



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC CIVIL CASE NO. 89 OF 2012

GEORGE KAMAU MACHORAPLAINTIFF

VERSUS

MARY GATHONI KAMAUDEFENDANT

JUDGMENT

1. The Plaintiff, **George Kamau Machora**, moved this court by way of Originating Summons dated 27th May, 2012 and filed on 29th May, 2012. The Plaintiff seeks the following orders:
 - a. **That he be declared the owner of land parcel number Mau Narok/Siapei Block 2/298 by adverse possession having occupied, cultivated and tilled the said parcel of land continuously and uninterrupted for over 15 years since 1997 and that this Honourable Court do direct that Nakuru District Land Registrar rectify the Land Register accordingly and register the Plaintiff as the sole proprietor of land parcel No. Mau Narok/Siapei Block 2/298 and that the Plaintiff herein be issued with a Title Deed for the said land.**
 - b. **That costs of this suit be borne by the Defendant who has occasioned this action.**
2. The Originating Summons was supported by an affidavit sworn by the Plaintiff on 29th May, 2012. He deponed that he entered into an agreement with one **Paul Gachanja Mwaniki** for the purchase of Mau Narok/Siapei Block 2/298 (*formerly plot 298*) for a consideration of Kshs. 50,000 and a two acre parcel known as plot no. 104 at Kampi-ya-moto registered in his name. Following the execution of the agreement on 5th July, 1997 the plaintiff immediately settled on the land and has enjoyed uninterrupted use and possession of the land until 2011 when the defendant claimed ownership of the same.
3. The Defendant, filed a Replying affidavit sworn on 20th June, 2012 in which she deponed that in 1997, her father purchased four parcels of land adjacent to each other for himself, Paul Gachanja Mwaniki, her brother and herself; That Paul Gachanja Mwaniki sold his parcel to the plaintiff but wrongly identified her parcel of land as his. She avers that the error was discovered in 1998 and the parties endeavored to settle the matter through village elders and local authorities and thus the plaintiff's occupation of the suit land has not been uninterrupted.
4. Prior to filing of the Originating Summons, **Mary Gathoni Kamau** (*the defendant herein*) had moved the subordinate court by way of a plaint dated 2nd April, 2012 in which she sought the following orders against **George Kamau Machora** (*the plaintiff herein*):
 - a) **An eviction order against the defendant (*the plaintiff herein*) to vacate parcel known as Mau Narok/Siapei Block 2/298 (Mutukanio "A");**

b) An order of perpetual injunction against the defendant, his servant, agents, employees restraining the defendant from trespassing, entering, constructing or interfering in any other way whatsoever with parcel of land known as Mau Narok/Siapei Block 2/298 (Mutukanio “A”)

c) General damages for trespass

d) Costs and interest of this suit.

5. By consent, the two files were consolidated on the 6th May, 2013 and the file in the lower court transferred to this court. The matter proceeded for hearing by way of viva voce evidence.

The Plaintiff's case.

6. The plaintiff testified on 7th October, 2013. He informed the court that he hails from Mau Narok where he has been living on the suit land with his family since 1997. According to the plaintiff, the suit land was owned by family members but the parcel shown to him by one Joseph Kamau Mwaniki (*defendant's father*) belonged to Paul Gachanja Mwangi (*defendant's uncle*). Upon agreeing on the terms of sale, the plaintiff and Paul Gachanja entered into an agreement for the sale of the suit land. The plaintiff thereafter settled on the land and begun to cultivate and has developed the land by putting up semi permanent structures and dug a bore hole. In 2008 the defendant accompanied by her mother informed the plaintiff that the parcel he occupied belonged to the defendant and the parcel sold by Gachanja was plot no 295 which had been occupied by a church.
7. On cross examination, the Plaintiff stated that at the time of the purchase, he did not know the plot number but the parcel was physically shown to him by the defendant's father and that he occupied it immediately. That he knew the suit land was registered in the name of the defendant after conducting an official search in 2005.

