REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANGA

ELC NO. 159 OF 2017(OS)

JAMES KIHIU NGANGA.....1ST APPLICANT

PETER GICHUHI NGANGA.....2ND APPLICANT

VERSUS

ESTHER NJERI NGAHU.....1ST RESPONDENT

JAMES GATEMBU KIMANI.....2ND RESPONDENT

BERNARD THIGA.....3RD RESPONDENT

JUDGMENT

1. Nganga Ngahu and Miriam Wanjira (both dcd) were the parents of the Applicants. They had 4 sons; Joseph Ngahu Nganga (dcd), James Kihiu Nganga, Peter Gichuhi Nganga (Applicants herein) and Simon Githinji Nganga (dcd). The 1st Respondent is the wife of Ngahu Nganga.

2. Before me is an Originating Summons filed by the Applicants against the Respondents urging the court for orders that;

a. The Applicants have become entitled by adverse possession to all those pieces of lands comprised of title Nos LOC20/MIRIRA/2678, 2679 and 2680 (hereinafter called the suit land).

b. The Applicants be registered commonly as the proprietors of the said parcels of land in substitution of the Respondents.

c. The Chief Land Registrar enter the names of the Applicants in substitution of the title under the Land Registration Act, No 3 of 2012.

3. The summons are supported by the joint supporting affidavit of the Applicants where they deponed that the suit lands originally comprised land ref LOC20/MIRIRA/647 measuring 7.0 acres. That parcel LOC20/MIRIRA/647 was acquired by Nganga Ngahu in 1970 by way of purchase. During the demarcation and registration of the land in the area, whilst Nganga Ngahu was away in Tana River, he left his two sons Ngahu Nganga and Simon Githinji living on the said land. Ngahu Nganga, without his consent, caused himself to be registered as owner of parcel LOC20/MIRIRA/647 during demarcation and registration.

4. It is their case that Nganga Ngahu returned back with his two other sons (the Applicants) and wife in 1980 and settled on the land parcel LOC20/MIRIRA/647 albeit it having been registered in the name of Ngahu Nganga, his son. That Ngahu Nganga never settled on the land despite it having been registered in his name.

5. This prompted the senior Nganga (Nganga Ngahu) to file suit against his son for the recovery of the land in SRMCC No 41 of 1983. The court ruled that parcel LOC20/MIRIRA/647 be shared between the two; 3.0 acres to Ngahu Nganga and 4.0 acres in the name of Nganga Ngahu. Ngahu Nganga was to be refunded Kshs 21,650/- for developments on the 4.0 acre portion that went to Nganga Ngahu. Nganga Ngahu then removed the caution he had lodged on the original title to pave way for implementation of the said orders.

6. They aver that to the contrary, Ngahu Nganga proceeded to subdivide the land into 3 portions, sold two portions and retained one in his name, leaving his father without any land contrary to the orders of the court issued in SRMCC No 41 of 1983.

7. The resultant subdivisions are;

a. LOC 20/MIRIRA/2678- 2.0 acres sold and transferred to James Gatembu Kimani (2nd Respondent)

b. LOC 20/MIRIRA/2679- 1.0 acre sold and transferred to Daniel Bernard Thiga (3rd Respondent)

c. LOC 20/MIRIRA/1678- 4.0 acres registered in the Ngahu Nganga (husband of the 1st Respondent)

8. As fate would have it, they depone, Nganga Ngahu died in 1990 leaving his wife and two sons, the Applicants living on the land. His son Ngahu Nganga died in 1989. Ngahu Nganga settled his family in Mbeere where he was buried. The 2nd and 3rd Respondents though became registered owners of their portions in 1987 have never taken possession of the suit lands.

9. The Applicants have attached copies of official searches for the three suit lands dated the 12/2/15 indicating the registered owners.

10. The 1st Respondent opposed the Originating Summons through the Replying Affidavit filed on the 7/11/18, she deponed that she is the legal administrator of the estate of Ngahu Nganga, her husband. She avers that her husband purchased parcel LOC20/MIRIRA/647 from Kimuhiu Gitau and Daniel Ikuha. That at the adjudication of the land in 1970, her husband was registered as owner. That at that time, the Applicants lived in Ithanga, Masinga Dam. That she lived on the land with her family and one Simon Githenji Juma (dcd).

11. She deponed that the Applicants have not been in possession of the suit land, albeit trying to gain entry through force in 1990. That she has planted trees and nappier grass on the land.

