



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 57 OF 2018

(Formerly Nairobi ELC No. 1123 of 2016)

IN THE MATTER OF THE PROPERTY KNOWN AS TITLE NUMBER NGONG/ NGONG/ 705

AND

**IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT, CHAPTER 22 OF THE LAWS OF KENYA
(ADVERSE POSSESSION)**

BETWEEN

PAUL KINYANJUI GICOBO

(as the administrator of the estate of Kinyanjui Roiyana).....PLAINTIFF

AND

MIRICHO GITHAIGA.....DEFENDANT

JUDGEMENT

By an Originating Summons dated the 14th September, 2016, the Plaintiff seeks the following orders as against the Defendant:

1. The Plaintiff be declared to have become entitled by adverse possession over twelve (12) years of all that piece or parcel of land known as Title Number Ngong/ Ngong/ 705 registered under the Registered Land Act, Chapter 300 of the Laws of Kenya (repealed) and situate in Kajiado County (the Suit Premises).
2. The Plaintiff be registered as the Sole Proprietor of the Suit Premises in the place of MIRICHO GITHAIGA, the Defendant in whose favour the Suit Premises is registered.
3. The Defendant by himself, his servants, his employees, his agents or his Advocates or any of them or any person, body or institution acting pursuant to his instructions individually or collectively or otherwise permanently be restrained from trespassing, alienating, entering, occupying, dealing and/or interfering in any way with the Plaintiff's quiet possession, use, occupation, development and proprietorship of the Suit Premises or any part thereof.
4. The Costs of this Application be provided for.

The Defendant though duly served via substituted service in the Daily Nation Newspaper on 9th November, 2016 failed to enter appearance nor file a Defence. The OS was set down for hearing on 7th May, 2019.

Evidence of the Plaintiff

PW1 Paul KINYANJUI GICHOBO who is the Administrator of the estate of Kinyanjui Roiyana stated that he has resided on land parcel number Ngong/ Ngong/ 705 hereinafter referred to as the 'suit land' for 42 years as he was born thereon in 1972. It was his testimony that no one had interfered with their occupation. He confirmed that his family had built on the suit land and they have buried their dead thereon and no one had opposed this. It was his testimony that he got married whilst residing on the suit property and have two children. Further, that they have cultivated crops thereon.

PW2 PETER MANKA KIDALE who is the Assistant Chief of Naserian Sub location Kiserian confirmed knowing the Plaintiff's family and

explained that some of the family members were his age mates. It was his testimony that the Plaintiff's family members have resided on the suit land and as an Administrator, no one has ever come to claim it nor oppose their stay thereon. He stated that he knew the Plaintiff's grandfather Kinyanjui Roiyana who died in 1987 and was buried on suit land. He further confirmed knowing Njenga Kinyanjui and Daniel Karanja, who were the first and last born respectively of Kinyanjui Roiyana, who both died in 1999 and were buried on suit land. It was his testimony that David Gichobo died in 2010 while Maria Wanja wife to Roiyana also died in 2007 and were all buried on suit land as he attended their burials. He testified that no one ever came forward to protest the burials nor claimed the suit land.

PW3 JANE NJAMBI KINYANJUI in her testimony stated that she is 60 years old, was married in 1963 and confirmed that all her children were born on suit land. Further, that she is the wife of David Gichobo Kinyanjui who is the second born son of Kinyanjui Roiyana. It was her testimony that all her husband's relatives who died were buried on suit land. She averred that ever since she got married, no one had claimed the suit land nor opposed their burying relatives thereon. Further, that they cultivate the said land and that is the place they call home.

PW4 WANJIKU KARANJA confirmed that she had resided on suit land for 35 years where she bore all her three children and brought them up therein. Further, that since she got married 14 members of the family have died and been buried on suit land but no one has ever objected to it.

