



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NYAHURURU

ELC NO. 383 OF 2017 (O.S)

(FORMERLY NAKURU ELC NO 312 OF 2013 (O.S))

(CONSOLIDATED WITH NYAHURURU SPMCC NO 55 OF 2013)

ELIJAH MAINGI KIMENGERE.....PLAINTIFF

VERSUS

TERESIAH WANJIKU JUMA.....DEFENDANT

(By original action)

AND

TERESIAH WANJIKU JUMA.....PLAINTIFF

-VERSUS-

ELIJAH MAINGI KIMENGERE.....1ST DEFENDANT

TERESIAH WANJIKU KIMENGERE.....2ND DEFENDANT

(By Counter-claim)

JUDGMENT

A. INTRODUCTION

1. This judgment is in respect of two suits which were consolidated for hearing and disposal. The first is **Nakuru HCCC No. 312 of 2013 (O.S) Elijah Maingi Kimengere v Teresia Wanjiku Juma**. The second is **Nyahururu SPMCC No 55. of 2013 - Teresiah Wanjiku Juma v Elijah Maingi Kimengere and Teresiah Mwhaki Kimengere**. Upon consolidation of the suits the originating summons was treated as the main suit whereas the second suit was treated as the counter - claim.

B. THE PLAINTIFF'S CLAIM

2. By an originating summons dated 17th April, 2013 brought under **Section 38 of the Limitation of Actions Act (Cap. 22)**, the Plaintiff sought determination of various questions relating to suit property. The Plaintiff then sought the following orders upon determination of his claim for adverse possession, that is:

a) *That an declaration be issued declaring that the title of Teresia Wanjiku Juma, the Defendant herein, in land Title Laikipia/Kinamba Mwenje Block 1/1331 has been extinguished through adverse possession.*

b) *That a declaration be issued declaring that the Plaintiff is entitled to be registered as proprietor of Land Title Number Laikipia/Kinamba Mwenje Block 1/1331 by adverse possession of the said parcel of land for a period of over twenty two (22) years.*

c) *That the Plaintiff be registered as the proprietor of Land Title Number. Laikipia/Kinamba Mwenje Block 1/1331 in place of Teresia Wanjiku Juma, the Defendant herein.*

d) *That the Defendant be ordered to execute the transfer and all necessary documents to effect transfer of Land Tile Number Laikipia/Kinamba Mwenje Block 1/1331 to the Plaintiff and in default the court do authorize the Deputy Registrar of this court to execute all such documents.*

e) *That the costs of this suit be borne by the Defendant*

3. The originating summons was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Elijah Maingi Kimengere on 17th April, 2013 and the exhibits thereto. The Plaintiff contended that he had been in continuous, exclusive and open possession of the suit property for a period of 22 years. It was further contended that he had developed the suit property over the years without interruption or objection by the Defendant who was the registered proprietor thereof and that she had not taken steps to assert her rights to the suit property.

C. THE DEFENDANT'S COUNTERCLAIM

4. By a plaint dated 12th April, 2013 the Defendant pleaded that she was the registered proprietor of the suit property which was previously known as Plot. No. 169B. She further pleaded that on some unknown date the Plaintiff and his daughter wrongfully entered upon the suit property and constructed a dwelling house thereon in violation of the Defendant's proprietary rights.

5. The Defendant further pleaded that the Defendants had wrongfully blocked a public road separating the suit property and Plot No 170B and annexed portions of her property without lawful justification or excuse. The Defendant's case was that the Plaintiff's said trespass, annexation, occupation and interference was illegal hence he should be ordered to vacate and desist from further interference. The Defendant consequently sought the following reliefs against the Plaintiff:

(a) *A declaration be issued that the Plaintiff is the absolute owner of L.R Laikipia/Kinamba Mwenje block 1/1331 and the Defendants have no interest thereon whatsoever.*

(b) *The Defendants be ordered to vacate L.R Laikipia/Kinamba Mwenje Block 1/1331 failing which they be evicted.*

(c) *The Defendants be ordered to reinstate the road of access between the Plaintiffs Plot No. Laikipia/Kinamba Mwenje Block 1/1331 and the Defendants Plot No 170B failing which the Land Registrar to open it up at the Defendant's expense.*

