



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.CASE NO.557 OF 2017

(FORMERLY NYERI ELC.NO.60 2016 [OS])

FRANCIS KANYORI MUNIU PLAINTIFF

-VERSUS-

SALIM MADATALLY MANJI DEFENDANT

JUDGEMENT

By an **Originating Summons** dated **5th April 2016**, the Applicant herein **Francis Kanyori Muniu**, has sought for various declarations and orders being:-

- 1) That Francis Kanyori Muniu be declared to have acquired by adverse possession all that parcel of land measuring 0.378 Hectares known as title No.Ruiru/Ruiru East Block 2/600, which parcel is clearly identifiable on the ground as it is demarcated and fully developed by the Applicant.**
- 2) That the land register relating to land Title No.Ruiru/Ruiru East Block 2/600, be rectified in such a manner as will reflect the Applicant herein as the registered owner of the said parcel of land measuring 0.378 Hectares.**
- 3) That this Honourable court be pleased to restrain the Respondent by an order of permanent injunction from entering, alienating, disposing or in any other manner interfering with Applicant's exclusive possession, use and occupation of the parcel of land measuring 0.378 Hectares known as Title No.Ruiru/Ruiru East Block 2/600.**
- 4) That such other questions as may be pertinent to the case be determined and appropriate directions and orders be given.**
- 5) That the costs of these proceedings be borne by the Respondent.**

The **Originating Summons** is grounded on the **affidavit** of **Francis Kanyori Muniu**, and on the fact that he has been in **actual, open, physical** and **uninterrupted possession** of the suit premises for a period in **excess of 12 years** and has been exercising all the **rights** and **privileges** of ownership, thereby acquiring title by adverse possession and any claim by the Respondent over the suit land **Ruiru/Ruiru East Block 2/600** has been extinguished by the adverse possession of the Applicant.

In his **Supporting Affidavit**, the Applicant, **Francis Kanyori Muniu** averred that he entered into the suit property **Ruiru/Ruiru East Block 2/600**, in the **year 1999** and has occupied and utilized the said land ever since to date. It was his further averment that one **Salim Madatally Manji**, the Respondent herein became the registered proprietor of the suit property sometimes in the **year 2015** as per the **official search certificate FKM-1**. He contended that despite the change of ownership, his stay at the suit property has never been interrupted since the **year 1999** to date and he has lived at the said suit property in peace to the exclusion of the Respondent and/or indeed any other person except his family.

He further contended that during his said occupation of the suit property, he has developed the same and has put up permanent structures which he had lived in and is in control to the exclusion of all others

including the Respondent herein. The Applicant also deposed that his occupation has been **open, without force, without any permission or licence** and has been **uninterrupted** for a **period exceeding twelve (12) years**. The Applicant further alleged that he has not known any other home for him and his family other than the suit property which he has utilized in all manner as his own property. It was his further contention that he has clearly demarcated the suit property in a concise manner and has gone ahead to fence the said suit property without any question from any person whatsoever.

He also alleged that the Respondent has not had any use of the parcel of land for the period that the Applicant has been residing in it nor has any of the previous owners if any had the use of the suit property for all the period that Applicant has been utilizing. Therefore it was his contention that he is entitled to a declaration that the interest of the Respondent or any previous owners has been forever extinguished by his adverse possession thereof and he is entitled to be registered as proprietor of the said property. He urged the Court to allow his claim.

The Respondent herein was served through *Substituted Service* as per the *Court Order* given on *9th May 2016* and *Affidavit of Service of Moses Tumu Advocate* dated *20th September 2016*. However, the Respondent failed to either enter appearance nor file any response to the *Originating Summons*. Therefore the instant claim herein is unopposed by the Respondent.

The matter proceeded for *Formal Proof* on *13th November 2017*, wherein the Applicant, *Francis Kanyori Muniu* gave his evidence and produced exhibits. He relied entirely on his *Supporting Affidavit* dated *5th April 2016*. He further testified that he carried a *search* for *Ruiru/Ruiru East Block 2/600*, and noted that it is registered in the name of *Salim Madatally Manji* the Respondent herein. He therefore *placed a restriction* on the suit property on *19th October 2015*, since he had lived on the suit property from *1999* without any interruption. He urged the Court to declare him as the sole proprietor of the said property since he never obtained any consent while getting into the suit land and no one has ever told him to move out. He has therefore lived on the suit land for *more than 12 years uninterrupted*. He produced photographs to show the development on the suit land which were carried out by him and the Respondent has not objected to that development. He also testified that he would be prejudiced if the Respondent is allowed to sell the suit land without his notice or knowledge.

The Applicant further filed *written submissions* and urged the Court to allow his claim. He submitted that the issues for determination are as follows:-

i) Has the Plaintiff fulfilled the elements of adverse possession?

ii) What are the orders that the Plaintiff is entitled to.

iii) What orders ought to be made with regard to costs?

i) Has the Plaintiff fulfilled the elements of adverse possession?

