



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT OF KENYA AT NAIROBI**

**ELC. CASE NO. 316 OF 2009**

**FLORENCE NJOKI KIGO.....PLAINTIFF**

**VERSUS**

**JOHN NDWARU KINYANJUI ALIAS KAMAU NDWARU.....DEFENDANT**

**JUDGMENT**

1. The two suits concerning the land subject matter of this judgment that is, **ELC Case No. 316 of 2009 – FLORENCE NJOKI KIGO –VS- KAMAU NDWARU ALIAS JOHN KAMAU KINYANJUI** and **ELC Case No. 634 of 2009 (O.S) – JOHN NDWARU KINYANJUI –VS- FLORENCE NJOKI KIGO** were consolidated by consent of the parties recorded before the Hon. Okwengu J. (as she then was) on **18<sup>th</sup> May, 2010**. It was further ordered that the hearing do proceed under ELC No. 316 of 2009. It was ordered that the Plaintiff in ELC 316 of 2009 and the Replying Affidavit in HCCC 634 of 1009 (O.S) do constitute the Plaintiff's pleadings. The Originating Summons in HCCC No. 634 of 2009 (O.S) together with the statement of defence in HCCC 316 OF 2009 were to constitute the Defendant's pleadings.

2. The Plaintiff filed a plaint dated 2<sup>nd</sup> July 2009 on the same date. She pleaded that she is the sole registered and absolute owner of all that parcel of land known as Title No. Dagoretti/Ruthimitu/631 measuring approximately 0.90 Ha. which the Defendant is allegedly occupying illegally and without the Plaintiff's authority and/or consent despite demand by the Plaintiff that he vacates the premises. The Plaintiff pleads that the Defendant's continued occupation and use of her land is a breach of her constitutional right to private property and she prays for an eviction order against the Defendant. The Plaintiff further prays for an order of permanent injunction prohibiting the Defendant or his agent from occupying, entering, encroaching, cultivating or in any other way interfering with the Plaintiff's parcel of land Title No. Dagoretti/Ruthimitu/631. She also prayed for costs of the suit.

3. Before delving into the defence filed in that case (HCCC 316/09) it is necessary to note that the Plaintiff also filed a Replying Affidavit in response to the Originating Summons filed against her in ELC Suit No. 634/09-(O.S).

4. The Defence filed by the Defendant is brief. It was filed on 4<sup>th</sup> August, 2009. It simply denies that the Defendant is illegally occupying the suit land; it states that he has been living on the suit land for over forty years; that at no time has the Plaintiff /demanded that he vacate the suit property and that the Plaintiff's suit should be dismissed with costs.

5. The Defendant also filed the Originating Summons dated 14<sup>th</sup> December 2009 on 15<sup>th</sup> December 2009 against the Plaintiff. This is ELC 634 of 2009 (OS). In the Originating Summons the Defendant seeks a declaration that the Plaintiff's right to claim the property known as Dagoretti/Ruthimitu/631 (the suit

land) is barred under the Limitation of Actions Act (Cap 22) on the ground that for a period of over 40 years the Plaintiff has been openly, peacefully and as of right been in possession and occupation of the suit land. The Defendant has also sought a further declaration that he is therefore the rightful owner of the suit land including all the developments thereon by prescription, and that he should be registered as such in place of the Plaintiff.

6. The Defendant seeks an injunction restraining the Plaintiff from interfering, selling, transferring, distributing or alienating the suit land and asks to be awarded the costs of the suit.

7. It is to this Originating Summons that the Plaintiff has responded by her Replying Affidavit sworn on 1<sup>st</sup> March, 2010 and filed on 3<sup>rd</sup> March, 2010. In that sworn Affidavit, the Plaintiff reiterates that she is the registered absolute sole proprietor of the suit land and annexes a copy of the title as "Exhibit FNI". She narrates that she bought the suit land from a chargee and was duly issued with the title deed on 31<sup>st</sup> December 1997. Her further evidence is that the Defendant is a son to the former owner of the land, the late Gabriel Kinyanjui who had charged the title to the land, to a bank; that the said Gabriel Kinyanjui was unable to repay the loan to the Bank hence the land was sold and transferred to her; that neither the Defendant nor his father challenged the said sale of the suit land to the Plaintiff and that the Defendant, being a trespasser on the suit land, has been issued with a demand letter dated 30<sup>th</sup> May 2009 seeking that he vacates the suit land but he has refused to vacate, instead the Defendant has approached the Plaintiff offering to buy the suit land which offer the Plaintiff now believes was made to buy time.

8. According to the Plaintiff, the Defendant replied to the letter of demand dated 30<sup>th</sup> May, 2009 and alleged to be a beneficiary of the suit land.

