



**Mwangi v Warui (Environment & Land Case 81 of 2016)
[2022] KEELC 4918 (KLR) (12 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 4918 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 81 OF 2016**

L WAITHAKA, J

MAY 12, 2022

BETWEEN

STEPHEN NDEGWA MWANGI APPLICANT

AND

TARCISIO WAMBUGU WARUI RESPONDENT

JUDGMENT

1. Stephen Ndegwa Mwangi hereinafter referred to as the applicant took up the summons dated April 26, 2016 for determination of the following questions:-
 - (i) Whether a declaration should issue to the effect that he, the applicant, has acquired the Parcel of land known as LR No Githii/Kiharo/797 by adverse possession;
 - (ii) Subject to the outcome of prayer (i) above, whether he, the applicant, should be registered as the proprietor of the parcel of land known as LR No Githii/Kiharo/797 in place of the respondent, Tarcisio Wambugu Warui;
 - (iii) Subject to the outcome of prayer (ii) above whether the Land Registrar should be directed to dispense with the production of the original certificate of title deed and the respondent's documents in effecting the orders issued in (ii) above;
 - (iv) What is the order as to costs? (prayers paraphrased).
2. The application is supported by the supporting affidavit of the applicant sworn on April 26, 2016 in which the applicant has deposed that he took possession and use of the suit land in 1995; that his possession and use of the suit land has been without the consent of the registered owner, exclusive, uninterrupted and continuous and that he has used the suit land for planting various crops.
3. In reply and opposition to the applicant's claim, the respondent, through the replying affidavit he swore on May 20, 2016 has deposed that he bought the suit land in 1981, took vacant possession of it,



allowed the applicant's father and some other people to carry out farming activities on portions thereof and planted trees and napier grass on other parts.

4. The respondent has further deposed that after the applicant's father died in 1995, the applicant requested him to allow him to continue growing crops on the suit land as his father had done, which request he granted but gave the applicant conditions he was to comply with; that sometime in 2006, the applicant approached him (the respondent) and requested him (the respondent) to allow him (the applicant) to extend the area he (the applicant) was cultivating, which request he (the respondent) declined; that in 2010, the applicant requested him to sell the land to him (the applicant) but he told him (the applicant) to wait; that in 2015 they negotiated the sale price but failed to agree forcing him (the respondent) to look for another person to sell the land to; that when the applicant learnt that he (the respondent) was selling the land to another person, he (the applicant) became annoyed and vowed to frustrate him (the respondent) by filing the instant suit.

Directions

5. On November 2, 2016 directions were issued to the effect that the originating summons be converted to a plaint and the replying affidavit to a statement of defence.

Evidence

The Applicant's Case.

6. When the matter came up for hearing, the applicant relied on the affidavit he swore in support of the originating summons and the list of documents he filed on April 26, 2016. He produced the documents in the list of documents to wit certificate of search and photographs showing his activities in the suit property as Pexbt 1 and 2 respectively.
7. The applicant informed the court that Pexbts 2(a) are photographs showing bananas and mature trees planted by him; Pexbt 2(b) is a photograph of coffee and banana plants planted by him in 2014; photograph 2(c) is of mango trees and napier grass he planted in 1995; photograph 2(d) shows mature coffee and trees which he planted in 1996 and photograph 2(e) shows mature napier grass he planted in 2000.
8. The applicant further informed the court that he has harvested coffee twice and that he has been selling bananas and using the napier grass to feed his animals since 2000.
9. The applicant reiterated his contention that his use and possession of the suit land has been without the consent of the registered owner or anyone else.
10. The court heard that the applicant started utilizing the suit land when he found it isolated and in disuse.
11. It is the applicant's case that he has been using a total of one acre comprised of half acre that was initially being used by his father and half acre he was using. He has demarcated the portions he was using with napier grass.
12. The court further heard that the two portions were initially separated by a valley but have since merged (the boundaries are no longer visible).
13. On cross examination, the applicant stated that his father died in 2008 and acknowledged that his father, who was utilizing a portion of the suit land, was in 1992 given permission by the owner to clear a portion thereof.



