



**Mwihike Farmers Company Limited v Karitu & another; Omega Commercial Services Ltd & 3 others (Interested Parties) (Suing as the Officials of Springfield (148) Residents Welfare Association) (Environmental and Land Originating Summons 1172 of 2016) [2024] KEELC 1786 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1786 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 1172 OF 2016**

**EK WABWOTO, J**

**MARCH 20, 2024**

**IN THE MATTER OF CLAIM FOR TITLE TO LAND BY ADVERSE POSSESSION OVER A PORTION OF LAND MEASURING 4 ACRES KNOWN AS L.R. NO. 6845/148 EMBAKASI, NAIROBI**

**BETWEEN**

**MWIIHIKE FARMERS COMPANY LIMITED ..... PLAINTIFF**

**AND**

**FRANCIS KAIGUA KARITU ..... 1<sup>ST</sup> DEFENDANT**

**GITHUNGURI NJIRU FARM (1966) LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**OMEGA COMMERCIAL SERVICES LTD ..... INTERESTED PARTY**

**JOEL N. ONCHWATI ..... INTERESTED PARTY**

**CONSOLATA W. MUREITHI ..... INTERESTED PARTY**

**JEREMIAH G WAMBUGU ..... INTERESTED PARTY**

**SUING AS THE OFFICIALS OF SPRINGFIELD (148) RESIDENTS WELFARE ASSOCIATION**

**JUDGMENT**

1. The Plaintiff sought the following reliefs vide its Re-Amended Originating Summons dated 21<sup>st</sup> October, 2021.



1. That Mwihiike Farmers Company Limited be declared to have acquired title by adverse possession to the suit premises being a portion measuring four (4) acres out of LR. No. 6845/148 and a permanent injunction restraining the Defendant from interfering with the Plaintiff or its members possession and title to the suit property do issue.
  2. That the registration of Francis Kaigua Karitu as proprietor of a portion measuring four (4) acres out of LR.. No. 6845/148 and or any other persons deriving title from Peter Karitu Kaigua and the defendant out of the suit property known as LR. No. 6845/148 be cancelled forthwith and the Register of Titles do rectify the register to enter and issue title in the name of the Plaintiff as the registered proprietors of a portion measuring 4 acres out of LR.. No. 6458/148 in place of the Defendant or anyone deriving title from the Defendant.
  3. The costs of these proceedings be borne by the Defendant.
2. The Summons was supported by the Affidavits sworn by Kibanyu Kimani on 26<sup>th</sup> September, 2016 and 29<sup>th</sup> March, 2022.
  3. The 2<sup>nd</sup> Interested Party filed a Replying Affidavit sworn by Consolota W. Mureithi on 2<sup>nd</sup> April, 2019 in support of the suit.
  4. The same was contested by the 1<sup>st</sup> Defendant who filed a Replying Affidavit sworn on 16<sup>th</sup> November, 2018 by Francis Kaigua Karitu. The 2<sup>nd</sup> Defendant filed a Replying Affidavit sworn on 19<sup>th</sup> November, 2021 by Peter Boro Gachau in response. The 1<sup>st</sup> Interested Party filed a Replying Affidavit sworn on 21<sup>st</sup> September, 2020 by Joseph Karanja Wamugi.

### **The Plaintiff's Case**

5. It was the Plaintiff's Case that since 1998 directly and through its members it has been in actual, open, physical and uninterrupted possession of the suit premises for a period in excess of 18 years immediately preceding the commencement of these proceedings and thereby acquiring title by adverse possession and any claims to title by the Defendant or anyone else claiming title under the Defendants of the said four (4) acres of land being a portion of LR.. No. 6458/148 Embakasi, Nairobi has been extinguished by adverse possession of the suit premises by the Plaintiff and its members who are entitled to become registered as the properties of the said 4 acres of land being the suit premises.
6. It was averred that at the time of acquisition of the property in 1998, the title to the property was still under process from Githunguri-Njiru Farmers Limited to the vendor who was the father of the Defendant.

The title for the whole land from where the 4 acres were derived was issued on 14<sup>th</sup> February, 2014. It was stated that from the extract of the title it turned out that the 1<sup>st</sup> Defendant's father Peter Karitu Kaigua had transferred his half undivided share to the defendant on 21<sup>st</sup> July, 2015. It was also averred that through allocation to its members the same was sub divided and its members took full control and exclusive use of the 4 acres and that this was openly undertaken.

