



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT NYAHURURU**

**ELC CASE NO 6 OF 2018 (OS)**

**CYRUS NDUNGU KINGORI.....PLAINTIFF**

**VERSUS**

**MARY NJOKI KIRIAKU.....DEFENDANT**

**JUDGEMENT**

1. By an Originating Summons dated 25<sup>th</sup> January 2018, and filed under Order 37 Rule 7 of the Civil Procedure Rules, and Section 38 of the Limitation Act, the Plaintiff herein who claimed to be entitled to be registered as the sole absolute Proprietor over LR No. **Nyandarua/Olgoro Orok Salient /9163 by adverse possession** sought for determination of the following questions:

**i. Whether the Plaintiff has acquired title deed by **adverse possession over** LR No. **Nyandarua/Olgoro Orok Salient /9163 measuring approximately 0.046 hectares.****

**ii. Whether LR No. **Nyandarua/Olgoro Orok Salient /9163 should forthwith be registered in the names of the Plaintiff and the Defendant be ordered to sign all the necessary instruments in his favour and in default the Deputy Registrar of the Court be authorized to sign the same.****

**iii. Whether the county Land Registrar Nyandarua should dispense with the production of the Original title deed for LR No. Nyandarua/Olgoro Orok Salient /9163 while transferring the land to the Plaintiff.**

**iv. Who should pay the Cost of the suit.**

2. The Originating Summons is premised on the grounds stated on the face of it as well as the Supporting *Affidavit* sworn on the 25<sup>th</sup> January 2018 by Cyrus Ndung'u Kingori, the Plaintiff herein.

3. The same was heard ex-parte the Defendant having been served through substituted advertisement in the Daily Nation newspaper of the 17<sup>th</sup> May 2018 and there having been no response to the Plaintiff's pleadings.

4. On the 4<sup>th</sup> October 2018, Counsel for the Plaintiff took directions to the effect that the Originating Summons be treated as the Plaintiff's plaint whereas the affidavits therein be treated as witness statements. The matter was then set down for formal proof hearing.

5. The Plaintiff's case in summary, was that in the year 1998 he bought plot No. 9163 in Nyandarua/Olgoro Orok Salient measuring 0.046 Ha from the Defendant, for a consideration of ksh 62,000/= wherein parties had drawn an agreement on the 15<sup>th</sup> May 1998 to that effect. He produced the said agreement as Pf exh 1.

6. That pursuant to the purchase, he had fenced the same, built a two bed roomed house, a chicken coop and a store.

7. Upon developing the said parcel of land, he had tried to pursue the title from the Defendant who kept telling him that she was processing it. It was later that he had come to learn that the Defendant had vanished without transferring the suit land to him. He had tried to trace the Defendant in vain.

8. That in her absence, he had conducted a search at the lands office, wherein he had discovered that she had taken the title deed before disappearing. He produced the search certificate dated the 5<sup>th</sup> January 2017 as well as a green card to the suit land as Pf exh 2 and 3 respectively.

9. He produced the Photographs he had taken of the suit land to show the developments he had done on the same as, photo No. 4(a) which showed his house, Pf exhibit 4(b) depicted the chicken coop, while Pf exhibit 4(c) depicted the gate to the suit land.

10. He further testified that he had lived on the suit land for 20 years wherein nobody had interfered with him for all those years. He sought for the court to assist him to obtain the title deed so that the suit land could be registered in his name.

11. The Plaintiff closed his case and filed his written submissions to the effect that Section 38 (1) of the Limitations of Actions Act provides that 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 may be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

12. That the Plaintiff demonstrated that upon execution of a sale agreement on the 15<sup>th</sup> May 1998, he had taken possession on the suit land wherein he developed and has settled thereon with his family since the year 1998.

13. That the Plaintiff had also proved that the Defendant was the proprietor of the suit land having been registered as such on the 24<sup>th</sup> May 1999. That following the Plaintiff's uninterrupted occupation of the suit land from the year 1998 to the time of filing the suit, which was almost 20 years, his occupation was continuous, open exclusive and undisturbed and the Defendant cannot claim the same by dint of the provisions of Section 7 of the Laws of the Limitation of Actions Act. The Plaintiff sought for the suit to be allowed.

