



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 15 OF 2019 (O.S)

STEPHEN MUCHIRA NYAGA.....1ST PLAINTIFF

JUSTIN MURIITHI MUCHIRA.....2ND PLAINTIFF

FRANCIS NGARI MUCHIRA.....3RD PLAINTIFF

VERSUS

CHARLES MITHAMO MWAI.....1ST DEFENDANT

ROBERT NJANJA MWAI.....2ND DEFENDANT

JOYCE WANJIKU MWAI.....3RD DEFENDANT

SYMON GITARI MWA.....4TH DEFENDANT

JUDGMENT

The Applicants/plaintiffs instituted this suit vide an Originating Summons dated 14th March, 2019 seeking inter-alia an order that they have acquired the suit land parcel number KABARE/NJIKU/504 by the doctrine of Adverse possession and that the court do make a declaration to that effect. They also seek to be registered as the absolute proprietors of the suit land described as KABARE/NJIKU/504. The defendants filed a replying Affidavit through the 4th defendant denying the plaintiffs' claim. When this case came up for hearing on 15/03/2021, the parties took the following directions by consent:-

- 1) *The evidence adduced before Hon. E.M. Nyaga (as he then was) and the proceedings therein are hereby set aside.*
- 2) *The plaint filed by the Respondents in the lower Court Case Number CMCC 267/2009 be and is hereby taken as the counter-claim in this O.S. while the O.S. is treated as the plaint.*
- 3) The statement of defence is treated as a reply to the counter-claim.

Plaintiffs' summary of facts

The first plaintiff was authorized to testify on behalf of the other plaintiffs referred to his affidavit in support of the Originating Summons sworn on 14/03/2019 which he adopted in its entirety. The 1st plaintiff also referred to copies of documents annexed to his affidavit in support of the Originating Summons and produced as P-Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26 & 27 respectively. He said that the defendants/respondents are the children of one Mzee Mwai Murondo who sold him the suit land parcel number KABARE/NJIKU/253 on 03/11/1975 measuring approximately 3 acres for a consideration of Ksh.3,900/= which amount he paid in full. The 1st plaintiff referred to the said sale agreement which he produced as P-Exhibit No. 2. He stated that the said Mwai Murondo later changed his mind and said that he would sell the same land parcel number KABARE/NJIKU/253 at a consideration of Ksh. 30,000. That they entered into an agreement dated 31st December, 1977 and paid the full purchase price. He produced the Sale Agreement as P-Exhibit No. 3. He took exclusive vacant possession of the suit property together with his family which include the 2nd and 3rd Plaintiffs/Applicants herein. He further stated that the 2nd and 3rd defendants started developing their defined portions on L.R KABARE/NJIKU/253.

The first plaintiff also stated that on 10th April, 1981, the Land Control Board gave consent for sub-division of L.R KABARE/NJIKU/253 into two portions of 2 acres and 1 acre where he would get the 2 acres worth Kshs. 20,000/= and the seller would refund Kshs.10,000/ for the 1 acre. He stated that the resultant sub-divisions of the said land parcel. No. KABARE/NJIKU/253 was KABARE/NJIKU/504 measuring

