



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MILIMANI LAW COURTS
ELC NO. 209 OF 2008 (OS)
IN THE MATTER OF THE LIMITATION OF ACTIONS ACT
AND
IN THE MATTER OF L.R. NO. DAGORETTI/THOGOTO T.178
KENNETH NJOROGE KAMAU.....PLAINTIFF
VERSUS
MACSON GITHUMBI KARIUKI.....1ST DEFENDANT
WESLEY NGIGE KARIUKI.....2ND DEFENDANT
DICKSON KIROMO KARIUKI.....3RD DEFENDANT

JUDGMENT

1. By an Originating Summons dated 6/5/2008 the Plaintiff claimed entitlement to the entire parcel of land known as L.R. No. Dagoretti/Thogoto T.178 and sought orders that:

a. The Defendants' rights to recover the land known as L.R. Dagoretti/Thogoto/T.178 (suit land) from the Plaintiff is barred under Section 7 of the Limitation of Actions Act and their title is extinguished under Section 17 of the said Act, on the grounds that the Plaintiff has openly and peacefully been in occupation of the above mentioned piece of land for a period of over 12 years preceding the presentation of this suit.

b. The Plaintiff be registered as proprietor of the suit land on his own behalf and on behalf of the other beneficiaries of the estate of David Kamau Njoroge (deceased)

c. In the event that the Defendants fail to transfer the suit land to the Plaintiff, the Deputy Registrar of the Court be authorized to sign all the necessary documents for effecting transfer of the suit land to the Plaintiff.

d. Costs of the suit be borne by the Defendants.

2. The summons was supported by an affidavit sworn by the Plaintiff on 6/5/2008 wherein he deposed that he brought the proceedings on his behalf and the estate of David Kamau Njoroge as the administrator

thereof. It was his deposition that prior to the registration of the suit land in favour of the Defendants herein, the same was registered in favour of their deceased father, Henderson Kariuki Kibathi, who sold the land to the Plaintiff's deceased father, David Kamau Njoroge, on 30/7/1962. The Plaintiff deposed that the purchase price was fully paid by 30/9/1962 in accordance with the Sale Agreement dated 30/9/1962 whereafter the Plaintiff's father took possession built a house and planted food crops. Further that the Plaintiff was born in 1966 and brought up on the suit land where he has been in an open, continuous and uninterrupted occupation since then to date.

3. It is deposed by the Plaintiff that on 10/3/2008 the Defendants served his family a 50 day notice to vacate the property. The notice notwithstanding, the Plaintiff deposed that though the Defendants' father did not execute a formal transfer of the property to his father, he became a trustee thereto and that the Defendants are deemed to have assumed title subject to the said trust as an overriding interest on the title. Consequently, that the Defendants' title over the property was extinguished under the doctrine of adverse possession. The Plaintiff urged the court to make a declaration of his entitlement to the suit land and order the transfer as prayed in the summons.

Defendants' Response

4. The 3rd Defendant swore a Replying Affidavit on 4/11/2008 whereby he refuted the Plaintiff's claim that the suit land was ever sold. The deponent referred to annexed copies of receipts which confirm that the Plaintiff's father was a tenant not a purchaser as alleged. He deposed further that there have been several notices to vacate with several court cases in respect to the suit land and therefore possession cannot be claimed to have been uninterrupted. The deponent contended that the Plaintiff has not met the conditions to vitiate their title. Nevertheless, the 3rd Defendant deposed, that even where the alleged cause of action survived the Plaintiff's father's demise in 1980, the suit is statute barred having been filed 27 years after his demise.

5. The deponent urged the court to dismiss the originating summons with costs, deposing that the suit was not a proper case for adverse possession. In respect to the sale Agreement, the deponent stated that first, it contravened the provisions of the Stamp Duty Act and therefore was of no evidential value. Secondly, that the translation was not accompanied by a Certificate indicating that the translator understood the language of the original sale agreement.

Plaintiffs' Response

6. The Plaintiff swore a Supplementary Affidavit on 2/12/2010 wherein he denied the allegations that his deceased father used to pay rent for the occupation of the property. Further that the purported rent demand notes were a fabrication with the intention of misleading the court since they were signed by W. Ngingi as the registered owner whereas at the time when the said notes were issued, the Defendants' father was the registered owner as indicated in the green card. The Plaintiff denied ever being served with a demand note for rent despite having continuously lived on the land since 1966.

