



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 311 OF 2017(formally Nairobi ELC No. 936 of 2016)

PETER WAWERU WAIRI.....1<sup>st</sup> PLAINTIFF

NAHASON NGUGI WAIRI.....2<sup>nd</sup> PLAINTIFF

STEPHEN KIUNA WAIRI.....3<sup>rd</sup> PLAINTIFF

VERSUS

PETER KIBUNJA NYAGA.....1<sup>st</sup> DEFENDANT

JOHN NDUNGU NYAGA.....2<sup>nd</sup> DEFENDANT

NYAGA KINYANJUL.....3<sup>rd</sup> DEFENDANT

JUDGEMENT

1. By an originating summons dated 1<sup>st</sup> August 2016, and filed and under Order 37 Rule 7 of the Civil Procedure 7 Rules, Section 38 of the Limitation Acts and Section 28(h) of the Land Registration Act No. 3 of 2012 the Plaintiffs herein who claimed to be entitled to be registered as the sole absolute Proprietors of eight (8) acres, six (6) acres and two (2) acres respectively of **Title No. Nyandarua/Muruaki/4044 and Nyandarua/Muruaki/4052 (which title is closed for sub division into Nyandarua/Muruaki/4784 and 4785) by adverse possession** seeks for the following orders:

i. That the honorable court direct the Defendants to transfer eight (8) acres, six (6) acres and two (2) acres respectively of land parcels **Title No. Nyandarua/Muruaki/4044 and Nyandarua/Muruaki/4052.**

ii. In the alternative and without prejudice to the foregoing, this honorable court direct that the Deputy Registrar execute transfer forms and all necessary documents pertaining to the land parcels in place of the Defendants in the event of the Defendants' failure to transfer the land to the Applicants.

iii. That Cost of the suit be awarded to the Plaintiff.

2. The Originating Summons is premised on the grounds stated on the face of it as well as the Supporting *Affidavit* sworn on the 1<sup>st</sup> August 2016 by Peter Waweru Wairi, the 1<sup>st</sup> Plaintiff herein.

3. The matter was initially filed at the Nairobi Environment Land Court wherein on the 17<sup>th</sup> January 2017, parties took directions to the effect that the Originating Summons be heard by way of viva voice and that the Defendants herein do file their replying affidavits within 21 days and the Applicants reply to the same 7 days upon service. The matter was then transferred to this court on the 15<sup>th</sup> February 2017 wherein on the 4<sup>th</sup> May 2017, the court was informed that the Defendants had complied with the orders of the 17<sup>th</sup> January 2017 and that the Applicants would not be filing any response.

4. The matter was thus set down for viva voice hearing for the 25<sup>th</sup> July 2017 on which day there was no appearance by either by the Defendants or their Counsel.

5. Since there was communication to the effect that Counsel for the Defendants would not be available to prosecute the matter on that day, it was re-scheduled for hearing for the 23<sup>rd</sup> November 2017 on which day, there was an application for adjournment, by the Counsel holding brief for the Counsel for the Defendants who submitted that the Defendants had just instructed another counsel who needed time to study the file. The matter was adjourned again to the 20<sup>th</sup> February 2018 on which day there was neither appearance by the Defendants nor their counsel. The matter proceeded ex-parte in their absence.

