



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**ELC NO. 510 OF 2017(OS)**

**KIGURU NGUGI.....PLAINTIFF**

**VERSUS**

**MICHEAL MUNGAI NGUGI.....DEFENDANT**

**JUDGMENT**

1. Vide Originating Summons filed on the 11/9/2013 and later amended with leave of the Court the Plaintiff filed suit against the Defendant seeking the following orders; -

- a. That the Court be pleased to declare the title to the land parcel No MARAGWA/RIDGE/1876 (suit land) has become extinguished by operation of the law and that the Applicant herein has become entitled to 2 acres through Adverse Possession .
- b. The Court be pleased to order 2 acres of the suit land be registered in the name of the Plaintiff.
- c. That the Respondent do execute all the necessary documents to effectuate the transfer of the two acres of the land to the Plaintiff and in default the Deputy Register of this Court be empowered to do so.
- d. Costs of the suit be provided for.

2. The Defendant denied the Plaintiff's claim vide his Replying affidavit filed on the 11/10/13 where he averred that he is the registered proprietor of the suit land having purchased it from the previous owner Kamau Nguni, deceased.

3. It would appear from the record that the Defendant herein filed a suit ELC No 199 of 2013 seeking orders for eviction of the Plaintiff from the suit land.

4. On the 23/9/15, the two files ELC 199 of 2013 and ELC 184 of 2013 (now 510 of 2017) were consolidated with the leave of the Court and ELC 184 of 2013 was taken as the lead file. The claim of the Defendant in ELC 199 of 2013 was deemed as the Defendant's Counterclaim in the consolidated suit. In the said counterclaim the Defendant prays for orders of eviction against the Plaintiff from the suit land failing which Thames Auctioneers be allowed to carry out the said eviction.

5. On the 11/9/2013 the Plaintiff filed a Notice of Motion that sought *inter alia* interim injunction against the Defendant from interfering with the quiet possession of the suit land. On the 22/10/13 the Court made the orders as follows; status quo be maintained in respect to cultivation and occupation be observed between the parties. The Plaintiff continued harvesting the mangoes on the portion of the Defendant's land while the Defendant continued cultivating the land.

6. At the hearing the Plaintiff testified and stated that the suit land was a resultant subdivision from parcel No MARAGWA/RIDGE /50 which was owned by Kamau Nguni, deceased. That currently the registered owner is the Defendant. He produced a certificate of official search dated the 13/8/13 in respect to the suit land and another certificate of official search in respect to the original land parcel 50 to support his testimony. Both searches show that the Defendant and Kamau Nguni were registered owners of the suit land and original parcel MARAGWA/RIDGE/50 respectively.

7. It was his testimony that he and Kamau Nguni entered into an agreement to purchase the suit land on the 27/9/1999 at the price of Kshs 225,000/-. The agreement in support of his averments is in Kikuyu with the English translation and dated 27/9/99 and marked PW3. The said agreement was later reduced into a formal agreement on 30/9/12 and witnessed by the among others Richard W Mburu, the chief of Maragwa Ridge. According to the formal agreement the purchase price was paid in full. In both agreements the portion of the land being sold is referred and identified as 2 acres although the land reference number of the suit land is silent.

8. The witness informed the Court that he took possession of the suit land in 1999 and commenced developments on the land and has lived

and worked on the land continuously, exclusively, openly and without force or secrecy to date. He produced pictures marked as PW6 to show the developments. He informed the Court that he has built a 3 bedroomed house, a kitchen, a goat pen and planted trees namely blue gum, mangoes and grevillia. That his occupation of the suit land was known to the previous seller Kamau Ngure who did not interrupt it.

9. He informed the Court that in 2011 he learnt from the land surveyor engaged by Kamau Ngure that Kamau Ngure was subdividing the land without his knowledge and he wrote to the chairman of Land control Board Maragwa asking him not to issue Land Control consent but his plea was not considered. That consent in respect to the transfer of the suit land to the Defendant was also issued despite his occupation on the ground.

10. The Plaintiff further informed the Court that the Defendant attempted to forcefully remove him from the suit land on 6/8/13 and 17/8/13 using armed goons but their attempts were thwarted by members of the public and the police. That the Defendant has built a house which is occupied by his sister who lives on the suit land.