7. The Plaintiff referred to the notice to vacate dated 10/3/2008 deposing that the contents therein were an admission by the Defendants that the Plaintiff's occupation and use of the land was for a period of over 12 years and without their consent hence meeting the test of adverse possession. The Plaintiff further denied ever being summoned as a party to any proceedings before any provincial administrator or a court in respect to the suit land. It was also deposed that this being a claim based on adverse possession, the same cannot not be time barred. In response to the contest of the sale agreement, the Plaintiff admitted that stamp duty was not paid but stated that the transaction was being undertaken by lay persons in good faith. Further that the translation was undertaken by Njoroge Baiya & Co. Advocates and duly authenticated by the said Njoroge Baiya through his signature.

Defendants' Response

8. The 3rd Defendant swore a Further Affidavit on 20/5/2011 wherein he deposed that the rent receipts issued to the Plaintiff's father was in respect to a single roomed mud house roofed with iron sheets which

he rented for Kshs. 30/- per month from April 1963. Further that the receipts were issued by W. Ngigi under the instructions of their mother following their father's ill health which also led to his termination from East Africa Railways and Harbours. The deponent states that the Plaintiff's father refused to continue paying rent from January 1967 when their mother died.

9. Consequently, that notices to vacate were issued to the Plaintiff's father from 1970 and 1977 and subsequently his mother in 1983, 1997 and 2008 after his father's demise in 1980. Additionally, that there were court proceedings and numerous meetings at the Provincial Administration offices during his father's lifetime which demonstrates that their occupation has all along been under challenge.

10. It was deposed that the Plaintiff having been born in 1966 could not be served with rent demand notices or notice to vacate. The deponent contended that if indeed there was sale of land as alleged, there would be no basis to issue demand notices to the Plaintiff's father who did not at any one time challenge the said notices. The Defendant further challenged the authenticity of the Sale Agreement deposing that it is evident that it was written by one person and that nobody, including the transacting parties signed it.

Evidence

11. Parties did comply with the provisions of Order 11 of the Civil Procedure Rules where they filed witness statements and bundle of documents in support of their urgings. The parties also filed a list of agreed issues dated 27/2/2012. At the hearing, it was agreed that the court would only determine issues No. 1, 4, 5 & 6 to wit;

- i. Whether the Plaintiff has been in open and uninterrupted possession of all that piece of land known as Dagoretti/Thogoto/T.178 for more than 12 years and whether the doctrine of adverse possession applies.
- ii. Spent
- iii. Spent
- iv. Whether the late David Kamau Njoroge (deceased) was a tenant of the suit land.
- v. Whether the registered proprietors of the suit land are trustees of the Plaintiff
- vi. Costs of the suit.

12. The Plaintiff gave sworn testimony where he reiterated the contents of his pleadings that he was born, brought up and currently lives on the suit land with his sister and her children whom he caters for. The Plaintiff produced his bundle of documents as evidence and urged the court to grant the prayers as sought. On cross-examination, the Plaintiff stated his father never told him that he was paying rent for the property and that he was always aware that his father had purchased ½ acre of the suit land. The Plaintiff also confirmed that the suit was prompted by the Defendants' notice to vacate of March 2008. The Plaintiff admitted to attending meetings before the Chief and District Officer in the 1980's stating that they used to attend the meetings because they were asked to vacate. It was his testimony that the suit property was not transferred to his father not because he was a tenant, but because they had no doubt that they were owners. On re-examination, the Plaintiff stated that the meetings at the DO's office in the 1980's commenced well after 14 years of their occupation.

13. The 1st Defendant (DW1) gave sworn testimony where he testified that the Plaintiff's father never purchased the suit land but rented a mud house for Kshs. 30/- per month from 1962 until 1967. It was his evidence that after their father died in 1976, they initiated a succession cause and obtained certificate of grant with no objection from any party. He reiterated that they had on several occasions issued notices to vacate before and after the Plaintiff's father's demise. DW1 testified that one Joseph Gitau placed a caution over the property as he and the Plaintiff's mother claimed ½ acre each of the suit land. Further that they both filed suits in the High Court No. 365 and 366 of 1983 to which the Defendants asked for

evictions. DW1 states that the court files got lost in the Registry and the suits have never been determined.

14. On cross-examination, DW1 stated that the Plaintiff's father took possession in 1962 and continued to pay rent without default until 1966 upon the death of their mother. He admitted that the photographs annexed by the Plaintiff do not show a mud house but testified that the Plaintiff pulled down the mud house and built the structures thereon. DW1 admitted that from 1962 to 2008 was a period of 46 years and that all notices issued to the Plaintiff's mother was beyond 12 years after the date of their occupation of the land. Further that the first case was filed by Joseph Kamau in 1982 a period of over 30 years since their occupation. On re-examination, DW1 stated that they were not concerned when the Plaintiff's father brought down the mud house to construct the current house which was done in 1967 after their mother's demise. DW1 stated that he issued the Plaintiff's father the first notice in 1977 and notified him of the succession cause in the event that he desired to lay claim, but that he failed to come to court. Further that he used to deliver documents to the Plaintiff's father in person.

