



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT EMBU**  
**ELC CASE NO. 112 OF 2015**  
**(FORMERLY ELC KERUGOYA NO. 42 OF 2013)**

SILAS MUGO NJOKA (Suing through next friend)

ANN MBUYA MUGO.....PLAINTIFF

VERSUS

RUTH WAMBUI KAGIRI.....1<sup>ST</sup> DEFENDANT

SAMUEL NTHIGA.....2<sup>ND</sup> DEFENDANT

**JUDGEMENT**

1. By an originating summons dated 19<sup>th</sup> January 2010, amended on 10<sup>th</sup> August 2010 and further amended on 28<sup>th</sup> January 2011 brought under **Section 38 of the Limitation of Actions Act (Cap. 22) and Order 37 of the Civil Procedure Rules**, the Plaintiff sought the following reliefs:

*a. That the Plaintiff/Applicant be declared to have become entitled by adverse possession of over 12 years to all that parcel of land registered under Act Cap 300 Laws of Kenya and comprised in the Title Number Mbeere/Mbita/ 2008 now Mbeere/Mbita/4158 and Mbeere/Mbita/4159 and situated at Mbeere District Mbita location in the Republic of Kenya.*

*b. That the said Plaintiff/Applicant be registered as the sole proprietor of the said land parcel Mbeere/Mbita/2008 now Mbeere/Mbita/4158 and Mbeere/Mbita/4159 in place of the Defendant/Respondent.*

*c. That the Land Registrar Mbeere District do register the Plaintiff/Applicant the proprietor of Title Number Mbeere/Mbita/ 2008 now Mbeere/Mbita/4158 and Mbeere/Mbita/4159.*

*d. That the Defendant/Respondent be ordered to pay costs of this suit to the Plaintiff/Applicant.*

*e. Such further of other orders as many be made as may be just.*

2. The said amended originating summons was supported by a further affidavit sworn by Ann Mbuya Mugo on 1<sup>st</sup> February 2011, a further affidavit sworn on 10<sup>th</sup> August 2010 and a supporting affidavit sworn on 19<sup>th</sup> January 2010 which were all annexed to the further affidavit of 1<sup>st</sup> February 2011. The said affidavits stated that the Plaintiff's husband had bought *Title No. Mbeere/Mbita/2008* (hereafter *Parcel 2008*) in 1989 from the 2<sup>nd</sup> Defendant, Samuel Nthiga. It was further contended that the Plaintiff immediately took possession of Parcel 2008, built houses thereon and undertook various other developments thereon openly and peacefully for over 20 years.

3. The 1<sup>st</sup> Defendant filed a replying affidavit sworn on 13<sup>th</sup> November 2017 in answer to the further amended originating summons. She contended that she was the registered proprietor of parcel No. 2008 and that there was previous litigation over the same with the Plaintiff's late husband. She further denied that her title thereto had been extinguished or that the Plaintiff had acquired the same through adverse possession.

4. At the trial hereof, the Plaintiff testified on her own behalf and called 3 more witnesses in support of her case. It was her case that her late husband, Silas Mugo Njoka (Silas) had bought parcel No. 2008 from one Samuel Nthiga, Macici (Samuel) in 1989 at an agreed consideration of 16,000/-. It was her case that upon taking possession Silas developed it by constructing houses, cultivating crops, and sinking a borehole. It was her case that her family enjoyed peaceful occupation of the land until 2009 when the 1<sup>st</sup> Defendant issued them with an eviction notice.

5. It was the Plaintiff's case that parcel No. 2008 was later on sub-divided by the 1<sup>st</sup> Defendant into *Title Nos. Mbeere/Mbita/4158 and 4159* (hereafter the *suit properties*). She produced copies of certificates of official search for the suit properties as exhibits.

6. By the time the suit came up for trial the 2<sup>nd</sup> Defendant (Samuel) was already deceased but he was not substituted by his personal representative. The Plaintiff's advocate informed the court that he did not wish to pursue the case against him.

7. Before the 1<sup>st</sup> Defendant could testify, the Plaintiff applied to re-open her case and tender additional oral and documentary evidence in support of her claim. When the court allowed the Plaintiff's said application, the Plaintiff presented an entirely different case from the one she had pleaded in her originating summons. She produced a copy of the rough book of the adjudication register which indicated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant were allocated parcel 2008. She disputed the correctness of the said entry and the genuineness of the 1<sup>st</sup> Defendant's national identity card (I.D.) card number entered therein. She produced copies of letters and documents from the Directorate of Criminal Investigation (DCI) and the National Registration Bureau which cast doubt on the authenticity of the 1<sup>st</sup> Defendant's I.D. card number as shown in the adjudication record.

8. The 1<sup>st</sup> Defendant did not testify at the trial hereof. Instead, she called one, Peter Njiru Mugeki who testified on her behalf as DW1. He adopted his witness statement dated 5<sup>th</sup> November 2018. He testified that the 1<sup>st</sup> Defendant was the first registered proprietor of parcel 2008 which was first registered in 2010. It was later on sub-divided into the suit properties. He conceded that the Plaintiff was in possession and that she was still in possession as far back as 2009.

9. Upon conclusion of the hearing, the Plaintiff was granted 45 days to file her written submissions whereas the Defendant was given 45 days upon the lapse of the Plaintiff's period to file hers. The record shows that the Plaintiff's submissions were filed on 2<sup>nd</sup> July 2019 whereas the 1<sup>st</sup> Defendant's submissions were filed on 27<sup>th</sup> August 2019.

