



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC. CIVIL SUIT NO. 1687 OF 2007**

**(FORMERLY HCCC NO. 1328 OF 2005)**

**JORAM NDUNGU.....PLAINTIFF**

**-VERSUS-**

**JOSEPH NGIMITHI MUIKAMBA.....DEFENDANT**

**JUDGEMENT**

1. The Plaintiff seeks to have the Defendant's title over L.R. No. Limuru/Bibirioni/723 measuring 0.212 ("the Suit Property") deemed to have been extinguished through adverse possession of the Plaintiff in the Originating Summons filed on 3/11/2005. The Plaintiff seeks an order that the Defendant holds the Suit Property subject to his interest and that he should be declared and registered as the proprietor of the Suit Property. In the alternative, the Plaintiff seeks to have the Defendant declared as being registered as the trustee of the Plaintiff of the Suit Property.

2. The Plaintiff claims that he took possession of the Suit Property in 1960 and has been on the land ever since. He put up his homestead and carried out various developments on the Suit Property. He also claims that he buried his grandmother and grandfather on this land. The Plaintiff claims that the Defendant was registered as proprietor of the Suit Property in 2001 yet the Plaintiff has been in continuous, open and uninterrupted occupation of the land. The Plaintiff urges that the Defendant has never been in possession of the land and has never requested the Plaintiff to move out.

3. The Defendant claims to have been in occupation of the Suit Property from 1970 when he bought it. He claims he has been cultivating the land since then and has planted trees on the land. At the time he bought the land, there were two graves on it. He claimed that the Plaintiff erected a temporary house on the Suit Property in August 2005. He reported this matter to the chief who wrote a letter to the Plaintiff asking him to vacate the suit land. The Defendant maintains that the Plaintiff owns L.R. No. Limuru/Bibirioni/1142. The Defendant claims that despite paying for the suit land in 1970, the transfer to him was only effected in 2001.

4. The Plaintiff testified when the matter came up before Lady Justice Gitumbi in May 2016. He stated that he lives on the Suit Property which he entered in 1960. His grandfather lived on the Suit Property. He claimed that he now lives there with his family. He claims that he buried his grandmother and grandfather on the land. He came to know the Defendant in 2005. He was aware of a case which the Defendant filed over Limuru/Bibirioni/755 against Mukirai Thairu. He denied ever seeing Grace Nyambura whom the Defendant claims he bought the Suit Property from.

5. He maintained that the Defendant bought parcel number 755 and not 723 and that at some point the Defendant wanted to exchange parcel 723 for 755 which was not possible. The Defendant had admitted that the Plaintiff's grandfather used to live on parcel number 723. He stated that his family members were the ones who lived on plot number 1142 which is developed and that he was registered as their trustee because it belonged to the family of Gathuri. He confirmed that he buried his daughter on parcel number 1142 and that parcel number 723 was a gift for him from his grandfather. He denied that any water had been connected to parcel number 723. The Chief knows that he lives on parcel number 723 which is where he was served with the summons.

6. It was his evidence that the Defendant took possession of parcel number 755 only to discover later that Grace Nyambura who had sold him the land did not own that parcel of land. The Defendant attempted to exchange parcel number 723 for 755 but that was not possible because the Plaintiff was living on parcel number 723. He stated that the Chief who testified in favour of the Defendant was much younger than him and may not know the correct history of the land. He also stated that parcel numbers 723 and 1142 are not next to each other. Parcel numbers 755 is adjacent to parcel number 723. He stated that the problems regarding parcel number 723 begun in 2005.

7. When the Chief wrote to him to vacate the land and he did not comply, the Defendant reported the matter to the police. The Plaintiff was arrested and taken to court. He filed this suit and was granted an injunction restraining the Defendant from evicting him from the land. The criminal case was stopped because of the instant case. The Plaintiff produced a copy of a certificate issued to his grandfather by the colonial government.

