



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

**ENVIRONMENT AND LAND COURT**

**CIVIL CASE NO. 148 OF 2012 (O.S)**

KIMARO MACHARIA .....1<sup>ST</sup> PLAINTIFF

CHARLES GITHENYA MACHARIA.....2<sup>ND</sup> PLAINTIFF

VERSUS

DANIEL KANYANGO KAREGWA.....1<sup>ST</sup> DEFENDANT

SAMUEL KARIUKI KAREGWA.....2<sup>ND</sup> DEFENDANT

MARY WANJIRU NJANGE.....3<sup>RD</sup> DEFENDANT

**J U D G M E N T**

The plaintiffs filed the Originating Summons herein on the 4<sup>th</sup> July 2012 seeking orders of adverse possession in Land Registration No. **Loc.14/ Kairo/189 measuring approximately 4.1 acres** in size. They seek to be registered as the proprietors of the said land having been in open and continuous possession of the land since demarcation in the area in 1961 and 1962 which is beyond the required period of 12 years in possession . In alternative they seek to be paid by the defendants the market value of the developments currently in the suit property as well as the current value of the soil there in. They argue that the defendants' rights over the land have been extinguished by their continuous undisturbed possession as per section 17 of the Limitation of Actions Act.

In the supporting affidavit of the 1<sup>st</sup> plaintiff sworn 3rd July 2012, he states that his late brother Mbogo Macharia entered into a sale agreement on 26/6/1962 with Karegwe Kamau for the sale of the said land at Kshs 2,370 which was totally paid to the seller and came into possession of the land in the same year, inviting the plaintiffs as his brothers to stay together there but transfer was not done during the lifetime of the parties. A copy of the sale agreement dated 10/11/1965 translated from kikuyu language by the advocate of the plaintiffs is attached, although it doesn't identify the property under sale.

The plaintiffs state that they have since then planted tea bushes, and developed the land. They have attached licenses from KTDA recognizing them as tea growers in the suit land. They lament the defendants have been registered as the proprietors of the land in a succession cause which registration the plaintiff term as illegal. They seek cancellation of the registration effected in favour of the defendants pursuant to the succession cause and the court to recognize their entitlement through adverse possession.

The plaintiffs state that Mbogo had earlier filed similar suit in this court being H.C.C No. 334 of 1982 against Wambui Karegwe, the wife Karegwe Kamau who was the registered proprietor, but that suit was subsequently dismissed for want of prosecution, and that the plaintiffs have been unable to trace the court file. The plaintiffs have attached a valuation report for all that is in the suit land including the valued of the land itself totaling to kshs 5,642,000/= and have attached photos of the buildings there in, the tea-bushes, bananas, and other trees.

The plaintiffs filed an application under certificate of urgency on 5<sup>th</sup> October 2012 seeking prohibitory orders against the defendants who he stated wanted to dispose off the suit property secretly instead of defending the suit for possession filed by the plaintiffs. The court granted the orders pending hearing and determination of the proceedings herein. The plaintiffs appeared in court on the 5/6/2013 through their counsel Mr. Kinoti and prayed the suit be disposed of by way of affidavits and the filed written submissions. The suit is undefended and on the hearing the defendants did not show up despite having been served.

The plaintiffs in their written submissions argue that the right of the defendant to acquire right over the suit land stopped running in 1974 when he failed to exercise his right under sec 7 of the Limitation of Actions Act to recover the land from them before expiry of 12 years, but which section was repealed by the Land Act No 6 of 2012. They state that mere change of ownership of the land that is occupied by adverse possession does not interrupt such possession. They argue that they have overriding interest in the land under Sec 30 of the Land Act.

The issues for determination are

- a. **Whether the plaintiffs have proved a case for adverse possession over the suit property.**
- b. **Whether the grant of letters of administration to the defendants before filing of this case affected the plaintiffs claim for adverse possession.**

The plaintiffs have relied on the decided case below which I proceed to analyse seeking to answer the questions in the issues for determination, *Kipketer Togom Vs Isaac Cipriani Shingore (2012) eKLR* where the court held that filing of an application for grant of letters of administration did not amount to interruption of possession as the trespasser ought to be physically put out of the suit property, not by filing suits or writing of letters except filing suits for the eviction of the trespasser.

This position was also adopted in undefended case of *Elijah Ikoha V Joseph Ngaira Asutsa (2006) eKLR*, where the court held that the registered administrator of the estate of the deceased was holding the property as a trustee of the applicant, his title to the suit land having been extinguished by virtues of adverse possession of the applicant. This position was also upheld in the case of *Miriam Wangari Munyiri Vs Bernard Mugambi Gituru & Another (2006) eKLR* where the court found the plaintiff having been in possession of the suit property for many years she had acquired title to it by adverse possession and that there was no title to be passed to the defendants via allotment title they held.

Also the case of *Samuel Miki Waweru Vs Jane Njeri Richu Civil Appeal 122 of 2001*, where the court found that adverse possession does not lie in cases where a party is relying on possession of land based on contract of sale or lease, or if a party is in occupation with the consent of the owner. However if a sale becomes void by virtue of operation of law like lack of Land Control Board Consent to effect transfer, the time period for adverse possession claim starts to run from the date when time limitation for application of the consent runs out and becomes void, unless the occupation is illegal. In this case adverse possession was found and orders granted, despite the suit having been filed after registered owner of the suit land had been changed to that of his estate administrator.

I have considered the evidence on record and the submission by the plaintiff and do find that the plaintiffs claim for the adverse possession is based on continuous occupation of the suit property since the year 1962 when their brother bought the suit land from the defendant's father which sale was nullified by operation of law for lack of the consent of the land control board and transfer in time. They have said they

were never evicted from the suit property from the time they gained entry in 1962.

They did not enter by consent of the defendant's father but by virtue of that sale agreement that consequently became void. I have discerned in the authorities above mentioned, and do agree, that the change of registered owner of suit property does not affect the right of the plaintiff unless they were evicted forcefully before lapse of 12 years after lapse of which they gain right in adverse possession. I find that the orders sought and the evidence tendered satisfy the conditions for grant of the orders sought, the right of the defendants having been extinguished after the lapse of 12 years of uninterrupted possession by the plaintiff, and title vested to the plaintiffs.

I allow the suit in the following orders;

- a. *The plaintiffs have acquired to L.R No. Loc.14/ Kairo/189 by way of adverse possession.*
- b. *The plaintiffs are entitled under sec 38 of the limitation of actions act to be registered as proprietors of L.R No. Loc.14/ Kairo/189.*
- c. *The defendants title to L.R No. Loc.14/ Kairo/189 is hereby extinguished.*
- d. *Defendants names be deleted from the land register and the plaintiffs names be entered in the land register.*
- e. *Cost of the suit to be borne by the defendants*

*Dated, signed and delivered at Nyeri this 10th day of October 2014.*

**A. OMBWAYO**

**JUDGE**