



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL CASE NO. 717 OF 2005 (OS)**

**IN THE MATTER OF LAND CHANIA/NGORONGO/11**

**AND**

**IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT (CAP 22 LAWS OF KENYA)**

**BETWEEN**

**BENSON NDUNGU KARIUKI.....PLAINTIFF**

**VERSUS**

**KAMAU KEBENU.....1<sup>ST</sup> DEFENDANT**

**NGUGI KIBINU.....2<sup>ND</sup> DEFENDANT**

**IGAMBA KIBINU.....3<sup>RD</sup> DEFENDANT**

**MUIGAI KAMAU.....4<sup>TH</sup> DEFENDANT**

**JOSEPH KARANJA KARIUKI.....5<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

1. This matter was commenced by way of originating summons dated 13<sup>th</sup> June 2005 and amended on 15<sup>th</sup> October 2009. The same is brought under section 38 of the Limitation of Action Act. The plaintiff claims to have been in possession and occupation of three (3) acre out of land parcel number Chania/Ngorongo/II. The defendants are jointly registered as proprietors of the said land.

2. The plaintiff prays for orders as that the plaintiff prays for orders:

*(a) That the plaintiff be declared to have become entitled to (3) acres out of land parcel number Chania/Ngorongo/11 by having had adverse possession of the said land for over twelve (12) years.*

*(b) That the defendant title to the said land be declared extinguished and/or invalid, null and void and the plaintiff be registered as proprietor of the three (3) acres.*

*(c) That the defendant execute the necessary documents to effect transfer of the three (3) acres.*

*(d) That costs be provided by the defendants.*

3. The suits supported by the affidavit of Benson Ndung'u Kariuki. He has annexed a copy of extract of the title for Chania/Ngorongo/11. He deposed that Land Parcel Number Chania/Ngorongo/II measures approximately nine (9) acres and is registered in the names of the defendant following succession proceedings after the death of their father, Kibeni Mutuura. That he has been in exclusive, continuous open and without permission, possession and occupation of 3 acres out of Chania/Ngorongo/II Since the year 1972. He states that he has developed the 3 acres, planted coffee and buried his wife there on.

