



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. E013 OF 2021 (O.S)

ABDIRASHID ADAN HASSAN.....PLAINTIFF

VERSUS

THE ESTATE OF W H E EDGLEY.....DEFENDANT

JUDGEMENT

Introduction

1. The suit was brought vide an Originating summons dated 30th March 2021 against the **ESTATE of W H E EDGLEY**. The summons was accompanied by a supporting affidavit sworn by **Abdirashid Adan Hassan**.

2. The grounds in support of the summons are inter alia that the Plaintiff has acquired ownership by adverse possession by virtue of living on parcel **LR No 214/372** (suit property) located in Muthaiga since 1983.

3. The Plaintiff relied on Section 17, 18, 37 and 38 of Limitations of Actions Act; Order 37, rule 7 of Civil Procedure Rules, 2020 and all other enabling provisions and sought the following orders:

i. The Plaintiff be declared to have become the legal owner entitled by adverse possession of over twelve (12) years since 1983 ALL THAT PROPERTY KNOWN AS NAIROBI LR NO. 214/372.

ii. The Plaintiff be registered as the sole proprietor of the said parcel of land namely ALL THAT PROPERTY KNOWN AS NAIROBI L.R. NO. 214/372 in place of the above named Defendant in whose favour the land is currently registered.

iii. The last original indentures in respect of ALL THAT PROPERTY KNOWN AS NAIROBI L.R. NO. 214/372 which are currently with the Defendant be dispensed with.

iv. An order of permanent injunction to restrain the Defendant, himself or through his servants, agents or employees from entering, occupying, evicting, the Plaintiff from or in any other way interfering with the Plaintiff's occupation and enjoyment of ALL THAT PROPERTY KNOWN AS NAIROBI L.R. NO. 214/372

v. Costs of this application to be awarded to the Plaintiff.

4. In a Chamber Summons application dated 6th April 2021, the Plaintiff sought leave to effect substituted service in East African Standard Newspaper, however the application was abandoned before it could be prosecuted.

5. The Defendant's counsel filed their Notice of Appointment through the firm of **M/S Wario Minishi & Co. Advocates** dated 29th April 2021 but did not file any response nor did they attend court proceedings.

6. Pursuant to the court's directions issued on 21st October 2021, it was directed that the suit would proceed by way of viva voce evidence with a hearing date set for 14th December 2021. Upon close of hearing, the parties were granted time to file and exchange their written submissions. The Court had further directed the Defendant's counsel to be served with the Plaintiff's submissions despite not participating in the suit.

The Plaintiff's case

7. In the Plaintiff's evidence-in-chief, he initially stated he was born at the suit property. He later clarified that he was born in Garissa but moved to join his father at the suit property. It was his testimony that his father had told him that the suit property was owned by Europeans who used to stay on the land and had left him as the sole caretaker. It was his further testimony that he currently stays with his family at the suit property. The Plaintiff produced his National I.D as Plaintiff Exhibit 1 and photos of current structures of the suit property as Plaintiff's Exhibit 2.

8. He further stated that he renovated the house using over 1 million Kenya Shillings. He produced the deed plan of the property as Plaintiff's Exhibit 3. He further claimed to have been paying land rates and produced receipts of rates as Plaintiff's Exhibit 4.

9. In written submissions dated 27th January 2022, he relied on the cases of Teresia Matoke Anyoka vs Daniel Nyaburi & 2 others[2021]eklr, Ibrahim Wachira Karaguri v Mary Mwhaki Simon & another[2020]eklr and Kimaro Macharia & another v Daniel Kanyango Karegwa & 2 others[2014]eklr in support of his case.

10. It was further submitted that the threshold regarding adverse possession specifically under Section 7 and 13 of the Limitation of Actions Act had been met and therefore prayed for the application to be allowed.

Defendant's case

11. The Defendant entered appearance on 29th April 2021 but did not file any response necessitating the suit to proceed as undefended.

