



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**ELC NO. 88 OF 2017**

**NELSON RURIRA KANG'ETHE.....1<sup>ST</sup> PLAINTIFF**

**JULIA MUTHONI KANGETHE.....2<sup>ND</sup> PLAINTIFF**

**VS**

**JOYCE WAMBUI KAMANJA.....1<sup>ST</sup> DEFENDANT**

**BETHA NJERI KAMANJA.....2<sup>ND</sup> DEFENDANT**

**DAVID KAMAU KAMANJA.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. By an amended originating summons filed on 13/12/16 the Plaintiffs filed suit against the Defendants seeking the following orders;
  - a) **THAT** the Plaintiffs have by adverse possession acquired 2 ½ acres out of Land Title Number Loc. 11/Gaitega/100 and or Land Reference Numbers Loc.11/Gaitega/793, Land Reference Number Loc.11/Gaitega/794, Land Reference Number Loc. 11/Gaitega/795 and Land Reference Number Loc. 11/Gaitega/796 measuring 5.5 acres registered (Suit Lands) in the name of the 1<sup>st</sup> Defendant.
  - b) **THAT** the caution lodged by the 3<sup>rd</sup> Defendant be removed.
  - c) **THAT** the Land Registrar Murang'a be ordered to transfer the 2.5 acres of Land Title Number Loc.11/Gaitega/100 and or Land Reference Numbers Loc 11/Gaitega/793, Land Reference Number Loc. 11/Gaitega/794, Land Reference Number Loc. 11/Gaitega/795 and Land Reference Number Loc. 11/Gaitega/796 into the names of Nelson Rurira Kang'ethe and Julia Muthoni Kang'ethe without requiring them to produce original title, copies of identify cards, PIN Certificate and Photographs.
  - d) **THAT** Land Reference Number Loc. 11/Gaitega/100 was sub-divided and registered illegally as Land Reference Number Loc. 11/Gaitega/793, Land Reference Number Loc. 11/Gaitega/794, Land Reference Number Loc. 11/Gaitega/795 and Land Reference Number Loc. 11/Gaitega/796 while this suit was pending and after pleadings were served upon the Defendants and the titles resultant from the subdivisions be revoked.
  - e) **THAT** the Deputy Registrar, High Court do sign application for land Control Board, Transfer and any other necessary applications to facilitate transfer into the Plaintiff's names.
  - f) **THAT** the Defendants be ordered to pay the costs of this suit.
2. The Originating Summon is supported by the affidavit of the 1<sup>st</sup> Plaintiff on the grounds, *inter-alia*;
  - a) The 1<sup>st</sup> and 2<sup>nd</sup> Defendants are registered owners of Land Title Number Loc. 11/Gaitega/100.
  - b) The 3<sup>rd</sup> Defendant claimed beneficial interest and lodged a caution on the title of Land Title Number Loc.11/Gaitega/100.
  - c) The Plaintiffs have been in continuous and uninterrupted occupation of the land in paragraph (a) above.
3. The 1<sup>st</sup> Plaintiff stated in his amended Supporting Affidavit that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are registered proprietors of the suit land

having been so registered on 16/7/2002. That the 3<sup>rd</sup> Defendant filed a caution on the Suit Lands on 23/11/09 to frustrate their claim. The claim herein is beneficial interest in the suit land.

4. That the Plaintiffs have been using the Suit Lands in conjunction with Kangethe Rurira deceased who was the husband of 1<sup>st</sup> and 2<sup>nd</sup> Defendants and father of 3<sup>rd</sup> Defendant. That the original suit land was Loc.11/Gaitega/100 and the same has been subdivided to create parcels Loc.11/Gaitega/793 – 796 and registered in the name of the 1<sup>st</sup> Defendant.

