



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC ORIGINATING SUMMONS NO. 48 OF 2018

ZAVERIO MWIRIGI RIRIA PLAINTIFF

VERSUS

SARAH KAREA M'ITIRARI DEFENDANT

JUDGMENT

A. PLEADINGS

1. The plaintiff brought an originating summons dated 27.11.2018 for the court under **Order 38 Rule 3 (1) Civil Procedure Rules and Section 38 of the Limitations of Actions Act** to determine the following questions: if **L.R No. Nkuene/Ukuu/162** measures **0.92** acres; if he has been in possession of the said land for 12 years and lastly if he is entitled to costs.
2. Upon determination of the aforesaid questions, he urged the court to declare that he has obtained 0.33 acres out of the **L.R No. Nkuene/Ukuu/162** by virtue of adverse possession.
3. The plaintiff filed a supporting affidavit whose gist was that he bought the suit land from his uncle Peter Kinyua now deceased and husband to the defendant, took up possession and developed the land.
4. He averred his uncle passed on in June 2011 before effecting the transfer but continued to live on the land openly, continuously, notoriously with full knowledge of the defendant.
5. Further, he averred the plaintiff had filed and obtained letters of administration of grant.
6. The defendant admitted her late husband had allowed the plaintiff to cut and or cultivate nappier grass for his cows on a portion of land her (husband) was to inherit from his late father's estate.
7. That she retained the coffee on the said portion and has been harvesting it up to the date of filing the suit.
8. She stated the plaintiff lived at his father's portion of land and had never lived on the portion that he was allowed to cultivate nappier grass. That upon the death of her husband in 2011, she reclaimed the portion and stopped the plaintiff from cultivating it since her son Zablon Murerwa had built on the land which he had taken possession of in 2010 while her husband was still alive.
9. In her view, the plaintiff's licence to cultivate terminated in 2011. He complied and vacated the land.
10. She averred she opposed the efforts to include the name of the plaintiff in the succession suit following which the grant was rectified. She denied the plaintiff had any entitlement to the land as alleged or at all.

B. EVIDENCE

11. The plaintiff adopted as evidence in chief his supporting affidavit to the originating summons and witness statement dated 11.9.2019. He stated he took vacant possession of the suit land in 2003 when his deceased uncle gave him a portion of his land measuring 0.33 acres. Since then, he said he had been utilizing the land.
12. He went on to say in 2015, the defendant allegedly gave out the land to someone else following which he came to court and stopped the eviction. He urged the court to grant him the orders he was seeking.
13. In cross examination the plaintiff insisted he was given the land at a costs of **Kshs. 180,000/=** through an oral agreement. He admitted

Zabron Murerwa, a son to the defendant had built on a portion of the suit land but could not remember when he put his building through it was after he had bought the land but before the death of his uncle. He denied being ordered to vacate the land by the defendant after his uncle passed on.

14. He told the court he had planted nappier grass, that he was the one picking coffee growing on the land and was No. 7859 at the coffee factory records.

15. He admitted the defendant took vacant possession in 2015 where after he stopped plucking the coffee or planting nappier grass on the suit land.

16. Asked further, the plaintiff admitted he was not living on the land but on **L.R Nkuene/Ukuu/166**.

17. Regarding his late father Joseph Ntoriria, he said he was aware of a **Succession Cause No. 977 of 2015** where he was to get 0.33 acres as a purchaser but eventually his name was removed by the court.

18. In re-examination, he confirmed he had no problem with the portion built by the defendant's son since his portion was still intact.

19. Further, he told the court his name was removed from the grant since he was a purchaser and could not inherit unless he lodged the instant case to have his purchaser's rights declared.

20. The defendant adopted her replying affidavits sworn on 12.8.2019 and 12.2.2020 respectively as her evidence in chief. Further, she produced her exhibits as per the list of documents dated 18.2.2021. They included an official search dated 16.11.2018, a certificate of confirmation of grant dated 21.11.2017, a copy of application/order dated 3.4.2018 and an amended certificate of confirmation of grant dated 27.2.2019 as **D exh 1 – 4** respectively.

21. She denied that the plaintiff was neither living on the suit land nor was she aware of the alleged sale of land to him by her late husband.

22. She insisted her son Zablon Murerwa was living on the suit and had a permanent homestead therein. She insisted that the plaintiff had his homestead on **Parcel No. Nkuene/Ukuu/166**.

23. Regarding the succession cause, she admitted the plaintiff was initially mistakenly included as a beneficiary of the estate but it was eventually rectified. According to her, the plaintiff's licence to plant nappier grass in 2003 expired upon her giving him a notice to vacate in 2011 which he complied with.

24. She denied that there was any injunction stopping her from removing the plaintiff from the suit land including an order of status quo.

25. Further, she insisted her late husband had only permitted the plaintiff to plant nappier grass and after his death she ordered him out of her land.