6. The Plaintiffs called two witnesses namely Peter Waweru Wairi and Kamau Chege Kangaru who apart from giving oral testimony had already filed affidavits on 2<sup>nd</sup> August 2016 and 19<sup>th</sup> July 2017 respectively.
7. The 1<sup>st</sup> Plaintiff who testified as PW1 testified to the effect that he and the other Plaintiffs were siblings and live in the suit land although the same is registered in the names of the Defendants as evidenced in the search certificates produced as exhibits 2 and 3, on both parcels of land.
8. That the suit land belonged to their father Wairi Kyuna(deceased) who had bought it in the year 1988 from its proprietor, who was also the Defendants' father, one Kinyua Nyaga, at a consideration of Ksh. 212,000/= as per the agreement marked as Exhibit 1. That at the time, it had previously been registered as **Nyandarua/Muruaki/290 and measured 8 acres.**
9. That their family had subsequently moved onto the suit land in 1992 wherein they had established their homesteads therein and had developed the same by the construction of their homes, keeping cattle, planting trees and even constructing a dam therein, that they had even buried their kin on the said land.
10. That despite the fact that parties to the agreement Marked as exhibit 1 having obtained consent from the Land control Board, when the Plaintiffs' father passed away in the year 2002, the Vendor, who was the Defendants' father refused to transfer the land. That is when they filed suit for specific performance
11. That the suit land was later subdivided into two parcels being No **Nyandarua/Muruaki/4404 which measured 6 acres and Nyandarua/Muruaki/4052 which measured 2 acres and which was later closed after its sub division into Nyandarua/Muruaki/4784 and 4785.**
12. PW 2, Kamau Chege testified to the effect that he knew the late Wairi Kyuna (deceased) in the year 1970 when he had come to live in Muruaki. That indeed after the deceased had sought help from him to look for land for sale, he had been the one who had found the suit land for the deceased.
13. He confirmed that the vendor was called Nyaga Kinyua Muriuki who was indebted to the Agricultural Finance Corporation who wanted to sell his land to recover their loan.
14. He further confirmed that the deceased had bought eight (8) acres of land at a consideration of Ksh 212,000/= which monies were paid in instalments of Ksh 10,000/ paid in cash in December 1988, Ksh 190,000/= paid through a bankers cheque and finally Ksh 2,000/=. The witness produced the acknowledgement agreement dated 4<sup>th</sup> December 1988 as Exhibit 4 confirming that the monies had been paid in the above captioned mode.
15. He also produced a copy of the bankers cheque for Ksh 190,000/= dated the 2<sup>nd</sup> December 1988 made out in the name of Nyaga Kinyua Muriuki as exhibit 5, a copy of the letter of consent dated the 24<sup>th</sup> February 1989 but which it's filing was not completed, as exhibit 6 as well as the proposed sub-division of Nyandarua/**Muruaki/290 clearly marking out the 8 acres, as exhibit 7 and his statement as exhibit 8.**
16. He further testified that he knew the deceased well and that he lived 8 kilometers away from him. He confirmed that the deceased was the father of the Plaintiffs herein who had moved onto the suit land in the year 1991 wherein they had developed the land by putting up their houses, planting trees and constructing a dam thereon. That they had also made use of the land by cultivating on the same. He confirmed that the Plaintiffs have also buried their kin on that land and that during those burial ceremonies which he had attended, there had been no opposition raised by the Defendants whom he confirmed were the sons of Nyaga Kinyua who was also deceased.
17. The Plaintiff closed their case and filed their written submissions on the 12<sup>th</sup> March 2018. Thereafter they served the same on the Defendants and when the matter came up for mention on the 24<sup>th</sup> May 2018 upon the court being satisfied that the filed submissions as well as the mention date had been served, reserved a date for judgment.
18. Although this matter was not defended yet the fact that the Defendants filed their replying affidavit on the 13<sup>th</sup> February 2017, I am obliged to consider the same so to appreciate evidence from both parties.
19. The Defendants aver vide their affidavit that the Plaintiffs' claim was not merited and should not be allowed.
20. The Defendants averred that indeed the suit lands being No. **Nyandarua/Muruaki/4404 and Nyandarua/Muruaki/4052** was originally their family land having been registered in the name of Nyaga Kinyua Muriuki their late father.
21. That it was not true that the Plaintiffs have lived on the suit land since 1992 as there was no evidence to that effect. They could therefore not claim the same by way of adverse possession.
22. That the Agreement herein which was produced as exhibit 1 was in relation to Plot No 290 Muruaki and that there was no connection between the said piece of land and the suit lands herein which are claimed by the Plaintiffs.
23. That further that the terms of the alleged sale agreement were to the effect that the land was sold for Ksh. 212,000/= yet there was no evidence that the money was paid to the vendor and the Plaintiffs could not therefore acquire land that they had not paid for. Further that the claim for title by way of adverse possession could not go hand in hand with the claim for purchase of land.

