



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

ELC CASE NO. 29 OF 2005

M'MUGUNA M'TWARUCHIU.....PLAINTIFF

VERSUS

BEATRICE TIRINDI MBURIRIA.....DEFENDANT

JUDGMENT

In an originating summons dated 7th April 2005, the plaintiff sought judgment for the following orders-;

- a) a declaration that the plaintiff has become entitled under section 38 of the limitation of Actions Act Cap 22 Laws of Kenya to be registered as the proprietor by adverse possession in lieu of the present registered proprietor of all that parcel of Land known as L.R NO. NYAKI/THUURA/1507 on which the plaintiff has been in peaceful undisturbed and uninterrupted possession user and occupation since the year 1970.
- b) An order of inhibition prohibiting the defendant from alienating transferring or in any other way however dealing with this parcel of land subject matter herein until this suit is heard and determined.
- c) Costs of this suit.

On 19th April 2005 the defendant filed a replying affidavit opposing the plaintiff's claim.

PLAINTIFF'S CASE.

The plaintiff testified on oath and stated that she knows the defendant in this case. He stated that the defendant's husband (deceased) sold him a piece of land situated at Mugundo location within Thuura area measuring approximately an acre. He stated that he bought the said piece of land in 1970. The seller was Timothy Mbwira. He then took possession of the property until 2005 when the defendant and her son claimed that the property belongs to them. The plaintiff then filed the instant suit. The plaintiff stated that he has been doing farming on the suit land. He is planting maize and beans. He produced a green card for the suit property as P exhibit No. 1.

On cross examination, the plaintiff stated that he lives in another parcel of land in Ngonyi being parcel No. 940. He stated that the son of the defendant is the one cultivating the suit property currently. The son of the defendant started utilizing the suit property in 2005.

P.W 2 was M'Muchai M'Ringera who was referred his witness statement filed in court on 12/06/2017 which was adopted in this evidence. In that statement the witness stated that he saw the plaintiff bought a parcel of land measuring 9 acres from one timothy Mbwiria at a consideration of Kshs. 3,000/= which the plaintiff paid in full.

The witness also stated that at the time of purchase the land was in the name of the vendor but the title had not been issued. He stated that it was a term of the agreement between the plaintiff and the seller that the vendor will transfer the land upon issuance of the title. He also stated that the title deed was issued in respect of the suit property No. Nyaki/Thuura/1507 in 1973 but the vendor refused to transfer the land to the plaintiff despite numerous promises. The plaintiff later informed him that the vendor's sons chased him from the suit property.

P.W 3 was M'Iringo M'Kirichiu who also testified on oath and stated that he was aware that the plaintiff had purchased the suit property and that he was utilizing the same. He stated that he had been engaged by the plaintiff to do some work.

DEFENDANTS CASE

The defendant stated on oath that the land in question registration no. Nyaki/Thuura/1507 belongs to her. She stated that she acquired the suit property by way of transmission through succession cause No. 177/1991. She produced the green card, title deed, gazette Notice No. 909 of

6th March 1992 certificate of confirmation of grant, death certificate No. 355, 877 and numerous lease agreements. She stated that the suit land was initially registered in her husband's name Timothy Mbwiria (deceased). She stated that it is not correct that the plaintiff has lived in the suit land for more than 12 years. She stated that her son is living in the suit land where he has constructed a semi-permanent house. She produced photographs contained in her further list of documents as D exhibit No. 8 and 9 respectively.

D.W 2 was Denis Mugambi who stated that the suit property Nyakii/Thuura/1507 is registered in his mother's name who is the defendant herein. He stated that when his mother told him about the land, he checked and found out that the plaintiff had leased it to some people around 2005. He reported to the area chief who summoned the plaintiff and the people he had leased the suit property. After perusing these documents the plaintiff was directed by the chief to refund the money to the people whom he had purportedly leased the suit property. Those people then vacated the suit property.

He stated that he is the one occupying the suit property where he has built a semi-permanent house. He has also connected water. He stated that the plaintiff does not live in the suit property.

D.W 3 was Joseph Kaaria Igweta. He testified on oath and stated that in 2005, he was working as assistant chief of Rwanyange sub location when he received a complaint by M'Muugania M'Twaruchiu (plaintiff) who reported that there was someone who was chasing him from his land. He stated that Denis Mugambi (d.w 2) was chasing him. He summoned the said Denis Mugambi and the complainant and told them to come with any documents in respect of the suit land. He said that Denis Mugambi came with a title deed in the name of Beatrice Tirindi whom he explained was his mother who is also the defendant in this case.

The plaintiff explained to him that he was the owner of the land and that he had leased the land to some tenants who included one Jacob Karuru. The witness heard the parties and ruled that the land belonged to the registered owner who was Beatrice Tirindi. He produced minutes of that meeting and the decision he made (d exhibit No. 6). The witness also ruled that those who had been leased the property by the plaintiff should be refunded their money. He visited the suit property and found that there was nobody living inside.

