



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 125 OF 2017 (O.S)

SIMON GITUTO NGARI.....PLAINTIFF

VERSUS

MICHAEL KAARU NJOROGE.....1ST DEFENDANT

PETER CHOMBA MWANIKI.....2ND DEFENDANT

JUDGMENT

BACKGROUND

By an Originating Summons dated 21st August 2017, the plaintiff sought the following orders:

- 1. The applicant be declared to have become the legal owner entitled by adverse possession of over 12 years since 1960 all that parcel of land comprised in title No. GICHUGU/SETTLEMENT/SCHEME/150.**
- 2. The said applicant be registered as the sole proprietor of the said parcel of land in place of the respondent in whose favour the land is currently registered.**
- 3. The costs of this application be provided for.**

The applicant swore an affidavit on 18th August 2017 in support of this claim and annexed numerous documents including a green card and a certificate of official search. The Originating Summons was amended on 13th November 2017 and further amended on 3rd January 2018. The subsequent amendments saw the addition of Peter Chomba Mwaniki and Kirinyaga Land Registrar as 1st and 2nd defendants in this case. On 19th January 2018, the 1st defendant filed a replying affidavit in opposition to the plaintiff's claim.

PLAINTIFF'S CASE

Beside the affidavit sworn on 18th August 2017, the plaintiff also filed his witness statement dated 13th March 2018. According to the plaintiff, he has lived in the suit land continuously un-interrupted since 1965 to-date having been given to him as a gift by Kirinyaga County Council in December 1960. After he took possession in 1961, he started farming and in 1965, he built a matrimonial home and over time developed the property by building a permanent house, planted trees, dug a borehole and connected piped water.

The plaintiff also stated that he kept farm animals e.g. cows, goats, chicken etc. The plaintiff also commenced the process of obtaining the title deed. In one of his visits to the Land Registrar Kirinyaga, he was surprised to find that from the green card, the suit property was registered in the name of one Karu Njoroge on 6th February 1958. He stated that he sought assistance of Kirinyaga County Council who vide a letter dated 11th March 1975 wrote to the Land Registrar, Kirinyaga directing him to issue him with a title deed. The Land Registrar advised him to make an application for consent of the Land Control Board to have the suit property transferred to him. On 15th April 1975, he obtained consent from the Land Control Board which he took to the Land Registrar. However, the Land Registrar did not act on the same. On 21st April 1975, he was issued with another letter addressed to the Land Registrar confirming that he had been allocated the suit property way back in 1960 and that he should therefore be issued with a title deed. In a letter dated 25th August 1992, the Council wrote to the District officer Gichugu advising him to direct the Land Registrar to nullify the title issued to Karu Njoroge. However, when he went back to the Registrar's office, he established with dismay that the suit property was transferred to one Michael Njoroge on 21st July 1992 and a title deed issued the same date. He stated that he was not able to put a caveat in the suit property since 1992 despite filing the requisite forms. He said that sometime in 1993, their Sub-chief summoned him and informed him that he had heard that there was a suit filed against

him in Nairobi in respect of the suit property. He instructed his advocate who went and upon checking, he confirmed the existence of a suit filed in the High Court and when he appeared before the Court, the Court declared that it had no jurisdiction to entertain the suit and dismissed the same. In 2016 or thereabouts, he went to the office of the Land Registrar where he discovered that the restriction he had placed had been removed on 19th July 2016 without his knowledge. He also discovered later in 2017 that the suit property had been transferred to the 1st defendant on 29th September 2017 and a title deed issued to him. In November 2017, the 1st defendant unlawfully and illegally invaded the suit property causing extensive damage to his property valued in excess of Ksh. 2,000,000/=. He applied and obtained registration of a caution on the suit property on 13th December 2017.

PW2 was Ndwiga Kamukunji. He stated as follows:

- That he was born in Kirinyaga County and in 1961, they moved to Murinduko after he was allocated a piece of land parcel No. GICHUGU/SETTLEMENT/SCHEME/042 by the Kirinyaga County Council through the Local clan.
- He stated that the plaintiff was also allocated land parcel No. GICHUGU/SETTLEMENT/SCHEME/150. Thereafter, they took possession of their respective parcels of land.
- As a sign of ownership, each of them were issued with a declaration on transfer by way of a gift under the then Registered Land Ordinance of 1963. He stated that all his life, prior to or even after 1960, he never saw or met one Karu Njoroge alias Michael Karu Njoroge. He stated that the said Karu Njoroge alias Michael Karu Njoroge has never lived on the suit property but the plaintiff has been living on it continuously and un-interrupted.

