



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 244 OF 2014 (O.S)**

**WANGARI WAITHANJE.....1<sup>ST</sup> PLAINTIFF**

**GATAVI WAITHANJE.....2<sup>ND</sup> PLAINTIFF**

**JACOB KARIUKI.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**THATHI FRANCIS MURUARIUA.....DEFENDANT**

**JUDGMENT**

The plaintiffs herein **WANGARI WAITHANJE** (1st plaintiff), **GATAVI WAITHANJE** (2nd plaintiff) and **JACOB KARIUKI** (3rd plaintiff) moved this Court by their amended Originating Summons dated 1st March 2008 and filed on 5th March 2008 praying for the following orders:

***1. A declaration that the plaintiffs are entitled to be registered forthwith as owners of the parcel of land No. KAGAARI/WERU/1256 which the plaintiffs have been in adverse possession for more than twelve (12) years immediately preceding the presentation of this suit and which they have used openly and continuously as of right and in adverse possession and without any interruption from the defendant or his predecessors in the above title and that the defendant's title to parcel No. KAGAARI/WERU/1256 has been extinguished in favour of the plaintiffs under Sections 37 and 38 of the Limitation of Actions Act Chapter 22 Laws of Kenya.***

***2. An order that the defendant do transfer title No. KAGAARI/WERU/1256 to the plaintiffs and in default the Deputy Registrar be authorized to do so and/or sign all documents to effect transfer of title No. KAGAARI/WERU/1256 to the plaintiffs.***

***3. An order for costs and interest thereon of this application.***

The Originating Summons is supported by the plaintiffs joint affidavit in which it is deponed, inter alia, that the 1st and 2nd plaintiffs moved into the land parcel No. KAGAARI/WERU/1256 (the suit land) in 1966 although the 2nd plaintiff moved out in 1979. The 3rd plaintiff was born on the suit land in 1974 and lives there with his family. That the plaintiffs jointly occupy and cultivate the whole parcel of land which measures seven (7) acres and although the suit land is registered in the names of the defendant, it was purchased by **WAITHANJE MURIRIA** the deceased husband to the 1st plaintiff, father to the 2nd plaintiff and grandfather to the 3rd plaintiff. That the said **WAITHANJE MURIRIA** was an uncle to the defendant and due to his advanced age and poor health, he allowed the defendant to have the suit land registered in his names after purchasing it from one **MURANI NDORO**. That the defendant holds the suit land in trust for the plaintiffs. That the defendant has his own parcel of land known as

KAGAARI/WERU/50 and 51 where he lives with his family.

The defendant **THATHI FRANCIS MURUARIUA** filed a twenty eight (28) paragraph replying affidavit in opposing the plaintiffs claim in which he deponed, inter alia, that he is the registered proprietor of the suit land since 1966 having bought it from **MURANI NDORO** (now deceased) for 2,500/=. He denied that it was the 1st plaintiff's husband **WAITHANJE MURIRIA** who bought it adding that he (**WAITHANJE MURIRIA**) was not employed and therefore could not buy land whereas he (defendant) and his wife were primary school teachers. That he took occupation of the suit land in 1966 and developed it by planting coffee, bananas, trees and nappier grass and in 1980, purely on humanitarian grounds, allowed the 1st plaintiff to cultivate a portion of the suit land and even constructed a temporary structure for her. That he never allowed the 2nd and 3rd plaintiffs to live or cultivate on the suit land although they occasionally visit the 1st plaintiff. That the 2nd plaintiff is married to one **KARIUKI JORAM** who is the father of the 3rd plaintiff and they live at Runyenjes some six kilometers from the suit land. That the 1st and 3rd plaintiffs have not been in continuous and un-interrupted occupation of the suit land for a period exceeding 12 years and in 2006, the 2nd plaintiff invaded the suit land and the matter was reported to the C.I.D Embu where the 2nd plaintiff and her children were summoned and advised to lodge their claim in Court. That in 2004, the 1st and 2nd plaintiffs attempted to acquire the suit land by filing **EMBU DISTRICT LAND DISPUTE TRIBUNAL CASE No. 12 of 2007** but the proceedings were quashed and so it is not true that the plaintiffs have lived on the suit land without interruption or opposition. That the 2nd plaintiff does not live on the suit land and instead leases portions thereof to strangers. That he does not hold the suit land in trust for the plaintiffs and the fact that he has other parcels of land being KAGAARI/WERU/50 and 51 where he lives is no reason for the plaintiffs to grab the suit land That if the 1st plaintiff is claiming her late husband's property, she should pursue the claim in a Succession Cause and the plaintiffs have not therefore acquired ownership of the suit land by way of adverse possession.

