



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MERU

MERU ELC CASE NO 87 OF 2010

IN THE MATTER OF LAND PARCEL NO. NYAKI/THUURA/1295 REGISTERED IN THE NAMES
OF M'TWERANDU IGANDA (DECEASED)

IN THE MATTER OF THE ESTATE OF TWERANDU IGUNDA

BETWEEN

GEOFFREY KAIRITHIAPLAINTIFF

VERSUS

HARRIET KARAMBU M'ITWERANDU.....DEFENDANT

(SUED AS THE ADMINISTRATOR OF THE ESTATE OF TWERANDU IGUNDA)

JUDGMENT

1. This suit was brought to court by way of Originating Summons which states

“ORIGINATING SUMMONS (O.S)

**(UNDER SECTION 38 OF THE LIMITATION OF ACTIONS ACT CAP 22 AND ORDER XXXVI
RULE 3D OF THE CIVIL PROCEDURE RULES, AND SECTION 3 AND 3A OF THE CIVIL
PROCEDURE ACT 21 LAWS OF KENYA AND ALL OTHER ENABLING PROVISIONS OF THE
LAW)**

LET HARRIET KARAMBU M'ITWERANDU of Nyaki location IMENTI NORTH DISTRICT of the Eastern Province, the Defendant herein within (15) days of service of this summons inclusive of the day of such service enter to this summons which is issued on the application of GEOFFREY KAIRITHIA of NYAKI location in IMENTI NORTH DISTRICT who prays the honourable court for the determination of the following questions;

1. Has the plaintiff occupied 2 acres of land parcel No. NYAKI/THUURA/1295 (herein after referred to as his suit land) for more than 12 years.
2. Has the plaintiff (sic) occupation has open, unhindered, notorious, undisturbed and interrupted for more than 12 years?
3. Has the plaintiff been in occupation of the suit land since the year 1963?
4. Has the plaintiff become entitled to the 2 acres of the suit land by way of adverse possession?

5. Has the defendant or the beneficiaries of the estate of TWERANDU IGUNDU ever occupied the two acres the suit land?

AND ISSUANCE OF THE ORDERS THAT:

1. A declaration that GEOFFREY KAIRITHIA the plaintiff herein has become entitled by adverse possession, to 2 acres of that parcel known as LR. NO. NYAKI/THUURA/1295 being part of the estate of TWERANDU IGUNDA.

2. An order that the said plaintiff be registered as sole proprietor of the 2 acres of land to be exercised from land No. NYAKI/THUURA/1295.

3. An order that the defendant herein do execute all the requisite instruments and/or documents to effectuate transfer to the plaintiff of 2 acres from land parcel LR. NO. NYAKI/THUURA/1295 and in default this honourable court do empower its Deputy Registrar to so execute the transfer instruments on her behalf.

4. This honourable court do make further or better orders it might deem fit and expedient to meet the ends of justice.

5. Costs of this suit be borne by the defendant.

WHICH APPLICATION is grounded on the annexed affidavit of GEOFFREY KAIRITHIA the nature of this matter and further grounds *inter-alia*.

1. THAT the plaintiff has been in exclusive, open and uninterrupted occupation of 2 acres of land parcel No. NYAKI/THUURA/1295 since the year 1963.

2. THAT the plaintiff has made substantial developments on the suit land, to wit, built permanent houses, planted trees which are now mature such as gravallia and Meru oak, does subsistence farming since 1963, generally developed the parcel by putting piped water, rearing goats, planted at least 1,000 banana stems, *ejusdem generis*.

3. That the plaintiff lives with his extended family on the suit land for a time running now to over 45 years.

DATED AT MERU THIS 24TH DAY OF JUNE, 2010”

2. The primary issue for determination is if or if not the plaintiff has satisfied all conditions to be declared as entitled to 2 acres to be excised from land parcel No. NYAKI/THUURA/1295 by way of adverse possession.

3. Parties have filed written submissions. I opine that they though written submissions are no doubt useful tools which help the court to arrive at its decisions in any matters before it, the primary determinant that inexorably moves a court of law to make its decisions are facts and evidence adduced by the parties in defended suits.

4. To put matters in perspective, I find it useful to reproduce in full herebelow affidavits filed by the parties in support of and in opposition to this suit.

