



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC HCCC. NO 266 OF 2007 (OS)

BERNARD HINGA WAKANYI & ANOTHER.....PLAINTIFF

=VERSUS=

WAIYAKI MUNYUA WAIRIMU.....DEFENDANT

JUDGEMENT

1. Through an amended Originating Summons brought under **Order 37 Rule of the Civil Procedure Rules, Section 3A, of the Civil Procedure Act and Section 38 of the Limitation of Actions Act Cap 22 Laws of Kenya**, the Plaintiffs herein *Bernard Hinga Waiyaki*, and *David Waiyaki Hinga* have sued the Defendant , *Waiyaki Munyua Wairimu* for determination of these issues.

1. That the Defendant's Title and Interest in the Parcel of Land measuring **1.1 hectares** or thereabout which is known as **Kabete/ Lower Kabete/443** registered under the Registered Land Act Cap 300 Laws of Kenya, in Kiambu District land Registry, herein after referred to as the suit land be declared extinguished.
2. That the 1st Plaintiff possession of the 'suit land' be declared adverse and he be registered as the absolute proprietor of the Parcel of Land measuring **1.1 hectares** in place of the Defendant.
3. Costs of the suit be awarded to the Plaintiff.

2. The Originating Summons is supported by the annexed affidavit of *Benard Hinga Wakanyi* and the annexures therein. The Deponent, contended that the Defendant herein is the registered proprietor of the Land known as **Kabete/Lower Kabete /443**, measuring approximately 1.1 hectares as per the abstract of the title annexed, BHWI. He further deponed that he has always lived on the Parcel of Land since he was young. He also averred that his late grandfather informed him before his demise that the (Grandfather) had exchanged **Land Parcel, Dagoreti/Kinoo/389** which belonged to the deceased with **Kabete/lower Kabete /443** which belonged to the Defendant herein.

Applicant further contended that after that exchange, the Defendant sold the Dagoreti/Kinoo land and relocated to Ol-Kalau in the year 1965. That the Deponent and his grandfather have been living on the suit land since 1980 and after the demise of the deponent, grandfather, he has continued to live there. Deponent further averred that he has been in continuous, open and uninterrupted occupation of the land parcel and his occupation has been adverse to the Defendant's proprietorship of the suit land, He also acknowledged existence of other suits concerning the suit land.

3. The Originating Summons was opposed by the Defendant herein **Waiyaki Munyua**. The Defendant denied that he ever exchanged his land parcel number Kabete/Lower Kabete /443 with the other land whatsoever. He also acknowledged existence of many previous proceedings concerning this suit land and it is not true that the Plaintiff has been in quiet possession or use of the suit land as

alleged by him as Defendant has asserted his right may turn many times before.

4. Parties herein took directions and agreed to proceed with the matter through viva voce evidence. The parties also filed their agreed issues on 22/11/2013. These issues are:-

- a. Was there an oral agreement between the Plaintiff's deceased grandfather and the Defendant to exchange and transfer land Dagoretti/Kinoo/389 to the Defendant and in turn the Defendant to transfer Lower Kabete/Kabete/443 and Plot Lower Kabete/Kingeero/T321?
- b. Has the Plaintiff attained the title of the suit property through adverse possession against the Defendants?
- c. Is the Plaintiff entitled to be registered as the proprietor of the suit premises by way of adverse possession?

In an attempt to answer the agreed issues, the parties herein gave oral evidence in Court and Plaintiff called witnesses and produced exhibits. The Plaintiff, **Bernard Hinga Wakanyi** in his evidence reiterated the contents of his supporting affidavit. He testified that he is the son of the late **Lilian Wakanyi Hinga**, the unmarried daughter of one (**Bernard Hinga Waiyaki**). He also testified that he lived with his mother on LR No. **Kabete/Lower Kabete/443**, which had been given to his mother by her father (**Bernard Hinga Waiyaki**). He contended that he lives on this parcel of land to date and has put up a house and fenced the land. He also confirmed that the land is in the name of the Defendant **Waiyaki Munyua (Wairimu)** as evidence by exhibit 1(a) & b. It was also the Plaintiff's evidence that this land was given to his grandfather, **Bernard Waiyaki Hinga** during Land demarcation in 1958. That the Plaintiff's grandfather exchanged his land parcel No. Dagoretti/Kinoo/389 with the suit land. The Defendant took possession of the land in Dagoretti/Kinoo/389, while **Bernard Hinga Waiyaki** remained in Kabete /Lower Kabete /443, now the suit land. That the later **Waiyaki Munyua** sold the land in 1965 to one Samuel Kibae Muchene and moved to Nyandarua Ol-Kalau and so **Waiyaki Munyua** has never lived on the suit land. In her evidence in Court, **PW2 Jane Wambui Njoki** the daughter of the late **Bernard Hinga Waiyaki** and an aunt to the Plaintiff confirmed that Plaintiff was a son to her late sister, **Lilian Wakanyi Hinga**, who was unmarried.

