



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT & LAND COURT

ELC NO.149 OF 2013

MARY WAMUYU MWANGI..... PLAINTIFF

VERSUS

JOSEPH KAHARA THINWA.....DEFENDANT

JUDGEMENT

Introduction

1. By a plaint dated **29th July, 2013** the plaintiff brought the suit herein seeking the following orders against the defendant:-

i) A declaration that the defendant is unlawfully entering and occupying part of her land to wit, Naromoru/Naromoru/Block 1/51 and a permanent injunction to restrain the defendant from entering occupying the said parcel of land and directing the defendant to vacate the suit property forthwith;

ii) Damages for trespass to land;

iii) Costs of the suit and any other or further relief as the court may deem fit to grant.

2. The plaintiff avers that at all times material to the suit, she was the registered owner of the parcel of land known as **LR. No. Naromoru/Naromoru/Kieni East Block 1/51** measuring 2.61 hectares (hereinafter called the suit property). The defendant is, on the other hand, said to be the registered owner of **LR. No. Naromoru/Naromoru/Kieni East Block 1/52** measuring one decimal seven one (1.71) hectares.

3. It is the plaintiff's case that the defendant has encroached into the suit property and continues to commit acts of trespass thereon. In particular, the plaintiff accuses the defendant of destroying and/or wasting the suit property.

4. The plaintiff contends that all her attempts to get the defendant to stop the trespass have been in vain.

5. Upon being served with summons to enter appearance, the defendant filed the statement of defence and counter-claim dated **20th August, 2013**. In his statement of defence, the defendant has denied having encroached into the suit property or having committed thereon the alleged acts of waste. On a without prejudice basis, the defendant has explained that he has been in adverse possession of the portion of the suit property in contention since 1979. The defendant also contends that the plaintiff's claim is statute

barred.

6. In the counter-claim, the defendant has reiterated his contention that he has become entitled to the portion of the suit property he occupies by adverse possession. The defendant has also reiterated his contention that the plaintiff claim is statute barred.

EVIDENCE

The plaintiff's case

7. When the matter came up for hearing, the plaintiff informed the court that he obtained title to the suit property in 2005 after the suit property was given to her by her father. When she took possession, she found the property to be less than the registered acreage. Upon carrying out investigations, she found that the defendant occupied three acres of her parcel of land.

8. Upon obtaining that information, she sought assistance from members of the Provincial Administration (village elders and the area chief) who were unable to resolve the dispute. The area chief referred her to the Land Registrar but she decided to file the current suit.

9. She recounted that during hearing of the case before the Registrar, the parties to the suit conceded to the proposal that a land surveyor be sent to the ground to ascertain the boundaries to the parcels of land in contention.

10. The court heard that during the visit to the parcels of land in contention, the surveyor showed the parties their boundaries. Thereafter the surveyor filed a report which none of the parties raised any objection to.

11. She explained that the site visit revealed that none of the parties knew their boundaries. In view of the foregoing, the plaintiff urged the court to allow her case and dismiss the defendant's counterclaim.

12. Upon being cross-examined by counsel for the defendant, the plaintiff admitted that the defendant had been in occupation of the three acres she seeks to recover from him for a long period of time. She was, however, unable to state for how long.

13. With regard to the photographs produced by the defendant which attest to the developments the defendant has effected on the suit property, the plaintiff explained that the developments indicated in the photographs were erected recently. That notwithstanding, she admitted that the defendant has buried some of his relatives on the three acres she claims.

The defence Case

14. On his part, the defendant informed the court that he purchased his parcel of land in 1979 and took possession soon thereafter. The court heard that at that time, the parcel of land owned by the plaintiff was occupied by a man called Muriuki (the plaintiff's father). In 1980, the plaintiff's father tried to stop the defendant from planting trees in the suit property but since the plaintiff's father did not follow up on the issue, the defendant continued carrying out the impugned developments on the portion of the suit property in dispute.

15. Explaining that he had enjoyed peaceful possession of the suit property ever since he took possession of it in 1980, the defendant contends that he was only summoned by the area chief concerning his activities in the suit property in 2013.

16. Contending that when he took possession of his parcel of land the properties which are the subject of this suit had been surveyed and boundaries marked, he explained that he bought four acres from the person who sold his parcel of land to him and took possession of the parcel that was identified to him by the seller. He however, contradicted himself by admitting that he has all along carried his activities on the

three acres in contention.

