



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**E.L.C. CASE NO. 176 OF 2014**

**MARION KAARI MBUI.....PLAINTIFF**

**VERSUS**

**ELISHA MBOGO NTHIGA.....DEFENDANT**

**JUDGEMENT**

1. By an originating summons dated 18<sup>th</sup> September 2002 and amended on 20<sup>th</sup> November 2013 brought under the provisions of **section 38 of the Limitation of Actions Act and Order 37 Rule 3 of the Civil Procedure Rules, 2010**, the Plaintiff sought the following orders against the Defendant, Elisha Mbogo Nthiga;

- a. That the Defendant's Title to land parcel Number Ngandori/Kiriari/453 which parcel has been sub-divided into land parcel numbers Ngandori/Kiriari/4236, 4237 and 4238 have been extinguished.*
- b. That the Plaintiff has acquired the Title to land parcel numbers Ngandori/Kiriari 4236, 4237 and 4238 which are sub-divisions of land parcel No. Ngandori/Kiriari/453 by way of adverse possession and the Plaintiff is therefore entitled to be registered as the proprietor of the said parcel of land.*
- c. That the names of Elisha Mbogo Nthiga be cancelled and/or deleted from the register for land parcels numbers Ngandori/Kiriari/4236/4237 and 4238 by the relevant District Land Registrar.*
- d. That the Plaintiff Marion Kaari Mbui be registered as the proprietor of land parcels Numbers Ngandori/Kiriari/4236, 4237 and 4238 by way of adverse possession and Title Deeds to the said parcels of land be issued to her.*
- e. That the Plaintiff be awarded costs of this suit.*

2. The said originating summons was supported by the affidavit of the Plaintiff sworn on 20<sup>th</sup> November 2013 filed with the amended originating summons. It was stated that prior to his death in 1967, the Plaintiff's father was the registered proprietor of *Title No. Ngandori/Kiriari/453* (hereinafter called *parcel No. 453*). It was further stated that upon the death of her father, she and her late mother continued residing upon and developing the said parcel No. 453.

3. It was further stated that upon the death of her mother in 2001 the Plaintiff discovered for the first time that parcel No. 453 was registered in the name of the Defendant, who was the son of her late brother, Nthiga Mbui. It was claimed that the Defendant's father had secretly filed a succession cause upon the death of their father and had the Defendant, who was a minor then, registered as proprietor thereof.

4. The Plaintiff further stated that Defendant had since sub-divided parcel No. 453 into three parcels namely *Title Nos. Ngandori/Kiriari/4236, 4237 and 4238* (hereinafter collectively known as the *suit properties*).

5. The Plaintiff's case was that she had all along occupied the suit property openly and peacefully without any threat of eviction from the Defendant. She stated that her occupation had been continuous, uninterrupted and exclusive for over 50 years. She, therefore, wanted to be declared to have acquired the suit properties through adverse possession.

6. The Defendant filed a replying affidavit sworn on 7<sup>th</sup> August 2017 in opposition to the said originating summons. It was denied that the Plaintiff had been in open, continuous and exclusive possession of the suit properties. He stated that he lawfully acquired the suit properties from his late grandfather through succession proceedings of which the Plaintiff was fully aware. It was contended that his ownership was confirmed in the succession proceedings hence this court had no jurisdiction to re-open the matter.

7. The Defendant further stated that the developments on the suit properties were undertaken by his late grandfather and late father with the assistance of the rest of the family members. It was denied that the Plaintiff had exclusive possession because she was in occupation together

with her late mother and that the Defendant's father used to visit the suit properties and do some work there.

8. At the trial hereof, the Plaintiff testified on her own behalf as PW 1. She adopted her witness statement dated 6<sup>th</sup> March 2015 as her sworn testimony. It was her case that parcel No. 453 which gave rise to the suit properties upon subdivision initially belonged to her late father who died in 1967. She stated that she was the only one amongst the children of her late father who was residing there. All her 5 sisters were married. She was residing there with her own children.

9. It was her case that although her late brother caused the Defendant to be registered as proprietor of the suit properties around 1969, he never lived there but he instead moved into his own land in Kambiu. She stated that the Defendant had never cultivated or developed the suit property. It was her case that the suit property was developed and had some cash crops. She denied any suggestion that she was occupying the suit properties with the consent or permission of the Defendant.

