



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 104 OF 2014

JOSEPH MWANGI MUTAHI.....PLAINTIFF

VERSUS

GERALD MUMO MUTAHI.....DEFENDANT

JUDGMENT

The plaintiff moved this Court by his Originating Summons dated 24th April 2014 claiming to have acquired 0.80 each (sic) out of land parcel No. KIINE/SAGANA/2387 by way of adverse possession and for a declaration that:-

1. ***He be registered 2 HA (5 acres) out of land parcel No. KIINE/SAGANA/2387 by way of adverse possession.***
2. ***The Deputy Registrar of this Court do execute all the relevant documents to facilitate transfer of the said parcel of land to the applicant.***
3. ***That costs of this suit be provided for.***

According to his supporting affidavit, the land parcel No. KIINE/SAGANA/2387 (hereinafter the suit land) belonged to their entire family having been developed since 1993 and he has not been threatened by any eviction and he was therefore surprised to learn that the said land had already been mysteriously registered in the names of the defendant who now seeks to evict him from the same.

Therefore, having lived on and developed the suit land for the last 21 years, he sought legal advice and was informed that he could claim a portion thereof by virtue of adverse possession.

The defendant resisted the claim and in his replying affidavit, he deponed that the suit land was part of land parcel No. KIINE/SAGANA/283 which belonged to MUMO BARAGU a brother to his grandfather MBUYU MUTAHI. That since his grandmother PRISCILLAH MUTHONI MBUYU did not have any male children, she married the defendant's mother SUSAN WANGARI MUTAHI according to Kikuyu customs and so his grandmother took him as her husband and gave him ten (10) acres out of parcel No. KIINE/SAGANA/283 as a gift while his brothers and sisters were also given land elsewhere including the plaintiff who is supposed to get his portion from land parcel No. KIINE/GACHARO/399 which is registered in the names of their deceased father. He denied that the plaintiff has been in actual occupation of the suit land or developed it adding that infact the plaintiff resides on land parcel No. KIINE/GACHARO/399 which he was given since he was disrespectful and abusive towards their grandmother. He added that since he was registered as the proprietor of the suit land in 1993, the plaintiff has never claimed nor cultivated it.

Directions were taken and parties having exchanged statements and other documents, the trial commenced on 17th March 2015 with the plaintiff confirming that the defendant is his brother and that their grandmother gave them the suit land to share equally though it was registered in the defendant's names. He testified that he has been living on the suit land since 1993 where he grows rice and also harvests stones from a quarry therein. He also grows trees. He therefore claims five (5) acres out of the suit land as their grandmother had ordered and he denied that he has another parcel of land known as KIINE/GACHARO/399 or that he had been disrespectful to their grandmother. He produced as evidence the certificate of search in respect to the suit land and photographs.

The plaintiff called as his witnesses his mother SUSAN WANGARI MUTAHI (PW2), his two brothers SIMON MAINA MUTAHI (PW3) and CHARLES MUGO MUTAHI (PW4), his aunt EUNICE MICHERE MURIMI (PW5) and DUSTAN KANYIARU WAGAKOMI (PW6) a member of their clan.

The evidence of SUSAN WANGARI MUTAHI (PW2) was that the suit land was given to the plaintiff and defendant by their grandmother to share equally. Her evidence was supported by the plaintiff's two brothers SIMON MAINA MUTAHI (PW3) and CHARLES MUGO MUTAHI (PW4) who all testified that the plaintiff has been occupying and utilizing five (5) acres out of the suit land. They denied that the plaintiff was given land parcel No. KIINE/GACHARO/399. Similar evidence was given by EUNICE MICHERE MURIMI (PW5) who said that the original land was twenty and a half (20 ½) acres out of which the plaintiff and defendant were given five (5) acres each by their grandmother and that the plaintiff has been cultivating part of the land for many years. DUSTAN KANYIARU WAGAKOMI (PW6) also testified that the suit land was given to the plaintiff and the defendant to share equally with each getting five (5) acres.

in his defence, the defendant told the Court that the plaintiff is infact entitled to five (5) acres out of land parcel No. KIINE/GACHARO/399 where he has a home and denied that the plaintiff has lived on the suit land for twenty one (21) years.