24. The Defendants although disputing the fact that the Plaintiffs have been on the suit land for more than 12 years, concede to the fact the only the 1<sup>st</sup> Plaintiff is in possession of 1 acre of the same.
25. The Defendants further averred that the Plaintiffs had filed another suit wherein they sought for specific performance which was based on the same alleged sale. The current suit, they averred was bad in law and ought to be dismissed.
26. I have since considered the evidence adduced in court, the written submissions by the plaintiff, the affidavit by the Defendants in response, as well as the fact that this suit was undefended.
27. The Plaintiffs' submission is to the effect that they had established that their occupation of land parcels No Nyandarua/Muruaki/4044 and Nyandarua/Muruaki/4052 (which was further closed for subdivision into Nyandarua/Muruaki/4784 and 4785) was Adverse to the interest of the registered owner, it was for a period of over 12 years and finally that it was continuous and uninterrupted and that consequently, they were entitled to the prayers sought in the originating Summons filed on 2<sup>nd</sup> August, 2016.
28. The Plaintiffs' submitted that the cause of action was based on the doctrine of adverse possession and not purchase of the suit premises and that the evidence tendered regarding the purchase of the land was with a view of demonstrating how the Plaintiffs entered into the suit land and also to establish that no Land Board Consent for the transfer of the land was ever given. That it was permissible in law for a transaction to commence as a sale of land but for the possession to become adverse in certain circumstances such as prevailed in the instance case.
29. The Plaintiff relied on the decided case of **Public Trustee vs Wanduru 1984 KLR 314** to buttress their submissions.
30. They further submitted that mere change of ownership of the land occupied by another does not interrupt adverse possession and relied on the case of Sophia **Thimu Wamuici & 6 others vs. Josephine Keru Gichangi (2009) eKLR** by J. Makhandia where he quoted the case of **Omukaisi Abulitsa vs Albert Abutsa Shetseswa, Kakamega HCCC No 86 of 2005**.
31. It was the Plaintiffs' further submission that based on the holding in the case of **Githu vs Ndeete (1984) KLR 776** that adverse possession could also be acquired over a portion of a bigger parcel of land. They reproduced part of the Court of Appeal's ruling that:-
- i. The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession
  - ii. A title by adverse possession can be acquired under the Limitation of Actions Act to a part of the parcel of land which the owner holds title."
32. It was the Plaintiffs' submission that their uncontroverted evidence and exhibits 1 to 8 established that indeed their late father Wairi Kyuna had set to purchase 8 acres of land parcel Nyandarua/Muruaki/4052 from the late Nyaga Kinyua Muriuki way back in 1988. Purchase price was paid, subdivision done but transfer was never effected as Land Control Board Consent for transfer was never obtained.
33. The Plaintiffs who are three sons of Wairi Kiuna (amongst others) however occupied the land in 1992 and have been in possession since. They have cultivated the land, planted mature trees, built their residential houses, a dam and also buried their relatives who died during the period of possession, one son of the 1<sup>st</sup> plaintiff Brian in 2001, a brother Evan in 2006 and a sister in law Mary in 2005. These burials were conducted openly without any opposition.
34. They also submitted that the Defendants are the sons of the Late Nyaga Kinyua Muriuki (the vendor herein) and the current proprietors of the suit land having inherited it from their father.
35. That there was evidence from Kamau Chege Kangaru (PW 2) that consent for the sub-division of the land into various portions including the subject 8 acres had been given on 24<sup>th</sup> February 1989. He produced the same as Plaintiff Exhibit 6 and the sketch for the 8 acres as Plaintiff Exhibit 7.
36. That from the Defendants' replying Affidavit sworn by Peter Kibunja Nyaga and John Ndung'u Nyaga, they admitted to facts that they are the present owners of the suit premises which was originally owned by Nyaga Kinyua Muriuki and secondly, they conceded that the 1<sup>st</sup> Plaintiff occupies one (1) acre of the suit land. Their contention that the purchase price was not paid was controverted by written evidence and in any event, it was not material as the cause of action was based on adverse possession and not the sale.
37. It was the Plaintiffs' contention that the Defendants' allegation that the Plaintiffs did not occupy the land in 1992 was not tenable as they failed to cross examine the Plaintiffs' evidence and/or tender contrary evidence. In any event, even counting period of possession from the date the son of the 1<sup>st</sup> Plaintiff was buried on the land in the year 2001 to the time of filing the suit in 2016 the 12 year period was still attained.
38. The Plaintiff's further submission was to the effect that from the decisions afore-quoted, it was clear that adverse possession started from the date the Plaintiffs occupied the land in 1991. The occupation was adverse as the time to issue Land Board Consent for transfer of the agreement of 1988 had long expired and the sale rendered a nullity under the premise of Section 22 of the Land Control Act. The possession was not legally on the Sale Agreement which had expired in accordance with Section 6 and 22 of the Land Control Act.
39. Further, that it mattered not that the adverse possession was only on part of the land. It also mattered not that there was change of ownership of the land from original owner Mr. Wairi Kyuna (deceased) to the present owners, the Defendants herein.