10. The Plaintiff also called 3 witnesses in support of her case two of whom were her own sisters. They all supported the Plaintiff's longevity of occupation of the suit properties. They were all in agreement that the Plaintiff was living together with her late mother until 2001 when she died. The evidence of Florence Runji Munyi (PW 4), who was the Plaintiff's elder sister, indicated that upon the Defendant's father moving out in 1967, he never returned to cultivate or work on the suit properties. It was also her evidence that the Defendant himself had never occupied or worked on the suit properties.

11. The Defendant testified at the hearing hereof on his own behalf as DW 1. He adopted the contents of his replying affidavit sworn on 6<sup>th</sup> September 2017 as his sworn testimony. His case was that the suit properties initially belonged to his late grandfather who died in 1967. He had seven children and that his late father was the only son. It was his case that upon the death of his grandfather, he lawfully obtained the suit property through succession proceedings with full knowledge of all the family members including the Plaintiff.

12. The Defendant further stated that because his late father was residing elsewhere on his own land, the Plaintiff and her mother were both in occupation of the suit properties until 2001 when the latter died. During cross-examination, he conceded that he had never lived on the suit properties since he was registered as proprietor in 1969. He also conceded that he had never cultivated the suit properties. He was also categorical that he had never given permission to the Plaintiff to occupy the suit properties.

13. The Defendant called his mother, Peninah Iganda Nthiga who testified as DW 2. She adopted her witness statement dated 7<sup>th</sup> August 2017 as her sworn testimony and supported the Defendant's case in various respects. She confirmed that the Defendant does not utilize the suit properties since they reside about 10 kilometers away.

14. When the hearing of the suit was concluded on 15<sup>th</sup> March 2018, the parties were given 45 days each to file and exchange written submissions. The days were to run consecutively with the Plaintiff being the first to file. By the time of preparing this judgement, however, only the Plaintiff had filed submissions. Those submissions were filed on 18<sup>th</sup> October 2018 when about one half of the judgement had been drafted.

15. The court has considered the pleadings on record, the affidavits, the statements as well as the oral evidence of the parties. The court has also considered the Plaintiff's written submissions on record. The court is of the opinion that the following issues arise for determination in this suit;

- a. Whether the Plaintiff has demonstrated her claim for adverse possession over the suit properties.
- b. Whether the Plaintiff is entitled to the reliefs sought in the amended originating summons.
- c. Who shall bear the costs of the suit.

16. The court has noted that the Plaintiff through her supporting affidavit, witness statement and oral evidence tried to cast doubt on the legality of the Defendant's title. Every effort was made to demonstrate that it was acquired through some secretive or clandestine scheme. The Defendant, on the other hand, devoted substantial evidence in a bid to demonstrate that his title was lawfully acquired through succession proceedings in which all family members participated. In the opinion of the court, such efforts by the parties were totally unnecessary. The legality of the Defendant's title was not being challenged in the originating summons. This is a claim for adverse possession. By filing the originating summons, the Plaintiff was in effect acknowledging the Defendant's title on the basis of which a declaration for adverse possession can be made.

17. The legal requirements for proving adverse possession were re-stated in the following cases **Wambugu Vs Njuguna [1983] KLR 172; Githu Vs Ndeete [1984] KLR 776; Kasuve Vs Mwaani Investments Ltd & 4 Others [2004] 1KLR 184 and Kimani Ruchine Vs Swift Rutherfords & Co Ltd [1980] KLR 10.**

18. In the case of **Kasuve Vs Mwaani Investments Ltd & 4 Others [2004] 1KLR 184** the elements of adverse possession were summarized as follows;

**“...and in order to be entitled to land by adverse possession the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, Wanja Vs Saikwa No. 2 [1984] KLR 284. A title by adverse possession can be acquired under Limitation of Actions Act for part of the land...”**

19. The court is satisfied on the basis of the evidence on record that the Plaintiff has been in possession of the suit properties for a period

exceeding the statutory minimum of 12 years. There was no dispute that the Plaintiff was in possession of the suit property in 1967 when their father died. There was no dispute that she continued in possession in 1969 upon registration of the Defendant as proprietor.

20. There was no contest that the Plaintiff's possession has been continuous and without interruption. It is now well settled that interruption of possession can only take place where the registered proprietor either makes an effective entry into the property or where he institutes legal proceedings for recovery of the land. See **Githu Vs Ndeete [1984] KLR 776** (*supra*). There was certainly no evidence of the Defendant having taken any of those two courses of action.