7. In respect to the role played by the 2<sup>nd</sup> Defendant, it was averred that the occupation and possession of the suit property by the Plaintiff commenced while the title was in the hands of the 2<sup>nd</sup> Defendant and hence the Company cannot plead that it was functus officio in the circumstances. It was asserted that the description of the suit property as 6845/145 in the letter dated 14<sup>th</sup> September, 1998 among other documents was a typographical error since the sale agreement was very clear that the correct parcel was LR.. No. 6845/148 and the Communication to the 2<sup>nd</sup> Defendant was based on the sale agreement. It was averred that the Plaintiff has never transacted on 6845/145.



8. During trial, Kibanyu Kimani, the Chairman and Director of Plaintiff Company testified on its behalf. He relied on his affidavits and Plaintiff's bundle of documents that were on record in his evidence in chief.
9. Upon cross-examination by Counsel for the 1<sup>st</sup> Defendant he stated that the land had no title when it was purchased. He also stated that the Surveyor confirmed the size of the property upon purchase.
10. When asked about whether or not any rates had been paid, he could not confirm the same. He also stated the balance had been cleared by September 1998 and Peter Karitu acknowledged receipt of the same vide an addendum dated 19<sup>th</sup> March 1998 and subsequently allowed them to take possession.
11. When asked on whether or not he executed the sale agreement, he stated that he signed the sale agreement on 19<sup>th</sup> March, 1998 but could not see his name nor his signature in the transfer document.
12. When cross-examined by Counsel for the 2<sup>nd</sup> Defendant, he stated that the Plaintiff had previously bought several parcels of land from the 2<sup>nd</sup> Defendants and they have several titles.
13. On cross-examination by the Advocate for the 1<sup>st</sup> Interested Party, he stated that he knew the family of Peter Kaigua and that Peter Kaigua had other children other than the 1<sup>st</sup> Defendant even though he did not know their names.
14. On cross-examination by the Advocate for the 2<sup>nd</sup> Interested Party he stated as follows; that the Plaintiff had an agreement with Peter Kaigua on 27<sup>th</sup> February, 1998. Peter Kaigua was to sell 4 acres out of the 6.7 acres that was part of LR.. No. 6845/148. The agreement was signed by all parties. There was a second agreement dated 19<sup>th</sup> March, 1998 upon which a purchase price of Kshs. 600,000 had been made. The land was sold as vacant possession which no structures even though the title was never released to the Plaintiff. He also stated that Peter Kaigua wrote and acknowledged that the entire purchase price had been paid and that they were allowed to take possession and develop the property. He also confirmed signing the transfer form. He also stated that the land was surveyed and subdivided and sold to 40 people who were members of the Plaintiff. He also stated that Consolata Mureithi was their member. All the development on the property belonged to the members of the Plaintiff.
15. On further cross examination by Counsel for the 1<sup>st</sup> Interested Party he stated that the Plaintiff filed this suit after the 1<sup>st</sup> Defendant had uprooted the fence of one of its members and further banning him from constructing. He also stated that the 1<sup>st</sup> Defendant knows that they have been on the suit property since he even sunk a borehole that supplies water to its members. He also stated that the conduct of the 1<sup>st</sup> Defendant is contrary to his father's wishes.
16. On re-examination, he stated that the Plaintiff has been in the property for over 23 years now. They bought 4 acres and they have no issue with the remaining 2.175 acres.

### **The 1<sup>st</sup> Defendant's Case**

17. The 1<sup>st</sup> Defendant's case is contained in the Replying Affidavit dated 16<sup>th</sup> November 2018 and the oral testimony tendered in court. The 1<sup>st</sup> Defendant's case is that he is the rightful owner of the subject parcel of land. He also averred that he did not consent to the purported sale of the land. It was also averred that the land has never been subdivided as alleged since what has been provided in Court is a proposed sub division scheme which has never been approved.
18. It was also averred that by dint of the fact that Plaintiff failed to fulfil its part of the agreement, there was no valid transfer of the land to the Plaintiff and thus the Plaintiff could not sell the same to the 2<sup>nd</sup> Interested Party as at that point in time it did not have title thereto.



