



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ENVIRONMENT AND LAND CASE NO. 23 OF 2013 (OS)**

**LOISE NKATHA MUTHURI.....PLAINTIFF**

**VERSUS**

**SILAS KIOGORA MBURUGU.....1<sup>ST</sup> DEFENDANT**

**JOSEPH MUTHOMI NGARUTHI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. This matter emanates from the Originating Summons dated 21<sup>st</sup> January, 2013, where by plaintiff /Applicant is claiming entitlement to Land parcel no MERU MUNICIPALITY BLOCK 1/244 by way of Adverse Possession.

2. The suit is supported by the grounds set out in the affidavit of PW 1 (plaintiff) sworn on 21<sup>st</sup> January, 2013, where she avers that on 30<sup>th</sup> August, 1989 she bought Plot No. T 405 (now MERU Municipality Block 1/244- **the suit land**) from one, Daniel M'Mathiu. Her family took possession of the suit land, but around 1995 the Defendants went into the suit land and claimed that they are the rightful owners. Plaintiff further states that on 2<sup>nd</sup> November, 1996, the Respondents obtained lease while she was still in occupation of the suit land.

3. The suit was opposed vide a replying affidavit sworn by the Defendants on 7<sup>th</sup> November, 2013. They deponed that the original allottee of the suit land was one Charles Kipsang Rono who sold it to them in 1995. They claim that they have been paying both land rent and land rates to the Council. They also aver that Plaintiff erected structures on the suit land, while a court case number HCCC NO. 86 of 2000 was pending.

4. The suit was heard via *viva voce* evidence. The Plaintiff and her witness adopted their statements recorded on 21.1.2013 as their evidence. Plaintiff's case is that she settled on the suit land way back in 1989 and she has since developed the same. She has installed piped water and electricity, she has built semi-permanent houses and she has planted both trees and cash crops. She has also fenced the land. Her witness, Peter M'Noti stated that he was aware that plaintiff is the one in occupation of the suit land.

5. In support of her case, PW1 produced the following documents as her exhibits; The 1989 sale agreement ( PEXH 1), search certificate from lands office (PEXH 2), a copy of plaint in Meru H.C.C No 86 of 2000 ( PEXH. 3).

6. The two defendant adopted their statements recorded on 26.2.2014 as their evidence. They aver that they bought the suit land from one Charles Rono in 1995 when the suit land was in vacant possession. Thereafter, they obtained the lease certificate for the land. However, their land was encroached upon by Meru junior school and this prompted them to file a case Meru HCC No 133 of 1996. While this case was in court, plaintiff encroached on the suit land. In support of their case, the defendants produced as exhibits their documents found in the list dated 6.4.2014.

7. I have perused the record, evidence and submissions brought before this court. The question for determination is "***whether the Plaintiff acquired L.R. MERU Municipality Block 1/244 through adverse possession?***"

8. Bryan A. Garner, *Black's Law Dictionary*, Ninth Edition, 2009, Thomson Reuters at page 62 defined adverse possession as:

**"The enjoyment of real property with a claim of right when that enjoyment is opposed to another person's claim and is continuous, exclusive, hostile, open, and notorious."**

Accordingly, to acquire land through adverse possession there must be an exclusive, uninterrupted possession and occupation of the land for a period of twelve years. The occupation must be hostile and without the consent of the owner, see-**James Mwangi and others vs.**

**Mukinye Enterprises Ltd Nairobi High Court civil case number 3912 of 1986, and Gateru Keru vs Mary Wambui Nene Nairobi High Court civil case number 333 of 1978.)**

9. The undisputed facts about this case are that defendants are the registered owners of the suit land, -see the certificate of lease dated 11/9/1996. Plaintiff appears to be the one in control of the suit land, while Defendants have never occupied the same.

10. On the issue of disputed facts, the court will determine the issue of registration, occupation and interruption.

11. This court has taken into account the fact that adverse possession applies in respect of registered land. In her own testimony as to why she did not get title to the suit land, PW1 had this to state **“I have no title to that land because there were no leases in that area”**. This evidence is in line with 2<sup>nd</sup> defendant’s contention that **“the property was not registered”**, in reference to the time they bought the suit land. Defence exhibit 1, the lease certificate indicates that the leasehold interest was to run from 1.10.1995 for the next 99 years. As rightly submitted by the defendant, the land was in the hands of municipal council of Meru and pursuant to section 41 of the Limitation of Actions Act, such land was not subject to the Act before registration in 1996. It follows that time could only run from 1996.

12. On the issue of occupation, plaintiff has stated that she took over possession of the land in 1989. Defence exhibit 5 is however a plaint for the case Meru H.C.C No. 133 of 1996, where by the present defendants were asserting their claim on the Suitland by suing the persons who had apparently encroached on their land. The present plaintiff was not one of them.

13. The plaintiff filed a suit, Meru H.C.C.No. 86 of 2000 where she was seeking for orders to be declared as the owner of the suit land. The logical conclusion to make is that the present plaintiff was not in the picture on the ground as at the time the present defendants were filing their suit in 1996, and she (plaintiff) came into the picture sometime thereafter, before year 2000 when she filed her own suit. I am therefore not persuaded that plaintiff was already in occupation of the suit land by 1996.

14. It has also emerged that there has been a lot of litigation in respect of the suit land. Defendants were the first ones to go to court in **H.C.C. No.133 of 1996 in Meru**. Then plaintiff filed her suit no. **H.C.C.86 of 2000 Meru**, as against the defendants whereby the latter lodged a counterclaim. Defendants apparently filed another suit, Meru C.M.C.C No.361 of 2005. The fate of these suits is not clear, however, it is certainly crystal clear that plaintiff’s occupation of the suit land was not peaceful.

15. On the issue of interruption, it appears that some of the suits did interfere with the continuous occupation. The first case, Meru H.C.C.no 133 of 1996 is immaterial as it was not against the plaintiff in so far as the issue of interruption is concerned. For the second case filed by the plaintiff, Meru H.C.C No.86 of 2000, plaintiff was asserting her rights to the land, but so were the defendants through their counter claim. In Meru C.M.C.C No. 361 of 2005, the present defendants were again asserting their rights to the suit land. In **Kinuu M’Imbutu versus Joshua Mutwiri Ntarangwi Meru ELC No. 48 of 2009** (cited by defence), reference was made to the case of **Elija Ikaha Ikanjo vs. Joseph Ngoina Asutsa (2006) eKLR** where it was held that **“for there to be interruption, the proprietor must evict or eject the trespasser, but because eviction is not always possible without breach of peace, institution of suit against the trespasser does interrupt and stop the time.”** I find that the cases number 86 of 2000 and 361 of 2005 did interrupt plaintiff’s occupation and time in respect of the statutory period could only run all over again after the conclusion of the aforementioned cases. Certainly, the 12 year period had not matured by the time this case was filed in 2013, if one is even to consider that perhaps case number 361 of 2005 was finalized the same year.

**16. In conclusion, I find that plaintiff has not proved her case on a balance of probability. I proceed to dismiss her case. Each party is to bear their own costs of the suit.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 28<sup>th</sup> NOVEMBER, 2018 IN THE PRESENCE OF:-**

C/A: Kananu

Karanja for plaintiff

Rimita C. for defendants

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**