12. She averred that her father in law Nganga Ngahu did not own LOC20/MIRIRA/647. That he owned some other land in Kamutungi at Kandara which he sold to Kimaru Ngahu. She contended that the Applicants' mother Miriam Wanjira, after the death of Nganga Ngahu, aggrieved with the decision of the court in SRMCC No 41 of 1983, filed an appeal at the High Court in Nairobi being CA No 39 of 1995 which was dismissed on the 26/2/02.

13. The 2nd Respondent in opposing the summons deponed that he bought the suit land parcel No LOC20/MIRIRA/2678 from Ngahu Nganga and took possession. That he has planted 50 mature trees which were cut by the Applicants in 2015.

14. The 3rd Respondent deponed that he is the owner of parcel No LOC20/MIRIRA/2679 absolutely having acquired it through purchase. He contended that the Applicants reside on the 4 acres belonging to the 1st Respondent, that is to say parcel No LOC20/MIRIRA/2680 and not the other two parcels. He referred to a letter dated the 29/6/1989 written by the Applicant's father to the then Attorney General stating that he and his sons resided on parcel LOC20/MIRIRA/2680. That he has planted trees on his land which he actively utilizes.

15. He stated that though he had charged the land to Agricultural Finance Corporation (AFC), the loan has been fully repaid and was in the process of discharging the title. He annexed a copy of the discharge fees paid to AFC towards the discharge of the suit land.

16. Parties took directions to prosecute the Originating Summons by way of viva voce evidence thus at the trial the Plaintiff/Applicants led evidence through the 1st Applicant. He stated that he knows all the Respondents. He stated that the land was bought by his father and left it to his two brothers Joseph Ngahu Nganga and Simon Githinji and relocated to Kindaruma Land settlement scheme where they settled in 1970. On their return in 1980 they found that their elder brother Ngahu Nganga had registered himself as owner of the suit land to the exclusion of their father. His father lodged a caution on the land. He sued his son Ngahu in SRMCC No 41 of 1983 where the court determined that 4 acres be transferred to his father and Ngahu remains with 3 acres and a compensation of Kshs 21,560/- for his developments situate on the portion that went to his father.

17. He informed the court that his father removed the caution he had lodged to pave way for the execution of the court's decision. However, Ngahu sold 3 acres to the Respondents and registered himself as owner of 4 acres leaving his father landless. Aggrieved by the turn of events, his mother appealed but died before the case was determined. The appeal was dismissed in 2002 for want of prosecution.

18. He denied that his brother purchased the land at all.

19. In addition, he added that Ngahu Nganga relocated to Mbeere in Siakago in 1985 where he settled his family. That the 2nd and 3rd Respondents/Defendants have never taken possession of the suit land.

20. Further he informed the court that there are no boundaries on the suit land. That he and the Co- Plaintiff and their families occupy and control the whole of 7 acres.

21. That he and his Co- Applicant live on the suit land with their families since 1983 where they have built permanent houses. His brother Githinji died in 1988 and was buried on the land. That both his parents were also buried on the suit lands.

22. The 1st Respondent led evidence and stated that she lives in Siakago with her family. That Ngahu Nganga died in 1989. He stated that he got married to him in 1960 and lived at Kamutungi, Kandara. It was her evidence that her husband bought a 7-acre farm -parcel LOC20/MIRIRA/647 from Daniel Ikua. He sold a total of 3 acres to the 2nd and 3rd Respondents and remained with 4 acres. She stated that she and the other Respondents utilize their portions of the land where she has planted 20 grevilia trees. She asserted that the Plaintiffs live and farm on the land forcefully and have prevented anyone from entering the suit lands. That she has no house on the land and neither of her children have settled there. That upon the death of Nganga Ngahu, her mother in law Miriam lived on the land until her death. She was buried there as well as her father in law. She stated that she has never gone to the land because she does not want conflict with the Plaintiffs.

23. DW2- Mugo Ikua testified that he sold the suit lands to Ngahu Nganga measuring 7 acres. That he was also aware of the legal dispute over the land involving Ngahu Nganga and his father which ended up in court. That he was aware that the Plaintiffs mother appealed but the appeal was dismissed after her death. That the suit land was not family or ancestral land.