19. The 1<sup>st</sup> Defendant also averred that what existed between his late father and the Plaintiff was a licence as the Plaintiff had failed to complete the sale and as such the late Peter Kaigua was at liberty to sell and or transfer the land to a third party of his choice.
20. During trial, he relied on his witness statement dated 1<sup>st</sup> February 2019 and his bundle of documents on record in his evidence in chief.
21. On cross examination by the Plaintiff's Advocate, he stated that his late father had 65 shares in the said title and that his shares were 35. He denied the fact that his father had sold 4 acres to the Plaintiff.
22. He also stated that he could not remember the agreement dated 11<sup>th</sup> March 1998 and that the signature belonging in that agreement was not his father's signature. He also stated that had not presented the said document for forensic examination. He also denied knowing the owners of the said property.
23. He also disputed the entry showing that his father had transferred ½ of his undivided share to him. He also denied ever seeing the letter dated 20<sup>th</sup> April 2016.
24. On cross-examination by Counsel for the 2<sup>nd</sup> Interested party, he stated that his National I.D had a different signature with the one appearing in his witness statement. He also stated that he had not made any reference to any sale agreement and the issue of the license in his statement. He also stated that according to him, he never sub divided the property.
25. He also stated that he has been at the suit property several times but does not stay there. He also stated that Consolata W. Mureithi is known to him and she has put up a building on the suit property. He also stated that he has never given any license or permission to any person neither was he aware of the people who bought the land.
26. On cross-examination by Counsel of the 1<sup>st</sup> Interested Party, he stated that the mistake made at the title document was his own. He also stated that his father did not write any will.
27. He stated that before 2014, the land belonged to his grandfather. He also stated that the 2<sup>nd</sup> Defendant did not sale the land to him. He further stated that he paid Peter Kaigua Kshs.10,000,000/- for 65 shares. Though in his statement it said that he paid for half of those shares. He also stated that he had not produced before court any evidence of payment.
28. When re-examined, he stated that he has never seen the letter dated 7<sup>th</sup> December 1993 written by his grandfather. He reiterated that the signature appearing in that letter did not belong to his father. He also stated that he had never seen the subdivision of the said land.

### **The Case of the 2<sup>nd</sup> Defendant**

29. The 2<sup>nd</sup> Defendant filed a Replying Affidavit sworn by Peter Boro Gachau on 19<sup>th</sup> November 2021 which it claimed to have become *funtus officio* upon it having executed a transfer in favour of the 1<sup>st</sup> Defendant and his father Peter Karitu Kaigua. It was also averred that the 2<sup>nd</sup> Defendant had been wrongly enjoined in the proceedings since it had already caused the titling of the suit premises to the names of the shareholders in its register and therefore the Plaintiff had no claim against it.

The 2<sup>nd</sup> Defendant did not Call any witness to testify on its behalf during trial.

### **The Case of the 1<sup>st</sup> Interested Party.**

30. The 1<sup>st</sup> Interest Party's case is contained in its trial Bundle dated 29<sup>th</sup> June 2022 which contained its Replying Affidavit dated 21<sup>st</sup> September 2020 sworn by one Joseph Karanja Warungi, a witness



statement of Joseph Karanja Wariungi dated 29<sup>th</sup> June 2022 and a list and bundle of documents dated 29<sup>th</sup> June 2022.

