



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 618 OF 2014

JANE WANGARI KAIRU1ST PLAINTIFF

JOHNSON MACHARIA KAIRU2ND PLAINTIFF

-VERSUS-

JANE WACHUKA KARIUKIDEFENDANT (*DECEASED*)

BENARD KARIUKI THEURI.....1ST DEFENDANT

PAULINE WANJIKU KARIUKI KIGUTA.....2ND DEFENDANT

ALEX MWANGI KARIUKI.....3RD DEFENDANT

JUDGMENT

BACKGROUND

1. This suit was initially filed at the High Court at Nyeri on 2nd September, 2008 and designated as *Nyeri HCC No. 109 of 2008*. It was subsequently transferred to this court and re-designated as *ELC 618 of 2014* by an order issued by the High Court on 3rd December, 2014.

2. By their Plaint dated 28th August, 2008 and filed on 2nd September, 2008 as aforesaid, Jane Wangari Kairu and Johnson Macharia Kairu (*hereinafter the Plaintiffs*) pray for Judgment against Jane Wachuka Kariuki (*hereinafter the Defendant*) for:

- (a) An order that the Defendant, her families, servants and agents together with their developments be evicted from the Plaintiffs' suit land (being) Parcel No. Aguthi/Muruguru/615;
- (b) A mandatory injunction be issued directed against the Defendant, her families, servants and or agents from entering and/or remaining in possession of a portion of one acre or thereabouts or at all of Land Parcel No. Aguthi/Muruguru/615;
- (c) That the Land Registrar Nyeri be ordered to remove the caution lodged by the Defendant against the Plaintiff's suit land;
- (d) General damages for loss of use of a portion of the Plaintiff's piece of land;
- (e) Costs of this suit and for the eviction to be awarded to the Plaintiffs;
- (f) Any other order as this Honourable court deems fit.

3. Those prayers are premised on the contention by the Plaintiffs who are a mother and her son, that they are the joint proprietors of the said parcel of land having been declared as the heirs thereof vide Nyeri High Court Succession Cause No. 22 of 1984. The Plaintiffs accuse the original Defendant of over the years cultivating a portion of the land measuring about an acre on the pretext that she bought the same from the husband of the 1st Plaintiff.

4. It is the Plaintiffs' case that they are unaware of any such sale transaction and that if there was one, then the same was not concluded as per the provisions of the relevant law.

5. The Plaintiffs aver that they lodged a case with the Land Disputes Tribunal in 2002 and that the same culminated in Nyeri HCCA No. 12 of 2003 where the decision of the Tribunal directing that the Defendant be given an acre of the land was set aside. The court however declined to order the Defendant's eviction on the ground that it was not established that she was a trespasser.

6. But in her Statement of Defence and Counterclaim dated 21st December, 2008, the Defendant avers that the registration of the Plaintiffs as the proprietors of the suit property was done secretly in order to defeat the Defendant's claim. The Defendant asserts that she is a purchaser for value having purchased one acre of the land from the original proprietor Kairu Wambugu pursuant to which she has been in possession of the land since 1968.

7. The Defendant avers that as at the time she purchased the land, the 1st Plaintiff was yet to be married by the original proprietor of the land and further that though the transfer was not effected before the death of the seller, the Plaintiffs acknowledged the sale and the boundaries were marked by a surveyor.

8. The Defendant further avers that she has acquired title to one acre of the piece of land by virtue of adverse possession given the period she has used the land before a dispute arose in the year 2002.

9. By way of her Counterclaim, the Defendant avers that she took possession of one acre of the suit property in 1968 during the lifetime of the registered proprietor and vendor Kairu Wambugu and that she has since been in an open and uninterrupted occupation of the said portion of land to-date.

10. Accordingly, the Defendant prays for Judgment against the Plaintiffs as follows:

(i) That the Plaintiffs suit be dismissed with costs;

(ii) An order that the Defendant is entitled to one acre out of LR No. Aguthi/Murugur/615; and

(iii) That the costs of the counterclaim be awarded to the Defendant.

11. As it turned out, the original Defendant Jane Wachuka Kariuki passed on before the trial commenced on 16th July, 2016. Her Legal Representatives Bernard Kariuki Theuri, Pauline Wanjiku Kiguta and Alex Mwangi Kariuki were subsequently substituted in her stead by an order made herein on 9th May, 2018.

THE PLAINTIFFS' CASE

12. The Plaintiffs called one witness at the trial herein which commenced before the Honourable Justice Angima on 17th May, 2021.

13. PW1 – Johnson Macharia Kairu is the 2nd Plaintiff and the son of the 1st Plaintiff. Relying on his statement dated 27th October, 2011 as filed herein on 28th October, 2011, PW1 told the court that LR No. Aguthi/Muruguru/615 was originally registered in the name of his father Kairu Wambugu who passed away on 11th March, 1981. Prior to his death, the Plaintiff's father had allowed the Defendant who is their neighbor to cultivate a portion of the said piece of land. After the demise of PW1's father the Defendant was allowed to continue cultivating the land as she was a family friend.