The Defendant's case

8. **DW1** informed the court that she is the registered owner of the suit land having acquired the same from her father. However, she was not living in Nakuru at the time of purchase and therefore was not shown her portion of the land until 2002. She found the plaintiff in occupation. According to **DW1**, the plaintiff's rightful portion was plot no. 295 which was illegally occupied by the church. **DW1's** family thus decided to sort the issue of encroachment on plot. 295 so that she would thereafter request the plaintiff to occupy his rightful plot. She further testified that the plaintiff's occupation of the suit land was interrupted by meetings in the quest to resolve the matter.
9. **DW2**, Paul Gachanja Mwaniki admitted to selling a parcel of land to the plaintiff. However, the parcel was encroached by a church and the defendant's brother therefore offered the Plaintiff an alternative portion being plot no 298 owned by the defendant temporarily while they sorted the issue of encroached property.
10. In cross examination, **DW2** stated that he lost the original sale agreement between himself and the plaintiff during tribal clashes. However, though the Sale Agreement refers to sale of plot 298 the correct plot sold ought to be plot number 295. He stated that he was still willing to transfer plot number 295 to the plaintiff.
11. **DW3**, Jesse Mburu Kimani testified that he attended a meeting held in 2004 between the plaintiff and defendants' family members. He stated that the plaintiff agreed in the meeting that he would occupy plot number 295 if the church would vacate the land. The church had since vacated plot no. 295 but the plaintiff has refused to occupy the property.

Submissions

12. The parties filed their respective submissions.
13. The plaintiff's counsel submitted that the plaintiff has satisfied the principles required for a claim for adverse possession because he has been in continuous use of the land for twelve years with the

- knowledge of the owner and without interruption of the defendant. He relied on the case of **Kimani Ruchine vs Swift Rotherford Limited (1980) KLR**.
14. The plaintiff's counsel further submitted that the defendant's claim for vacant possession is statute barred since the suit was brought twelve years after the right of action accrued to the defendant.
15. The defendant's counsel submitted that the plaintiff's claim is defective as the affidavit in support of the Originating Summons did not contain a certified extract of the title to the land. He relied on the decision in **Kweyu vs Omuto Civil Appeal No. 8 of 1990** and **Githi Mwangi & 4 Others vs Joseph Maina Kingori & 2 Others**.
16. He further submitted that the plaintiff entered onto the land with permission from the father of the defendant and in extension such occupation is not adverse. He relied on the decision in **Pritam Singh Sian vs Gurbachan Singh Hrdit Singh & Another, Nakuru HCCC No. 632 of 1996**. Further, counsel submitted that a person claiming title by way of sale cannot turn around claiming adverse possession.
17. Counsel also submitted that the defendant's claim is not statute barred as occupation was with permission either through the defendant or her father and time begun to run when the plaintiff was given notice by the chief to vacate the land.

Issues for determination

18. The following are the issues for determination:

1. **Whether the suit is defective for failure to comply with Order 37 Rule 7 of the Civil Procedure Rules?**
2. **Whether the occupation of the land was adverse?**
3. **Whether the claim for eviction is statute barred?**

Analysis

19. **Order 37 Rule 7** of the **Civil Procedure Rules** provides as follows:

- (2) **The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.**

20. The main reason for the requirement is because proceedings for adverse possession can only be maintained against the title holder or current registered owner of the suit land. The purpose of the certified extract of the title is to show the status of title and the registration details as at the time of its extraction.
21. The defendant's counsel in his submissions, submitted that the statute provision is in mandatory terms and the Court of Appeal in **Kweyu v Omuto Civil Appeal No. 8 of 1990** stated as follows:

“... the appellant's supporting affidavit to his originating summons did not have annexed to it a certified extract of the title to the parcel of land out of which the suit land was claimed. Save what the parties deponed to in their respective affidavits and the oral evidence before the superior court, the certainty of the existence and proprietorship of the suit land could not otherwise be guaranteed. An order under section 38(1) of the Act was not therefore capable of being made. It is for this reason only that I would dismiss the appellant's appeal with costs to the respondent.”

22. Similarly, in the case of **Symon Gatutu & 587 Others vs East Africa Portland Cement (2011) eKLR** at par 27 the Justice Dulu stated as follows:

“requiring a certified extract is not a talismanic hoop to be jumped by an intended disseisor but the objective is to provide a means to the court to ascertain the existence and proprietorship of the suit land.”