40. That and as per Plaintiff Exhibit 2, land parcel Nyandarua/Muruaki/4052 was at the time of filing suit on 2<sup>nd</sup> August 2016 already closed for sub-division to land parcels Nyandarua/Muruaki/4784 and 4785. But that even if the land parcel 4052 has already been sub-divide further to 4784 and 4785, the two acres should still accrued from these latter subdivision.

41. The Plaintiffs prayed for the court to issue orders as prayed.

42. The matter for determination herein is whether the Plaintiffs have acquired prescriptive rights over the suit land by adverse possession. The law is settled as anchored under Sections 7, 13, 17 and 38 of the Limitation of Actions Act.

43. Section 7 provides inter alia:

*“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 or, if it is first accrued to some person through whom he claims, to that person”.*

44. Section 13 is in these terms:

*“(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession.....”*

45. Section 17 is to the effect that upon the expiry of the period (12 years) prescribed by the Act for a person to bring an action to recover land, the title of that person to the land stands extinguished.

46. Finally Section 38 states:

*(1) where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, 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.”*

47. As was stated by the Court of Appeal in the case of **Benjamin Kamau Murma & Others vs Gladys Njeri, C A No. 213 of 1996:**

*“The combined effect of the relevant provisions of sections 7, 13 and 17 of the Limitation of Actions Act, Chapter 22 of the 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.”*

48. The onus is on the person or persons claiming adverse possession:

*“.. 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 evasion). So the plaintiffs must show that the company had knowledge (or the 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 endeavors to interrupt it or by any recurrent consideration”*

49. The main the elements of adverse possession that a claimant has to prove include :

- i. actual,
- ii. open,
- iii. exclusive
- iv. and hostile possession of the land claimed.

Have the Plaintiffs herein demonstrated the said elements?

50. The facts upon which the claim for adverse possession is made is that the Plaintiffs' late father Wairi Kyuna had set to purchase 8 acres of land parcel Nyandarua/Muruaki/4052 from the late Nyaga Kinyua Muriuki way back in 1988. Purchase price was paid, subdivision done but transfer was never effected as Land Control Board Consent for transfer was never obtained.

51. The plaintiffs who are three sons of Wairi Kiuna (amongst others) however occupied the land in 1992 and have been in possession since. They have cultivated the land, planted mature trees, built their residential houses, a dam and also buried their relatives who died during the period of possession, one son of the 1<sup>st</sup> Plaintiff Brian, in 2001, a brother Evan in 2006 and a sister in law Mary in 2005. These burials were conducted openly without any opposition.

52. In essence therefore the occupation of the land by the Plaintiffs was exclusive and without permission from the Defendants who are the registered proprietors of the land occupied.

53. When the suit property was registered in the Defendant's name, the Plaintiffs were still living on it and the Defendants have never tried to evict them from thereon. That they had been cultivating on the suit land and have made extensive developments thereon. They have built houses, **planted trees, cultivated land, and even dug a dam on the land which activities were paramount to prove dispossession of the Defendants.**

54. That the Defendants has never occupied nor lived on the suit property. Based on the aforementioned facts, the Plaintiffs claims title to the suit land by way of adverse possession.

