



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NAIROBI**  
**E.L.C NO. 201 OF 2006**

**J W G.....PLAINITFF**

**VS**

**M N K.....1<sup>ST</sup> DEFENDANT**

**J M K.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff and the Defendants are widows and administrators of the estates of Mr. G and Mr. K respectively. The Plaintiff's suit is based on an agreement for sale between the late husband of the Plaintiff, Mr. G and the Defendants husband, Mr. K, following which they took possession as purchasers. The Defendants are co-wives and wives of the late Mr. K. It is the Plaintiffs case that her husband entered into an agreement of sale, have occupied the land in excess of 12 years and is urging the Court to register her as the owner based on a claim of adverse possession.

2. The Plaintiff filed an Originating Summons claiming ownership of LR No. *Limuru/Kamirithu /T.372* accrued through adverse possession and registered in the name of Josiah Kabocha Mbira. The originating summons is premised on the following grounds;

a) The Plaintiff has acquired title to the suit land through adverse possession.

b) The Defendant's title has been extinguished through adverse possession.

c) The Plaintiff has been in open, quiet, continuous and uninterrupted possession of the suit land for a period exceeding 12 years.

3. In her supporting affidavit the applicant deponed that she and her husband one G N (deceased) entered into the land, initially through a purchase agreement with the Defendant. That they took possession of the land in 1968 and have continued being in occupation as well as possession a period of over 12 years until recently when the Defendant started making attempts to repossess the land from her.

4. In resisting the claim the Defendant (the late K) in his replying affidavit filed on 27.3.06 denied the Plaintiffs claim and asserted that he is the rightful registered owner of the land and that the Plaintiff's deceased husband did not buy the land; that he in good faith allowed the Plaintiff and the deceased husband who are his in-laws to occupy the land as they sought to acquire theirs; That indeed the deceased husband bought two parcels of land at Ndeiya and Lari. On acquisition of his own land, he

moved his family to reside on the Ndeya and in 1972/73; That the Plaintiff deserted her husband for 8 years before he moved to Ndeiya; That the Plaintiffs husband had another wife namely W whom he lived with while still on the Defendants land and also till his death; That the Plaintiff resurfaced after the husband died. That the terms the Plaintiffs claim that she has occupied the land in quiet continuous and uninterrupted possession is unfounded.

5. The Defendant passed away in 2010 and the windows of the Defendant J M and M N were substituted as Defendants by the Court on 30.6.11, paving way for the amendment of the Originating Summons.

6. In her Replying affidavit, J M the 1<sup>st</sup> Defendant deponed on her own behalf and that of the second Defendant. She reiterated the contents of the deceased husband's affidavit. That the Plaintiff's husband was buried in his land in Ndeiya where the Plaintiffs three sons and their families live. That when the Plaintiff returned to her homestead after the death of her husband she was housed at her mother in laws house as a guest. That the Plaintiff separated from her husband and went on to remarry and got 6 other children outside her 1<sup>st</sup> marriage.

7. At the trial the Plaintiff testified in solo. She reiterated the contents of her supporting affidavit and stated that her late husband bought the land from the Defendants husband J K. She produced an agreement for sale dated 10/6/69. That upon purchase of the suit land, her husband took possession and lived on the land to date. She indicated that the dispute has gone through suits filed in court i.e. PMCC No. 254 of 2014 at Limuru which was dismissed for being time barred and PMCC No. 245 of 2003. In Cross-examination she admitted that her husband died in 1978 and was buried on his land in Ndeiya. She denied ever separating with her husband before his death, only stating that her husband lived with another wife in Ndeiya. That after the death of her husband in 1978, her stay on the suit land begun being interrupted through an eviction which she resisted and has never vacated the land. It is her evidence that she has continuously lived on the land since 1960s to date.

8. The Defendant further testified that her husband, the late K accommodated the Plaintiff and her husband when they had not acquired their own land. Later the Plaintiff left her husband for a period of time leaving G and his new wife W whom he married when the Plaintiff left the marriage. G lived on the suit land for about 6 years before moving to their own land that he had bought at Ndeiya. That the Plaintiff came back to the suit land when G died. That was 1978. Her husband K asked the Plaintiff to leave after a while but she stayed on. The Plaintiffs sons live at their family land at Ndeiya. The Chief tried to arbitrate on the matter but in vain. That there was no agreement between G and K at all. That the Plaintiff stayed on the land since 1978 with their permission since she was a relative. That she lived in the house that was occupied by her mother. That this was an old house that G lived in before he moved to his own land.

9. The issue before this Court for determination is whether the Plaintiff has acquired title to the suit land through adverse possession?. 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. **Meggary & Wade, The Law of real property 7<sup>th</sup> Edition at page 1416** defines adverse possession as possession inconsistent with and in denial of the title of the true owner.

10. The law is clear under **Section 7 of the Limitations of Actions Act**, Cap 22 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". Under the Limitation of Actions Act, one of the ways of acquiring title in land is by adverse possession under certain conditions after the expiry of 12 years.

