



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC CASE NO. NO. 111 OF 1999 (O.S.)**

**GEORGE MIRITI MWARANIA (suing as the legal Representative of the  
estate of M'MWARANIA KABURUKI-deceased).....PLAINTIFF**

**VERSUS**

**M' MUNGANIA KAINI.....1<sup>ST</sup> DEFENDANT**

**DENNIS MURIUKI MBATAU (sued as the legal representative of the estate of**

**FREDRICK MUTWIRI MBATAU).....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**The History**

1. The odyssey of this dispute has lasted 20 years in the court's arena! The original plaintiff bought a portion of land no. ABOGETA/L.KIRINGA/217 in 1978 from the 1<sup>st</sup> defendant who later subdivided the land into two parcels namely ABOGETA/L. KIRINGA/324 and 323, where by the original plaintiff was to own the latter parcel now the suit land. The transfer was however not effected triggering the litigation in the courts. The initial plaintiff had filed a case no. 66 of 1999 against the 1<sup>st</sup> defendant in Meru Chief Magistrate's court, where he had sought orders to have the suit land transferred to him. but this case was apparently withdrawn on 17.9.1999.
2. Thereafter, the plaintiff filed this Originating Summons on 26.10.1999 seeking a declaration that he is entitled by adverse possession to the whole parcel known as **L.R. No. Abogeta/Kiringa/323** measuring 2.96 Ha. It came to be that 1<sup>st</sup> defendant had sold the suit land to the 2<sup>nd</sup> defendant, prompting the plaintiff to amend his pleadings to bring on board the 2<sup>nd</sup> defendant. The amended plaint was filed on 9.12.1999.
3. The plaintiff testified way back on 3.4.2003, but sadly, he passed on few years later on 12.4.2008. Vide an application dated 25.3.2009 and which was allowed by consent on 12.7.2010, the legal representative of the deceased, one **George Miriti Mwarania** took over the plaintiffs case. The 2<sup>nd</sup> defendant also died on 12.7.2010 and an application for his substitution was filed on 28.4.2011, and the same was allowed by consent on 5.6.2012 where by, **Denis Muriuki Mbatau** took over the case of 2<sup>nd</sup> defendant.
4. On 12.2.2019, directions were taken by consent for the case to proceed from where the matter had stopped.

**The pleadings**

5. The pleadings of the plaintiff are contained in his Amended plaint dated 9.12.1999 and the supporting affidavit thereof. Therein, he averred that he bought 7 acres in what was L.r.Abogeta/L-Kiringa/217 from the 1<sup>st</sup> Defendant in the year 1978. That he took possession from then to date. That in the year 1993 the 1<sup>st</sup> defendant subdivided L.R.Abogeta/L.Kiringa/217 and obtained new titles with plaintiff's portion being L.R. Abogeta/Kiringa/323. That on 28.9.1999 the 1<sup>st</sup> Defendant stealthily and without notice transferred L.R.Abogeta/L.Kiringa/323 to the 2<sup>nd</sup> Defendant.
6. The plaintiff pleaded that his occupation on the suit land has been open, unhindered, notorious, undisturbed, uninterrupted and continuous for a period of twenty (20) years and he has equally developed the same land by constructing a semi-permanent dwelling house, a granary, planting ½ acre with bananas, 18 orange trees, 8 avocado trees and many other trees. He also stated that his whole family ekes a living from the suit land.

7. The pleadings of the 1<sup>st</sup> defendant are contained in his grounds of opposition and a Replying affidavit filed on 25.11.1999. However, these documents were not in the court file by the time I conducted the Pre-trial conference on 12.2.2019, but Mr. Mburugu, counsel for the 1<sup>st</sup> defendant did avail the said documents to the court. Before delving into the contents of the said pleadings, I find it necessary to point out that Mr. Mburugu for the 1<sup>st</sup> defendant had filed an application on 15.11.2017 seeking orders to cease acting for the 1<sup>st</sup> defendant and this application was allowed on 21.2.2018. However, Mr. Mburugu continued to actively participate in the case on behalf of his client. Since no one raised an issue on this point throughout the trial, then this court will take it that Mr. Mburugu continued to get instructions from his client, the 1<sup>st</sup> defendant.