PW3 was Andrew Fundi Gitute. The witness stated as follows:

- That he is the son to the plaintiff. That he was born on 2nd May 1972. He lives in the suit land/property where he has built permanent matrimonial home. He stated that he has never seen or met Michael Karu Njoroge alias Karu Njoroge nor has anyone at all ever come to the suit property to claim ownership. He stated that in November 2017, the 1st defendant sent hired goons who invaded their home and cut down trees and food crops and ploughed about 1/8 of his father's land. They went with his father and reported at Wanguru Police Station where the OCS advised them to seek an injunction in Court.

1ST DEFENDANT'S CASE

The 1st defendant did not attend Court during the hearing and his case was closed. However, he filed a replying affidavit to the plaintiff's claim sworn on 18th January 2018.

2ND DEFENDANT'S CASE

The 2nd defendant did not enter appearance or file defence.

ISSUES FOR DETERMINATION

The plaintiff through the firm of Wanyonyi & Muhia Advocates prepared 14 statement of issues dated 13th March 2018. However, the following are appropriate issues for determination.

1. Whether the plaintiff has established the principles for the claim of adverse possession.

2. Who shall bear the costs of this suit?

LEGAL ANALYSIS

I have considered the evidence adduced by the parties and the applicable law. The key issue for determination is whether or not the plaintiff has established ownership by way of adverse possession. The requirements for adverse possession in Kenya has been set out in a multitude of decisions In the case of *Mbura Vs Gachuhi (2002) I.E.A.L.R 137* where it was held:

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

The Court of Appeal in the recent case of *Mtava Lewa Vs Kahindi Ngala Mwangandi (2005) e K.L.R* held as follows:

“Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya 12 years “.

The plaintiff in this case stated that he has lived in the suit land continuously without interruption since 1965 having been given to him by Kirinyaga County Council as a gift in December 1960 and that he has fully developed the land. He annexed photographs of permanent houses, banana stems and other crops on the suit land. The suit property was first registered in favour of one Karu Njoroge on 6th February

1958. The plaintiff has stated on oath that he has been in occupation and possession of the suit land since 1965 to-date. His averments on oath have not been challenged or controverted. The original registered owner was not called to rebut the evidence by the plaintiff that he has lived on the suit land from 1965 to-date. On 21st July 1992, the original registered owner transferred the suit land to one Michael Karu Njoroge.

The said Michael Karu Njoroge was not also called as a witness to deny the evidence adduced by the plaintiff. The green card produced in evidence does not show any further transfer of the suit land except entries in form of a caution and summons upon the registered proprietor on grounds of fraudulent transaction. The certificate of search and green card indicates that the suit property was transferred to the 1st defendant on 29th September 2017 and a title issued the same date. The defendant did not attend Court during the hearing of this case despite having been duly notified. I am satisfied that the plaintiff has proved the principles for the grant of the orders sought. He has shown that his possession and occupation of the suit property was "*nec vi, nec clam, nec precario*", that is, peaceful, open and without the authority or permission of the owner for a period more than 12 years. He stated that his possession of the suit property has been open and notorious to the knowledge of the owner and that he has asserted a hostile title to the owner of the property. His evidence is supported by the numerous photographs of permanent houses, crops and other developments on the suit land.

Considering the totality of the evidence availed in this case which is not challenged and applying the legal principles of law as outlined in the cases above, it is clear beyond peradventure that the plaintiff has proved his case on a balance of probability and has brought himself within the limits of the doctrine of adverse possession. In the final analysis, I allow this suit and enter judgment as follows:

1. **The plaintiff is entitled to be registered as the owner of land parcel No. GICHUGU/SETTLEMENT/SCHEME/150 measuring 6.10 Ha.**
2. **There shall be no order as to costs.**

READ, DELIVERED and SIGNED in open Court at Kerugoya this 22nd day of November, 2019.

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E.C. CHERONO

ELC JUDGE

22ND NOVEMBER, 2019

In the presence of:

1. Mr. Abubakar holding brief for Beaco for Plaintiff
2. Mr. Chomba holding brief for Mr. Ndana for Defendant
3. Mbogo – Court clerk – present