



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 24 OF 2014(OS)**

**BETH WANJIKU KIURA .....PLAINTIFF**

**-VERSUS-**

**1. FOURTEEN FALLS LIMITED**

**2. REGISTRAR OF TITLES..... DEFENDANTS**

**JUDGMENT**

1. The plaintiff commenced this suit by way of Originating Summons dated 13<sup>th</sup> September 2012 seeking the following orders:-

**1. That this Honourable court be pleased to order that the plaintiff be registered as the proprietor of all that piece or parcel of land known as LR. NO.13005 KWALE in place of the first defendant.**

**2. That subsequent to grant of prayer/order (1) hereinabove this honourable court be pleased to order the second defendant to revoke and cancel the first defendant's title in respect of the suit premises and instead register the plaintiff as proprietor thereof and to reflect such entries in the land's register.**

**3. That the costs of this summons be in the cause.**

2. The Originating summons was premised on the grounds that:

**i. The plaintiff had been in actual physical and exclusive possession of the suit premises for a continuous and uninterrupted period since 1998.**

**ii. The plaintiff has changed the state of the land by construction buildings and other improvements thereon.**

**iii. The plaintiff's occupation and possession of the suit premise has been open and notorious such as to give clear notice to the first defendant of the possibility by the plaintiff to assert claim thereto.**

**iv. The plaintiff's use of the suit premises has been hostile and or adverse in that she entered and has remained therein without permission from the first defendant.**

**v. In the premises it is rightful, just and equitable thus incumbent upon this Honourable court to register the plaintiff as proprietor of the suit premises in accordance with the doctrine of adverse possession.**

3. In support of her claim, the plaintiff swore a supporting affidavit dated 6<sup>th</sup> February 2014 in which she affirmed the grounds set forth in the Originating Summons. The plaintiff deposed that she has been in actual physical possession of the suit premises for fourteen (14) years since 1998 and in the course of her tenure and possession of the suit premises, she changed the state of the same from a scrubland, bushy and uncultivated land by clearing and ultimately constructing permanent buildings and other improvements thereon. The plaintiff has annexed photographs depicting the said improvements. The plaintiff avers that her possession of the suit premises have been open, visible and apparent to all and sundry, not least of all the 1<sup>st</sup> defendant, and above all without any permission whatsoever from or by the 1<sup>st</sup> defendant. The plaintiff further avers that besides satisfying the legal requirements necessary to entitle her to be registered as proprietor of the suit premises, the value of the constructions and improvements she has carried out in respect thereof are substantial and will be occasioned irreparable loss and damage should she not be registered as owner in place of the 1<sup>st</sup> defendant.

4. The defendants were duly served with summons to enter appearance but failed to do so. The plaintiff requested for judgment on 7<sup>th</sup> March 2017 and the court ordered that the suit be set down for formal proof.

5. The matter proceeded for formal proof on 8<sup>th</sup> July, 2019. The plaintiff produced her National Identity Card, the Certificate of TITLE FOR LR. NO.13003 and Certificate of Postal Search. The Plaintiff testified that she bought PLOT NO.13003 from one Joe Mwangi in 1998 but was wrongly shown the suit property LR. NO. 13005 which she took possession and developed it. That she is currently running a business and rearing animals and has houses and go downs on it, besides planting some trees. The plaintiff produced photographs showing the developments undertaken over the past 21 years. The plaintiff also produced a map showing that PLOT NO.13003 and 13005 are adjacent to each other. The plaintiff stated that when she applied for connection of electricity to the suit property, she discovered she was in the wrong plot and after carrying out a search discovered that the suit property is in the name of the 1<sup>st</sup> defendant. A demand letter issued to 1<sup>st</sup> defendant was also produced by the plaintiff. The plaintiff urged the court to grant her the prayers sought herein.

6. In their submissions, the plaintiff's advocates, M/s Lumatete Muchai & Company Advocates summarized the plaintiff's case as pleaded and submitted that based on the unchallenged and therefore uncontroverted evidence the plaintiff has proved her case on a balance of probabilities. They relied on the case of **Ernest Kipkemboi Lelei –v- Jacob Kimutai & Another (2018)eKLR**. The plaintiff's advocates submitted that the plaintiff has satisfied all the conditions for adverse possession and relied on the case of **Virginia Wanjiku Mwangi –v- David Mwangi Jotham Kamau (2013) eKLR** where Ombwayo, J stated the minimum five basis conditions being met to perfect the title of the adverse party are; a) open and notorious use of the property, b) continuous use of the property; c) exclusive use of the property; d) actual possession of the property and, e) non-permissive, hostile or adverse use of the property. Further, the plaintiff's advocates relied on the case of **Peter Mbiri Michuki and Samuel Mugo Michuki (2014)eKLR** in which the Court of Appeal referred to the leading case of **Kimani Ruchire –v- Swift Rutherford & Co. Ltd (1980)KLR 10** at page 16 Letter B where Kneller J held that:

“.....The plaintiffs have to prove that they have 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) of the possession or occupation. The possession must not be broken for any temporary purposes or any endeavors to interrupt it by way of recurrent consideration.” The plaintiff's advocates submitted that the 1<sup>st</sup> defendant, who is the registered proprietor of the suit premises should have done due diligence and not sleep on his rights. That after been served with the pleadings and summons to enter appearance, the 1<sup>st</sup> defendant had failed to enter appearance. The plaintiff's advocates also relied on the case of **Wairimu Mburu –v- Chege Thaiya (2019)eKLR**, and the Court of Appeal decision in **Wines & Spirits Kenya Limited & Another –v- George Mwachiru Mwangi (2018) eKLR** where the Court of Appeal referred to the case of **Benjamin Kamau Murima & Others –v- Gladys Njeri, CA No.213 of 1996** where the court held that:

“The combined effect of the relevant provisions of Section 7, 13 and 17 of the Limitation of Actions Act, Cap 22 Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.”

7. I have considered the plaintiff's uncontroverted evidence. I have no reason to disbelief the plaintiff. The Plaintiff had testified that she has been in possession and occupation since 1998 without interruption. That is a period of over 12 years. The plaintiff has produced photographs showing extensive developments, including permanent building. I have no doubt in my mind that such developments must have been undertaken over time and openly. Considering the evidence availed in this case, and applying the legal principles of adverse possession, it is clear that the plaintiff had proved her case on a balance of probabilities and has brought herself within the limits of the doctrine of adverse possession. The acts done on the suit property by the plaintiff as stated above are adverse to the owners title. The occupation and use of the suit land by the plaintiff had *animus possidendi* and was *nec vi, nec clam, nec precario*. The 1<sup>st</sup> defendant as the owner of the suit property was clearly dispossessed and their possession discontinued.

8. In the result, the suit by way of Originating Summons dated 13<sup>th</sup> September, 2012 is allowed and I enter judgment in terms of prayers 1 and 2 thereof. Considering that the defendants did not contest the suit, I order that each party shall bear their own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 3<sup>rd</sup> day of December 2019.

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C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Buxton holding brief for plaintiff

No appearance for defendants

Yumna Court Assistant

C.K. YANO

**JUDGE**