



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL SUIT NO 90 OF 2010 (O.S)

ISAIAH MUTEA M' ITUNGA.....APPLICANT

-V-

FRANCIS KAIRETHIA IBERE1ST RESPONDENT

PETER MUTHAMIA KAIRETHIA.....2ND RESPONDENT

JUDGMENT

1. The Plaintiff instituted this suit by way of an Originating Summons dated 30th June 2010, seeking determination of the following questions;

- a) Whether the Applicant herein has acquired Kianjai/Thau/153 by way of adverse possession having been in possession prior to 1984'**
- b) Whether the name of the 1st respondent in title deed of Parcel Kianjai/Thau/153 should be cancelled and in his place the applicants name be entered as the proprietor.**
- c) Whether the applicant is entitled to be paid the costs of this suit.**

2. The Defendants have opposed the suit by way of replying affidavits filed in court on 26th July 2012, deposing inter alia t plaintiff never lived on the suit land, that no portion of this land was ever sold to him and that 1st defendant is the one who has occupied this land since 1968 with his family. 1st defendant further contended that he had already distributed the land to his children and each child had a share on the ground.

3. **PW1** was Isaiah Mutea, the plaintiff. He adopted his witness statement filed in court on 3rd May 2016. His testimony is that in 1984, he bought two acres out of land parcel no. **KIANJAI/THAU/153** from the 1st defendant and he paid the whole purchase price and was granted possession thereof. He avers that they signed an agreement but the same got burnt when his house caught fire. He further contended that he had been in occupation of this land since 1984.

4. **PW2** was Lucy Kinganga, the area chief of Thau location. She testified that she knew the parties herein as they were resident in her area and that she had written a letter concerning the dispute. This letter was produced as plaintiff exhibit 3.

5. **PW3**, one John M' Ibunga testified and also adopted his statement recorded on 3.5.2016 as his evidence. He avers that plaintiff did buy the suit land and he even stocked building materials there. During cross examination, PW3 stated that plaintiff and his family have never stayed on the suit land but they used to come to work on the said land. He further contended that the plaintiff had built a timber house and a tank. Pw3 is aware that plaintiff was chased away from the suit land but he doesn't know when this happened.

6. **PW4**, one Charity Karuthu adopted her statement recorded on 3.5.2016 as her evidence. She avers that plaintiff had land at Nkereche which he bought in 1984 and that he was on this land until 2010, when the 2nd defendant chased him away.

7. Defendants gave evidence and they also relied on their Replying affidavits filed on 26.7.2012. It has emerged that 1st defendant is a father to 2nd defendant. **DW1**, Francis Kairethia testified that he never sold any land to the plaintiff, but he had leased the suit land to plaintiff. He further stated that he is the registered owner of the suit property where he has lived with his family. It was his further evidence that the plaintiff never lived on the land but would only come to the land and farm and go.

8. **DW2**, Peter Muthamia Kaireithia stated that he used to see the plaintiff tiling his father's land and that his father used to tell him that he had leased the same to the plaintiff for 5 years so that he could get money for school fees.

9. The parties were directed to file and serve submissions and this order was complied with. It was submitted for the plaintiff that since 1984 to 2007 when the interruptions began, there was sufficient time to grant adverse possession regardless of how occupation or possession was acquired and that the defendant knew all along and did nothing about it possibly because they knew they had legal means of throwing the plaintiff out of his land, thus resulting to those illegal means and denying the facts as they are.

10. On the other hand, it was submitted for the defendants that this matter was filed 3 years after the plaintiff left the suit land and that as such, it could not be said that the occupation was open and continuous without interruption as there were constant disputes with the plaintiff and the defendants in this matter and the chain had been cut by moving out of the land for three years before filing of the suit. It is further submitted that plaintiff's lease was only for 1 acre for a period of 5 years. Consequently. The defendants urged the court to dismiss this suit with costs.

