquires a possessory title to the land which after the expiry of 12 years may acquire title adverse to the registered proprietor. He cited ***Section 7 as read together with Section 13 of the Limitation of Actions Act***. They cited the case of ***Mtanelewa Vs Kahindi Ngala Mwangandi (2015) e K.L.R and Githu Vs Ndeete (1979) e K.L.R***

#### DEFENDANTS SUBMISSIONS

The defendants on the other hand submitted that contrary to the assertion by the plaintiffs, their mother Miriam Wambui Wabetta (deceased) had occupied about 5 acres of the suit land before her demise. The defendants also submitted that the plaintiffs' occupation of a portion of the suit property was with the consent of the original registered owner. They submitted that the deceased had allowed the plaintiffs to only occupy a portion when there was an active litigation case in Nairobi in HCCC No. 1481/1972. The defendants therefore submitted that the plaintiffs cannot claim to have occupied the entire parcel of land since 1962 and their claim for adverse possession is untenable since their occupation was with permission of the defendant's deceased father and their mother Miriam Wambui Wabetta. It is the defendants' submissions that from the judgment in HCCC No. 1481/1972, the plaintiffs' father entered into the suit land as a purchaser. The Court ruled in favour of the plaintiff who is the defendants' father and ordered the plaintiffs father to be evicted. The defendants cited the case of ***Samuel Miki Waweru Vs Jane Njeri Richu Civil Appeal No. 122 of 2001 (L.R)***.

#### ANALYSIS AND DECISION

The dispute in this case is a claim for adverse possession. In the case of ***Wambugu Vs Njuguna (2004) 2 K.L.R 309***, the Court of Appeal restates the law of adverse possession as follows:

***“2. In order to acquire by the statute of Limitations title to land which has a known owner, that owner must have lost his right or the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title (is an act) ..... inconsistency with his enjoyment of the soil for the purpose for which he intended to use it.....***

***“3. The Limitation of Actions Act, on adverse possession, contemplates two concepts; dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years”.***

Again in the case of ***Samuel Miki Waweru Vs Jane Njeri Richu Civil Appeal No. 122 of 2001 (UR)***, the Court held as follows:

***“..... It is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in Jandu Vs Kirpal (1975) E.A 225, Possession does not become adverse before the end of the period for which permission to occupy has been granted”.***

The plaintiffs in their pleadings have not stated when exactly they took occupation of the suit land. They simply stated that since 1962 to-date, none of the defendants or even the deceased has ever occupied, entered or used the suit land.

The Supreme Court of India in **KARUATAKA BOARD OF WAKF VS GOVERNMENT OF INDIA & OTHERS (2004) 10 SCC 779** discussed the essentials of adverse possession and stated as follows:

***‘In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion – Non-use of the property by the owner even for a long time won’t affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is peaceful, open and continuous. The possession must adequately in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and confirmed over the statutory period”.***

From the evidence adduced and applicable law, it is my finding that the plaintiffs have not proved their claim for adverse possession. The judgment in HCCC No. 1481 of 1972 which was produced by the defence shows that the suit land was a subject of litigation in Nairobi between one Geoffrey Gathitu Wabetta (deceased) who is the 3<sup>rd</sup> defendant’s father and Muthusi Muinde (deceased) who is the father to the 3<sup>rd</sup> plaintiff.

The dispute between the two was for eviction of the 3<sup>rd</sup> plaintiff’s father from the suit land. From the introductory of that judgment, the plaintiff had agreed to sell and the defendant agreed to purchase the same at an agreed price upon which a down payment of Ksh. 1,000/= was paid by the defendant. Pursuant to that agreement, the defendant was given possession of the suit property. However, the parties failed to seek and obtain the statutory consent from the Land Control Board concerned in which case the plaintiff sought a declaration that the alleged agreement had become null and void. The defendant is said to have admitted in his statement of defence and counter-claim that he had agreed to buy the suit property at a price of Ksh. 2,100/= and paid a deposit of Ksh. 1,000/= leaving a balance of Ksh. 1,100/=. Having considered all the issues and the applicable law, the Court dismissed the counter-claim and entered judgment for the plaintiff. The Court ordered the defendant to vacate from the suit property forthwith and hand over vacant possession to the plaintiff. The 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs in that case who were born in 1954 and 1969 respectively were too young to comprehend what was happening. The other plaintiffs who were born after 1962 may not even be aware what may have transpired. One thing is for sure. The plaintiffs in the instant case are children of Muthusi Muinde. Their occupation of the suit property was through their father Muthusi Muinde (deceased) who had been allowed to occupy the suit property through a sale agreement which was later declared as null and void. In that regard, their claim for adverse possession therefore cannot succeed on grounds that their father under whom they took possession of the suit property through consensual which consent was extinguished with the determination of HCCC No. 1481/1972 (Nairobi). The plaintiffs entered the suit property by consent of the registered owner on or about the 02/12/2002.

In fact the Court has already pronounced itself on the occupation of the suit property by the plaintiff vide HCCC No. 1481/1972 which was delivered on 14/11/1991. The plaintiffs have not appealed against that judgment. In the upshot, the plaintiffs claim fails and the same is hereby dismissed with costs to the defendants.

*READ and SIGNED in open Court at Kerugoya this 28<sup>th</sup> day of June, 2019.*

**E.C. CHERONO**

**ELC JUDGE**

**28<sup>TH</sup> JUNE, 2019**

*In the presence of:+*

- 1. Ms Nyangati holding brief for Ms Makworo*
- 2. Plaintiff/Advocate – absent*
- 3. Court clerk - Mbogo*