



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MERU**

**ELC CASE NO. 61 OF 2017**

**(FORMERLY NO. 97/2004 (O.S))**

**ERNEST M. MUGAMBI R'IBURI.....PLAINTIFF**

**VERSUS**

**JACOB HENRY KIRIMI.....1<sup>ST</sup> DEFENDANT**

**JACOB KABUTO KANGANGI.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

**BACKGROUND**

The Plaintiff Ernest M. Mugambi R'Iburi via a Notice of Motion (O.S) dated 25<sup>th</sup> November, 2004 sought the court's determination on the following issues;

- (i) Whether parcel of land No. NTIMA/IGOKI/2504 measuring 0.88 Ha was originally owned by the father of the Plaintiff one Robert M'Iburi M'Njogu (now deceased)
- (ii) Whether the Plaintiff has been in continuous exclusive, open and uninterrupted occupation of parcel of land No. NTIMA/IGOKI/2504 especially since its registration on 12<sup>th</sup> February, 1973.
- (iii) Whether the Plaintiff has been cultivating and using upon parcel of land No. NTIMA/IGOKI/2504 since its registration.
- (iv) Was parcel of land number NTIMA/IGOKI/2504 secretly transferred to the Defendants by the late Robert M'Iburi M'Njogu on 5<sup>th</sup> April, 1976?
- (v) Has the Plaintiff confirmed to have the possession, both the occupation, enjoyment and use of parcel of land No. NTIMA/IGOKI/2504 since 5<sup>th</sup> April 1976?
- (vi) Has such possession, occupation and use of the suit land been interrupted since 5<sup>th</sup> April, 1976.
- (vii) Whether such occupation of the suit land has been open and notorious for a period of 28 years.
- (viii) Whether the proprietors in common (Defendants) of parcel No. NTIMA/IGOKI/2504 had the knowledge that the Plaintiff has had exclusive use and possession and in occupation in an open and notorious way since 5<sup>th</sup> April 1976?
- (ix) Have the Defendants entered or attempted to enter, use, possess or develop the suit land after the date they were registered as co-proprietors on 5<sup>th</sup> April, 1976?
- (x) Has the Plaintiff acquired the suit land by adverse possession?

The Plaintiff is therefore saying that if the answers to the aforesaid questions are in the affirmative, he seeks the following reliefs:

1. A declaration that the Plaintiff has acquired title of land parcel No. NTIMA/IGOKI/2504 by adverse possession.

**2. A declaration that the Defendant holds the title to L.R NTIMA/IGOKI/2504 in trust for the Plaintiff.**

**3. An Order that the Defendants do execute a valid transfer of LR. NO. NTIMA/IGOKI/2504 in favour of the Plaintiff and in default the court's Executive Officer be authorized to execute all the necessary documents required to facilitate such transfer.**

**4. Costs of this suit.**

On 24<sup>th</sup> January, 2006, the 2<sup>nd</sup> Defendant filed a supporting affidavit sworn on 23<sup>rd</sup> January, 2006 and a supplementary affidavit sworn on 13<sup>th</sup> March, 2006 and filed the same date. Again on 8<sup>th</sup> Decemer, 2010, the 2<sup>nd</sup> Defendant filed defence to the O.S.

#### **PLAINTIFF'S CASE**

The Plaintiff in his supporting affidavit to the originating summons stated that his father one Robert M'Iburi M'Njogu (deceased) was the original proprietor of land parcel No. NTIMA/IGOKI/2504. The Plaintiff further stated that he has been in continuous exclusive, open, and uninterrupted occupation of the suit land since its registration on 12<sup>th</sup> February, 1973. The Plaintiff also deposed that on 5<sup>th</sup> April, 1976 while he was still in such occupation his father (deceased) secretly transferred the whole parcel of land No. NTIMA/IGOKI/2504 to the Defendants proprietors-in-common in equal shares. By virtue of occupation of the suit land openly and notorious utilization, uninterrupted for a period more than 12 years he has acquired the same by adverse possession. In his testimony in court, the Plaintiff reiterated his averments contained in the witness statement dated 27/10/2012. He said that the suit property was registered in his name in 2004. He has been in occupation of the suit property since he was born in 1945. When his father passed away in 2001, they tried to look for the title deed without success. He went to the lands office to check and discovered that the Defendants allegedly bought the land in the year 2003 but found out that they were registered in 1976.

