



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT AND LAND COURT
CIVIL CASE NO.39 OF 2010

GLADYS NYAMBURA GATERE.....PLAINTIFF

VERSUS

MARGARET WAMBUI MUGO.....DEFENDANT

J U D G M E N T

The plaintiff has come to court by way of Originating Summons dated at Nyeri on the 26/3/2010 seeking for orders that it be declared that the plaintiff Gladys Nyambura Gaterere for herself and on behalf of the estate of Gaterere Kinyua has acquired by adverse possession the portion of land out of L.R NO CHINGA/KAGONGO/258 measuring approximately 0.9 acres adjacent to the deceased parcel of land L.R NO CHINGA/KAGONGO/256 and registration of the said portion in the deceased's name or the plaintiffs name. The Originating Summons is supported by the affidavit of Gladys Nyambura Gaterere on grounds that the plaintiff and her deceased husband have been in uninterrupted occupation of the subject portion since 1958 where they have planted trees.

In the supporting affidavit, she deposes that the parcel of land L.R. *No.chinga/Kagongo/256* is registered in the name of Gaterere Kinyua (deceased), who was her husband whilst L.R. *No.Chinga/Kagongo/258* is registered in the name of the defendant herein. The above registrations were effected consequent to rectification of the respective registers however, on the ground, a portion of land measuring approximately 0.9 acres comprised in the defendant's title, but formerly comprised in the deceased's title, was incorporated in the defendant's title and that the said portion of 0.9 acres is under coffee trees which the deceased and herself planted upon their taking exclusive occupation thereof in 1958. Which portion they have never relinquished occupation and use of the said portion to date and the defendant has never occupied or used the same. It is now over 50 years of continuous and uninterrupted occupation of the said portion.

In her replying affidavit filed on 16/4/12 the defendant states that the applicant Gladys Nyambura Gaterere is known to her but better still her late husband Gaterere Kinyua. She put the dispute herein into perspective to enable the court to appreciate the issues arising therein. She deposes that at the time of consolidation and registration on 17.2.1958, Gaterere Kinyua (deceased) and herself and Waruhiu Muhuu (deceased) became registered as proprietors of – Chinga/Kagongo/254(sic) and Chinga/Kagongo/258 respectively and were given their *respective titles*. However, on the ground they occupied different parcels of land as against the held titles. The first error was realized after the demise of Waruhiu Muhuu when in 1978 they realized the mistake on the ground but they mutually agreed to rectify the same by changing the respective titles to accord to where each was specifically living. In the year 1997, they agreed to rectify and reflect the position on the ground whereupon they proceeded and rectified so that the defendant became entitled to Chinga/Kagongo/258 and the plaintiff's husband became entitled to

Chinga/Kagongo/256. In the year 2000, she realized that the deceased was farming on about ¼ of land belonging to her late husband. He refused to vacate in spite of the fact being pointed to him claiming that this was still part of his land. They litigated before the Chief and later took the process through the Land Disputes Tribunal at Othaya and the Central Province Appeals Committee and even the High Court of Kenya at Nyeri in High Court Civil Appeal No.68/2007. In the circumstances of this case there was no time that the applicant ever possessed her land adversely. She is ready to have the titles rectified and reposses the portion that was rightfully hers.

In the written submissions, the plaintiff has summarized the facts or the history of the land as from the 17th February 1958 to 21st January 1997. The *gravamen* of the plaintiff's submission is that the disputed portion has always been in the plaintiff's possession since 1958 to 21st January 1997 to the year 2000 and to date the aggregate of which constitute a period of more than 12 years.

It is an undisputed fact that L.R. No.CHINGA/KAGONGO/258 measuring approximately 4.4 acres is registered in the name of the defendant. The register was rectified on the 8th of January 1997 and title issued in the name of the defendant. This court finds that the time began running on the rectification of the register and issuance of title on the 21/1/1997. Though the land is registered in the defendant's name to date, 0.9 acres of the said land has been occupied by the plaintiff since the year 1958.

In the year 2000, approximately three years after being registered as proprietor of the land and after rectification of the register the defendant commenced proceedings to claim the subject portion of the suit land from the plaintiff being a claim filed in the Othaya Land disputes Tribunal that was processed all the way through the Central Province Appeals Committee and ended up as an appeal in the High Court of Kenya at Nyeri. The decision of the High Court was delivered on the 29th day of October 2009 by Hon. Justice Makhandia.

Section 7 of the Limitation of Action Act Cap 22 Laws of Kenya forbids an action to recover land after the end of 12 years from the date on which the right of action accrued. The court finds that the right to this land accrued to the defendant when the registrar of lands rectified the register thus on the 21/1/1997 and therefore time began running on this date.

The defendant has also filed written submissions which in summary is that in the year 2003 the plaintiff discovered that she was occupying part of the defendants parcel of land and that the parties have been before various jurisdiction to establish their respective rights as documents herein have shown. The defendant contends that the plaintiff ought to have vacated and yielded possession in order to prolong peaceable occupation as their initial intention during rectification.

The parties herein chose to proceed by way of case stated and agreed that the common undisputed facts in this matter are that during land demarcation the plaintiff's husband was registered proprietor of **Chinga/Kagongo/258** while the defendant was registered proprietor of **Chinga/Kagongo/256**. The plaintiff is occupying **Chinga/Kagongo/256** while the defendant is occupying **Chinga/Kagongo 258**. They had agreed to exchange and rectify their titles so that the plaintiff's husband was registered as owner of Chinga/Kagongo/256 and the defendant was registered as owner of Chinga/Kagongo/258.The two parcels had different acreage and the defendant sought to ascertain boundaries of the rectified parcels and learnt that part of her land was occupied by the plaintiff's husband.

The issue for determination by this court is whether the plaintiff can claim by adverse possession the 0.9 acres of parcel No.**Chinga/Kagongo/258** that she currently occupies though being registered in the name of the defendant.

The legal position on this matter is that any person who claims to be entitled to land by adverse possession has the right to apply to the High Court for an order that he be registered as the proprietor of the land. The person must prove that he has been in occupation and possession of the land exclusively and openly and as of right and without interruption for a period of 12 years.

This court finds that the plaintiff has been in occupation and possession of the disputed portion of

land against the defendant's title since the year 1997 when the register was rectified to date. Moreover, the court observes that this occupation has never been without dispute as the defendant has been litigating in the Land Disputes Tribunals under the provision of Land Disputes Tribunals act No.18 of 1990 (repealed) and has litigated under the said law up to the High Court on appeal when Justice Makhandia dismissed his appeal on the basis that the same was time barred and therefore the Land Disputes Tribunal lacked jurisdiction.

I have read the Originating Summons filed by the plaintiff in this case and the supporting affidavit. Equally I have read the replying affidavit. I have considered the case stated by the parties and do find that though the plaintiff's possession of the part of the land has been continuous as from the 21/1/1997, there have been concerted efforts by the defendants to interrupt the possession by litigating until the 29th day of October 2009. The court further observes that from the 21/1/1997, time should have stopped running on the 20/1/2009 however, the period when a dispute was filed at the Othaya Land Disputes Tribunal until the decision of Justice Makhandia on the 29/10/2009 cannot be computed within the 12 years.

The upshot of the above is that the Originating Summons is not sustainable in view of the fact that the requisite period of adverse possession of twelve years was interrupted by the aforesaid suits. The originating summons is dismissed with costs to the defendant.

Dated, signed and delivered on 14th day of March 2014.

A. OMBWAYO

JUDGE