14. Sometimes in March, 1994, PW1 who was residing in Meru came to learn that his mother (*the 1st Plaintiff*) had filed a succession cause for the administration of the estate of his father. PW1 testified that upon enquiry, his mother told him she had filed the cause with the help of the Defendant.

15. PW1 told the court he became suspicious as his mother is illiterate. When he perused the court file in Nyeri High Court Succession Cause No. 22 of 1984, he came to learn that the Defendant who had signed the P & A form No. 5 had inserted her name therein on the side of liability on the pretext that she had bought one acre of the land from his deceased father at a consideration of Kshs.25,000/-.

16. PW1 told the court he further came to learn at the time that his mother had been issued with a Grant of Letters of Administration for the estate and that an application for confirmation was pending in court. PW1 decided to lodge an objection. He thereafter agreed with his mother that the two of them be made joint administrators. A certificate of confirmation of Grant was subsequently issued in their joint names.

17. PW1 further testified that they used the certificate to have the land transferred to their name. Upon being issued with a Title Deed in their joint names on 10th July, 2000, they requested the Defendant to stop cultivating and or interfering with the land. The Defendant however declined to do so. In January, 2002, PW1 and his mother lodged a case for eviction of the Defendant before the Nyeri Land Disputes Tribunal.

18. PW1 told the court the Tribunal proceeded to award the Defendant a share of one acre of the land. Aggrieved by the decision PW1 and his mother appealed to the Provincial Land Dispute Tribunal which upheld the previous decision in a verdict rendered on 29th January, 2003. Still dissatisfied with the decision, the Plaintiffs herein filed Nyeri HCCA No. 12 of 2003. On 31st January, 2008, the High Court set aside the decisions of the Tribunals. Thereafter, the Plaintiffs again served notice upon the Defendant to vacate the land but she refused to comply thereby compelling the Plaintiffs to institute the present suit.

19. On cross-examination, PW1 conceded that the late Jane Wachuka Kariuki (deceased) had been utilizing the one acre piece of land since 1968. While the portion was not demarcated, it was known to the parties. PW1 told the court that the late Jane had leased the land from his father and was paying annually for the lease to his father.

20. PW1 further told the court his father passed away in 1981 and that Jane had never paid any money for the lease since then though she continued using the land. He further told the court that Jane had planted trees on the land and that the trees were now mature. PW1's family had never demanded for any rent for the use of the land because of this pending case.

THE DEFENCE CASE

21. The Defendant's equally called one witness in support of their case during the trial.

22. DW 1 – Bernard Kariuki Theuri is the husband to Jane Wachuka Kariuki (*deceased*) who was the original Defendant herein and one of the Administrators of her estate. Adopting his statement filed herein on 9th June, 2021, DW1 testified that sometime in the year 1968, their neighbor Kairu Wambugu (*also now deceased*) offered to sell one acre of his land to DW1 and his wife Jane.

23. DW1 told the court that at the time, the late Kairu Wambugu had no family. They chose part of the land adjacent to DW1's land and negotiated the price of Kshs.50,000/- in the presence of local elders and family members. The one acre was to be excised from LR No. Aguthi/Muruguru/615 measuring about 3 acres and which was then registered in the name of the seller.

24. DW1 further told the court that as he was employed away from home, he entrusted his wife with the transaction and gave her money which they paid in instalments for the land. The one acre was demarcated on the ground and DW1's family immediately took possession thereof. They planted trees round the perimeter to mark the boundary. The family also planted more trees inside the land, fruits, food crops like bananas, maize, beans, coffee, Macadamia and livestock fodder.

25. Upon completion of the payments, a Sale Agreement was executed between DW1's wife and the seller on 20th August, 1970. DW1's wife was then given the original title to keep pending formal sub-division and transfer. DW1 still had the original title in his possession. The seller did not however take any step to transfer the land. The seller who died in 1981 married the 1st Plaintiff in 1972 and they kept away from the portion of land sold to DW1's family.

26. DW 1 told the court that in 2002, the Plaintiffs filed a case before the Land Disputes Tribunal claiming his wife had leased the land for a yearly rent of Kshs.100. They demanded for Kshs.400,000/- as purchase price for the land but the Tribunal ruled in favour of DW1's wife. DW1 and the rest of his family remain in occupation of the land to-date.

27. On cross-examination, DW1 testified that he got married to the original Defendant herein in 1967. He told the court his wife bought the land from the late Kairu and that it was not true she was only given the portion to cultivate. He further denied that his wife was paying any rent for the portion of land to the late Kairu.