5. The Originating Summons is supported by the affidavit of the plaintiff/applicant sworn on 24th June, 2010. The affidavit states as follows:

“I, GEOFFREY KAIRITHIA of P. O. Box 1568- MERU do hereby make oath and state as follows:

1. THAT I am the plaintiff herein well versed with the facts of this matter and therefore competent

to make and swear this affidavit.

2. THAT land parcel No. NYAKI/THUURA/1295 belongs to one TWERANDU IGUNDA (deceased) annexed and marked GK 1 is a copy of the green card.

3. THAT I have been in occupation of the aforesaid parcel since 1963.

4. THAT I understand that the defendant herein filed a succession cause No.406 of 2006 and she is in the process of distributing the same (a copy of the certificate of confirmation of grant herein is annexed and marked GK2).

5. THAT I was not informed of the same as I have a vested interest in the estate.

6. THAT I have been in occupation of 2 Acres of the said estate.

7. THAT I have been in open, exclusive and uninterrupted occupation of the said two acres of the land since the year 1963.

8. THAT the defendant has severally visited the parcel of land with surveyors and other people, I believe they are rehearsing to evict me.

9. THAT I have no other land to call home. I will suffer irreparable eviction.

10. THAT I have made substantial developments thereon, to wit, built permanent houses, planted trees, put piped water, planted over 1000 banana stems and generally developed the place I call home.

11. THAT I have buried my deceased parents and my former wife who passed away on the parcel of land.

12. THAT my late father had instituted a suit against the owner of the parcel of land in issue but died before conclusion. I took over the same but the same abated due to the death of the defendant before determination (annexed and marked SK3 is a copy of the plaint in suit NO.HCC 148 of 1994).

13. THAT hence I filed this suit and the application herein.

14. THAT I have remained on the suit land for more than 12 years. I believe am entitled to the same vide the doctrine of adverse possession as advised by my lawyer on record.

15. THAT what is deponed to hereinabove is true to the best of my knowledge, belief and information.

6. The defendant has replied to the plaintiff's affidavit vide an affidavit sworn on 25th August, 2010 which states as follows:

"I, HARRIET KARAMBU M'TWERANDU of P. O. Box 1644 MERU in the Republic of Kenya do hereby make oath and states as follows:

1. THAT I am the Respondent herein well versed with the issues herein hence competent to swear this affidavit.

2. THAT the plaintiff herein has failed to disclose that land parcel No. NYAKI/THUURA/1295 only came into existence in the year 1973 when the same was registered.

3. THAT I am therefore baffled by the assertion that the plaintiff herein has been in occupation of the said and parcel NO. NYAKI/THUURA/1295 since 1963 even before the said parcel existed.
4. THAT I highly doubt that the plaintiff was of majority age in the year 1963 as the court on 15th November, 2000 (Commissioner of Assize G.O. Omwitsa) had observed and recorded in the proceedings in Civil Case No. 148 of 1994 that the plaintiff's father (deceased) one M'Mboroki M'Itiri was about 50 years old meaning his father was born around 1950.
5. THAT I highly doubt that the plaintiff herein had been born in the year 1963 and shall be praying that he discloses his age.
6. THAT the plaintiff has deliberately failed to disclose that his father had even filed Meru HCC No. 122 of 1986 seeking transfer of 2 acres to himself. Annexed hereto marked "HKM I" are copies of the summons and plaint in the said case.
7. THAT after the case was dismissed the plaintiff's father M'Mboroki M'Itiri instituted another suit being HCC NO.148 OF 1994 (O.S) which is annexed to the plaint herein as "SK 3".
8. THAT the truth of the matter is that the plaintiff's father had been given a small portion to cultivate as a licensee in 1980's after he gave a friendly loan of Kshs.900/= to my deceased husband and they had agreed that the said M'Mboroki M'Itiri had agreed to vacate the land on 10th October, 1980.
9. THAT the plaintiff herein came onto the land just before his father died on February, 2001 when the said HCC 148 of 1994 was pending and therefore I verily believe the plaintiff has not become entitled to my land as he has not been in occupation for over 12 years.
10. THAT I am advised by my advocates on record that the period of limitation does not run when a suit is pending in court hence the plaintiff cannot claim title to this land.
11. THAT the plaintiff herein cannot claim that he was unaware of the succession cause NO. 406 of 2006 as he was served on 16th May, 2009 with an application dated 10th September, 2008 for removal of cautions placed on the land by the plaintiff's father.
12. THAT the plaintiff herein has not been in notorious, undisturbed and uninterrupted occupation for more than 12 years and in any case since 1963 as alleged herein.
13. THAT in any case the suit herein is an abuse of the process of the court as HCCC NO. 148 OF 1994 is still alive and the plaintiff was on 6th November, 2001 appointed the Legal Representative of his father for the purposes of that suit as sought by the application dated 3rd September, 2001. (Annexed hereto marked "HKM II" is a copy of the application and proceedings of 6th November, 2001).
14. THAT I pray that this application be dismissed with costs.
15. THAT what is deponed to herein above is true to the best of my knowledge, information and believe.