11. In his evidence he testified that he occupies and cultivates approx. 0.5 acres of the suit land. That the Court also allowed him to access another portion for the purposes of harvesting his mango trees which are on the suit land. He conceded that he did not sue Kamau Ngure who died in 2013 even when he learnt that he had sold the suit land to the Defendant. He informed the Court that the register for Maragwa Ridge was opened on the 11/8/11 and first registered owner of the original land parcel MARAGWA/RIDGE/50 was Settlement Fund Trustee in 2011. That Kamau Ngure became registered as owner of the parcel on 12/8/11. That as at the time they entered into agreement in 1999 the suit land was not registered in the name of Kamau Ngure. That parcel No MARAGWA/RIDGE/ 50 was subdivided to yield parcel Nos. MARAGWA/RIDGE/ 1866-1880 and the Defendant became registered as owner on 11/7/12. Although the witness claimed that he and Kamau Ngure applied for land control board consent to transfer the suit land to him, he stated in evidence that he had no documents to support his averment.

12. PW2 – Pauline Njeri informed the Court that she is a neighbor of the Plaintiff and knew that the Plaintiff bought the suit land from Kamau Ngure although she was not a witness to the agreement. She stated that she was present when the Plaintiff was showed the boundaries of the suit land. She testified that the Plaintiff took possession in 1999 and built a house and cultivated the suit land. That later the same suit land was sold to the Defendant. She testified that the Plaintiff lives on the land and cultivates about  $\frac{3}{4}$  of it. She stated that the Defendant's sister too lives on the land. When shown the pictures of the suit land she explained that the eucalyptus and mango trees belong to the Plaintiff while the mangoes on the Defendant's side belong to the Plaintiff. She also identified the houses on the ground between the parties to the suit.

13. DW1 – Michael Mungai Ngugi testified that he is the registered proprietor of the suit land having been registered as such on the 10/7/12. He produced a copy of the title of the suit land marked DEX1. He explained that the suit land was a subdivision of parcel MARAGWA/RIDGE/50 which became registered in the name of Kamau Ngure on the 12/8/11. Prior to this date parcel No MARAGWA/RIDGE/50 was registered in the name of Settlement Fund Trustee on 11/8/11. Upon discharge of charge the said Kamau Ngure became the registered owner of the land. That prior to the said registration he entered into an agreement with the said Kamau Ngure for the purchase of 2 acres of land at the consideration of Kshs 400,000/- and produced a copy of the agreement in Court and marked DEX2. Land control consent was obtained upon which the transfer was registered in his name. That he took possession in 2009 and commenced cultivation and built a 2 bedroomed brick house in which his sister Lena Muthoni has resided in since January 2010. That he has planted grevillea and mangoes amongst other tree types. That on the 9/9/13 he issued notice to the Plaintiff to vacate the suit land but he did not heed the same culminating in his filing suit for eviction in Nyeri on the 4/10/13.

14. He informed the Court that at the time he purchased the land the boundaries had not been set but he was shown the general boundaries of the said land. It is after subdivision that the suit land became registered as 1876. He stated that the Plaintiff also occupies a portion of the said land. He has a 3 bedroomed house, kitchen hutch and has planted mango trees which are on his part of the land. He stated that the Plaintiff occupies parcel 1875 where he grows nappier grass and that is the land that he ought to relocate to. That he utilizes about 1.5 acres of the suit land and the Plaintiff occupies about 0.5 acres. He stated that the Plaintiff is occupying his land unlawfully and ought to be evicted.

15. DW2 – Peter Muchunu Kamau informed the Court that he introduced the Plaintiff to Kamau Ngure and was present when the Plaintiff was shown land which is now 1875 and not 1876. That 1876 belongs to the Plaintiff.

16. DW3 – Charles Muiruri Mwaura informed the Court that he had earlier purchased the suit land in 1999 but due to failure to complete the agreement he surrendered the said land to Kamau Ngure in 2009 where upon the same was sold to the Plaintiff. That he was refunded Kshs 200,000/-

17. DW4- Joseph Maina Kamau testified and stated that he is the son of Kamau Ngure the owner of the original parcel MARAGWA/RIDGE/50. That his father purchased the land from Settlement Fund Trustees. He informed the Court that he is aware that his father sold portions of original parcel MARAGWA/RIDGE/50 which now form parcel MARAGWA/RIDGE/1875 to the Plaintiff and 1876 to the Defendant. That he was present and witnessed the agreement between the Defendant and his father. Prior to that his father had sold the suit land to one Charles Muiruri Mwaura in 1999 but on default the said Mwaura was refunded the purchase price of Kshs 200,000/- to pave way for the surrender and sale of the suit land to the Defendant. He categorically stated that the Plaintiff's portion is MARAGWA/RIDGE/1875 and not 1876.