#### **DEFENDANT'S CASE**

PW1 was Philis Kanja Karimi who stated that she is the wife of one Jacob Henry Kirimi (deceased) who passed on in May, 1985. She is the legal representative of his Estate. She stated that Jacob Kabutu Kangangi alias Mwirigi has been taking care of the suit property since it was acquired. On cross-examination, she said that the suit property was bought by her late husband. She confirmed that she has no relative living on the land.

DW2 was Jacob Kabutu Mwirigi. He is the 2<sup>nd</sup> Defendant herein. He referred to his statements dated 5/12/2014 and 4/7/2018 which he adopted in his evidence. The witness in his statement stated that soon after they bought the suit property, they took over possession and started cultivating and even paid land rates to the local Municipal Council. Sometime in the year 2002, the 1<sup>st</sup> Defendants son joined in the utilization and possession of the land.

He further stated on 18/1/2006, one of his neighbours called him saying that someone had fenced off his land. He immediately went to the suit land where he discovered that the land had been sub-divided into 9 plots. He also went to inquire from the Land Registrar Meru who informed him that the land was transferred through a court order to a third party who then sub-divided the same into 9 plots. He was given the case number. He then filed an application to set aside interlocutory judgement that had been entered and all consequential orders. After hearing the application, the interlocutory judgment was set aside and the court granted inhibition orders against the nine portions of land being NTIMA/IGOKI/6906, 6907, 6908, 6910, 6911, 6912, 6913 AND 6914. The 2<sup>nd</sup> Defendant also stated that immediately after the sub-division was done, the Plaintiff started selling off the parcels of land and in particular parcels No. NTIMA/IGOKI 6910 and NTIMA/IGOKI/6914.

#### **PLAINTIFF'S SUBMISSIONS**

The counsels for the Plaintiff and the Defendants recorded a consent order on 05/07/2018 requiring the Plaintiff to file and serve written submission within 14 days with corresponding leave to the Defendants to file theirs within another 14 days from the date of service thereof. On 30/7/2018 when the matter came up for mention, only the Defendants had filed their submissions. The lawyer for the Plaintiff had not filed their submissions.

#### **SECOND DEFENDANT'S SUBMISSIONS**

The 2<sup>nd</sup> Defendant through the firm of Charles Kariuki & Kiome Associates started by giving the ingredients for one to acquire an interest in land by way of adverse possession. The Learned Counsel cited Sections 7, 13, 37 and 38 of the limitations of Actions Act Cap. 22 Laws of Kenya. The 2<sup>nd</sup> Defendant in conclusion submitted that the Plaintiff has not proved his claim on a balance of probabilities. It is submitted that the Plaintiff has not produced any evidence that he lived on the suit property or that he has been in occupation and exclusive possession. The Learned Counsels also submitted that the Plaintiff has not produced any evidence that he has developed the suit property.

#### **ANALYSIS AND DECISION**

I have carefully considered the viva-voce evidence adduced by the Plaintiff, the second Defendant and their witnesses. I have also looked at the documents relied by the parties and the applicable law. This court has pronounced itself in numerous decisions on the ingredients required for one to acquire an interest in land by Adverse Possession. In the case of **Mbira –Vs- Gachuhi (2002) EALR 137**, the court held that;

**“.....a person who seeks to acquire title to land by the method of Adverse Possession for the applicable statutory period**

**must prove non-permissive or non-consensual actual, open, notorious, exclusive, and adverse use by him or those under whom he claims for the statutory prescribed period without interruption.....”**

The Plaintiff in his affidavit in support of this originating summons at paragraph 6 stated that he has been in continuous, exclusive open and uninterrupted occupation of the suit land since its registration on 12<sup>th</sup> February, 1973. Again in paragraph 8 thereof, the Plaintiff deposed that as at 5<sup>th</sup> April, 1976, the Defendant’s had the full knowledge that he was in exclusive possession of the entire suit land as his occupation was open. The 2<sup>nd</sup> Defendant filed defence dated 8<sup>th</sup> December, 2010 where he averred at paragraph 5 as follows;

**“ 5 The land herein has always been in possession of the 2<sup>nd</sup> Defendant and the dependants of the 1<sup>st</sup> Defendant (deceased).”**