PW5 SEMORA OLE KELEINE testified that the deceased KINYANJUI ROIYANA resided on the suit land for a long time before getting children. Further, that no one interfered with the deceased's possession and occupation of suit land for the time he knew him. It was his testimony that the deceased came to the suit land with the wife and seven children and they had been neighbours. He confirmed that no one interfered with the occupation of the deceased family on suit land nor objected to their burying their dead thereon. He reiterated that the people currently residing on the suit land do not have title documents. The Plaintiff annexed various documents including Letters of Administration Ad Litem; Sale Agreement between Kinyanjui Roiyana and Robert Mutonga; Certificate of Official Search for suit land; Photographs of graves and houses on suit land as his exhibits.

The Plaintiff closed his case and filed submissions.

Analysis and Determination

Upon consideration of the Pleadings filed herein, witness testimonies, exhibits and submissions, the only issue for determination is whether the Plaintiff is entitled to the orders sought in the Originating Summons dated the 14th September, 2016. The Plaintiff sought to be registered as owner of the suit land having acquired it through adverse possession and for the Defendant, his agents or servants to be permanently restrained from interfering with their occupation or possession of the same. The Plaintiff in his submissions reiterated his claim as stated in the Originating Summons.

It emerged in evidence that the Plaintiff instituted this suit on behalf of the estate of Kinyanjui Roiyana having acquired a Grant of Letters of Administration Ad Litem in respect to the deceased estate. In the supporting affidavit the Plaintiff averred that his grandfather purchased the suit land from one ROBERT MUTONGA and commenced residing thereon. He contended that they have peacefully, openly and conspicuously undertaken planting of trees and crops, construction of houses and keeping livestock on suit land. Further, that the Defendant has never occupied nor taken possession of the suit land. They only learnt that he was registered as owner of suit land when they undertook a Search which Certificate was annexed to the supporting affidavit. Plaintiff insists he is entitled to be registered as owner of suit land on behalf of estate of Kinyanjui Roiyana (deceased) in place of the Defendant who is its registered proprietor.

Adverse possession is governed by Section 38 (1) and (2) Limitation of the Actions Act which stipulates thus: ‘ **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.**’

In the case of **Wambugu V Njuguna (1983) KLR 173** the Court of Appeal articulated the requirements a party is expected to fulfill in a claim for adverse possession and held thus: ‘ **Adverse possession contemplates two concepts: Possession and discontinuance of Possession. It further held that the proper way of assessing proof of Adverse Possession would be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.**’

Further in the case of **Haro Yonda Juaje V Sadaka Dzenge Mbauro & Another (2014) eKLR** Judge Angote also outlined the ingredients of adverse possession and summarized them as thus: ‘ **a) That one has made physical entry on the land and is in actual possession of the land for the statutory period; b) That the said occupation is non permissive; c) That the occupant has the clear intention of excluding the owner from the property (*animus possidendi*) ; d) The acts done by the claimant are inconsistent with the owners enjoyment of the land for the purpose which he intended to use it; and e) that the possession was continuous, uninterrupted and unbroken for the statutory period.**’

For a party seeking a claim for adverse possession it has to prove that it has openly been in possession and occupation of the land in dispute and used it with no force or evasion.

In the instant case, the Plaintiff has presented evidence which was not controverted that together with his uncles, father, step mother and brothers, they have been in physical, actual, continuous, exclusive and uninterrupted occupation of the whole of the suit land measuring 4.05 hectares. All the Plaintiff's witnesses contended that they been physical occupation of the suit land, cultivated it, buried 14 members of the family thereon and there was no objection from any person. The local Chief who testified as PW2 confirmed that the Plaintiff's family members have resided on the suit land and no one had laid a claim nor opposed their stay thereon. PW2 confirmed knowing the Plaintiff's grandfather Kinyanjui Roiyana who died in 1987 and was buried on suit land. He further confirmed in his testimony that various members of the Plaintiff's family namely Njenga Kinyanjui, Daniel Karanja, Kinyanjui Roiyana, David Gichobo and Maria Wanja were all buried on suit land as he attended their burials. Further, no one lodged any complaint against them. In their testimony it was evident that they did not have

