



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

E.L.C. CASE NO 169 OF 2017 (OS)

KAGAARI NORTH FARMERS CO-OPERATIVE.....APPLICANT

VERSUS

JOHANNAH MURITHI JOSEPH ALIAS JOHANNA MURIITHI MBOGO.....RESPONDENT

RULING

1. By an originating summons dated 31st October 2017, the Applicant sought the following orders against the Respondent;

- a. A declaration that the Applicant is entitled to be registered forthwith as the owner of L.R. Kagaari/Mbuinjuru/T.122, T.123, T.124, T.125, T.126, T.127, T.128, T.129, T.130 and T.131 of which the Applicant has been in adverse possession for more than 12 years immediately preceding the prosecution of this suit and which they have used openly, continuously as of right and any interference from the Respondent and hence the said titles have been extinguished in favour of the Applicant.
- b. Whether the Respondent was fraudulently registered as the proprietor to L.R Kagaari/Mbuinjuru/T.122, T.123, T.124, T.125, T.126, T.127, T.128, T.129, T.130 and T.131 and therefore be ordered to transfer the land parcels No. L.R Kagaari/Mbuinjuru/T.122, T.123, T.124, T.125, T.126, T.127, T.128, T.129, T.130 and T.131 within 30 days of this order and in default the Executive Officer of the honourable court to sign all the necessary documents to effect transfer of the said land to the Applicant.
- c. That costs of this application be borne by the Respondent.

2. The Respondent filed a replying affidavit sworn on 27th November 2017 denying the Applicant's claim in its entirety. It was denied that the Applicant had become entitled to any of the suit properties through adverse possession. It was also denied that the Respondent had obtained the suit properties fraudulently.

3. Vide a notice of preliminary objection dated and filed on 17th May 2018 the Respondent raised the following two objections;

- a. That the suit offends the provisions of **section 7 of the Limitation of Actions Act Chapter 22 Laws of Kenya.**
- b. That the suit offends the provisions of **sections 24, 25 and 26 of the Land Registration Act No. 3 of 2012.**

4. The record shows that the advocates for the parties appeared before the Deputy Registrar on 16th July 2018 whereby they agreed to canvass the Respondents said preliminary objection through written submissions. Consequently, the Respondent filed his submissions on 31st July 2018 whereas the Applicant filed its submissions on 11th October 2018.

5. The court has considered the 1st preliminary objection relating to limitation of actions. It was contended by the Respondent that the originating summons was statute barred under **section 7 of the Limitation of Actions Act (Cap 22)** in that it was filed after the lapse of twelve (12) years from the date of accrual of the cause of action.

6. This court had occasion to consider a similar objection from the same advocate in **Embu ELC Case No 72 of 2017 (OS) Effureith Irima Mbogo Vs Ibara Mwaniki & 6 Others.** In the said case, the court held as follows;

“...A plain reading of the provisions of the Limitations of Actions Act (Cap 22) indicates that the claimant's right to sue for adverse possession only arises upon the registered owner getting time-barred in the recovery of his land. In other words, it is only upon the proprietary rights of the registered owner getting extinguished that the claim of the adverse possessor springs into life. It would, therefore, follow that the limitation period prescribed in section 7 of the Act applies only against the

registered proprietor and not the adverse possessor. Accordingly, the court finds no merit in this objection and the same is dismissed.”

7. The court hereby adopts the said holding and accordingly finds no merit in the 1st preliminary objection raised by the Respondent. The same is thus overruled. The mere fact that the Applicant has an alternative claim for a declaration that the Respondent was fraudulently registered as proprietor does not affect the main prayer for adverse possession. It is also doubtful if the alternative prayer can be properly canvassed by way of originating summons given the limited scope of inquiry which can be undertaken by way of originating summons. See **Kibutiri Vs Kibutiri [1982] KLR 1** and **Kenya Commercial Bank Ltd Vs Osebe [1982] KLR 296**.

8. The 2nd preliminary objection was based upon **sections 24, 25 and 26 of the Land Registration Act, 2012**. It was contended by the Respondent that the rights of a registered proprietor under the Act were absolute and indefeasible and could not be challenged except on grounds of fraud to which the owner was privy. It was further contended that the Applicant had not demonstrated that the Respondent was involved in any fraud. As the court held in the case of **Effreith Irima Mugo Vs Ibara Mwaniki & 6 Others (supra)**, this objection is for rejection. In the said case, this court held that;

“...This objection is for outright rejection. It is totally misconceived and mischevius. A claim for adverse possession is not a challenge against the title of the registered owner. On the contrary, it is a recognition of such title with an assertion that the right to recovery of his land has been extinguished.”

9. The court hereby adopts the said reasoning and finds no merit in the 2nd preliminary objection. Accordingly, the said objection is overruled.

10. The upshot of the foregoing is that the court finds no merit in the Respondent’s notice of preliminary objection dated 17th May 2018 and the same is accordingly overruled with costs to the Applicant.

11. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **20th** day of **DECEMBER, 2018**.

In the presence of Mr Wachira holding brief for Mr Mugambi for the Applicant and Ms Kithaka holding brief for Mr Ombachi for the Respondent.

Court clerk Mr Muinde.

Y.M. ANGIMA

JUDGE

20.12.18