The trial commenced on 31st March 2016 by way of viva voce evidence although the 1st plaintiff who is quite elderly simply adopted her statement.

The 2nd plaintiff confirmed that the 1st plaintiff is her mother while the 3rd plaintiff is her son. She testified that the suit land, though registered in the names of the defendant, was bought by her father from one **MURANI NDORO** in 1966. That since her father was blind, he was assisted by the defendant and although she now lives in Runyenjes, the 1st plaintiff has lived there since 1966 when it was purchased and the 3rd plaintiff was born there in 1974 and still lives there to-date with his family but the defendant does not live on the suit land. She confirmed having filed a case in the Land Disputes Tribunal in 2004 but added that her witnesses in that Tribunal namely **IBRAHIM NJIRU** and **FAUSTINO NJERU** have now refused to be her witnesses. She added that the defendant has never asked them to vacate the suit land and sought judgment as per their Originating Summons.

The 3rd plaintiff told the Court that he was born on the suit land in 1974 and still lives there with his family but the defendant has never lived on the suit land nor cultivated it and neither has he or anybody else removed them from the said land.

**NJUKI KANIKI** (PW4) is a neighbour to the plaintiffs and told the Court that the 1st plaintiff and her husband moved to the suit land in 1966 where the 3rd plaintiff was born. The 2nd plaintiff does not live on the suit land. He said the defendant does not live on the suit land nor cultivate it.

The defendant confirmed that the 1st plaintiff is his aunt (wife to his uncle) while the 2nd and 3rd plaintiffs are her daughter and grandson respectively. He told the Court that he bought the suit land in 1966 from one **MURANI NDORO** and in 1980, he invited the 1st plaintiff and her husband to live thereon having earlier in 1960 invited them to live on his other parcel of land KAGAARI/WERU/50. He said he invited the 1st plaintiff to live on the suit land because she was having problems with his mother who was also living on land parcel No. KAGAARI/WERU/50. He told the Court that the 1st plaintiff no longer lives on the suit land but only returned there recently for purposes of filing this suit while the 2nd plaintiff moved out in 1979 and went to live with her husband in Runyenjes. The defendant added that he moved away from the suit land in 2006 when the 2nd plaintiff and her family chased him away

armed with pangas. Then in 2007, the plaintiffs filed a case at the Land Disputes Tribunal and obtained a judgment in their favour which was however quashed by the High Court. He insisted that he had invited the plaintiffs to live on the suit land as they had no land of their own and he did not want them to suffer. He denied that the suit land was bought by the 2nd plaintiff's father.

Submissions have been filed both by the firm of **JOE KATHUNGU & CO.** Advocates for the plaintiffs and **ONYONI OPINI & GACHUBA** Advocates for the defendant.

I have considered the Originating Summons, the rival affidavits and annexures thereto as well as the submissions by counsel.

