



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MILIMANI**

**ELC NO. 512 OF 2012**

**NELSON NJOROGE GITHINA.....PLAINTIFF**

**VERSUS**

**JORETH LIMITED.....1<sup>ST</sup> DEFENDANT**

**ACCO LIMITED.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. The Plaintiff filed this Originating Summons against the Defendants in which he sought the following reliefs:-

**1. That Nelson Njoroge Githina be declared to have acquired title by adverse possession to the suit premises known as Plot No. 176 Thome Farmers No. 5 Limited and also known as L.R. No. 13330/593.**

**2. That the registration of Joreth Limited and Acco Limited as proprietors of L.R. No. 13330/593 and or any other persons deriving title from Joreth Limited based on the land previously known as Plot No. 176 and now known as L.R No. 13330/593 be cancelled forthwith and the Chief Land Registrar of Titles do rectify the register to enter the name of the Plaintiff as registered proprietor of the said property L.R. No. 13330/593 in place of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants or anyone deriving title from the Defendants.**

**3. The costs of these proceedings be borne by the Defendants.**

2. The 1<sup>st</sup> Defendant was the registered owner of LR No. 4920/3 and LR No 4921/3 which were later amalgamated into LR No 13330 in or around 1999. Prior to the amalgamation of the two parcels, there was an intention to sell the two portions to Thome Farmers No. 5 Limited (Thome 5) but which sale apparently never went through as the properties still remained registered in the name of the 1<sup>st</sup> Defendant.

3. Despite the fact that the sale between the 1<sup>st</sup> Defendant and Thome 5 had not been formalized, Thome 5 was allowed to settle its members on the two parcels. This is how the Plaintiff who had purchased a share at Thome 5 was settled in a half acre plot along Thika road which he took possession of in 1979. He had purchased a share at Thome 5 in 1975.

**Plaintiff's case**

4. The Plaintiff's evidence is that after he finished paying for the plot which was identified as Plot No. 179, he initially began cultivating half of it. He later built a permanent boundary wall round the plot complete with a gate. He has since leased it out to a person who uses it a garage and storage yard for construction equipment. The Plaintiff produced photographs confirming the activities going on in the suit property which is now known as LR 13330/593 and is registered in the name of the 2<sup>nd</sup> Defendant (suit property).

5. The Plaintiff testified that he has continuously enjoyed the suit property openly and without any interruption until in July, 2012 when he received a letter dated 9<sup>th</sup> July, 2012 demanding that he vacates the suit property. This letter was thrown into the garage at the suit premises. It is in this letter which it was indicated that the suit property had been transferred to the 2<sup>nd</sup> Defendant.

6. The Plaintiff further testified that the 2<sup>nd</sup> Defendant's representatives have never gone to the suit property. Sometime in 2008 he went to the firm of Kimani Kahiro & Company Advocates who were acting for the 1<sup>st</sup> Defendant where he paid Kshs.250,000/= for processing of

title but the title was never processed. He stated that he has never been sued in any case by the Defendants.

### **1<sup>st</sup> Defendant's case**

7. The case of the 1<sup>st</sup> Defendant was presented by Robertson Nderitu Mwehu, a general manager of the 1<sup>st</sup> Defendant. He stated that the 1<sup>st</sup> Defendant purchased LR No. 4920/3 and LR No. 4921/3 from a European Settler. The two parcels were amalgamated into LR No. 13330. The directors of the 1<sup>st</sup> Defendant were Arthur Magugu, Njenga Karume and Duncan Ndegwa. In 1992, the 1<sup>st</sup> Defendant filed Nairobi HCCC No. 6206 of 1992 against 23 individuals who were staying on the property belonging to the 1<sup>st</sup> Defendant. A consent was later recorded allowing those in occupation to pay Kshs.200,000/= each so that they could be given titles. This witness denied that the 1<sup>st</sup> Defendant and Thome 5 had any relationship.

8. This witness stated that he lives behind the suit property in his plot and that he knows that the suit property was leased to one Nduati who is a contractor trading under Uchumi Contractors and that the contractor moved to the suit property in 2007 where he keeps graders and other heavy machinery. He testified that the suit property was sold and has since been transferred to the 2<sup>nd</sup> Defendant.