(d) *A permanent injunction be issued restraining the Defendants, their agents, servants and/or employees from interfering with L.R Laikipia/Kinamba Mwenje Block 1/1331 whatsoever.*

(e) *Costs of the suit.*

(f) *Any further or other relief this court may deem just to grant.*

C. THE PARTIES RESPONSES TO THE SUIT AND COUNTER CLAIM

6. As expected, the Defendant disputed the Plaintiff's claim for adverse possession vide a replying affidavit sworn on 23rd May, 2013. By virtue of the order for consolidation and directions given prior to the hearing of the two suits, the Defendant's claim was to be treated as a counter - claim whereas the Plaintiff's originating summons was to be treated as the main suit.

7. The Plaintiff also filed a defence in which he contested the Defendant's claim. He pleaded that he first took possession of the suit property in 1975 whereby he fenced it, built dwelling houses and planted coffee and trees thereon. He further pleaded that the 2nd Defendant in the counter claim was his daughter who was in possession with his permission. The Plaintiff denied blocking a public road separating Plot No. 169B and 170B and put the Defendant to strict proof thereof.

8. It was the Plaintiff's contention that since the Defendant was registered as proprietor of the suit property in 1991, the counter- claim for recovery of the suit property was statute-barred under **Section 7 of the Limitation of Actions Act (Cap. 22)**. It was also the Plaintiff's contention that the Defendant's counter claim was incompetent, bad in law and an abuse of the court process.

D. THE SUMMARY OF THE EVIDENCE AT THE TRIAL

(a) The Plaintiff's evidence

9. The Plaintiff testified at the trial as PW1. He testified that he was allocated Plot Nos. 169B and 170B each measuring 10 acres in 1975 by virtue of being a member of Laikipia West Farmers Co. Ltd. It was his evidence that upon taking possession in 1975 he took possession and started utilizing and developing both parcels. It was further his evidence that when he lost allocation documents for Plot No. 169B he reported the loss to the Location Chief Juma Gakure, who was the Defendant's husband. He was later surprised to discover that the Defendant was registered as proprietor of Plot No. 169B.

10. The Plaintiff testified that although the Defendant was registered as proprietor, in 1991, he and his family members continued to occupy and utilize Plot No. 169B (*the suit property*) and that the Defendant has never occupied or utilized any portion thereof. The Plaintiff's witnesses supported the Plaintiff's evidence in various respects especially regarding the occupation and user of the suit property.

b. The Defendant's evidence

11. The Defendant testified at the trial as DW1. She relied upon her replying affidavit sworn on 23rd May, 2013 in answer to the originating summons and her witness statement dated 12th April, 2013 and adopted them as her evidence in chief. She stated that the suit property was rightfully hers by virtue of having been allocated by Laikipia West Farmers. Co. Ltd. It was her evidence that she could not take possession or utilize the suit property because the Plaintiff has encroached upon it by building houses, felling trees and cultivating the land.

12. It was the Defendant's evidence that she discovered the Plaintiff's encroachment in 2013 since she never used to visit the property prior to that year as she was sickly. She stated during cross examination that she did not know when the Plaintiff built the houses. She could not tell when the Plaintiff entered the suit property or when he started cultivating it. She further conceded that she did not know what was happening on the suit property between 1991 and 2013. She further conceded that she had never utilized the suit property and that it was the Plaintiff and his family who were still occupying and utilizing it.

13. The Defendant's second witness PW2 testified that it was the Plaintiff's daughter who was in possession and not the Plaintiff himself. He stated that there were no houses on the suit property and that the Plaintiff's children only cultivated and leased out part of the suit property. It was further his evidence that the Plaintiff's daughter Mwhaki only utilizes about ½ acre of the suit property and that the rest was an open grazing field.

E. DIRECTIONS ON SUBMISSIONS

14. Upon conclusion of the hearing the parties were given 21 days each within which to file and exchange their submissions. The record shows that the Plaintiff filed his submissions on 8th November, 2021 whereas the Defendant filed hers on 28th October, 2021.