#### **Analyses and Determination.**

14. This being a matter where the Plaintiff sought for orders that he be registered as proprietor of parcel LR No. **Nyandarua/Olgoro Orok Salient /9163**, having acquired the title by virtue of the doctrine of adverse possession, the court is mindful of the legal attribution to the doctrine of adverse possession in Kenya which is embodied in Section 7 of the Limitation of Actions Act, (Cap 22) in these terms:

15. **Section 7 of the Limitation of Actions Act** provides as follows:

***“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him...”***

16. *Section 13 of the Limitation of Actions Act* aforesaid further provides that:

***A right of action to recover land does not accrue unless the land is in the possession of some person in whose favor the period of limitation can run (which possession is in this Act referred to as Adverse possession) and, where under sections 9, 10, 11 and 12 (of the Act) a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.***

17. *Sections 37 and 38 of the Limitation of Actions Act* stipulate that if the land is registered under one of the registration Acts, then the title is not extinguished but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in him.

18. *Section 37 of the Limitation of Actions Act* provides that:

***Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, to land or easement 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.”***

19. In terms of *Section 38 of the Limitation of Actions Act*, where a person claims to have become entitled by adverse possession to land, (s)he must apply to the High Court for an order that (s)he be registered as the new proprietor of the land in place of the registered owner. The elaborate procedure of moving the High Court is provided for in *Order 37 Rule 7 of the Civil Procedure Rules* as follows:

**i. An application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons.**

**ii. The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.**

20. On analyzing the above evidence, it is the Plaintiff's case that he entered into the suit property in the year 1998 after entering into a Conveyance Agreement dated 15<sup>th</sup> May 1998, with the defendant herein one Mary Njoki Kariuki the proprietor of the suit land.

21. From the year 1998, he has been in uninterrupted occupation of the suit property and has become entitled to be registered as the legal owner thereof in place of the Defendant, whom he admits is the title holder of the suit property.

22. It is further the Plaintiff's case that he has been in open, exclusive, peaceful and actual possession of the suit property without any interruption from the Defendant for more than 21 years since he bought it. According to the Plaintiff, the said period is more than the 12 years required under the law for him to acquire title against the Defendant by way of adverse possession.

23. It is against this background, that the issue that arises for my determination is whether or not the Plaintiff has acquired the suit property by way of adverse possession.

24. I have looked at the official search certificate produced as exhibit 2, as well as the green card produced as exhibit 3 and the same

confirms that indeed the Defendant herein was the registered proprietor of the suit land

25. In the decided case of **Wambugu vs Njuguna (1983) KLR 173**, the Court of Appeal held as follows:

*“For an order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his rights to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.*

*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 of the requisite number of years.”*

26. The court is mindful of the legal attribution to the doctrine of adverse possession in Kenya which is embodied in Section 7 of the Limitation of Actions Act, (supra).

27. As I have indicated herein, the rule in adverse possession is that the party claiming must have been in possession for over 12 years. To prove a claim under adverse possession, all that the Plaintiff had to do was to establish that he came into occupation and took possession exclusively and has lived on the suit property continuously without interruption for a period of over 12 years.

28. I am satisfied from the Plaintiff’s testimony and the documents he produced in evidence that he had discharged this burden of proof. The Plaintiff further proved that he has been in open, continuous and uninterrupted occupation of the suit property since 1998.

29. At the end of the trial, the Plaintiff placed before the court a title document in the name of a green card to prove that the Defendant was the registered owner of the suit land.

30. The Defendant did not defend the suit and as such placed no material before the court to contradict the Plaintiff’s evidence. It is therefore my finding that the Plaintiff has proved its case on a balance of probability. I enter judgment for the Plaintiff against the Defendant as follows;

i. The Plaintiff has acquired title deed by adverse possession over L.R No. **Nyandarua/Olgoro Orok Salient /9163**

ii. The land LR No. **Nyandarua/Olgoro Orok Salient /9163** should forthwith be registered in the names of the Plaintiff and the Defendant be ordered to sign all the necessary transfer instruments in his favour and in default the Executive Officer of the court be authorized to sign the same.

iii. The County Land Registrar Nyandarua to dispense with the production of the original title deed for the suit land while transferring the land to the Plaintiff.

iv. The Plaintiff shall have the cost of this suit at a lower scale since the same was undefended.

31. It is so ordered.

**Dated and delivered at Nyahururu this 25<sup>th</sup> day of June 2019.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**