



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC CASE NO. 211 OF 2013 (O.S)**

**PETER GICHUKI WANJOHI ..... APPLICANT**

**-VERSUS-**

**JULIA MUMBI MUTURI ..... RESPONDENT**

**JUDGMENT**

1. Peter Gichuki Wanjohi (hereinafter referred to as the applicant) took up the summons dated **16th October, 2013** for determination of the following questions:-

**(i) Whether he has become entitled to the parcel of land known as L.R No. Laikipia/Tigithi/Matanya Block 3 (Matanya Centre)/ 126 situated in Laikipia County by adverse possession;**

**(ii) If the answer to (1) above is in the affirmative, whether the Land Register in respect of that parcel of land, should be rectified to reflect him as the proprietor of that parcel of land;**

**(iii) Whether the respondent should be ordered to surrender all documents necessary to effect transfer of the parcel of land herein to him and in default whether the Executive officer of this court should be ordered to execute the necessary transfer documents on behalf of the respondent and**

**(iv) Who should bear the costs of the application.**

2. The application is supported by the affidavit of the applicant where he has, *inter alia*, deposed that he has resided in the suit property since 1973; that in 2008 he was issued with a clearance certificate by Manyata Estates Limited and that Manyata Estates Limited had initially allocated the parcel of land herein to his grandmother (Murugi Gichuki).

3. The applicant contends that his occupation of the suit property has been open, notorious, continuous and adverse to that of the registered proprietors thereof.

4. In reply, the respondent filed the affidavit (replying) she swore on **31st October, 2013** in which she has deposed that the property has never been in the name of the applicant's grandmother (Murugi Gichuki); that the applicant's own documentary evidence (annexture c), shows that the applicant's parcel of land is different from her parcel that is to say Laikipia/Tigithi Matanya/1586.

5. Terming number 126 referred to in the affidavit the applicant swore in support of this suit, a

serialization number as opposed to a land reference number, the respondent contends that neither the applicant nor his grandmother lived in the suit property.

6. The respondent explains that the suit property was originally owned by her husband, Smith Muturi, and is currently occupied by her daughter Beatrice Wanjagi Muturi and herself.

7. Pointing out that she was registered as the proprietor of the suit property in 2005, the respondent contends that even if the applicant has been in possession of the suit property, his possession is not adverse to the title she holds or that held by her husband (Her predecessor in entitlement to the suit property).

8. Terming the applicant's application lacking in merit, the respondent contends that the applicant has never utilised or developed the suit property.

## **EVIDENCE**

### **The applicant's case**

9. When the matter came up for hearing, the applicant (**P.W.1**) informed the court that plot number 1586 was allotted to his grandmother, Murugi Gichuki (deceased) by Matanya Estates Limited. To prove that fact, he produced the receipts issued in favour of his grandmother and the share certificate issued to his grandmother as **Pexbt 1(a) to (f)** and **2** respectively. He reiterated that he has been residing in the suit property since 1973 and he has effected massive developments thereon. He produced photographs as **Pexbt 10(a) to (d)** showing the developments.

10. He explained that following his grandmother's death in 2008, he was issued with a clearance certificate in respect of the suit property by Matanya Estates Limited. To prove those facts he produced a burial permit in respect of his grandmother as **Pexbt-3**.

11. The applicant further informed the court that according to records held at the land's office, the suit property is registered in the name of Julia Mumbi Muturi (the respondent herein) as a trustee of Beatrice Wanjagi Muturi and pointed out that before the suit property was registered in the name of the respondent, it was registered in the name of Smith Muturi.

12. The applicant further pointed out that before the property was registered in Muturi's name, it was registered in favour of the Government of Kenya. To prove those facts, the applicant produced an extract of the green card in respect of the suit property as **Pexbt-6**.

13. According to the applicant, prior to 2013 when the respondent and/or her agents invaded the suit property and destroyed his crops, he had never met the registered proprietors of the suit property.

14. The applicant was charged in a Nanyuki court for forcible detainer. In this regard see the documents produced as **Pexbt-8** and **Pexbt-9(a) to (c)**.

15. The applicant further informed the court that his grandmother and father died while still living in the suit property and are buried thereon.

16. Upon being cross examined by counsel for the respondent, the applicant admitted that he did not purchase any share/plot from Matanya Estates Ltd but maintained that the Land Company merely changed his grandmother's entitlement to him.

17. With regard to the criminal case against him for forcible detainer, he admitted that the case was merely stayed pending the hearing and determination of this suit.

18. **P.W.2, James Gichuki Ngatia**, told the court that the suit property belonged to the applicant's grandmother (Mirugi Gichuki) and that the applicant and his family have lived in the suit property since

1973.

19. P.W.2 confirmed that the applicant had effected the developments in the suit property as per the photographs he (read the applicant) produced.

20. In cross examination, P.W.2 stated that the applicant is not very well known to him.

### **The respondent's case**

21. The respondent, who testified as **D.W.1**, informed the court that her family bought the suit property in 1969 but they did not stay there. Her husband, Smith Muturi, who passed on in 1999, had planted trees and bananas therein.

22. The court heard that the suit property forms part of the estate of the respondent's deceased husband which the respondent administers having being appointed the administrator in 2003. To prove those facts the respondent produced the grant issued to her and letters of confirmation of the grant as **Dexbt 1** and **2** respectively.

23. Explaining that she has given the land to her two daughters, Beatrice Wanyagi and Jackline Njoki, the respondent informed the court that in 2013 she visited the suit property and found some people farming thereon.

24. The persons who were using the land informed her that they had leased it from the applicant.

25. The court heard that the respondent removed the persons who were on the property paving way for her daughters to take possession of the suit property and to plant tomatoes and cabbages thereon.

