



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 166 of 2015 (O.S.)

IMMACULATE WAMBIA MUNGAI.....PLAINTIFF

VERSUS

FREDRICK MWAI MWIHIA.....DEFENDANT

JUDGMENT

Summary of facts

Vide originating summons dated 15th December 2015 and supported by the affidavit of even date, the Plaintiff moved to court seeking a declaration of the following orders against the Defendant:

- a) That the Plaintiff has acquired title by adverse possession to land parcel number Mwerua/Baricho/882 measuring 0.40 Ha situate within Kirinyaga County;***
- b) That the said land parcel Mwerua/Baricho/882 be registered in the name of the Plaintiff in place of the Defendant;***
- c) That the costs of the suit be provided for.***

The Plaintiff's prayers are grounded on the following premises:

- i. That land parcel Mwerua/Baricho/882 is a resultant parcel of Mwerua/Baricho/84 which was registered in the name of Joseph Mungai Kihara;
- ii. That the Plaintiff entered into land parcel number Mwerua/Baricho/84 in the year 1962 and has utilized the said land for a period of more than 50 years;
- iii. That the Plaintiff has extensively developed the said land parcel number Mwerua/Baricho/882 which is a resultant of Mwerua/Baricho/84;
- iv. That the said land parcel number Mwerua/Baricho/84 was subdivided in the year 1998 and LR Mwerua/Baricho/882 was transferred to the Defendant;
- v. That the Defendant has never entered the said land since he acquired the title deed and the Plaintiff has been utilizing the said land exclusively to any other person;
- vi. That it is only fair and just that the Plaintiff be awarded the said parcel which she has developed for all those years.

It is the Plaintiff's case that she is the widow of the original registered proprietor of Mwerua/Baricho/882 a resultant parcel of the subdivision of Mwerua/Baricho/84. That the said land parcel Mwerua/Baricho/84 was subdivided in 1998 into several portions, including the suit land. That the original registered proprietor, one Joseph Mungai Kiara died on 25th April 2001. That the Plaintiff obtained letters of administration of the deceased's estate on 11th February 2002. That upon confirmation of grant on 20th September 2002, she became a beneficiary of the suit land, among other subdivisions of the original land parcel Mwerua/Baricho/84. That when she went to process the transmission over the suit land, she discovered that the land had already been registered in the name of the Defendant. It is her case that she entered the land in the year 1962 and has been residing therein since. It is her case therefore that she has satisfied the ingredients of adverse possession against the Defendant and ought to be registered as the proprietor of the suit land.

The Defendant filed his replying affidavit on 30th March 2017. He strenuously opposes the Plaintiff's assertions and prayers. It is his case

that he is the sole registered proprietor of land parcel number Mwerua/Baricho/882 (hereinafter referred to as the suit land). That he was registered as the owner of the suit land on 27th January 1998 after purchasing it from the Plaintiff's husband. He contends that at no time has the Plaintiff been in possession of the suit land. That the Plaintiff cannot on the one hand claim that the acquisition of the suit land was done fraudulently and at the same time seek to prove adverse possession over the same land. That the Plaintiff had in August of 1998 placed a caution over the suit land, which caution was lifted in October 2009. That the failure of the Plaintiff to acknowledge him as the proprietor of the suit land nullifies her claim of adverse possession. He thus urges the court to dismiss the Plaintiff's suit.

By consent, the Parties agreed to file written submissions for consideration by the court. The Plaintiff filed her submissions on 14th April 2021. She reiterates the contents of the originating summons and supporting affidavit. She submits that she has satisfied the requisite conditions necessary for a finding of adverse possession. She further submits that she entered onto the suit land in 1962 and has been residing therein since and has built dwelling houses and extensively developed the suit land. She relies on the decision in **Eunice Karimi Kibunja Vs Mwirigi Mringera Kibunja, Civil Appeal No. 89 of 2009** and **Richard Mugo Kiambo Vs James Muriuki Kiambo, Civil Appeal No. 46 of 2013** in support of the fact that she has proved her case on a balance of probabilities.

