



## REPUBLIC OF KENYA

### IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

#### ELC. CASE NO. 612 OF 2008 (O.S)

REBECCA WANGANGA.....PLAINTIFF/APPLICANT

=VERSUS=

JANE WANJIRU NJOROGE.....1ST DEFENDANT/ RESPONDENT

GEORGE THARA GITHUNGURI...2ND DEFENDANT/RESPONDENT

NICHOLAS GITAU KIBORO.....3RD DEFENDANT/RESPONDENT

SARAH NJOKI MAINA.....4TH DEFENDANT/RESPONDENT

#### JUDGMENT

1. The plaintiff in this suit is the second wife of the late George Wanganga. The 1st defendant is the estranged first wife of the said George Wanganga. The dispute in the suit relates to what was previously registered as Land Title Number **KIAMBAA/KIHARA/508** (hereinafter referred to as Parcel Number 508), measuring approximately 3.8 acres. The parcel register in respect of the land was opened on 10/6/1958 in the name of **Kairiuri Thara** who is now deceased. On 28/2/1964, the parcel of land was transferred to **Jeane Wanjiru George Wanganga** (now known as **Jane Wanjiru Njoroge** - the 1st defendant (½ Share) and **Kairiuri Thara** (½ Share). A certificate of title was issued in the joint names of the two proprietors on 10/3/1964. On 7/6/2002, the parcel register was closed upon partition of the land and two new parcel registers were created, namely: (i) **Parcel Number Kiambaa/Kihara/3200** (hereinafter referred to as **Parcel Number 3200**) measuring 0.74 hectares and registered in the name of **Jeane Wanjiru George Wanganga** (the 1st defendant); and (ii) **Parcel Number Kiambaa/Kihara/3201** (hereinafter referred to as **Parcel Number 3201**) measuring 0.74 registered in the names of George Thara Githunguri (2nd defendant), Nicholas Gitau Kiboro (3rd defendant) and Serah Njoki Maina (4th defendant). The two parcel registers still bear those names but have restrictions registered against them by the applicant. The parcel register for Parcel No. 508 does not bear any succession court order in respect of the estate of the late Kairiuri Thara.

2. On 16/12/2008, Rebecca N Wanganga ( the **applicant**) took out an originating summons dated 2/12/2008 against the respondents seeking the following orders:

**1. That REBECCA N WANGANGA who has been in adverse possession of Land Reference Numbers KIAMBAA/KIHARA/3200 and 3201 (formerly Land Reference Number KIAMBAA/KIHARA/508) from 1968 to date be declared and be registered the owner of Land Reference Numbers KIAMBAA/KIHARA/3200 and 3201 (formerly Land Reference Number KIAMBAA/KIHARA/508).**

**2. That JANE WANJIRU NJOROGE, GEORGE THARA GITHUNGURI, NICHOLAS GITAU KIBORO and SERAH NJOKI MAINA be ordered to transfer Land Reference Numbers KIAMBAA/KIHARA/3200 and 3201 (formerly Land Reference Number KIAMBAA/KIHARA/508) to REBECCA N WANGANGA, the Applicant herein as the beneficial owner thereof by virtue of adverse possession.**

**3. That the Deputy Registrar of this honourable court be authorized to sign all requisite documents/papers on behalf of JANE WANJIRU NJOROGE, GEORGE THARA GITHUNGURI, NICHOLAS GITAU KIBORO and SERAH NJOKI MAINA to facilitate the transfer of Land Reference Numbers KIAMBAA/KIHARA/3200 and 3201 (formerly Land Reference Number KIAMBAA/KIHARA/508) to the Applicant.**

**4. That costs of this suit be borne by the Respondents**

3. The Originating summons was supported by the applicant's affidavit sworn on 2/12/2008 and further affidavit sworn on 4/6/2009. The originating summons was opposed by the respondents through a replying affidavit sworn by (1st **respondent**) on 25/2/2009. The 2nd, 3rd and 4th respondents opposed the originating summons through a replying affidavit sworn by the 3rd respondent on 20/2/2009. At the hearing of the originating summons, oral evidence was led by the applicant who adopted her sworn affidavits as her sworn evidence in chief.

The respondents led evidence by the 1st respondent (DW1) and the 3rd respondent (DW2).