F. THE ISSUES FOR DETERMINATION

15. The court has considered the pleadings, evidence and documents in the consolidated suits and is of the opinion that the following issues arise for determination herein:

- (a) **Whether the Plaintiff has proved his claim for adverse possession to the required standard.**
- (b) **Whether the Plaintiff is entitled to the reliefs sought in the originating summons.**
- (c) **Whether the Defendant has demonstrated her ownership of the suit property.**
- (d) **Whether the Defendant's claim is time-barred under the Limitation of Action Act (Cap. 22).**
- (e) **Whether the Defendant is entitled to the reliefs sought in the counter-claim.**
- (f) **Who shall bear costs of the suit and counter-claim.**

G. ANALYSIS AND DETERMINATION

(a) Whether the Plaintiff has proved his claim for adverse possession to the required standard

16. The court has considered the material and submissions on record on this issue. Whereas the Plaintiff submitted that he had established the elements of adverse possession, the Defendant contended otherwise. The Defendant put emphasis on the fact that the Plaintiff was not physically in possession and that it was his daughter, Serah Mwhaki, who was in occupation of the suit property. It was further submitted that the said daughter had not filed her own claim for adverse possession.

17. The elements of adverse possession were enunciated in the following cases: **Wambugu v Njuguna [1983] KLR 172; Githu v Ndeete [1984]KLR 776; and Kasuve v Mwaani Investments Ltd and 4 others [2004]1KLR 184**. In the case of **Kasuve v Mwaani Investment Ltd (supra)** the elements of adverse possession were summarized as follows:

"...and in order to be entitled to land by adverse possession, the claimant must prove 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 dispossession of the owner or by the discontinuation of possession by the owner on his own volition, Wanja v Sakwa No. 2 [1984] KLR 284. A title by adverse possession can be acquired under the Limitation of Actions Act for part of the land..."

18. The court has noted that even though the Defendant disputed the Plaintiff's possession of the suit property in her written submissions, it is abundantly clear from her averments in the plaint that the Plaintiff had trespassed and entered upon the suit property and cultivated it. Infact, she pleaded in paragraphs 8 and 10 of the plaint that the Plaintiff had wrongfully annexed and occupied the suit property. That is the reason why she prayed for an eviction order against the Plaintiff.

19. At the trial hereof, the Defendant testified that although she was the registered proprietor, she was unable to take possession and utilize the suit property because the Plaintiff and his daughter were the ones occupying and utilizing the property. She conceded in cross examination that the Plaintiff had already built dwelling houses on the suit property and that he was cultivating it. She also conceded that she had never occupied and utilized the suit property since her registration as proprietor.

20. There is no evidence on record to demonstrate that the Plaintiff's occupation was with the consent or permission of the Defendant. The Plaintiff's evidence was that he took possession of the suit property way back in 1975 even before the Defendant was registered as proprietor thereof. The Defendant did not allege that the Plaintiff and his daughter were in occupation with her consent either. In fact, from the Defendant's own pleadings she termed the Plaintiff's occupation as trespass.

21. The material on record further indicates that the Plaintiff's occupation as been open, continuous and uninterrupted. Although the Defendant was registered as proprietor in 1991 she did not assert her proprietary rights until April 2013 after passage of 22 years since she became entitled to immediate possession.

22. The court is satisfied on the basis of the material on record that the Plaintiff has adequately demonstrated his claim for adverse possession as required by law. His occupation has been open and continuous for a period of at least 22 years. His occupation was definitely hostile in that it was without the consent of the registered proprietor. By taking possession, building houses, cultivating crops and even leasing out portions thereof to third parties the Plaintiff's actions were inconsistent with the rights of the registered proprietor.

(b) Whether the Plaintiff is entitled to the reliefs sought in the originating summons

23. It is evident from the pleadings and the material on record that the Plaintiff's claim was hinged entirely on adverse possession. Having proved his claim to the required standard, it would follow that he is entitled to the reliefs sought to facilitate his registration as proprietor of the suit property.

(c) Whether the Defendant has demonstrated her ownership of the suit property

24. The Defendant submitted that there was abundant evidence on record that she was the absolute registered proprietor of the suit property hence the Plaintiff had no interest therein whatsoever. It was submitted that the Defendant was entitled to all the rights and privileges enjoyed by a registered proprietor under Section 24 of the Land Registration Act, 2012.