Submissions

15. The suit was further canvassed by way of written submissions. Mbugua Ng'ang'a & Co. Advocates for the Plaintiff filed submissions dated 22/10/2014 where the Plaintiff recapped the Plaintiff's case that possession was for a period of over 12 years, without consent from the Defendants and that even after the Plaintiff's father allegedly stopped paying rent in 1966, the Defendants did not take steps to recover their property. It was further submitted that the suit filed by Joseph Kamau and the Plaintiff's mother in 1983 could not in any way interfere with the time for the purposes of adverse possession. Counsel submitted that these proceedings were not filed by the Defendants' nor their parents and therefore could not stop time from running.

16. In support of the submission counsel relied on the decision by the Court of Appeal in **Baber Alibhai Mawji v Sultan Hasham Lalji and Green Fields Investments Limited Civil Appeal Nai. No. 269 of 2001** where their Lordships held:

"In our view, the assertion of right must involve either the regaining of entry to the land by the owner or the commencement of a suit whose substance is to regain possession and any other suit by the owners would, in our view, be ineffective in stopping the running of time".

Counsel further cited the authority of **Githu v Ndette Civil [1984] JKR 776** submitting that first, change of ownership of land which is occupied by any a person under adverse possession does not interrupt such person's possession, and secondly, issuing notices to vacate did not amount to assertion over the property.

17. It was further submitted that even if the Plaintiff's father was to be held to be a tenant, he became an adverse possessor from the date when he stopped paying rent in 1966 up to his demise in 1980 which is a period of 14 years and continued thereafter through the Plaintiff, since adverse possession is not extinguished by his death his dependents continued in occupation. On the foregoing, counsel submitted that the suit land is subject to the overriding interest under Section 28 of the Land Registration Act and the Defendants therefore hold the land in trust for the Plaintiff who acquired rights under Section 7 of the Limitation of Actions Act. Further that having established his claim, the Plaintiff is entitled to costs.

18. J.M. Njenga & Co. Advocate for the Defendants filed submissions on 25/11/2014. Counsel submitted that a claim for adverse possession can only be sought against the registered owner of the land. It was submitted that the Defendants only became registered owners of the property in 1983 and therefore time could only have started to run as against the Defendants in 1983 and not anytime earlier. Counsel submitted that the entry upon the land by the Plaintiff's father was for the intended purpose of the property, that is, rental and that of the Plaintiff was by virtue of being born there. Therefore, counsel submitted that their occupation and use was not contrary to that of the owner at the time. It was further submitted that since the Defendants were not registered owners before 1983, they could not assert their rights and subsequently after they were registered, they sought to obtain a court order for eviction.

19. It was submitted that the ingredient of uninterrupted possession was not satisfied because of the numerous notice to vacate, court cases, one instituted by the Plaintiff's mother in 1983 and another by the 1st Defendant against the Plaintiff's mother in Kiambu SRMCC No. 64 of 1985 as well as several meetings held at the Chief's and DO's offices in an attempt to amicably resolve the dispute. These actions, counsel submitted, are indicative of the Defendants' efforts to acquire possession and assert their rights subsequent to their being registered as proprietors thereof. It was counsel's submission that having failed to establish acquisition of rights over the property pursuant to Section 7 of Cap 22, the Defendants cannot be said to be holding the property in trust for the Plaintiff.

20. Counsel for the Defendant relied on the Court of Appeal decision of **Wambugu –v- Njuguna [1983] KLR 172** as well as the unreported High Court decisions of **Dhariwal Hotels Ltd –v- Sato Properties Ltd [2011] eKLR** and **Sophie Wanjiku John –v- Mwihaki Kimani [2013] eKLR** in exposition of the law regarding adverse possession.

Discussion

21. A part from three facets of the evidence, the parties appear in agreement on all other facts. The first two facets are that the Plaintiff was always on the premises as a tenant and secondly that the Plaintiff's possession of the suit premises was interrupted. The third facet of evidence is whether the Plaintiff used the property adversely. The Plaintiff contests these set of facts alleged by the Defendants. Otherwise, the fact that the Plaintiff is in possession is a fact not disputed and neither is the fact that the Plaintiff has been in possession since the year 1962, first through the Plaintiff's deceased father and thereafter the Plaintiff in person. First a brief avowal on the law of adverse possession.