The Defendant filed his submissions on 10th May 2021. He reiterates that he is the registered proprietor of the suit land. That he purchased the suit land from the Plaintiff's deceased husband, paid the agreed purchase price and obtained landboard consent. That the title deed was transferred into the joint names of the deceased proprietor and himself awaiting subdivision. That subdivision was done and the Defendant registered as proprietor of the suit land on 27th January 1998. That on 7th August 1998, the Plaintiff lodged a caution against the Defendant's title, claiming beneficial ownership over the suit land. That in addition, she filed a restriction over the suit land on 30th September 2009. That the caution was removed on 29th October 2009 while the restriction was lifted on 6th October 2015. That although he had been registered as a proprietor of the suit land on 27th January 1998, it was not until the restriction was lifted in 2015 that he was issued with a title deed on 7th December 2015. Copies of the title and green card are attached for reference. That 10 days after the title was issued, the Plaintiff filed the present suit, claiming possession by way of adverse possession. It is his submission that for a claim of adverse possession to be successful, the claimant ought to demonstrate the proprietor's dispossession or discontinuance use of land. Reliance is placed on **Gabriel Mbui Vs Mukindia Maranya Civil Case No. 283 of 2019; Daniel Kimani Ruchire & Another Vs Swift, Rutherfords & Co Ltd and Another (1976-80) 1 KLR; Wairimu Mburu Vs Chege Thaiya ELC No. 87 of 2018 (O.S)**. It is his submission that his occupation of the suit land from 1998 to 2015 was hampered first by the caution registered on 7th August 1998 and restriction placed on 30th September 2009. It was not until both the caution and restriction were removed that the land was free of encumbrance in 2015, the year in which he was issued title. It is his contention that the occupation of the suit land by the Plaintiff was on the belief that she is entitled as a beneficiary of her husband's estate. She therefore believed herself to be the true owner of the suit land and cannot therefore claim adverse possession. He further submits that time begins to run when the owner has a right of immediate possession. Reliance is placed on **Gabriel Mbui Vs Mukindia Maranya Civil Case No. 283 of 2019** and **Wambugu Vs Njuguna [1983] KLR 172**. He contends that his non occupation of the land was hindered by legal impediments in the nature of the caution and restriction placed by the Plaintiff. As such he submits that time began to run on 7th December when title was issued in his name. In conclusion, it is his submission that a claim for adverse possession cannot lie where the possessor has not conceded that the registered proprietor is the owner of the land. He cites the decision in **Haro Yonda Juaje Vs Sadaka Dzengo Mbauro & Another ELC No. 106 of 2007** and **Joshua Ndiritu Nduhiu Vs Francis Mwangi Maina ELC No. 2 of 2017**.

Issues for determination

- a) Whether the Plaintiff has acquired land parcel number Mwerua/Baricho/882 by way of adverse possession;
- b) Whether the Defendant acquired land parcel number Mwerua/Baricho/882 fraudulently from the Plaintiff's husband;
- c) Who should bear the cost of the suit.

Legal analysis and opinion

The Court has anxiously considered the Parties' rival pleadings, affidavits and submissions.

The doctrine of adverse possession is embodied in **Sections 7 and 13 of the Limitation of Actions Act (Cap 22)**. The sections are set out here verbatim, as a necessary first step in the discussion:

Section 7: *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.*

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 38 of the Act gives guidance on the procedure to be followed by a person claiming adverse possession. It is the Section under which

the present suit has been filed:

‘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.’

The doctrine of adverse possession, being a common law doctrine has been the subject of numerous decisions, each of which has enriched and clarified the considerations to be taken into account by Court called upon to make a determination as to whether or not the doctrine is applicable in the case before them.

The Court of Appeal case, **Mtana Lewa Vs Kahindi Ngala Mwangandi [2015] e KLR**, defines the doctrine of adverse possession and the circumstances giving rise to the same:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

The case of **Gabriel Mbui Vs Mukindia Maranya [1993] e KLR**, while noting that the Limitation of Actions Act does not provide a definition for adverse possession attempted a simplified definition of the doctrine in the following words:

“..... It is possible to define “adverse possession” more fully, as the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owners enjoyment of the land for the purposes for which the owner intended to use it.’

The ingredients of the doctrine of adverse possession were succinctly captured by the Court of Appeal case in **Wambugu Vs Njuguna (1983) KLR 173** as follows:

“Adverse Possession contemplates two concepts: Possession and discontinuance of Possession. It further held that the proper way of assessing proof of adverse possession would 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 or she has been in Possession for the requisite number of years.”

The case of **Jandu Vs Kirplal & Another (1975) EA 225** provided helpful amplification of the matters to be considered within the two concepts advanced by the **Wambugu Vs Njuguna** decision above. The Court held as follows:

“.....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.”

