Karanja v Ngari & another (Environment & Land Case 28 of 2019) [2022] KEELC 3789 (KLR) (30 June 2022) (Judgment)

Neutral citation: [2022] KEELC 3789 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ENVIRONMENT & LAND CASE 28 OF 2019

JO OLOLA, J

JUNE 30, 2022

BETWEEN

JOHN MAIGUA KARANJA .... APPLICANT

AND

GITHITHO NGARI .... 1ST RESPONDENT

GEOFREY GITHITHO MURIITHI .... 2ND RESPONDENT

JUDGMENT

Background

1. By the Originating Summons dated and filed herein on October 11, 2019, John Maigua Karanja (the applicant) prays for orders:

   1. That the applicant has acquired by adverse possession all that parcel of a land known as L.R Mugunda/Karemeno Block 1/821 measuring approximately four (4) acres which previously formed part of Plot No. 206 (Karemeno Farm);

   2. That the respondents rights to L.R Mugunda/Karemeno Block 1/821 are extinguished and the applicant be registered as the proprietor and the registration of the 2nd Respondent was meant to defeat the Applicant's interests; and

   3. That the Respondents do pay the costs of the suit.

2. The summons is supported by an affidavit sworn by the applicant wherein he depones that he took possession of the four (4) acres of land onDecember 7, 1994upon executing a Sale Agreement with the 1st respondent and has been in an open and an uninterrupted occupation of the same.

3. The applicant avers that he completed payment of the purchase price for the then unregistered land on August 30, 1996 but the 1st respondent has failed to transfer the portion of the land after the same was

registered as L.R Mugunda/Karemeno Block 1/821. On July 1, 2019, the 1st respondent transferred the parcel of land to the 2nd respondent with the sole aim of defeating the applicant's claim.

4. The Originating Summons is opposed by the 1st respondent – Githitho Ngari. In a replying affidavit sworn on November 28, 2019, the 1st respondent avers that he had agreed to sell to the Applicant part of his land then known as Plot No. 206 Karemeno Farm sometime in 1994. He avers that contrary to the applicant's contention, it is not true that the applicant completed payment of the purchase price.

5. The 1st respondent further avers that he is the one who allowed the applicant to enter and cultivate the said portion of land and that he transferred the same to the 2nd respondent who is his grandson on December 15, 2016 after he withdrew the permission of the applicant to occupy the land.

6. The 1st respondent further avers that he only became registered as the proprietor of the land in 2011 when he started demanding the balance of the purchase price at the current market value on the understanding that inflationary trends had taken a beat at the price they had initially settled for. When the applicant refused to pay, the 1st respondent sold the land to his grandson who was willing to bear the costs of the sub-division.

7. Following directions given herein by the consent of the parties, it was agreed that the Originating Summons be treated as a Plaint and that the replying affidavit would be treated as the defence. It was further agreed that the matter would proceed by way of viva voce evidence.

The Applicant's Case

8. The applicant testified as the sole witness in his case. Testifying as PW1, the applicant reiterated the contents of the affidavit in support of the Originating Summons and told thecourt the purchase price for the suit property was Kshs.143,000/- which he had since paid in full.

9. PW1 told the court he took over the land in 1994 and constructed his home thereon. At some point in time, the 1st respondent started asking him to vacate the land. When he conducted a search at the Land Registry on July 26, 2019, he realized that the land had been transferred into the name of the 2nd respondent.

10. On cross-examination, PW1 told the Court that the land had no title when he bought the same. They brought a Surveyor who sub-divided the original parcel into two. The Survey Report however disappeared. He had bought 4 of the 8 acres comprised in the original parcel of land.

The Respondent's Case

11. The 1st respondent equally testified as the sole witness in his case. Testifying as DW1, the 1st respondent told the court that at one

    point in time he wanted to sell the land then known as Plot 206 Karemeno to the Applicant. DW1 told the court they went to an Advocate and executed a Sale Agreement with the applicant.