I have identified the following issues to be crucial in the determination of this dispute:

**1. Whether the plaintiffs are on the suit land at the invitation of the defendant and;**

**2. Whether the plaintiffs have in fact used the suit land *nec vi, nec clam nec precario* (no force, no secrecy no force) in order to entitle them to orders of adverse possession – **KIMANI RUCHIRE VS SWIFT RUTHERFORDS & CO. LTD 1980 K.L.R 10.****

It is not in dispute that the defendant is the registered proprietor of the suit land since 23rd May 1966 as per the certificate of title produced as part of the documents herein. It is the plaintiff's case that notwithstanding that registration, the suit land was in fact purchased by **WAITHANJE MURIRIA** the deceased husband to 1st plaintiff and father to the 2nd plaintiff and grandfather to the 3rd plaintiff and who was an uncle to the defendant. The plaintiffs' evidence is that **WAITHANJE MURIRIA** was blind and was being assisted by the defendant when the purchase of the suit land was being done. The plaintiffs would therefore like this Court to believe that the suit land in fact belonged to the 1st plaintiff's husband. However, in the absence of any evidence of fraud, this Court can only presume, as mandated by **Section 83 of the Evidence Act**, that the certificate of title issued to the defendant with regard to the suit land is a genuine document. Consequently, as provided under **Sections 24 and 25 of the Land Registration Act**, the defendant is the absolute owner of the suit land since 1966 and is entitled to all the rights and privileges appertaining thereto. In the same breath however, the defendant is the registered proprietor contemplated under **Section 38 of the Limitation of Actions Act** against whom the orders sought in this Originating Summons can be granted.

To be entitled to orders of adverse possession with respect to the suit land, the plaintiffs must prove that they have been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition – **KASUVE VS MWAANI INVESTMENT LTD & OTHERS 2004 1 K.L.R 184**. It is now clear that the combined effects of the provisions of **Sections 7, 13 and 7 of the Limitation of Actions Act** is to extinguish the title of the proprietor of land in favour of an adverse possessor of that land – **BENJAMIN KAMAU & OTHERS VS GLADYS NJERI C.A CIVIL APPEAL No. 2132 of 1996**. Similarly, **Section 28 (h) of the new Land Registration Act 2012** and **Section 7 (d) of the Land Act 2012** recognize the doctrine of adverse possession as part of our law. The plaintiffs' case as per the oral evidence of the 1st and 2nd plaintiffs and their joint affidavit is that they have lived on the suit land since 1966 although the 2nd plaintiff moved out in 1979 upon her marriage and the 3rd plaintiff was born there in 1974. The plaintiffs' evidence is that the defendant does not live nor cultivate the suit land and instead lives on his other parcels of land KAGAARI/WERU/50 and 51. The defendant's evidence is that he invited the 1st plaintiff to live on the suit land in 1980 on humanitarian grounds. The issue I have grappled with is whether the defendant invited the 1st plaintiff to the suit land in 1980 or whether in fact the 1st and 2nd plaintiff have been living on the suit land from 1966 to-date (in the case of the 1st plaintiff) or upto 1979 when she got married (in the case of the 2nd plaintiff). That the 3rd plaintiff was born on the suit land in 1974 is not really in contention. In support of their case, the plaintiffs called a neighbour **NJUKI KANIKI (PW4)** part of whose evidence in chief was as follows:

***"I am a neighbour to the plaintiffs. I know the 1st plaintiff and her husband moved there in 1966 and the 3rd plaintiff was born there. The 2nd plaintiff does not live there now. It is only***

***the 1st and 3rd plaintiffs who live there. The 3rd plaintiff has a family there. The 2nd plaintiff cultivates the land in dispute.***

***I know the defendant. He does not live or cultivate the land in dispute. He has never lived or cultivated it”.***

There is therefore cogent and corroborative evidence to support the plaintiff’s case that the 1st and 2nd plaintiffs have lived on the suit land since 1966 and that the 3rd defendant was born there and still lives there with his family. The defendant’s claim that he invited the 1st plaintiff and her husband onto the suit land in 1980 cannot be true because in his own evidence during cross-examination by **MR. KATHUNGU** advocate for the plaintiffs, he said as follows:

***“I permitted the 1st plaintiff and her husband to live on the land subject of this suit. It is true that the 1st plaintiff’s husband died while living on my land. I don’t recall when the 1st plaintiff’s husband died. It may be true that he died in 1967”.***

Earlier on in his evidence in chief, the defendant stated as follows:

***“The 2nd plaintiff is now also living with her husband near Runyenjes. She got married while living on my land in 1979. Then she moved to her husband’s land in Runyenjes. She does not plough it but has leased it to someone else’***

