



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**  
**AT NYERI**  
**ELC CASE NO. 227 OF 2014 (O.S)**  
**(In the matter of Limitation of Actions Act Cap 22 Laws of**  
**Kenya Order 37 Rule 7 of the Civi Procedure Rules).**

**DOCTOR INGRID WEBER.....PLAINTIFF**

**-VERSUS-**

**SIMON WACHIRA THUMBUI.....DEFENDANT**

**JUDGMENT**

**Introduction**

1. The plaintiff herein, Doctor Ingrid Weber, took up the summons dated **19th November, 2014** for determination of the following questions:-

- 1. Whether he has been in continuous and uninterrupted possession of the parcel of land known as LR No. Naromoru Block 2/Muriri 1153?**
- 2. Whether the defendant's title has been extinguished by her adverse possession thereof?**
- 3. If the answer to question (2) above is in the affirmative, whether she should be registered as the proprietor of the suit property in place of the defendant?**
- 4. Whether she should be granted the costs of the suit?**

2. The originating summons are premised on the grounds that the applicant has been in continuous and uninterrupted occupation of the suit property since 1992; that the plaintiff has buried her deceased husband in the suit property and that the plaintiff has become entitled to be registered as the proprietor of the suit property by adverse possession.

3. Vide the summons herein, the plaintiff prays for orders that the suit property belongs to her and an order directing the deputy registrar of this court to sign transfer forms and all other necessary documents on behalf of the respondents in order to facilitate the registration of the suit property in favour of the plaintiff. The plaintiff urges the court to dispense with the production of the defendant's original title deed in respect of the suit property, the defendant's PIN number, passport sized photographs and a copy of the defendant's identity card during the registration process.

4. The plaintiff also prays for costs of the suit and interest at courts' rates.

5. The originating summons are supported by the affidavit of the plaintiff (applicant) sworn on 20th November, 2014. In that affidavit, the plaintiff has deposed that she purchased the suit property on 27th March, 1992 from the defendant; that upon purchase, she took possession of the suit property and developed it by, *inter alia*, fencing it and burying her husband therein. The plaintiff explains that owing to unavailability of the defendant, she has not been able to have the suit property transferred to her.

6. Explaining that she has been in occupation of the suit property for over 12 years, the plaintiff urges the court to find that she has acquired title to the suit property by adverse possession and grant her the orders sought in order to facilitate registration of the suit property in her favour.

7. On or about 17th June, 2015 the plaintiff applied for and obtained leave to serve the defendant by way of substituted service (by advertising the summons in a newspaper of national circulation).

8. There is evidence that pursuant to the leave granted to the plaintiff to serve the summons by advertisement, the plaintiff did serve the summons as ordered. In this regard see the document annexed to the affidavit of service of Anthony Mwangi Ng'ang'a sworn on 23rd July, 2015, marked **A1**.

9. Despite the defendant having been served with summons to enter appearance in the manner indicated hereinabove, he neither entered appearance in the time indicated in the summons and at all. Consequently, on 4th August, 2015 interlocutory judgment was entered in favour of the plaintiff.

### **Formal proof**

10. When the matter came up for formal proof, the plaintiff reiterated the averments contained in the affidavit she swore in support of the summons herein and produced a copy of the certificate of search she conducted in respect of the suit property and some other documents in support of her claim.

### **Submissions**

11. In the submissions filed on behalf of the plaintiff, reference is made to the sale agreement executed between the plaintiff and the defendant and submitted that being a controlled transaction under **Section 6(1)** of Cap 302 it became null and void following the lapse of the period of six months, within which the parties were obligated to apply for the consent to transfer the land. It is submitted that following the lapse of the six months stipulated in statute for obtaining consent to transfer, the plaintiff's occupation of the suit property became adverse to that of the defendant. In this regard reference is made to the case of **Samuel Miki Waweru vs. Jane Njeri Richu Nairobi Civil Appeal No. 122 of 2001** where the Court of Appeal observed:-

**“...it follows therefore, and Mr. Gitonga concedes, that, the alleged sale or lease became void for all purposes as provided by Section 6(1) of the Land Control Act. thus, the agreement of sale in this case was terminated for all purposes by operation of law and continuation of possession by the respondent thereafter could not be referable to the agreement of sale or the permission of the original owner. It was an independent possession adverse to the title of the original owner...”** (emphasis supplied).

12. Based on the above authority and given the fact that the transaction entered into between the plaintiff and defendant was a controlled dealing under **Section 6(1)** of the Land Control Act, Cap 302 Laws of Kenya, it is submitted that the plaintiff's occupation and possession of the suit property became adverse to that of the defendant as from 24th August, 1991.

13. There being evidence that the plaintiff has been in occupation of the suit property ever since and without interruption of the defendant or any other person, it is submitted that the plaintiff has made up a case for being granted the orders sought.

## **Analysis and determination**

14. From the pleadings filed in this suit, the evidence adduced in support thereof and the submissions by the plaintiff's counsel, the sole issue for determination is whether the plaintiff has made up a case for being granted the orders sought.

15. With regard to this question I have read and considered the uncontroverted evidence of the plaintiff to the effect that she has been in possession and use of the suit property since 1991. Although the entry of the plaintiff in the suit property was initially permissible, on the authority of **Samuel Miki Waweru vs. Jane Njeri Richu** (*supra*) I agree with the submissions by the plaintiff's counsel that since the transaction between the plaintiff and the defendant was a controlled one, it became null and void after the period for obtaining a consent in respect thereof lapsed without the consent having been obtained. The plaintiff's possession and use of the suit property became adverse to the title held by the defendant/respondent thereafter. By dint of the provisions of **Section 38** of the Limitation of Actions Act, Cap 22 Laws of Kenya, the plaintiff was entitled to move to the High Court and claim entitlement to the suit property by adverse possession after the lapse of 12 years.

16. There being no evidence to contravert the testimony of the plaintiff that she has been in possession of the suit property for a period way beyond the 12 years period the law prescribes as the minimum period for one to gain title to land by adverse possession, I find and hold that the plaintiff has made up a case for being granted the orders sought. Consequently, I grant the plaintiff all the prayers sought in the originating summons dated 19th November, 2015 save for prayer (c) as the suit was not defended.

Orders accordingly.

**Dated, signed and delivered at Nyeri this 11th day of July, 2016.**

**L N WAITHAKA**

**JUDGE**

In the presence of:

Mr. Ng'ang'a for the plaintiff

N/A for the defendant

Court assistant - Lydia