permission from the Defendant who had been the registered proprietor of the suit land from 13th September, 1971 to occupy it. I note the deceased together with the family have been in occupation of the suit land and it was clear from the testimony of the witnesses that they had actually excluded the registered owner who is the Defendant herein from the suit land as they continued to use it as their own and even buried their dead thereon without reference to him nor getting his permission. I opine that the said acts were indeed inconsistent with the Defendant's enjoyment of his land. The Plaintiff and his witnesses all confirmed that their possession of the suit land had been open, continuous, uninterrupted from the 1960s to date. On the question of when time began to run, I wish to make reference to the case of **Wines & Spirits Kenya Limited & another v George Mwachiru Mwango [2018] eKLR**, the Court of Appeal held that: 'The law is clear on when time starts running for purposes of adverse possession. The possession or occupation must be with the knowledge of the registered owner (See **Kimani Ruchine & Another vs. Swift Rutherford & Co. Ltd (1980) supra**. Time cannot therefore start running until the registered owner becomes aware that there is a trespasser occupying his/her property and does nothing to assert his rights on the property for at least 12 years. That being so, time in this case only started running in 2012. Immediately thereafter, the appellants had the respondent evicted from the suit premises. Even as at the time they filed their claim before the High Court, they had already been evicted. It was evident therefore that the respondent was not in actual possession for over 12 years as alleged.'

In relying on this Court of Appeal decision, I note that Defendant was registered as proprietor of the suit land from 13th September, 1971 and title deed issued to that effect. PW3 in her testimony stated that in 1963 when she got married to David Gichobo the father to the Plaintiff and second born child to Kinyanjui Roiyana, she found them residing on the suit land. PW3 stated that she got married in 1974 and found her father in law residing on suit land. PW4 who is aged 80 years old testified that the deceased Kinyanjui Roiyana entered the suit land in the 1960s with his wife and seven children. From the foregoing, I hold that time started to run in 1968 as per the evidence of PW5. This in essence means that by 1980, twelve years had indeed lapsed. I find that from 1990 to date the Defendant's title to the suit land had indeed extinguished and he was simply holding the said title in trust for the Plaintiff.

Based on my analysis above and in associating myself with the various judicial authorities I have cited including the legal provision I have quoted, I find that the Plaintiff has discharged his burden of proof and indeed proved that he is entitled to the suit land through adverse possession.

Who should bear the costs of the suit.

I note that costs generally abide an outcome of a suit but since the Defendant never entered appearance nor interfered with the Plaintiff's occupation and possession of suit land, I will not make him pay the costs.

It is in the circumstances and for the reasons given above that I find the Plaintiff has proved his case on a balance of probabilities and will proceed to allow the Originating Summons dated the 21st March, 2007

I further make the following final orders:

1. The Plaintiff be and is hereby declared to have become entitled by adverse possession to all that piece or parcel of land known as Title Number Ngong/ Ngong/ 705 in Kajiado County.
2. The Land Registrar, Kajiado North be and is hereby directed to register the Plaintiff PAUL KINYANJUI GICOBO (as the administrator of the estate of Kinyanjui Roiyana) be registered as the Proprietor of land parcel number Ngong/ Ngong/ 705 in the place of MIRICHO GITHAIGA, the Defendant herein who is the current registered owner.
3. The Defendant by himself, his servants, his employees, his agents or any person acting pursuant to his instructions individually or collectively or otherwise permanently be restrained from trespassing, alienating, entering, occupying, dealing and/or interfering in any way with the Plaintiff's quiet possession, use, occupation, development and proprietorship of the suit land or any part thereof.
4. Each party to bear their own costs.

Dated and Delivered in Kajiado this 10th day of December, 2019.

CHRISTINE OCHIENG

JUDGE

IN THE PRESENCE OF:

Jaik Omondi holding brief for Muyala for plaintiff

No appearance for the defendant

Court assistant- Mpoye