8. The 1<sup>st</sup> defendant contends that he sold 7 acres in L.R. Abogeta/L.Kiringa to the plaintiff in 1978 for a consideration of Kshs. 21,000/=, but the plaintiff only paid Kshs. 6,900/= hence sometime in 1997 he repudiated the contract and offered to refund the Kshs. 6900/= but the plaintiff refused. 1<sup>st</sup> defendant further pleaded that in the year 1994, he subdivided the land no.217 into two portions i.e. Parcels No. 323 and 324. He sold parcel 324 to Joslyeen Kanini Christopher and Wilson Kinyua Magiri and allowed the plaintiff to cultivate parcel No. 323.

9. 1<sup>st</sup> defendant further pleaded that the plaintiff does not have a claim in adverse possession since he (1<sup>st</sup> defendant) sold and transferred the suit land to the 2<sup>nd</sup> Defendant. He denied that the plaintiff has been in continuous occupation of the suit land for 20 years and stated that the plaintiff entered the land in the year 1994 and he asked him to vacate in the year 1997. He added that the plaintiff has only been cultivating seasonal crops on 1 acre of the land as opposed to 7 acres as averred. He also stated that the plaintiff had instituted a suit in Meru RMCC No. 66 OF 1999 but withdrew the same on 17<sup>th</sup> September 1999.

10. For the 2<sup>nd</sup> defendant, the pleadings are contained in the Replying affidavit filed on 6.3.2000, where he avers that he bought the suit premises from the 1<sup>st</sup> Defendant. That the plaintiff had instituted a suit in Meru RMCC No. 66 OF 1999 but withdrew the same on 17.9.1999. That at the same time the caution registered in the suit premises was removed and the 1<sup>st</sup> Defendant was then able to sell the land. He denied evicting the plaintiff from the suit premises.

### **The Evidence**

11. Pw1 (the initial plaintiff herein) testified on 3.4.2003. He stated that he entered into an Agreement with the 1<sup>st</sup> Defendant on 22/10/1978 for the sale of 7 acres. That he paid by instalments a total sum of Ksh. 21,737 plus transport amounting to Ksh. 250/=. He attended the Land Control Board where he obtained a consent to subdivide the land. The land was divided into Parcel no. 323 and 324. He stayed in Parcel No. 323.

12. **Pw2** a son of Pw1 and the legal representative of the estate of Pw1 testified on 12.2.2019. He is also the current plaintiff. He stated that he was born in 1956, that he was present when his father bought the land but cannot recall the year of subdivision. He told the court that the caution was removed in an irregular manner and thereafter, the 1<sup>st</sup> Defendant sold the land to the 2<sup>nd</sup> Defendant. He stated that his father stayed and built on the land. He denied that he had built on the land after his father had passed on. He told the Court that he currently stays and farms on the land with his brother, one Dedan Mwarania.

13. **Pw3 Wilson Kinyua** testified that he is a neighbour of the plaintiff and had leased the suit premises from the initial plaintiff to farm for two (2) years. He claimed that he never paid the plaintiff for his farming activities. He further stated that the initial plaintiff had built a house on the suit land, that he had planted trees and he also farmed on this land. He stated that he was aware that the 2<sup>nd</sup> Defendant had bought the land while the plaintiff was still on the land.

14. **Dw1 the 1<sup>st</sup> Defendant herein** testified that in the year 1978, he sold to the plaintiff 7 acres of land through an Agreement. That the sale price was Kshs 21,000 but he only received Kshs 6,900/= from the plaintiff. He told the court that at the time he was selling the land to the 2<sup>nd</sup> Defendant, the plaintiff had nothing on the land. He however conceded that the plaintiff had built a small house before the filing of the lower court case in the year 1999. That he tried to chase the plaintiff away by summoning him to the Area Chief but plaintiff came back in the year 1999. He also conceded that the sons of the plaintiff currently reside on the suit premises. He also stated that he doesn't stay on the suit land.

15. **DW2** the legal representative of the 2<sup>nd</sup> Defendant is one Dennis Muriuki Mbatuu. He testified that his father has title to the land (the court saw the Original title and retained a copy). It was his testimony that they visited the land and found a make shift structure looking like a store. He stated that his father could not take over occupation of the land due to the ongoing case and on advice from the Area Chief. He opined that the claim in the lower court was filed one month after title was issued.

