



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**ENVIRONMENT AND LAND DIVISION**

**ELC. CASE NO. 1270 OF 2002**

**ANN WANJIRU MUOHO.....1<sup>ST</sup> PLAINTIFF**

**MARTIN KINYANJUI MUOHO.....2<sup>ND</sup> PLAINTIFF**

**PETER GATURA MUOHO.....3<sup>RD</sup> PLAINTIFF**

**(AS ADMINISTRATORS OF THE ESTATE OF THE LATE**

**MUOHO KINYANJUI MUOHO (DECEASED**

**VERSUS**

**FRANCIS NDUMBI GATURA..... DEFENDANT**

**JUDGMENT**

This suit was filed by way of an Originating Summons dated 23<sup>rd</sup> July 2002 and filed on 29<sup>th</sup> July 2002 in which the Plaintiff sought for the determination of the following questions:

- a. Whether the estate of the late Muoho Kinyanjui Muoho (hereinafter referred to as the “Deceased”) is entitled to Land Reference Number Chania/Mataara/1584 (hereinafter referred to as the “suit property”) on the ground that the Deceased had openly and peacefully and without any interruption used the suit property which is a sub-division of parcel number Chania/Mataara/336 since the year 1972;
- b. Whether the title of the Defendant in respect of the suit property is extinguished under section 17 of the Limitation of Actions Act Cap 22;
- c. Whether the Plaintiffs as the administrators of the estate of the Deceased are under section 38 of the Limitation of Actions Act entitled to be registered as the owners of the suit property; and,
- d. Whether the costs of this suit should be awarded to the Plaintiffs.

The said Originating Summons was supported by the Affidavit of the Plaintiffs wherein they stated that they are the administrators of the estate of the Deceased who died on 3<sup>rd</sup> November 2011. They produced a copy of their Grant of Letters of Administration.

**The Plaintiffs’ Case**

In the Affidavit supporting the Originating Summons, the Plaintiffs averred that the Deceased and the Defendant were sons of the late Gatura Kinyanjui who purchased the larger parcel of land known as Chania/Mataara/336 which he caused to be registered in the name of the Defendant to hold a half portion for himself and the other half portion in trust for the Deceased. They further averred that in the year 1992, the Deceased and the Defendant agreed to bring the trust to an end and the larger parcel of land was subdivided into two portions namely the suit property which was allocated to the Deceased and parcel number Chania/Mataara/1585 which remained in the occupation of the Defendant. They further contended that the Deceased continued occupying the suit property with his family peacefully, openly and as of right up to the date of his death on 3<sup>rd</sup> November 2000. The Plaintiffs further averred that after the death of the Deceased, they continued to occupy the suit property. They also contend that as the administrators of the estate of the Deceased, they are entitled to be registered as the proprietors of the suit property in place of the Defendant.

In her testimony, the 1<sup>st</sup> Plaintiff who was PW1 stated that the Defendant was registered as the proprietor of the larger parcel of land because he was the eldest son in the family under Kikuyu customary law when the land was being adjudicated. She further stated that in recognition of her husband's right to the portion he was occupying, the larger parcel of land was subdivided into two portions by means of planting the traditional plant called Mukungugu between the suit property and the other portion. She further testified that the two portions were registered in favour of the Defendant and that the Deceased passed on before the transfer of the suit property into his name.

PW2 was Joseph Gatwa Njuguna who stated that he was a neighbor of the Plaintiffs and that he was there when the Mukungugu tree was planted after the subdivision of the larger parcel into the suit property and the other portion occupied by the Defendant. He testified to the subdivision being done in 1992.

### **The Defence Case**

The Defendant filed a Replying Affidavit filed on 18<sup>th</sup> November 2009 in response to the Originating Summons. In his testimony as well as in his Replying Affidavit, the Defendant stated that he is the registered proprietor of the suit property which was part of a larger parcel of land known as Chania/Mataara/336. He stated that he was given that larger parcel of land way back in 1952 by his maternal grandfather after whom he is named. He stated that at that time, demarcation had not been done but that demarcation was completed in 1958 when that larger parcel of land was registered in his name. He further stated that in 1964, his mother went to Nakuru with the Deceased but that the Deceased later returned to Mataara. He further stated that he is the one who subdivided the larger parcel of land into two pieces so that he could get a loan from the Agricultural Finance Corporation. He confirmed that he was issued with title documents in respect of both parcels of land in his name and that in 1977, he borrowed a loan with the title to the suit property. He further disclosed that he is the one who allowed the Deceased to enter and reside on the suit property in 1980 as he did not have any land to reside on. He further confirmed that at no time during his lifetime did the Deceased lay any claim of ownership over the suit property. He further confirmed that he rented out the tea bushes on the suit property to another man without any objections from the Deceased. He further confirmed that the Deceased married, got children and brought them up on the suit property, all with his consent. He further stated that at no time did he transfer the suit property to the Deceased.