7. PW1 the plaintiff in his testimony told the Court that he had stayed on the suit land from around 1963 when his family moved into the land after his father bought it. He said that with his parents, his wife and his children, he lived on the suit land. He told the court that he was 4 years old when his family moved into the suit land and that his stay on the land and the stay of his family had been continuous and uninterrupted. He told the court that his mother had died in 1987 and continued to say that she was buried

on the suit land. He went on to testify that he had 4 houses on the suit land and planted coffee trees and other trees on the land. He further said that he grew maize and beans on the suit land.

8. PW1 told the court that he brought this suit to court when the defendant started subdividing land parcel No. NYAKI/THUURA/1295 from which he was claiming a portion measuring 2 acres which he occupies. He was categorical that his father, mother and the entire family did not move into the land with the permission of M'TWERANDU IGUNDA, the defendant's deceased husband. He was insistent that his father had bought the portion of 2 acres his family occupied.

9. In cross examination by the defendant's counsel, PW1 said that his father had died in 2004. He also told the court that M'Twerandu, the defendant's deceased husband and his father had married two separate sisters thus suggesting that the defendant may be his maternal aunt. He was unequivocal that he was not aware that the purchase price his father had paid to the defendant's husband had been refunded.

10. DW1 Salome Kigetu, gave evidence that the suit land was registered in the name of her father TWERANDU IGUNDA and that the father of the plaintiff and her father had several cases in court. She said that Meru HCCC No. 122 of 1986 pitting her and the plaintiff's father was still pending in court. She also told the court that the plaintiff's father had filed another case, being Meru High Court Civil Suit No. 148 of 1994 (O.S) claiming ownership by way of adverse possession. She testified that in this case the plaintiff was substituted in place of his deceased father on 6th November, 2001.

11. DW1 who adopted her witness statement dated 16th February, 2016 as her evidence tells the court that the plaintiff could not have had exclusive open, unhindered, notorious and uninterrupted occupation of 2 acres out of parcel No. Nyaki/Thuura/1295 since 1963 since his father was alleging that he was the one who had exclusive possession until he passed away in February 2001.

12. DW1 produced what she claimed to be evidence that the Kshs.900/= paid to her father had been refunded to the plaintiff's father. The letter was produced as DW1 exhibit No. 3.

13. In cross-examination by the plaintiff's advocate, she told the court that the plaintiff entered the suit land as a child in 1963. She admitted that he lived on the suit land and had houses there. She, however, said that she did not know if or if not the plaintiff cultivated the suit land as she does not live on the suit land.

14. During re-examination DW1 contradicted herself. Whereas she had told the court that Kshs.900/= being the alleged purchase price paid to her father had been refunded to the plaintiff's father, she was categorical that no such money had been paid to her father.

15. DW2, M'Rintari M'Mangichira asked the court to accept the evidence given to the court by the defendant. In cross examination by the defendant's advocate, he told the court that he did not know the period the plaintiff had lived on the land. He contradicted DW1 who had said that PW1 had lived on the suit land and had buried his parents there. He told the court that the plaintiff merely occasionally visited the land.

16. DW2 was a difficult witness. He asked the plaintiff's advocate not to ask him silly questions. At another point he asked the plaintiff's advocate not to treat him "as a fool" He laconically told the plaintiff's advocate that he would not answer his questions. The upshot of his conduct is that he had no useful evidence to give in support of the defendant's case.