Adverse possession

22. The claim herein is about the doctrine of possessory title as the Plaintiff contends that by reason of more than 12 years of adverse possession of the such property by both himself and his predecessors in title the Defendants right of action to recover the suit property or cause delivery up of vacant possession of the suit property is statute barred and pursuant to statutory provisions the Plaintiff is entitled to be recognized and registered as proprietor of the suit property as the Defendants title has been extinguished. The suit is pegged to the various provisions of the Limitation of Actions Act (Cap 22) Laws of Kenya, in particular Sections 7, 8, 13 and 17 thereof.

23. The statute of limitations has behind it the general legal policy that in the public interest claims, even good claims, ought not be pursued in court after the expiration of specified statutory periods. In the case of land the effect of that policy is to protect any undisturbed exclusive possession of land from recovery by the person with good title to the land. As distinct from the normal mechanisms of a registration of a transfer of property, the effect of limitation period in the case of land is that a person is able to claim and acquire title and the right to be registered as proprietor of land by reason of exclusive adverse possession of it for 12 years or more.

24. There are effectively two key elements under statute: a discontinuance of possession or dispossession of land and secondly, adverse possession of that land by another person for 12 years or more after the accrual of the right of action for its recovery.

25. The foregoing is aptly captured under the Limitation of Action Act (Cap 22) Laws of Kenya at Sections 7 and 38, which state as follows:

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.

38(1). Where a person claims to have become entitled by adverse possession to land registered ... or comprised in a lease ... he may apply to the High Court for an order that he be registered as the proprietor of that land or lease.

26. Case law has also not failed to clearly capture the law on adverse possession. From the various authorities one can safely discern that possession cannot be said to be adverse if it is enjoyed under a lawful title. If a party occupies property with the permission of the owner he cannot be treated as having been in adverse possession as against the owner: see **Ramnarace –v- Lutchman [2001]1 WLR 1651**. Possession of land also is adverse as against the owner only. The occupation also needs to be adverse for time to start running in favour of the person claiming adverse possession. Mere dispossession or discontinuance of possession is not enough for time to start running as a right of action to recover possession must have accrued to the owner. These principles were well captured in the English case of **JA Pye (Oxford) Ltd –v- Graham [2003] 1 AC 419** which reiterated the established principle that a person claiming adverse possession must be shown to have both factual possession and the requisite intention to possess. **Lord Brown-Wilkinson held in JA Pye (Oxford) Ltd –v- Graham (supra)** at paragraph 40, that the two crucial elements in adverse possession claim could be described as:

“(1) a sufficient degree of physical custody and control” and (2) “an intention to exercise such custody and control on one’s own behalf and for one’s own benefit”

27. The above principles have been followed in various cases within our jurisdiction including but not limited to **Kasuve –v- Mwaani Investments Ltd & Others [2004] 1 E.A 81**, **Wanje –v- Saikwa (Number 2) [1984] KLR 284** **Githu –v- Ndeete [1984] KLR 776** and **Mbira –v- Bachuhi [2002] 1 EA 137**. Lately the principles have been applied in **Jacktone Nzioka Muyanga –v- Sitola Kinyili [2015] eKLR** and also in **Wellingtone Lusweti –v- Lands Limited [2014] e KLR**.

Issues

28. The Plaintiff brought this action claiming possessory title on 6th May, 2008. The issues, if condensed, consequently would be: Did the Defendants or their predecessor in title discontinue possession or were they disposed of the disputed land before 6th May, 1996 and if so, did the Plaintiff or his predecessor in title remain in possession for a period of twelve (12) years without interruption? These two issues certainly capture issues number 1, 4 and 5 contained in the agreed statement of issues filed by the parties.

29. On the first issue, it is certainly common ground that the Defendants predecessor in title discontinued his possession of the property at least prior to 6th May, 1996. Evidence by the Plaintiff was to the effect that he has occupied the suit premises since 1966. Possession was taken up of the suit property by the Plaintiff’s deceased father in or about 1966. The Plaintiff says possession was taken up with the Defendants’ knowledge and permission as the property had been bought from the Defendant. The Defendants contend that the Defendants predecessor in title surrendered the suit property to the Plaintiffs deceased father on the basis of a tenancy in 1962. DW2 however testified that rent was last paid by the Plaintiff’s father in 1966. Effectively, even if I was to take the Defendants position that the Plaintiff entered the suit premises as rent paying tenants then on the Defendant admission, the Defendants were dispossessed in the year 1966 when the Plaintiff’s father stopped paying rent. **Section 12 of the Limitation of Actions Act** is to the effect that where a person is in possession of land by virtue of a lease by which rent is reserved then if no rent is subsequently received by the owner of the property the right to action accrues at the date when rent is due but not received. In other words, when there is default the owner is deemed for the purposes of the Act to have been dispossessed and the right of action to recover possession accrues then. By the Defendant’s own admission consequently, the Defendants’ possession was discontinued in 1966. That was over forty years prior to the filing of the suit. In 1966, the Plaintiff’s deceased father effectively ceased to be a tenant. Time then began to run.

