



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

E.L.C NO. 70 OF 2017

ESTHER WANJIRU MUTUGU.....PLAINTIFF

VS

MUIRURI GACHANJA.....DEFENDANT

JUDGEMENT

1. On the 8/10/15 Esther Wanjiru Mutugu filed an Originating Summons under order 37 Rule 7 of the Civil Procedure Rules (CPR) and Section 38 of the Limitations of Actions Act, Cap 22 seeking orders of ownership of LR NO LOC 20/KAMBIRWA/1384 by way of adverse possession and that she be registered as such. The grounds of the application are to be enumerated in the Affidavit of the Applicant filed on an even date.

2. The claim is grounded on the following grounds;

That the Applicant is the widow and the administrator of the estate of Francis Mutugi Mwangi. On the 14/4/70 the said Francis Mutugu Mwangi purchased land LR NO LOC 20/KAMBIRWA/1384 from Kanyoro Gachanja (deceased) who took immediate possession and has been cultivating and living thereon since 1970 exclusively and uninterrupted. That it was not until October 1998 that the Applicant realized that the suit property had not been transferred to her late husband by the deceased vendor. It is also then that she discovered that the Defendant had petitioned for letters of administration ostensibly to claim the suit land. That the Defendants right to the parcel of land became extinguished upon expiry of 12 years from 1970.

3. In support of her case she has attached the following documents;

- a. Grant of letters of administration intestate of the estate of Francis Mutugu Matheru Mwangi issued on 2/11/98.
- b. Agreement of sale between her deceased husband and the Kanyoro Gachanja (now deceased) over LR NO LOC 20/KAMBIRWA/1384 dated 14/4/70.
- c. Copy of green card for LR NO LOC 20/KAMBIRWA/1384.

4. By leave of the Court granted on 15/8/16 the Defendant was served by way of substituted services by advertisement in the Daily Nation. A copy of the advert in the Daily Nation of 28/10/16 is attached. See Affidavit of Service filed on 21/2/17. It is on record that the Defendant has not filed any appearance nor defence. Consequently, the Applicant then set down the matter for hearing. The hearing proceeded

exparte and undefended on 13/7/17. I will proceed to determine the suit undefended notwithstanding.

5. In her evidence the Applicant testified that her late husband Francis Mutugu Mwangi entered into an agreement of sale with one Kanyoro Gachanja on 14/4/1970 after which possession was granted to him. It would appear that the transfer was not effected until both parties passed away at different times. That the Defendant was appointed as personal representative and administrator of the estate of Kanyoro Gachanja on 2/2/99. Muturi Gachanja is the brother of the late Kanyoro Gachanja.

6. The learned counsel for the Applicant filed written submissions which I have reviewed. In the submissions, the Applicant urged the Court to grant her prayers. She submitted that the Applicant has proved that she has occupied the land openly and as of right and without interruption for a period of 12 years. She relied on the case of **Susan Wangari Mathenyu & Others VS. James Peter Mathenyu ELC 129 of 2014** which is distinguishable from this case in the sense that the parties in that case were close relatives and the Court held that no adverse possession can be available to a wife and her children over the husband's land. I found the case to be most unrelated. Similarity the case of **Jandu vs. Kirpal 1975 EA 225** which has been cited has not been of much relevance. In further persuasion, a third case was presented to wit **Ruth Kamau vs. Monica Kamau I KAR 427**. I have examined this case which relates to overriding interests in land and would be constrained to apply its dicta on the case at hand because it is distinguishable from the facts herein.

7. The issue before me for determination is whether the Applicant is entitled to the ownership of the suit land LR NO LOC 20/KAMBIRWA/1384 by way of adverse possession.

8. Adverse possession is one of the ways which one may acquire title in Kenya. Section 38 of the Limitation of Actions Act (Cap 22) gives the procedure to be followed. In that section a person claiming to have become entitled by adverse possession to land registered may apply to the High Court (read ELC Court) for an order that he be registered as the proprietor of land in place of the person then registered as the owner. Section 7 of the Limitations of Actions Act states that an action may not be brought by any person to recover land after the end of 12 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.

9. A person who seeks ownership of land under adverse possession must *inter alia* prove the following; That he has been in continuous open and interrupted occupation of the land; that he has acquired the land with clear intention to dispossess the rent owner (*animus possipendi*).

10. Section 3 (3) of the Contract Act 2003 states that an agreement for sale of land should be in writing signed by the parties and witnessed. There is on record an agreement of sale between the husband of the Plaintiff and the Defendants deceased brothers signed on 14/4/70. The land being sold is LR NO LOC 20/KAMBIRWA/1384 measuring 1.9 acres. The consideration was stated at Kshs 1330/= where Kshs. 650/= was paid on 30/7/1970 and the balance was to be paid on completion. It is the evidence of the Plaintiff that her husband took possession of the suit property immediately on paying the full purchase price. The agreement contains a provision that the transaction was subject to the consent of the commissioner of lands and that in the event that the consent is withheld, the agreement would be rendered null and void and the purchase monies would be refunded to the purchaser.

11. As it would happen, the purchaser passed away on 7/4/98 before the suit land was transferred to him. No reason was given for this scenario except that after selling the land to the purchaser, and putting him in possession he relocated to Kirinyaga and nothing was heard about him until October 1998 when the Plaintiff learnt that he had passed away. It is also then that she learnt that the Defendant was in the process of petitioning for letters of grant for the estate of the late Kanyoro Gachanja with the sole intention of succeeding the suit land. The letters were eventually granted on 2/2/92 to the Defendant as the legal representative and administrator of the estate of the late Kanyoro Gachanja. It is on record and in the Plaintiff's evidence that the Defendant has abandoned the Succession Cause and it is not clear whether the grants were confirmed as no evidence was tendered on trial. There is also no evidence that the letters of grant of administration issued to the Defendant on 2/2/92 were revoked.

12. It is on record that the Plaintiffs husband entered into the suit property pursuant to a sale agreement in 1970 in fulfillment of a purchaser's right and was given possession. Adverse possession therefore will be calculated from the time that the full purchase price was paid and purchaser took possession to the span of 12 years. That means time started running from 1970 to 1982 for purposes of adverse possession. A purchaser in possession of land purchased after having paid the purchase price is a person in whose favour the period of limitation could run. By 1998 when the Plaintiff discovered that the land had not been transferred to her late husband, the right of adverse possession had accrued and the title vested in the estate of the purchaser, her late husband in 1982. The vendor and his legal representatives were therefore holding the title in trust for the Plaintiff. By the time the vendor died, whichever time, the suit land was already subject to equitable rights of possession in favour of the Plaintiff. The Defendant therefore is administering the suit land in paper as the rights in the said land have accrued to the Plaintiff. In this case the title of the vendor to the suit land was extinguished in 1982 but was being held in trust by the estate of the purchaser in favour of the purchasers who by virtue of Limitation of actions Act had acquired title against the proprietor. The Plaintiff has been in possession and her occupational and possessory rights are both equitable as well as overriding interests binding on the suit land.

13. Having reviewed the totality of the evidence presented I hold and find that the Plaintiff has proved her case of adverse possession and I make the final orders as follows; -

- a. The Plaintiff be and is hereby declared entitled to the ownership of the LR NO LOC 20/KAMBIRWA/1384 by adverse possession.
- b. That the Plaintiff be registered as proprietor of the LR NO LOC 20/KAMBIRWA/1384.
- c. The Deputy Registrar is directed to sign all the relevant documents to effect the registration.
- d. Each party to meet their own costs.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 5TH DAY OF OCTOBER, 2017.

J.G. KEMEI

JUDGE