5. That the said subdivisions and transfers were done to defeat the Plaintiffs' claims on the suit properties.

6. That the Plaintiffs have occupied 2.5 acres of the Suit Lands since 1983 and have been in such uninterrupted continuous occupation for a period of 32 years. He annexed a copy of green card for Loc.11/Gaitega/100 and the certificate of official searches for the resultant subdivisions namely Loc.11/Gaitega/793 – 796, all registered in the name of the 1<sup>st</sup> Defendant.

7. In response to the Plaintiffs' claims aforesaid the Defendants through the Replying Affidavit filed on 13/12/16 and deponed by the 3<sup>rd</sup> Defendant stated that the Plaintiffs are seeking adverse possession on titles that are nonexistent. That vide Succession Cause No. 147 of 1994 the Suit Lands became vested in the 1<sup>st</sup> Defendant by a confirmation of grant issued on 21/6/2002. That the 1<sup>st</sup> Defendant is now registered owner of Land Parcels Loc.11/Gaitega/793 – 796.

8. He contended that the present suit is incompetent as the proper cause of action was for the Plaintiffs to apply for revocation of the said grant. They denied that the Plaintiffs have been in uninterrupted occupation of the suit lands. That the suit lands are non-existent.

#### **Plaintiff's case**

9. The 1<sup>st</sup> Plaintiff in his witness statement stated that they have resided on the land for over 32 years. That he lived on the land with his father Kangethe Rurira until his death. That they have been carrying on farming activities and have built houses on the said land. That at the time of filing suit the suit land was registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants while the 3<sup>rd</sup> Defendant had filed a caution against the land claiming beneficial interest. Thereafter the suit land was subdivided and registered in the names of the 1<sup>st</sup> Defendant alone.

10. That the transfer of the suit land was a fraudulent scheme to defeat their interests. That the Defendants title in the land has been extinguished by passage of time and are now entitled to 2.5 acres of the land. That the suit premises belonged to their grandfather's clan which was registered in the name of Kamanja Rurira in 1965. Kamanja Rurira was the husband of 1<sup>st</sup> & 2<sup>nd</sup> Defendant and the father of the 3<sup>rd</sup> Defendant.

11. That while the suit was pending in Court the suit land was subdivided into the portions and registered in the name of the 1<sup>st</sup> Defendant. That the Plaintiffs have been subjected to harassment in relation to the dispute in respect to the suit land.

12. At the trial the 1<sup>st</sup> Plaintiff testified solely and reiterated the contents of his Supporting Affidavit and his witness statement. He stated that the land belonged to his grandfather Rurira wa Kaimu. That Kamanja Rurira was the 1<sup>st</sup> registered owner of the suit land. He was his uncle (father's brother).

13. He stated that the land had been subdivided into 4 parcels and registered in the name of the 1<sup>st</sup> Defendant. He stated that he is claiming the share of the land that belonged to his father Kangethe Rurira. That Kamanja Rurira held the land in trust for his father, though they have not filed suit claiming trust but their case is based on adverse possession. That they have lived on the land for over 40 years.

14. He stated that he was not involved in the Succession Cause No. 147/94 neither did he file any claim against the estate of Kamanja Rurira. He stated that they are entitled to 2.5 acres of the suit land for which they are in possession. That he has built a house and planted mango trees. That his father Kangethe Rurira is buried on the suit land.

#### **The Defendants case**

15. The Defendant chose to rely on the Replying Affidavit filed in Court on 24/11/16. At the hearing, the 3<sup>rd</sup> Defendant testified and stated that the Plaintiffs and the Defendants are related. His father Kangethe Rurira was the brother of Kamanja Rurira the husband of 1<sup>st</sup> and 2<sup>nd</sup> Defendants and father of the 3<sup>rd</sup> Defendant.