0.81 Hectares and KABARE/NJIKU/505 measuring 0.40 Hectares respectively. He said that Mwai Murondo, the seller transferred L.R Number KABARE/NJIKU/505 to him on 7th May, 1981 and that he has continued to be in exclusive and un-interrupted possession of his parcel of land. He produced a copy of the green card as P-Exhibit 4. However, the said Mwai Murondo refused to transfer L.R Number KABARE/NJIKU/504 to him or refund the purchase price paid. It is the 1st plaintiff's contention that despite refusal to transfer the said property by Mwai Murondo, they have been in open, exclusive, un-interrupted possession of the said land parcel number KABARE/NJIKU/504 from 7th May, 1981 to-date. He stated that on 4th May 2009, the said Mwai Morondo purported to transfer to his children, the Respondents herein the said property L.R No. KABARE/NJIKU/504 but the Respondents have not taken possession or in any way interfered and/or interrupted with their open, exclusive, and un-interrupted possession of the land. That there have been several court cases relating to the suit land. One of the cases is HCCC No. 213/1981 (Nyeri) which was later transferred to the Senior Resident Magistrate's Court (Kerugoya) and registered as RMCC No. 265 of 1992. In its Judgment delivered on 23rd January 2006, the trial Court dismissed the case on grounds that he had filed a claim for specific performance in relation to the agreement in regard to L.R NO. KABARE/NJIKU/253, yet the land did exist after it was partitioned to give rise to L.R. No. KABARE/NJIKU/504 and L.R. No. KABARE/NJIKU/505. He produced a copy of the Judgment and proceedings as P-Exhibit 6. He said that he was dissatisfied with the said judgment and preferred an Appeal being HCCA No. 14 of 2006 (Nyeri). He produced the M/A as P-Exhibit 7. That the Defendant thereafter sued him in the High Court at Embu vide HCCC No. 39 of 2006 seeking for his eviction from L.R. No. KABARE/NJIKU/504. However, the said suit was dismissed on 29/09/2010 for being Resjudicata. He produced a copy of the Ruling as P-Exhibit No. 8. He also produced a copy of the plaint and defence as P-Exhibit No. 9. On 03/08/2009, the Respondents herein filed RMCC No. 267 of 2009 (Kerugoya) seeking for his eviction which case is still pending. He produced a copy of the plaint, defence and a ruling as P-Exhibit No. 10. The 1st plaintiff also referred to numerous documents and photographs as evidence of developments on the suit land parcel No. KABARE/NJIKU/504 also produced as P-Exhibit No. 11, 12, 13, 14, 15, 16, 17, 18, 10, 20, 21, 22, 23, 24, 25, 26 & 27 respectively.

DEFENDANTS SUMMARY OF FACTS

- 1) The 4th defendant testified on his own behalf and on behalf of the 1st, 2nd and 3rd defendants. He stated that on 7th May 1981, their late father Mwai Murando subdivided his land parcel number KABARE/NJIKU/253 into land parcels No. KABARE/NJIKU/504 and 505 measuring 0.81 Ha. and 0.4 Ha. respectively. He produced copies of a letter dated 19/05/1981 and minutes as D-Exhibit No. 2a & 2b respectively.
- 2) The 4th defendant also said that on the same date, their late father Mwai Murando transferred land parcel number KABARE/NJIKU/505 to Stephen Muchira Nyaga, the 1st plaintiff herein and on 4th May, 2009 he transferred land parcel number KABARE/NJIKU/504 to the defendants /respondents herein.
- 3) That sometimes in the year 1981, the 1st Plaintiff/Applicant filed a suit against their late father Mwai Kirono in Nyeri High Court being HCCC No. 213/1981 which was later transferred to the SRMCC (Kerugoya) and registered as RMCC No. 262 of 1992. He produced copies of the Plaint and Defence as D-Exhibit No.3a and 3b respectively.
- 4) That by a ruling delivered by Hon A.K. ITHUKU on 23/01/2006, the trial magistrate dismissed the suit for being unsustainable as the suit property land parcel number KABARE/NJIKU/253 had been subdivided into land parcels KABARE/NJIKU/504 and 505 respectively.
- 5) Being dissatisfied with the judgment by the learned trial magistrate, the 1st Applicant preferred an Appeal to the High court at Nyeri being HCCC No. 14 of 2006. That Appeal was later transferred to ELC Court (Kerugoya) and registered as ELC Case No. 42 of 2013.
- 6) That on 28th July 2017, the Mr. Justice B.N. Olao dismissed the said Appeal for want of prosecution. A copy of the dismissal order was produced as D-Exhibit No.4.
- 7) The 4th Respondent/Defendant further stated that his late Father Mwai Murando filed another case at Embu High Court being HCCC No. 39 of 2006 and on 29/09/2010, the Hon. Justice W. Karanja dismissed the case for being Res-judicata in view of the fact that judgment had been given in PMCC No. 265/1992 (Kerugoya) and that an Appeal was by then pending being HCCC No. 14 of 2006.
- 7) That they then filed PMCC No. 267 of 2009 (Kerugoya) whereby they sought to assert their rights in respect of title number KABARE/NJIKU/504 and after hearing, the judgment was stayed by Hon. E.M. Nyaga on 20/09/2011 pending the judgment in HCCA No. 14 of 2006 (Nyeri) and later transferred and registered as ELCA No. 42 of 2013 (Kerugoya), which Appeal was subsequently dismissed.
- 8) That the developments shown in the photographs produced by the Plaintiffs/Applicants were done during the pendency of the aforesaid suits.
- 9) That the various suits filed by the parties herein above have interrupted the Applicants'/Plaintiffs' occupation of the Title number KABARE/NJIKU/504.