She testified that **Lilian Wakanyi** lived on land parcel No. **Kabete /Lower Kabete /443**, after she was given the same by their father, late **Bernard Hinga Waiyaki**. She also testified that during Land demarcation, **Bernard Hinga Waiyaki** had exchanged his land **Dagoretti/Kinoo/389** with the suit land. The Defendant was given by the late **Hinga**, the **Dagoretti** land and **Bernard Hinga Waiyaki** remained in the **Kabete/Lower Kabete/443**. She further testified that plaintiff has lived on this suit since he was a small boy and he is still using the land to date. **PW3 David Mugi Kinyanjui** told the Court he was involved in the land demarcation in the late 1950's. He also testified that he knows the family of **Hinga** as he is married in the said family.

In his testimony, he testified that he was aware of the exchange of the two parcels of land between **Bernard Hinga Waiyaki** who owned LR No. **Dagoretti/Kinoo/359** and **Waiyaki Munyua Wairimu** (Defendant) who owned LR **Kabete /Lower Kabete/443**. That **Bernard Hinga Waiyaki** exchanged his **Dagoretti/Kinoo/359** with **Kabete/ Lower Kabete/443**. **Bernard Hinga Waiyaki** remained in **Kabete** and **Waiyaki Munyua** (Defendant) took possession of **Dagoretti/Kinoo/359**. **PW3** also testified that the mother to Plaintiff was unmarried daughter of the late **Bernard Hinga Waiyaki** and she lived on the suit land.

5. Defendant **James Waiyaki Munyua** in his testimony contended that he owns the suit land and he was allocated the land during land demarcation and consolidation. He also admitted having been related to **Bernard Hinga Waiyaki**. He however, denied knowing the plaintiff herein. Defendant also denied ever exchanging his land with the late **Bernard Hinga Waiyaki's** Land in **Dagoretti**. He contended that he owned both parcels of land in **Kabete** and **Dagoretti**. He also confirmed selling the land in **Dagoretti** to **Samuel Kabue Muchene**. He also confirmed that **Bernard Hinga Waiyaki** lived on the suit land for long. He admitted existence of other cases over the suit land. In other Courts. Defendant confirmed that he cannot transfer the land to the plaintiff and he prayed for dismissal of the suit. He also admitted that after he moved to **Ol Kalau**, he has never gone back to **Kabete** to live there.

6. After the close of the Defence, parties herein filed their written submissions. The Court has now considered the available evidence, the exhibits and the written submissions. The Court is now called to make a finding and find answers to the questions for determination as prayed in the Originating Summons. The claim herein is brought under section 38 of Cap 22 Laws of Kenya, which reads as follows:

“Where a person claims to have become entitled by adverse possession to Land registered under any of the Acts, or land comprised in a lease registered under any of the Acts, he may apply to the High Court for an Order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land. Section 38 (2) an Order made under sub-section (1) shall on registration take effect subject to any entry on the register which has not been extinguished under this Act”

Since the Plaintiff has brought a claim under adverse possession, he has to satisfy the requirements for grant of such orders. Plaintiff has to satisfy the Court that there was an existence of Oral Agreement between the Defendant and his grandfather. Plaintiff also has to prove that he has been in continuous, open and un interrupted occupation of the suit land for a period of more than 12 years.

