



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**MILIMANI LAW COURTS**  
**ELC NO.641 OF 2010 (OS)**  
**IN THE MATTER OF A CLAIM FOR TITLE TO**  
**KAND UNDER SECTION 38 OF THE LIMITATION**  
**ACTIONS ACT CAP 22 LAWS OF KENYA**  
**PETER MUSYOKA MUTHINI & 45 OTHERS.....PLAINTIFFS**  
**=VERSUS=**  
**KONYOK HOLDINGS LTD.....DEFENDANT**

**JUDGEMENT:**

**INTRODUCTION**

1. The Plaintiff brought this suit against the defendant seeking orders that they had acquired LR No. Dagoretti/Kangemi/856 (suit property) by way of adverse possession. The suit property is registered in the name of the defendant. Certificate of lease in respect of the suit property was issued on 15<sup>th</sup> February 1990.

**PLAINTIFFS' CASE**

2. The Plaintiffs filed this suit on their own behalf and as members of Waruku Community Development Group (WACODEP). The Plaintiffs authorized one of them namely Charles Wagura to plead on their behalf. The Plaintiffs contend that they entered the suit property between the year 1970 and 1998 and that they have been staying on it continuously and uninterrupted for a period of over 12 years. In March 2010, agents of the defendant went to the suit property and started harassing them and threatening them with eviction.

3. In May 2010, the Plaintiffs learnt that the defendant had moved to Court and filed a miscellaneous application No.164 of 2008 and obtained ex-parte orders of eviction against them. They further contend that unknown persons were using the then Nairobi City Council to issue them with illegal enforcement notices. They later moved to Court and had the ex-parte orders obtained by the defendant set aside.

4. The Plaintiffs' case was stated by Charles Wagura the Chairman of WACODEP and Hannah Wairimu Kiriro. In his witness statement, Charles Wagura stated that he went to the suit property in 1986 from where he has been staying since then to-date. He has raised all his children on the suit property. In 2009 all the Plaintiffs houses on the suit property were demolished but they later rebuilt the same.

5. On her part, Hannah Wairimu Kiriro testified that she and her co-plaintiffs have been on the suit property for over 30 years. The Plaintiffs in conjunction with Non-Governmental Organizations such as Maji na Ufanisi helped put up sanitary facilities and other amenities on the suit property. In May 2010, the residents heard of a Court order which had been obtained by the defendant. When they investigated the matter, they learnt that the order had been obtained fraudulently.

**DEFENDANT'S CASE**

6. The defendant's case was stated by Janerose Nyokabi Kimani who is a director of the defendant company. The other director of the defendant is her husband John Kimani. Janerose and her husband bought the suit property from a company called Seafood Limited which had an allotment but had not processed certificate of lease. The certificate of lease was issued to the company on 15<sup>th</sup> February 1990. They did not develop the suit property immediately because they had two of their family members who were suffering from terminal ailments.

7. In 2006, Janerose and her husband got a green card to the USA. They started preparing to dispose of their properties in preparation for re-location to the USA. They sold their matrimonial house at Kilimani. In February 2007, they visited the suit property and found it intact. As the time to move to USA neared, they suspended plans to dispose of the suit property and left the country for USA. Once they had settled in the USA, she came back to the country and found that the suit property had been invaded by some people who had erected structures on it. She got the names of the trespassers from the area District Officer.

8. A case was filed in Court for eviction of the trespassers. This was in March 2010. They had obtained approval to build a fence round the suit property. The approval was however withheld pending the removal of the illegal structures which had been erected. Janerose was actually arrested and charged at the City Court for erecting illegal structures. She was fined kshs.10,000. The trespassers were thereafter evicted in 2009 by having their houses demolished.

9. The defendant's witness denied that what the plaintiffs are calling WACODEP is actually occupying the suit property. She had paid all the outstanding rates and had the suit property valued for purposes of sale to those who had purchased their matrimonial property but this never happened because of this case which was filed subsequently.

## ANALYSIS

10. I have gone through the evidence adduced by the plaintiffs and that adduced by the defendant. I have also gone through the documents relied on by the respective parties as well as the submissions filed on behalf of the parties. The issues which are for determination are whether the plaintiffs have been in continuous and uninterrupted possession of the suit property for a period of 12 years. The other issue is on who is to pay costs of the suit.

11. To sustain a claim for adverse possession, a Plaintiff has to prove that he has been in continuous, quiet, and uninterrupted possession for at least a period of 12 years. In the case of Wareham t/a Wareham & 2 others Vs Kenya Post Office Savings Bank (2004) eKLR it was held as follows:-

***“The burden of proof is on the plaintiff and the degree of proof is on a balance of probabilities. In discharging the burden of proof, the only evidence to be adduced is evidence of the existence or non-existence of the facts in issue or facts relevant to the issue. It follows that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail”.***

12. The Court of Appeal in the case of Harrison Ngige Kaara Vs Gichobi Kaara & another ( 1997) eKLR stated as follows:-

***“ The law on adverse possession is clear . Section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya provides for a 12 years limitation period for actions to recover land. That period does not start running unless the land is in the possession of some person or persons whose interest is hostile to that of the owner thereof. Possession is hostile if it is open, without right, without force or fraud and exclusive. In other words the adverse possessor must be shown ,to be using the land as though it is solely his own before a right of action can be said to have accrued for the limitation period to start running”.***

13. In the instant case there are over 45 Plaintiffs in this case. As I said before in this judgement, the Plaintiffs gave authority to Charles Wagura to plead their case. The Plaintiffs have pleaded that they entered the suit property on diverse dates ranging from 1970 to 1998. Other than the pleadings, there was no evidence adduced in support of what was pleaded. The suit property is less than one acre. The evidence which has been adduced is that there are about 800 people on the suit property according to Hannah Wairimu Kiriro. According to Charles Wagura, there are about 300 people on the suit land. This evidence is simply unbelievable. A group of 800 person or even 300 cannot fit in that small portion complete with their houses, sanitary facilities and a church and other facilities like shops and hotels as the plaintiffs claim.

