



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI NAIROBI

ELC CIVIL SUIT NO. 1153 OF 2007 (O.S)

PETER MBURU KAMAU.....PLAINTIFF

VERSUS

EDWARD NJENGA KIRUMBA.....1ST DEFENDANT

LABAN KARANJA NJENGA.....2ND DEFENDANT

WILFRED KIRUMBA NJENGA.....3RD DEFENDANT

Karanja Kirumba and Wilfred Kirumba Njenga (the 2nd and 3rd defendants)

4. The Parcel Register of Title Number **Githunguri/Githiga/T.593** (hereinafter referred to as **Parcel Number T.593**) was opened on 10/7/1959 and the land measures 0.21 acres. In 2003 when the present originating summons was taken out, this piece of land was registered in the name of Raymond Kirumba Ngiri. According to the latest records presented to court by the defendants, Parcel Number T.593 was on 22/9/2011 registered in the name of Wilfred Kirumba Njenga (the 3rd defendant).

5. It is noted from the respective parcel registers that Kirumba Ngiri changed his name to Raymond Kirumba Ngiri and the change was noted in the two land parcel registers. The defendants are administrators of the estate of the late Raymond Kirumba Ngiri also known as Kirumba Ngiri.

Plaintiff's Case

6. The Plaintiff's case is that he has openly, peacefully and of right, been in possession and occupation of the suit properties for a period of over twelve years immediately preceding the presentation of the originating summons. He contends that the late Raymond Kirumba Ngiri was a nephew of his adopted parents, Wanjau Kihungu (also known as Wanjau Njunu) and Maria Nyaguthi. The two were his maternal aunt and uncle respectively and they were wife and husband. He further contends that Wanjau Kihungu's other wife was Hannah Wanjiru.

7. The plaintiff contends that during land demarcation in 1958, it was agreed that Wanjau Kihungu's family land at Kiambaa would be taken up by Kirumba Ngiri in exchange with the suit properties. Consequently, Wanjau Kihungu's family relinquished their rights over the family land at Kiambaa and the land was taken by Kirumba Ngiri. In return, the family of Wanjau Kihungu took up possession of the suit properties.

8. He further contends that in 1982, the two widows of Wanjau Kihungu (Maria Nyaguthi and Hannah Wanjiru) discovered that Kirumba Ngiri had not relinquished title to the suit properties. This led to the lodging of a complaint with the elders' panel. The elders' panel rendered a verdict in favour of Wanjau Kihungu's family. Dissatisfied with the award, Kirumba Ngiri instituted **Nairobi HCCC No 1617 of 1984; Kivumba Ngiri v Hanna Wanjiru & Maria Nyaguthi**. This suit was subsequently dismissed for want of prosecution. Maria Nyaguthi who was one of the defendants in Nairobi HCCC No 1617 of 1984 died in February 1988 and the plaintiff is the administrator of her estate.

9. The plaintiff further contends that he has lived and made substantial developments on both properties since 1958; that he continued to cultivate the suit properties with the knowledge of the late Raymond Kirumba Ngiri until 1991 when he died. He adds that together with the late Maria Nyaguthi, they have had possession of the suit properties enjoying quiet, continuous, open and uninterrupted possession of the properties from 1958. He contends that he continued to enjoy similar possession upon the demise of Maria Nyaguthi in February 1988. He urges the court to grant the prayers in the originating summons.

Defendants' Case

10. The defendants contest the plaintiff's claim. Their case is that there was never an agreement to exchange land between the family of Wanjau Kihungu and Kirumba Ngiri. They contend that in or about 1945, the late Kirumba Ngiri allowed Hannah Wanjiru and Maria Nyaguthi to move into the suit properties as **"ahoi"** under Kikuyu customary law or as licencees and/or tenants at will. They add that the late Wanjau Kihungu did not, during his lifetime, claim any land from Kirumba Ngiri nor did he settle his wives on his own land as he did not have any. They further contend that up to 1958, Maria Nyaguthi and Hannah Wanjiru lived on a plot owned by Kirumba Ngiri. They state that in 1982, Kirumba Ngiri attempted to terminate the licence. This culminated in Nairobi HCCC No. 1617 of 1984 but the two windows of Wanjau Kihungu refused to move out.

11. The defendants further contend that prior to moving to court, it had been agreed that the land which was held in Kirumba Ngiri's name would be shared as follows:

(i) Kirumba Ngiri would retain the whole of Githunguri/Githiga/T.593; and

(ii) Githunguri/Githiga/12 would be shared in the following ratio: Maria Nyaguthi 1½ acres, Hannah Wanjiru 1½ acres and Kirumba Ngiri 4 acres.