9. It is the Plaintiffs' belief that the Defendant has no legal or equitable claim over the suit land and that the filing of the Originating Summons is only meant to delay the finalization of the suit that the Plaintiff had filed earlier against the Defendant that is ELC 316/2009.

10. The Plaintiff further pleads that the Defendant cannot succeed in a claim of adverse possession against her because he has not enjoyed quiet and uninterrupted possession of the suit land for a total of period of 12 years as against the Plaintiff as the time began to run for the purposes of adverse possession when the Plaintiff was issued with title to the suit land. Besides, the Plaintiff further pleads the defendant was living on the suit land as a son to the late owner of the land, Gabriel Kinyanjui. The Plaintiff therefore pleads that the Originating Summons is frivolous and vexatious, a sham and discloses no cause of action against her, is an abuse of court process and should be struck out with costs. The Plaintiff's statement filed in ELC 316/2009 on 3<sup>rd</sup> April, 2012 reiterates many of the facts mentioned in the Replying Affidavit. However, she adds that after she purchased the land, Gabriel Kinyanjui, the former owner, asked for time to enable him look for an alternative parcel of land, but died before he had moved out of the suit land whereupon his family forcibly buried him on the suit land despite opposition by the Plaintiff. She avers that sickness that affected her after the death of her husband delayed her follow up on the issue of the eviction of the Defendant from the suit land.

11. The Defendant filed two witness statements, one by a former Chief and the other by the Defendant's wife. They averred that they were aware the land belonged to the Defendant.

12. The hearing of this suit took place on 22<sup>nd</sup> March, 2012<sup>7</sup> when both the Plaintiff and the Defendant in that order, and without calling any witnesses, took the stand and gave evidence. They reiterated mostly what is contained in the pleadings they have filed.

13. In my view the issues that arise in this suit are as follows:-

**a) Is the Plaintiff the legal owner of the suit land?**

**b) Has the Defendant acquired ownership of the suit land by way of adverse possession?**

**c) Is the plaintiff entitled to the prayers sought in the plaint?**

**d) Who should bear the costs of the suit?**

14. The issues are addressed as hereunder.

**a). Is the Plaintiff the legal owner of the suit land?**

15. The Plaintiff pleads that she is the “sole registered and absolute owner” of the suit land known as Dagoretti/Ruthimitu/631. Though the Defendant denies this at paragraph 2 of his defence, the Plaintiff has produced a copy of her title to the land as well as a certificate of official search dated 8<sup>th</sup> April, 2009. They both show that the Plaintiff was registered as the owner of the suit land in the year 1997 and a title deed was issued to the Plaintiff on 31<sup>st</sup> December 1997. Upon cross-examination by Mr. Wahome the Defendant admitted that the land is registered in the name of the Plaintiff. The Defendant admitted that his name does not feature anywhere in the papers relating to ownership of the land. This went contrary to what the Defendant had pleaded at paragraph 2 of the Defence dated 31<sup>st</sup> July 2009 where he denied that the Plaintiff is the registered owner of the suit land. As the Plaintiff’s evidence was not challenged, I find that the Plaintiff is the registered owner of the land.

**b). Has the Defendant acquired ownership of the suit land by way of Adverse possession?**

16. In the **Malindi Land case No. 108 of 2011 (O.S) – KAHINDI NGARA MWAGANDI VERSUS MTANA LEWA EKLR**, the court stated as follows:-

*a. “Adverse possession is the process by which a person can acquire a title to someone else’s land by continuously occupying it in a way that is inconsistent with the right of the owner. If the person in adverse possession continuous to occupy land, and the owner does not exercise his right to recover it by the end of the prescribed period of 12 years, the owner’s remedy as well as his title to the land are extinguished by virtue of the provisions of sections 7,9,13,37 and 38 of the Limitation of Actions Act. ”*

17. The question that arises in the present suit is whether the Defendant has been on the land in question for at least 12 years and whether continuous occupation by the Defendant has been inconsistent with the right of the registered owner, the Plaintiff.

18. In her evidence the Plaintiff stated that even after purchasing the suit land, she never dealt with the Defendant as she sought vacant possession of the premises because she was dealing with the Defendant’s father over the matter. The Plaintiff in her evidence stated that she bought the suit land in “1996 – 1997” for Kshs. 800,000/= and that she was registered as proprietor and issued with a title deed on 31<sup>st</sup> December, 2017.

19. As to whether the Defendant enjoyed continuous occupation for at least 12 years, I find that the Defendant has been on the land for more than 12 years. He testified, and this evidence was not challenged by the Plaintiff that he was born on the suit land in 1952 and that he has resided on the suit land till now. He stated that he was about 45 years old when the Plaintiff bought the suit land.

