



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MURANG'A**

**ELC NO.13 OF 2019(OS)**

**KIMANTHI KILONZO - PLAINTIFF/APPLICANT**

**VS**

**SUSAN WANGARI KIIRU - 1<sup>ST</sup> DEFENDANT/RESPONDENT**

**JUDGMENT**

By way of Originating Summons the Plaintiff sued the Defendant seeking the orders as follows;

- a. The Defendant/Respondent's title to all that parcel of land known as KAKUZI/KIRIMIRI BLOCK 8/170 measuring approximately 0.8040 Hectares be declared to have been extinguished through adverse possession of the Plaintiff/Applicant.
- b. The Plaintiff/Applicant be declared and registered as proprietor of all that parcel of land known KAKUZI/KIRIMIRI BLOCK 8/170 having become entitled to it by way of adverse possession for over twelve (12) years.
- c. The Land Registrar Thika be ordered to transfer the said land comprised of land title KAKUZI/KIRIMIRI BLOCK 8/170 to the Plaintiff/Applicant.
- d. The Deputy Registrar to execute the necessary documents to effect the transfer of all that parcel of land known as KAKUZI/KIRIMIRI BLOCK 8/170 to the Plaintiff/Applicant as the rightful proprietor on behalf of the Defendant/Respondent and production of the original title be dispensed with.
- e. Costs of this application be provided for.

2. The summons are supported by the affidavit of the Plaintiff where she states that the Defendant is the registered proprietor of the suit land; the Plaintiff has been in possession of the suit land since 1983 to date exclusively as of right openly and continuously and without any interruption from the Defendant for over a period of 12 years; the Plaintiff has even buried his kin on the suit land.

3. The Defendant was served vide substituted services however she did not enter any appearance and or filed a defence. The case of the Plaintiff against the Defendant is therefore undefended.

4. At the hearing the Plaintiff testified and relied on his supporting affidavit dated the 29/4/19 and the list of documents annexed thereto. He stated that he entered the suit land in 1983 upon allocation of the same by Muthithi Coop Society Limited where he was a member vide share certificate No. 529 dated the 1/9/1983. He also produced the presidential commissions (large scale farms in Makuyu, Muranga) list of allottees of the members where he is listed as allottee for plot No 170.

5. He added that upon taking possession of the suit land he settled with his family, raised his 5 children, carried out farming of subsistence crops, mangos, avocados, bananas and produced a picture which shows the crops thereon on the suit land. That in total he has been in uninterrupted occupation and possession of the land for a period of 36 years without the consent and or interruption of the Defendant.

6. As fate would have it, he buried his son Kitwa Kimanthi on the suit land in 2014 and the Defendant did not raise any objection.

7. He explained that he lacked money to process the title immediately following allocation of the suit land and in 2017 when he visited the land Registry, he discovered upon obtaining a search of the title that the Defendant had been registered as owner of the suit land in 1989. The green card further revealed that his name had been registered on the title on the 5/5/89 but cancelled and replaced with that of the Defendant on the same day. He produced a copy of the green card in support.

8. He stated that he does not know the Defendant and she has never come to the suit land to remove him or interfere with his peaceful possession of the suit land. He stated that according to the records at the Muthithi Coop Society he is listed as the owner of the suit land.
9. He informed the Court that he filed an earlier case ELC 398/17 which case was based on fraud but it was dismissed for want of proof.
10. The Plaintiff filed written submissions which I have read and considered.
11. The key issue is whether the suit is resjudicata in view of the disclosed suit ELC 398/17 and secondly whether the Plaintiff has established title by way of adverse possession.
12. In respect to the 1<sup>st</sup> issue, section 7 of the Civil Procedure Act states as follows;

“No Court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a Court of competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

13. In order to decide the question whether a subsequent proceeding is barred by resjudicata it is necessary to examine the question in reference to;
- a. Matters directly and substantially in issue in the former suit.
  - b. Whether the parties are the same or parties under whom they are or any of them claim
  - c. Litigating under the same title
  - d. Competence of the Court that handled the previous cases.
  - e. Matter has been heard and finally decided.

14. In the previous case ELC 398/17 the parties are the same and the subject matter is similar. However, the issues are different. The cause of action in the previous suit was fraud while the issue in this case is that of adverse possession. I have reviewed the judgment and am satisfied at no time did the Court determine the cause of action relating to adverse possession.

15. In the end I have come to conclusion that the suit is not resjudicata and I shall proceed to determine it on its merits.

16. 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.

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.

17. 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.

18. In the case of **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”.

19. 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.”

20. The Plaintiff led evidence that he entered the suit land in 1983 and settled thereon. That the entry was not with the permission of the Defendant. Indeed, his evidence is that the Defendant has not sought to dispossess him of the suit land and neither has he relinquished possession since 1993. The activities on the land is evidence of his animus possidendi that is to say the use of the land in an inconsistent manner with that of the paper owner, the Defendant.

21. Based on the evidence of the Plaintiff which the Court found to be cogent truthful and believable time can be said to have started running in 1989 when the Defendant became registered as owner of the suit land in which case 12 years expired in 2001. It is the firm finding of this Court that title to the suit land by way of adverse possession crystalized and vested in the name of the Plaintiff in the year 2001. The title of the Defendant therefore became extinguished by operation of law.

22. In the end it is the conclusion of the Court that the claim of the Plaintiff is well founded and I hereby grant it.

23. The costs of the suit shall be met by the Plaintiff.

**24. It is so ordered.**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 19<sup>TH</sup> DAY OF DECEMBER, 2019.**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Ms Awour HB for Maina for the Plaintiff

Defendant: Absent

Irene and Njeri, Court Assistants