



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**E.L.C NO. 7 OF 2021(OS)**

**STEPHEN MWANGI GATUNGE.....APPLICANT/ PLAINTIFF**

**-VERSUS-**

**EDWIN ONESMUS WANJAU (Suing in her capacity as the administrator of the estates of KIMINGI WARIERA**

**(Deceased) and of MWANGI KIMINGI (Deceased).....RESPONDENT**

**JUDGEMENT**

By Originating Summons dated 3<sup>rd</sup> March 2021, the Applicant herein sought for the following orders against the Respondent;

i. ***THAT the Plaintiff be declared to have become entitled to one (1) Acre out of land parcel Number LOC 13/GITUGI/424, registered under The Registered Land Act (Cap 300 Laws of Kenya) (now repealed) by having had adverse possession of the said land for over twelve (12) years.***

ii. ***THAT the Defendant's title to the said land be declared extinguished and or invalid, null and void and the Plaintiff be registered as proprietor of the suit land.***

iii. ***THAT the Defendant do execute the necessary documents to effect the transfer of the said one (1) acre of land Parcel Number LOC 13/GITUGI/424, to the plaintiff.***

iv. ***THAT the costs of the Application be provided for.***

The application is premised on the Supporting Affidavit of the Applicant herein sworn on the 3<sup>rd</sup> March, 2021. It is his averments that the Defendant is a son of the late **Mwangi Kimingi**, who had filed a Succession Cause No. 230 of 2002 – Murang'a in respect of the estate of his father the late **KIMINGI WAIRERA**. That the Defendant's father (**Mwangi Kimingi**) died before finalization of the said Succession Cause and the Defendant was substituted in his place after obtaining limited grant of letters of administration ad Litem. That prior to his death, the Defendant's father sold a portion of one (1) acre out of land parcel No. **LOC 13/GITUGI/424**, to the Applicant as evident by sale agreement translation attached to the Respondent's Affidavit marked "DEXB4". Further, that the Applicant was given vacant possession by the Defendant's father and has been in **exclusive, open** and **continuous** occupation of the suit property for over 12 years without interruption.

In response to the Summons, the Respondent filed Replying Affidavit dated 15<sup>th</sup> April 2021, and deponed that land parcel No **LOC 13/GITUGI/424**, which is the suit land and parcel No **LOC 13/GITUGI/422**, were both registered in the name of the late **Kimingi Wariera**. That both parcels of land form part of the estate of the deceased in **Succession Cause 23 of 2012**, which is still pending determination in **High Court at Murang'a**. That the late **Mwangi Kimingi**, was the sole administrator of the estate of the Late **Kimingi Wariera** and he died on 17<sup>th</sup> April 2009, before the succession case was concluded and determined. Further, that upon his demise in 2009, the Respondent herein was substituted in his place in the **Succession Cause** and was subsequently appointed as an

administrator of the estate of the late **Kimingi Wariera**.

Further, the Respondent averred that the Applicant bought land from his father, **Mwangi Kimingi**, while the land was still registered under the name of his grandfather **Kimingi Wariera**, and therefore cannot claim from his estate. He disputed that the Applicant has had **peaceful occupation** of the land and deponed that the Applicant instituted a suit against him in **2017**, which suit stopped time from running.

On **27<sup>th</sup> August 2021**, the Respondent filed a Further Replying and deponed that the Applicant did not adduce any evidence indicating that he bought land from his father or that he paid the consideration thereto. Further that on **25<sup>th</sup> June 2014**, he filed for Confirmation of Grant whereby he filed an Affidavit proposing the mode of distribution of property, but was protested to by the Applicant herein. That if there was any claim for **adverse possession**, the summons and Affidavit of protest discontinued time from running.

The Applicant filed a Further Affidavit and maintained that he has been in occupation of the suit land for **over 12 years**. He deponed that he withdrew the suit alluded to by the Respondent, as the same was filed by way of Plaint and not Originating Summons, and which was withdrawn with the consent of the Respondent herein.

The matter proceeded by way of viva voce evidence and parties gave evidence as below; -

#### **PLAINTIFF'S CASE**

**PW1 STEPHEN MWANGI GATUNGE** adopted his witness statement dated **22<sup>nd</sup> October 2021**, and list of documents dated **22<sup>nd</sup> October 2021**, as his evidence in chief and urged the Court to allow his claim. On cross exam, he told the Court that the Respondent was known to him and that they were in Court because he was not in support of his claim.