PLAINTIFFS'/APPLICANTS' WRITTEN SUBMISSIONS

The firm of Magee Law LLP submitted that the plaintiffs have been in exclusive, un-interrupted possession of L.R KABARE/NJIKU/504 without the registered owners consent from 7th May, 1981 and that they have extensively developed the land as shown by the documents and photographs produced in their evidence. The learned Counsel further submitted that the mere filing of a suit does not interrupt adverse

possession. They also argued that the change of ownership from the defendant's father to them did not interrupt adverse possession. They referred to the following cases;

1) *KIMANI VS KIBOGORO (1990) KLR 49*

2) *KASUVE VS MWAANI INVESTMENT LTD & 4 OTHERS (2004) KLR 184.*

In conclusion, the learned counsel submitted that the plaintiffs' have proved their claim on the required standard and the suit should be allowed as prayed.

THE DEFENDANTS'/RESPONDENTS' WRITTEN SUBMISSIONS

The firm of NGIGI GICHOYA & COMPANY ADVOCATES submitted on the following issues:-

- a) Whether this suit is Res Judicata?
- b) When time starts and/or cease to run under the Limitation of Actions Act?
- c) Whether the 1st plaintiff/Applicant and his co-plaintiffs/Applicants and/or Agents and/or Assigns occupy the suit land with leave and/or permission of the registered owner?

WHETHER THIS SUIT IS RES-JUDICATA

On this issue, the Defendants/Respondents counsel submitted that this suit is res-judicata in view of Section 7 of the Civil Procedure Act as the claim has been settled in the following suits;

- i) HCCC NO. 213 of 1981 (NYERI)
- ii) PMCC NO. 265 of 1992 (KERUGOYA)
- iii) HCCA NO. 14 of 2006 (NYERI)
- iv) ELCA NO. 42 of 2014 (KERUGOYA).

WHEN TIME STARTS AND/OR CEASES TO RUN UNDER THE LIMITATION OF ACTIONS ACT

The learned Counsel cited to ELC case No. 11 of 2015 (O.S) PURITY WANGECHI MITHAMO VS BERNARD MAINA NYAGA where Justice Olao in his judgment referred to the case of *GITAU VS NDEETE (1984) KLR 776* where the Court stated that time ceases to run under the Limitation of Actions Act either where the owner takes legal proceedings or makes an effective entry into the land. He submitted that when the 1st plaintiff herein filed HCCC No. 213 of 1981 (EMBU), the act of filing the Defence dated 2/01/1982 by MWAI MURONDO was a clear assertion of his right to the suit land which effectively interrupted the 1st plaintiff's occupation thereof and extinguished any claim he may have validly laid on the said land by virtue of his adverse possession thereof, he interrupted the 1st plaintiff's occupation of the suit land which, by that time the plaintiff had only been in occupation for approximately less than 1 year (1981-1982) which is 11 years short of the statutory limit period required in law.

WHETHER THE 1ST PLAINTIFF/APPLICANT AND HIS CO-PLAINTIFFS AND/OR AGENTS AND/OR ASSIGNS OCCUPY THE SUIT LAND WITH LEAVE AND/OR PERMISSION OF THE REGISTERED OWNER

The Counsel for the Defendant/Respondent submitted that from his replying Affidavit sworn on 14/03/2019 at paragraph 5, the 1st plaintiff admitted that he took possession of the suit property with permission from MWAI MURONDO, the then registered owner pursuant to a valid sale Agreement. That it is now well established that the combined effect of the provisions of Section 7, 13, and 17 of the Limitation of Actions Act is to extinguish the title of the proprietor of land in favour of an adverse possessions of the same at the expiry of 12 years of the adverse possession of the land. He submitted that the claim for adverse possession is based on Section 38 of the Limitation of Actions Act. He referred the following cases in opposition to the Plaintiffs'/Applicants' claim.

LEGAL ANALYSIS AND DETERMINATION

I have considered the pleadings, the proceedings, the evidence adduced by the parties and the exhibits produced in support of their respective positions. From the pleading and the materials presented, I find the following issues comment for determination;

- 1) **Whether this suit is Res –Judicata?**
- 2) **When does time start to run under the limitation of Actions Act?**
- 3) **Whether the doctrine of Adverse possession apply where a claimant was given possession by the owner under a valid Sale Agreement?**

4) Who will bear the costs of the suit?