55. It is trite law that the mere change of ownership of land which is occupied by another person under adverse possession does not stop time from running or interrupt such person's adverse possession. **See Githu v Ndeete** (supra)

56. Time therefore began to run against the Defendants in favor of the Plaintiffs from the time the latter occupied the suit property and engaged in acts that were inconsistent with the Defendant's title, for instance building houses on the suit property, planting trees and the digging of a dam. There is nothing to suggest that that occupation was secret or that it was not known to the Defendants.

57. When would time stop running" **In Joseph Gahumi Kiritu v Lawrence Munyambu Kabura Civil Appeal No.20 of 1993**, the court of Appeal held that;

*"Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a mere formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. ...He must therefore make a peaceable and effective entry, or sue for recovery of land."*

58. Neither the Defendants nor their father took any steps throughout the time that the Plaintiffs were in possession of the suit property that would interrupt time from running. Reference is made to the years from the year 1992 to the year 2016 when the present suit was filed.

59. In the case of **Littledale v Liverpool College (1900) I ch.19, 21** it was held that;

*"In order to acquire by the 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 next question, therefore, is what constitutes dispossession of the proprietor" ....acts must be done which are inconsistent with his (the owner's) enjoyment of the soil for the purpose for which he intended to use it."*

60. Indeed in the case of **Githu vs Ndeete** (supra) it was held that;

*"Time ceases to run under the Limitations of Actions act either when the owner takes or asserts his right or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes effective entry into land, giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act."*

61. The actual knowledge on the part of the registered proprietors being the Defendants herein that the Plaintiffs were in possession of the suit property was established to exist from the year 1992 up to when the present suit was filed in the year 2016. No evidence has been adduced that indeed the Defendants herein **took legal proceedings or made effective entry into land.**

62. On the issue that the claim for title by way of adverse possession could not go hand in hand with the claim for purchase of land, I find that the Plaintiffs' case is brought under the provisions of the law seeking land by way of adverse possession and that is the pleading that has been responded to by the Respondents. The suit squarely remains one of adverse possession and it follows that the contentions that the land was or was not transferred to the Plaintiff's father by the Defendant's father through and agreement of sale are irrelevant and are not the subject matter of this suit. The main issue in this suit is whether or not the Plaintiffs are entitled to the suit land by way of adverse possession.

63. From the exhibits produced by the Plaintiffs as well as the evidence adduced, it cannot be said that Plot No. 290 Muruaki was different from the suit lands herein. No evidence was adduced by the Defendants to prove their allegation as is expected of them by the provisions of section 111 of the Evidence Act. Further, the doctrine of he who alleges must prove was not discharged by the Defendants.

64. I find and hold that the Plaintiffs have proved on a balance of probabilities that their right of action as against the Defendants had accrued as at the time of filing this suit for the suit property to be said to have fallen into their possession pursuant to the provisions of section 38 as read together with sections 7, 9 and 13 of the Limitation of Actions Act.

65. In the circumstance herein the Plaintiffs' Originating Summons dated 1<sup>st</sup> August 2016, succeeds in its entirety in the following terms;

**i. The Defendants herein are ordered to transfer eight (8) acres, six (6) acres and two (2) acres respectively of land parcels Title No. Nyandarua/Muruaki/4044 and Nyandarua/Muruaki/4052 to the Plaintiffs herein.**

**ii. That land parcel No Nyandarua/Muruaki/4784 and 4785 still accrue from the sub-division of Nyandarua/Muruaki/4057.**

iii. In the alternative the and without prejudice to the foregoing the Deputy Registrar is directed to execute transfer forms and all necessary documents pertaining to the land parcels in place of the Defendants in the event of the Defendants' failure to transfer the

land to the Applicants.

iv. **That** Cost of the suit be awarded to the Plaintiff at a lower scale since the same was not defended.

**Dated and delivered at Nyahururu this 31<sup>st</sup> Day July of 2018.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**