### **2<sup>nd</sup> Defendant's case**

9. The 2<sup>nd</sup> Defendant's case was presented by John Peter Mbue Mwangi, a director of the 2<sup>nd</sup> Defendant. He testified that he sent an agent to look for land along Thika road where he intended to put up residential houses. The agent identified the suit property which was registered in the name of the 1<sup>st</sup> Defendant. He proceeded to purchase the suit property at Kshs.1,800,000/=. The property was duly transferred to him.

10. He stated that at the time of purchase, there were some structures on the suit property but that the 1<sup>st</sup> Defendant had assured him that they were going to give him vacant possession. He stated that the property was registered in the name of the 2<sup>nd</sup> Defendant on 8<sup>th</sup> May, 2012 and that prior to the purchase, he had not been to the property.

### **Analysis and issues for determination**

11. The Plaintiff and the two Defendants filed Written Submissions at the conclusion of the oral hearing. I have gone through the submissions, the affidavit in support of the Originating Summons as well as the affidavits in opposition to the Originating Summons. The Counsel for 1<sup>st</sup> Defendant submitted that the Plaintiff has not proved his claim for adverse possession in that he did not give evidence on when he took possession; that he did not acknowledge the title of the 1<sup>st</sup> Defendant and that in any case his occupation was interrupted when the 1<sup>st</sup> Defendant filed Nairobi HCCC No. 6206 of 1992 in which Thome 5 was named as the 24<sup>th</sup> Defendant.

12. The Counsel for the 1<sup>st</sup> Defendant further submitted that as at 1979 when the Plaintiff alleges to have taken possession, subdivision had not taken place as evidence on record shows that subdivision was concluded in 2002. The 1<sup>st</sup> Defendant's Counsel further submitted that the Plaintiff's claim cannot succeed as the Plaintiff was using the land as a garage whereas the user for the area was residential.

13. On its part, the 2<sup>nd</sup> Defendant's Counsel submitted that the claim by the Plaintiff cannot succeed as one cannot claim adverse possession and at the same time claim purchaser's interest.

14. I have considered the submissions and the evidence adduced. The claim herein is for adverse possession. There is no claim based on purchase. There is also no claim based on fraud and the issue of whether one was an innocent purchaser for value does not arise. The only issues for determination are firstly when did the Plaintiff take possession of the suit property. Secondly, was the occupation of the Plaintiff open and without any interruption. To me these are the pertinent issues. The issue of costs will obviously follow the event.

15. The Plaintiff testified that he purchased a share from Thome 5 in 1975. One share translated into one plot of half an acre. The Plaintiff produced a resolution of the directors of the 1<sup>st</sup> Defendant in which the directors resolved to sell LR No. 4920/3 and LR 4921/3 to Thome 5. He also produced a letter dated 9<sup>th</sup> December, 1975 from National Bank of Kenya Limited addressed to A.K Magugu who was a director of 1<sup>st</sup> Defendant and also instrumental in Thome 5 affairs. This letter showed how monies deposited in the account of Thome 5 was disbursed to various individuals.

16. M/s Kamwere & Associates were surveyors who were subdividing the two properties. By their letter of 23<sup>rd</sup> December 1975, they wrote to Mr. Magugu and confirmed that already 500 plots had been subdivided on the ground. They asked him to indicate on how he wished the numbering to be done. The Plaintiff's evidence is that in 1979 he was shown his portion by Mr. Kamwere and he took possession after a week of receiving his share certificate.

17. There is no evidence which has been adduced to controvert the one by the Plaintiff. M/s Kamwere & Associates were paid survey fees of Kshs.13,000/= on 7<sup>th</sup> December, 1979. This money was from Thome 5. M/s Kamwere had already confirmed to Mr. Magugu that already 500 plots had been surveyed on the ground. The argument by the 1<sup>st</sup> Defendant that subdivision had not been carried out as at 1979 is therefore without basis. There are correspondence to show that there were challenges to the subdivision which was being carried because of logistical reasons and for reasons of planning purposes but despite this, some members of Thome 5 had already been shown their portions on the ground.