17. Owing to the developments he has effected on the parcel of land in dispute and the fact that he has buried his relatives thereon, he stated that he does not agree with the plaintiff's demand that he be evicted from the suit property. In support of the claim that he has effected developments on the suit property, he produced several photographs as Dextb (a) to (e). He maintained that before this suit was filed, nobody attempted to remove him from the portion of the suit property he is accused of having trespassed onto.

18. Upon cross examination by counsel for the plaintiff, the defendant informed the court that the parcels of land which are the subject of this suit were allocated to Kieni East Farmers Company Ltd; that he purchased his parcel from a member of the company and that the said member handed to him documents showing that the land he was buying was 4 acres. He stated that the seller showed him the land he was buying by which time the parcel had not been fenced off. This notwithstanding, he insisted that he only uses 3 acres on the ground. He reiterated that the plaintiff's father had raised concern about his encroachment into the plaintiff parcel.

19. The court heard that the defendant was issued with a title showing that his parcel is 4 acres in 2014.

20. Concerning the report by the surveyor which indicates that he has encroached on 3 acres belonging to the plaintiff, he stated that he was not challenging that report. He informed the court that if directed to vacate the portion he was found to have encroached onto he would comply.

21. By consent of the advocates for the respective parties, the report of the surveyor was admitted into evidence without calling its maker.

22. At the close of the case of the respective parties their advocates filed submissions which I have read and considered.

Submissions for the plaintiff

23. In the submissions filed on behalf of the plaintiff, a brief history of how the suit property was acquired and the circumstances leading to the filing of this suit is given. It is pointed out that during the pendency of the suit herein, parties to the suit agreed that the solution to the dispute herein was to seek expert evidence. As a result, the parties are said to have agreed to have the Land Registrar and a Land Surveyor visit the disputed area with a view of ascertaining the boundary dispute.

24. It is further explained that the exercise established that the defendant had encroached into the plaintiff's land. Consequently, the proper boundaries were fixed. The Land Registrar is said to have filed a report in court. It is pointed out that the report of the Registrar which was not objected to by any of the parties was admitted into evidence. With regard to that report, it is submitted that the report offers a solution to the dispute herein.

25. With regard to the defendant's claim that the plaintiff's suit is time barred and that he has become entitled to the portion he occupies by adverse possession, it is submitted that both parties admitted that they did not know their respective boundaries until the boundaries were ascertained through the order issued by this court. That being the case, the parties in this suit are urged to accept the solution offered by the Land Registrar and maintain the new boundaries because the original ones were wrong.

26. It is further submitted that the defendant cannot claim to have been in adverse possession of the plaintiff's parcel of land when he was leaving in ignorance as to the extent of his land. Because the boundaries had not been fixed or ascertained, it is submitted that the defendant cannot be heard to claim that his possession of the portion of the suit property in contention was adverse to the plaintiff's interest therein. Besides, the defendant is said to have admitted that he is ready to vacate the portion he wrongfully occupies.

27. Based on the defendant's intimation that he is willing to vacate the portion he has been found to be encroaching and in the spirit of good neighbouriness, it is submitted that the plaintiff is willing to vacate the claim for damages.

28. On costs, it is submitted that because the defendant did not settle the plaintiff's claim in good time, he should be ordered to pay the costs of the suit.

Submissions for the respondent

29. In the submissions filed on behalf of the defendant, it is contended that from the rival testimonies adduced in this suit, the following common grounds emerge:-

- a. The defendant has been in continuous possession of the portion of the suit property in contention;
- b. That the defendant's claim of adverse possession arose when the plaintiff's land was occupied by the plaintiff's father long before it was gifted to the plaintiff;
- c. That the plaintiff only sought to claim the portion occupied by the defendant in 2014;
- d. That the portion of the plaintiff's land under the defendant's possession measures approximately 3 acres.

30. The report by the surveyors commissioned by the parties during the pendency of this suit is said to have confirmed the defendant's possession of the plaintiff's suit.

31. Arguing that at the time the plaintiff filed the suit herein both parties did not know the location of their common boundary and referring to **Section 18(2)** of the Land Registration Act, 2012, counsel for the defendant has submitted that this court did not have jurisdiction to entertain the action or proceedings began before it. **Section 18(2)** provides as follows:-

“18(2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.”