D.W 4 was Jacob Kalulu Ituamwari. He recalled that sometime in 2004, he was leased a portion of the suit land by the plaintiffs. In 2005 Denis Mugambi (D.W 2) told him that the land belonged to his father. He decided to enter into a lease agreement with Denis Mugambi. Later, Denis settled in the suit land. He referred to his witness statement recorded 21/6/2017 on which was adopted in his evidence. He stated that they went to the chief's office where the plaintiff agreed to refund them their money for leasing the suit property.

D.W 5 was Joshua Kimathi who stated on oath that he is a neighbor to land Parcel No. Nyaki/thuura/1507. He stated that the said property is being occupied by the defendant's son one Dennis Mugambi who has done several developments which include construction of a semi-permanent house, cattle rearing, sheep, goats, pigs and chicken keeping. He also stated that the said Dennis Mugambi has planted trees and connected water on the land.

PLAINTIFF SUBMISSIONS

The plaintiff through the firm of Mithiga & Kariuki advocates submitted that the plaintiff has proved his case on the ingredients for adverse possession on a balance of probabilities. The learned counsel submitted that all credible evidence was lead showing that the plaintiff was in quiet and uninterrupted user and occupation of the suit land since 1970 until 2005 or thereabouts when the defendant's son (D.w 2) together with his mother (D.W1) forcefully evicted him therefrom. He submitted that by the time he was forcefully evicted, the plaintiff had occupied LR NO. NYAKI/THUURA/1507 for over 12 years and that his claim for adverse possession is therefore tenable. He cited the following cases in support thereof.

(1) *Munyaka Kuna company Ltd Vs Bernado Vicezode masi the administrator of the estate of Dominico De Masi (deceased) 2018 eKLR*

(2) *Sammy Lekuyi Adiema VS Charles Shamwali Shishikani (2014) eKLR.*

(3) *Kinyanjui chege & another Vs Mworja Gathuuga (2005) eKL*

In conclusion the counsel sought judgment to be granted as prayed in the originating summons.

DEFENDANTS SUBMISSIONS.

The defendant through the firm of Mbogo & Muriuki advocates submitted that the plaintiff has not proved his claim on a balance of probabilities and that the same ought to be dismissed with costs.

He cited the following cases in support of their position.

(1) *Benson Mukuwa Wachira vs the assumption sisters of Nairobi registered trustees. (civil appeal No. 121 of 2006 (Nairobi) unreported)*

(2) *M'mbaoni M'thaara Vs James Mbaka ELC No. 110 of 2017 (chukka (unreported).*

DISPOSITION

The plaintiffs claim is hinged on the doctrine of adverse possession. In his testimony the plaintiff stated that he bought the suit property from

the defendant's late husband Timothy Mbwiria sometimes in the year 1970.

The plaintiff also stated that he took possession of the suit property and started farming. He however did not produce any sale agreement in his evidence. He called M'Muchai M'ringera who was one of the witnesses during the purported sale transaction (P.w 2). The said witness however stated that the vendor did not transfer the land to the plaintiff immediately but was agreed that the seller was to transfer the land upon issuance of the title.

In the case of **Samuel Miki Waweru Vs Jane Njeri Richu, civil appeal No. 122 of 2001(unreported)** it was held as follows-;

“In our view where a purchaser of land in controlled transaction is permitted to be in possession of the land by the vendor or lessor pending completion and the transaction, thereafter becomes void under section 6(1) of the land control Act for lack of consent of the land control Board, such permission is terminated by the operation of land and the continued possession, 1s not illegal becomes adverse from the time the transaction becomes void”

In this case, the plaintiff has stated that he bought the suit property LR. NO. NYAKI/THUURA/1507 in 1970. However he did not produce any sale agreement. The purported sale of the suit property in my view is untenable as there can be no lawful disposition of interest in land without an agreement in writing signed by the parties. The plaintiff's entry and the occupation in the absence of a sale agreement in writing can be construed to have been a consensual occupation of the suit land by the original registered owner (Timothy Mbwiria). The plaintiff's possession and or occupation could only become adverse and begin to run the moment the permission or licence is determined. In this case the plaintiff's/or occupation and possession of the suit property was terminated in the year 2005 when the defendant's son Dennis Mugambi took over possession and occupation of the same. Prior to 2005 the plaintiff's possession and occupation of the suit property was not adverse until it was determined in the year 2005.

The totality of my evaluation of the evidence and the applicable law is that the plaintiff has not proved his claim on adverse possession on the required standard and this suit is hereby dismissed with costs.

Read and signed at Meru in the open court this 28th February, 2019.

HON. E.C CHERONO

ELC JUDGE.

In presence of

1. M/s Rimita Holding brief for M. Kariuki for plaintiff
2. Defendant/ advocate (absent)
3. Kananu – C.c present