#### **DEFENCE CASE**

**DW1 EDWIN ONESMUS WANJAU** testified that the parcel of land should remain with his family and the Applicant should not be given any share. On cross-exam he testified that the Applicant entered into the land sometime in the year **2001/2002**, and he currently uses the land which he has used for more than **15 years**. He also told the Court that they objected to the Applicant's stay on the land and maintained that his father never sold land to him. On re-exam, he stated that he was not sure when the Applicant entered into the suit property.

At the close of hearing, the parties filed and exchanged their written submissions which the Court has duly considered.

The Applicant through the **Law Firm of Nganga Ngigi & Co Advocates**, filed his written submissions dated **21<sup>st</sup> December 2021** and submitted, that when determining a claim for adverse possession, the mode of taking occupation does not matter as long as a party can demonstrate the ingredients of adverse possession. He invited the Court to the holding of the Court in **Githu vs Ndete (1984) KLR 776** as quoted in **Murang'a Kabangi & 2 Others vs Hannah Wairimu Gitau & Another** where the Court laid out what constituted dispossessing one of his title.

It was his further submissions that the filing of succession cause did not affect adverse possession as was the holding of the Court in **Murunga Kabangi Case(Supra)**. In the end, he submitted that the Respondent was estopped in law from denying the actions of the Late **Mwangi Kimingi** and **Kimingi Wairera** which were performed during their lifetime.

The Respondent through the Law Firm of **S. K. Njuguna & Co. Advocates** filed his written submissions dated **27<sup>th</sup> January 2022**, on **28<sup>th</sup> January 2022**. The Respondent submitted that the Applicant had not proved his case to the required standard for the reasons enumerated in the submissions. He also submitted that the Applicant failed to plead his case and having failed to demonstrate the ingredients of adverse possession, he cannot be granted the said order. That if he is in occupation of the land, it was with the consent of the seller and adverse possession, cannot issue. It was his further submissions that at the time **Mwangi Kimingi** sold the land, the same was in the name of **Kimingi Wairera** and there is no way the transactions could issue.

What is not in controversy is that the land originally belonged to **Kimingi Wairera**, and which land devolved to his estate, including **Mwangi Kimingi**. Further that the Applicant is in occupation of the land it is not in doubt and that the suit land forms part

of the estate of the late Kimingi Wariera. The Court has carefully read and considered the pleadings, the evidence adduced, submissions, authorities cited and the relevant provisions of law and finds that the issues for determination are;

a) **Whether the Applicant has met the threshold for grant of orders for adverse possession"**

b) **Whether the Applicant is entitled to one (1) Acre to be excised out of land parcel Number LOC 13/GITUGI/424"**

c) **Who should bear the cost of the suit"**

**1. Whether the Applicant has met the threshold for grant of orders for adverse possession"**

It is trite that a claim for adverse possession is attached to land and not title and it matters not that the land was owned by either **Kimingi Wairera** or **Mwangi Kimingi**. This was the position in *Maweu VS Liu Ranching & Farming Cooperative Society [1985] eKLR* as quoted in *Civil Appeal No 164 of 2011 Gachuma Gacheru VS Maina Kabuchwa [2016] eKLR* where the Court held *"Adverse possession is a fact to be observed upon the land. It is not to be seen in a title"*

This Court having laid the basis for the instant suit, will then proceed to delve into the issues outlined above.

It is the Applicant's case that she has been in continuous uninterrupted occupation and possession of the suit property for a period in excess of 12 years. The burden of leading the Court to ascertaining this lies with the Applicant. This Court concurs with the sentiments of Justice Kuloba J, (as he then was,) in *Nairobi Civ No. 283 of 1990 Gabriel Mbui v Mukindia Maranya [1993] Eklr*, where the Court held:

*"The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown"*

The principle of adverse possession is well settled under **Limitation of Actions Act**. Section 7 of the said Act places a bar on actions to recover land after 12 years from the date on which the right accrued. Further section 13 of the same Act, provides that adverse possession is the exception to this limitation:

**"(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.**

**(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.**

**(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land."**

Finally, **Section 38 of the Act** provides that:

**"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."**

The principle of adverse possession was more elaborately set out in the case of **Wambugu vs Njuguna [1983] KLR 172**, where the Court held that:

*“In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.”*

And that:

*“The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.”*

This right to be **adverse** to land does not automatically accrue unless the person in whose this right has accrued takes action. Section 38 of the Act gives authority to the claimant to apply to Court for orders of adverse possession. Set the findings of the **Court in Malindi App No. 56 of 2014 Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR** where it held;

*Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.*

Further, in the case **Mbira v. Gachuhi (2002) 1 EALR 137**: the court stated as follows;

*“... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption...”*

Therefore, to determine whether the Applicant’s rights accrued the Court will seek to answer the following