31. It was averred that Mr. Peter Kaigua and his two sons jointly and severally agreed to sell to the 1<sup>st</sup> Interested Party their beneficial interest in two plots each measuring approximately 0.08 Hectares and designated as plots No. 4 and 5 for a sum of Kshs.170,000 only per plot. That deceased had acquired legal title to the parcel of land known as LR. No. 6845/148 and that on conducting an official search it emerged that title to the property was issued on or about 14<sup>th</sup> February 2014 to the joint names of the 1<sup>st</sup> Defendant and Peter Kaigua (deceased) as tenants in common in the rates of 35% to 65% shares respectively.
32. It was averred that in order to protect its interest, the 1<sup>st</sup> Interested Party instituted a suit in ELC Case No. 1114 of 2015 against the 1<sup>st</sup> Defendant however the suit did not proceed further for want of Letters of Administration, and hence they applied to be joined in the current suit.
33. It was also averred that in the suit herein, the interest of the 1<sup>st</sup> Interested Party ought to be protected and that a resultant trust be declared and determined in favour of the 1<sup>st</sup> Interested Party in respect of the plots designated as Nos 4 and 5 being parties of LR. No. 6845/ 148.
34. During trial, Joseph Karanja Wamugi testified on behalf of the 1<sup>st</sup> Interested Party and relied on the 1<sup>st</sup> Interested party's witness statement, Replying Affidavit and bundle of documents on record.
35. When cross-examined by Mr. Ng'ang'a Advocate he stated he purchased the land from Peter Kaigua and he did due diligence before purchase. He also stated that no transfer was prepared because there was no title.
36. When re-examined, he reiterated that at the time of purchase there was no title and that the title only came out in 2014.

#### **The case of the 2<sup>nd</sup> Interested Party**

37. The 2<sup>nd</sup> Interested Party filed a Replying Affidavit sworn by Consolata W, Mureithi on 2<sup>nd</sup> April 2019 in support of the Plaintiff's suit.
38. It was averred that the 2<sup>nd</sup> Interested Party moved into the plots, developed them with permanent structures and put up their homes and commercial building in the suit property.
39. It was also averred that their occupation, possession and development in the suit property was undertaken openly without any interruptions and as of right for a period of over 12 years after dispossessing the owner and the deconstruction of possession by the owner of his own volition.
40. Consolata Wangui Mureithi testified on behalf of the 2<sup>nd</sup> Interested Party during trial. She stated that she had been at the suit property since 1998 and they have about 148 residents. She also relied on her Replying Affidavit and bundle of documents on record as her evidence in chief.
41. When cross-examined by Counsel for the Plaintiff, she stated that the plots were identical and had beacons. The subdivision plan has a total of 40 plots and some members had more than one plots. She also stated that the father of the 1<sup>st</sup> Defendant never objected to them moving into the land. Their developments are visible and further the 1<sup>st</sup> Defendant supplies water to all the members.
42. When cross examined by Mr. Irungu Advocate, She stated that she purchased the property from the plaintiff and they were not given titles at the time of purchase. They were only given certificates of plot ownership by the Plaintiff.



43. When cross-examined by Mr. Ng'ang'a Advocate, she stated that she made payment and was issued with receipts though she did not have the same in court.

### **Analysis and Determination**

44. The court has considered the pleadings filed by the parties, written submissions on record and oral evidence tendered and has outlined the following salient issues for consideration: -
- i. Whether a case for adverse possession has been established.
  - ii. Whether the Plaintiff is entitled to the reliefs sought.

### **Issue No. I**

#### **Whether a Case of Adverse Possession has been Established.**

44. Section 38 of the *Limitations of Actions Act* provides a framework on how an adverse possessor is to move the court for orders vesting the land in the adverse possessor. The Section provides as follows:

38. Registration of title to land or easement acquired under *Act*

- (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 of this *Act*, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.
  - (2) An order made under Subsection (1) of this Section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.
  - (3) A proprietor of land who has acquired a right to an easement under section 32 of this *Act* may apply to the High Court for an order vesting the easement in him, and may register any order so obtained in the register of the land or lease affected by the easement and in the register of the land or lease for whose benefit it has been acquired, and the easement comes into being upon such registration being made, but not before.
  - (4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.
  - (5) The Minister for the time being responsible for Land may make rules for facilitating the registration of titles to land or to easements acquired under this *Act*.
45. The essential and mandatory ingredients that a claimant seeking adverse possession orders under Section 38 of the *Limitation of Actions Act* must establish have been spelt out by our courts in various cases, among them; *Kweyu v Omutut* [1990] KLR 709, *Patrick Magu Mwangi Kimnyu v Joreth Limited* [2015] eKLR, *Peter Mbiri Michuki v Samuel Mugo Michuki* [2014] eKLR; and *M'Mbaari M'Itbara v James Mbaka* [2019] eKLR among others.
46. In *Gabriel Mbui v. Mukindia Maranya* [1993] eKLR, the court stated that a person claiming land by adverse possession must establish on a balance of probabilities the following elements;
- a) The person claiming land by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period.