It is clear therefore from the plaintiffs’ evidence and which finds support in the defendant’s own evidence, that the 1st and 2nd plaintiffs must have occupied the suit land in 1966 during the life time of 1st plaintiff’s deceased husband who died thereon in 1967. That evidence rebuts the defendant’s testimony that he invited the 1st plaintiff and her deceased husband to the suit land in 1980. That cannot be true given his own testimony that the 1st plaintiff’s deceased husband died in 1967 while living on the suit land and that the 2nd plaintiff also lived there upto 1979 when she got married and moved to join her husband in Runyenjes. Given that evidence, I dare say, without determining that issue, that the plaintiffs’ claim that the suit land was infact bought by the 1st plaintiff’s deceased husband, but the defendant took advantage of his blindness to have it registered in his names, is the more credible and plausible explanation of the two versions presented to this Court by the two sides. That explains why the 1st plaintiff and her deceased husband moved into the suit land in 1966 which is the year when it was purchased. I therefore answer question (1) posed above by making a finding that the 1st and 2nd plaintiffs have lived and occupied the suit land since 1966 and were not invited thereon by the defendant in 1980 or at all. Of course if the 1st and 2nd plaintiffs were in occupation of the suit land with the permission of the defendant, then a claim based on adverse possession cannot be sustained – see **MWINGI HAMISI ALI VS ATTORNEY GENERAL & ANOTHER C.A CIVIL APPEAL No. 125 of 1997** where it was held that:

***“Adverse possession does not apply where possession is by consent and in a Court of law, sympathy takes a second stand as the Court is governed by statutes”.***

Therefore, with regard to the 1st and 2nd plaintiffs, time started running from 1966 when they not only moved onto the suit land but it was also registered in the names of the defendant. And as regards the 3rd plaintiff, time started running in 1974 when he was born on the suit land and where he has lived since.

I shall now interrogate whether the plaintiffs occupation and use of the land from 1966 (in the case of the 1st and 2nd plaintiffs) and 1974 (in the case of the 3rd plaintiff) can, in law, satisfy the requirements of adverse possession. In **KIMANI RUCHIRE VS SWIFT RUTHERFORDS** (supra), the Court held at page 16 as follows:-

***“The plaintiffs have to prove that they have used this land which they claim as of right, nec vi, nec clam nec precario (no force, no secrecy, no persuasion). So the plaintiff must show that the Company had knowledge (or the means of knowing actual or construction) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary***

***purposes or any endeavours to interrupt it by way of recurrent consideration”.***

In a claim for adverse possession, the law is that the plaintiff has to prove the following:

- 1. That he has been in continuous and un-interrupted occupation and possession of the land in dispute for 12 years or more having dispossessed the registered owner thereof.***
- 2. That such possession has been open, notorious and with the knowledge of the registered owner.***
- 3. That such occupation and possession is without the permission of the owner.***
- 4. That the plaintiff has asserted a hostile title to the registered owner of the property.***

Having found as a fact that the 1st and 2nd plaintiffs moved into the suit land in 1966, then by dint of the provisions of ***Sections 7 and 17 of the Limitation of Actions Act***, the defendant's rights to the suit land were extinguished by the end of 1978. ***Section 7 of the Limitation of Actions Act*** provides that;

***“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”.***

***Section 17*** on the other hand provides that:

***“Subject to Section 18, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action) the title of that person to the land is extinguished”***

It follows therefore that as far back as 1979 when, by the defendant's own evidence, the 2nd plaintiff moved to Runyenjes, the defendant's right to the suit land had long been extinguished in favour of the 1st and 2nd plaintiff following their occupation thereof since 1966.

Did the defendant have knowledge about the 1st and 2nd plaintiffs' occupation of the suit land? By his own testimony which I have quoted above, the defendant had such knowledge.