30. The next issue to be addressed is whether the Plaintiff’s possession was ever interrupted. DW1 testified that the Plaintiff’s possession was interrupted in 1970 when the Defendants gave the Plaintiff’s father a notice to vacate. Then DW1 also testified that the Defendants commenced suits against the Plaintiff. The suits were stated to be civil cases number 365 of 1983 and 366 of 1983. Finally, the Defendants testified through DW1 that the Defendants had sought the intervention of the local administration to have the Plaintiff vacate the premises to no avail. The question is whether these actions by the Defendants, if true, did interrupt the Plaintiff’s possession.

31. In my judgment and foremost, there is no evidence that the defendants commenced any legal action against the Plaintiff or the Plaintiff's predecessor in title. DW1 did not produce copies of the pleadings in the two cases allegedly filed against the Plaintiff seeking possession. DW1 only testified that the documents got lost. In the circumstances, I am unable to hold that such suits interrupted the Plaintiff's possession as no proof of their existence has been availed.

32. Assuming that the suits were truly filed in 1983, they would still have been time barred as the Defendant's right of action, as already founded, accrued in 1966.

33. With regard to notices as well as mediation meetings I am ready to accept and hold that the notices truly were issued and mediation meetings before the local administration were held. The Plaintiff admitted as much during cross examination. I am however not ready to accept that either the notices to vacate or the mediation meetings before the local administrators interrupted the adverse possession by the Plaintiffs. Such action is not sufficient to bring an adverse possessor's possession to an end, in my view. For that to happen the owner must prior to the end of the statutory period of twelve years, retake exclusive possession. The intention to take back possession must not be by word only but by deed also. Possession can be resumed even for very short time. Eviction of the possessor will be deemed an interruption of the adverse possessor's possession: see **Randall –v- Stevens [1853] 2 E& B 641**. Filing an action in court for delivery up of vacant possession will also interrupt the adverse possessor's possession but mere oral declarations, even in meetings will not. It is the quality of the acts which matter: see **Zarb –v- Parry [2012] 1 WLR 1240**.

34. I am satisfied and find that between 1966 and May, 2008 when this case was filed, the Plaintiff has established his case that the Plaintiff was in uninterrupted and exclusive possession of the suit property.

35. Was there intention to absolutely dispossess the Defendant? I would answer this question in the affirmative on the basis of the evidence by the plaintiff. The Plaintiff has erected permanent houses on the suit property. Both the Plaintiff as well as the Defendants through DW1, testified to like effect. The occupation and continuous use of the land has been exercised with the *animus possidendi* of an owner.

36. I find in conclusion that the Plaintiff has proved to the acceptable standard of a balance of probability that the Plaintiff's predecessor in title and the plaintiff went into peaceable possession of the suit property without permission of the Defendants in 1966 and so remained for a period of 12 years and more. All the while there was nothing to suggest to the Defendants that their rights remained intact as the Defendants were excluded from enjoying the property. The Plaintiffs sufficient degree of occupation and physical control as proven establishes, and I so find, a possessory title in favour of the Plaintiff. Even the change of ownership to the Defendants in 1982 did not defeat such possessory title. It follows that the Defendants were holding the property in trust for the Plaintiff.

Result

37. I would allow the originating summons. It succeeds.

38. In the result, the main reliefs that I grant are as follows:

- i. A declaration that the Defendants' right to recover possession of the suit property namely title No. Dagoretti/Thogoto/T.178 is statute barred.
- ii. A declaration that the Defendants right and interest in the suit property was extinguished in 1978.
- iii. An order that the Plaintiff be registered as proprietor of the suit property on his own behalf and on behalf of his nominees with the consequent result that the Plaintiff is at liberty to make appropriate applications for purposes of execution of this judgment.

Costs

39. The Plaintiff will also have the costs of the suit.

40. By way of post script, I would like to thank counsel on both sides, for their clear and helpful submissions as well as the case law availed to the court.

Dated, signed and delivered at Nairobi this 20th day of April, 2015.

J. L. ONGUTO

JUDGE

In the presence of:-

Mr. Ng'ang'a for the Plaintiff/Applicant

Ms. Wachanga for the Defendants/Respondent