4. The defendants opposed the originating summons through an affidavit sworn by Kamau Kibenu on 5<sup>th</sup> July 2005. He deposed that the defendants became legal owners to the above suit property through succession cause number 425 of 1999. That the plaintiff cannot claim for adverse possession when the defendants have held the property for only five years. That there was a case before the Thika court being CMCC No. 492 of 2002 involving the plaintiffs brothers and father and the defendants herein over a boundary dispute.
5. The plaintiff has since passed on and was substituted by his son Eliud Mwangi Ndungu. PW1 Eliud Mwangi Ndungu told the court that that his family has lived on the suit property for a long time. That they have been doing farming and his late mother was buried thereon. He told the court that he was born on the land. That he has lived there with his three sisters and a brother. He also told the court they have planted coffee and mangoes on the said land.
6. PW2 Francis Peter Irengi told the court that Benson Ndungu Kariuki, the plaintiff was his brother. He also told the court that the suit premises were given to the plaintiff by their father in 1972. That he built and raised his family on that land. They have been on the land for about forty (40) years. PW2 stated that he lives on Plot No. 19. That he has been sued by the defendant in Thika court.
7. PW3 John Mucheru Ndungu also told the court that the late Benson Ndungu Kariuki lived on the land for more than 40 years. He and his wife were buried on the land.
8. DW1 Kamau Kabenu told the court that the land parcel number Chania/Ngorongo/11 belongs to Kamau Kabenu. He said he and his brother inherited the land from their father in 1957. He further stated that they had not been occupying the suit land but he was registered as the owner in the year 2000. He said the beacons were removed when he went to Nyandarua. He said the whole parcel is about nine (9) acres. He is using five and a half acres. The rest was grabbed by someone who removed the beacons when he was away in Nyandarua. He told the court that he filed a complaint at the Tribunal. The Tribunal granted him orders but PW2 refused to grant the surveyor access to place the beacons properly. He told the court the deceased Benson Ndungu Kariuki is a brother to PW2.
9. He admitted that the plaintiff was living in a portion of the suit property. Further that he knew the plaintiff buried his wife on the suit property and that the plaintiff was buried there while the case in Thika was pending. He told the court that plaintiff's children are occupying the said portion despite the court orders.
10. At the end of the trial the parties tendered written submission.
11. The plaintiff submissions are dated 22<sup>nd</sup> October 2018. The plaintiff submitted four issues for determination by the court. First whether the plaintiff has been in occupation and possession of three (3) acres out of land parcel number Chania/Ngorongo/11 since 1972. Secondly, whether the plaintiff's occupation of the suit property has been exclusive and continuous without interruption. Thirdly whether the defendants' title to the three (3) acres out of Land Parcel Number Chania/Ngorongo/11 has been extinguished. The plaintiff submitted that the title is not extinguished but held in trust for the plaintiff who is in adverse possession until he obtains a court order vesting the land to him. The plaintiff also relied on Section 38 of the Limitation of Actions Act.
12. The issue for determination is whether the plaintiff should be declared the owner of the 3 acres out of Chania/Ngorongo/11 by adverse possession. The plaintiff submitted that the witness testimonies were in line that their occupation had been peaceful, open, continuous and uninterrupted for more than 12 years. He also relied on the case of **Peter Omukatu Esilabi vs Zedekiah Ondele Omuhanjia [2018] eKLR; Titus Mutuku Kasuve vs Maawani Investment Ltd & Others Civil Appeal [2004] 1KLR 184.**
13. The defendant's submissions are dated 25<sup>th</sup> October 2018. The defendants' submitted that they became the legal owners of the suit property in the year 2000 after a confirmation of grant issued in succession cause No. 425 of 1999. They went to the Land Control Board with the intention of sub-dividing the land when they discovered it measured 5.371 acres on the ground and not 9 acres as in the register. This was as a result of the encroachment by the adjoining parcel Chania/Ngorongo/19 which was later subdivided into four parcels. This led to the boundary dispute in Thika CMCC No. 492 of 2002 between the plaintiff herein and the plaintiffs' brothers and father.
14. The defendants outlined one issue for determination, whether a claim for adverse possession has been established. They relied on the cases of **Wilson Kazungu Katana & 107 Others vs Salim Abdalla Bakshwein & Another [2015] eKLR** where the Court of Appeal relied on the cases of **Kasuve vs Maawani Investments Ltd & 4 Others [2004] eKLR; Benson Mukuwa Wachira vs Assumption Sisters of Nairobi Registered Trustees [2016] eKLR; Amos Weru Murigu vs Marata Wangari Kambi & Another Kakamega HCCC NO. 33 of 2002 (os).**
15. The defendants further submitted that the doctrine of adverse possession cannot be invoked against a bonafide owner or a beneficiary entitled to but who is not registered as a proprietor. That prior to the year 2000, they were not registered owners, the claim could not run against them since they did not have legal title.
16. Further that the moment they got their title to the suit land, they asserted their right by instituting legal proceedings in CMCC 492 of 2002 which rendered the plaintiff's claim impossible. They also relied on the case of **Wambui Gikwa vs Paul Kimani Muruba [2016] eKLR** where the Court of Appeal relied on the cases of **Kirutu vs Kabura Civil Appeal No. 20 of 1993 (unreported); Githu vs Ndeete [1984] KLR 776; Mbira vs Gachuhi [2002] 1EA 183; Wanyancha Gibiti & 3 Others vs Waigoge Nyahiri Sinda [2015] eKLR; Wakaria Mboi Njaramwe & Another vs Loice Kaguu Munge [2013]; Francis Gitonga Macharia vs Muiruri Waitthaka Civil Appeal No. 110 of 1997.**
17. I have considered the pleadings, the evidence on record and the written submissions tendered on behalf of the parties together with the authorities cited. The issues for determination are:-

*(i) Whether a claim for adverse possession has been established.*

(ii) *Whether the succession cause and subsequent reissuance of title over the suit property to the defendants affects the plaintiff's claim for adverse possession.*

(iii) *Whether the plaintiff should be declared the owner of three (3) acres out of land parcel numbers Chania/Ngorongo/11 by adverse possession.*

(iv) *Who should bear costs?*

18. I have considered the principles governing the claim for adverse possession;

(a) *That the plaintiff must have clear possession of the suit land.*

(b) *That the occupation of the land/property must be without the consent of the owner of the land/property.*

(c) *That the occupation must be uninterrupted for a continuous period of twelve (12) years.*

(d) *That the plaintiff must exhibit an extract copy of the title under litigation.*

