



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**ELC CASE NO. 214 OF 2014**

**(FORMERLY KERUGOYA ELC NO. 378 OF 2013)**

**FREDRICK MARIA & 3 OTHERS.....PLAINTIFFS**

**VERSUS**

**LAWRENCE MURIUKI & 4 OTHERS.....DEFENDANTS**

**JUDGEMENT**

1. By an originating summons dated 24<sup>th</sup> April 2008 brought under the provisions of **section 38 of the Limitation of Actions Act (Cap. 22)**, the Plaintiffs sought the following orders against the Defendants:

*a. The Honourable Court do make a finding that the Plaintiffs have acquired land parcel Nos. Embu/Kamarandi/223,224,225 and 226 by adverse possession and further that the Plaintiffs be vested with free and vacant occupation of the said lands undeterred. (Sic.)*

*b. The honourable court do make an order for rectification of Embu Land Office records to cancel the titles Embu/Karamandi/223, 224, 225 and 226 in the names of the defendants instead to read as follows;*

*i. Ngari Kabingu – Embu/Kamarandi/223*

*ii. Gicebu Giceko – Embu/Kamarandi/224*

*iii. Kirinya Njiru – Embu/Kamarandi/225*

*iv. Fredrick Maria Njiru – Embu/Kamarandi/226*

*c. The said lands being the subject of this summons be dealt with in such a manner as the honourable court may deem fit and just.*

2. The said originating summons was supported by an affidavit sworn by the 1<sup>st</sup> Plaintiff, Fredrick Maria, on his own behalf and on behalf of his co-plaintiffs. It was stated that the Plaintiffs were born and brought up on the suit properties which were all sub-divisions of *Title No. Embu/Kamarandi/222*. It was contended that the Plaintiffs had been in continuous, exclusive and uninterrupted possession of the suit properties since the 1970's.

3. The 1<sup>st</sup>, 4<sup>th</sup> & 5<sup>th</sup> Defendants entered appearance through the firm of Duncan Muyodi & Co. Advocates on 4<sup>th</sup> June 2008. Later on, the 4<sup>th</sup> Defendant appointed the firm of Lee Maina & Associates to act for him vide a notice dated 24<sup>th</sup> February 2014. The record further indicates that the firm of Duncan Muyodi & Co. Advocates ceased acting for the cited Defendants in 2017 for lack of instructions.

4. The only Defendant who filed a replying affidavit in answer to the originating summons was the 5<sup>th</sup> Defendant. He filed an affidavit sworn on 17<sup>th</sup> July 2008 disputing the Plaintiffs' claim for adverse possession. He stated that he was the proprietor of *Title No. Embu/Kamarandi/226* and that it was not true that the Plaintiffs were in occupation of the same for a long time. He contended that he was the one in actual possession of that parcel.

5. The court record indicates that when the originating summons was fixed for hearing on 21<sup>st</sup> November 2018 the Plaintiffs obtained leave of court to serve court process through substituted service by advertising once in the Daily Nation newspaper. The hearing notice was consequently served through substituted service in the Daily Nation edition of 20<sup>th</sup> February 2019.

6. At the hearing of the suit on 19<sup>th</sup> March 2019 only the Plaintiffs attended court for hearing. The Defendants did not attend court despite service. The 1<sup>st</sup> Plaintiff testified on his own behalf and on behalf of his co-plaintiffs who are his siblings. He stated that at all material times the Plaintiffs and their families have been residing on the suit properties. It was his case that all his siblings were born on the suit properties and that no one had ever interfered with their exclusive possession thereof since 1969 or thereabouts.

7. Since the Defendants did not attend court for hearing, the Plaintiffs' evidence remains unchallenged. The court accepts their evidence without reservations. The main issue for determination herein is whether the Plaintiffs have established their claim for adverse possession over the suit properties.

8. The elements of adverse possession were summarized in the case of **Kasuve V Mwaani Investments Ltd & 4 Others [2004] 1 KLR 184** as follows:

**“...and 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 and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, Wanja Vs Saikwa No. 2 [1984] KLR 284. A title by adverse possession can be acquired under the Limitation of Actions Act for part of the land...”**

9. The court has considered the pleadings and the evidence on record on the issue of adverse possession. The court is satisfied on the basis of the uncontroverted evidence of the Plaintiffs that they have demonstrated all the elements of adverse possession. The Plaintiffs are accordingly entitled to a declaration that they have acquired the suit properties through adverse possession.

10. The court is of the opinion that upon such declaration the Plaintiffs are entitled to be registered as proprietors of the suit properties in place of the respective Defendants. However, the remedy of rectification of the register is not the appropriate relief in the circumstances. The remedy of rectification of the register as provided for under **section 80 of the Land Registration Act, 2012** is restricted to situations where registration was obtained through a mistake, omission or fraud to which the registered proprietor was privy.

11. The upshot of the foregoing is that the court finds and holds that the Plaintiffs have proved their case to the required standard. Accordingly, there shall be judgement for the Plaintiffs in the following terms.

a. A declaration is hereby issued that the Plaintiffs have acquired *Title Nos. Embu/Kamarandi/223, 224, 225 and 226* by virtue of adverse possession.

b. The Land Registrar Embu shall cause the Plaintiffs to be registered as proprietors of the said parcels in place of the Defendants as follows:

*i. Ngari Kabingu – Title No. Embu/Kamarandi/223*

*ii. Gicebu Giceko – Title No. Embu/Kamarandi/224*

*iii. Kirinya Njiru – Title No. Embu/Kamarandi/225*

*iv. Fredrick Maria Njiru – Title No. Embu/Kamarandi/226*

c. The Deputy Registrar of the court shall sign and execute all necessary documents and forms on behalf of the Defendants to facilitate the Plaintiffs' registration as aforesaid.

d. There shall be no order as to costs.

12. It is so decided.

**JUDGEMENT DATED, SIGNED and DELIVERED at EMBU this 25<sup>TH</sup> DAY of JULY, 2019.**

In the absence of the Plaintiffs and the Defendants.

Court Assistant Mr. Muinde

**Y.M. ANGIMA**

**JUDGE**

**25.07.19**