



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELCC NO. 51 OF 2017 CONSOLIDATED WITH ELCC NO. 211 OF 2018**

**(FORMERLY NAIROBI HCCC NO. 479 OF 2005 AND NAIROBI HCCC NO. 462 OF 2005)**

**SAMWEL KIMANI MUTU**

**SARAH WANJIKU MUTU**

**ABRAHAM MWANGI MUTU.....PLAINTIFFS**

**VS**

**MUMBI GATHINA**

**THINDI GATHINA**

**WAMBUI GATHINA**

**PHILOMENA NJAMBI MUTU.....DEFENDANTS**

**AND**

**CHAI KARUGI**

**NGANGA MUNYUA**

**PAUL KIMANI KARIUKI**

**TABITHA NJOKI KARANJA**

**PETER KAMAU MUTURI.....INTERESTED PARTIES**

**JUDGMENT**

1. This Judgement is in respect to two (2) consolidated suits pursuant to a consent order made on 5<sup>th</sup> November 2018. The said suits are;
  - a. Thika ELCC No. 51 of 2017 (Formerly Nairobi HCC No 479 of 2005 and herein after referred to as the 1<sup>st</sup> suit, the lead file) and the property in dispute in L.R No. Ndarugu/Gacharage/125 (Herein after referred to as the 1<sup>st</sup> suit land).
  - b. Thika ELCC No 211 of 2018 (formerly Nairobi HCC No 462 of 2005 and herein after referred to as the 2<sup>nd</sup> suit) whereby the property in dispute is L.R No Ndarugu/Gacharage/490 (Herein after referred to as the 2<sup>nd</sup> suit land).
2. As regards the 1<sup>st</sup> suit, by an originating summons dated 26<sup>th</sup> April, 2005 and filed on even date, the gist of the plaintiffs' claim is that in 1958, Mutu Kamau (Deceased 1) who was husband of the 1<sup>st</sup> plaintiff became the 1<sup>st</sup> registered owner of the 1<sup>st</sup> suit land. That the plaintiffs are entitled to two (2) acres, one (1) acre and 0.50 acres respectively of the 1<sup>st</sup> suit land by adverse possession. They further seek an order that they be registered as the proprietors of the respective portions of the 1<sup>st</sup> suit land in place of the Defendants and or successors in title namely Mumbi Gathina, Thindu Gathina and Wambui Gathina, who are widows of Gathina Kungu (Deceased 2). They also pray for costs of

the suit. The originating summons is premised on the 1<sup>st</sup> plaintiff's supporting affidavit sworn on even date.

3. In respect of the 2<sup>nd</sup> suit filed on 22<sup>nd</sup> April, 2005 by way of originating summons of even date, the plaintiffs' claim in brief is that since the year 1967, they have been in open, peaceful, continuous and exclusive possession of one (1) acre, four (4) acres and two (2) acres respectively of the 2<sup>nd</sup> suit land, thus acquired the same by adverse possession. They seek to be registered as proprietors accordingly in lieu of Defendant, Philomena Njambi Mutu (referred to as defendant Philomena herein) wife of George Kungu (Deceased 3) who was son of deceased 2. That cost of the originating summons be borne by the said Defendant Philomena. The originating summons is anchored on the 1<sup>st</sup> plaintiff's affidavit sworn on even date.

4. The plaintiff's are represented by learned counsel Mr. Mutisya Ngala while the Defendants and interested parties are represented by learned counsel Mr. Gicheha Kamau.

5. The Defendants' case in brief is per a replying affidavit sworn and filed on 6<sup>th</sup> November, 2006 by the 1<sup>st</sup> Defendant. They denied the plaintiff's claim and sought its dismissal with costs. The Defendants state that the land forms part of the estate of deceased 2 who died on the 24<sup>th</sup> August, 1969 and that the suit is rejudicata.

6. Moreover, by a replying affidavit sworn on 11<sup>th</sup> July, 2016, the defendant, Philomena averred, inter alia, that she is the legal registered proprietor of the 2<sup>nd</sup> suit land since 9<sup>th</sup> April, 2001 and that prior to the year 2001, the land was registered in the name of deceased 2. That before 29<sup>th</sup> March, 1997, deceased 3 used to live and exclusively occupied the 2<sup>nd</sup> suit land up to his death in 1997 when people started to occupy and cultivate the land through the influence of the 2<sup>nd</sup> plaintiff. She termed the plaintiffs and all other people trespassers thereon and sought dismissal of the suit with costs.

7. In an application dated 17<sup>th</sup> November, 2006, the plaintiff sought to enjoin the interested parties as co-defendants in the 1<sup>st</sup> suit. On 8<sup>th</sup> February, 2001, the application was allowed accordingly. The interested parties filed a replying affidavit sworn on 29<sup>th</sup> July, 2008 and the plaintiffs filed a reply thereto dated 19<sup>th</sup> December, 2008.

8. On 10<sup>th</sup> December, 2014, Nyamweya J, partially heard the suit. On 6<sup>th</sup> September, 2016, Okongo J ordered hearing of the suit to start afresh on 10<sup>th</sup> July, 2018. This suit was then transferred to Thika ELC where hearing started afresh on 5<sup>th</sup> November, 2018.

