



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 530 OF 2016 [OS]

CATHERINE WAMBUI KURIA PLAINTIFF

VERSUS

SAMUEL GICHUHI 1ST DEFENDANT

SAMUEL GICHINI 2ND DEFENDANT

JUDGMENT

1. On 18/5/2016, the plaintiff, **CATHERINE WAMBUI KURIA**, took out an originating summons dated 18/5/2016 seeking determination on the following questions:

*1) Whether the plaintiff has been in exclusive, open, peaceful, uninterrupted occupation, use and possession of the parcel known as **RIRUTA/S266** for a period of over 19 years.*

2) Whether the plaintiff has developed the suit property by constructing and running a nursery school thereon besides farming activities.

*3) Whether the plaintiff has thus become entitled by adverse possession to all that land parcel known as *Riruta/S266*.*

*4) Whether the plaintiff should be registered as the proprietor of the said land parcel known as *Riruta/S266*.*

*5) Whether the 1st and or the 2nd defendant and or the personal representatives of the 1st defendant be ordered to execute instruments to convey land parcel known as *Riruta/S266* situate at *Riruta* in *Nairobi* area to the plaintiff, and in default of which the Deputy Registrar of this honourable court or such other officer as the honourable court may designate, do execute the same.*

*6) Whether a permanent injunction be issued restraining the defendants whether by their servants, agents, employees, or persons otherwise claiming under them howsoever from illegally or otherwise interfering with the plaintiff's quiet possession and enjoyment of the said land parcel known as *Riruta/S266*.*

7) Whether the costs of this summons should be awarded to the plaintiff.

2. The plaintiff's case is that the suit property is registered in the name of the 1st defendant. In 1995, the plaintiff entered the suit property and has been in exclusive, open, peaceful and uninterrupted occupation, use and possession of the suit property since 1997 when her host, Mama Mburu, relocated to her rural

home in the Rift Valley. She has developed the suit property by constructing a nursery school thereon.

3. On 19/5/2016, the court [*Gitumbi J*] granted the plaintiff leave to serve summons to enter appearance upon the defendant by way of a notice in one of the local daily newspapers. On 28/6/2016, the plaintiff placed a notice in the Standard Newspaper and on 13/1/2017 she filed an affidavit of service sworn by Thomas K'bahati on 31/12/2016 confirming service as ordered by the court. On 10/4/2017, the Deputy Registrar of this court certified this suit for hearing as an undefended cause. It is against this background that an *ex parte* hearing proceeded before me on 18/7/2017. Judgment was reserved for 18/10/2017.

4. Only the plaintiff gave evidence at the hearing. She adopted her affidavit in support of the Originating Summons as part of her sworn evidence. She produced the following documents, among others:

a) *Official search showing that Samuel Gichuhi is the registered proprietor of the suit property;*

b) *Rates receipts; and*

c) *Site map.*

5. The plaintiff's testimony is that the suit property is registered in the name of the 1st defendant. She contends that she has been in open, peaceful, uninterrupted occupation, use and possession of the suit property since 1997. She has constructed and runs a nursery school on the suit property. She now seeks to be declared to have acquired title to the suit property pursuant to the doctrine of adverse possession. The plaintiff's testimony is uncontroverted. Her claim is uncontested.

6. The suit property is registered under the Registered Land Act [*now repealed*]. Until 2012, the substantive law governing the suit property was the Registered Land Act. The suit property is currently governed by the Land Registration Act and the Land Act, both of 2012.

7. The doctrine of adverse possession is contained in **Sections 37 and 38 of the Limitation of Actions Act**. The two sections provide as follows:

“37.This 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.

38. (1)Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

(3) A proprietor of land who has acquired a right to an easement under section 32 of this Act may

apply to the High Court for an order vesting the easement in him, and may register any order so obtained in the register of the land or lease affected by the easement and in the register of the land or lease for whose benefit it has been acquired, and the easement comes into being upon such registration being made, but not before.

(4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.

(5) The Minister for the time being responsible for Land may make rules for facilitating the registration of titles to land or to easements acquired under this Act.”

8. The above legal framework is a pre-2010 law. The Court of Appeal examined the constitutionality of the doctrine of adverse possession in the context of the Constitution of Kenya 2010 in *MTAMA LEWA V KAHINDI NGALA MWAGANDI*, [2015] eKLR. The court found that the doctrine of adverse possession as codified in *Section 38 of the Limitation of Actions Act* is in tandem with the letter and spirit of the Constitution of Kenya, 2010.

9. Consequently, in the absence of any contest from the 1st defendant I am inclined to grant judgment in favour of the plaintiff in terms of the following orders:

a. The plaintiff has become entitled to Land Title Number: Dagoretti/Riruta/S266 pursuant to the doctrine of adverse possession.

b. The 1st defendant shall execute appropriate instruments to vest the land in the name of the plaintiff. In default, the Deputy Registrar of the Environment and Land Court at Nairobi shall execute the instruments.

c. There shall be no order as to costs.

Dated, signed and delivered at Nairobi on this 31st day of October, 2017.

B M EBOSO

JUDGE

In the presence of:

Halima Abdi: Court Assistant