14. The court further heard that the applicant planted napier grass on a separate portion adjacent to his father's portion and that the applicant's father and the owner of the land (the respondent) used to meet and visit each other.
15. The applicant maintained that he did not enter the suit land with the permission of his father or the owner. He further stated that he was not utilizing the land by virtue of being his father's son.
16. The applicant acknowledged that there were people cultivating the lower portion of the suit land, near the river, but stated that he did not know whether they were given permission by the owner to cultivate.
17. The applicant denied having approached the owner to lease to him the portion his father was using after his father died. He also denied having recently approached the owner of the land with a view of purchasing the suit land. Nevertheless, he acknowledged that in 2015, the defendant called him asking him to buy the land. He stated that they never negotiated or agreed on a price.
18. The applicant also availed three witnesses namely John Maina Njoroge (PW2); Joseph Mwaura (PW3) and Mary Wangechi (PW4) all of whom described themselves as casual labourers engaged by the applicant to work on the suit land.
19. PW2 was engaged by the applicant to clear the bush in the suit land in 1995. He believes that the suit land belongs to the applicant because the applicant told him so. According to him, the only other person who was utilizing the suit land is the applicant's father.
20. PW3 informed the court that since 2002 he has been engaged by the applicant to cultivate the land, about $\frac{3}{4}$ of an acre. The remaining portion was cultivated by the applicant's father, Mwangi.
21. PW4 informed the court that all the years she has worked for the applicant as a casual labourer, she has never seen anybody else claiming the land apart from the applicant.

The Respondent's Case.

22. The respondent relied on his statement, recorded on June 8, 2016. He informed the court that he is the registered owner of the suit land; that he allowed John Kingara and the applicant's father (Mwangi Wa Rangi) to cultivate on the land.
23. After the applicant's father died, he allowed his son, the applicant herein, to continue cultivating on the portion his father was cultivating, measuring less than $\frac{1}{4}$ an acre.
24. The respondent informed the court that the applicant showed interest in purchasing the suit land if he was willing to sell it, but when he told him his price, the applicant refused saying his price was high.
25. Later, he (the respondent) decided to sell the land to John Kuiru but did not complete the transaction because the applicant registered a caution prohibiting dealings with the suit land.
26. On cross examination, the respondent stated that the coffee trees in the suit land are his. The respondent acknowledged that the applicant extended the area he was allowed to cultivate from about a quarter an acre to about $\frac{1}{2}$ an acre.
27. The respondent acknowledged that the applicant planted about 200 coffee trees in the suit land but stated that he planted it for him, to thank him for the favour he had done to him.
28. Concerning the bananas in the suit land, the respondent stated that some are his while others belong to the applicant.



29. In re-examination, the respondent termed the applicant's claim an afterthought and maintained that he had allowed him to cultivate on the suit land and even offered him an opportunity to buy it which opportunity he refused.
30. According to the respondent, the applicant took advantage of his generosity and extended the portion he had allowed him to cultivate.
31. The respondent availed three witnesses, namely RiChard WaChira Wanjama (DW2), James Mundia Kariuki (DW3) and Joseph Maina (DW4).
32. DW2 relied on his statement recorded and signed on June 8, 2016.
33. The statement of DW2, which was adopted as his evidence, is to the effect that on invitation by the respondent to go and meet the applicant to discuss sale of the land to him; the respondent in the company of Joseph Mwangi Kiama (DW4) and he went and met the applicant over the issue. He learnt from the respondent that the applicant had requested the respondent to give him priority should he decide to sell his land. The respondent offered to sell the land to the applicant at Kshs 650,000/= per acre, making the total price Kshs 1,300,000/= for the two acres.
34. It is the testimony of DW2 that the applicant offered to buy the land at Kshs 300,000/= per acre, which offer the respondent refused and gave a counter offer of Kshs 550,000/= per acre, which offer the applicant refused.
35. DW3 relied on his statement recorded and signed on May 11, 2017. The statement is to the effect that he had leased the lower part of the suit land between 1990 and 1995. During that time, the applicant was not cultivating in the suit land. After the end of his lease term, the applicant's father was allowed by the owner to clear the bush on the upper part of the land.
36. It is the testimony of DW3 that the applicant like any other member of his father's family was cultivating the part his father was given by the owner. After the applicant's father died in 2008, the applicant took the part his father had been given and attempted to clear more bush.
37. DW4 relied on his statement that was recorded and signed on May 11, 2017. The statement confirms the statement of DW3 to the effect that he, DW4, in the company of the respondent and DW2 went and met the applicant to discuss a possible sale of the suit land to the applicant by the respondent. He confirms that the respondent and the applicant negotiated the sale but failed to agree on the purchase price.
38. At close of hearing, the parties to this suit filed submissions, which I have read and considered.