16. On 8/3/2019 the Court directed parties to file their respective submissions. At the time of writing this Judgement only the plaintiff had complied with this direction. The plaintiff submitted that the defendants have never occupied the suit land and they also don't claim to have done so 12 years prior to the year 1999 when this suit was filed and that the plaintiff has proved his occupation. He relied on the cited authority of **Peter Mbiri Michuki v Samuel Mugo Michuki [2014] eKLR.**

### **Analysis and Determination**

17. I have considered the pleadings, the record and the submission of the parties and I do find that the issue for determination is whether the Plaintiff has met the criteria of an adverse possessor in respect of the whole parcel known as **L.R. No. Abogeta/Kiringa/ 323** measuring 2.96 Ha.

18. In **Celina Muthoni Kithinji v Safiya Binti Swaleh & 8 others [2018] eKLR**, the Court explained the conditions to be met for one to prove an entitlement in adverse possession. The court proceeded to quote various authorities which explain the entitlement and I wish to borrow fully from the decision and capture it as hereunder;

**“The requirements for Adverse Possession in Kenya has also been set out in the case of Mbira –v- 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 or non-consensual, actual, open, notorious, exclusive and Adverse use by him or those under whom he claims for the statutory prescribed period without interruption....***

19. In the case of Mtana Lewa –v- Kahindi Ngala Mwangandi- COA MALINDI (2005) eKLR it was held that:

***“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.”***

20. Aligning the above analysis to the facts of this case, it is clear that the plaintiff has been in occupation of the suit property for the period between the year 1978 to 1999 when the 1<sup>st</sup> Defendant registered the parcel in the name of the 2<sup>nd</sup> Defendant. It is not in dispute that the plaintiff’s sons are still in occupation of the suit land to date. The presence of the store/unoccupied hut and the continuous farming by the plaintiff and his sons is a clear indication that plaintiff is the one who has been in control of the land.

21. The court now has to determine whether such occupation has been continuous, without interruption, without permission and hostile to the title of the registered owner.

22. In James Maina Kinya v Gerald Kwendaka [2018] eKLR, the court was of the opinion that time continues to run despite the filing of suit when it held as follows;

***“Did the filing of HCCC No. 30 of 1988 stop time from running? Once time begins to run for purposes of limitation it will continue to do so unless the true owner brings an action to recover the disputed land. Re Berson (1914) 2 Ch. 68 page 76. The action must be brought to recover the disputed land. The true owner must seek to retake possession or specifically raise the claimant’s right to possession. In this case the suit filed by the Plaintiff in 1988 was for specific performance asserting title pursuant to a contract of sale. It was met by the Defendant denying the sale of the property to the Plaintiff. It is trite law that time stops running the moment a suit is filed by the title owner. In this case time would have stopped running had the defendant filed an independent suit or a counterclaim in the suit of the Plaintiff. He did not do so. In the circumstances therefore, I find that time was running continuously notwithstanding the suit of the plaintiff.”***

23. In the present case all parties are in agreement that a suit was filed by plaintiff in Meru CMCC NO. 66 of 1999. It is not the owner of the title to land who was asserting his rights to the land. It is the plaintiff who wanted the transfer of the land to be affected in his favour. There is no evidence or claim that 1<sup>st</sup> defendant ever filed a counterclaim in respect of that suit. Despite it being dismissed the 1<sup>st</sup> Defendant did not file any independent suit against the plaintiff. It follows then that the said suit did not interrupt the time in so far as plaintiff’s claim of adverse possession is concerned.

24. The 1<sup>st</sup> defendant in his testimony has claimed that plaintiff was at some point chased away from the suit land, However, in his Response to the Originating Summons, the 1<sup>st</sup> defendant stated that he asked the plaintiff to vacate the land in 1997 but does not say whether this request was adhered to. As for the 2<sup>nd</sup> defendant, in paragraph 6 of his replying affidavit, he avers that ***“on my part, I have never either verbally or in writing threatened to evict the plaintiff..... the plaintiff has never been chased away from the suit premises”***. I therefore find that there is no evidence to show that the initial plaintiff or his children were ever evicted from the suit premises.

