



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT NYAHURURU**

**ELC CASE NO 188 OF 2017**

**DAVID KARIUKI GAKUU.....PLAINTIFF**

**VERSUS**

**ESTHER WAMAITHA MWENJE .....DEFENDANT**

**JUDGEMENT**

1. The Plaintiff commenced this suit by way of Originating Summons dated 17<sup>th</sup> December 2014 and filed on the 19<sup>th</sup> December 2014 under section 38 of the Limitation Act and under order 37 Rule 7(1) (2) and (3) of the Civil Procedure Rules and all other enabling provisions of the Law, seeking for the following orders:

i. That the tile to parcel No. Nyandarua /Kiriita/Mairo Inya Block 2 (Ngai Ndeithia)/1403 registered in the names of Esther Wamaitha Mwenje be declared to have become extinguished and that the Plaintiff be declared to have acquired title thereto by virtue of adverse possession having been in peaceful, open uninterrupted and exclusive possession thereof for a period exceeding 16 years.

ii. That the Plaintiff be registered as proprietor of parcel No. Nyandarua /Kiriita/Mairo Inya Block 2 (Ngai Ndeithia)/1403 having acquired the title by virtue of the doctrine of adverse possession thereof since 12<sup>th</sup> September 1998.

iii. That the defendant be ordered to apply for the requisite consent and execute the relevant transfer document in favor of the Plaintiff, and release to the Plaintiff a copy of his PIN, ID and passport photograph within 7 days of service of the order failing which the deputy Registrar of this Honorable court be authorized to execute the same.

iv. That the Defendant be ordered to release and/return the original title deed to the Land Registrar Nyandarua for the same to be cancelled and in its place the Land Registrar to issue a title in favor of the Plaintiff in respect of Nyandarua /kiriita/Mairo Inya Block 2 (Ngai Ndeithia)/1403

v. That the costs of this suit be borne by the Defendant.

2. The Originating Summons is premised on the grounds stated on the face of it as well as on the Supporting Affidavit of David Kariuki Gakuu, sworn on 17<sup>th</sup> December 2014.

3. It is on record that despite efforts to serve the Defendant herein with the application, the same proved futile which prompted the Plaintiff to subsequently file a Notice of Motion dated the 21<sup>st</sup> April 2017 under Order 5 Rule 17(1) of the Civil Procedure Rules seeking for leave of the court to serve the

Defendant by way of substituted service.

4. The plaintiff *obtained leave of the court vide an order dated the 31<sup>st</sup> May 2017 and substituted service was effected on the 5<sup>th</sup> June 2017 and a copy of the documents was affixed on the court notice board on the 13<sup>th</sup> June 2017.*

5. *The Defendant having neither entered appearance within the stipulated 21 days of the order nor having filed her replying affidavit, interlocutory judgment was entered against her and a date for formal proof was fixed for the 23<sup>rd</sup> November 2017.*

6. On the hearing day, the Plaintiff while giving his evidence in chief testified that that vide a sale agreement, a copy of which he availed as Exhibit 1, dated the 12<sup>th</sup> September 1998, entered between him and the Administrators of the Estate of James Karaya Kiragu, who were his sons, hence James Kiragu Karaya and Thomas Kiragu Karaya, he bought the suit land measuring 0.134 hectares an equivalent of  $\frac{3}{4}$  acres at a cost of ksh. 110,000/= of which he paid in two installments of Ksh 67,000/=, and 24,000/=. The balance of Ksh. 19,000/= was to be paid before taking possession of the suit land.

7. That upon payment of the two installments herein above stated, he went to the office of the Ngai Ndeitha Farmers who were distributing the suit land wherein he was informed that since the proprietor of the suit land was deceased, the vendors who were his sons had to avail the consent and the letters of Administration.

8. The plaintiff testified that to date, the vendors have not availed the said letters of Administration but instead have been playing hide and seek with him.

9. That despite this hiccup, he decided to pay the balance of ksh. 19,000/= wherein he took possession of the suit land on the 12<sup>th</sup> September 1998 and went ahead to build his residential home and develop it.

10. That he lived on suit land with his family uninterrupted thereafter but due to fact that the vendors started acting funny with him, he decided to conduct a search on the said suit property wherein he found that the same was registered in the name of Esther Wamaitha Mwenje the Defendant herein who had been issued with the title deed. The search certificate and receipt issued were produced as Exhibit 2 (a) and (b) respectively.

11. He thus sought legal advice and on the 9<sup>th</sup> December 2014, he placed a caution on the land, registered it and paid for the same. He produced the documentary evidence to this effect as exhibit 3(a) (b) and (c) respectively.

12. That thereafter he applied and paid for the abstract of the green card which was issued to him and which he produced as exhibit 4(a) and (b).

13. The Plaintiff while testifying on how he had developed the suit land, also produced 5(five) pictures depicting the said developments which pictures were marked as exhibit5 (a-e), and stated that since he had lived on the suit land uninterrupted for close to 19 years, that it was only fair that he be declared as the proprietor as prayed in his originating summons.

14. When examined by the court, the Plaintiff informed the court that he had tried through all means to look for the Defendant to the extent of engaging the police force to no avail. That even the vendors did not know her or her where about although it was said that she lived in Ngong. At the close of the plaintiff's case, there were no submissions filed and the matter was set down for judgment.