4. The case of the plaintiff is that she has acquired adverse title to the suit property pursuant to the doctrine of adverse possession. She contends that she has been in continuous, quiet, uninterrupted and exclusive possession and user of the suit property since 1978 when she got married to George Wanganga. She produced copies translated sale agreements dated 13/2/1964, 25/2/1965, 2/3/1966 and 15/11/1967 between her late husband Kairiuri Thara. Her position is that the land was purchased by her late husband from the late Kairiuri Thara and that Parcel Number 508 was irregularly subdivided into Parcel Numbers Kiambaa/Kihara/3200 and 3201 and registered in the names of the defendants without any succession order. She states that the defendants have never lived on the suit land in the last 40 years.

5. The case of the 1st defendant is that she got married to the late George Wanganga in 1960 under Kikuyu Customary Law and they have never divorced. She contends that in 1964, she bought a portion of Parcel Number 508 from Kairiuri Thara and was subsequently registered as the legal owner of the ½ share. She states that she lived on the land with her late husband until they separated in 1978. She further states that in 2002, the land was partitioned and her ½ share was registered in her name while the other ½ was registered in the names of the 2nd, 3rd and 4th defendants. She adds that twice, the late George Wanganga caused cautions to be registered against the two parcels. She contends that at the time of his death in 2006, the late George Wanganga had filed Nairobi High Court Civil Case Number 791 of 2004 seeking to be declared owner of Parcel Numbers 3200 and 32101 under the doctrine of trust. She further states that she filed suit to prevent burial of George Wanganga on the suit property but he was nonetheless buried on the land.

6. It is the 1st defendant's case that the applicant cannot have an independent claim on the suit property and could only claim through their late husband, George Wanganga, who during his lifetime, claimed an interest in the land based on trust and not as an adverse possessor.

7. The case of the 2nd, 3rd and 4th defendants is that they are registered owners of land Title Number Kiambaa/Kihara/3201 by virtue of inheritance from the estate of their late uncle, Kairiuri Thara. They add that the said parcel was registered in their names in 2002 following subdivision of Parcel Number 508. They further contend that the plaintiff swore a replying affidavit in Nairobi HCCC Number 791 of 2004 in support of her late husband's claim of ownership of the suit land under the doctrine of trust. They state that the plaintiff cannot take two different legal positions regarding the suit property.

8. In submissions, Mr Mwaura Shairi, counsel for the plaintiff, submitted that the plaintiff and her late husband had lived on the suit land from 1978 and the title of the 1st defendant was extinguished upon expiry of 12 years from 1978. He added that by the year 2002, the plaintiff and her late husband had acquired adverse title to the entire suit land.

9. In response, Mr Kimani, counsel for the respondents submitted that the Land George Wanganga and his first wife (the 1st defendant) lived on the suit property from 1964 to 1978 with the permission of the 1st defendant. In 1978, the late George Wanganga chased the 1st defendant and their six children away and invited the plaintiff who moved in as his second wife. Counsel contended that the plaintiff entered the suit property with the leave, permission and consent of her late husband, George Wanganga who had originally entered the suit land with the permission of the 1st defendant. He argued that the plaintiff cannot therefore contend to be an adverse possessor. Counsel relied on **Kimano v Kimamo (2004) eKLR**. Counsel added that if the plaintiff's entry was to be found to have been non-permissive, the right claimant would be the late George Wanganga and not the plaintiff. He contended that the plaintiff's possession commenced in 2006 upon the death of George Wanganga and the threshold of 12 years had not been attained by the time the plaintiff took out the originating summons herein.

10. I have considered the plaintiff's plea as set out in the originating summons dated 2/12/2008, the responses thereto, the oral evidence led in court, and the parties' rival submissions. I have also considered the relevant legal framework in the Limitation of Actions Act and the prevailing jurisprudence on the subject of adverse possession. The applicant's case is that she has acquired an adverse title to the suit property under the doctrine of adverse possession. The respondents contest this and contend that the plaintiff as wife of the late George Wanganga lived on the suit property with the permission of her co-wife, which permission was granted to their late husband. The single issue to be determined in this suit is whether the plaintiff has satisfied the criteria for acquisition of title under the doctrine of adverse possession.

11. The common law doctrine of adverse possession connotes possession which is inconsistent with and in denial of the title of the true owner of land. To establish adverse possession, a litigant must prove that he has both the factual possession of the land and the requisite intention to possess the land [*animus possidendi*]. Secondly, one must prove that he has used the suit land without force, without secrecy, and without persuasion [*nec vi, nec clam, nec precario*] for the prescribed limitation period of twelve years. Third, he must demonstrate that the registered owner had knowledge [or the actual or constructive means of knowing] that the adverse possessor was in possession of the suit property. Fourth, the possession must be continuous; it must not be broken or interrupted. In **TITUS KIGARO MUNYI v PETER MBURU KIMANI, CA NO 28 OF 2014**, the Court of Appeal held that computation of time starts from when there is actual or constructive knowledge by the registered proprietor.