He called as his witness ANTHONY KABIRU KABUKI (DW2) and CHARLES KANIARU GAKOMI (DW3) who both confirmed that the suit land was given to the defendant by the parties' grandmother and that the plaintiff lives on parcel No. KIINE/GACHARO/399. Both witnesses confirmed that none of the parties have a home on the land but the defendant utilizes it.

At the end of the trial, both Mr. Maina advocate for the plaintiff and Mr. Mwaura advocate for the defendant filed their respective submissions.

I have considered the evidence by both sides together with their counsels' submissions.

From that evidence, the following are not in dispute:-

1. **The suit land is registered in the defendant's names.**
2. **The parties are siblings and the suit land originally belonged to their grandmother.**

The point of departure is that while the plaintiff claimed in his evidence in chief that he has been living on the land and cultivating it since 1993, the defendant's evidence is that the plaintiff's entitlement is infact some five (5) acres out of parcel No. KIINE/GACHARO/399 where he has constructed a home.

This is a claim for adverse possession and **Section 38 (1) of the Limitation of Actions Act** provides as follows:-

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, 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 combined effects of the provisions of **Sections 7, 13 and 17 of the Law of Limitation of Actions Act** is to extinguish the titles of the proprietor of land in favour of an adverse possessor of the same at the expiry of twelve (12) years of that adverse possession. Similarly, **Section 28 (h) of the new Land Registration Act 2012** recognizes some of the overriding interests as those acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions by prescription. It is also provided under **Section 7 of the Land Act 2012** as follows:-

“Title to land may be acquired through

- a. -
- b. -
- c. -
- d. ***prescription”***

I have cited the above legal provisions because although the Originating Summons makes no reference to the law, it is clear from the pleadings that this is a claim for adverse possession.

What is required of the plaintiff to prove a claim for adverse possession? In **KASUVE VS MWAANI INVESTMENT LTD & FOUR OTHERS 2004 1 K.L.R 184**, the Court of Appeal re-stated that in order to prove such a claim, the plaintiff must show

“... that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition” emphasis mine.

And in **WAMBUGU VS NJUGUNA 1983 K.L.R 173**, the Court of Appeal held as follows:-

“In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his rights 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.

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”

emphasis added

Therefore, to prove a claim for adverse possession, the plaintiff would need to prove that he ***“is in exclusive and actual possession or occupancy of the land for a period of over twelve (12) years continuously and un-interrupted without the consent of the owner who has either been dispossessed or discontinued his possession of the same”***

It is clear from the evidence herein that although the plaintiff in his testimony in chief stated that he has been living on the suit land since 1993, the totality of the evidence from both sides is that infact none of the parties live on the suit land. Indeed even from the photograph produced by the plaintiff, there is no homestead on the land. The plaintiff said the following in cross-examination by Mr. Mwaura:-

“Currently, I live just across the road from the land subject of this suit”

Later on he said:-

“I am living on land belonging to my grandfather Charles Muiu. He is also called Muiu Mbaragu. The land is known as KIINE/GACHARO/399 but I left there a long time ago”

The defendant on his part also admitted that he doesn't live on the suit land. In cross-examination by Mr. Maina he said:-

“I have not put up a house on the land subject of this suit”

What ran through the evidence of the witnesses called by both parties is that the two of them either harvest stones or carry out some other activity thereon. The pertinent issue that arises therefore is whether the plaintiff has dispossessed the defendant of the suit land or even a defined portion of it or if indeed the defendant has discontinued his possession of the same – see KASUVE and also WAMBUGU cases (supra). From the evidence on record it does not appear to me that the plaintiff has dispossessed the defendant of the suit land as known in law. If, as is clear from the evidence herein, both parties have been carrying on some activity on the suit land, then the plaintiff cannot be said to have dispossessed the defendant of the same. In the case of JOSEPH MACHARIA MWANGI VS JONAH KABIRU C/o KABUTHI C.A CIVIL APPEAL NO. 141 OF 2009 (NYERI), the Court of Appeal addressed the issue as follows:-