20. However, an issue arises as to whether any period of time spent on the land before it was purchased by the Plaintiff may be reckoned in the computation of time for the purposes of **Section 37** and **38** of the Limitations of Actions Act. It is Section 7 of that Act which provides that an action for the recovery of land cannot be brought after the expiry of 12 years from the date on which the cause of action arose.

21. It is not in doubt that before the Plaintiff purchased the land the Defendants had lived thereon for many years previously, indeed, more than forty years as the Defendant put it. However this period of stay happened to be the time the Defendant’s father owned the land, and the Defendant was therefore on the land by virtue of being the son to the then registered proprietor who also resided thereon.

22. Drawing from this court's reasoning in the case of **MBIRA –VS- GACHUHI, (2002) Vol I, EA, 137**, that period of stay upon the suit land should not be considered relevant for computation of time for the purposes of determining whether the Defendant has acquired title by way of adverse possession. In that cited case the court stated as follows:-

***“To hold that adverse possession can arise between persons living together as hindered, whether by blood or marriage relationship, would open floodgates of litigation. Such a holding would be portentous of calamitous practical consequences on cherished positive cultural practices and usages amongst our people, meant to provide social and economic security in the event of misfortune befalling a number of the community.”***

23. The court also stated as follows in the same judgment:-

***“As it is common knowledge within the legal profession a person who seeks to acquire title to land by the method of adverse possession .....must prove non permissive or non-consensual, actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption. He must have the right intent to claim and hold the land in opposition to all the world. He must show on evidence that the true owner of or persons interested in the property have proper knowledge of the adverse assertion of ownership by the occupant who has no colour of right to the land, and has the intent to hold solely for himself denoted by the exercise of acts of dominion over the land which includes making ordinary use and taking ordinary rights of which the land is susceptible in its present state.”***

24. The Defendant's statement contained in paragraph 4 of the defence, when viewed in the light of the above dicta, to which I subscribe, does not aid the defendant at all. I find that the relevant period for the purpose of an inquiry into the possibility of the Defendants acquisition of title by way of adverse possession is the period commencing from 31<sup>st</sup> December, 1997 up to the date of the institution of the suit ELC No. 316 of 2009 filed by the Plaintiff, seeking eviction of the Defendant and his family from the suit land. The question would be: During that period, did the Defendant have non permissive, non consensual, open notorious, exclusive and adverse use for the statutorily prescribed period without interruption?

25. A simple calculation shows that a 12 year period from 31<sup>st</sup> December, 1997 would expire on or about 30<sup>th</sup> December 2009. The Plaintiff's suit, ELC No. 316 of 2009 was filed on 2<sup>nd</sup> July 2009 if it is judged by the court stamp on the plaint and the copy of Receipt Number 2925203 dated 2<sup>nd</sup> July, 2009 which are in the court file. Therefore I find that the statutory period of 12 years had not elapsed from the date of the registration of the Plaintiff as the absolute proprietor of the suit land till the date the Plaintiff filed suit. It is than the statutorily required 12 years lesser by a mere five months.

26. The Defendants stay on the premises cannot therefore be considered to have attained at least 12 years or as being one that was uninterrupted. It is evident from the record that the Plaintiff's suit ELC 316 of 2009 was only one of the interruptions. It is notable, that in the Defendants own Supporting Affidavit to the Originating Summons, which was sworn on 14<sup>th</sup> December, 2009, the Defendant averred at paragraph 7 as follows:-

***“7. That sometimes (sic) in July 2009, I was informed by my wife that certain people entered the aforestated parcel and claimed to be sub-dividing the parcel of land on the Defendant's instructions who is allegedly the title holder(sic).”***

27. This is a clear admission by the Defendant that the course of his stay on the land was interrupted by the Plaintiff's assertion of ownership or title when she entered upon the land and sought to subdivide the land.

28. It was also the Plaintiff's evidence that her advocates wrote a demand letter requiring the Defendant to vacate the land within 7 days. This letter was written on 30<sup>th</sup> April, 2009 before the expiry of the

statutory 12 years period and at paragraph 10 of the Plaintiff's Replying Affidavit sworn on 25<sup>th</sup> September, 2009, the Defendant responded to the said letter of demand through a letter from the legal firm of J.A.B Orengo Advocates. The second paragraph of that letter from J.A.B Orengo Advocates acknowledges receipt of the letter dated 30<sup>th</sup> May, 2009 written to the Defendant by the Plaintiff's Advocates.

29. Finally, a look at the evidence given in court shows that there was engagement between the two parties during the period between 31<sup>st</sup> December, 1997 and 2<sup>nd</sup> July, 2009 over the land issue. The Plaintiff avers that upon learning that there was an engagement to bury the Defendant's father on the suit land, she sought held through the District Officer.