9. The 1<sup>st</sup> plaintiff (PW1) testified that he was entitled to the 1<sup>st</sup> and 2<sup>nd</sup> suit land by adverse possession. He relied on his list of documents dated 8<sup>th</sup> May, 2012 (P Exhibits 1 to 15) and two photos (P Exhibits 16 & 17) in his evidence.

10. PW2, Joseph Mwaura Wainaina who is a former chief of the area where the 1<sup>st</sup> and 2<sup>nd</sup> suit land are situated told the court that he has known the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs who are his neighbours since their childhood. That they occupy the 2<sup>nd</sup> suit land. He relied on his statements dated 12<sup>th</sup> May, 2012 and 1<sup>st</sup> October, 2018 in respect of the 1<sup>st</sup> suit land.

11. PW3, Peter Kinyira Mungai, a farmer and ex-teacher, stated that PW1 occupies the 2<sup>nd</sup> suit land while the 1<sup>st</sup> suit land is vacant. He relied on his statements dated 8<sup>th</sup> May, 2018 and 28<sup>th</sup> September, 2018 with regard to the 1<sup>st</sup> and 2<sup>nd</sup> suit land.

12. The testimony of Njenga Njuguna (PW4) is per his statement dated 8<sup>th</sup> May, 2012 which was adopted as his evidence in chief by consent of counsel for the respective parties. There was no cross examination of PW4 herein.

13. The 1<sup>st</sup> defendant (DW1) relied on his replying affidavit sworn on 5<sup>th</sup> September, 2006 and his statement dated 2006 as well as his statement dated 10<sup>th</sup> September, 2018 in respect of the 1<sup>st</sup> and 2<sup>nd</sup> suit land respectively. He stated that the plaintiffs do not occupy the 1<sup>st</sup> suit and 2<sup>nd</sup> suit land.

14. DW2, Peter Njoroge Gathina relied on his statement dated 10<sup>th</sup> September, 2018 and another statement dated 10<sup>th</sup> September 2018, in respect of the 1<sup>st</sup> and 2<sup>nd</sup> suit land respectively. He stated, inter alia, that he stays with his family at Loitoktok and not on the 1<sup>st</sup> and 2<sup>nd</sup> suit land. That the 2<sup>nd</sup> suit is registered in the name of defendant Philomena.

15. DW3, Robert Njoroge Karanja a son of the 4<sup>th</sup> interested party relied on his statement dated 10<sup>th</sup> September, 2018. He stated that he is a farmer on the 1<sup>st</sup> suit land in which there are tea plants since 2006.

16. DW4, Philomena Njambi Mutu is the defendant in the 2<sup>nd</sup> suit herein. She relied on her affidavit sworn on 11<sup>th</sup> September, 2018. She stated, inter alia, that she lives in Loitoktok and that she has never lived on the 2<sup>nd</sup> suit land. She also stated that the 1<sup>st</sup> suit land belongs to deceased 2 Gathina Kungu since 1958.

17. Learned counsel for the plaintiffs filed submissions dated 5<sup>th</sup> December, 2018 wherein he urged the Court to find in favour of the plaintiffs who have occupied the 1<sup>st</sup> and 2<sup>nd</sup> suit land openly, continuously and undisturbed since 1967. Counsel submitted, among others, that there is no dispute that the 1<sup>st</sup> suit land and the 2<sup>nd</sup> suit land were registered in the name of deceased 2 in 1958 and 1967 respectively. That the defendants admitted that they live in Loitoktok.

18. Counsel also submitted that the purported buyers also admitted that they bought the 1<sup>st</sup> land in the year 2006 while the owner was

deceased thus, intermeddling with property of deceased 2, under section 45 of the Law of Succession Act (Cap 160). That title to the 1<sup>st</sup> suit land had long been extinguished and none of the defendants testified to controvert the plaintiffs' evidence.

19. Learned counsel for the defendants filed submissions dated 6<sup>th</sup> December, 2018 whereby he urged the court to dismiss the plaintiffs' claim which has not attained the threshold for adverse possession claim. That the matter is *rejudicata* having been heard and determined in Nairobi High Court succession cause Number 983 of 1995.

20. Counsel submitted that the interested parties including DW1, DW2 and DW4 have been in possession of the suit land since 1995. That the plaintiffs have not been in occupation of the same and that PW1 admitted so in his evidence in this suit. Counsel relied on authorities including **Mbira-vs-Gachuhi (2002) 1 EA, Wilson Kazungu Katana and 101 others-vs-Salim Abdala Bakshwein and another (2015) eKLR which made reference to Wanje-vs-Saikwa (1984) KLR 284 and Virginia Wanjiku Mwangi-vs- David Mwangi Jotham Kamau (2018 eKLR** in respect of adverse possession.