DW2 was Mathew Ndungu Chege who testified that it was indeed true that he leased the tea on the suit property from the Defendant for 10 years from 1990 to the year 2000 and that during that period of time, the Deceased used to reside in the suit property and was unwell. He confirmed that there were Mukungugu trees planted demarcating the two subdivisions.

DW3 known as Samson Kimani Kinyanjui was a brother to the Defendant and he testified that the owner of the suit property was the Defendant. He confirmed that this land was part of the larger parcel which was given to the Defendant by their maternal grandfather. He further testified that the Defendant was not a biological son of their father, but that his mother came with him into the marriage meaning that he could not inherit any land in Njoro. He further testified that the Deceased could not inherit the suit property and that if he needed land, he should have gone to Njoro where he inherited land from their father. DW2

further confirmed that the Deceased was given a portion of land in Njoro.

DW4 was David Ngesha Kinyanjui who confirmed that he and DW3 are twins. He confirmed that they were born in Njoro and that their father had land in Njoro where they reside. He confirmed that the land in Njoro is their joint names and that they inherited it from their father who is deceased. He clarified that the land in Njoro was registered in their joint names because at that time the Deceased was no longer with them. He testified that the suit property belongs to the Defendant.

### **Issues for Determination and Analysis**

The Plaintiffs' claim that they are entitled to the suit property on the basis of a customary trust under Kikuyu customary law cannot be a matter for adjudication in this Originating Summons as the only relief sought and indeed the only relief which should be sought in an Originating Summons of this nature is the registration of the Plaintiffs as proprietor of the suit property by virtue of adverse possession. I will therefore express no opinion on the merits or otherwise of that claim.

The Plaintiffs have brought their claim for adverse possession of the suit property under **Section 38** of the **Limitation of Actions Act** which provides as follows:

**“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 ... he may apply to the High Court for an order that he be registered as the proprietor of the land.”**

The Plaintiffs have also based their claim on the provisions of **Section 7** of the same statute which provides as follows:

**“An action may not be brought by any person to recover land after the end of twelve years from the date which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”**

I wish to point out at this juncture that while the Plaintiffs have gone to great length to demonstrate how the Defendant came to be registered as the proprietor of the suit property, their claim is based on adverse possession and therefore this is not an issue here. The court will therefore not consider how the Defendant came to be the registered proprietor of the suit property.

To prove a claim under adverse possession, all that the Plaintiffs have to do is to establish that the Deceased came into occupation and took possession exclusively and lived on the suit property continuously without interruption for a period of over 12 years.

Both sides of this dispute have filed their written submissions. The issues that arise for my determination are as follows:

1. Whether the Deceased was in occupation of the suit property for over 12 years considering that the Defendant obtained a title deed on 15<sup>th</sup> September 1992;
2. Whether the subdivision conducted in 1992 affected the running of time in favour of the Deceased;
3. Whether the occupation of the suit property by the Deceased was adverse to the rights of the Defendant.

On the first issue enumerated above, it would appear that if the running of time was to be calculated from the date of issuance of the title deed in respect of the suit property which was on 15<sup>th</sup> September 1992 to the date of filing of this suit which was 29<sup>th</sup> July 2002, then 12 years would not have lapsed. However, the converse would be true if time starting running in 1980 when the Defendant admitted that the Deceased entered into the suit property. This issue finds a conclusive answer in the case of **Wasui versus Musumba (2002) 1 KLR** where Ringera, J. stated as follows:

**“On the impact of prescriptive rights in respect of one title on subsequent titles to the same land, I agree with the submission of counsel for the applicant that if the applicant had been in adverse possession of the land of Wilson Odari for 12 years prior to 1993 when it was subdivided and other titles registered, the proprietors of the new titles would not have been able to shake off his rights. As I understand the law, prescriptive rights are in the nature of overriding interests and they run with the land irrespective of changes in proprietorship thereof.”**

From the foregoing, I conclude that in this case, time started running in 1980 and not in 1992. That answers both the first and second issue.

The third issue is the make or break issue in this suit and it raises the question whether the occupation of the suit property by the Deceased was adverse to the Defendant’s interests. This issue was addressed in the case of **Wanje versus Saikwa (No. 2) Civil Appeal No. 72 of 1982** where the Court of Appeal held as follows:

**“A person who occupies another person’s land with that person’s consent cannot be said to be in adverse possession as in reality he has not dispossessed the owner of the land and the possession is not illegal.”**

From the evidence adduced in this suit, I find that indeed, the Deceased entered into the suit property and remained thereon over all those years with the consent and blessings of the Defendant. Accordingly, his occupation thereof cannot be said to have been adverse to the Defendant’s interests therein. To that extent therefore, the Plaintiffs have failed to prove to this court that they are entitled to the suit property by virtue of adverse possession. The upshot of this is that this suit is hereby dismissed with costs to the Defendant.

**DELIVERED AND SIGNED AT NAIROBI THIS 26<sup>TH</sup>**

**DAY OF SEPTEMBER 2014.**

**MARY M. GITUMBI**

**JUDGE**