23. This court having stated why it is necessary to have the certified extract of title annexed to the originating summons, the requirement is not merely a technical requirement because it goes to the root of proving the subject matter of the proceedings and the person whose ownership must be displaced.
24. The plaintiff produced in evidence a copy of the official search in respect of the suit property which shows that the property is registered in the name of the defendant. This fact has not been denied by the defendant. Contrary, she annexed a copy of the title to the suit land which further supports she is the registered owner of the land.
25. The instant suit can be distinguished from **Kweyu v Omuto, Civil Appeal No. 8 of 1990** where the court observed that the evidence of witnesses had cast doubt as to whether the appellant and respondent were the right parties to the action relating to the suit land. Thus there was uncertainty of the existence and proprietorship of the suit land and the order under **Section 38 (1) of the Limitations of Actions Act** was not therefore capable of being made. In the present case, there is certainty of the existence and proprietorship of the suit land. Consequently, the failure to annex a certified extract of the defendant's title on the supporting affidavit is not fatal to the plaintiff's originating summons in the circumstances.
26. The second issue for determination is whether the plaintiff's occupation is adverse. Adverse possession is defined as a **method of gaining legal title to real property by actual, open hostile and continuous possession of it to the exclusion of its true owner for the period prescribed by state law.**
27. In Kenya, the **Limitations of Actions Act, Cap 22** prescribes the period of time for one to acquire adverse possession to be 12 years. **Section 38 (1) of the Act** then provides that a person who is entitled by adverse possession may apply to the High Court for an order that he be registered as the proprietor of the land in place of the person then registered as the proprietor. The plaintiff herein seeks such an order.
28. For a claim for adverse possession to succeed the plaintiff must meet at least five basic conditions namely; open and notorious use of the property, continuous use of the property for the prescribed period, exclusive use of the property, actual possession of the property, and non-permissive, hostile or adverse use of the property.
29. The affidavit in support of the originating summons and sworn by the applicant states in part:

“2. That on 5th July, 1997 one Paul Gachanja Mwaniki purported to sell to me Land Parcel No. Mau-Narok/Siapei Block 3/298.

3. That at the time the parcel of land had not title deed hence it was referred to simply as Plot 298. Annexed hereto is a copy of the Sale Agreement.

4. That as part of the consideration, I transferred my 2 acres parcel of land being Plot no 104 at Kampi-ya-Moto Rongai to Gachanja and added him Kshs. 50,000

5. That I settled and developed land parcel no. Mau-Narok/Siapei Block 3/298 since 1997 and I have been in uninterrupted use and possession of the same.

6.

7. That in November, 2011 the Defendant showed up and claimed that the parcel of land I am occupying belongs to her.

8. That I conducted an official search at the Lands office and was shocked to learn that indeed the Defendant was registered proprietor on 5th July, 1999. Annexed hereto is a copy of the search certificate dated 18th April, 2012 marked 'GKM3'.

9. That I pray that I be declared the owner of land parcel no. Mau-Narok/Siapei Block 3/298 by adverse possession having occupied, cultivated and tilled the said parcel of land continuously and uninterrupted for over 15 years since 1997.

30. From the above extract, it is clear that the adverse party entered the suit land with permission emanating from a contract between himself and the vendor. It is on this basis and after payment of the requisite consideration that he entered and settled on the suit land. The parties to the agreement and in particular the plaintiff herein derive their right claim to the suit land from the terms of contract and as such the entry lacks the element of possession being hostile.
31. Further, the occupation of the plaintiff on the suit land does not demonstrate the exclusion of the defendant from the same. In his testimony he admits that he was shown the suit land by the defendant's father following his purchase. Consequently, this shows his entry was with direct consent or permission of the owner through her father.
32. In **Wambugu vs Njuguna (1983) KLR 173**, the Court of Appeal is stated as follows:

“The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.”

33. The plaintiff in his evidence stated that he moved onto the suit land since 1997 and immediately after been shown the land by the defendant's father settled and started cultivating the land.
34. The plaintiff has however not proved that he dispossessed the Defendant the land since 1997 or that the defendant discontinued possession of its land then. From the evidence, discontinued possession according to paragraph 7 of the supporting affidavit is from November 1997 when the plaintiff's occupation on the suit land became hostile and adverse to the defendant. Prior to this date, his occupation was subject to a contract which led him to be physically shown the property on the ground. The Plaintiff has thus not satisfied the element of continuous use of the property for the prescribed period.
35. For the above reason, I do find that the plaintiff has not proved on a balance of probabilities that his action as against the defendant had accrued as contemplated under **Section 38** of the **Limitation of Actions Act**.
36. The final issue for determination is whether the defendant's claim for eviction from the suit land is time barred. The plaintiff argued that under **Section 7** of the **Limitations of Actions Act** an action may not be brought by a person to recover land after the end of twelve years from the date on which the right of action accrued to him. Having found above that the right of action accrued to the defendant in 2011, I do find that the plaintiff argument has no merit.
37. In the circumstances, I hereby dismiss the plaintiff's originating summons dated 27th May, 2012 with costs to the defendant. I further order that the plaintiff vacates the parcel of land known as Mau Narok/Kiapei Block 3/298 within 45 days from the date hereof failure of which he be evicted.

Dated signed and delivered in open court at Nakuru this 21st day of February 2014

L N WAITHAKA

JUDGE

In the presence of:

- Mr. Mwangi holding brief for MS. Gatei for the Plaintiff.
- MS. Omondi holding brief for Mr. Ngure Rubua for the Defendant.
- Court clerk: Emmanuel Maelo.