



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ENVIRONMENT AND LAND CASE NUMBER 27 OF 2021 (OS)

ALPHONCE AGUTU DERA.....PLAINTIFF

VERSUS

FANUEL DERA ACHONGO.....DEFENDANT

JUDGMENT

Introduction

1. By way of an originating summons dated 29/06/2018, the plaintiff instituted suit against the defendant. The plaintiff's claim is that by virtue of the legal principle of *nec vi, nec clam, nec precario* which means not by force, nor stealth, nor the licence of the owner he is an adverse possessor of land parcel number **NORTH GEM/MARENYO/512** [*the suit property*]. He prayed the court to; do order that he be registered as an owner of the suit property, the land registrar to change the proprietorship of the suit property to his name and for the Deputy Registrar to execute the transfer and consent form in his name in the event the defendant declined to do so. In response, the defendant filed a replying affidavit dated 9/09/2018 in which he denied the plaintiff's assertions and contended that the plaintiff is his cousin and the plaintiff's claim if at all it existed, lay in the family's ancestral land known as **NORTH GEM/MARENYO/513**.

The plaintiffs' case and evidence

2. The plaintiff's case is contained in the originating summons dated 29/06/2018, supporting affidavit dated 3/07/2018, his witness statement and documents produced as "**Pexh 1 to 3**" which respectively were a "greencard" of the suit property and photographs of crops and trees and oral evidence tendered in court during the hearing. In the supporting affidavit and witness statement, it was the plaintiff's case that though the suit property was registered in the defendant's name, it was originally registered in the name of one Washington Achongo [the defendant's father who is deceased] who had allocated the suit property to him. He stated that he was on the mistaken belief that the suit property was registered in his name. He averred that he was in occupation and possession of the suit property in a manner that was open, overt, clear, noticeable and hostile to the rights of the registered owner. He contended he and his family had been in occupation of the suit property from 1969 which was a period of over 12 years.

3. In his testimony, he averred that the defendant is his cousin and that he had lived peacefully with him on the suit property and that his parents and the defendant's father [who was his uncle] used to live on the suit property together. He contended the suit property was customary land and that currently, it was only his father's lineage that resided on the suit property. He asserted that his extended family lived on another parcel of land which was registered in the name of one Susanna who was his grandmother. He stated that he was born on the suit property.

The defendants' case and evidence

4. The plaintiff's case is contained in his replying affidavit dated 9/9/2018 and annexures. He denied the averments in the originating summons and contended that the suit property was purchased by his father from one Njeka Nyagudi in 1969 and consequently the suit property was not ancestral land. He averred that the family's ancestral land is land parcel no. **North Gem/Marenyo/513** which is registered in the name of one Agiso[grandmother to the plaintiff and defendant] who was mother to Washington Achongo Dera [defendant's father], Samuel Njeka Dera, Alois Owino Dera and Alphonce Agutu Dera [plaintiff's father] and that the entire lineage of his grandmother all occupy and possess this particular land. He denied that the plaintiff was in actual physical occupation and possession of the suit land and contended he had since sold the suit property with vacant possession.

5. Despite service of a hearing notice, the defendant failed to attend court to testify and consequently, the case was closed.

The Plaintiff's submissions

6. The plaintiff filed written submissions dated 4/12/2021. He pegged his submissions on three issues he identified for determination; (i) whether the defendant is the registered owner of the suit property (ii) whether the plaintiff has lived peacefully on the suit property for more

than 12 years and, (iii) whether the plaintiff has any remedies. On the 1st issue, he contended that “**Dex 1**” confirmed that the defendant was the registered proprietor of the suit property. On the 2nd issue, he submitted that he had been in occupation of the suit property for close to 32 years which was a period of over 12 years and his occupation had been peaceful and without interference from the defendant. He contended that “**Dex 2**” and “**Dex 3**” demonstrated that he had undertaken developments on the suit property and essentially proved that he was in actual possession. On the 3rd issue, he urged the court to grant him the orders sought.

The Defendant’s submissions

7. The defendant did not put in any written submissions.

Analysis and determination

8. I have considered the pleadings together with the plaintiff’s submissions and evidence tendered. The key issue falling for determination is whether the plaintiff has established a claim of adverse possession.

9. Even if the plaintiff’s evidence is unconverted, this court is called upon to determine the case on its own merits.

I will proceed to analyse the legal and jurisprudential framework on the singular issue.

10. The doctrine of adverse possession is provided for in various statutory provisions including **Sections 7,13, 17 and 38 (1) and (2) of the Limitation of Actions Act** and **Section 28 (h) of the Land Registration Act**.