16. That the suit land was registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in 2002. That he lodged a caution against the suit land on 23.11.09. That the suit land was subdivided and registered in the name of 1<sup>st</sup> Defendant on 17/3/2016. He confirmed that the subdivision and the transfer of the titles to the 1<sup>st</sup> Defendant was carried out while the case was pending in Court. He contended that the Plaintiff is entitled to 1.0 acre. He confirmed that the Plaintiffs live on the land. That on the Plaintiff's portion they have planted Napier grass and a few mango trees and their side has intensive cultivation. That his father died in 1984. That the land on the ground is demarcated using a deep trench which is almost in the middle of the land. He stated that his father had directed that one acre of land should be given the Plaintiff. He further confirmed that the Plaintiffs have been on the land since 1998. He stated that though no surveyor has been demarcated the land on the ground he is unsure if the two pieces are equal in sizes. On re-examination he stated categorically that the occupation of the suit land by the Plaintiffs has been continuous and uninterrupted since 1998.

17. Parties elected to file written submissions which the Court has read and considered. The Plaintiff filed and set out 7 issues for determination while the Defendants did not file any.

18. The Plaintiffs submitted that they are claiming 2.5 acres of land out of 5.5 acres of suit land registered in the name of 1<sup>st</sup> Defendant. That the land they are seeking an interest in is an ancestral land which was registered in the name of Kamanja Rurira the brother of the 1<sup>st</sup> Plaintiff. Upon the death of Kamanja Rurira the 1<sup>st</sup> and 2<sup>nd</sup> Defendants succeeded the land vide a grant issued in 2002. They submitted that they have been on the land since 1983, cultivated the land and have built houses as well. That the Plaintiffs' father was buried on the said land where they live to date.

19. They submitted that pending the determination of the suit the land was subdivided into 4 plots without the consent of the Court and is now registered in the name of the 1<sup>st</sup> Defendant. That the said subdivision and transfer was to defeat the Plaintiffs' claim of adverse possession and the Defendants now claim that the land is nonexistent. That the 3<sup>rd</sup> Defendant has lodged a caution to defeat their claim.

20. Relying on the case of **Olympic Company trading Ltd & Another vs said Mohamed & 4 others (2014) EKL ELC Civil Suit No. 259 of 2012** *inter-alia* the Plaintiffs submitted that the doctrine of *Lis pendens* was applicable in this case. Quoting the Learned Judge in **Abdalla Omar Nashan vs. the executor of the estate of said Bin Abdallah Bin Abuod & Another, Malindi HCCC No. 63 of 2013**, the purpose of *Lis pendens* was to preserve the suit property until the suit was finally determined or until the Court issues orders and gives terms on how the suit property should be dealt with. The Plaintiffs submitted that vide the doctrine of *Lis pendens* the Court should treat the purported subdivision and transfer to the 1<sup>st</sup> Defendant like it never happened.

21. On adverse possession the Plaintiffs quoted the case of **Gatimu Kinguru v Muya Gathangi (1976) Eklr, Civil case No 176 of 1973**, where the Court determined an interest in adverse possession for the Defendant who had occupied the suit land with his brother. They relied on the case of **Virginia Wanjiku Mwangi v David Mwangi Jotham Kamau (2013) EKLR, Civil case No 86 of 2011** to show that the Plaintiff has met the basic requirements to prove adverse possession.

22. The Defendants filed their written submissions on 10/4/18 and stated that the 1<sup>st</sup> Defendant became registered owner upon successful confirmation of grant of letters of administration in the estate of the late Kamanja Rurira.

23. Maintaining that the Originating Summons is an abuse of Court process they contended that the Plaintiffs should have sought revocation of the grant. That the orders for adverse possession should have been claimed against the 1<sup>st</sup> Defendant only without including the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants. They termed the Plaintiffs' claim as a fishing expedition for which they should be stopped. That this Court has no jurisdiction to overturn the decision of the Succession Court. That the registration of the title was registered in the name of the 1<sup>st</sup> Defendant in 2016 and therefore 12 years have not lapsed. That the Plaintiffs have not established adverse possession.