8. The Law on adverse possession is settled. Where a person has been in continuous, un-interrupted occupation or possession of Land for a period of 12 years or more, he may apply to the High Court to be registered as the proprietor thereof in place of the registered owners. The Court of Appeal in the case of **Civil Appeal No. 10 of 1982**, held that:-

“In order to acquire by the statute of limitation title to land which has a known owner, the owner must have lost the right to the land either by being disposed of it or by having discontinued his possession of it- dispossession of property that defeat his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intends to use it”

Having considered the available evidence, there is no doubt that, the Defendant herein and one Bernard Hinga Waiyaki were related. There is no doubt the Plaintiff herein is a grandson to the late Bernard Hinga Waiyaki. There is also no doubt that Land parcel No. Kabete /Lower Kabete/443 is registered in the name of the Defendant . The Plaintiff adduced evidence that Defendant exchanged his land with LR.No.Dagoreti/Kinoo/389. That evidence was not explicitly denied by the Defendant in his Defence. The evidence was not controverted. It is probable that Defendant exchanged his land in Kabete with Bernard Hinga’s land in Dagoreti . Defendant did not transfer the land to the late Bernard Hinga Waiyaki.

There was also evidence that late Bernard Hinga Waiyaki lived on the said land uninterrupted. When Waiyaki Munyua (Defendant) failed to transfer the said land to the Defendant, and time started to run. There was evidence that the Plaintiff herein lived on this parcel of land uninterrupted since the death of his mother in 1995 and his grandfather in 1997.

The Defendant admitted that he has never lived on this land and he had never attempted to evict the late Bernard Hinga Waiyaki and later the plaintiff herein though he knew they lived on the land without his permission. If defendant has not been in possession of the suit land, then he has been dispossessed or his possession was discontinued. As was held in the case of **Littledale Vs Little college (1900) 1 Ch. 19** which was quoted in the case of **Ng’ati Farmers Cooperative Society Ltds Vs Ledidi & 15 Others, Civil Appeal No. 64 of 2004.**

“ In order to acquire by the statute of limitations as title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it”

The fact that the Defendant’s herein has never been in possession of suit land means that he was disposed of it. The plaintiff has lived on the suit land since 1980. His occupation was without permission and so it was adverse to the Defendant as the registered owner.

8. The issue herein is whether the plaintiff has been able to avail evidence on a balance of probabilities that he has disposed or discontinued the Defendants possession of the suit for more than 12 years. The Court finds that the evidence by the plaintiff and his witnesses and the own admission by the defendant that he has never gone back to LR No Kabete/Lower Kabete/443 since 1970 is enough prove on a balance of probabilities.

Having now considered the evidence on record, the Court answers issues agreed herein as follows:-

On issue No. 2, it is evident that the Plaintiff has attained title of the suit land through adverse possession against the Defendant.

On issue No.3, having found that Plaintiff attained title of the suit land through adverse possession, then it is obvious that he is entitled to be registered as the proprietor of the suit premises by way of adverse possession.

9. In CONCLUSION, the Court finds that:-

(i) Defendants' title and interest in the parcel of land measuring 1.1 acres or thereabout known as Kebete/Lower Kabete /443 registered under Cap 300 Laws of Kenya, is hereby declared extinguished.

(ii) The 1st Plaintiff possession of this suit land is hereby declared adverse and he is to be registered as the **absolute proprietor** of Kabete/Lower Kabete /443 measuring **1.1 acres**.

(iii) There will be no orders as to costs.

Dated, Signed and delivered this 14th day of June, 2013.

28 days Right of Appeal.

In the Presence of:-

..... For the Plaintiff

.....For
Anne : Court Clerk

the

Defendant

L. N. GACHERU

JUDGE

14/6/2013

Before Gacheru Judge

Court Clerk Anne

Plaintiff Present

Defendant Absent

Mr Kariuki holding brief for Kinga for the Plaintiff.

Ndere holding brief Njuguna for the Defendant.

L N GACHERU

JUDGE

Court.

Judgement read in open Court in the presence of Mr. Kariuki holding brief for Kinga for Plaintiff and Mr.Ndere holding brief for Njuguna for Defendant.

28 days Right of Appeal.

L. N. GACHERU

JUDGE

14/6/2013