In the case of **Peter Mberi Michuki vs Samuel Mugo Michuki**, Civil Appeal Number 22 of 2013, the Court of Appeal held that;

***“this court in Francis Gicharu Kariuki vs Peter Mairu, Civil Appeal No. 293 of 2002 approved the decision of the High court in the Case of Kimani Ruchire vs Swift Rutherfords Co Ltd [1980] eKLR where Kneller J held..... “the plaintiffs have to prove that they used this land which they claim as of right nec vi nec clam nec precario (no force, no secrecy, no persuasion) so the plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) or the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or endeavours to attempt it by way of recurrent consideration”.***

19. It is the plaintiff's case that he has been in occupation and possession of the three (3) Acres exclusive of right continuously without any interruption. That the possession has been peaceful, open, continuous and uninterrupted for more than twelve (12) years and without the defendants' consent.

20. The defendants on the other hand contend that they did not have the legal capacity to assert their right of ownership and eject the trespassers from the suit land. That time for adversity could not run against them until they acquired legal title. The defendants further submitted that adverse possession date from the granting of the certificate of title, for that is when a person holding title to land is prima facie entitled to take possession of the land and acquires the right to take action against any intruder to the land. It follows that by the time the present suit was filed by the plaintiff in the year 2005, the defendants had only been in possession for five years.

21. PW1 Eliud Mwarigi Ndungu when cross examined by the defence counsel said he was aware there was a case pending before Thika court. PW2, Francis Peter Irengi admitted on cross examination that his late brother (plaintiff) and Kabenu were not relatives. He also admitted his father owned plot No. 19 but used to farm on plot No. 11 which is the suit property. DW1 Kamau Kabenu told the court the case in Thika court being CMCC 492 of 2002 is still pending.

22. Section 38(1) of the Limitation of Actions Act provides that:-

***“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 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 in place of the person then registered as proprietor of the land”.***

23. In the case of **Benson Mukawa Wachira vs Assumption Sisters of Nairobi Registered Trustees [2016] eKLR**. The Court of Appeal cited with approval the case of **Amos Weru Murigi vs Marata Wangari Kambi & Another HCCC No. 33 of 2012 (OS) at Kakamega** where the court held as follows:-

***“Adverse possession can only arise where land is registered in the name of the person against to whom the claim for adverse possession is made for the simple reason that land must be occupied by a trespassing claimant adversely to the title of the owner (proprietor) against whom the claim is made under section 38 of the Limitation of Actions Act”***

The court went further to state;

***“Where a person is a beneficial owner or is a beneficiary entitled to, but is not registered as a proprietor of land registered under any of the statutes cited in section 37 of the Limitation of Actions Act, the doctrine of adverse possession cannot be invoked against him or her. A beneficial owner may not be in a position to effectively assert his or her title to the land and time cannot run against such beneficial owner”.***

The court went on to observe that:-

***“A beneficial owner would include a heir who would not have legal title before transfer is effected in his or her name and***

*consequently cannot assert her right to the land.”*

24. In the instant case the defendant became registered proprietors of the suit property in the year 2000. Immediately they asserted their title to the suit property by instituting legal proceedings in Civil Suit No. 492 of 2002 in a Thika court, Kamau Kabenu & 4 Others vs Francis Peter Irengi & 2 Others. The suit is still pending. The plaintiff instituted the present suit five years after the defendants were registered.

25. The plaintiff's possession cannot be said to have been quiet and uninterrupted given the pending suit at the Thika court. The claim for adverse possession could not start to run against the defendants in the years preceding 2000 as they had not acquired any proprietary interest in the suit property. I find that the plaintiff has not proved that he has been on the suit land for twelve (12) years from the time the same was registered in favour of the defendants.

26. In conclusion, I find that once the defendant became registered proprietors of the suit land they acquired absolute and indefeasible title that could not be challenged except in account of fraud or misrepresentation to which the defendants were shown to be a party to. I find that the plaintiff has failed to prove that the defendants had been dispossessed or had discontinued possession of the said land for a continuous period of twelve years so as to entitle him to that land by way of adverse possession.

27. The upshot of the matter is that the plaintiff has failed to prove his case against the defendant in a balance of probabilities. I find no merit in this suit and the same is dismissed with costs to the defendant.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 11<sup>th</sup> day of December 2019.**

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

No appearance for the plaintiff

No appearance for the Defendants

Kajuju - Court Assistant