“A claimant under Section 38 (1) of the Limitation of Actions Act must prove possession and show that it was exclusive, continuous and uninterrupted for a period of not less than twelve (12) years. Where possession is not exclusive, the doctrine of adverse possession cannot hold. Where possession is not continuous for twelve years, adverse possession cannot hold. Where possession is not adverse to the title of the owner, adverse possession cannot hold. Moving into another person's land without such person's consent and carrying out cultivation from time to time without showing that such cultivation was continuous and without interruption for 12 years may not meet the threshold under the doctrine of adverse possession. For that reason, going into the land of another periodically to cultivate may not amount to adverse possession even where the total period of cultivation may amount to 12 years unless it is shown that cultivation was conducted continuously from season to season and the trespasser had control of the land claimed throughout”

In my view, the situation that obtained in the JOSEPH MWANGI case (supra) is not too dissimilar to what obtains in this case. Each of the parties has utilized the land in one way or the other but it cannot be said that the plaintiff's utilization has been such as would amount to dispossessing the defendant of the suit land or even a portion of the same that can be identified – see GITHU VS NDEETE 1984 K.L.R 776.

In the recent case of SAMUEL KIHAMBA VS MARY MBAISI C.A CIVIL APPEAL NO. 27 OF 2013 (KISUMU), the Court of Appeal stated as follows:-

“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 licence or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the 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”

As I have indicated above, I see no evidence of the plaintiff having dispossessed the defendant of the suit land or any portion thereof.

From the evidence of the plaintiff and his witnesses, it is suggested that the defendant holds five (5) acres of the suit land in trust for him. In his evidence in chief, the plaintiff said:-

“My grandmother told me that the defendant was registered as owner of the land but was to share it with me”

And in her testimony, SUSAN WANGARI MUTAHI (PW2) said:-

“The land was to be divided equally among them and each was to get 5 acres”

Similar evidence was given by SIMON MAINA MUTAHI (PW3), CHARLES MUGO MUTAHI (PW4), EUNICE MICHERE MURIMI (PW5) and DUSTAN KANYIARU WAGAKOMI (PW6). This was of course disputed by the defendant who testified that infact the plaintiff was given five (5) acres out of land parcel No. KIINE/GACHARO/399. The pleadings herein do not relate to any claim in trust. The plaintiff’s case is based on adverse possession as is clear from the Originating Summons which I have referred to at the beginning of this judgment. It is a cardinal principle of law that parties are bound by their pleadings and cannot be allowed to raise a fresh claim in the course of the trial unless the said pleadings are amended. The importance of this principle is due to the fact that parties being adversaries, they must formulate their own cases so that each party knows what he is required to meet and similarly, the Court can only pronounce itself on the issues raised by the parties. In the case of **GALAXY PAINTS CO. LTD VS FALLON GUARDS LTD (2000) 2 E.A 385**, it was stated as follows:-

“It is trite law that issues for determination in a suit generally flow from the pleadings and the trial Court may only pronounce judgment on the issues arising from the pleadings and such issue as the parties have framed for the Court’s determination (see also ODD JOBS VS MUBIA E.A 476”

Therefore, while there was a reference by the plaintiff and his witnesses about the suit land having been given to the parties to share equally, this Court can neither investigate that claim nor make any pronouncement on it because that would be going out of the parties own pleadings which is not permitted.

Ultimately therefore, having considered all the evidence herein, I am not persuaded that the plaintiff has made out a case for adverse possession against the defendant with respect to the suit land or any portion thereof. He has not met the threshold to warrant the orders sought in his Originating Summons dated 24th April 2014. The plaintiff’s suit is therefore dismissed and since the parties are brothers, I order that each meets their own costs.

B.N. OLAO

JUDGE

26TH FEBRUARY, 2016

Judgment delivered in open Court this 26th day of February 2016.

Mr. Ngangah for Mr. Mwaura for Defendant present

Plaintiff present

Right of appeal explained.

B.N. OLAO

JUDGE

26TH FEBRUARY, 2016