24. Further the Defendants submitted that the Plaintiffs are unsure of the acreage they are claiming 2.5 or 2.75 acres. That the parcel of land Loc.11/Gaitega/100 is non-existent and the Applicants do not know the existence of parcel Nos Loc.11/Gaitega/793-796. They urged the Court to dismiss the originating summons.

25. Having reviewed and analyzed the evidence, the written submissions and the case law where supplied, the issues that commend themselves for trial are;

- A. Whether the court has jurisdiction.
- B. Whether the Defendants are in breach of the doctrine of *Lis pendens*?
- C. Whether the Plaintiffs have established title by adverse possession?
- D. What orders are to be issued by the Court?
- E. Costs of the suit?

#### **A. Whether the Court has jurisdiction.**

26. The Defendants have challenged the jurisdiction of this Court in their submissions. That this Court has no power to determine this suit which is related to a succession cause. They relied on the grant of representation issued in respect of the suit land. To set the record straight the matter before this Court is a claim for title under adverse possession. Pursuant to Section 13 (2) of the ELC Act, this Court has jurisdiction to deal with the matter as nothing has been placed before it to warrant ousting its powers.

#### **B: Whether the Defendants are in breach of the doctrine of *Lis pendens*?**

27. The doctrine of *Lis pendens* was provided for in the Indian Transfer of Property Act (ITPA) under section 52. Though the ITPA was repealed in Kenya, *lis pendens* is a common law principle which is still applicable in Kenya. The Purpose of the doctrine was to preserve the suit property until the suit is finally determined or until the Court issues orders and gives terms on how the suit property should be dealt with.

28. The doctrine of *lis pendens* rests upon the foundation that it would plainly be impossible that any action or suit could be brought to a successful conclusion if alienations pendent lite were permitted to prevail. In the case of **Bellamy v Sabince IDeG & J 566** it was held that:

“The doctrine of *lis pendens* intends to prevent not only the defendant from transferring the suit property when litigation is pending but it is equally binding on those who derive their title through the defendant, whether they had or had no notice of the pending proceedings. Expediency demands that neither party to a suit should alienate his interest in the suit property during the pendency of

the suit so as to defeat the rights of the other party ...”.

29. In **Festus Oganda vs Hans Million (Civil Appeal No. 100 of 2007)** the doctrine was explained as:

“The doctrine of *lis pendens* is meant to maintain the status quo over the property which is the subject matter of a pending suit until the final determination of the suit or until the suit is in any other manner terminated.....the transfer was obviously intended to defeat the outcome of the appeal. The transfer of the suit property.”

30. In the instant suit the original land was Loc.11/Gaitega/100. The said land was registered in the names of the 1<sup>st</sup> & 2<sup>nd</sup> Defendant upon completion of Succession of the estate of the original owner of Kamanja Rurira. The said title was subdivided during the subsistence of the suit into 4 parcels and the same transferred to the 1<sup>st</sup> Defendant. The Defendants have stated in their defence that adverse possession cannot obtain because the land was registered in the name of the 1<sup>st</sup> Defendant in 2016 and secondly that the original title is non-existent. In my view the suit lands registered in the 1<sup>st</sup> Defendant’s name forms the original land registered as Loc.11/Gaitega/100. It is the same property that was and is subject to the current litigation. This necessitated an amendment of originating summons on 13/12/16. This suit was filed on 18.12.15 when the suit land was registered in the names of 1<sup>st</sup> and 2<sup>nd</sup> Defendants. In subdividing the land and transferring it to the 1<sup>st</sup> Defendant it is irresistible to conclude that the Defendants intended to obscure the track record of the subject title. The Court holds that the subdivision and the eventual transfers are of no legal consequences. In this case the Court will make a pronouncement on the same in the final orders.