18. The Plaintiff took possession in 1979 and has remained in possession since then. In the absence of evidence to the contrary, I find that the Plaintiff took possession in 1979.

19. This suit has been brought against the 1<sup>st</sup> Defendant who was the registered owner of LR 4920/3 and LR 4921/3. These two parcels were later amalgamated into LR 13330 which was subdivided and resulted into the suit property. The Plaintiff has never been moved from the location he took possession of in 1979. The Plaintiff produced pictures which show that the suit property has been securely fenced with a gate. In the property are graders and vehicles. It is not contested that this is the position. This is therefore evidence of full possession. Before the suit property was fenced, the Plaintiff was cultivating it.

20. The entry of the Plaintiff into the suit property was without permission of the 1<sup>st</sup> Defendant who was the registered owner. This is even confirmed from the letter of 9<sup>th</sup> July, 2012. The Plaintiff's stay on the suit property was therefore adverse to the 1<sup>st</sup> Defendant's interest. The stay has been open, continuous and without secrecy. The property is just next to Thika Super Highway and there is no way the 1<sup>st</sup> Defendant can claim that it did not know of the Plaintiff's occupancy.

21. There has been no attempt to interrupt the occupation of the Plaintiff since 1979 when he took possession. Time for purposes of limitation started running from 1979. As at 1991 twelve years had lapsed and the title to the 1<sup>st</sup> Defendant had been extinguished. There was an argument that time was interrupted in 1992 when the 1<sup>st</sup> Defendant filed Nairobi HCCC No. 6206 of 1992 in which it is said that Thome 5 was joined as the 24<sup>th</sup> Defendant. It was argued that Thome 5 was joined to represent all shareholders including the Plaintiff. There was no evidence adduced to show when Thome 5 was enjoined in this suit. Even if Thome 5 was a party from the beginning, as at the time the suit was filed, the Plaintiff had already enjoyed quiet, open and uninterrupted period of twelve years and the title to the 1<sup>st</sup> Defendant had been extinguished.

22. The transfer of the suit property to the 2<sup>nd</sup> Defendant on 8<sup>th</sup> May, 2012 was of no effect. In the case of *Githu Vs Ndeete* [1984]KLR 776 the Court of Appeal held that mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such persons adverse possession. In the instant case change occurred after the previous owner who is the 1<sup>st</sup> Defendant had already lost his title.

23. In the case of *Githu Vs Ndeete (Supra)* the Court of Appeal held that in a claim for adverse possession, time ceases to run under the Limitation of Actions Act either when the owner asserts his rights or when his right is admitted by the adverse possessor. The Court went on to state that assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land.

### **Conclusion**

24. Whichever way one looks at this case, it is clear that the title to the suit property was lost in 1991 after the lapse of 12 years from 1979. The purpose for which the land is used is immaterial and the 1<sup>st</sup> Defendant cannot argue that since the suit property was designated as a residential area and there has been no changer of user, its use as a garage is therefore illegal. I find that the Plaintiff has proved his case on a balance of probabilities. I enter Judgment for the Plaintiff as follows:-

- 1. That Nelson Njoroge Githina be and is hereby declared to have acquired LR 13330/593 by adverse possession.**
- 2. The registration of Acco Limited as proprietor of LR 13330/593 is hereby cancelled and the Land Registrar is directed to rectify the register and enter the name of Nelson Njoroge Githina as proprietor of LR 13330/593.**
- 3. The costs of this suit shall be paid to the Plaintiff by the 1<sup>st</sup> Defendant.**

**Dated, Signed and delivered at Nairobi on this 26<sup>th</sup> day of August, 2019.**

**E.O OBAGA**

**JUDGE**

In the presence of Mr King'ara for Plaintiff,

M/s Koech for 1<sup>st</sup> Defendant and M/s Muraguri for 2<sup>nd</sup> Defendant

**E.O.OBAGA**

**JUDGE**

**26/8/2019**