Was the 1st and 2nd plaintiffs' occupation of the suit land interrupted or has it been continuous for the requisite twelve (12) years? I have already found that by 1979, the defendant's right to the suit land had been extinguished. The twelve (12) years statutory period was never interrupted between 1966 and 1979. Interruption occurs when the owner takes legal proceedings or makes an effective entry onto the land – ***GITHU VS NDEETE 1984 K.L.R 776***. Even a mere assertion by the registered owner to claim possession by a letter will not be sufficient – ***MOUNT CARMEL INVESTMENT LTD VS PETER THURLOW LTD & ANOTHER (1983) 3 ALL E.R 12***. At least upto 1979, there is no evidence that the defendant had made any attempt to institute legal proceedings against the plaintiffs in order to assert his rights to the suit land. The earliest legal proceedings appear to have been instituted in 2004 and even then, it was by the 2nd plaintiff who filed a suit at the Embu District Land Tribunal in Case No. 12 of 2004 where a finding in favour of the 1st and 3rd plaintiffs was made but later quashed by the High Court in 2007. The only time the defendant tried to assert his rights over the suit land was in February 2006 when he complained to the Police who summoned one **MBOGO GITAVI** for threatening him with a panga. The said **MBOGO GITAVI** is not a party herein and as is now clear, that letter in itself was not sufficient to interrupt the 1st and 2nd plaintiffs occupation of the suit land which, in any event, was now some forty (40) years late. This suit was first filed on 9th October 2007 before being amended on 1st March 2017.

From the above evidence, I am satisfied that the 1st and 2nd plaintiffs have established that they deserve orders of having acquired the suit land by adverse possession.

What about the 3rd plaintiff? He says he was born on the suit land in 1974. The defendant has refuted this and has deponed in paragraph 13 of his replying affidavit as follows:

***“That the 2nd plaintiff got married in the late 1960s and is the mother of the 3rd plaintiff JACOB KARIUKI who is over 34 years old and it is not true the 3rd plaintiff was born in 1974 and has been living on the suit land”.***

However, in cross-examination, the defendant said as follows:

***“The 3rd defendant was born on the land subject of this suit but now he lives there with his family. He was living there even at the time of the case in the Tribunal”.***

Therefore, even if the 3rd plaintiff was not born in 1974 as alleged by the defendant, the defendant has himself conceded that the 3rd plaintiff is over 34 years of age and since he was born on the suit land and continues to live there with his family, he has clearly established that he too is entitled to orders of adverse possession with respect to the suit land as the period of over 34 years is well in excess of the 12 years limitation period provided in the law.

Having considered the evidence by both parties herein, I am persuaded that the plaintiffs have proved their case against the defendant as required in law. The plaintiff's occupation of the suit land is well in excess of the twelve (12) years limitation period provided in law and the defendant's rights to the same was extinguished as far back as 1979. And although the 2nd plaintiff moved away in 1979 when she got married, her rights to the suit land by adverse possession had already crystallized. Furthermore, and that notwithstanding, the 2nd plaintiff continues to dispossess the defendant of the suit land as he himself concedes in paragraph 14 of his replying affidavit when he says:

***“That the 2nd plaintiff is currently leasing out portions of the subject land to strangers without my consent as the registered owner and has made it difficult for me to cultivate and or develop my land in the manner I would desire”***

The up-shot of the above is that there shall be entered judgment for the plaintiffs against the defendant as prayed in the amended Originating Summons dated 1st March 2017 and filed herein on 5th March 2017 except that on costs, each shall meet their own costs as they are related.

It is so ordered.

**B.N. OLAO**

**JUDGE**

**21<sup>ST</sup> APRIL, 2017**

Judgment dated, delivered and signed in open Court this 21<sup>st</sup> day of April 2017

Ms Muthike for Mr. Kathungu for Plaintiffs present

Ms Kiragu for Mr. Gachuba for Defendant present

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**21<sup>ST</sup> APRIL, 2017**

Both counsels requested to hold brief for their colleagues who are absent though letters were sent to them on 5<sup>th</sup> April 2017.

**B.N. OLAO**

**JUDGE**

**21<sup>ST</sup> APRIL, 2017**