25. There is no doubt from the pleadings and material on record that the Defendant is the registered proprietor of the suit property. The Defendant's registration was never disputed by the Plaintiff. In fact, the Plaintiff exhibited copies of the certificate of official search and land register to demonstrate that the Defendant was the registered proprietor. The only point in issue is whether the Plaintiff had acquired any overriding interest over the Defendant's property. The court therefore finds and holds that the Defendant is the registered proprietor of the suit property.

(c) Whether the Defendant's claim for recovery of the suit property is time-barred

26. The Plaintiff in his defence pleaded that the Defendant's counter-claim was time-barred under Section 7 of the Limitation of Actions Act (Cap. 22). Section 7 stipulates as follows:

“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 occurred to him or, if it first occurred to some other person through whom he claims, to that person.”

27. The extract of the land register shows that the Defendant was registered as proprietor of the suit property on 21st March, 1991 and a title deed issued to her on the same date. The court is of the opinion that is the effective date when the Defendant's cause of action arose. The Defendant had up to 20th March, 2002 (i.e. 12 years) to assert her proprietary rights either by making an effective entry or filing suit for recovery against the Plaintiff. So, by the time the Defendant filed her plaint dated 12th April, 2013 on 15th April, 2013 it was already out of time by more than 10 years. The court is thus satisfied that the Defendant's counter-claim is effectively statute-barred under Section 7 of the Limitation of Actions Act. It should be noted that the 12 years period applicable to adverse possession is the same period applicable to the instant issue.

28. It is evident from the material on record that the Defendant's counter claim was hinged on her registration as absolute proprietor of the suit property. Although the Defendant is the registered proprietor of the suit property, the court has found and held that the Defendant's claim for recovery of the suit property is statute-barred. The court has further found that the Plaintiff has acquired adverse possession of the suit property under Section 38 of the Limitation of Actions Act. It would, therefore, follow that the Defendant is not entitled to the reliefs sought in her suit. The Defendant's allegation that the Plaintiff had blocked an access road passing between the suit property and Plot No. 170B was not proved since DW2 conceded during cross-examination that there was no blockage. He claimed that the Plaintiff's daughter sometimes prevented passersby from using it.

(e) Who shall bear the costs of the suit and counter-claim

29. Although costs of an action or suit are at the discretion of the court the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287*. The court finds no good reason why the successful litigant should not be awarded costs of the action. Accordingly, the Plaintiff shall be awarded costs of the suit and counter-claim.

H. CONCLUSION AND DISPOSAL

30. The upshot of the foregoing is that the court finds and holds that the Plaintiff has proved his claim for adverse possession of the suit property whereas the Defendant has failed to prove that she is entitled to the orders sought in her claim. Accordingly, the court makes the

following orders for disposal of the suit and counter-claim:

- (a) A declaration be and is hereby made that the Defendant’s title to Laikipia/Kinamba Mwenje Block 1/1331 has been extinguished.
- (b) A declaration be and is hereby made that the Plaintiff, Elijah Maingi Kimengere is entitled to be registered as proprietor of Title No. Laikipia/Kinamba Mwenje Block 1/1331 on account of adverse possession.
- (c) The Defendant shall execute the transfer form and all necessary documents to effect transfer of the suit property to the Plaintiff within 30 days from the date hereof in default of which the Deputy Registrar of the court is hereby authorized to sign all such documents on his behalf.
- (d) The Land Registrar shall cause the Plaintiff, Elijah Maingi Kimengere, to be registered as proprietor of Title No. Laikipia/Kinamba Mwenje Block 1/1331 pursuant to the decree
- (e) The Defendant’s counter-claim be and is hereby dismissed in its entirety.
- (f) The Defendant, Teresia Wanjiku Juma, shall bear the costs of the suit and the counter-claim.

JUDGMENT DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 27TH DAY OF JANUARY, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of

Mr. Njogu for the Plaintiff and Defendants in counter claim

Mr. Kaburu for the Defendants and Plaintiff in the counter claim

CA- Carol

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Y. M. ANGIMA

JUDGE