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Case Class:	Civil
Court:	High Court at Murang'a
Case Action:	Judgment
Judge:	Jemutai Grace Kemei
Citation:	Francis Waweru Mwangi v Samuel Kirumba Kariuki & another (both substituting the Late Kariuki Kimani alias Kariuki Manuthu Deceased); Joseph Kuria Mwangi (Interested Party) [2020] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	Plaintiff's case dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

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

**ELC NO. 48 OF 2017 (OS)**

**FRANCIS WAWERU MWANGI.....PLAINTIFF**

**VS**

**SAMUEL KIRUMBA KARIUKI.....1<sup>ST</sup> DEFENDANT**

**TERESIAH WAMBUI KARIUKI.....2<sup>ND</sup> DEFENDANT**

**(both substituting the Late Kariuki**

**Kimani alias Kariuki Manuthu**

**Deceased)**

**AND**

**JOSEPH KURIA MWANGI.....INTERESTED PARTY**

**JUDGMENT**

1. The Plaintiff filed took out Originating Summons dated 3/10/2014 and amended on 11/12/2017 against Kariuki Kimani alias Kariuki Manuthu seeking the following orders;

a) That the Applicant has become entitled by adverse possession to that parcel of land comprised and known as LOC.18/MARUMI/213 registered in the name of the Respondent.

b) That the Applicant be registered as the proprietor of the said parcel of land known as LOC.18/MARUMI/213 in place/substitution of the Respondent.

c) That the District Land Registrar Murang'a do effect the said substitution accordingly.

d) That the costs of this suit be provided for.

2. Upon the death of the said Kariuki Kimani on the 23/11/14 the Plaintiff substituted the deceased with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who are his children and legal representatives of his estate. With the leave of the Court the Plaintiff filed the amended Originating Summons on the 11/12/2017.

3. The interested party is said to have purchased the suit land in 2016 from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and their siblings.

4. The suit land was registered in the name of Kariuki Kimani as at 12/6/63.

5. On the 24/6/2014 the Plaintiff lodged a caution on the suit land claiming a licensee's interest (see entry No 2 on the green card).
6. The Plaintiff's case is that he has been in exclusive continuous and uninterrupted possession of the suit land since 1988. That he acquired the land through purchase and that the title of the interested party was extinguished by adverse possession in his favour.
7. The Defendants denied the Plaintiff's claim and stated that upon the death of their father the suit land devolved to them and their other 4 siblings who acquired the suit land by way of transmission following the successful succession of their father's estate. That prior to the sale, the suit land had never been permanently occupied nor had any developments.
8. The Interested party denied the Plaintiff's claim and stated that he purchased the suit land for value without notice from the administrators of the estate of Kariuki Kimani and holds an indefeasible title. He refuted the claim of possession by the Plaintiff and contended that the suit land was not occupied when he purchased it. That the land had no encumbrances and the only caution that was there had been removed in 2015.
9. The Plaintiff's case was led by two witnesses. PW1 – Francis Waweru Mwangi testified and relied on his witness statement and list of documents dated the 24/1/18. That the suit land was initially purchased by his family in 1966. That on the 30/6/1984 Kariuki Kimani sold the suit land to him and his brother, Kuria Mwangi. Later the family agreed that the suit land be registered in his name alone as his two other brothers had inherited their father's land. That he entered the suit land in 1988 and attended Land Control Board in 1988 but in the 1<sup>st</sup> instance the wife of Kariuki Kimani did not turn up and the 2<sup>nd</sup> time it was scheduled both, Kariuki Kimani and his wife were absent and therefore the consent was not obtained. That the District Officer of the area allowed him to plant coffee which he did in 1988. That Kariuki Kimani died before transferring the land to him.
10. The witness further stated that upon the death of Kariuki Kimani his children obtained letters of grant of administration without his knowledge and later sold the land to the Interested party in 2016.
11. That he was evicted from the suit land in 2014 when the suit was pending in Court.
12. With respect to his averment that he planted coffee on the land, the witness stated that though he had a coffee factory delivery number, he did not attach to his list of documents. He clarified that he never resided on the land but only planted and tended coffee.
13. While being cross examined the witness stated that he stopped utilizing the land in 2016 when asked by the interested party to stop. That Kariuki Kimani and his family were not aware that he was cultivating the land as they did not know where it was.
14. With respect to the sale of the suit land, the witness stated that he was yet to complete the payment of the balance of the purchase price.
15. PW2 – Peter Maina Nganga stated that he is a neighbour of the Plaintiff and his land is adjacent the suit land. He stated that the mother of Kimani Manuthu lived on the suit land. That Kimani Manuthu lived on another land in Limuru. He testified that the Plaintiff planted coffee and bananas on the suit land which crops are still on the land. That the Plaintiff has been cultivating the suit land since 1966 to date. He was not sure if it is the Plaintiff that built the gate on the suit land. He was not aware that the Interested party had purchased the suit land despite his claim that he has known him since childhood and that he is neighbour to the parties. Further that the Plaintiff and his brother namely Kuria used to cultivate on the suit land and before that other family members cultivated the suit land too.
16. DW1- Samuel Kirumba Kariuki testified that he and the co-Defendant are the legal administrators of the estate of Kariuki Kimani. That the land devolved to them and co-siblings and later they sold it to the interested party.
17. That the Plaintiff did not occupy the suit land before the sale. That he lives on his family land which is a kilometer away from the suitland. That the Plaintiff cautioned the suit land which caution was removed by the Land Registrar on notice. That the removal followed the application made by their deceased father before his death.
18. He stated that the Plaintiff and his brother Kuria Mwangi have had schemes to grab the land from them and gave an example of