Determination

11. I have carefully considered the rival pleadings, the evidence and submissions by the parties herein. The plaintiff essentially claims to have acquired the suit property by way of adverse possession. The plaintiff's evidence was that he had bought the land from the defendant in 1984 and was granted possession thereof immediately till 2010 when he was evicted by the 2nd defendant. In cross examination he stated that he did not have the agreement as the same got burnt. He further stated that the chief's letter confirmed that he lived there. Contrary to the plaintiff's evidence that he lived on the suit property, his witnesses appeared to contradict him. **PW3** stated as follows in cross examination;

“He used to come and farm on the land (Isaiah) and he would go away. He was cultivating and going away. He never lived on that land. His family never lived there. Mutea used to come with his workers and go away.”

PW3 could not tell when plaintiff stopped cultivating the land and he could not tell the year he was chased away. The assertion by **PW3** that the plaintiff would only come, farm and go away solidifies and corroborates the 2nd defendant' evidence that he used to see the plaintiff come and farm on the land which he had leased from the 1st defendant.

12. **PW4** similarly seemed to contradict herself when she stated as follows in cross examination;

“When Mutea bought the land I was present. The agreement was made in my absence. I was told by Mutea that he bought the land. I was not present when the agreement was made.”

She further confirmed just like **PW3** that the plaintiff never lived on that land. All these contradictions raise doubts as to the credibility of these witnesses who claimed to be neighbors of both the plaintiff and the defendant.

13. Defendants' evidence on the other hand that they lived on the suit property and that 1st defendant had leased a portion of the property to the plaintiff. Even though the plaintiff contended that he bought the land from the 1st defendant in 1984, one wonders why he never took any action to have the same transferred in his name until 2010, when he filed the instant summons. There was no evidence that the defendant had refused to transfer the same or frustrated transfer of the same. The only logical inference to make is that no sale actually took place.

14. The requirements for Adverse Possession in Kenya have been set out in the case of **Mbira –v- Gachuhi (2002) IEALR 137** in which the court held that:

“.....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 statutory prescribed period without interruption....”

15. Likewise, in **Jandu –v- Kirplal & Another (1975) EA 225**, it was held:

“.....to prove title by Adverse Possession, it is not sufficient to show that some acts of Adverse Possession must be adequate in continuity, in publicity and in extent to show that it is Adverse to the owner. It must be actual, visible, exclusive, open and notorious. ”

16. The ingredients were recently discussed by the Court of Appeal in the case of **Mtana Lewa –v- Kahindi Ngala Mwangandi (2015)eKLR** where it was held that:

“Adverse Possession is essentially a situation where a person takes Possession of land, asserts rights over it and the person having title to it omits or neglects to take a action against such person in assertion of his title for a certain period, in Kenya 12 years.”

17. It is also a well settled principle that a party claiming Adverse Possession ought to prove that this Possession was “*nec vi, nec clam, nec precario*,” that is, **peaceful, open** and **continuous**. The Possession should not have been through force, it should not be in secrecy and same is without the authority or permission of the owner.

18. In the instant case there was no evidence that the plaintiff had bought land from the 1st defendant. Even if it were to be assumed that such sale took place, there is no evidence that plaintiff took possession or was in control of the suit land to the exclusion of all others. Plaintiff's witness no. 3 (John), had stated that plaintiff had tried to fence the land but the posts were stolen and removed. PW3 was again sent to get new fencing posts and he, PW3 fenced a second time. But again, these posts too were stolen. It follows that the alleged two acres of land being claimed by plaintiff are not clearly demarcated on the ground.

19. It has also emerged that plaintiff is no longer on the land. He was evicted. In the case of **Elija Ikaha Ikanjo vs. Joseph Ngoina Asutsa (2006) eKLR** it was held that;

“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 the trespasser does interrupt and stop the time.

20. It appears that plaintiff had long been evicted before this suit was filed. In his submissions, the year mentioned is 2007.

21. **The upshot of the foregoing is that the plaintiff's suit is without merit and the same is hereby dismissed with costs to the defendants.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 17TH DECEMBER, 2018 IN THE PRESENCE OF:-

C/A: Kinoti

Karanja for plaintiff

HON. LUCY. N. MBUGUA

ELC JUDGE