Analysis and Determination.

39. The sole issue arising from the pleadings filed in this suit and the submissions is whether the applicant has made up a case of being granted the orders sought.
40. Concerning that issue, from the evidence tendered in this suit, it is common ground that the applicant has been in use and possession of a portion of the suit property for a long period of time. There is however, no concurrence on the size of the portion of the suit property the applicant has been using and whether that possession and use has been with consent or permission of the respondent or by virtue of the fact that his father had permission from the respondent to use a portion of the suit land.
41. Concerning the size occupied and used by the applicant, the evidence of the applicant and his witnesses puts it at about an acre while the respondent puts it at about ½ acre.



42. As can be discerned from the certificate of search produced by the applicant as Pexbt 1 the size of the suit land is 0.8 Ha which in terms of acres is two acres or thereabout.
43. In prayer 1 of the originating summons hereto, the applicant sought a declaration that he has acquired by adverse possession the whole of the suit land. From his evidence, which shows that he has been in use and occupation of a portion of the suit land measuring about one acre, I find no difficulty in returning a negative verdict to that question.
44. To return a positive verdict on that question, it behooved the applicant to lead evidence capable of showing that he was actually in adverse possession of the whole of the suit property for at least the period provided for in law before moving to court to seek that declaration.
45. In his own evidence, the applicant stated that he was using about half an acre before he took the additional half acre that was being used by his father, in total that would amount to a mere acre as opposed to 2 acres comprised in the suit property. His witness, PW3 confirmed as much by stating that they were cultivating on about $\frac{3}{4}$ of an acre.
46. As to whether the applicant's use of the acre or so proved to have been in his use and occupation is adverse to the respondent's ownership of the suit land, it is common ground that the portion of the suit land claimed by the applicant was initially occupied by his father and that he only occupied and began using it after his father died.
47. Without going to the question as to whether the applicant's occupation of that portion was with the permission of his father or the respondent, because that issue is contested, it is notable from the totality of the evidence adduced in this case that the applicant's occupation and use of that land must have begun after his father passed on. The evidence adduced in this case, through the oral testimonies of the witnesses, the applicant included, show that the applicant's father died in 2008. The current suit having been filed in 2016, about 8 years later, it goes without saying that, even assuming that the applicant's use and possession of that portion was without the sanction of his father or the owner, the plaintiff would not sustain a claim for adverse possession in respect of that portion, as the occupation would not have been for the period required in law to acquire title by adverse possession. In making that finding, I have considered the undisputed fact that the occupation of the portion by the applicant's father was by permission granted by the respondent.
48. The upshot of the foregoing is that the applicant's claim has no merits. Consequently, I dismiss it with costs to the respondent.
49. Orders accordingly.

DATED AND SIGNED AT ITEN THIS 25TH DAY OF APRIL, 2022.

L. N. WAITHAKA

JUDGE

READ, DELIVERED AND SIGNED AT NYERI THIS 12TH DAY OF MAY, 2022.

J. O OLOLA

JUDGE