ELC 270 of 2017 which was filed by the said Kuria against them claiming specific performance or the alternative of a refund of the purchase price. The Plaintiffs brother claimed a purchaser's interest in the suit land to mean that they were not in occupation of the land. That the significance of the suit is to show that the Plaintiff did not enjoy an exclusive nor peaceful occupation of the land. That at some point the Plaintiff and his brother Kuria were squabbling over his fathers land.

19. He explained that the land was sold to the Interested Party who took possession and fenced the suit land.

20. He refuted the sale of the land by his father and contended that his father had asked the Plaintiff and his two brothers to watch over the land (caretakers). He did not produce any document to support this averment. That his father died on 23<sup>rd</sup> November 2014 after the case had been filed in October 2014

21. The witness stated that the Plaintiff did not cultivate any coffee on the land as at the point of sale the land in 2016 was unkempt and bushy.

22. The interested party, DW3 – Joseph Kuria Mwangi explained that he purchased the suit land in March 2016 from the children of the late Kariuki Kimani and took possession and fenced the same. That he was not aware of any subsisting suit during the purchase and was later enjoined into the suit. That he carried out due diligence and found that the suit was neither encumbered nor occupied by third parties, the Plaintiff included. That the land was vacant and bushy with a small section that the Plaintiff and his two brothers cultivated maize and beans. That at the sub chief's office he allowed them to harvest their crops and move out which they peacefully did. That this was in April 2016. That thereafter he cleared the land and fenced it.

23. The parties have filed written submissions which I have read and considered.

24. Having reviewed and considered the pleadings, evidence, the written submissions, the key issue for determination is whether the Plaintiff has proved a claim of ownership by adverse possession.

25. It is not in dispute that the suit land was registered in the name of Kariuki Kimani in 1963. It is not in dispute that the parties with the exception of the interested parties are related. The father of the Defendants was a brother to the father of the Plaintiff, therefore they are cousins.

26. The Plaintiff averred that the suit land was sold by Kariuki Kimani to his brother Mwangi Kimani in 1966. Later the family in 1984 agreed to have the suit land registered in his name as his two brothers had been allocated land by their father, Mwangi Kimani. It would appear that it fell on the Plaintiff to pay for the purchase of the suit land from his uncle, Kariuki Kimani aka Kanuthu.

27. The Defendants have refuted the sale of the land and insist that the three brothers; Plaintiff, Kuria Kimani and Mwangi Murira took care of the land with the permission of their father. Evidence was led by the Plaintiff that indeed there was a sale. He produced a sale agreement dated the 7/8/88 in which the land was sold to the Plaintiff at the sum of Kshs 45000/-. The payment of Kshs 42,600 was acknowledged by Kariuki Kimani leaving the balance of Kshs 2400/- which according to the letter dated the 23/12/96 was to be paid upon the registration of the title in the name of the Plaintiff. This evidence leads the Court to make a finding on a balance of probability that there was indeed a sale between Kariuki Kimani and the Plaintiff.

28. The Plaintiff explained that he and Kariuki Kimani sought for the Land Control Board consent in 1988 and in the first instance it was not obtained because Kimani's wife did not attend. A second meeting was scheduled but both Kimani and his wife did not attend. This evidence seems to be collaborated with the copy of the Land Control Board register which shows the details of the suit land and the parties that sought the consent. The Plaintiff did not find it necessary to produce the application for consent in Court. There is no evidence of the Land Control Board consent. This evidence is consistent with the letter dated the 8/7/99 where Kariuki Kimani was writing to Waweru Murira stating that his wife will transfer the land when she finds a plot. It shows that the Land Control Board consent was held because of the wife who had other unmet demands on the sale.

29. Further the Court was shown a case vide ELC 270 of 2017 which was filed by Kuria Mwangi against the children of Kariuki Kimani and the interested party seeking specific performance (transfer of the land) or in the alternative the refund of the purchase price.

30. I will highlight the key sections of the Limitations of Actions Act Cap 22 and the Registration of Land Act No 6 of 2012 that anchors adverse possession.

Section 7 states that

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

Further in Section 13

“(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”.