Further guidance is found in the Court of Appeal decision in **Ruth Wangari Kanyagia –vs- Josephine Muthoni Kinyanjui [2017] e KLR**

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won’t affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continues. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

See also **Leonola Nerima Karani v William WanyamaNdege [2012] e KLR** 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...

h. Where a claimant pleads the right to land under an agreement and in the alternative seeks an Order based on subsequent adverse possession, the rule is the claimant's possession as deemed to have become adverse to that of the owner after the payment of the last instalment of the purchase price. The claimant will succeed under adverse possession upon occupation of at least 12 years after such payment." (Underline, mine)

The statutory and case law prescriptions above shall now be applied to the facts of the present case.

There is no contention that the Defendant is the registered proprietor of the suit land, having been so registered on 27th January 1998 and title issued on 7th December 2015. It is also not in dispute that the Defendant has not been in occupation of the said land on account of a caution registered on 7th August 1998 and restriction placed on 30th September 2009. It was not until both the caution and restriction were removed that the land was free of encumbrance in 2015, the year in which he was issued title. In essence then, for the period between 1998 to 2015,

the Defendant was incapable of taking possession of the suit land. The issue of dispossession or discontinuance of use does not therefore arise, since there was no occupation in the first place. See the Court of Appeal decision in **Sisto Wambugu Vs Kamau Njuguna [1983] e KLR**

"The same point was made by Bramwell L.J in Leigh vJack (1879) 5 Ex D 264, 272, where he said referring to the Statute of Limitations: 'Two things appear to be contemplated by that enactment, dispossession and discontinuance of possession.' If this is the right way to approach the problem, the question becomes 'Has the claimant proved that the title holder has been dispossessed, or has discontinued his possession of the land in question for the statutory period?' rather than 'Has the claimant proved that he (through himself or others on whose possession he can rely) been in possession for the requisite number of years?' It certainly makes it easier to understand the authorities if one adopts the first formulation."

See **Margaret Wambui Mburu V Mwaniki Githirwa [2012] e KLR**

"The two determining factors from the aforesaid section as to when time starts to run in terms of dispossession or discontinuance of possession, is the time the owner was last in possession, and if an owner has

never been in possession, one must look at the time he or she became entitled to the land and therefore to possession. Legal entitlement to land is conventionally established by the issue and registration of the owner's title or transfer as the case may be. The claim by the Defendants that time begins to run when the Plaintiffs becomes aware of their title is therefore not correct in light of the provisions of section 9(1) of the Limitation of Action Act." (Underline, mine)

From the foregoing, time started to run when the Defendant became capable of taking possession of the suit land, upon the removal of the restriction place by the Plaintiff on 6th October 2015. The occupation by the Plaintiff in the period between 1998-2015 was by the permission of the law, safeguarded by the caution and restriction placed on the suit land. On this premise, the requisite 12 years are yet to lapse and the Plaintiff cannot claim adverse possession. The claim of adverse possession is also extinguished by the fact that the Plaintiff additionally claims beneficial interest as a beneficiary of the husband's estate. The court in **Haro Yonda Juaje –v- Sadaka Dzengo Mbauro & Kenya Commercial Bank, (2014) e KLR**, which decision was cited with approval by the Court of Appeal in **Sisto Wambugu Vs Kamau Njuguna [1983] e KLR**, took the view that a claim of adverse possession cannot be made contemporaneously with a claim for beneficial ownership. The Court found as follows:

"One cannot claim to have acquired land by adverse possession if he claims that the land he is occupying is his ancestral land having been born and brought up on the land and that the registered owner has never been in possession of such land".

The Plaintiff has not been able to prove that the suit land was acquired fraudulently. The entry in the proprietorship section of the title indicates that the Defendant purchased the suit land from the Plaintiff's husband for a consideration of Twenty Thousand Shillings (Ksh. 20,000/=) in 1998. The Plaintiff's husband was alive at the time of the subdivision and registration of the suit land in the Defendants name, and long after that, seeing as he passed away on 25th April 2001. There is nowhere where the Plaintiff's deceased husband complains that the land was acquired illegally. The court in **Civil Appeal No. 246 of 2013 between Arthi Highway Developers Limited - Vs - West End Butchery Limited and Others**, the Court of Appeal expressly stated that the law on fraud and indefeasibility of Title has been settled. The court pronounced itself thus:

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the Land Registration Act set out below) gives an absolute and indefeasible title to the owner of the property.

The title of such an owner can only be subject to

challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

In the end, the Plaintiff has failed to prove her case on a balance of probabilities and it is my view that the suit ought to be dismissed with costs which I hereby do.

JUDGMENT READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 21ST DAY OF JANUARY, 2022.

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HON. E. C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. Munyori holding brief for Mungai for Defendant
2. Ms Wambui holding brief for Ndana for Plaintiff
3. Kabuta – Court clerk.