26. As concerns her son, she admitted he built on the suit land in 2010 and that the name of the plaintiff was mistakenly put in **D exh 2**. The grant was rectified since he was not a son to the deceased.

27. She testified as at the time this suit was lodged, the plaintiff was already out of the suit land and that if there was an order of the status quo issued it had come out after he had already vacated the land.

C. SUBMISSIONS WITH LEAVE OF COURT

28. The plaintiff submits he has met the requirements to be entitled to adverse possession since he took vacant possession against the defendant's permission and has occupied the land for over 12 years openly, continuously, notoriously and uninterruptedly.

29. In his view, it is admitted he took possession of the land on 2003 and by the time he filed the suit, 15 years had elapsed.

30. As regards developments on the land, the plaintiff submits he had planted nappier grass and fenced of the land.

31. The plaintiff submits the defendants purported attempt to evict him was thwarted after he obtained an order of maintenance of status quo on January 2019.

32. Nevertheless, the plaintiff submits he had started to assert his rights as a purchaser in the succession cause long before the attempted eviction.

33. The defendant submits though there was an admission the plaintiff was allowed to enter, cultivate and plant nappier grass on the suit land by her later husband in 2003, her son Zablon Murerwa moved into the land in 2010 and built on it effectively terminating the plaintiff's licence.

34. On the succession cause, the defendant submits there was a mistake but eventually the plaintiff's name was removed after and grant was rectified as per **D exh 4**. She submits she holds the property in trust of her children.

35. The defendant submits a licensee cannot make a claim of adverse possession as held in *M'Mbaoni M'Thara –vs- James Mbaka [2017] eKLR.*

36. Concerning when time started running, the defendant submits, 2003 is the date alleged by the plaintiff to have moved into the land and given her son Zablom Murerwa took over the land and built on it in 2010, the 12 years period could not have been over since there was interruption. She relied on *Gerald Muriithi –vs- Wamugunda Njuguna [1983] eKLR.*

37. It is submitted the plaintiff was only on the land for 7 years and not 12 years as required for one to found a claim on adverse possession. Similarly, she submits the plaintiff did not prove the alleged purchase of the land from her husband.

D. ISSUES FOR DETERMINATION

38. The issues commending themselves for determination are:-

- a) **Whether the plaintiff entered into the suit land with or without the permission of the registered owner.**
- b) **What period the plaintiff occupied the suit land.**
- c) **If the plaintiff's stay was adverse to the rights of the registered owner.**
- d) **If the plaintiff has proved the ingredients of adverse possession to the required standards.**
- e) **What are the reliefs the plaintiff is entitled to.**

E. THE LAW AND PRINCIPLES OF ADVERSE POSSESSION

39. In *Mbira –vs- Gachuhi [2002] 1 EALR 137* the court held a person seeking to acquire title to land by the way of adverse possession must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption.

40. The plaintiff pleaded he bought the land from his uncle one Petr Kinyua and was eventually put into possession immediately until his uncle's demise in 2011.

41. He claimed he developed the land exclusively, openly and notoriously before and after the death of his uncle until a succession cause was lodged. He thereafter asserted his rights as a purchaser but his name was removed from **D exh 4**, though initially **D exh 2** included his name.

42. The plaintiff testified his uncle had given him a portion from his late father's land to cultivate and plant nappier grass.

43. On the other hand, the defendant insists that the plaintiff entered the suit premises with the permission of the deceased and eventually her son entered the land in 2010 and built his homestead during the lifetime of her husband.

44. Eventually, she said she ordered the plaintiff out of her land in 2011 to which he obliged.

45. It is crystal clear the plaintiff's entry into the suit land was with the permission of the then registered owner. The plaintiff therefore fails on the first ingredient of adverse possession.

46. Secondly, the plaintiff asserts he also bought the land from his late uncle. He did not prove that there existed any sale agreement in terms of the **Law of Contract Act** and **Section 38 of the Land Act 2012**. He did not bring any written agreement duly executed and witnessed. In absence of any such proof my finding is the plaintiff did not enter into the land as a purchaser for value.

47. The plaintiff asserts he took vacant possession, fenced off the land and continued to utilize it. If at all the plaintiff avers his rights were adverse to the registered owner, evidence tendered and which he has admitted is that a son of the deceased one Zablom Murerwa entered into or took possession thereof and put up a homestead on the suit land.

48. The plaintiff did not object to the entry and occupation at the time or at all during the lifetime of whoever had sold him the land. He did not complain against the entry before this court. Instead he testified that his portion was still intact. Therefore my finding is the plaintiff did not exclusively and uninterruptedly occupy the suit land for a total period of 12 years since the entry of Zablom Murerwa in 2010 or thereabout, interrupted the 12 year cycle.