- b) The entry and occupation must be with, or maintained under, some claim or colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.
  - c) The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied.
  - d) The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with the evinced unmistakable *animus possidendi*, that is to say occupation with clear intention of excluding the owner as well as other people.
  - e) Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter, unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.
  - f) The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community of the exercise of dominion over the land.
  - g) The possession must be continuous uninterrupted, unbroken for the necessary statutory period.
  - h) The rightful owner or paper title holder against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of and during, the statutory period.
  - i) The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.
  - j) The land, or portion of the land adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. The absence of a plot or title number need not present any difficulty, nor should it be a bar to establishing a claim of adverse possession.
47. The Plaintiff and the 2<sup>nd</sup> Interested Party in this suit testified that they moved into the suit property in 1998 and have since then openly occupied the said plots developed then with permanent structures and put up their homes and commercial building.
48. As to the nature of occupation, the it was contended that the Plaintiff has been in open, continuous and exclusive occupation. To determine the nature of possession, this Court is guided by the decision in Kisumu Civil Appeal No. 27 of 2013; - *Samuel Kibamba v Mary Mbaisi* [2015] eKLR where the court held:
- "Strictly, for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, *nec vi, nec clam, nec precario*. The additional requirement is that of *animus possidendi*, or intention to have the land".
49. Evidence was also adduced to the effect that the Plaintiff purchased 4 acres out of the 6 parcel of land and the vendor retained 2.175 acres. The same was purchased for Peter Kaigua the father of



the 1<sup>st</sup> Defendant. It was also evident from the documentary evidence that was produced herein and specifically at Page 30 of the 2<sup>nd</sup> defendant's trial bundle dated 19<sup>th</sup> July 2022 it showed 2<sup>nd</sup> Defendant's members list and their respective names at entity No. 93 there appears the name of Peter Karitu Kaigua "as owner" of 6845/148 on the left hand margin while on the extreme right the names of Francis Kaigua Karitu (2.17 acres and Peter Kaigua Karitu 4 acres.

50. For one to succeed in a claim for adverse possession one must prove that he has been in exclusive continuous occupation of the suit land for a period of at least 12 years, which occupation must be open and continuous and should be without permission of the owner. The documentary evidence adduced by the Plaintiff clearly gives a glimpse of how the plaintiff came to take or the suit land in view of the foregoing the court is satisfied that the Plaintiff and the 2<sup>nd</sup> Interested party have been able to prove on a balance of probabilities their claim for adverse possession as against the Defendants.

## **Issue No. II**

### **Whether the Plaintiff is Entitled to the Reliefs Sought**

51. Having found that the Plaintiff has been able to prove its claim to the required standard it therefore follows that it is entitled to the orders sought and this court shall proceed to grant the appropriate reliefs.

### **Final Orders**

52. In the end, the court proceeds to grant the following orders: -
- a. Mwhike Farmers Company Limited is hereby declared to have acquired a title by adverse possession to the suit premises being a portion measuring four (4) acres out of LR. No. 6845/148 and an order of permanent injunction is hereby issued restraining the Defendants from interfering with the Plaintiff's or its members possession and title to the suit property.
  - b. That the registration of Francis Kaigua Karitu as proprietor of a portion measuring four (4) acres out LR. No. 6845/148 and or any other person deriving title from Githunguri Njiru Farm (1966) Limited and Peter Karitu Kaigua and the Defendants out of the suit property known as LR. No. 6845/140 be and is hereby cancelled forthwith and the Registrar of Titles is hereby directed to rectify the register to enter and issue title in the name of the Plaintiff as the registered proprietor of a portion measuring 4 acres out of LR. No. 6458/148 in place of the Defendants or anyone deriving title from the Defendants.
  - c. Each party to bear own costs of the suit.

Judgement accordingly,

**DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20<sup>TH</sup> MARCH 2024**

**E. K. WABWOTO**

**JUDGE**

In the presence of:-

Mr. King'ara for Plaintiff.

Mr. Irungu for 2<sup>nd</sup> Defendant.

Mr. Gichuru D. N. for 1<sup>st</sup> Interested Party.

N/A for the Other parties.



Court Assistant-Caroline Nafuna.