The defendants contend that this agreement was entered in the relevant parcel register.

12. The defendants add that the plaintiff has never exercised adverse possession on the properties belonging to Kirumba Ngiri; that he has always occupied the portion belonging to Maria Nyaguthi. They contend that if the applicant has been using the portions belonging to Kirumba Ngiri, he was doing so secretly under the umbrella of Maria Nyaguthi and Hannah Wanjiru. They add that from 1982 Maria Nyaguthi and Hannah Wanjiru occupied the suit property by force. Lastly, they contend that the plaintiff's claim is statute-barred.

Plaintiff's Evidence

13. At the hearing, the plaintiff adopted his sworn affidavit in support of the originating summons as his sworn evidence in chief. The affidavit contains his case as summarized in the preceding paragraphs. He produced a certified copy of the grant of letters of administration in respect of the estate of the late Maria Nyaguthi, certified copies of parcel registers for the two parcels of land, copy of grant of letters of administration in respect of the estate of the late Kirumba Ngiri and extract of proceedings in Nairobi HCCC No 16 17 of 1984. He stated that he lives on the suit properties. He further stated that he has lived on the suit properties since 1948.

14. Under cross-examination, he stated that his biological parents died when he was very young and Maria Nyaguthi and Wanjau Kihungu took him and raised him as their own child. He stated that that is why he refers to them as "mother" and "father" respectively. He added that before they moved to the suit properties they lived in Githiga. He further stated that he did not know if Kirumba Ngiri licenced Maria Nyaguthi and Hannah Wanjiru to stay on the suit properties. He added that Wanjau Kihungu and his two wives lived on the suit properties prior to his death. The plaintiff further testified that Raymond Kirumba Ngiri never told them to vacate the suit property.

15. In re-examination, he stated that his mother died in 1946 and that is the year he was taken up by Maria Nyaguthi and Wanjau Kihungu. He added that on the physical ground, the two properties are one piece of land. He concluded by stating that he has his home on the suit properties.

Defendants' Evidence

16. The defendants called one witness, DW1 - Laban Karanja Kirumba (2nd defendant). He adopted his affidavit sworn on 17/7/2017. He deponed in the said affidavit that the plaintiff's claim is *res judicata* because there was previously Nairobi HCCC No. 1617/1984. Secondly, he deposed that if the plaintiff's claim were genuine, he should have applied to be enjoined in Nairobi HCCC No 1617 of 1984. Thirdly, he deposed that the plaintiff's claim is not *bonafide* because he did not object to the apportionment of the suit properties in 1983. DW 1 further deposed that the plaintiff has always occupied the portion designated for Nyaguthi, measuring 1½ acres.

17. Under cross examination, DW 1 stated that the person currently residing on the suit properties is the plaintiff. He added that the plaintiff has a plantation of more than 10,000 tea plants on the suit properties. He further stated that the plaintiff has trees on the suit properties and has built permanent living quarters on the suit properties. He stated that the plaintiff built the houses without the permission of their late father, Kirumba Ngiri. Asked for how long the plaintiff had lived on the suit properties, he stated that he could not remember.

18. In re-examination, he stated that together, the two parcels are 7 acres. He further testified that the plaintiff is occupying all the two parcels but he is supposed to occupy only 1½ acres belonging to Maria Nyaguthi.

Submissions

19. Mr Njoroge Baiya, counsel for the plaintiff submitted that the title of the late Kirumba Ngiri to the 40/70 Share in Githunguri/Githiga/12 was extinguished under the provisions of **Sections 7, 13 & 17** of the **Limitation of Actions Act** because the plaintiff together with the late Maria Nyaguthi were in occupation of the suit properties way back before demarcation and consolidation took place leading to registration of the suit properties in 1958 and 1959 respectively.

20. Mr Ndirangu, counsel for the defendants submitted that Hannah Wanjiru and Maria Nyaguthi entered the suit properties on invitation and approval of the late Kirumba Ngiri. Consequently, they cannot be said to have been adverse possessors. He added that the plaintiffs entered the suit properties upon the invitation or adoption by Maria Nyaguthi and his continued occupation of the suit properties must be viewed in light of the relationship of invitor-invitee, host-guest or guardian-dependent established thereupon.

Determination

21. The court has considered the originating summons together with the supporting affidavit and response thereto, the parties' respective evidence and written submissions, and the relevant legal framework and jurisprudence on the doctrine of adverse possession. Two issues fall for determination in this suit. The first issue is whether this suit is *res judicata*. The second issue is whether the plaintiff has satisfied the criteria for acquisition of title under the doctrine of adverse possession. I will make pronouncements on the two issues in that order.