49. The plaintiff asserted his uncle died before he had transferred him the land to him. In the succession cause, the plaintiff was asserting purchaser's rights and not adverse possession. Given my finding, there was no valid sale agreement, the claim herein appears to be an afterthought.

50. As to the nature of occupation and or possession, the plaintiff was permitted to cultivate nappier grass. The plaintiff did not call any evidence to corroborate his assertion that he was occupying the land contrary to the rights of the registered owner.

51. The defendant insisted the plaintiff was occupying the land as a licensee and hence vacated and when a notice to do so was issued.

Evidence tendered indicated the plaintiff ha never lived on the land but was only cultivating it.

52. The plaintiff did not refute the evidence that he was a licensee. He did not assert any exclusive ownership rights when the deceased allowed his son Zablon Murerwa to move in, occupy and develop the land. The failure by the plaintiff to assert his ownership rights at the time either as a purchaser or an adverse possessor makes an irresistible inference that he was there more as a licensee than a purchaser for value. He waited to assert his rights as a purchaser after the death of his uncle yet he had not sought to have the land transferred to his name.

53. When he saw signs of his cousin moving in to the land to replace him, the plaintiff did not raise any alarm and or demand that his late uncle confirms his status on the land.

54. It cannot therefore be said he ever asserted hostile title in denial of the registered owner and or anyone else the true owner was introducing into the land hence complicating the matrix. The entry of the son of the deceased person also confirmed another thing that the registered owner had not abandoned possession and ownership exclusively to the plaintiff. **See Alfred Welimo -vs- Mulaa Sumba Barasa, CA No 186 of 2011**

55. The plaintiff's evidence is over use of the land for 12 years. Having found the time was interrupted in 2010, the plaintiff however alleges he continued to co-exist with the son to the defendant and hence his rights accrued until 2018 when the defendant allegedly attempted to evict him. He insisted that he resisted it through a court order for the status quo to be maintained till the determination of this suit.

56. On the other hand the defendant testified that the plaintiff vacated the suit land since his licence had expired in 2010, and even if he was still using the land at the time the suit was filed and orders issued, he was already out of the suit land. Through an application dated 22.11.2019, the plaintiff sought for a temporary order of injunction claiming there were attempts by the defendant to evict him and or interfere with his peaceful stay on the land.

57. In his affidavit in support of the application, the plaintiff averred on 14.11.2020, building materials were deposited on the land and sons of the defendant allegedly abused him and ordered that he vacates the land. The court granted an order for status quo to be maintained on 3.12.2019.

58. The defendant made a replying affidavit sworn on 12.2.2019. By consent of parties, the notice of motion was compromised and a status quo was to be maintained with each party ordered to continue occupying the portion of the land that they were utilizing. The order was made in the presence of the parties and their advocates on record.

59. My finding is that at the time the suit was filed, the plaintiff was still using the land. Therefore it cannot be true he had vacated the land in 2018 as alleged by the defendant.

60. The question to be answered is whether the deceased passed on in 2011, if there was co-existence of the land with his son Zablon Murerwa and the deceased, if the plaintiff's occupation from 2011 up to 2018 was adverse to the rights of the defendant as the legal representative? **D exh 4** was issued to Joel M'Riria M'Ikunyua and the defendant jointly on 27.2.2019. The plaintiff did not amend the plaint to include the 2nd legal representative. On that account alone, the suit fails as the defendant lacks capacity to defend the suit on behalf of the estate in absence of her co-administrator. **See Simon Kamau Muhindi -vs- Monica Wambui Nguji & Another [2014] eKLR**.

61. In **Richard Wefwafwa Songoi -vs- Ben Munyifwa Songoi [2020] eKLR** the Court of Appeal held; the plea of title on a sale agreement and a claim for adverse possession are mutually inconsistent and exclusively. The court took the view that the appellant could not found his claim for possession of the suit on a gift from his father and also assert a claim founded on adverse possession and he should have either proved a gift or independently proved his claim for adverse possession.

62. The defendant pleaded and averred she ordered the plaintiff to vacate the land since his licence had expired in 2011 and more so after her son Zablon Murerwa took over the land as an owner, displacing any claim by the plaintiff.

63. The defendant denied any knowledge the of purchase by the plaintiff or adverse possession. She resisted the same to an extent of applying before the succession cause for the removal of the plaintiff's name from the confirmed grant.

64. Likewise she sought for an inhibition order stopping any further transaction in favour of the plaintiff as orchestrated by her co-administrator.

65. Looking at the totality of the evidence, my finding is the occupation of the plaintiff has not been peaceful due to the resistance by the defendant between 2011 and the filing of the suit which period in any event is less than 12 years.

66. In view of the foregoing, my conclusion is that the plaintiff has failed to prove his claim. The suit is dismissed with costs for adverse possession.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS

16TH DAY OF FEBRUARY, 2022

In presence of:

Kihara Kimathi for plaintiff

Mrs. Muia for defendant

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE