



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 37 OF 2013**

**CYRUS MURIITHI MBAU.....PLAINTIFF**

**VERSUS**

**GICHUHI GITHUMBI NYAMU.....DEFENDANT**

**JUDGMENT**

By his Originating Summons filed herein on 1st February 2010, the plaintiff sought the following orders against the defendant:-

- 1. That the plaintiff be declared to have become entitled to a portion approximately 0.21 hectares (50 x100 feet) of all that parcel of land known as L.R No. MWERUA/KAGIO/2636 measuring about 0.83 hectares or thereabout by virtue of adverse possession thereof having been in open exclusive and continuous and/or un-interrupted possession or occupation of the same for a period of over 12 years.***
- 2. That the aforesaid portion of 0.21 hectares now part of L.R No. MWERUA/KAGIO/2636 be excised therefrom and the plaintiff be registered as the proprietor thereof in place and instead of GICHUHI GITHUMBI NYAMU free from all encumbrances.***
- 3. That costs of this summon be borne by the defendant.***

The Originating Summons was supported by the affidavit of the plaintiff **CYRUS MURIITHI MBAU** in which he has deponed, inter, that he has been in open exclusive and/or continuous un-interrupted occupation and possession of approximately 0.21 hectares (50x100 feet) of land being a portion of all that property known as L.R No. MWERUA/KAGIO/2636 (the suit land) for over 12 years which land is registered in the defendant's name. That he had purchased that portion on 27th August 1997 from one **PETER NJIMA KIRORI** who had acquired it from one **J.G. WARUI** who had been allocated the same by the County Council of Kirinyaga. He immediately took possession of the said plot which he developed and has been in occupation hereof having constructed a permanent building where he lives with his family. That the defendant has at all material times been aware of his possession, occupation and development of the said plot and has not challenged that possession or occupation. Annexed to the said Originating Summons is a copy of the title deed in respect to the suit land, a certificate of search, minutes of the Kirinyaga County Council approving the transfer of plot No. 412 from **PETER NJIMA KIRURI** to the plaintiff, beacon certificate and photograph of a house – annexures **CMM1** to **CMM5**.

The Originating Summons is opposed and the defendant filed a replying affidavit in which he deponed, inter alia, that the plaintiff's claim is misplaced since he is in actual occupation of 0.21 hectares of plot No. 412 KAGIO which is not adverse to his title. That the County Council of Kirinyaga had no title to pass to the plaintiff who is a mere trespasser and must therefore pay him mesne profits for the period

starting 27th August 1992 until he vacates from the plot.

In a supplementary affidavit filed on 23rd November 2015, the plaintiff deponed that the suit land arose out of a sub-division of land parcel No. MWERUA/KAGIO/646 giving rise to MWERUA/KAGIO/2636, 2637 and 2638 which are registered in the names of the defendant, one **JACINTA WAIRIMU MUBARI** and **PATRICK CHARAI GICHUHI** respectively. That he took possession of the plot No. 412 KAGIO from its previous owner **PETER NJIMA KIRORI** sometime in August 1997 and immediately started putting up a permanent building where he resides with his family to-date. That the defendant used to frequent the suit plot in 1997 and has been aware about the construction thereon but has made no attempt to reclaim it.

Following the transfer of the case and others from the High Court Embu after the establishment of Environment and Land Court in Kerugoya, it was agreed that this case, **KERUGOYA ELC CASE No. 39 of 2013, 40 of 2013 and 41 of 2013** be consolidated and that this case be the test case. However, upon perusal of the said files, I found it prudent to write separate judgments for each case. It was also agreed that this Court writes a judgment based on the parties' pleadings after counsel file their submissions.

I have therefore considered the parties respective pleadings and annexures thereto, as well as the submissions by counsel.

It is conceded that the defendant is registered proprietor of the suit land of which the plaintiff seeks to have acquired by adverse possession a portion measuring 0.21 hectares or 50x100 feet which he has developed and resides with his family. The defendant by his replying affidavit claims that infact the plaintiff occupies plot No. 412 KAGIO and not a portion of the suit land.

In **KASUVE VS MWAANI INVESTMENTS LTD & 4 OTHERS (2004) 1 K.L.R 184**, the Court of Appeal set out what a person claiming to be entitled to land by adverse possession must prove. It said:-

***“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.***

See also **WANJE VS SAIKWA 1984 K.L.R 284**.

**Section 38 of the Limitation of Actions Act** entitles a person who claims to have become entitled by way of adverse possession to land registered under any of the Acts cited in **Section 37 of the Limitation of Actions Act** or land comprised in a lease to apply to the High Court for an order that he be registered as the proprietor of the land or a lease in place of the person then registered as proprietor of the said land. It is now well settled that the combined effect of the relevant provisions of **Sections 7, 13 and 17 of the Limitation of Actions Act** is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of the adverse possession – **BENJAMIN KAMAU & OTHERS VS GLADYS NJERI C.A CIVIL APPEAL No. 2136 of 1996**.

The new land laws promulgated after the 2010 Constitution also recognize the doctrine of adverse possession. **Section 28 (h) of the Land Registration Act 2012** recognizes some of the overriding interests in land as

***“rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription”***

**Similarly, Section 7 of the Land Act 2012** provides as follows:-

***“Title to land may be acquired through:-***

(a)

(b)

(c)

**(d) Prescription”**

The Supreme Court of India had declared the doctrine of adverse possession to be archaic and recommended to the Government to immediately consider and seriously deliberate either abolition of the law of adverse possession and in the alternative, make suitable amendments in the law on adverse possession – see **STATE OF HARYANA VS MUKESH KUMAR & OTHERS (2012) A.I.R SCH 276**. However, the position in this country with regard to the doctrine of adverse possession is as was held by the Court of Appeal in the case of **MTANA LEWA VS KAHINDI NGALA MWAGANDI C.A CIVIL APPEAL No. 56 of 2014 (MALINDI)** where it was stated that the doctrine of adverse possession is neither arbitrary nor an un-Constitutional limitation of the right of property. That decision is binding on me unless reversed by the Supreme Court of Kenya if at all.

Possession of the land in dispute is a fact to be proved and observed on the land itself – see **MAWEU VS LIU RANCHING & FARMING CO-OPERATIVE SOCIETY LTD 1985 K.L.R 430**. See also **KIM PAVEY & 2 OTHERS VS LOISE WAMBUI NJOROGE & ANOTHER (2011) e K.L.R** where the Court said:-

***“Thus to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also necessary to prove that the possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”***

To develop the land being claimed through adverse possession or a portion thereof, is perhaps the best evidence of possession or occupation. In this case, the plaintiff states that he has been living on a portion of the suit land since 27th August 1997 when he purchased it from one **PETER NJIMA KIRORI** when it was designated as plot No. 412 KAGIO. The issue to be determined by the Court is whether the plaintiff occupies plot No. 412 KAGIO which does not form part of the defendant’s suit land (as the defendant alleges) or whether the portion of land occupied by the plaintiff is in fact part of the defendant’s suit land designated as MWERUA/KAGIO/2636 (as alleged by the plaintiff). The answer to that question is found in paragraph five (5) of the defendant’s own replying affidavit in which he has deponed as follows:-

***“That I am advised by my advocate on record which advise I verily belief (sic) to be true that the plaintiff must pay me mesne profit for the period starting 27th August 1992 till he vacates and removes all his belongings from the plot”***

Since the defendant is the registered proprietor of the suit land, he can only claim mesne profits from one who is illegally occupying that land and no other land. Indeed in his replying affidavit, he refers to what the plaintiff is occupying as **“the plot”**. The only conclusion that this Court can arrive at on that evidence is that the plot No. 412 KAGIO which the plaintiff purchased and occupies since 1997 must be part of the suit land registered in the defendant’s names since 1998 as per the title deed annexed to the plaintiff’s Originating Summons. It is therefore not correct, as suggested by the defendant in paragraph two (2) of his replying affidavit, that what the plaintiff occupies and the suit land are different. This suit was filed on 10th February 2010 which means that the plaintiff has been in occupation of a portion of the suit land for 13 years which meets the statutory period for which such a claim for adverse possession can be made. There is nothing to suggest that the defendant has made any attempt to evict the plaintiff from the portion that he has occupied during all that period. The defendant is content to describe the plaintiff as a trespasser who must pay him mesne profits. I can see that part of the documents annexed to the plaintiff’s previous Chamber Summons dated 29th January 2010 are a judgment in **EMBU HIGH COURT CIVIL CASE No. 42’A’ of 1999** in which the defendant had filed a suit against one **JOHN CERERE MWANGI** seeking his eviction from the suit land. As that suit did not involve the plaintiff herein, it cannot be said to have interrupted the plaintiff’s occupation of a portion of the suit land. The

only way the defendant could have asserted his right to the suit land would have been by taking legal action against the plaintiff or making an effective entry. It is also now established that an adverse possessor can lay a claim to a portion of the suit land so long as the same is well identified – **GITHU VS NDEETE 1984 K.L.R 776.**

From the evidence above, it is my finding that the plaintiff has proved his case that he is entitled to the orders sought in his Originating Summons filed on 1st February 2010.

The up-shot of the above is that there shall be judgment for the plaintiff against the defendant in the following terms:-

***1. The plaintiff is declared to have become entitled to a portion approximately 0.21 hectares (50x100 feet) of the parcel of land known as L.R No. MWERUA/KAGIO/2636 by virtue of adverse possession thereof having been in open, exclusive, un-interrupted and continuous occupation of the same for a period of over 12 years.***

***2. The aforesaid portion of 0.21 hectares now part of L.R No. MWERUA/KAGIO/2636 be excised therefrom and the plaintiff be registered as the proprietor thereof in place of Gichuhi Githumbi Nyamu free from all encumbrances.***

***3. Each party to meet their own costs.***

**B.N. OLAO**

**JUDGE**

**30<sup>TH</sup> SEPTEMBER, 2016**

Judgment dated, delivered and signed in open Court this 30<sup>th</sup> day of September 2016.

Plaintiff present in person

Mr. Mwangi for Mr. Munene for the Defendant present

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**30<sup>TH</sup> SEPTEMBER, 2016**