21. The Defendant contended in his replying affidavit that the Plaintiff's possession was not exclusive because she was not alone in the suit properties but was in occupation together with her mother who died in 2001. The court does not agree that possession cannot be exclusive simply because there are additional occupants such as family members on the suit properties. The court's understanding of the term 'exclusive' is that possession should be to the exclusion of the registered owner and not the entire world. It is on record that the Defendant has never occupied or resided on the suit property. He had never cultivated or worked on the suit property. The court is satisfied that the Plaintiff's possession was exclusive in relation to the registered owner. The mere fact that the Defendant's father used to visit his mother on the suit property could not affect the Plaintiff's possession of the suit property.

22. The court is satisfied that the Defendant discontinued possession of his own volition on the basis of the evidence on record. He was not dispossessed by any actions on the part of the Plaintiff such as using the suit properties in a manner inconsistent with the rights of the registered owner. The evidence on record is that the Defendant's father opted to relocate to his own parcel of land in Kambiu where he settled with his family. The Defendant was then a minor aged about 9 years. He had no choice but to move with his parents. Thereafter, the Defendant never returned to assert his ownership rights.

23. The court has noted from the extract of the green card for parcel No. 453 that the Defendant was first registered as proprietor on 17<sup>th</sup> April 1969. There was a correction of name on 17<sup>th</sup> October 1978 when the Defendant became of age and he was registered under his current name. So, whether time is reckoned from 1969 or 1978, the Plaintiff will satisfy the statutory minimum of 12 years since the originating summons was filed on 18<sup>th</sup> September 2002.

24. The final aspect for consideration on the 1<sup>st</sup> issue is whether the Plaintiff's possession of the suit properties was hostile or with the consent of the Defendant. This question was answered very candidly by the Defendant during cross-examination. He was categorical that the Plaintiff was not in possession with his consent. That really settles the first issue.

25. In view of the foregoing, the court is satisfied that the Plaintiff has demonstrated all the elements of adverse possession. The 1<sup>st</sup> issue is, therefore, answered in favour of the Plaintiff.

26. The 2<sup>nd</sup> issue is whether the Plaintiff is entitled to the orders sought in her amended originating summons. It would follow that the Plaintiff is entitled to the orders sought in her amended originating summons. It would follow that the Plaintiff is entitled to the orders sought on view of the fact that she has proved her claim of adverse possession to the required standard.

27. The 3<sup>rd</sup> and final issue relates to costs. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event. See **section 27 of the Civil Procedure Act (Cap 21)**. As such, a successful litigant will normally be awarded costs of the suit unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court is aware that the parties herein are close relatives. In those circumstances, the court is of the view that the appropriate order to make on costs is for each party to bear his own costs.

28. The upshot of the foregoing is that the court finds merit in the Plaintiff's originating summons dated 18<sup>th</sup> September 2002 and amended on 20<sup>th</sup> November 2013. The same is consequently allowed in the following terms;

- a. The Defendant's title to land parcel no. *Ngandori/Kiriari/453* which has been sub-divided into land parcels Nos. *Ngandori/Kiriari/4236, 4237 and 4238* has been extinguished.
- b. A declaration that the Plaintiff has acquired Title Nos. *Ngandori/Kiriari 4236, 4237 and 4238* which are sub-divisions of Title Nos. *Ngandori/Kiriari/453* by way of adverse possession.
- c. That the name of Elisha Mbogo Nthiga shall be cancelled and/or deleted from the register for Title Nos. *Ngandori/Kiriari/4236/4237 and 4238* by the Land Registrar, Embu.
- d. That the Plaintiff, Marion Kaari Mbui, shall be registered as the proprietor of Title Nos. *Ngandori/Kiriari/4236, 4237 and 4238* by way of adverse possession by the Land Registrar, Embu and Title Deeds to the said parcels of land issued to her.
- e. That each party shall bear his own costs.

29. It is so decided.

**JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 25<sup>th</sup> day of OCTOBER, 2018.**

In the presence of Mr Okwaro for the Plaintiff and Mr Mogusu holding brief for Mr Gekonge for the Defendant.

Court clerk Muinde.

**Y.M. ANGIMA**

**JUDGE**

**25.10.18**