22. The defendants contend that the suit herein is *res judicata*. For the defence of *res judicata* to stand, the party raising it must demonstrate that the matter in issue was directly and substantially in issue between the same parties or between parties under whom they or any of them claim, litigating under the same title in a court of competent jurisdiction, and the issue was heard and finally decided by the court. In the present suit, no evidence has been produced to show that the plaintiff was a party to any other suit in which the issue of adverse possession was tried and determined on merit. The plaintiff was not a party in Nairobi HCCC No 1617 of 1984. Secondly, the said suit was by Kirumba Ngiri and it was dismissed for want of prosecution. It cannot therefore form the basis of a defence of *res judicata* by Kirumba Ngiri's personal representatives against the plaintiff who was not a party to the suit. I am therefore satisfied that the plaintiff's suit is not *res judicata*.

23. The second issue is whether the plaintiff has acquired title to the two parcels of land under the doctrine of adverse possession. The common law doctrine of adverse possession connotes possession which is inconsistent with and in denial of the title of the true owner of land. To establish adverse possession, the claimant must prove that he has both the factual possession of the land and the requisite intention to possess the land [*animus possidendi*]. Secondly, he must prove that he has used the suit land without force, without secrecy, and without persuasion [*nec vi, nec clam, nec precario*] for the prescribed limitation period of twelve years preceding the initiation of proceedings for the vesting order. Third, he must demonstrate that the registered owner had knowledge [or the actual or constructive means of knowing] that the adverse possessor was in possession of the suit property. Fourth, the possession must be continuous; it must not be broken or interrupted. In **Titus Kigaro Munyi v Peter Mburu Kimani, CA Civil Case No 28 of 2014**, the Court of Appeal held that computation of time starts from when there is actual or constructive knowledge by the registered proprietor.

24. The doctrine of adverse possession has its statutory underpinnings in **Sections 7, 9, 13, 37 and 38** of the **Limitation of Actions Act**. The Court of Appeal examined the constitutionality of the doctrine of adverse possession in the context of the Constitution of Kenya 2010 in the case of **Mtama Lewa v Kahindi Ngala Mwangandi, [2015] eKLR** and found that the doctrine does not offend the spirit and letter of the present constitutional framework on protection of the right to property.

25. In the present suit, the plaintiff moved the court under Section 38 of the Limitation of Actions Act for an order that he is entitled to be registered as proprietor of the 40/70 Share of Title Number **Githunguri/Githiga/12** which in 2003 was held in the name of Raymond Kirumba Ngiri (formerly known as Kirumba Ngiri) and the whole of **Githunguri/Githiga/T.593** which in 2003 was wholly held in the name of Raymond Kirumba Ngiri. He contended that since 1958, he has openly, peacefully and as of right been in possession and occupation of the suit properties.

26. The plaintiff testified that he was adopted by the late Maria Nyaguthi and her husband, Wanjau Kihungu in 1946. He further testified that Maria Nyaguthi died in 1988. Prior to that, in 1983 the late Kirumba Ngiri, Maria Nyaguthi and Hannah Wanjiru became common owners of undivided shares of **Title Number Githunguri/Githiga/12** in the ratio of 40/70, 15/70 and 15/70 respectively. The above registered ownership ratio of the suit property remained in place up to the time Maria Nyaguthi died in 1988. The plaintiff is the administrator of the estate of Maria Nyaguthi, having obtained a grant to that effect on 11/7/2002. It is to be noted that the 40/70 undivided Share which the plaintiff claims came into existence in 1983.

27. There is also evidence that in 1984, the late Kirumba Ngiri sued Hannah Wanjiru and Maria Nyaguthi seeking a perpetual restraining order barring them from interfering with his portion of the suit properties. The defendants in that suit filed a counterclaim and contended that the late Kirumba Ngiri held the two suit properties in trust for the defendants. One of the defendants, Maria Nyaguthi died in 1988 and the claim against her abated in 1989. The suit was eventually dismissed for want of prosecution. The plaintiff contends that he continued to occupy the 40/70 portion of Parcel No 12 and the whole of Parcel No T 593 from 1988 when Maria Nyaguthi died up to 2003 when he took out the originating summons. He still occupies the 40/70 portion of Parcel No 12 and the whole of Parcel No T 593. He has built permanent houses and planted tea trees on the said properties.

28. Under cross-examination, DW 1 Laban Karanja stated that the person currently residing on the suit properties is the plaintiff. He added that the plaintiff has a tea plantation of more than 10,000 plants, trees and permanent dwelling houses on the suit properties. He could not remember for how long the plaintiff has lived on the suit properties. He reiterated that position under re-examination by his counsel.