32. It is submitted that a claim for trespass to and eviction from land presupposes the existence of a pre-determined boundary. Where the claim for trespass and eviction is based on a boundary that had not been ascertained and fixed, like in this case, it is submitted that the claim would be unsustainable.

33. With regard to the defendant's claim for adverse possession, it is submitted that the claim ought to succeed on the ground that the defendant's evidence to the effect that he has been in uninterrupted, continuous and open occupation of the portion of the parcel of land in dispute for about 35 years is not controverted.

34. With regard to the contention by the plaintiff's counsel that the defendant's possession was not adverse to that of the plaintiff because the parties did not know the location of their boundaries, reference is made to the testimony of the defendant to the effect that the plaintiff's father objected the defendant's occupation without taking any measures to throw him out.

35. On what is required to prove adverse possession, it is submitted that possession of land by an adverse possessor may take different forms, for instance:-

- i. Objective view which is used without true owner's permission and inconsistent with true owner's right;
- ii. Bad faith view which is intentional trespass with the adverse possessor's subjective intent and state of mind and
- iii. Good faith view where the party mistakenly believed that it is his land, as in the instant case.

36. It is further submitted that adverse possession entails a claim of title or a claim of right and that the mere intention of taking the land as one's own constitutes claim of right.

37. According to counsel for the defendant, a claim of right exists if a person believes he has rightful claim to the property even if the the belief is mistaken. Good faith, bad faith, developing the land, a legal document which incorrectly appears to give the claimant title or dispossession not under force are said to be specific requirements for the principle of adverse possession to apply. The person in such possession is said to have a right to acquire title to land by adverse possession.

38. In a reply to the issues raised in the submissions filed by the defendant, counsel for the plaintiff has explained the circumstances that led to the filing of the current suit before the boundaries were fixed and ascertained as required under **Section 18(2)** of the Land Registration Act. Terming the omission herein a procedural technicality, counsel for plaintiff urges the court to disregard it as no party was prejudiced by it.

39. Concerning the defendant's claim for adverse possession, it is reiterated that the claim cannot be maintained because none of the parties knew that the occupation of the property was adverse. According to counsel for the plaintiff, for a claim of adverse possession to be established, all the parties to the claim must have known that the possession is adverse to the interest of the rightful owner.

40. It is further submitted that for the claim of adverse possession to be sustained against the plaintiff, the defendant must demonstrate that he had been in adverse possession of the portion of the suit property for a period of over 12 years from the time the plaintiff became the proprietor of the suit property, that is, from 2005.

Issues for determination:

41. From the pleadings filed in this suit and the submissions, the issues for determination are:-

1. Whether this court has jurisdiction to hear and determine this suit?
2. Whether the the plaintiff claim is time barred?
3. If the answer to (2) above is negative, whether the defendant has become entitled to the suit property by adverse possession?
4. If the answer to (3) above is negative, whether the plaintiff has made up a case for issuance of the orders sought?
5. What orders should the court make?

Whether this court has jurisdiction to hear and determine this suit?

42. With regard to this question, it is submitted that by dint of the provisions of **Section 18(2)** quoted herein above, this court lacked jurisdiction to hear and determine the dispute herein at the time it got seized of it.

43. Indeed, **Section 18(2)** prohibits a court from entertaining any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with that section. However, the circumstances of this case can be distinguished from the circumstances contemplated under the said Section in that it is not a case seeking the determination of boundaries as argued by counsel for the defendant. Fixing of the boundaries was just an incident in the proceeding aimed at helping the court make the decision it was called upon to make from a point of information.

44. I also find the issue of the court's jurisdiction to be an afterthought, the same having been raised too late in the proceedings. A party who wants to challenge proceedings on the question of jurisdiction is enjoined to raise it early enough and not too late into the proceedings like the defendant did in this case. In this regard see the case of **Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367** where the Court of Appeal expressed itself as follows:

"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably

plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.”