26. The court heard that the applicant came and destroyed the crops planted by respondent's daughters.

27. The destruction of the crops was reported to the police leading to the arrest and charge of the applicant.

28. According to the respondent, the applicant has never personally used the land but had been leasing it to different people.

29. Concerning the developments in the suit property, the respondent stated that the trees on the suit property were planted by her husband.

### **Submissions**

30. At the close of their respective cases, parties to this suit filed submissions, which I have read and considered.

### **The applicant's submissions**

31. In the submissions filed on behalf of the applicant, a brief overview of the evidence adduced in support of the applicant's case is provided and submitted that the evidence of the applicant was not controverted in any material respect.

32. Based on the decision in the case of **Virginia Wanjiku Mwangi v. David Mwangi Jotham Kamau (2013) eKLR** where **Ombwayo J.**, gave a detailed account of the law on adverse possession, it is submitted that from the evidence adduced in this case, the applicant proved that he has become entitled to the suit property by adverse possession.

### **The respondent's submissions**

33. On behalf of the respondent, it is submitted that title to land can only be extinguished as against a registered owner. In this regard, it is submitted that the aspect of non permissive, hostile or adverse use of the property must be tested against a registered owner who is living and having knowledge of the other person's occupation of his land.

34. According to counsel for the respondent, the 12 year period of limitation cannot be computed against a deceased person.

35. The testimony of the applicant and his witness, P.W.2 is said to be unreliable because the applicant could not explain the circumstances under which the receipts he purported to produce were changed from his grandmother's name to his name. It is pointed out that P.W.2, was unable to identify the plaintiff in court. It is also pointed out that there were contradictions in the evidence of the applicant.

In that regard, it is pointed out that the applicant stated that his clearance certificate was signed by the District officer and not the directors of Matanya Estates Ltd.

36. On whether the respondent has been in possession of the suit property, it is submitted that the respondent's testimony suffices to prove that her family had taken possession of the suit property.

**Analysis and determination:**

37. From the pleadings, the evidence and the submissions in respect thereof, I find the following to be the issues for the court's determination:-

- (a) Whether a claim for adverse possession can be urged against the estate of a deceased person;
- (b) If the answer to (1) above is in the affirmative, whether a claim for adverse possession can be urged against a person not sued as an administrator or trustee of the estate of a deceased person;
- (c) Whether, in the circumstances of this case, the applicant has made up a case for being granted the orders sought and
- (d) What is the order as to costs.

38. On whether a claim for adverse possession can be urged against the estate of a deceased person, I adopt the decision in **Karuntimi Raiji v. M'Makinya M'itunga (2013)eKLR** where the Court of Appeal observed:-

**“...Another issue raised by the appellant is that a claim for adverse possession does not survive a deceased person. Section 30 (f) of the Registered Lands Act and Section 2 of the Law Reform Act provide an answer to the issue. Section 30 provides that:**

***Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same without them being noted on the registers:***

- a. ....;***
- b. ....;***
- c. ....;***
- d. ....;***
- e. ....:***

*f. rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;*

Section 30 (f) preserves rights being acquired by virtue of limitation of actions.....

Section 2 (1 ) of the Law Reform Act stipulates that on the death of any person, all causes of action subsisting against or vested in him shall survive against or as the case may be, for the benefit of, his estate. The proviso to the sub-section indicates the causes of action that do not survive namely defamation or seduction or inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.

**The respondents claim to adverse possession was subsisting at the date of his death and he had filed an Originating Summons before the High Court to prove and establish his claim to adverse possession. Accordingly, the submission by the appellant that a claim in adverse possession does not survive the deceased is not supported by the provisions of Section 2 (1) of the Law Reform Act. This ground of appeal cannot succeed.**” (Emphasis supplied).

39. Also see the case of Titus Kigoro Munyi v. Peter Mburu Kimani (2015)eKLR where it was observed:

**“It must be noted that under Section 7 of the *Limitation of Actions Act*, the law relating to prescription affects not only present holders of the title but their predecessors. (See *Peter Thuo Kairu – v- Kuria Gacheru, (1988) 2 KLR 111*).”**

40. It is clear from the foregoing provisions of the law and case law that a claim for adverse possession can be urged against the estate of a deceased person.

41. On whether a claim for adverse possession can be urged against a person not sued as an administrator or trustee of the estate of a deceased person, I adopt the decision in the case of Titus Kigoro Munyi v. Peter Mburu Kimani (supra) where it was stated:-

**“In the case of *Francis Gitonga Macharia – v- Muiruri Waithaka, - Civil Appeal No. 110 of 1997* this Court stated that the limitation period for purposes of adverse possession only starts running after registration of the land in the name of the respondent. It follows that in the instant case; time for adverse possession could not run against the respondent prior to the year 1978 as he had no proprietary interest in the suit property. Time for adversity cannot run against a person who has no interest in the property....”**

42. On whether the applicant has made up a case for being granted the orders sought, since the applicant’s claim must be gauged against the title held by the current registered proprietors of the suit property and cognisance of the fact that the suit herein was filed merely 8 years after the title held by the respondents was obtained, I find and hold that by the time the current suit was filed, the title held by the respondents had not been extinguished by the applicant’s alleged adverse possession of the suit property.

43. The upshot of the foregoing is that the applicant’s claim is unmaintainable. Consequently, I dismiss it with costs to the respondent.

**Dated, signed and delivered at Nyeri this 16th day of October, 2017**

**L N WAITHAKA**

**JUDGE**

In the presence of:

N/A for the plaintiffs

N/A for the defendants

Court assistant - Esther