11. In the case of **Sammy Mwangangi & 10 others v Commissioner of Lands & 3 others [2021] eKLR**, the Supreme Court of Kenya held that the principles of adverse possession are well settled. In a long list of court decisions including **J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. The United Kingdom** which quotes **Halsbury’s Laws of England (Fourth Edition, Reissue 1998)**, **Titus Mutuku Kasuve v Mwaani Investments Limited & 4 others [2004] eKLR**, **Wambugu vs Njuguna (1983) KLR** and **Gabriel Mbui vs Mukindia Maranya (1993)eKLR** the principles of adverse possession have been settled as thus; (i) One must have been in continuous and uninterrupted possession of the land for at least 12 years(ii) such possession has been open and notorious to the knowledge of the owner(iii) such possession is without the permission of the owner; and (iv)That the plaintiff has asserted a hostile title to the owner of the property. These principles shall be juxtaposed against the facts and evidence before this court.

12. The plaintiff has asserted that he has been in continuous and uninterrupted possession of the suit land for at least 12 years. In his originating summons, the plaintiff contended that he had been in occupation of the suit property from 1969 which was a period of over 49 years to the time he filed suit. However, in his written submissions he calculated his period of occupation to be 32 years. I do not know if the number of years calculated in his submissions are a typographical error. In his testimony, he contended that his family together with that of the defendant at one time or the other lived together on the suit property but currently, his family is the only one in occupation. The date and year the family of the defendant or the defendant departed from the suit property has not been disclosed by the plaintiff and without these specifications, this court is unable to determine when time started running from the date the defendant or defendant’s family vacated the suit property. Had this particular date of vacation been disclosed, this court would have been able to calculate the period of time the plaintiff has been in occupation of the suit property to the exclusion of the defendant and his family. It is the finding of this court that the plaintiff has not proved his case on this 1st principle.

13. The 2nd principle is whether such possession has been open and notorious to the knowledge of the owner. The plaintiff contended that he has been in open and notorious possession of the suit property. He produced copies of photographs as evidence of his possession and occupation of this property. This court has scrutinised these photographs and they only portray the existence of trees and maize. It is only in one photograph that one catches a glimpse of a roof top. In his list of documents, he described the photographs as “photographs of crops and trees on the land” and in his witness statement, he stated that he has planted trees “along the boundary” and subsistence crops. This evidence shows that the house whose roof top can be glimpsed from his exhibits is not part of his evidence. Possession is a matter of fact and there must be actual possession which requires some sufficient degree of physical occupation. The case of **William Kipnyor Rotich v Paul Kiprof Karoney [2020] eKLR** cited with approval the case of **Ernest Wesonga Kweyu versus Kweyu Omuto CA Civil Appeal No. 8 of 1990** where **Gicheru J.A** (as he then was) held thus on occupation and possession;

“there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and occupation must be shown.”

14. With mere photographs of seasonal crops and trees demarcating boundaries as evidence of his occupation for a purported period of over 49 years, this court is not satisfied that the plaintiff has been in occupation and possession in a manner that demonstrates that he has been in open and notorious occupation to the knowledge of the owner. The plaintiff fails on this 2nd principle.

15. The 3rd principle is whether possession was without the permission of the owner. It is trite law that an adverse possessor must prove that his act of possession was not as result of permission or license given to him by the owner. The plaintiff has asserted that the defendant’s father allocated the suit land to him which connotes permission. In the grounds in support of his originating summons he contends his family entered the suit property without consent or permission of the registered owner but in his supporting affidavit he asserts that the defendant’s father gave his family permission to take possession of suit property vide a verbal agreement. With these contradictory statements by the plaintiff it is quite obvious that the plaintiff has failed to discharge proof that his possession was without the permission of the owner. This court is persuaded by the high court decision of **Gabriel Mbui vs Mukindia Maranya (1993) eKLR** which held thus;

“It has been held many times that acts done under licence or permitted by, or with love of, the owner do not amount to adverse

possession and do not give the licensee or permitted entrant any title under the limitation statute”.

The plaintiff fails on the 3rd principle.

16. The 4th principle is whether the plaintiff has asserted a hostile title to the owner of the property which in other words means that the plaintiff must prove that his act of possession involved rights irreconcilable with those claimed by the owner of the land such as to give the owner occasion to dispute that possession. The plaintiff's testimony was somewhat contradictory, on the one hand he asserted he was an adverse possessor while on the other hand he claimed at one time or the other he co-existed in the suit property with the defendant and or the defendant's family. This act of co-existence negates the principle that the plaintiff has asserted a hostile title. Further, he has not discharged proof that he asserted a hostile title to the owner of the property. The Plaintiff fails on the 4th limb.

17. It is trite law that if the essential elements of adverse possession are not proved, the claim of adverse possession must fail and it is my net finding that the plaintiff has not proved his case on a balance of probabilities.

18. Ultimately, I make the following disposal orders;

a) The plaintiff's suit is hereby dismissed.

b) The costs to the defendant.

19. It is so ordered.

Judgment delivered virtually.

N/A for petitioner

N/A for respondent

Court assistant: Sarah Ooro

HON. A. Y. KOROSS

JUDGE

20/1/2022