45. Although in this case the question of jurisdiction was not been raised after the case had been heard and determined, it was raised after the mischief sought to be cured by ousting the jurisdiction of the court had been cured. By the time the defendant raised the issue, the parties had consented to have the Land Registrar and a Surveyor visit the suit properties for purposes of ascertaining and fixing the boundaries as required by the said section. The said action cured the defect, if any, in the proceeding. It has not been demonstrated that the defendant has suffered any prejudice by the proceedings conducted in this case. That being the case, I find and hold that in the special circumstances of this case, the court had jurisdiction to hear and determine the dispute herein.

46. Since questions 2 and 3 are related, I will tackle them together. In tackling the questions I adopt the reasoning of **Lenaola J.**, in the case of **Beatrice Syokau Gatumbu v Kenya Airports Authority & 2 Others [2012]eKLR** where he observed:-

“The period of time for which title to real property is acquired through the doctrine of adverse possession is provided for under Section 7 of the Limitations of Actions Act Cap 22 Laws of Kenya. Section 7 of this Act reads:-

“An action may not be brought by any person to recover land after the end of 12 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....

The issue of time has also been settled by case Law where it has been held over and over again that time begins to run when there is some person in adverse possession of the land and not by virtue of the fact that the land is vacant. In the case of **Tayebali Adamji Alibhai – Vs – Abdulhussein Adamji Alibhai (1938), 5 E.A.C.A 1**, it was held that **in respect of a registered land, adverse possession dates from the granting of the certificate of title, for that is when the title holder is *prima facie* entitled to possession and, therefore, entitled to take action against any intruder to the land.** This was later on quoted with approval in the case of **Peter Wanyoike Gathure – Vs – A. Beverly (1965) E. A at Pg. 514** where it was held:-

(i) That certificates of ownership issued under the Land Titles Ordinance must be regarded as conferring an absolute and indefeasible title to the property referred to therein subject to no other interest than those mentioned therein.

(ii) That no period of prescription as against the title shown in a certificate of ownership could begin to run prior to the date of the grant of the certificate.”

47. In applying the above principles, which I totally agree with, to the circumstances of this case, the plaintiff's title having been obtain in 2005 and the current suit to recover the portion of the suit property which the defendant is said to be illegally occupying having been brought in 2013 (about 8 years later) I agree with the plaintiff's counsel that the claim is not time barred.

48. As for the claim for adverse possession, I equally find the same to be unmaintainable as the defendant's adverse possession of it, if at all existed, began in 2005 when the plaintiff obtained title to it. By the time the plaintiff brought the current proceedings, the minimum period of 12 years prescribed in our laws had not elapsed.

49. On whether the plaintiff has made up a case for being granted the prayers sought, on the basis of the uncontrovereted or unchallenged report of the Land Registrar filed in court on **6th March, 2014** which at the relevant parts reads as follows:-

“This is a case relating to an uncertain boundary between land parcel Nos. Naromoru/Naromoru/Kieni East Block 1/51 and 52 measuring 2.61 hectares and 1.71 hectares respectively.....

The case was introduced to this office through his letter dated 29th July, 2013 and thereafter a court order in the Environment and Land Court in case No. 149 of 2013 served to the district land registrar and the District Surveyor...

Summons to the parties informing them of our intended visit to the site were prepared and sent through the Chief of the area. The date of visit was set as 16th January 2014...

After the boundary was marked I called the wife of the owner of parcel 52 and the complainant i.e the owner of parcel No.51 and pointed to them their common boundary. Thereafter I asked one of the elders to read aloud section 21(1) of the Land registration Act.

Section 20(3) is read out to the owner of parcel No. 51 as an order of the Land Registrar....

Ruling

- 1. The boundary marked by the surveyor and shown to the parties to be fenced with appropriate material by the owner of parcel No. 51 within 60 days from the date of this ruling;**
- 2. The area Chief to supervise the fencing;**
- 3. Peace be maintained from now on.”**

I find the plaintiff's case to have merit and allow it in terms of prayer one of the plaint.

50. Since the plaintiff moved to court before the boundary dispute had been heard and determined by the body with mandate to hear and determine it at first instance, I decline to grant damages and costs of the suit.

51. Parties are ordered to bear their own cost of the suit.

Dated, signed and delivered at Nyeri this 16th day of April, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Ms Kahinga holding brief for Mr. Wachira for the plaintiff

No appearance for the defendant

Joseph Kahara Thinwa - present

Lydiah – Court Assistant