WHETHER THIS SUIT IS RES-JUDICATA

The law on Res-judicata is captured under **Section 7 of the Limitation of Actions Act, Cap. 22** which provides as follows;

“No Court shall try any suit or issues in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and it has been heard and finally decided by such court”.

From the evidence adduced, numerous cases have been filed by the parties in respect of the suit property including HCCC No. 213 of 1981(NYERI) which was instituted by the 1st Plaintiff/Applicant in this case against Mwai Murondo and later transferred to the Magistrate’s Court at Kerugoya and registered as SRMCC No .265 of 1992 (Kerugoya). In that case, the 1st plaintiff was seeking an order for Specific performance against the defendant to transfer land parcel Number KABARE/NJIKU/253. The 1st plaintiff was also seeking an alternative order for the payment of the sum of Kshs. 74,400 as special damages for breach of contract. In a judgment delivered on 23/01/2006, the trial Magistrate Hon. A.K. Ithuku at page 2 observed as follows;

‘-----The claim in the plaint dated 14/12/81 is in relation to parcel of land known as KABARE/NJIKU/253. From the Exhibit marked 10 produced by the plaintiff, no such parcel of land was in existence as at the time this suit was filed. Sub-division was done on 7/5/81 and land certificates for 504 and 505 issued on 10/06/81-----The plaintiff did not amend the plaint to correct the changed circumstances. During the hearing, he proceeded as if the land was still intact.-----We find that the suit is not proved on a balance of probabilities.’

The evidence adduced also points that the 1st plaintiff herein was aggrieved by the decision of the trial Magistrate and appealed to the High Court at Nyeri being HCCA No. 14 of 2006. That case was later transferred to this Honourable Court and registered as ELC Case No. 42 of 2013. On 28/07/2017, the said Appeal was dismissed for want of prosecution with costs by Justice B.N. Olao. On 09/05/2006 soon after the dismissal of the said Appeal, the Respondent in the said Appeal case Mr, Mwai Murondo filed another suit against Stephen Muchira Nyaga, the 1st plaintiff herein seeking orders inter-alia for eviction of Mr. Stephen Muchira Nyaga from land parcel number KABARE/NJIKU/504. However, he filed defence and averred at paragraph 7 thereof that the subject matter of the suit therein was the subject matter in PMCC No. 265/92 (Kerugoya) as well as HCCA No. 14/2006 (Nyeri). An application was filed dated 20/09/2007 seeking to have the said suit dismissed for being re-judicata. In a ruling delivered on 29/09/2010, Justice W. Karanja allowed the said application and stated as follows;

‘---Execution can therefore only proceed in those other files and there was no option for the Respondent herein to file a fresh suit before this court. That contravenes Section 7 of the Civil Procedure Act and amounts to a gross abuse of this court’s process. The application before me has merit. I allow the same with costs to the Applicant/Defendant. He is advised to seek any orders related to the subject matter herein in PMCC NO. 265/92 or if the Appeal is still pending in the Appeal file.’

In view of finding by the trial Court in PMCC No. 265 of 1992, I find this suit Res judicata having been heard and fully determined in the said suit. The attempt by the 1st Plaintiff to reverse the decision on Appeal failed after the appeal was dismissed by Justice B.N. Olao for want of prosecution on 28/07/2019. In a similar case of **BEATRICE WARUGURU & GRACE WAMBUI VS CHARLES KARANI, HCC MISC, SUCC NO. 23 OF 2005 (EMBU) UR, Justice Lenaola** (as he then was) held as follows:-

“To allow this suit to go on will allow the plaintiff to embroil the entire judicial system by review, by arbitration, by appeal by originating process at all court levels-into an interminable litigational warfare over the same one acre of land, between the same parties or their privies, for as long as the plaintiff’s or his privies’ ingenuity will carry them. They will come in all guises---They will sue in singles; they will sue in plural. Title to this one acre of land will forever be in question-----”

I cannot allow this suit to proceed, without violating every element of **Doctrine 9 of Res-judicata** with a fragrant disregard for its principles sufficient to send the cosmos into complete disarray” (**HCC 2340 OF 1991 (NAIROBI) MWANGI NJANGU VS MESHACK MBOGO WAMBUGU AND ANOTHER (Unreported)**).