12. DW1 told the court the applicant never paid him all the agreed purchase price and that the only paid Kshs.83,000/- leaving a balance of Kshs.60,000/- unpaid. The applicant kept promising that he will pay but he never did. DW1 further told the court he had sold 4 acres out of the original 8 acres he had to theapplicant. After the applicant failed to pay, dw1 sold the land to the 2nd respondent.

13. On cross-examination, the 1st respondent denied signing the acknowledgment notes for the balance of Kshs.60,000/-. He told the court he had earlier taken the applicant to the Area Chief to compel

him to pay but he did not. DW1 conceded that the 2nd respondent is his grandson and that he (the 2nd respondent) knew the land had previously been sold to the applicant.

Analysis and Determination

14. I have carefully perused and considered the pleadings filed herein, the testimonies of the two witnesses as well as the evidence adduced at the trial. I have similarly considered the rival submissions and authorities placed before me by the Learned Advocates representing the applicant and the 1st respondent. The 2nd respondent neither entered appearance nor responded to the Originating Summons.

15. The applicant herein has asked the court to declare that he has since acquired all that parcel of land known as L.R Mugunda/Karemeno Block 1/821 and measuring approximately four (4) acres by way of adverse possession. Accordingly, he urged the court to determine that the 1st respondent's rights to the said parcel of land have since been extinguished and that the subsequent registration of the 2nd respondent as the proprietor of the said parcel of land was only meant to defeat his (the applicant's) interest over the land.

16. The law on adverse possession is now well settled and the essential requirements that one has to meet in order to succeed in a matter such as this have been the subject of various judicial pronouncements. As the Court of Appeal stated in *Wambugu v Njuguna* (1983) KLR 178, Adverse Possession contemplates two concepts: Possession and discontinuance of possession. The court went on to state that the proper way of assessing proof of adverse possession would be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether that he or she has been in possession for the requisite number of years.

17. In *Mbira v Gachuhi* (2002) EA 137, the court held that:

> "... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption."

18. Speaking on the ingredients of adverse possession recently in *Mtana Lewa v Kahindi Ngala Mwamgandi* (2005) eKLR, the Court of Appeal held thus:

> "Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such a person in assertion of his title for a certain period, in Kenya 12 years."

19. Accordingly, this being a claim for adverse possession, it was incumbent upon the applicant to demonstrate that he has been in continuous possession of the land for the statutorily prescribed period of 12 years or more; that such possession has been open and notorious to the knowledge of the owner and that he has asserted a hostile title to the owner of the property.

20. In the matter before me, it was not in dispute that the applicant herein took possession of the suit property on December 7, 1994 pursuant to a Sale Agreement executed the same day with the 1st respondent in regard to 4 acres of land which were to be excised from a parcel of land then known as Plot No. 206 Karemeno.

21. The said Agreement produced by the applicant (as Pexh 1) reveals that the purchase price for the said 4 acres of land was Kshs.143,000/-. On execution of the Agreement, the 1st Respondent acknowledged

that he had on the same date received the sum of Kshs.83,000/-. Under Clause 4 of the Agreement, the balance of the purchase price was to be paid in two instalments of Kshs.60,000/- with the completion date set for February 3, 1995.

22. Clauses 5 and 6 of the Agreement provided as follows:

> " 5. The vendor shall immediately after completion of the purchase price join the purchaser in seeking the consent to sub-divide the said parcel of land and thereafter transfer the agreed portion and the Vendor do hereby indemnify (sic) the Purchaser herein"
>
> 6. The Vendor do hereby undertake to put the purchaser into occupation of the agreed portion and which occupation shall not (be) withheld by the Vendor for any reasons."

23. According to the applicant, he did complete payment of the purchase price but the 1st respondent declined to transfer the land to himself. The 1st respondent on the other hand asserted that the applicant had not completed payment of the balance of the purchase price. In support of his position that he had paid the purchase price in full, the plaintiff produced various acknowledgment notes of different sums of money (Pexh 2(a) to (e)). In one of the notes dated August 30, 1996, the 1st respondent is shown to acknowledge that the Applicant had completed payments for the parcel of land.