25. Was the occupation of the suit land by the plaintiff a permissive one? The dispute as to whether or not the plaintiff breached the contract and as a result of which the 1<sup>st</sup> Defendant sold the same to the 2<sup>nd</sup> Defendant was not ascertained. However, it is not disputed that the plaintiff and the 1<sup>st</sup> defendant had agreed on the sale of the suit land way back in 1978. It can therefore be presumed that the entry of the plaintiff onto the suit land was with the permission of the 1<sup>st</sup> defendant as per their agreement. However, the transfer was not effected. And there is no evidence to indicate that the parties obtained consent from the land control board. The land sale contract was therefore breached and or frustrated by the parties as they failed to obtain the relevant consent from the land control board and to execute the transfer. The breach can be computed from the lapse of six months from the time the agreement was made which was 22.10.1978, I can therefore safely compute the time of breach as 22.4.1979. It follows that thereafter, plaintiff’s occupation of the suit land was not with the permission of 1<sup>st</sup> defendant. Using this computation, it means that plaintiff had been in occupation of the land for a period of 20 years by the time he filed the suit.

26. In the case of Samuel Miki Waweru vs. Jane Njeri Richu Court of Appeal no. 122 of 2001 Nairobi, it was held that;

***“In our view, where a purchaser or lessee of land in a controlled transaction is permitted to be in possession of the and by the vendor, or lessor pending completion, and the transaction thereafter becomes void under section 6(1) of the land control Act, for lack of consent of the land control board , such permission is terminated by the operation of the law and the continued possession , if not illegal, becomes adverse from the time the transaction becomes void”.***

27. Time can also be computed from the time of payment of the last instalment. See Leonola Nerima Karani vs. William Wanyama Ndege Court of Appeal Kisumu, Civil Appeal no 142 of 2007. The book produced by the plaintiff on 3.4.2003 has a page capturing the total payment of Ksh 21,777 plus Ksh 250. The date thereof is indicated as **22.6.1980**. Thus by year 1999 when this suit was filed, 19 years had

gone by.

28. The fact that the plaintiff had even lodged a caution on the suit land is a clear indication of the adverse nature of the occupation of the suit land by the plaintiff.

29. From the records presented by the plaintiff, it is clear that the caution on the suit land was lifted, paving the way for the transfer of the suit land to the 2<sup>nd</sup> defendant. This suit was instituted immediately thereafter. The question is whether the plaintiff's interests supersedes those of the 2<sup>nd</sup> Defendant? At the time the 2<sup>nd</sup> defendant was purchasing the property, he has admitted that the plaintiff was still in possession of the same. There is no indication that the 1st defendant moved to lawfully evict the plaintiff before the purchase of the land by the 2<sup>nd</sup> Defendant. It can therefore be presumed that the 2<sup>nd</sup> Defendant knew the pre-existing rights and interest of the plaintiff during the purchase.

30. Section 28 (h) of the Land Registration Act provides that;

***“Rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription”, are overriding interests”.*** It follows that the rights and interest of the plaintiff supersedes those of the 2<sup>nd</sup> Defendant.

31. For the reasons advanced above, the Plaintiff's claim for adverse possession succeeds as prayed. I proceed to grant orders as follows:

**(1) It is hereby declared that plaintiff has become entitled to own land parcel no. ABOGETA/L-KIRINGA/323 by way of adverse possession.**

**(2) The Land Registrar is hereby directed to effect the transfer of the land no. ABOGETA/L-KIRINGA/323 from the name of FREDRICK MUTWIRI MBATAU to be registered in the name of GEORGE MIRITI MWARANIA in trust for the estate of M'Mwarania Kaburuki.**

**(3) The Deputy Registrar of this court is hereby authorised to sign the requisite documents to give effect to the implementation of this Judgment.**

**(4) Each party to bear their own costs of the suit.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 13<sup>TH</sup> DAY OF NOVEMBER, 2019 IN THE PRESENCE OF:-**

C/A: Kananu

Kirimi holding brief for Gikunda for plaintiff

Mburugu for 1<sup>st</sup> defendant

Mburugu holding brief for Ruthugua for 2<sup>nd</sup> defendant

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**