



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 2 OF 2019 (OS)

GICHINGA KIBUTHA.....PLAINTIFF/APPLICANT

VERSUS

CAROLINE NDUKU.....DEFENDANT/RESPONDENT

JUDGMENT

1. Gichinga Kibutha took out an Originating Summons pursuant to Order 37 Rule 7 of the Civil Procedure Rules and Section 37 of the Limitations of Actions Act and section 1A and 3A of the Civil Procedure Act and other enabling provisions of the law. In the Originating Summons, the Applicant sought title by way of Adverse Possession for the whole of land parcel No MAKUYU/KIRIANI/BLOCK 1/208.

2. The application is supported by grounds adduced thereto and the affidavit of the Applicant who deponed that he entered and took possession of the suit land by virtue of being a member of Kiriaini Farm and that recently he found out that the Respondents name had been entered into the title of the suit land as the registered owner. That he has constructed a semi-permanent house on the suit land and undertaken developments thereon. That the possession is adverse by virtue of his occupation of the suit land for a period in excess of 30 years.

3. In further support of the motion, he has annexed the copy of the certificate of search dated the 3/12/13 together with a certified copy of the green card in the name of the Respondent. He added that the Respondent has never made any attempt to take possession of the suit land.

4. The Defendant/Respondent was served with the pleadings however she did not file any defence against the suit. The suit is therefore undefended.

5. At the trial the Plaintiff relied and reiterated his evidence as set out in the supporting affidavit. He stated that he had possession of the suit land since 1967 and that he built his house in 1988. That he entered the land through purchase having been a member of the Kiriaini Farm and the Respondent has never removed him from the land. That he knows the Defendant who lives in Kakuzi.

6. Having evaluated the Pleadings filed and the evidence led at the hearing of the suit, the key question for determination is whether the Plaintiff has proved a claim of adverse possession over the suit land.

7. The key test is that the owner of the land must have been dispossessed or has discontinued possession of the property. In this particular case evidence was led by the Plaintiff that his possession has neither been broken nor interrupted. 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.”

8. In the case of **Celina Muthoni Kithinji Vs Safiya Binti Swaleh & 8 Others (2018) eKLR** Yano, J reiterated the case of **Mbira –vs- Gachuhi (2002) IEALR 137** in which the Court held that;

“.....a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive of non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption.....”

9. In deciding the issue of adverse possession, the primary function of a Court is to draw legal inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of fact, the question whether that possession is adverse or not is a matter of legal conclusion to be drawn from the findings of facts” **Kweyu v Omuto, C A Civ Appeal 8 of 1990** (as yet unreported). This Court is satisfied that the Plaintiff has proved adverse possession and his case is for granting. The title of the suit land is being held in trust by the Respondent for the Plaintiff.

10. In the instant case the Plaintiff has stated that he has lived on the suit land since 1988 to date and that he has neither handed over

possession nor been disposed by the Defendant whom he knows. He has demonstrated to the Court that he has developed the land as though it were his and as of right for a period of over 12 years, which is allowed by statute.

11. Considering the totality of the evidence and applying the legal principles outlined above, and in the absence of evidence to the contrary, I am persuaded that the Plaintiff has proved his case on a balance of probability and has established a claim in adverse possession.

12. In the end the suit is allowed and I enter judgement as follows;

a. The Plaintiff has acquired prescriptive rights and title by adverse possession of the suit land.

b. The Defendant to transfer the suit land to the Plaintiff and in default the Deputy Registrar of the Court be and is hereby mandated to execute all the requisite documents to effect the orders stated at a above.

c. To meet the ends of justice, the Land Registrar is mandated to dispense with the production of the original title deed in default of the production by the said Defendant.

d. Each party to meet their costs of the suit.

13. **It is so ordered.**

DELIVERED DATED & SIGNED AT MURANG'A THIS 9TH DAY OF OCTOBER 2019.

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Ndegwa HB for Jessee Kariuki for the Plaintiff

Defendant – Absent

Irene and Njeri, Court Assistants