24. DW3- James Gatembu Kimani stated that he bought the land parcel No LOC20/MIRIRA/2678 measuring 2 acres in 1987 from Ngahu Nganga and got his title upon completion of subdivision of 6 LOC20/MIRIRA/647. Thereafter he planted 50 grivellia trees and subsistence crops which were destroyed every time it matured. That in 1990 he attempted to built a house on the portion of the land but was repulsed by the Plaintiffs. That in 1997 the 1st Plaintiff cut down his trees. That every time he visited the land he would be prevented from entry by the Plaintiffs. That the boundary fixed by the surveyor was destroyed by the Plaintiffs. He insisted that the Plaintiffs live and utilize parcel LOC20/MIRIRA/2680 and not his parcel of land which is LOC20/MIRIRA/2678.

25. He stated that when he bought the land in 1987 the seller, his parents and the Plaintiffs all lived on the land. That currently the 2 nd Plaintiff is cultivating his portion of the land.

26. DW4- Bernard Thiga stated that he bought the parcel LOC20/MIRIRA/ 2679 from Ngahu Nganga in 1987. That he took a loan from AFC in 1987 which he has fully repaid and the charge is being discharged. He stated that the Plaintiffs have not constructed any house on the suit land but live on the parcel 1680 which is their family land. He admitted that there are no boundaries demarcating the three parcels of land as they were destroyed by the Plaintiffs. He informed the court that he does not live on the suit land but lives in Nyahururu where he resides with is family on land that he purchased in 1987. Interalia, he informed the court that if the Plaintiffs are utilizing the land they are doing so without his consent and authority. That he does not know who cut his trees.

27. The parties elected to file written submissions which I have read and considered.

28. The key issues for determination;

a. Whether the claim of the Plaintiffs against the 1st Defendant is competent.

b. Whether the Plaintiffs have occupied the suit lands for over 12 years?

c. Where their possession is adverse to the interest of the 2nd and 3rd Defendants

d. Who meets the costs of the suit?

29. The Plaintiffs have sued the 1st Defendant as the legal representatives of the estate of Ngahu Nganga. In their joint supporting affidavit at para13, they lament that the 1st Defendant has refused to take out letters of grant of administration for the estate of Ngahu Nganga, deceased and the registered owner of the parcel LOC20/MIRIRA/2680. In her Replying Affidavit the 1st Defendant admits that she is the legal representative of the estate of Ngahu Nganga. In the written submissions however she appears to change tune to state that she is not suited because she lacks the locus standi to be suited as such.

30. In the case of **Virginia Edith Wamboi Otieno vs. Joash Ochieng Ougo & Another CA 31 of 1987** where the Court of Appeal held thus:-

> "But an administrator is not entitled to bring an action as ….. before he has taken out letters of administration. If he does the action is incompetent from the date of inception."

31. I have perused the record and there are no letters of grant of administration in respect to the estate of Ngahu Nganga. The issue of the said grant is therefore marred in contentions from both sides. It is the courts view that the grant of letters of administration ought to have been taken out to equip the administrator with the legal standing to sue and or be sued in the case. To the extent that the said documents are missing, it is the finding of the court that the 1st Defendant is therefore not suited and the claim against her is hereby struck out.

32. The doctrine of adverse possession is one of the ways of land acquisition in Kenya. I will highlight some of the statutory provisions that underpin the doctrine as set out in the Limitations of Actions Act Cap 22 and the Registration of Land Act No 6 of 2012;

Section 7 states that

> "An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person"

Further in Section 13

> "(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
>
> (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse

possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land".

Section 16 provides as follows;

"For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration."

Section 17 goes on to state;

"Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished".

Finally, Section 38(1) and (2) states;

"(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

33. The combined effect of these sections is to extinguish the title of the proprietor of the land in favour of the adverse possessor at the expiry of 12 years of occupation of the adverse possession on the suit land.

34. Section 28(h) of the Land Registration Act, 2012 recognizes overriding interests on land, some of which are rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription. Under Section 7 of the Land Act, 2012 prescription is one of the ways of acquisition of land.

35. In **Kasuve Vs Mwaani Investments Limited & 4 others 1 KLR 184**, the Court of Appeal restated what a Plaintiff in a claim for adverse possession has to prove;

"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 without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition".

36. The key test is that the owner of the land must have been dispossessed or have they discontinued possession of the property. 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."

