



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**ELC NO.93 OF 2018 (OS)**

**FRANCIS MWANIKI NGUMBA.....PLAINTIFF**

**VS**

**JOHN MWARIRI WAMAI.....1<sup>ST</sup> DEFENDANT**

**THOMAS NGUMBA WAMAI.....2<sup>ND</sup> DEFENDANT**

**KIMANI G WAMAI.....3<sup>RD</sup> DEFENDANT**

**EDWARD KAHUHA GEDION.....4<sup>TH</sup> DEFENDANT**

**SIPHIRAH WAMBUI GACHANJA.....5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The parties are all related. The Plaintiff is the nephew of the 1<sup>st</sup>, 3<sup>rd</sup> -5<sup>th</sup> Defendants. He is the son of the 2<sup>nd</sup> Defendant. The Defendants are the children of Gedion Wamai the registered owner of LOC 2/MAIRI/71. The Plaintiff claims to have purchased the land that was the entitlement of the 1<sup>st</sup> Defendant from the family land.

2. This suit was filed on 23/12/02 in Nairobi by way of Originating Summons. It was transferred to this Court on 27/11/18 when the hearing started denovo. In the Originating Summons the Applicant (hereinafter referred to as the Plaintiff) sought orders against the Respondents (the Defendants) for 4.5 acres by Adverse Possession over the land reference No. LOC2/MAIRI/71(suit land refers to 4.5 acre portion of the title). The suit is premised on the grounds that the Plaintiff has been in possession and occupation of the suit land from 1987 exclusively continuously and without interruption. That he entered the suit land in pursuance of an agreement of sale between himself and the 1<sup>st</sup> Defendant. He avers that he has sued the 2<sup>nd</sup> – 5<sup>th</sup> Defendants as administrators of the estate of the late Gideon Wamai whom he accuses of being uncooperative in transferring the suit land to him.

3. The Defendants denied the Plaintiff's claim and in the replying affidavit of the 4<sup>th</sup> Defendant sworn on the 20/1/2003 which he deponed on behalf of the 2<sup>nd</sup> -5<sup>th</sup> Defendants stated that they had no knowledge of the sale between the Plaintiff and the 1<sup>st</sup> Defendant, if indeed there was a sale, the 1<sup>st</sup> Defendant had no capacity to sell the land as the same was registered in the name of Gideon Wamai, there was no Land Control Board consent to sell the land, the suit land is not identifiable on the ground and urged the Court to disallow the Plaintiffs claim.

4. The 1<sup>st</sup> Defendant in his Replying affidavit sworn on the 20/1/2003 deponed and admitted that in 1986 the Plaintiff proposed to purchase 2 acres of land out of parcel LOC 2 /MAIRI/71 owned by Gideon Wamai his father. He was not aware if his father was ever consulted on the transaction but avers that certainly his siblings, the co -Defendants were not aware. He expressed disbelief that the Plaintiff had planted as much tea as he claims but nevertheless admitted that he has tea on the land. That he informed the Plaintiff that he cannot transfer the land to him since doing so would disinherit his family who would in all probability object to land control board consent being issued for the transaction. That the purported sale was a nullity and therefore unenforceable in law as he does not own the land and Land Control Board consent was not obtained.

5. At the hearing the Plaintiff stated that he bought the land totaling 4.5 acres between the years 1986 (2 acres), 1989 (0.5 acres) and 1990 (2 acres). The purchase commenced in 1981 culminating into a formal agreement in 1986. That his grandfather Gideon Wamai was aware of the land transaction. He wanted to give land to the 1<sup>st</sup> Defendant that had tea but on releasing that 1st Defendant was going to sell it gave him bare land. This is the land that was sold to the Plaintiff. That he paid a total of Kshs 104,000/- leaving a balance of Kshs 8500/-. He informed the Court that he has planted 15000 tea bushes, trees and food crops and constructed a house thereon. He produced a verification certificate and tea growers' certificate to support his averments. That he planted tea in 1983. That the land is identifiable on the ground by a life hedge. That in 1990 he held a meeting in which some of the Defendants were present and the land he is claiming was reidentified to him. By then he

had occupied the land since 1981.

6. Stephen Kamau testified that he knows the Plaintiff and is aware that he bought land from the 1<sup>st</sup> Defendant. That the Plaintiff started developing the land in parts in 1981.

7. The 5<sup>th</sup> Defendant testified and, on her behalf, and that of the 3<sup>rd</sup> Defendant. She stated that the 1<sup>st</sup> and 4<sup>th</sup> Defendants are deceased. She stated that the 1<sup>st</sup> Defendant did not own the land and did not have capacity to sell the land either. That the family including the Defendant was not consulted. That the Plaintiff entered the land illegally and planted tea in 1996 and again in 2001 and thus he is a mere trespasser. That the 1<sup>st</sup> Defendant also sold his entitlement to two other parties. That no land control board consent was obtained. She opined that if the Plaintiff has any claim, he should pursue it against the estate of the 1<sup>st</sup> Defendant.

8. Further she stated that she does not know the size of the land the Plaintiff occupies. That she did not witness the tea bushes being planted and would not know they were actual planted. That she is aware that the Plaintiff has been in occupation of the suit land. She however does not know when he begun occupying the suit land.