30. In his evidence in chief, the Defendant stated that the Plaintiff's husband came to the land on the day of burial of the Defendant's father and said he does not want **"any case with the neighbours"** when he found **"people with papers."** Instead, he asked for money which there is good reason to believe was a refund of the purchase price. There can be no other conclusion save that on that day, the Plaintiff's husband cut short her attempts to assert ownership rights simply because he did not want a dispute to arise.

31. Lastly in the cross-examination the Defendant averred that:-

***"There is a paper showing that there was an intention to refund the money. I have not refused to leave. Her husband said that I pay before he died."***

32. Under re-examination by his counsel, the Defendant also states as follows:-

***"I seek to refund her the money. I pray the court that I be allowed to refund her the money."***

33. It would appear therefore that at some point, during the period between 31<sup>st</sup> December 1997 and 2<sup>nd</sup> July 2009, the Defendant's residence on the premises became a point of compromise between him and the Plaintiff's family which arose when the Plaintiff's husband sought, as the Defendant testified, to have the purchase price refunded by the Defendant to no avail.

34. The upshot of the above analysis is that by the date 2<sup>nd</sup> July 2009, the statutory period of 12 years had not elapsed so as to bar the Plaintiff to file a suit for the recovery of land. Secondly the Defendant's stay on the land was not, and cannot be considered to have been interrupted during the period. These two findings lead to only one conclusion that the Defendant has not acquired ownership of the suit land by way of adverse possession.

### **c). Is the Plaintiff entitled to the prayers sought in the plaint?**

35. The Plaintiff being a purchaser of the land following the exercise of a chargee's power of sale is now the registered proprietor of the suit land. The relevant law under which the land is registered is the Registered Land Act (now repealed). The title is free hold. Section 27(a) of the Registered Lands Act (now repealed) provided as follows:

***"27. Subject to this Act:-***

***The registration of person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto."***

36. Section 28 of the Registered Land Act (Repealed) provides as follows:-

***"28: The rights of proprietor whether acquired on first registered or whether acquired subsequently for valuable Consideration or by an order of court shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor together with all privileges and***

***appurtenances, belonging thereto, file from all other interests and claims whatsoever but subject:***

***to the leases, charges and other encumbrances and to the conditions and restriction, if any, show in the register and***

***unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by Section 30 not to require noting on the register provided that nothing in this Section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”***

37. The Defendant claim was simply that he has acquired ownership by way of adverse possession. The Defendants claim was not in respect of any other interest or interests.

38. It is clear that going by the provisions of sections 27 and 28 of the Registered Land Act (repealed) the Plaintiff, upon registration acquired indefeasible rights. The Defendant and all claiming under him, have no rights to the said land and are mere trespassers. It is not the Plaintiff who put the Defendant and all claiming under him into occupation of the suit land. No overriding interest in favour of the Defendant was created over the land within the provisions of Section 30 of the Registered Land Act. No overriding interests are shown to be registered against the title.

39. In conclusion, I find that the Plaintiff has proved her case on a balance of probabilities and that the Defendant has failed to prove his claim as contained in the Originating Summons on a balance of probabilities.

40. I therefore would grant prayers number (a) and (b) of the plaint dated 2<sup>nd</sup> July, 2009 and dismiss the Originating Summons dated 14<sup>th</sup> December, 2009.

**d). Who should bear the costs of these proceedings?**

41. The Plaintiff's case had merit. The Defendant not only opposed the Plaintiff's claim but also filed his own claim in respect of the said land. The Defendant was fully aware that the Plaintiff had purchased the land from a chargee exercising a power of sale. The Defendant had even attempted to negotiate a refund of the purchase price to enable him remain on the land.

42. In the ordinary course of events it would be proper to let the Defendant bear the costs of the suits herein. However, in the current circumstances, the court while exercising its discretion under Section 27 of the Civil Procedure Act and appreciating that the Defendant and his family members have to now give up the very land they were born on, finds it proper to order that each party do bear its own costs of these consolidated cases.

43. For the avoidance of doubt, the final orders are as follows:-

(a) Prayers Nos (a) and (b) in the Plaintiff's plaint dated 2<sup>nd</sup> July 2009 are hereby granted.

(b) The Originating Summons dated 14<sup>th</sup> December 2009 is hereby dismissed.

(c) Each party shall bear its own costs of these proceedings.

It is so ordered.

**Dated, Signed and Delivered at Nairobi on this 25<sup>th</sup> Day of May 2017**

**MWANGI NJOROGI**

**JUDGE.**

**Judgement read in open court in the presence of:**

Court Assistant: Halima.

**MWANGI NJOROGE**

**JUDGE.**