### **C: Whether the Plaintiffs have established title by adverse possession?**

31. It is on record that the Plaintiffs have been on the suit land since 1983. The Defendants contended that they have been in occupation since 1998, However it would be noted that the 3<sup>rd</sup> Defendant was born in 1994 and therefore incapable of adducing evidence for the period relating the Plaintiffs occupation of the land prior to 1994. No evidence was adduced by the Defendants to countenance this averment. The land was registered in the name of Kamanja Rurira in 1965. It is stated that Kamanja died in 1984. The Plaintiffs averred to have settled on the land in 1983. There is no evidence to point out that they did occupy the land with the permission of the original owner. It can be concluded that their entry into the suit land was therefore non-permissive.

32. It is on record that the 3<sup>rd</sup> Defendant made the following admissions on trial; that the Plaintiffs have been on the suit land from 1998 and have never left the land; that the Plaintiffs are entitled to one care of the land, which he says as per the directions of his late father; that his father died when he was 2 years old ( hearsay evidence as he was too young); that the Defendants and the Plaintiffs each occupy half of the land, though titles have been issued dividing land into four parcels, the parts occupied by the Defendants does not have beacons or anything to show it has been subdivided.

33. It is on record that the Plaintiffs have cultivated crops such as mangoes and built houses on 2.5 acres of the land. That they share the land with the family of the Defendants each occupying a definitive portion. The 3<sup>rd</sup> Defendant confirmed that the land was demarcated into 2 portions of almost equal acreage by a deep trench. That the portion of the Plaintiffs have a few mangoe trees while that of the Defendants has intensive farming. This evidence supports the Plaintiffs claim that the area of 2.5 acres is known and identifiable on the ground.

34. From the above evidence on record, the Court is of the view that the Plaintiffs have met the basic requirements of adverse possession as set out; that is to say; They have enjoyed open and notorious use of the suit land, from which they have been cultivating in that part of the land, besides that the 1st Plaintiff buried his father in the suit land; They have shown *animus possidendi* to possess the suit land by constructing their residential houses; They have resided on that portion of land to the exclusion of the owner uninterrupted for over 12 years; They have enjoyed actual possession, since they have exercised immediate and direct physical control over that part of the suit land for a period of over 32 years; They have enjoyed non-permissive, adverse use, without the Defendants permission and inconsistent with their rights.

### **35. Final orders;**

a. THAT Land Reference Number Loc. 11/Gaitega/100 was sub-divided and registered illegally as Land Reference Number Loc. 11/Gaitega/793, Land Reference Number Loc. 11/Gaitega/794, Land Reference Number Loc. 11/Gaitega/795 and Land Reference Number Loc. 11/Gaitega/796 while this suit was pending and after pleadings were served upon the Defendants and the titles resultant from the subdivisions be and are hereby revoked and the title to revert to its original title Loc. 11/Gaitega/100 registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

b. THAT the Plaintiffs have by adverse possession acquired 2 ½ acres out of Land Title Number Loc. 11/Gaitega/100 measuring 5.5 acres registered in the name of the 1st and 2<sup>nd</sup> Defendants.

c. THAT the caution lodged by the 3rd Defendants be and is hereby removed.

d. THAT the 1st and 2nd Defendants to subdivide and transfer the 2.5 acres of Land Title Number Loc.11/Gaitega/100 into the names of Nelson Rurira Kang’ethe and Julia Muthoni Kang’ethe.

e. THAT in default of (d) above the Deputy Registrar, ELC Court do sign any necessary applications and/or documents to facilitate transfer of 2.5 acres into the Plaintiffs’ names.

f. THAT the Defendants are hereby ordered to pay the costs of this suit.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 12<sup>TH</sup> DAY OF JULY 2018.**

**J. G. KEMEI**

**JUDGE**

**Judgment read in open Court in the presence of;**

Mr Wandaka for the Plaintiffs

1<sup>st</sup> Defendant

2<sup>nd</sup> Defendant      Absent

3<sup>rd</sup> Defendant

Ms.Irene and Ms Njeri, Court Assistants