18. In cross examination, he stated that the Defendant entered the land in 1999 and found the Plaintiff occupying a portion of the suit land. That the Plaintiff settled on the wrong land and should move to parcel MARAGWA/RIDGE/1875. He stated that by the time the Plaintiff took possession the boundaries of the suit land had not been clearly demarcated and that the said boundaries became clear upon survey in 2012. He stated that his family was ready to transfer to the Plaintiff parcel MARAGWA/RIDGE/1875.

19. At the close of the hearing the parties with the concurrence of the Court sought time to explore an out of Court settlement given the evidence that had been led at the hearing. The Parties with their counsels on record visited the suit land on the 2/12/18 and filed a joint report filed on 6/3/19. On the 25/2/19 the parties informed the Court that they had not reached an agreement and requested the Court to determine

the matter. They elected to file written submissions which I have carefully read and considered.

20. The Plaintiff submitted and set out the summary of the pleadings and the evidence of the parties. The Plaintiff proffered several proposals as to the resolution of the dispute between the parties inter alia; that the Court orders the parties to share both parcel Nos MARAGWA/RIDGE/1875 and 1876 in order to save the developments made by the Plaintiff on parcel 1876; in the alternative the Court orders that the Plaintiff takes possession of MARAGWA/RIDGE/1875 which is not contested and the Plaintiff be allowed 9 months to relocate his dwelling house to the said land and remove his trees on the suit land as he does not wish to negotiate for any compensation from the Defendant. That further Kamau Nguni's Defendants be given 90 days to remove trees on parcel MARAGWA/RIDGE/1875 and that a surveyor be appointed to ascertain the boundaries of the two parcels of land.

21. In his submissions the Defendant stated that he became registered owner of the suit land on 10/7/12 upon subdivision of the larger parcel MARAGWA/RIDGE/50 which was registered in the name of Kamau Nguni on 12/8/11. The said title for parcel 50 was closed for subdivision on 21/2/12 which yielded parcel Nos MARAGWA/RIDGE/1866-1880. That prior to 21/2/12 the title to the suit land did not exist and as such time had not started running for purposes of Adverse Possession against the title of the Defendant. That the originating summons for Adverse Possession were filed one year after the Defendant was registered owner and therefore the same is untenable as the statutory period of 12 years under the Limitations of Actions Act had not lapsed.

22. He further argued that on a purely without prejudice basis the Plaintiff's occupation was interrupted on the Defendants entering the land in 2009. By then the Plaintiff would have occupied the land from 1999 -2009, a period of 10 years which still falls short of statutory 12 year period.

23. To buttress his point that in a case of Adverse Possession a party must prove dispossession and or discontinued possession of the land by the registered owner, he cited the case of **Kirugi & Anor Vs Kabiya & 3 others (1987) KLR 347** in which the Court held that the burden of proving Adverse Possession rests with the Plaintiff. The Defendant also relied on the case of **Ramco Investment Ltd Vs Union Drive Theatre Limited CA No 235 of 2014** in which the appellate justices held that the person claiming Adverse Possession against the Defendant must prove that he has enjoyed quiet undisturbed open and peaceful occupation of the suit land to the exclusion of the registered owner.

24. The Defendant submitted that the Plaintiff is occupying a portion of the suit land and the Defendant on the other hand occupies another portion. The Court allowed the Plaintiff to access the portion of the Defendant's land for purposes of harvesting his mangoes. The site report filed by the parties after the site visit attest to the fact that the Defendant is in occupation of almost the whole suit land while the Plaintiff accesses the Defendants land for purposes of harvesting mangoes growing on the Defendant's land. This evidence the Defendant submits shows that the Plaintiff is not in exclusive possession of the suit land to the exclusion of the Defendant.

25. The Defendant submitted that the Plaintiff should move to his rightful parcel No 1875 as testified by the Joseph Maina Kamau, the son of the deceased Kamau Nguni who stated that the Plaintiff's parcel is MARAGWA/RIDGE/1875 and not 1876.

26. It is not in dispute that the suit land is registered in the name of the Defendant. It is also not in dispute the suit land was a subdivision of a larger parcel MARAGWA/RIDGE/50 that was registered in the name of Settlement Fund Trustees on 11/8/11 after consolidation of parcels nos. 259-269. On the 12/8/11 the said parcel 50 became registered in the name of Kamau Nguni and on the 21/2/12 the title was closed on subdivision which yielded parcel Nos MARAGWA/RIDGE/1866-1880.