Again in the case of **JOYCE NANCY KABIRU VS FAULU MICRO FINANCE BANK LTD AND 2 OTHERS, ELC CASE NO. 178 OF 2016 (KERUGOYA) (UR), JUSTICE B.N. OLAO** referred to the case of **HERNDERSON VS HERNDERSON (1843) 67 E.R. 313** where it was held;

‘-----Where a given matter becomes the subject of litigation in and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject only because they have, from negligence, inadvertence, or even accidents, omitted part of their case’

I agree with the above decisions on the doctrine of res-judicata which brings finality in litigation of cases between same parties over the same subject matter. It makes courts to be vigilant of parties who refuse to accept the outcome of their dispute and instead take the courts in circles mutating and developing different forms, entities and characteristics over the same subject matter. This court cannot therefore allow the plaintiffs/Applicants to bring back the second time a claim over the same subject matter which was dismissed in a former suit being SRMCC No. 265/92 on 23/01/2006 and also by the appellate Court in ELCA No. 42/2013 for want of prosecution on 28/07/2017.

WHEN DOES TIME START TO RUN UNDER THE LIMITATION OF ACTIONS ACT?

The plaintiffs' claim in this case is for adverse possession. **Sections 7, 13, 17, and 38 of the Limitation of Actions Act CAP 22** combined is to extinguish the title of the proprietor of land in favour of a squatter who has squatted/overstayed on his/her land for a period of more than 12 years. The principles for a claim of adverse possession were discussed and set out in the case of **MISTRY VALJI VS JANENDRA RAICHAND & 2 OTHERS, C.A NO. 46 OF 2015 (2016) e KLR** where the Court of Appeal stated as follows;

“i. Adverse possession is not available to a party who is on the registered owner’s land with his consent or where the entry and occupation was lawful and based on some agreement. In other words where the title of the owner is admitted, there can be no claim for adverse possession.

ii. The occupation of the land must be nec vi, nec clam, nec precario.

iii. The adverse possessor must prove that through his occupation, the true owner has been dispossessed or his possession discontinued.

iv. It is equally established that adverse possession does not arise merely by occupation and use.

v. The filing of a suit for recovery of land or any other recognized assertion of title to the land by owner stops time from running for purposes of Section 38 of Cap. 22”.

The Court of Appeal also in the case of **SISTO WAMBUGU VS KAMAU NJUGUNA (1983) K.L.R 172** held as follows;

“Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid sale agreement, the possession becomes adverse and time begins to run at the licence is determined. Prior to the determination of the licence, the occupation can only be either with permission or adverse, the two concepts cannot co-exist. The respondent occupied the suit land originally under an agreement for sale of land being a licence from the appellant although the respondent’s possession was exclusive and continuous but was not adverse, it only became adverse after the licence was determined.”

The 1st plaintiff/Applicant in paragraph 5 of his supporting Affidavit to the Originating Summons sworn on 14/03/2019 deposed as follows;

“5. That I was given vacant possession of L.R. KABARE/NJIKU/253 and took exclusive possession of the same with my family which includes the 2nd and 3rd Applicants herein. The 2nd and 3rd Applicants and I started developing our defined portions on L.R KABARE/NJIKU/253”.

From the above admission by the 1st Plaintiff/Applicant on his own behalf and that of his co-Applicants, it becomes clear that the Plaintiffs/Applicants in this case entered into and took possession of the suit property with the leave and/or consent of the registered proprietor and not adverse.

CONCLUSION AND FINAL ORDERS

In view of my analysis of the two issues which are the subject of the dispute in this case, I find that the plaintiffs’/Applicants’ claim for adverse possession as brought in this suit is untenable, a non-starter, incompetent, bad in law and an abuse of the court process for being Res-Judicata. Even assuming I was wrong in my finding on the first issue, the Plaintiffs’/Applicants’ claim cannot also succeed as their possession and occupation of the suit property was with the leave and/or consent of the registered owner and therefore cannot pass the ingredients for adverse possession. In the final result, I enter judgment as follows:-

1) The plaintiffs’/Applicants’ suit commenced by way of Originating Summons dated 14th March 2019 and the Supporting affidavit sworn by Stephen Muchira Nyaga, the 1st Plaintiff/Applicant herein together with the annexures thereto is hereby dismissed for being Res-judicata.

2) The costs of this suit shall be borne by the Plaintiffs/Applicants jointly and severally.

JUDGMENT READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 11TH DAY OF FEBRUARY, 2022.

.....
HON. E. C. CHERONO

ELC JUDGE

IN THE PRESENCE OF:-

1. MR. ARUBA HOLDING BRIEF FOR MR. MAGEE

2. MR. RURIGE HOLDING BRIEF FOR MR. NGIGI

3. KABUTA – COURT CLERK.