11. Section 38 of the Limitations of Actions Act applies to land registered under the Government Lands Act (Cap. 280), the Registration of Titles Act (Cap. 281), the Land Titles Act (Cap. 282) or the Registered Land Act (Cap. 300), in the same manner and to the same extent as it applies to land not so registered, except that—

a) where, if the land were not so registered, the title of the person registered as proprietor would be

extinguished, such title is not extinguished but is held by the person registered as proprietor for the time being in trust for the person who, by virtue of this Act, has acquired title against any person registered as proprietor, but without prejudice to the estate or interest of any other person interested in the land whose estate or interest is not extinguished by this Act;

(b) an easement acquired under section 32 of this Act does not come into being until a copy of the judgment establishing the right to the easement has been registered against the title to the land affected thereby, but is, until that time, held by the person for the time being registered as proprietor in trust for the person who has acquired it.”

Where the land is unregistered under any of the land registration statutes, the owner's right, is extinguished. However, if it is a registered title, it is not extinguished but the registered proprietor holds it in trust for the person who by virtue of the statute has acquired the title, and the stranger acquires the title by moving the High Court under section 38 of the Act.

12. For one to succeed in a claim for adverse possession, he must prove the following elements:- a) He must have made physical entry and be in actual possession of the land for the statutory period. b) The entry and occupation must be with or maintained under some claim or colour of right or title. c) The occupation must be non-permissive. d) The occupation must evince unmistakable *animus possidendi*, that is occupation with the clear intention of excluding the owner and all other persons and; e) The acts of the adverse possessor must be inconsistent with the owner's enjoyment of the soil for the purpose which he intended to use it.

13. I have seen on record an agreement for sale dated the 10. 6. 1969 which has not been controverted; it is not denied nor that the purchase price has not been paid. The purchase price was Kshs 1800/- and the sum of 1400/- was paid on the 10.6.1969 and the balance of Kshs 400/- was paid on the 15.10.1977. The agreement is in writing, signed by the parties and witnessed by 3 witnesses, hence complies with all the requirements of a contract. That notwithstanding the agreement must have become void after the expiry of 3 months for lack of land control board consent. The agreement though basic was subject to the Land Control Act, the land being agricultural.

14. Section 6 of the Land Control Act provides as follows;

“Each of the following transactions that is to say—

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;

(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act”.

15. The Land Control Act was enacted and became law in 1967 and the agreement was signed in 1969, thereby bringing it under its ambit. Then, the law required that the Land control board consent be obtained within 3 months of the signing of the agreement, in default the transaction became void. It therefore means that this agreement became void by the 9.10.1969. It is not in dispute that the Plaintiff and her husband entered into possession pursuant to the agreement for sale. Possession therefore became adverse from the 9.10.1969 when the parties failed to obtain the consent of the Land Control Board. The possession therefore was not with permission but adverse. The Defendants have averred that the Plaintiff

and her husband was accommodated on the land pending their acquisition of their own parcel of land. This evidence is inconsistent with the agreement of sale on record and also inconsistent with the evidence of the Plaintiff who testified that she has lived on the land since after independence.

16. The Defendants have stated that the Plaintiff left the land due to marital problems with G her late husband and returned in 1978 on the death of her husband. No evidence was led as to time that she left the land or if indeed she gave back possession of the land to the Defendants. The Plaintiff has denied that she left the land at all. Even if she did, which is in doubt, the Defendants in their evidence did assert that she has been on the land since 1978. That they have been asking her to leave but she has not. The conclusion is that even if 1978 is taken as the cut off period for purposes of time running, it means that she has been in possession and occupation for the last over 37 years. The 2nd Defendant stated that the Plaintiff stayed and occupied the same house that she had done before, the house that she and G had occupied. This is not consistent with the conduct of a visitor. She had a house and so had established her physical and factual occupation and possession on the land for over 12 years. That evinces clear case of animus Possidendi – intention for the time being to possess the land to the exclusion of all other persons including the Defendants husband, the title holder. In the case of **Kimani Ruchire Vs Swift Rutherfords & Co Limited (1980) KLR 10** Kneller J as he then was held that 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). The Defendants have had knowledge of the possession of the Plaintiff and his family since the 1960s to date. She and her family lived in the house they built in the 1960s to date. I find that possession has been continuous.

17. It is the Plaintiff case that the Defendants tried to evict her in 2014. Why were the Defendants trying to evict the Plaintiff? It is in the evidence that was adduced that the Plaintiff's occupation and possession had dispossessed the registered owner of the land, the late Mr. K and hence their efforts to get her to give them back possession by vacating. She did not vacate. I find that the Plaintiff did dispossess the owner and was not just a mere persistent trespasser or a visitor.

18. Adverse possession will cease where the adverse possessor vacates the property, gives written acknowledgement of the owner's title (which causes time to run afresh), registered owner grants the possessor a licence, tenancy or the true owner retakes possession of the property. There is no evidence that was led to show that the Plaintiff did any of the acts aforesaid to cede possession to the Defendants.

19. From the totality of the evidence adduced, the summation of the pleadings and the submissions, I find that the Plaintiff has proved adverse possession and I order as follows;

a) The Defendants be and are hereby ordered to transfer the title No. Limuru/Kamirithu/T. [particulars withheld] to the Plaintiff forthwith and in default the Deputy Registrar is directed to sign all the requisite documents of transfer to effect the transfer of the land to the Plaintiff.

b) The costs of the suit shall be borne by the Defendants.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> SEPTEMBER 2017**

**J.G. KEMEI**

**JUDGE**