12. The doctrine of adverse possession has its statutory underpinnings in **Sections 7, 9, 13, 37 and 38 of the Limitation of Actions Act**. The Court of Appeal examined the constitutionality of the doctrine of adverse possession in the context of the Constitution of Kenya 2010 in **MTAMA LEWA v KAHINDI NGALA MWAGANDI, [2015] eKLR** and found that the doctrine does not offend the spirit and letter of the Constitution of Kenya 2010 on protection of the right to property.

13. In the present suit, there is common ground that the 1st defendant and the plaintiff are the 1st wife, and 2nd wife respectively, of the late George Wanganga. There is also common ground that George Wanganga lived on the suit land from 1964 to 2006 when he died. Although the 1st defendant contends that she bought a portion of the suit land from the late Kairiuri Thara, she has not exhibited any evidence to support that claim. The evidence exhibited by the plaintiff reveals that the late George Wanganga bought the land from Kairiuri Thara. Indeed, when George Wanganga discovered that the land had been clandestinely partitioned, he filed Nairobi High Court Civil Case Number 791/2004 and asserted his title as the equitable owner of the property. He contended that he bought the land and caused the land to be registered in the name of his then only wife (1st defendant) as trustee. Upon the death of George Wanganga, the defendants herein brought an application seeking an abatement order and the plaintiff herein swore a replying affidavit on 6/6/2008 contending that her petition for grant of letters of administration had delayed and she intended to pursue the suit.

14. It does appear that the plaintiff subsequently abandoned that route and opted to lodge a claim in her own name as an adverse possessor. The claim is partly directed against her co-wife who lived on the suit property with their mutual husband before she was thrown out in 1978.

15. From the totality of the evidence on record, the plaintiff was not an adverse possessor between 1978 and 2006 when she lived on the suit property as the 2nd wife of the late George Wanganga. She lived there as an invitee of their mutual husband. Their mutual husband asserted his right as purchaser of the suit property and never considered himself as an adverse possessor. In my view, the plaintiff's adverse possession, if any, can only be considered to have commenced upon the demise of George Wanganga. The court's finding therefore is that the plaintiff has not satisfied the criteria for acquisition of title under the doctrine of adverse possession.

16. It is unfortunate that the plaintiff abandoned the suit which their late husband had initiated; one which if successful, would be in the interest of the two widows and all the children of the late George Wanganga. I say so because uncontroverted evidence has been exhibited before this court to show that George Wanganga purchased the suit land and had possession of the suit land from 1964 to 2006 when he died. He lived on the land with his 1st wife from 1964 to 1978. In 1978, he separated with his 1st wife and invited the plaintiff to live with him on the land. He continued to live on the land till his death in 2006. A claim of adverse possession by the plaintiff would only serve to benefit the plaintiff to the exclusion of the rest of George Wanganga's family. The 1st defendant too appears to be pursuing similar path. I say so because there is evidence of partition and creation of new parcel registers without any evidence of succession in relation to the estate of the late Kairiuri Thara. There could be no legitimate partitioning and transfer of the suit land without confirmed letters of administration or probate. Yet by abandoning her late husband's suit and making a personal claim for adverse title, the plaintiff appears to be acknowledging the questioned titles held by the defendants.

## **Summary & Disposal Orders**

17. In summary, the court's finding is that the plaintiff's entry into Parcel Number Kiamba/Kihara/ 508 was by virtue of being George Wanganga's second wife. The 1st defendant was George Wanganga's estranged first wife. At the time George Wanganga died in 2006, he had asserted his title to the said land as beneficial owner of the property through Nairobi High Court Civil Case Number 791 of 2004. As a widow of the late George Wanganga, the applicant is at liberty to pursue the claim of her deceased husband on behalf of the estate. Time in respect of the plaintiff for purposes of acquisition of title under the doctrine of adverse possession started running in 2006 when George Wanganga died. She brought this suit in 2008 before the limitation period of 12 years had lapsed. Consequently, the orders sought in the originating summons herein are declined. The suit is accordingly dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF NOVEMBER 2018.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Ms Mwaura holding brief for Mr Mwaura for the Plaintiff/Applicant

Mr Oguye holding brief for Mr Kimani for the Respondents

June Nafula - Court Clerk