8. The Plaintiff called Michael Kinyanjui Mbutia who lived in Bibirioni Sub- location as a witness. He is the Plaintiff's neighbour and knew about the suit land. He stated that he saw the Plaintiff's grandmother and grandfather on the suit land in 1957-58 during the demarcation. He confirmed that the Plaintiff's grandmother and grandfather were buried on the suit land and that the Plaintiff has always lived on that land.
9. The Chief of Bibirioni location gave evidence. He first met the Defendant in 2005 when they dispute over the land arose. He has known the Plaintiff from childhood. He stated that the Plaintiff's home is on Limuru/Bibirion/1142 which is a few metres from where he lives. The Defendant lodged a complaint before the Chief in 2005 claiming that the Plaintiff had occupied his land, which is the Suit Property, and was planning to build on it. He investigated the case and asked the warring parties to produce ownership documents. The Plaintiff had no documents to support his claim for ownership.
10. He claims in his statement that there was no dispute previously because the Plaintiff was using parcel 1142 while the Defendant was using the Suit Property. He stated that the Plaintiff had recently taken possession of the land.
11. The Chief's evidence is full of contradictions. On the one hand he states that he first met the Defendant in 2005 when the dispute over the suit land arose, and on the other hand, he claims that the Defendant was using the Suit Property prior to 2005.
12. He maintained that the Plaintiff lived on parcel number 1142 and that the Plaintiff built the mabati structure on parcel number 723 when the Plaintiff was served with summons. He did not know where the Plaintiff's grandparents were buried. He did not know whether the Defendant used to occupy parcel number 755 which is within his location. He claimed that he served the summons on the Plaintiff in parcel number 1142. He stated that he knew where parcel 723 was and had never found the Plaintiff on it. He made his conclusion that the Defendant owned the land based on the documents which were presented to him. He also confirmed that parcel numbers 723 and 755 share a boundary.
13. The Defendant gave evidence. He bought the Suit Property from Grace Nyambura in 1970. He claimed that he had been cultivating the land and had planted trees on it. He moved to Nyahururu in 1997 and left his brother in-law in charge of the Suit Property. He knew the Plaintiff whom he claimed owned land about 200 – 300 metres away from his land. He stated that in August 2005 his brother in-law called him and informed him that a temporary structure had been put up on his land. He asked him to report the matter to the Assistant Chief since he had not authorised that construction. When he bought the land in 1970, it had two graves on it. He denied that the Plaintiff had been living on the suit land since 1960. He produced copies of maps showing that parcel number 723 adjoins 755. Parcel number 1142 is on a different map and it is difficult to tell how far it is from the Suit Property.
14. He also produced a copy of the letter dated 14/10/2003 from the Ministry of Lands and Settlements in respect of the site visits to Limuru/Bibirioni/723 and 755. The letter asked the Defendant to be on site with documents relating to the ownership on 28/10/2003 at 10.00 a.m. when the District Surveyor was to visit the site. He produced a copy of the official search done on 1/12/1997 which showed that Grace Nyambura wife of Samuel Gitau was registered as proprietor on 7/3/1969. The search done on 6/9/2005 shows that the Defendant was issued a title deed over the Suit Property on 8/1/2001. He produced copies of receipts issued by Bibirioni Water Project for water connection. No parcel number is indicated on the receipts and the court is unable to conclusively determine that water was connected to the Suit Property.
15. The Defendant produced a copy of title deed issued to him in January 2001 and a copy of the notice to vacate the land issued to the Plaintiff on 6/10/2005. He produced a copy of the agreement dated 7/6/1970 written in Kikuyu together with its translation to English. The Defendant produced photographs of a permanent house which he argues is erected on plot number 1142 and not 723. It is difficult to tell where the house is based on the photographs alone.
16. The Plaintiff produced a copy of the Originating Summons in **Nairobi HCCC No. 313 of 2004 (O.S)** which was filed by the Defendant on 1/4/2004 against Mukirai Thairu. He sought an order directing the Land Registrar, Kiambu to transfer L.R. No. Limuru/Bibirioni/755 to him. He deponed in the supporting affidavit that he had bought plot number 723 measuring one acre from Grace Nyambura and that he immediately settled on the land, put up his homestead and carried out developments on the land. He later discovered that L.R. No. Limuru/Bibirioni/723 was occupied by one Njau Muchuku, who has since died. It would seem that this was the Plaintiff's grandfather.
17. He deponed that the Land Registrar's efforts to exchange the positions of the two parcels of land on the ground and in the register became futile. He further stated he had used and utilised plot number 755 for 35 years without any interruption from anybody. He indicated that the certificate of official search showed that Mukirai Thairu whom he sued was registered as the proprietor of plot number 755 even though he had never settled on it. He requested the court to grant an order directing the Land Registrar to transfer plot number 755 to him by virtue of adverse possession.
18. On cross examination, the Defendant stated that he used to go to the Suit Property which was next to 755 and that when he bought the suit land there was no boundary with 755. He maintained that the two graves on the land he bought were for Grace's husband and her mother in-law. He stated that he started farming on the suit land in 1970 and that he sued Mukirai over the boundary in **HCC No. 313 of 2004**. The Defendant attempted to change his evidence and to deny some paragraphs of his witness statement during cross examination and in the submissions.
19. Parties filed submissions. The Defendant submitted that the Plaintiff had failed to prove the conditions for the grant of an order for adverse possession. The Defendant's advocate urged the court not to place much reliance on HCC Number 313 of 2004 which the Defendant filed against someone else and which he withdrew before it was heard on the basis that the Defendant acted on advice from other persons when he filed that suit. He submitted that the Plaintiff failed to show that he was in possession of the suit land.
20. A party claiming adverse possession must prove that his possession is peaceful, open and continuous. The party must show that their possession is adverse to the true owner and must start with a wrongful disposition of the rightful owner and must be feasible, exclusive, hostile and continued over the statutory period.
21. The court has considered the pleadings, the evidence adduced and the submissions of the parties. The issue for determination is whether

the Plaintiff is entitled to the orders he seeks. The Plaintiff claims that he entered the Suit Property in 1960 while the Defendant claims that the Plaintiff entered the Suit Property in 2005. From the documents produced in court it is clear that the Defendant who bought the Suit Property from Grace Nyambura was shown parcel number 755 which is why the Defendant asked the Kiambu Land Registrar to exchange this plot for plot number 723. When that failed, the Defendant filed a claim against Mukirai Thairu who was the registered proprietor of plot number 755 seeking to be declared as the owner of that land by virtue of adverse possession.

22. The court finds that the Plaintiff has proved on a balance of probabilities that he was on the suit land for more than 12 years without the Defendant's permission. The Defendant moved to Nyahururu in 1997 and only complained about the Plaintiff's occupation of the Suit Property in 2005. Plot number 1142 is not near plot number 723.

23. The court grants orders number (a) and (c) of the Originating Summons. The Plaintiff is awarded the costs of the suit.

**Dated and delivered at Nairobi this 6<sup>th</sup> day of December 2018.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Joram Ndung'u, the Plaintiff in person

Mr. V. Owuor- Court Assistant

No appearance for the Defendant