Section 17 goes on to state;

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished”

Finally, Section 38(1) and (2) states;

“(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.

31. The combined effect of the sections above is to extinguish the title of the proprietor of the land in favour of the adverse possessor at the expiry of 12 years in adverse possession of the suit land.

32. Section 28(h) of the Land Registration Act, 2012 recognizes overriding interest on land such of which are rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription. Under Section 7 of the said Act prescription is one of the ways of acquisition of land.

33. In the case of **Kimani Ruchire –v – Swift Rutherfords & Co. Ltd. (1980) KLR 10 at page 16 letter B**, where Kneller J. held that:

“The Plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion). So the Plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it by way of recurrent consideration”.one must show that they are in long exclusive, uninterrupted possession, possession is hostile to the rights of the registered owner and the registered owner is aware; possession has as much

publicity as not to be missed by the registered owner.

34. In the case of **Leonola Nerima Karani v William Wanyama Ndege**[2012] EKLR the Court citing the case of **Wambugu versus Njuguna (1983) KLR 171** laid down the following guiding principles in respect to adverse possession:-

a. The general principle is that until the contrary is proved possession in law follows the right to possess.

b. In order to acquire by the statute of limitation 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 for which he intended to use it.

c. The limitation of Actions Act, in adverse possession contemplates two concepts, disposition and discontinuance of possession. 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 for the requisite number of years.

d. Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid sale or agreement, the possession becomes adverse and time begin to run at the time the licence is determined. Prior to the determination of the licence, the occupation is not adverse but with permission. The occupation can only be either with permission or adverse; the two concepts cannot co-exist.

e. The rule on permissive possession is that possession does not become adverse before the end of the period during which the possessor is permitted to occupy the land.

f. Adverse possession means that a person is in possession in whose favour time can run...

g. Where the claimant is a purchaser under a contract of sale of land, it would be unfair to allow time to run in favour of the purchaser pending completion when it is clear that he was only allowed to continue to stay because of the pending purchase because had it not been for the pending purchase, the vendors would have evicted him. The possession can only become adverse once the contract is repudiated...

35. The Plaintiff states that he has occupied the suit lands exclusively continuously uninterrupted planting since 1988 until 2014 when he was removed. The Plaintiff led evidence that he planted coffee in 1988 with the permission of the District Officer after he failed to get Land Control Board consent to transfer the land in his name. He did not table the letter or permission from the said administrator. When asked about the coffee delivery notes or coffee growing permits, he stated that he has them but did not attach to his list of documents.

36. Further the Plaintiff did not lead any evidence to show that he was removed from the suit land. The Defendants and the interested party led evidence that the land was bushy and uncultivated with no coffee. The interested party states that he visited the land before purchase and found it unkept and bushy. That later after he had become registered as owner he found the Plaintiff and his two brothers cultivating a small portion with maize and beans. That in the presence of the sub chief he allowed them to harvest their crops and move out voluntarily. That they did that without any resistance. It follows that the Plaintiff's entry in 2016 was recent and that is why he readily agreed to harvest the crop and leave without a protest notwithstanding that the suit was already in Court. Conversely, it can be deduced that the Plaintiff by walking away from the land duly relinquished his possession to the title holder hence extinguishing any rights that may have accrued to him, if any.

37. I have examined the green card produced by the Plaintiff which shows that he lodged a caution on the land claiming a licensee's interest. A licensee's interest denotes permission to be on the land. It is trite that any occupation with the permission of the title owner cannot amount to adverse possession. If indeed the Plaintiff had a beneficial interest then why did he not claim it instead he was telling the whole world that he was on the land with the licence or permission of Kariuki Kimani.

38. Possession is a fact which must be proved by the party asserting or relying on it for a claim in adverse possession to succeed. This may have been in form of a coffee growers licence, coffee delivery cards, photographs to depict the activities on the ground

and or a valuation report to show how the land is being utilized and by whom.

39. Curiously the Plaintiff led evidence and stated that the family of Kariuki Kimani were unaware that he was utilizing the suit land. One of the key criteria to prove adverse possession is the open and notorious occupation of the suit land. It should not be in secrecy. If the Kariuki's did not have knowledge that he was in occupation of the land then a claim of adverse possession cannot be sustained.

40. The Plaintiff failed to show that he used the land in an inconsistent manner to that of the title holder. He failed to prove occupation and that the occupation if any was adverse to the title holder.

41. It is the finding of the Court that the Plaintiff failed to prove that he was in exclusive continuous uninterrupted occupation of the land.

42. In the upshot the Plaintiff's case fails. It is dismissed with costs to the Defendants and the Interested Party.

**43. It is so ordered.**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 3<sup>RD</sup> DAY OF DECEMBER, 2020.**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of;**

Kirubi HB for Ms. Wangui Ngugi for the Plaintiff

1<sup>st</sup> and 2<sup>nd</sup> Defendants: Absent

Interested Party: Absent



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