10. The court has considered the pleadings, affidavits and the oral and documentary evidence on record in this matter. The court is of the opinion that the main question for determination is whether or not the Plaintiff has demonstrated her claim for adverse possession.

11. The elements of adverse possession were restated in the following cases: **Wambugu Vs Njuguna [1983] KLR 172; Githu Vs Ndeete [1984] KLR 776; Kasuve Vs Mwaani Investments Ltd & 4 Others [2004] 1KLR 184 and Kimani Ruchine Vs Swift Rutherfords & Co Ltd [1980] KLR 10.**

12. In the case of **Kasuve Vs Mwaani Investment Ltd** (supra) the elements of adverse possession were summarized as follows;

**“...and 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 and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, Wanja Vs Sakwa No. 2 [1984] KLR 284. A title by adverse possession can be acquired under the Limitation of Actions Act for part of the land...”**

13. The court has considered the evidence on record and the respective written submissions of the parties. There is no doubt that the Plaintiff and her family have been in possession and occupation of the suit properties for a very long time. The court believes the evidence of the Plaintiff and her witness that she has been in possession at least since 1989. The 1<sup>st</sup> Defendant did not disprove the Plaintiff's possession through her sole witness. If anything, DW1 confirmed that the Plaintiff was in possession as far back as 2009 when he came to know of parcel 2008.

14. There is also no doubt that the Plaintiff's possession was adverse to the title of the true owner of the land. The material on record indicates that the Plaintiff's family entered the suit properties without the consent or permission of the 1<sup>st</sup> Defendant. In fact, it was the 2<sup>nd</sup> Defendant who put the Plaintiff's family into possession pursuant to a sale agreement dated 1989.

15. Although the Plaintiff's family has been in possession since 1989, it is necessary to determine the period from which the limitation period started to run and whether the Plaintiff has satisfied the minimum statutory period of 12 years. It has been held that time for purposes of limitation of actions does not run unless the land in question has a registered owner.

16. In the case of **Wilson Kazungu Katana & 101 Others Vs Salim Abdalla Bakshwein & Another [2015] eKLR** it was held, *inter alia*, that;

**“...from all these provisions, what amounts to possession? First, the parcel of land must be registered in the name of a person other than the Applicant, the Applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the land owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner...”**

17. The Plaintiff did not annex a certified copy of the extract of title or the land register to the originating summons. She did not produce any such copies at the trial hereof. She only produced copies of certificates of official search which did not bear the history of either parcel 2008 or the suit properties.

18. The court has examined the copy of the land register for parcel 2008 which was tendered on behalf of the 1<sup>st</sup> Defendant. It indicates that the register was opened on 14<sup>th</sup> January 2000 (Edition No. 1) whereby the 1<sup>st</sup> Defendant's name was entered as the first registered proprietor. The court is thus of the view that time for purposes of this suit can only be computed as from 14<sup>th</sup> January 2000 and not earlier. The material on record shows that the original originating summons dated 19<sup>th</sup> January 2010 was filed on 20<sup>th</sup> January 2010. The period

between 14<sup>th</sup> January 2000 and 20<sup>th</sup> January 2010 is about 10 years and 6 days which falls short of the statutory minimum of 12 years. In the event, the Plaintiff has failed to prove one of key elements of adverse possession.

19. At the trial hereof, the Plaintiff put considerable emphasis on the fact that parcel 2008 was bought for valuable consideration. She called 3 witnesses including the son of Samuel to confirm that the sale took place. The court is of the opinion that demonstration of a purchase is not one of the elements of adverse possession in law. A claimant does not have to demonstrate a purchase or payment of valuable consideration in order to succeed in a claim for adverse possession. A suit for adverse possession is quite distinct from a claim for specific performance of an agreement for sale.

20. The Plaintiff also put some emphasis on the fact that the authenticity of 1<sup>st</sup> Defendant's national I.D. card was under investigation by the Directorate of Criminal Investigation (DCI). She tendered some documentary evidence tending to show that the I.D. card number shown in the adjudication register was fraudulent. The court is of the view that such evidence of fraud or irregularity in the acquisition of title is not admissible in a claim for adverse possession. A claimant for adverse possession cannot properly challenge the validity of the title of the registered owner.

21. As was held in the case of **Wasui Vs Musumba [2002] 1KLR 396** the only legitimate question for determination in such an originating summons is the issue of adverse possession. In the said case, Ringera J (as he then was) held as follows;

**“Lastly, I desire to say that the Applicant’s claim that he may have an overriding interest over the Respondent’s land under the provisions of the Registered Land Act cannot be a matter for adjudication in this originating summons as the only relief sought and indeed the only relief which could be sought in an originating summons of this nature was the registration of the Applicant as proprietor of the suit land by virtue of adverse possession. I will, therefore, express no opinion on the merits or otherwise of that claim.”**

22. The upshot of the foregoing is that the court is not satisfied that the Plaintiff has proved her claim for adverse possession despite her longevity of possession. The court finds and holds that she has failed to meet the minimum statutory requirement of possession for at least 12 years from the date of registration of parcel 2008. Accordingly, the Plaintiff's further amended originating summons of 28<sup>th</sup> January 2011 is hereby dismissed with no order as to costs.

23. It is so decided.

**JUDGEMENT DATED, SIGNED and DELIVERED at EMBU this 7<sup>TH</sup> DAY OF NOVEMBER, 2019.**

In the presence of Ms. Nzekele holding brief for Mr. Macharia Muraguri for the Plaintiff and Mr. Kimanzi holding brief for Mr. Mogusu for the Defendants.

Court Assistant Mr. Muinde

**Y.M. ANGIMA**

**JUDGE**

**07.11.19**