When Philis Kanja Kirimi (DW1) who is the widow of the 1<sup>st</sup> Defendant was cross-examined in court, she stated that she does not know any of her neighbours in the suit property. She also stated that she is not physically occupying the suit land but she instructed Mr. Mwirigi to take care of the land. Mr. Jacob Kabulu Kangangi (DW2) who is the 2<sup>nd</sup> Defendant in cross examination also stated that he has never lived in the suit land since he bought it. He also stated that he neither fenced nor constructed any structure/building on the suit property. The 2<sup>nd</sup> Plaintiff also stated that he does not know the person who utilizes the suit land. He also said that he does not know if the suit property is ancestral land or not. The Defendants do not even know who their neighbours are in the suit property. There is no indication whatsoever that the Defendants were given vacant possession of the suit property after they purchased it in 1976. They do not appear to know the boundaries of the suit land. My analysis of the evidence given by both the 2<sup>nd</sup> Defendant and Philis Kanja Karimi who is the widow of the 1<sup>st</sup> Defendant in cross-examination is a clear testimony that they have never set foot in the suit property after it was acquired. They seem to have no clue what is happening in their own property. Those are actions which are definitely inconsistent with the owners enjoyment of the suit land for its intended purpose. In the case of **Little dale –Vs- Liverpool College (1990) 1Ch. 19, 21** Lord Lindley M.R. held that in order to acquire by the statute of limitation a title of 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. My analysis from the evidence by the parties and their witnesses particularly in cross-examination of the Defendants makes me to conclude that the Defendants did not exercise due diligence at the time they purchased the suit property by inspecting the boundaries and establishing who was in occupation.

In the case of **Mweu –Vs- Ranching & Farming Co-operative Society Ltd, (1985) KLR 430**, the court held:

**“Adverse possession is a fact to be observed upon the land. It is not to be seen in the title even under Cap. 300. A man who buys land without knowing who is in occupation of it risks his title just as he does if he fails to inspect his land for 12 years after he had acquired it.”**

The circumstances in that case are obtained in the instant case. In the result, I find and hold that the Plaintiff has proved that he has acquired the Defendant’s land after demonstrating that his occupation and possession has been exclusive open continuous and uninterrupted for the prescribed period of more than 12 years.

That was the holding in the case of **Mbira –Vs- Gachuhi (2000) EALR 137** where it was held:

**“....a person who seeks to acquire title to land by the method of Adverse Possession for the applicable statutory period must prove non-permissive or non-consensual actual, open notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption.....”**

The Plaintiff has stated that he has been in occupation of the suit property since 1973 when it was registered in favour of his late father Jacob Henry Kirimi (deceased) todate which is a period of over 12 years. He has also stated that he has been in occupation and possession of the suit property openly and continuously and without interruption for that period. There was no evidence availed to controvert the Plaintiff’s averments. The Plaintiff also produced a copy of the title deed and a green card confirming that the property is registered in the joint names of the Defendants.

I have no doubt in my mind that the Plaintiff is telling the truth. Considering the entire evidence and applying the legal principles set out herein above, it is clear in my mind that the Plaintiff has proved his claim on a balance of probabilities and therefore entitled to the prayers sought.

In the upshot, the Plaintiff’s claim commenced by way of originating summons dated 5<sup>th</sup> November, 2004 and filed on 25<sup>th</sup> November, 2004 succeeds and I therefore enter judgement in the following terms:

- 1. That the Plaintiff be and is hereby registered as the proprietor of land title No. NTIMA/IGOKI/2504 by Adverse Possession.**
- 2. Each party to bear their own costs.**

**DATED AND SIGNED IN THIS 18<sup>TH</sup> DAY OF OCTOBER, 2018.**

**E. C. CHERONO**

**ELC JUDGE - KERUGOYA**

**DELIVERED IN OPEN COURT AT MERU THIS 31<sup>ST</sup> DAY OF OCTOBER, 2018**

**LUCY N. MBUGUA**

**ELC JUDGE - MERU**

**In the presence of:**

Miss. Materi H/B for Kiome for 1<sup>st</sup> defendant

BG Kariuki for 2<sup>nd</sup> defendant

Vivian Mugambi daughter of the plaintiff