24. While the 1st respondent contended in court that the notes were forgeries and that he had not signed the same, there was nothing placed before the court to demonstrate the alleged forgery of his signature in the documents. From a perusal of his reply to the Originating Summons, the 1st respondent conceded that he wanted more money from the applicant in order to take care of inflation from the time of the sale up until the time the suit property was registered.

25. Again, while the 1st respondent contended that the entry of the applicant and his occupation of the land over the years was all with his permission and that he withdrew the permission in 2016 when he transferred the land to his grandson I was unable to accept that as the right position. The Sale Agreement clearly required the parties to obtain Land Control Board Consent.

26. That consent was not obtained and it was clear to me that the Sale Agreement pursuant to which the 1st respondent allowed the applicant to enter and occupy the land became void some six months after execution thereof for want of the consent and that the continued and uninterrupted occupation of the land by the applicant could only be construed to have been adverse to the 1st respondent's interests. That much was clear from the fact that the 1st respondent does not deny that ever since, the applicant took possession of the land and constructed a home wherein he resides to-date with his family.

27. While the 1st respondent submitted that he had only been registered as proprietor of the land in the year 2011 and that therefore 12 years had not lapsed at the time this suit was filed in 2019, I did not again find that to be factual. I say so because the 1st respondent does not deny that he was the registered owner of the original land parcel number 206 Karemeno Farm from which the suit land was sub-divided.

28. Dealing with a similar situation in *Gachuma Gacheru v Maina Kabuchwa* (2016) eKLR, the Court of Appeal held as follows:

> " Lastly, on argument by the respondent that time in adverse possession can only begin to run once title is issued, we disagree and set out the sentiments of the Court in *Maweu v Lin Ranching & Farming Co-operative Society*, (1985) eKLR:
>
> > "What logic is there in saying that the concept of the absolute and indefeasible title may only be lost, after twelve years of suffering adverse possession from the time of registration, but not for shorter periods because the adverse possession commenced during the time of the owner's predecessor? How is it lost at all?
>
> Adverse possession is a fact to be observed upon the land. It is not to be seen in a title, even under cap 300. Any man who buys land without knowing who is in possession of it risks his title, just as he does, if he fails to inspect his land for 12 years after he had acquired it. If such title can be lost at all, its absolute and indefeasible nature obviously refers to other matters other than adverse possession.
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> The Plaintiff society of course relies upon the decision of the earlier Court, but no argument on the point of principle was pressed that I could see, with great respect to Learned Counsel. Certainly he was unable to advance any cogent argument from the reasoning in Alibhai's case, or otherwise why absolute and indefeasible title interfered with the operation of the Limitation of Actions Act (cap 22).
>
> There is nothing in the concept of an overriding interest which is new to the law; it is merely an acknowledgment of existing common law. No title which passed to a new owner before registration was provided for, curtailed the period of limitation. The reason lies in the public policy which underlies the Limitation of Actions Act (cap 22); namely that a long period of possession should not be disturbed by the negligent owner or owners in succession." (Emphasis mine).

29. Arising from the foregoing, the notion that this court should compute time from the year 2011 when title for the present suit land was issued is false and erroneous. The applicant has been in open and notorious uninterrupted occupation of the suit land since the year 1994. That was some 22 years before the 1st respondent purported to transfer the suit land to his grandson – the 2nd respondent. His title having been extinguished by effluxion of time, the 1st respondent had absolutely no title that he could transfer as he purported to do.

30. The applicant had for a period in excess of the statutory period of 12 years asserted a hostile title and dispossessed the 1st Respondent of the suit land by engaging in acts that were inconsistent with the enjoyment of the land by the 1st respondent. The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such a person's adverse possession.

31. Accordingly, I am persuaded that the Originating Summons dated October 11, 2019 has merit and that the applicant has proved his claim of adverse possession of the suit land to the required standards. In the premises I allow the Summons in terms of Prayers 1 and 2 thereof with costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 30TH DAY OF JUNE, 2022.

In the presence of:

Mr. Mwangi for the Plaintiff

Mr. Nderi for the Defendant

Court assistant - Kendi

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J. O. Olola

JUDGE