29. In light of the above evidence, it is clear that the plaintiff has been in possession of the 40/70 portion of **Title Number Githunguri/Githiga/12** together with the whole of **Githunguri/Githiga/T593** from 1988 when Maria Nyaguthi died. That is the time when limitation period started running because there is evidence that the plaintiff lived on the suit properties as an invitee of Maria Nyaguthi. The plaintiff subsequently took out the present originating summons in September 2003, after a period of about 15 years.

30. The question that arises is whether in view of the fact that the plaintiff as the administrator of the estate of the late Maria Nyaguthi who was a co-owner of undivided share of Parcel No 12 has, in that capacity, acquired adverse title to the 40/70 portion that belonged to the late Raymond Kirumba Ngiri. In my view, the answer to that question is in the negative. I say so because, as the administrator of the estate of the late Maria Nyaguthi, the plaintiff stepped into her shoes and is entitled to be registered either as trustee owner or absolute owner of the 15/70 undivided share which belongs to Maria Nyaguthi. He is effectively a co-owner of Parcel Number 12 and as a co-owner he cannot invoke the doctrine of adverse possession against his co-owners. At common law, a co-owner of undivided share of land is considered to be a trustee of the other co-owners and cannot claim the title of an adverse possessor against another co-owner. The **Right Hon Sir Robert Megarry and Sir Willam Wade** in their reputed work **The Law of Real Property** have shed light on this common law principle thus:

Since 1925 the law has been changed, perhaps unintentionally, by the imposition of what is now statutory trust of land which operates in all cases of tenancy in common and beneficial joint tenancy. This brings into play the rules relating to trusts, mentioned above, in particular rules that a trustee cannot bar his beneficiary, and that one beneficiary cannot bar another beneficiary. Thus in a case where one of two tenants in common received all the rents and profits from 1925 for over 12 years, the other tenant's claim failed in respect of the

years 1923 - 1925 when the old law applied. However, it succeeded in respect of the later years, for after 1925 the legal estate was vested in the two tenants as trustees for sale on their own behalf, and neither could plead the Limitation Act against the others. Since 1940, moreover, the position would be the same even if other persons were trustees, because of the provision that one beneficiary cannot bar another.

31. The above English Law position has been codified under **Section 20 (1)** of the **Limitation of Actions Act** which provides as follows:

1. None of the periods of Limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action -

a) in respect of a fraud or fraudulent breach the trustee was a party or privy too; or

b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.

32. It is therefore the finding of this court that, as administrator of the estate of Maria Nyaguthi who was a co-owner of Title Number **Githunguri/Githiga/12**, the plaintiff stepped into the shoes of Maria Nyaguthi and he is a trustee of the other co-owners of the property. In that capacity, the plaintiff cannot invoke the statute of limitation against any of the co-owners. In that position of a trustee, he cannot claim the title of an adverse possessor of a portion of the very property in respect of which he is a trustee. The Grant of Letters of Administration which he annexed to the originating summons was issued on 11/7/2002. The present originating summons was instituted in 2003. At that time, he was the administrator of the estate of the late Maria Nyaguthi and he held the suit property as a trustee of the other co-owners.

33. What is the position with regard to Title Number **Githunguri/Githiga/T.593** which was registered in the name of Raymond Kirumba Ngiri alone at the time of initiating this suit? My finding in relation to Title Number **Githunguri/Githiga/T 593** is that the plaintiff's adverse title to this parcel crystallized twelve years from 1988 when Maria Nyaguthi died. The plaintiff therefore properly acquired adverse title to Title Number Githunguri/Githiga/T.593 in the year 2000 because he had been in adverse possession of the parcel from 1988 when Maria Nyaguthi died.

34. In light of the above findings, I make the following orders in disposing the Originating Summons herein:

a) It is hereby declared that the plaintiff is entitled to be registered as proprietor of Land Title Number Githunguri/Githiga/T.593 under Section 38 of the Limitation of Actions Act;

b) The land registrar is hereby ordered to register the plaintiff as the proprietor of Githunguri/Githiga/T.593;

c) The plaintiff's claim of title under the doctrine of adverse possession over the 40/70 Share which was registered in the name of Raymond Kirumba Ngiri at the time of filing this suit is hereby dismissed for lack of merit; and

d) Each party shall bear own costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF MAY 2018.

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B M EBOSO

JUDGE

In the presence of:-

Mr Morara holding brief for Mr Banja for the Plaintiff

Mr Ndirangu advocate for the Defendant

Ms Halima Abdi - Court clerk