27. According to the site report dated filed in Court on the 6/3/19 it is commonly acknowledged by the parties that the suit land is being occupied by both the Plaintiff and the Defendant. Both have their homesteads on the suit land. The Plaintiff accesses the suit land for purposes of harvesting mangoes growing on the land. It was also found that the Plaintiff occupies and cultivates almost half of the parcel MARAGWA/RIDGE/1875 where he has a number of trees.

28. The issues for determination are;

- a. Whether the possession by the Plaintiff is adverse to the Defendant?
- b. When did time run for purposes of calculating time for Adverse Possession?
- c. Whether the Plaintiff should be evicted from the suit land?
- d. Who meets the costs of the suit?

29. For Adverse Possession to mature into title to land the following conditions must be fulfilled:

- a. The trespasser has to demonstrate that he/she has been in *Continuous and uninterrupted* possession without the consent of the owner of the land;
- b. The trespasser's interest has to be *inconsistent* to the interests of the true owner of the land;
- c. The possession has to be *Open and notorious*, to enable the owner be on notice that there is a trespassing on his/her land;
- d. The possession has to be *actual*, to enable the owner have a cause of action which if he/she fails to act on within the required legal period then he/she will be estopped by the law of limitation to claim back the land.

e. The possession has to be *exclusive*, to avoid confusion on who is entitled to obtain the title to the suit land once the limitation period lapses.

f. Possession must be without the permission of the owner.

30. Section 7 of the Limitations of Actions Act provides that 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 or, if it first accrued to some person through whom he claims, to that person.

31. Under section 13(1) of the said Act a right of action to recover land does not accrue unless the land is in the possession of some person in whose favour 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 this 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.

32. In **Amos Weru Murigu –Vs- Marata Wangari Kambi and Another (H.C.C.C. No. 33 of 2002)** the Court held that :-

**“Adverse Possession can only arise where land is registered in the name of the person against whom the claim for Adverse Possession is made for the simple reason that land must be occupied by a trespassing claimant adversely to the title of the owner (proprietor) against whom the claim is made under Section 38 of the Limitation of Actions Act.”**

33. In this case the title of the suit land was registered in the name of the Defendant in the year 2012. The Originating Summons were brought only one year later. This evidence taken in the prism of section 7 of the Limitations of Actions Act, the one year occupation post registration of the title falls short of the statutory period of 12 years.

34. In the case of **Gabriel Mbui v Mukindia Maranya [1993] eKLR** the Court held as follows;

‘...The possession must be continuous, uninterrupted, unbroken, for the necessary statutory period. This element means that the possession by the adverse possessor must continue without significant interruption for a solid block of time at least as long as the period of limitation, being at the moment twelve years before the filing of suit. What is a significant interruption depends upon the nature of the land. Brief and ordinary absences, while the adverse possessor goes to town, is gone overnight, or is away working or on vacation, for instance, would surely not break any Adverse Possession. If the land, by its nature, is suitable and normally used for reasonable pursuits, then seasonal use may be continuous enough. The test is whether the adverse possessor used the land as a true owner would. But breaks caused by the owner’s intermittent possession, for a few days or weeks every now and then, are likely to defeat both exclusivity and continuity of possession”.

35. In the case of **Powell V. McFarlane [1977] 38 P & Cr. 452** the Court held that exclusive physical control of the land must depend on the circumstances of each case, the nature of the land and the manner in which land of that nature is commonly used or enjoyed.

36. Evidence has been led by the Plaintiff that he bought the suit land in 1999 and immediately took possession and commenced developments. These developments were authenticated by the site report filed by the parties after the close of the hearing. The Defendant does not dispute that the Plaintiff lives on one corner of the suit land and has access to another portion where he harvests his mature mangoes. The Defendant too led evidence that he bought a portion of land from Kamau Ngure and was shown the general boundaries and upon survey and subdivision, the land he bought was registered as parcel MARAGWA/RIDGE/1876 in in 2012.