17. In his submissions the plaintiff's advocate proffered the following cases to buttress his assertions:

1. Mtana Lewa AND Kahindi Ngala

Mwagandi – Malindi Court of Appeal CA No. 56 of 2014.

2. Grace Kamene M'Berece and Joyce Kigiri and Another

- *Nyeri Civil Appeal No. 73 of 2015*

3. Daniel Ruchine & others versus Swift, Rutherford Co. LTD & Another

- *Nairobi HCCC No. 1401 of 1971.*

18. The defendant's advocate in support of assertions contained in his submissions did not annex any authority but cited the following cases.

1. Grace Mberece versus Joyce Rigiri and another

- *Nyeri Court of Appeal No. 73 of 2015*

2. Mtana Lewa versus Kahindi Ngala Mwangandi [2015] Eklr

19. I have considered the pleadings, the submissions and the authorities cited or annexed by the parties to buttress their diametrically opposed assertions. The authorities cited or proffered are good authorities in their circumstances. However no case is exactly congruent in facts and circumstances to another.

20. As I have already stated, the primary issue that calls for determination by this court is if the plaintiff is entitled to be declared as proprietor of 2 acres to be excised from Land Parcel No. Nyaki/Thura/1295.

21. The plaintiff has given evidence that he has lived on the suit land since 1963. The date his father died is contested. Although the defendant has testified that the defendant's father and the plaintiff's father had been engaged in other suits, one in which the plaintiff was substituted in place of his deceased father, and both of which may be still pending, the defendant has pellucidly stated that the plaintiff has all along lived on the suit land and has buried his parents thereon. As to when time for adverse possession started to run, there is no concurrence by the parties. However, by admission of DW1, the money allegedly paid by the plaintiff's father as purchase price was refunded to him by Twerandu Igunda, the deceased defendant's father around 10th October, 1980 or earlier. From at least that time, time for adverse possession started running, at least, in the case of the plaintiff's father.

22. If as per the evidence of PW1, the plaintiff was born in 1959 and was therefore around 4 years old in 1963, then it is pellucid that in 1980 the plaintiff was around 21 years old. As the refund of the purchase money to the plaintiff's father had the effect that any licence under his father predicated on purchase had been abrogated, then it follows that in his own right as a person with full capacity to sue and to be sued, and not a minor, time for adverse possession could run in favour of the plaintiff.

23. Other cases involving the plaintiff's father and the deceased defendant, notwithstanding, it is clear that the plaintiff has filed this suit in his own name and not on behalf of anyone else including his deceased father.

24. The evidence adduced by DW1 had material contradictions. DW2's evidence was not useful to the defence case. He refused to answer questions meant to test the veracity of his witness statement.

25. I answer the questions framed in the Originating Summons as follows:

1. The plaintiff has occupied 2 acres of land parcel No. NYAKI/THUURA/1295 for a period exceeding 12 years.
2. The plaintiff's occupation of the suit land has been open, unhindered, notorious, undisturbed and uninterrupted for a period exceeding 12 years.
3. I refuse to answer the question whether or not the plaintiff has occupied the suit land for the purpose of a claim for adverse possession since 1963. However, as already stated the plaintiff has occupied the suit land for over 12 years for him to achieve the threshold of being declared

proprietor by way of adverse possession.

4. The plaintiff is entitled by way of adverse possession to be registered owner of 2 acres to be excised from land parcel Number NYAKI/THUURA/1295.

5. By DW1's admission, the defendant or the beneficiaries of the estate of TWERANDU IGANDA have never occupied the 2 acres of the suit land claimed by the plaintiff.

26. It is ordered as follows:

1. The plaintiff having obtained ownership by way of adverse possession of 2 acres to be excised from Land parcel NO. NYAKI/THUURA/1295 be registered as proprietor of 2 acres thereof.

2. The defendant to transfer 2 acres to be excised from parcel NO. NYAKI/THUURA/1295 to the plaintiff and should the defendant refuse or fail to do so, the Deputy Registrar is authorized to sign all documents necessary for the transfer of the apposite land to the plaintiff.

3. As the plaintiff has intimated that he seeks no costs, NO COSTS ARE AWARDED.

Delivered in open court at Chuka this **17th day of October, 2017** in the presence of:

CA: Ndegwa

Mbaabu present for the defendant

Mwanzia absent for plaintiff

P. M. NJOROGE

JUDGE