37. In the case of **Joseph Gahumi Kiritu Vs Lawrence Munyambu Kabura CA No 20 OF 1993** Justice Kwach JA (as he then was) stated as follows;

"The passage from Chesire's Modern Law of Real Property to which Porter JA made reference in **Githu Vs Ndeete** is important and deserves to be read in full. …….Time which has begun running under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that merely formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. ……. He must either make a peaceable and effective entry, or sue for recovery of the land." (emphasis is mine).

38. In this case the Plaintiffs have led unchallenged evidence that they relocated to the suit lands in 1980 and lived there as a family. The father sued the son in court in 1983 which case proceeded to the court of appeal and was later dismissed in 2002. It therefore follows that time did not start running from 1983 to 2002 when the case was still subsisting in court. Time however started running from 2002 till the time the suit was filed. This suit was filed in 2015, after a period of 13 years. The Plaintiffs have been in continuous and uninterrupted occupation of the land for the relevant period of 12 years permitted by law.

39. The Defendants have all admitted that the Plaintiffs have been in the suit land concentrating their residence on parcel LOC20/MIRIRA/2680 but generally farming and in exclusive control of the other two parcels LOC20/MIRIRA/2678 and 2679. Both registered owners led evidence that they have never entered the suit lands. That some attempts made in 1990 were repulsed by the Plaintiffs. They led evidence that there are no physical boundaries on the suit lands and therefore the Plaintiffs are in exclusive control of the suit lands. The 2nd and 3rd Defendants have stated in evidence that other than a few trees on the land some of which were cut by the Plaintiffs and

unknown persons, they have never constructed houses or farmed on the land.

40. It is the finding of the court that the Plaintiffs have exclusive control and occupation of the suit lands to the exclusion of the 2nd and 3rd Defendants.

41. There is no discernible action on the part of the Defendants to stop time from running. From the evidence time started running in 2002 and by 2015 by which time, the Plaintiff had been in occupation of the suit land for a period of 12 years and in accordance with section 7 of the Limitations of Actions Act, the right of adverse possession had accrued and vested in the Applicants.

42. Chanan Singh J, in **Jandu v Kirpal [1975] E A 225, at p 237** and Simpson, J (as he then was), in **Wainaina v Murai and others [1976] Kenya L R 227 at p 231** were unanimous that the paper owner must have knowledge of the occupation of the adverse possessor and that he has been dispossessed. In this case the 2nd and 3rd Defendants have had knowledge of the open uninterrupted and exclusive possession of the suit land by the Applicants/Plaintiffs.

43. The 3rd Defendant in his replying affidavit deponed that he charged the suit land to AFC in 1987 but he has repaid the loan in full and he is in the process of discharging the same. Under para 17 of the said affidavit he annexed a copy of the discharge fee payment to enable AFC to discharge the land. In his submissions he appears to make a turnaround and purport to state that the suit land is charged to AFC and faulted the Applicants for not enjoining the lender. The court takes this to be an afterthought. The court takes his evidence under oath to be cogent, that is to say that the suit land is no longer encumbered.

44. The totality of the evidence above is that the Plaintiffs have proved their claims as against the 2nd and 3rd Defendants. I therefore make orders as follows;

a. The Plaintiffs' claim against the 1st Defendant is struck out.

b. The Plaintiffs have become entitled by adverse possession to all those pieces of lands comprised of title LOC 20/MIRIRA/2678 and LOC 20/MIRIRA/2679 by way of adverse possession

c. The Plaintiffs shall be registered commonly as proprietors of the LOC 20/MIRIRA/2678 and LOC 20/MIRIRA/2679.

d. The 2nd and 3rd Defendants are ordered to execute all the documents necessary to effectuate the said orders in default the Deputy Registrar of the court is mandated to do so.

e. To meet the ends of justice, the Land Registrar is mandated to dispense with the production of the original title deeds in respect to LOC 20/MIRIRA/2678 and LOC 20/MIRIRA/2679 in default of the production by the said 2nd and 3rd Defendants.

f. The Plaintiff shall have costs of the suit against the 2nd and 3rd Defendants.

g. I make no orders as to costs in respect to the 1st Defendant.

36. It is so ordered.

DATED DELIVERED & SIGNED AT MURANG'A THIS 7TH DAY OF NOVEMBER 2019.

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of;

Kamiro for the 1st & 2nd Plaintiffs

Chege HB for Mwaura for the 1st Defendant

2nd & 3rd Defendants – Present in person. – Advocate Absent.

Ms Irene and Ms Njeri, Court Assistants