37. It is the conclusion of this Court that the Plaintiff did not have exclusive possession of the suit land to found a claim for Adverse Possession. He has not demonstrated that his occupation is inconsistent with the registered owner's enjoyment of the land for the purpose for which he intended to use it. **See Ngati Farmers Co-operative Society Limited V. Councillor John Ledidi & 15 others, Nkr CA No. 94 of 2004.** I say so because the Plaintiff has access to the suit land for purposes of harvesting mangoes and the Defendant cultivates crops on the same portion of land where the mangoes grow. The Defendant owns the soil. The Plaintiff has neither demonstrated that he has dispossessed the Defendant of his land.

38. I have perused the green card submitted by the Defendant in evidence and note that prior to 2011 the land was registered in the name of Settlement Fund Trustees. Section 41 (a) (i) of Limitation of Actions Act states that Government Land or land otherwise enjoyed by the Government is not subject to Adverse Possession. Settlement Fund Trustee is a Government agency and land registered under it is deemed as Government land for purposes of the Limitations of Actions Act.

39. The law is that Adverse Possession cannot run against the Government or where land is registered in favour of the Settlement Fund Trustees as Trustee. In the case of **Kenya Airports Authority –Vs- Mitu-Bell Welfare Society & 2 others [2016] eKLR** the Appellate Court upheld the trial Court’s decisions that 1st Respondent and residents of Mitumba village could not maintain a claim in law against the Commissioner or Attorney General over the suit property as there can be no claim for Adverse Possession against government land or land otherwise enjoyed by the Government. This was pursuant to **Section 41 (1) (i) of the Limitation of Actions Act, Cap 22 of the Laws of Kenya.**

40. In **Benson Mukuwa Wachira –Vs- Assumption Sisters of Nairobi Registered Trustees [2016] Eklr** the Court of Appeal noted that if the land is registered in favour of the Government of a County Government, the doctrine of Adverse Possession would not apply to it and the claim would fail. The Court held that Adverse Possession did not attach when the Applicant took possession since it was still government land, that it Adverse Possession only attached when the government allocated the land to the Respondent at a later.

41. In **Boniface Oredo –Vs- Wabomba Mukile, CA No. 170 of 1989 (UR)** the Court of appeal held that that the interest of Settlement Fund

Trustee is not extinguishable under the Limitation of Actions Act. This was later upheld by the same Court in *Gitu –Vs- Ndungu [2001] EA 149.*

42. It is this Courts finding that Adverse Possession cannot be found on land as prior to 2011 the land was unalienated Government land that was subsequently registered under the Settlement Fund Trustees which is a Government entity. Time did not start running until 2012 when the title was registered in the name of the Defendant which time was only one year before the suit was filed in 2013 and therefore falls short of the 12 year statutory period required under the section 7 of the Limitations of Actions Act.

43. I shall now turn to the Defendants counterclaim. Having held that the Plaintiff has not established title by way of Adverse Possession to oust the title of the Defendant, I find no legal reason why the Plaintiff should continue occupying the Defendants suit land. The Defendant is entitled to protection under section 24, 25 and 26 of the Land Registration Act as the absolute owner of the land. The Plaintiff has not demonstrated any lawful reason to remain on the land.

44. In response to the Plaintiffs submissions on how the land should be shared I am constrained to state that parties are bound by their pleadings. The parties on their own volition had sought time to explore an out of Court settlement which fell through. The Court can only be guided by the issues as raised in the pleadings of the parties and not anything else. In the case of **Galaxy Paints Co. Ltd –v- Falcon Grounds Ltd (2000) 2EA 385** the Court held that the issues for determination in a suit generally flow from either pleadings or as framed by the parties. It is unfortunate that the Plaintiff did not amend the originating summons to cater for the proposals being made too late in the day. With respect, I decline to entertain them.

**45. Final orders;**

- a. The Plaintiffs suit fails and is dismissed.
- b. The Defendants counterclaim succeeds.
- c. The Plaintiff is ordered to vacate the suit land within 60 days from the date of the judgement and in default eviction to issue.
- d. The Plaintiff is ordered to remove at his own costs the houses and trees and any other developments that may be on the suit land within 60 days from the date of this judgement in default the Plaintiff shall remove them and the costs shall be recoverable from the Plaintiff.
- e. Costs of the suit shall be payable by the Plaintiff.

**Orders accordingly**

**DELIVERED, DATED AND SIGNED AT MURANGA THIS 24<sup>TH</sup> DAY JUNE, 2019.**

**J G KEMEI**

**JUDGE**

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

Mbuthia HB for Nyambura Njuguna for the Plaintiff. Plaintiff is present.

Ms Kiama HB for Kirubi for the Defendant.

Njeri and Kuyiki, Court Assistants