9. Parties filed written submissions which I have read and considered

10. The key issue is whether the Plaintiff has proven title by way of Adverse Possession.

11. It is not in dispute that the original land LOC2/MAIRI/71 was registered in the name of Gideon Wamai on 21/5/62 and on the 26/7/2002 the 2<sup>nd</sup> – 5<sup>th</sup> Defendants became registered by transmission vide succession cause No 55 of 1992. The parties all admit that the Plaintiff is in occupation and the point of divergence is that according to the Defendants he did so in 1996 as a trespasser.

12. The doctrine of Adverse Possession is one of the ways of land acquisition in Kenya. The combined effect of sections 7, 13, 16 17 and 38 of the Limitations of Actions Act is to extinguish the title of the proprietor of the land in favour of the adverse possessor at the expiry of 12 years of occupation of the Adverse Possession on the suit land.

13. Section 28(h) of the Land Registration Act, 2012 recognizes overriding interests on land, some of which are rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription. Under Section 7 of the Land Act, 2012 prescription is one of the ways of acquisition of land.

14. In **Kasuve Vs Mwaani Investments Limited & 4 others 1 KLR 184**, the Court of Appeal restated what a Plaintiff in a claim for Adverse Possession has to prove;

“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 without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

15. The key test is that the owner of the land must have been dispossessed or has discontinued possession of the property. In this case evidence was led by the Plaintiff that he purchased the land at various times and sizes in 1986, 1989 and 1990 totaling 4.5 acres. The Plaintiff has led evidence that he has been occupied the land since 1987 although he stated that he had taken over the land as early as 1981. That the occupation has not been interrupted. He led evidence that he has planted about 15000 tea bushes and produced tea verification and growers' certificates from Kenya Tea Development Authority to support his developments. Other developments are planting of trees and food crops. He led evidence that he has constructed a house on the land. The 5<sup>th</sup> Defendant informed the Court that she was not aware of the size of the land that the Plaintiff claimed but admitted that he has planted tea though her evidence was that the tea was planted in 1996. The Court finds the evidence of the Plaintiff supported and believable. There is unchallenged evidence that the Plaintiff has not been dispossessed of the suit land since he took possession in 1987, a period in excess of 12 years. There is also no evidence that he has handed over possession to the Defendants. In the case of **Francis Gacharu Kariri v Peter Njoroge Mairu, Civil Appeal No. 293 of 2002 (UR)**:

“...the possession must not be broken, or any endeavours to interrupt it.”

16. The Defendants have claimed that the suit land not identifiable on the ground. The evidence of the 5<sup>th</sup> Defendant is that she does not know the land. The Plaintiff led evidence that the land has about 15000 tea bushes on 2 acres, 1 acre has trees, ¼ acre is on Napier and food crops while ¼ acre contains the homestead. Further that the land is separated by a life hedge. In the opinion of the Court this is sufficient evidence to identify the suit land.

17. In the case of **Wanyoike v Kahiri [1979] KLR** at page 239 Justice Todd (as he then was), held that in a purchase scenario, the period of limitation starts to run on the date of the payment of the last installment of the purchase. In the case at hand the Plaintiff led evidence that the last installment was paid in Nov 1990 and by the time of filing suit in December 2002, the full span of 12 years had run its term. There is no evidence that the Defendants have taken steps to stop time from running. The Plaintiff led evidence that the family was aware of his occupation of the land. The 1<sup>st</sup> Defendant whom he bought the suit land is a party. He produced minutes of a meeting held on 25/4/1990 where some of the Defendants were present. In those minutes which remain unchallenged by the Defendants, the land claimed by the Plaintiff was revisited and the boundaries reidentified and shown to the Plaintiff. The Defendants defense is that they were not consulted and if they were the 1<sup>st</sup> Defendant did not have capacity to sell and in the alternative there was no Land Control board consent. Adverse Possession is merely a legalized trespass on the land. It mattered not that land control board consent was not obtained nor the entry is illegal. The fact on the ground is that the Plaintiff has occupied the land in his right as a purchaser and his possession became adverse to that of the registered. By the time the Defendants became registered owners of the land the Plaintiff had been in occupation from 1987, thus Adverse Possession had accrued and vested in the Plaintiff.

18. The Plaintiff led evidence that he has been in exclusive control of the suit land and demonstrated her *animus possidendi* in developing the suit land through planting tea, trees food crops and building a house on the suit land as though it was as of right. That he has done this since 1987 to date openly and without interruption by anyone, least of all, the Defendants and their family is not under challenge.

19. Chanan Singh J, in **Jandu v Kirpal [1975] E A 225, at p 237** and Simpson, J (as he then was), in **Wainaina v Murai and others [1976] Kenya L R 227 at p 231** were unanimous that the paper owner must have knowledge of the occupation of the adverse possessor and that he has been dispossessed. In this case unchallenged evidence has been led that the Defendant's father and as admitted by them had knowledge of the open and exclusive possession of the suit land by the Plaintiff.

20. The totality of the evidence above is that the Plaintiff's case succeeds.

21. I order costs to be borne by the Defendants jointly and severally.

**Orders accordingly.**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 24<sup>TH</sup> DAY OF JUNE 2019.**

**J. G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Ms Kinuthia HB for Wandaka for the Plaintiff

Wajama for the 1<sup>st</sup> – 5<sup>th</sup> Defendants

Njeri and Kuyiki, Court Assistants