15. This being a matter where the Plaintiff sought for orders that he be registered as proprietor of parcel No. Nyandarua /Kiriita/Mairo Inya Block 2 (Ngai Ndeithia)/1403, having acquired the title by virtue of the doctrine of adverse possession, the court is mindful of the legal attribution to the doctrine of adverse possession in Kenya which is embodied in Section 7 of the Limitation of Actions Act, (Cap 22) in these

terms:

16. Section 7 of the **Limitation of Actions Act** provides as follows:

***“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...”***

17. Section 13 of the *Limitation of Actions Act* aforesaid further provides that:

***A right of action to recover land does not accrue unless the land is in the possession of some person in whose favor 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 the 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.***

18. Sections 37 and 38 of the *Limitation of Actions Act* stipulate that if the land is registered under one of the registration Acts, then the title is not extinguished but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in him.

19. Section 37 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, to land or easement 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.”***

20. In terms of Section 38 of the *Limitation of Actions Act*, where a person claims to have become entitled by adverse possession to land, (s)he must apply to the High Court for an order that (s)he be registered as the new proprietor of the land in place of the registered owner. The elaborate procedure of moving the High Court is provided for in *Order 37 Rule 7 of the Civil Procedure Rules* as follows:

***i. An application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons.***

***ii. The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.***

21. As I have indicated herein, the rule in adverse possession is that the party claiming must have been in possession for over 12 years. To prove a claim under adverse possession, all that the Plaintiff had to do was to establish that he came into occupation and took possession exclusively and has lived on the suit property continuously without interruption for a period of over 12 years.

22. On analyzing the above evidence, it is the Plaintiff's case that he entered into the suit property in the year 1998 after entering into a Conveyance Agreement dated 12<sup>th</sup> September 1998, with James Kiragu Karaya and Thomas Kiragu Karaya, sons and purported Administrators of the Estate of James Karaya Kiragu.

23. From the year 1998, he has been in uninterrupted occupation of the suit property and has become entitled to be registered as the legal owner thereof in place of the Defendant, whom he admits is the title holder of the suit property.

24. It is further the Plaintiff's case that he has been in open, exclusive, peaceful and actual possession of the suit property without any interruption from the Defendant for more than 19 years since he bought it. According to the Plaintiff, the said period is more than the 12 years required under the law for him to acquire title against the Defendant by way of adverse possession.

25. It is against this background, that the issue that arises for my determination is whether or not the Plaintiff has acquired the suit property by way of adverse possession.

26. I have looked at the official search certificate produced as exhibit 2, as well as the green card produced as exhibit 4(a) and one thing is clear, that unlike the evidence adduced by the Plaintiff to the effect that one Mr. James Karaya Kiragu (deceased) was the proprietor of the suit land, nothing in these two documents confirms that fact.

27. What is clear from the documents produced is that the suit land had been registered in the name of the Government in the year 1993 and thereafter in the year 2012, the same was registered in the Defendant's name. Nowhere does the deceased's name feature either in the green card or in the official search certificate. I find that the deceased was not the proprietor of the suit land in the circumstance.

28. Having found no evidence to show that at any one time the suit land had belonged to the deceased Mr. James Karaya Kiragu and further that his sons James Kiragu Karaya and Thomas Kiragu Karaya, herein referred to as the vendors, had been issued with letters of Administration through cause No 1067 of 1994 filed in the Nairobi High Court, as depicted in the Sale agreement dated the 12<sup>th</sup> September 1998, and was produced as exhibit 1, I hold that the vendors herein did not hold a valid title to the suit property to enable them sell and/or transfer the same to the Plaintiff.

29. Having so found, and pursuant to the **principle of public policy which is; *ex dolo malo non oritur action* ["no action arises from deceit"]**. and while guided by the case of ***Mistry Singh vs Serwano Wofunira Kulubya 1963 E.A 408*** where it was held that no Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to have arisen out of a contract or transaction which is illegal, I find that the agreement entered between the Plaintiff and the supposedly vendors (administrators) was illegal and void ab initio and as such this court will not lend its aid to a man who founds his cause of action upon an illegal act.

30. Secondly, the search certificate produced as exhibit 2 the as well as the green card produced as exhibit 4(a) both indicate that the Defendant herein was registered as the proprietor of the suit land on the 5<sup>th</sup> January 2012 wherein she was issued with the title on the same day. It is also clear that the plaintiff herein instituted this suit on the 19<sup>th</sup> December 2014

31. According to the rule on adverse possession, a party claiming must have been in possession for over 12 years and that the period starts running a fresh whenever there are changes in the title. Indeed in the case of ***Kimani Ruchine & Anor -vs- Swift Rutherford & Co.Ltd and Another(1980) KLR 10***, it was held for example that where cultivation of land is advanced to support the claim to adverse possession, the evidence of the cultivation must be definite as to the area and time.

32. Has the Plaintiff been able to establish this rule?

33. I find that in the present case, that the Plaintiff has not proved that he dispossessed the Defendant for a period of 12 years as it is clear that for the purposes of adverse possession if any, time started to run from 5<sup>th</sup> January 2012 when the Defendant got registered as the proprietor of the suit land up to 2014 when the Plaintiff subsequently commenced legal proceedings that effectively stopped time from running, which makes it two years thus making the filing of the present suit premature.

34. For the above reasons, I find and hold that the Plaintiff has not proved on a balance of probabilities that his right of action as against the Defendant has accrued as at the time of filing this suit for the suit property to be said to have fallen into his possession pursuant to the provisions of section 38 as read together with sections 7, 9 and 13 of the Limitation of Actions Act.

35. In the circumstance herein I dismiss the Originating Summons dated 17<sup>th</sup> December 2014 filed on the 19<sup>th</sup> December 2014 in its entirety with no costs.

**Dated and delivered at Nyahururu this 19<sup>th</sup> day of February 2018.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**