14. The defendant's contention is that the suit property was invaded in 2007. I have no reason to doubt this. On 15<sup>th</sup> February 2007 the defendant paid arrears of land rent to the tune of kshs.1,519,886/= . This was in preparation for the sale of the suit property to enable the directors re-locate to the USA. As at this time there were no persons in the suit property. On 23<sup>rd</sup> May 2008 the suit property was valued. The photographs attached to the valuation show that there were a few structures on the suit property. The explanation for this is that there were structures which were on the roadside next to the suit property. When there was construction of storm water drainage in the area, there were those who were affected who moved their structures into the suit property.

15. The defendant had moved to Court two months earlier and obtained orders against those who had encroached on the suit property. The photographs are clear that the rest of the land was unoccupied as at 23<sup>rd</sup> May 2008. It is therefore not true as claimed by the plaintiffs that there were 800 or even 300 people on the suit property as at the time the defendant filed suit in Court.

16. When the Plaintiff's filed this suit in the year 2010, they did not have the documents annexed to their supplementary affidavit. They sought to introduce them in Court for the first time on 16<sup>th</sup> April 2015 when the hearing started. An objection was raised which objection was sustained. The Plaintiffs later filed an application for review of the Court's ruling. After the court heard the application for review the same was allowed with the result that the plaintiffs were allowed to introduce the documents which they did through supplementary affidavit sworn on 14<sup>th</sup> September 2015.

17. The Plaintiffs are on record as having stated that their documents were lost in their houses when the same were demolished. The houses are said to have been demolished in September 2009. One then wonders where they again got these documents six years later. There is one letter annexed to the supplementary affidavit dated 10<sup>th</sup> November 2003. The letter was addressed to the then area MP for Westlands Hon Fred Gumo. The Plaintiffs were pleading with Hon Gumo to help them get a space on the suit property to build toilets. In the same letter the Plaintiffs under the umbrella of WACODEP were complaining that landlords surrounding the suit property had started building structures on the suit property yet they were not poor people. This letter if genuine shows that the plaintiffs were not on the suit property because they

were looking for space to build toilets.

18. There is evidence that an ablution block was later put up on the suit property. This was done after 2007. The Plaintiffs were clearly living in the larger Waruku Village which did not include the suit property. The Plaintiffs had acknowledged title of the Defendant and that is why they wanted assistance to get the suit property on grounds that the Defendant did not acquire it in accordance with the law. There were other entities and person like Kungu & Sons Co.Ltd which had purported to give ¼ of the suit property for construction of a Chief's Office. There were also other landlords who were claiming that they are the ones who surrendered their portions of land to form the suit property. All this is a pointer that the plaintiffs were not on the suit property between 1970 and 1998 as they claim in their pleadings.

19. The projects which were being undertaken by NGO's in the area such as drains and road improvements and water installation were being done for the benefit of the Waruku Village Community which comprised of 6000 members as per the plaintiffs own documents. These projects were going on on Gichamba Road, Juma road and Hinga Road. The suit property is along Musa Gitau Road. When I consider the evidence of the plaintiffs and that of the defendant, I no doubt make a finding that the suit property was invaded after 2007 and the reasons for this finding have been stated herein above.

20. For purposes of adverse possession time stops running in favour of an adverse possessor either when the title holder asserts his right to the land in question or when the adverse possessor admits the title holder's right . In the instant case, whichever angle one looks at this case, the plaintiffs have not acquired the suit property. Assuming that in 2003 the plaintiffs were in the suit property which is not the case, they had already acknowledged the defendant as the tile holder whatever their view about its acquisition. Time therefore stopped running in their favour on account of acknowledgment of title of the defendant.

21. In the case of **Wambui Gikwa Vs Kimaru Muraba (2016) eKLR** the Court of Appeal stated as follows:-

*“ We understand the law to be that time stops running in favour of an adverse possessor either when the title holder asserts his right to the land in question or when the adverse possessor admits the title holders right. As set out in Kirutu Vs Kabura (supra) assertion of a title holder's right can be through institution of legal proceedings to regain possession whether or not the title holder succeeds in such proceedings is another matter altogether . The fact that such proceedings are instituted and prosecuted is in our view , a clear indication of the title holder exerting his right to the land interrupting possession of the adverse possessor”.*

### **CONCLUSION**

22. When the defendant's director came back from USA and found that the suit property had been invaded, a miscellaneous application was filed in Court in 2008. This action stopped time from running in favour of the adverse possessors. Besides this stoppage of time, the Plaintiffs had never enjoyed quiet and peaceful occupation of this suit property. In 2009, they were evicted and their houses demolished. The Plaintiffs themselves have conceded that they have been harassed by the defendant's agents and the then Nairobi City Council at the instance of the defendant. They cannot therefore claim that they have enjoyed the suit property, quietly, peacefully and uninterrupted as though it was theirs. I therefore find that the plaintiffs have failed to prove their case on a balance of probabilities. The same is hereby dismissed with costs to the defendant.

**Dated, Signed and delivered at Nairobi on this 6<sup>th</sup> day of March ,2018.**

**E.O.OBAGA**

**JUDGE**

In the presence of :-

Mr Obok for Plaintiffs

Mr Wanjohi for Defendants

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**