Though the Applicant's evidence was unopposed, he had a duty to call sufficient evidence and prove his case on the required standard of balance of probabilities. The Applicant is the one who has alleged and therefore he had a duty to prove as provided by *Section 107* and *109* of the *Evidence Act* which provides:-

107(1) Whoever desires any court to give judgment as to any legal

right or liability dependent on the existence of facts which

he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact,

it is said that the burden of proof lies on that person.

109 "The burden of proof as to any particular fact lies on the

person who wishes the court to believe in its existence,

unless it is provided by any law that the proof of that fact

shall lie on any particular person".

The Applicant's claim is on adverse possession and *Section 7* of the **Limitation of Actions Act, Cap 22** states that:-

"An action may not be brought by any person to recover land after the end of twelve years after the date on which the right of action accrued to him or if it first accrued to some persons through whom he claims to that person. (See the case of Peter Opundo Nyakundi & Another.....Vs...The Chairman of School Committee of Achol School, Kisii HCC No.74 of 2003.)

The Applicant has alleged that he has been in occupation of the suit property since *1999*, and has put up permanent development thereon where he lives with his family. He produced photographs of the said permanent development.

Courts have made several pronouncements on the law on adverse possession. In the case of *Wambugu...Vs...Njuguna (1983) eKLR*, the Court held that:-

"In order to acquire by statute of limitation, a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it".

The Applicant has alleged that from **1998**, when he occupied the suit land, no one objected to his occupation and the said occupation was **open** and **without secrecy**. He even put up a permanent house where he lives today. It is therefore evident that if the suit land was owned by any proprietor, the fact that the Applicant took control of it in **1999** and started putting up a permanent development without objection meant that the Applicant had dispossessed the rightful owner and that the said rightful owner had discontinued his possession of the suit property.

The Applicant herein has remained in uninterrupted possession of the suit property **since 1999**, and has put up a permanent development where he is living with his family. Therefore the act of the Applicant is inconsistent with the enjoyment of the property by the alleged rightful owner. See the case of **Wambugu...Vs...Njuguna (supra)**, where the Court further held that:-

“Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intends to use it for a period of over 12 years”.

See also the case of **Littledale...Vs...Liverpool College (1900) 1CL at 21**, where the Court held that:-

“In order to acquire by statute of limitation, a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it”.

There is undisputed evidence that the Applicant has been in an uninterrupted occupation of the suit property **since 1999**. There is also undisputed evidence that the Applicant has erected a permanent structure on the suit land where he lives therein today with his family. That action of the Applicant has dispossessed and discontinued the rightful owner's possession of the said suit property. Therefore the **Court finds that the Applicant herein has met the elements of adverse possession**.

ii) What are the orders that the Plaintiff is entitled to?

Having found that the Applicant has proved that he has dispossessed and discontinued the rightful owner of his possession of the suit property, then the **Court finds that the Applicant is entitled to be declared the proprietor of the suit property by virtue of adverse possession** and that the rightful owner's right was extinguished upon expiry of **12 years**. The **12 years** period expired in the **year 2011**. Therefore the title holder of the suit property lost his right in the **year 2011**. From the search certificate, the suit property was transferred to the Respondent herein in the **year 2015**. By the time of the said transfer, the Applicant had been in an uninterrupted occupation of the suit property for more than **12 years**. He had dispossessed the rightful owner and had therefore acquired ownership of the suit property by adverse possession.

The Applicant alleged that his occupation of the suit property has been **open** and **without force**. Therefore the Court finds that the Applicant's action is *nec vi, nec clam, nec precario* (neither by force, nor secretly and without permission). See the case of **Kimani Ruchine...Vs...Swift Rutherford & Co. Ltd (1980) KLR**, where the Court held that:-

“The Plaintiffs have to prove that they have used this land which they claim of right; *Nec vi, nec clam, nec precario* (no force, no secrecy, no evasion)..... so the Plaintiffs must show that the company had knowledge (or means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration”.

From the above analysis of the evidence adduced and the exhibits thereto, the **Court finds that the Plaintiff is entitled to the orders sought in his claim**.

iii) What are the orders as to costs?

As provided by **Section 27** of the **Civil Procedure Act**, costs are granted at the discretion of the court. However it is trite that costs do follow the event. The Plaintiff is the successful litigant herein. However, **the suit herein is unopposed and therefore the Court finds that the Applicant should bear his own costs**.

Having now carefully considered the available evidence, the Court finds that the Applicant has proved his case on the required standard of balance of probabilities. Consequently, the **Court allows the Applicant's claim in terms of prayers No.1, 2, and 3 with an order that the Applicant bears his own costs**.

It is so ordered.

Dated, Signed and Delivered at Thika this 20th day of April 2018.

L. GACHERU

JUDGE

In the presence of

M/S Cheserek holding brief for Mr. Tumu for Applicant

No appearance for Respondent

Lucy - Court clerk.

Court – Judgement read in open court in the presence of the above advocate.

L. GACHERU

JUDGE

20/4/2018