21. I have carefully considered the entire pleadings, evidence and submissions. I note the plaintiffs' statement of issues filed on 30<sup>th</sup> March, 2005, the defendant's issues of 30<sup>th</sup> March, 2011 and issues in the submissions of the respective parties. Thus, the issues for determination herein boil down to the doctrine of adverse possession dictates as recognized in Mbira and Wilson Kazungu Katana cases (*supra*) in condensed form that:

**a. The land be registered in the name of other than the applicant.**

**b. The applicant's occupation has been open and exclusive in adverse manner to the title of the owner.**

**c. Occupation of the suit land by the applicant for a period of excess of twelve years having dispossessed the owner or discontinued the possession of the owner.**

22. On the first dictate, is the 1<sup>st</sup> suit land and 2<sup>nd</sup> suit land registered in the name other than the plaintiffs? There is no dispute that the 1<sup>st</sup> suit land and 2<sup>nd</sup> suit land were registered in the name of deceased 2. Thus, the plaintiffs in the 1<sup>st</sup> and 2<sup>nd</sup> suit are not the registered proprietors of the said 1<sup>st</sup> and 2<sup>nd</sup> suit land.

23. Secondly, have the plaintiffs been in open and exclusive possession of the 1<sup>st</sup> and 2<sup>nd</sup> suit land in adverse manner to the titles of the owners of the 1<sup>st</sup> suit land and the 2<sup>nd</sup> suit land? The plaintiffs assert that they have been in open and continuous occupation of the 1<sup>st</sup> and 2<sup>nd</sup> suit land since 1958 and planted wattle trees and crops thereon. This was confirmed by P Exhibits 3 and 8 which reveal cultivation thereon.

24. It is trite law that possession can take different forms such as fencing or cultivation of the land in dispute; **see the case of Kimani Ruchine and another-vs-Swift Rutherford Company Limited and another (1976:80) 1 KLR 1500 cited in Titus Ong'ang'a Nyachio -vs-Martin Okioma Nyauma and 3 others (2017) eKLR.**

25. Be that as it may, evidence of cultivation should be definite as to area and time as observed in the case **of West Bank Estate Limited – vs-Arthur (1966) 3 WRL 750.** In the instant matter, the time question arises as demonstrated hereunder.

26. In the case of **Gatimu Kinguru-vs-Munya Gatangi (2008) 1 KLR 1007 at 1015** Madan J (as he then was) rendered himself on adverse possession as follows;

**“The defendant's possession was open and notorious. There has been no discontinuation of possession by the plaintiff since 1959.”**

27. Notably, PW1 testified that the defendants chased them away from the 1<sup>st</sup> suit land when it was sold to five (5) buyers who are interested parties herein in 1995. That the 1<sup>st</sup> and 2<sup>nd</sup> suit land have been subject to various arbitration attempts including Nairobi HCC succession cause No 983 of 1995 where several orders were made with regard to the estate of deceased 2 hence possession of the 1<sup>st</sup> and 2<sup>nd</sup> suit land was interrupted thereby; **see Wanyoike Gathure-vs- Beverly (1965) EA 514.** Therefore the plaintiffs' possession and occupation of the 1<sup>st</sup> and 2<sup>nd</sup> suit land has not been open and notorious as held in **Kinguru case** (*supra*).

28. Regarding the 3<sup>rd</sup> dictate, have the plaintiffs dispossessed the owner of the 1<sup>st</sup> and 2<sup>nd</sup> suit land? Admittedly, adverse possession means possession not consistent with the title of the owner of the land in dispute.

29. The plaintiffs further assert that the defendants live in Loitoktok and not on the 1<sup>st</sup> and 2<sup>nd</sup> suit land. They termed the purported purchasers to be intermeddling in the property of deceased 2 since no grant of letters of administration have been issued to them. There is no dispossession of owner of the land in dispute if enjoyment and use are not possible; **see Halsbury's Laws of England 3<sup>rd</sup> Edition paragraphs 481 and 482 at pages 251 and 252.**

30. The defendants contend that the plaintiffs have never been in possession of the 1<sup>st</sup> and 2<sup>nd</sup> suit land. That the interested parties have been in possession of the 1<sup>st</sup> and 2<sup>nd</sup> suit land since 1995. That deceased 2 who died in 1969, bought the 2<sup>nd</sup> suit land from the plaintiffs' father.

31. The totality of my evaluation of the evidence on record is that the plaintiffs have not proved that they have acquired title to the 1<sup>st</sup> and 2<sup>nd</sup> suit land by way of adverse possession. The upshot is that this plaintiff's' 1<sup>st</sup> suit namely Thika ELCC No. 51 of 2017 as consolidated with

the 2<sup>nd</sup> suit, Thika ELCC 211 of 2018 be dismissed. The plaintiffs shall bear the costs of this suit.

**DATED AND SIGNED AT MIGORI THIS 29<sup>th</sup> DAY OF APRIL 2019**

**GMA ONG'ONDO**

**JUDGE**

**DELIVERED, SIGNED AND DATED IN OPEN COURT AT THIKA THIS 14<sup>th</sup> DAY OF JUNE 2019**

**L.N.GACHERU**

**JUDGE**

**In the presence of:**

1. M/s. Kaimuguru holding brief for Gicheha Kamau for defendant
2. Mr. Macharia Ngaru holding brief for Mr. Ngala for plaintiff.
3. Lucy – Court Assistant