Analysis and Determination

12. I have considered the pleadings, evidence and submissions. I have also considered the relevant legal frameworks. Further, I have considered the prevailing jurisprudence by Kenya's superior courts and in my opinion the issues for determination before Court are as follows:

i. Whether the Plaintiff's is entitled to the ownership of L.R. NO. 214/372 by adverse possession?

ii. Who should bear costs of the suit?

13. However, this Court will in the first instance deal with a preliminary issue on whether the plaintiff's suit is properly before this Court. The Plaintiff has brought this suit against **THE ESTATE OF W H E EDGLEY**. The Plaintiff deponed that he is suing the estate of deceased person, no evidence was tabled to show that there is a legal representative of the Defendant as contemplated by Section 2 of the Civil Procedure Act.

Section 2 of the Civil Procedure Act defines **legal representative** as follows: -

"means a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on who the estate devolves on the death of the party so suing or sued"

14. One cannot make a claim against the estate of a deceased person. A suit against the estate of the deceased requires an application for a grant in order to have locus standi. In the case of Julian Adoyo Ongunga v Francis Kiberenge Abano Civil Appeal No. 119 of 2015, Justice A. Mrima stated as follows: -

"The impact of a party without locus standi can be equated to that of a court acting without jurisdiction. Since it amounts to null and void proceedings. It is also worth noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties"

15. The mere fact that the suit property belonged to the deceased is not sufficient. Without locus, the suit cannot be sustained.

Issue No. 1

Whether the Plaintiff's is entitled to the ownership of L.R. NO. 214/372 by adverse possession?

16. The law of adverse possession is a well-established doctrine. The person alleging a right of title on adverse possession must show by clear and unequivocal evidence that his possession was not permissible, open, with the knowledge of the true owner and excluded the true owner from the enjoyment of his property.

17. In Maweu vs. Liu Ranching and Farming Cooperative Society 1985 KLR ... 430 where the Court of Appeal held;

"...Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances..."

18. First, I take note that the Plaintiff's claim is not premised on a sale agreement nor lease but by virtue of his continuous possession of the suit property. He relied on **Section 7** of the Limitation of Actions Act:

“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.”

19. In the case of Samuel Miki Waweru vs. Jane Njeru Richu, Civil Appeal No. 122 of 2001, the Court of Appeal delivered the following dictum:

“...it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in Jandu v Kirpal [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted.”

20. To determine when time began to run, I have considered that the Plaintiff testified he was born in Garissa and moved on the suit property after the death of his father. For the Plaintiff to claim his right to the property, time would run from the time of his father's death, which was not disclosed to the Court.

21. Additionally, the photos of the property produced as Plaintiff's Exhibit 2 portray a seemingly run-down and abandoned structure which casts doubt as to any recent habitation to the suit property. For this reason, I am doubtful that the Plaintiff was in continuous possession of the said property.

22. Secondly, the effect under Section 17 of the Limitation of Actions Act would be to extinguish the title, therefore there is need for reference or production of a copy of a title. A claim for adverse possession must be brought against the registered proprietor since it seeks a declaration that the proprietor's title has been extinguished by prescription. It follows therefore that the proceedings must be in respect of the correct parcel of land and whose ownership is verified by an annexed extract of title in terms of **Order 37 rule 7** of the **Civil Procedure Rules**. In the instant case, the Plaintiff only adduced a deed plan as Plaintiff's Exhibit 2 which is inconclusive proof of ownership of the property. In determining the issue of adverse possession, this Court cannot extinguish an 'non-existence and unknown title'.

Issue No. 2

Who should bear costs of the suit?

23. It is trite law that costs follow the event. I recognize that whereas the suit was undefended, the Defendant's actual name and identity are unknown by the Plaintiff.

24. Further, the Affidavit of Service dated 24th January 2022 was neither signed nor stamped which casts doubt as to whether there was proper service.

25. In view of the foregoing, the Court finds the suit is incompetent and it lacks merit and is accordingly struck out with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF FEBRUARY 2022

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Okonji for the Plaintiff

N/A for the Defendant

Court Assistant; Caroline Nafuna