- i. How did the Applicant take possession of the suit property”*
- ii. When did she take possession and occupation of the suit property”*
- iii. What was the nature of her possession and occupation”*
- iv. How long has the Applicant been in possession”*

This Court notes that the land in question is registered in the name **Kimingi Wariera** (now deceased). It is not in dispute that the estate of the said **Kimingi Wariera** is yet to be distributed and a **Succession Cause No. 23 of 2012**, is still pending before the **High Court of Murang’a**. Further it is not in doubt that **Mwangi Kimingi** (deceased) was the administrator of the estate of **Kimingi Wariera**, and he sold the suit land to the Applicant. Attached to the Respondent’s Replying Affidavit is a copy of translation which indicates a sale agreement between **Mwangi Kimingi** and the Applicant herein. This Court has no reason to doubt the authenticity of the same as it corroborates the Applicant’ claim that he bought land from **Mwangi Kimingi**.

The Applicant’s mode of entry was as a result of a sale agreement which means it was a permissive one. It is trite that claim of **adverse possession** to suffice, the claimant must demonstrate that the same was non-permissive and non-consensual and without license. (See **Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others [2018] eKLR**, where the Court enumerated the required elements to prove **adverse possession** as follows:

*“Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12years as espoused in the Latin maxim, nec vi nec clam nec precario.”*

The Applicant’s occupation having been permissive, it will follow that a claim for adverse may not issue. However, Courts have

found that such claim can be sustained after payment of the last installment. The Court in *Nairobi Appeal No. 73 of 1982 Public Trustee v Wanduru Ndegwa [1984] eKLR* found that Limitation of Action begun running from the date of final payment. In the case *Hosea v Njiru & Others [1974] EA 526, Simpson J, following Bridges v Mees [1957] 2 All ER 577*, held that once payment of the last installment of the purchase price had been effected, the purchaser's possession became adverse to the vendor and that he thenceforth, by occupation for twelve years, was entitled to become registered as proprietor of it. From the copy of translation, of the sale agreement, the Applicant made a final payment on the **5<sup>th</sup> September, 2006**.

The Applicant contends that he took occupation of the land after the purchase and the Respondent in his testimony told the Court that the Applicant has been in occupation since 2001 or 2002. Therefore, it follows that he entered into the suit property immediately after the sale and has remained in occupation. For purposes of computing time as elaborated above, this Court finds and holds that time started running in 2006 after the final installment.

As to the nature of occupation, the Applicant contends that he has been in **open, continuous and exclusive occupation**, a fact which has been objected to by the Respondent though he admitted the Applicant has occupied the land for a period of over 15 years. To determine the nature of possession, this Court is guided by the decision in *Kisumu Civil Appeal No. 27 of 2013; - Samuel Kihamba 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”*

The Applicant did not produce any evidence to show that he has put up a home or planted a thing thereon, but the Respondent in cross-examination corroborated the Applicant's evidence that he is in occupation of the land and has been in occupation for over 15 years. The act of occupying the land for more than fifteen years is a demonstration of the Applicant's intention of dispossessing the Respondent. Undoubtedly, the nature of his possession was **open, without secrecy** and with the **sole intention** of acquiring ownership.

On whether time stopped running at any point, the Respondent told the Court that the filing of Succession Cause and the Civil case stopped time from running. The Affidavit of Protest was filed in **4<sup>th</sup> September, 2014** while the civil suit filed on **4<sup>th</sup> December, 2017**. What begs an answer is whether a Succession Cause stops time from running in adverse possession.

It is trite that the filing of a suit asserting rights over land stops time from running in adverse possession. A Succession Cause is initiated for the purpose of distributing the property of the dead owner, to the persons entitled. Adverse possession on the other hand is about occupation of land belonging to another, and asserting a right to be given title to it on the basis of the prolonged occupation of the said property. In the instant case, there was no evidence that the filing of the Succession Cause was for eviction of the Applicant from the suit property or was meant to assert rights over the land. Adverse possession accrues to land and not title and unless the Respondent took steps to evict the Applicant from the suit land, which he did not. The mere act of claiming ownership on does not stop time from running. In *Eldoret Civil Appeal No. 212 of 2012 ; - Isaac Cypriano Shingore v Kipketer Togom [2016] eKLR* the Court held:

*“By the time the respondent filed the originating summons in November 2006, he had been in possession of the property for about 24 years. Even by the time the appellant became registered as proprietor by transmission on 28th April 2000, the appellant had been in occupation of the property for about 18 years. No attempts were made by the appellant over all those years to assert title. There is no merit in the argument by the appellant that the objection proceedings in the succession cause by the respondent and the complaint by the respondent before the Land Disputes Tribunal had the effect of interrupting the respondent's possession of the property. We are unable to appreciate how steps taken by the respondent to assert his claim to the property can be construed as steps by the appellant to assert his right to ownership of the property.*

*As the Court held in Githu Vs. Ndeete [1984]KLR 776 “Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land; see Cheshire's Modern Law of Real Property, 11th edition at p 894”).*

The filing of succession case did not amount to assertion of rights that could stop time from running. As to the civil case, the suit was commenced by the Applicant, and there is no evidence of assertion of rights by the Respondent. This Court finds no reason to

infer that the filing of the Succession cause and Civil case stopped time from running. The Court of Appeal in **Civil Appeal No. 121 of 2006; - Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees [2016] eKLR** affirmed the sentiments of the Court in *Amos Weru Murigu v. Marata Wangari Kambi & Another* where the Court held:

*“...as regards assertion of title, it is not enough for a proprietor of land to merely write to the trespasser (to vacate). A letter by the proprietor, even if it be through an advocate or the chief of the area does not amount to assertion of title in law and cannot therefore interrupt the passage of time for the purpose of computing the period of adverse possession. For there to be interruption, the proprietor must evict or eject the trespasser but because eviction is not always possible without breach of peace, institution of suit against a trespasser does interrupt and stop the time from running.”*

This Court finds that there was nothing that stopped time from running as the Respondent never took any plausible step to assert rights over the suit property. There being nothing that stopped time from running, this Court finds and holds that the Applicant as at the time of filing the suit had been in occupation of the suit property for a period of 15 years.

To this end, the Court finds and holds that the Applicant has on a balance of probability established that he meets the threshold for the grant of orders for adverse possession.

## **2. Whether the Plaintiff is entitled to one (1) Acre to be excised out of land parcel Number LOC 13/GITUGI/424"**

What flows from the pleadings is that the suit land is not surveyed. However, the agreement expressly states that the Applicant was entitled to **one acre** to be excised from land parcel No. **LOC 13/GITUGI/424**. The occupation of the Applicant on the suit property has been confirmed by the Respondent. From the attached extract of Green Card, it is evident that the land is registered under the name of **Kimingi Wairera**. What this Court appreciates is that the land can easily be identified.

For a claim of **adverse possession** to issue, it is important that the said land is clearly identified as was held by the Court in *Wilson Kazungu Katana & 101 Others vs. Salim Abdalla Bakshwein & Another [2015] eKLR* where the Court observed:-

*“The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of Githu vs. Ndele [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them.”[Emphasis added]*

The Court in the foregoing case found that the requirement of identification was crystallized by the mandatory provisions of **Order 37 Rule 7 of the Civil Procedure Rules**, which requires that and

application for **adverse possession** be accompanied with a title deed extract.

The Applicant has attached a copy of a title deed extract as required by law. The title shows that the land is registered in the name of **Kimingi Wairera** measuring **4.0 acres** identified as **Fort Hall Loc. 13 Gitugi/ 424**. This Court has not had the benefit of being able to identify the exact occupation of the Applicant out of the entire parcel **Fort Hall Loc. 13 Gitugi/ 424**, but what is not in dispute is that the Applicant is occupying part of the land which is one acre. It would not be difficult for this Court to conclude that the Applicant and the Respondent are aware of the Applicant’s confines and or borderlines the larger portion notwithstanding.

In totality, the Court finds and hold that the Applicant has on a balance of probability demonstrated that he is entitled to one (1) acre piece of land to be excised from **Fort Hall Loc. 13 Gitugi/ 424**.

## **3. Who should bear costs**

Costs normally follow the events, and the successful party is always awarded costs. The Applicant herein is the successful party and the Court finds no reasons not to exercise its discretion in his favour.

Having now carefully considered the available evidence and the rival written submissions, the Court finds that the Applicant herein has proved his case on the required standard of balance of probabilities. For the above reasons, the Court enters judgment for **the**

Applicant as prayed in the originating summons dated 3<sup>rd</sup> March 2021 in terms of prayers **No. (a) (b) (c) and (d)**.

**It is so ordered.**

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 24TH DAY OF FEBRUARY, 2022.**

**L. GACHERU**

**JUDGE**

**Delivered online**

**In the presence of;**

**M/s Wainaina H/B Mr Nganga Ngigi for Applicant/Plaintiff**

**Mr S.K. Njuguna for the Respondent/Defendant**

**Kuiyaki - Court Assistant**

**L. GACHERU**

**JUDGE**



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