28. DW1 conceded that his wife assisted the 1st Plaintiff to file the succession cause and that they helped finance the costs thereof. He denied receiving any notice to vacate the land after the decision of the High Court which overturned the decision of the Tribunal.

ANALYSIS AND DETERMINATION

29. I have carefully gone through the pleadings filed herein by the parties, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the written submissions and authorities as filed herein by the Learned Advocates for the parties.

30. The two Plaintiffs herein are a mother and his son. They instituted this suit way back in the year 2008 seeking an order for the eviction of the Defendant from a portion measuring one acre being part of all that parcel of land known as Aguthi/Muruguru/615. The Plaintiffs also crave a mandatory order of injunction restraining the Defendant from entering and/or remaining in possession of the said portion of land. In addition the Plaintiffs want the Land Registrar Nyeri to be ordered to remove a caution lodged by the Defendant on the title to the suit property. Ultimately, the Plaintiffs pray for general damages for loss of use of the portion of land.

31. Those prayers arise from the Plaintiffs contention that they are the registered proprietors of the suit land having been declared as the only heirs of the late Kairu Wambugu, the original proprietors of the land vide Nyeri High Court Succession Cause No. 22 of 1984. It is their case that the Defendant has been cultivating the portion of land in dispute on the pretext that she had bought the same from the late Kairu Wambugu.

32. The Plaintiffs aver that they are not aware of the said sale transaction and that if there was one, the sale was not concluded as per the provisions of the relevant law.

33. As it turned out, the sole Defendant – Jane Wachuka Kariuki originally sued by the Plaintiffs passed away on 16th July, 2016 before this trial commenced. She was subsequently substituted by her husband who testified herein as DW1 and their two children. Prior to her death, the late Jane Wachuka Kariuki had filed a Statement of Defence and Counterclaim wherein she denied the Plaintiffs' accusations.

34. It was the position of the Defence that the late Jane bought the land from the late Kairu way back in 1968 at a time when the 1st Plaintiff was yet to be married to the late Kairu. It was further the Defence case that even though the land was not transferred to the name of the late Jane, the Plaintiffs were aware of the sale and that the boundaries of the parcel of land were clearly marked and known by both parties.

35. The Defendants told the court that even though the title was not transferred to the name of the late Jane, the family had acquired title to the one acre portion of land by dint of the doctrine of adverse possession given the period of time that they had been in possession of the land.

36. As it were, there was no dispute that the Defendants had been in possession of the suit land for a long period of time. During his cross-examination at the trial, the 2nd Plaintiff who testified as the Plaintiffs' sole witness (PW1) admitted as much. According to PW1, the late Jane Wachuka Kariuki had been utilizing the land since 1968 and while the portion was not demarcated, all the parties were aware of the situation of the disputed portion of the land.

37. While the Defendants insisted however that they had purchased the land at a consideration of Kshs.50,000/- the Plaintiffs took the position that the land had been leased by the late Kairu Wambugu to the late Jane at the annual rent of Kshs.100/-. As it turned out, neither the Plaintiffs nor the Defendants produced a copy of an agreement of lease and/or one for the sale of the land.

38. From the material placed before me however, it was apparent that the Defendants had initially entered the suit land under some arrangements with the late Kairu Wambugu. It was also apparent that as at that time as stated by the Defendants, the 1st Plaintiff was yet to be married to the late Kairu Wambugu. While she did not testify herein due to what was attributed to old age, the 1st Plaintiff testified before the Nyeri Land Disputes Tribunal where they had previously lodged the case in the year 2002.

39. At Page 1 of the Tribunal's proceedings of 28th March, 2002, she is recorded to have stated the following:

"Statement by the 1st claimant Jane Wangari Kairu ID/No.

The defendant is my neighbor. She claims that she bought one acre from my late husband Wambugu Kairu yet my husband did not tell me that there is any land he had sold. The only thing he told me is that he hires the land at Kshs.100/- annually. Also he told me the part which is being utilized by the defendant never to interfere with it and not to step in that portion ..."

40. It was difficult to find a reason why the late Kairu Wambugu would forbid his wife from stepping onto the disputed portion of land if he had not completely relinquished his interest thereon. From the material placed before me, the said Kairu passed away on 11th March, 1981. That would be almost 13 years since the Defendants were said to acquire interest in the land and during all that period, the 1st Plaintiff was forbidden from stepping on the land.

41. That the Plaintiffs were aware the late Kairu Wambugu had sold the land to the Defendants can be discerned from a copy of the demand letter they sent to the original Defendant dated 8th September, 2001 asking her to vacate the land. In the letter produced as Plaintiffs' Exhibit 6 and authored by S. K. Njuguna Advocates on their behalf, they address the late Jane Wachuka Kariuki in the relevant portion as follows:

"RE: JANE WANGARI KAIRU (AND) JOHN MACHARIA KAIRU

We are the Advocates of our above named clients under whose instructions we write and address you as herein following:

That our above named clients are joint registered proprietors of land Parcel No. Aguthi/Muruguru/615 which formally had been registered under the name of Kairu Wambugu the deceased husband/father of our clients and which piece of land our clients have succeeded the same (sic) through the High Court of Kenya at Nyeri.

It has been brought to our understanding that you have been cultivating a portion of the said piece of land on pretext that the deceased husband/father of our clients had sold the same to you prior to the date of his death.

We are also made to understand that from the date of the alleged sale no consent was applied for and obtained within the required statutory period.

As the law stands the sale of the alleged portion of one acre by the deceased husband/father of our clients becomes null and void after the expiry of three months from the date of the said sale for lack of the necessary consent ..."

42. The Plaintiffs were still clearly holding to that position when they instituted this suit some seven (7) years later and hence their averment at Paragraphs 8 to 10 of the Plaint in which they state as follows:

"8. The Plaintiffs add that the Defendant has been cultivating a portion of about one acre of the Plaintiffs' suit land on the pretext that she had bought the same from the deceased husband of the 1st Plaintiff;

9. The Plaintiffs state that they are not aware of the said sale and if there was, the sale was not concluded as per the provisions of the relevant law; and

10. The Plaintiffs add that since the sale transaction was rendered null and void under the law, the Defendant's occupation of part of the Plaintiffs suit land is unlawful and the Defendant should be evicted through the order of the Honourable Court with the assistance of the Court Bailiff.

43. That being the case, I find the submissions by the Plaintiffs that there was no proof of sale rather disingenuous. Based on that clear

understanding, the 1st Plaintiff herself instituted Nyeri High Court Succession Cause No. 22 of 1984 clearly acknowledging that the late husband's estate had liabilities owing to the Defendants. The mere fact that the 2nd Plaintiff was made a Co-Administrator of the Estate with his 1st Plaintiff mother does not in my view change that fact. The Plaintiff did not infact tell the court how the confirmed Grant came to reflect no liabilities after the initial P&A Form 5 had stated the estate owed the Defendant one acre of land.

44. Be that as it may having entered the land as purchasers **Section 7 of the Land Control Act (Cap 302 of the Laws of Kenya)** required the Defendants to obtain the relevant Land Control Board consent for the sub-division of the portion of land that had been sold within 90 days. Having failed to do so, and as correctly stated by the Plaintiffs, the sale transaction was rendered null and void for all purposes upon expiry of the given period.

45. According to the Defendants, they had entered into the transaction in 1968 and concluded the same on 20th August, 1970, when they claim to have executed a sale agreement with the late Kairu Wambugu. While as we have seen the sale agreement was not produced by the Plaintiff, it was evident to me that if indeed the agreement existed, the Defendants would not base any claim to the land on the basis thereof upon expiry of 90 days from 20th August, 1970.

46. It was however common ground that the Defendants continued to be in possession of the land from the said 1970 until the demise of Kairu Wambugu 11 years later in 1981 and from then on until 2002 when the Plaintiffs filed the claim before the Nyeri District Land Tribunal. That possession for some 32 years before the Plaintiffs sought to stop it can only be said to have been adverse to the interest of the registered owner.

47. Adverse possession as it were 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 which in Kenya is capped at 12 years under **Section 7 of the Limitation of Actions Act (Cap 22 of the laws of Kenya)**. As was stated by the Court of Appeal in **Kasuve -vs- Mwaani Investments Limited & 4 Others 1 KLR 184**:

”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 without interruption for a period of 20 years either after dispossessing the owner or by discontinuation of possession by the owner of his own volition.”

48. That being the case, the key test is then that the owner of the land must have been dispossessed or had discontinued his own possession of the property. In the matter before me, there was no dispute that the Defendants have had exclusive possession over the suit property at least since the year 1970 as the seller himself had forbidden his family from stepping onto the land.

49. Arising from the foregoing I am satisfied that there is no merit in the Plaintiffs case and that the Defendants have made out a clear case for their claim of adverse possession of the suit land. In the premises, I make orders as follows:

- (i) The Plaintiffs' suit is hereby dismissed.
- (ii) A declaration is hereby made that the Defendant has become entitled by adverse possession to the one acre piece of land currently in their possession being part of LR No. Aguthi/Muruguru/615.
- (iii) An order is hereby issued that the Land Registrar Nyeri does register the Defendant as the absolute proprietor of the said one acre to be excised out of LR No. Aguthi/Muruguru/615.
- (iv) The costs of the suit and the counterclaim shall be borne by the Plaintiffs.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 20TH DAY OF JANUARY, 2022

In the presence of:

Ms Wambui Mwangi holding brief for Njuguna for Plaintiffs

Mr. C. M. King'ori for the Defendants

Court assistant - Wario

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J. O. OLOLA

JUDGE