



REPUBLIC OF KENYA

High Court at Meru

Civil Case 127 of 2002

HENRY KITHINJI M'MWONGO.....PLAINTIFF

VERSUS

M'IKIUGU M'MWONGO.....DEFENDANT

J U D G M E N T

The plaintiff late Henry Kithinji M'Mwongo filed an originating summons on 9th July, 2002 against the defendant M'Ikiugu M'Mwongo seeking the following orders:-

- a) For a declaration that he has acquired title under the Limitation of Actions Act, by adverse possession since 1981 of 1 ½ acres out of KIIRUA/NAARI/1514 and now KIIRUA/NAARI/2565 previously and presently registered in the name of M'IKIUGU M'MWONGO(the respondent).***
- b) An order directed to the Land Registrar Meru Central District ordering him to rectify the register to give effect to the declarations contained in paragraph (a) above.***
- c) Costs of the suit.***

The defendant on his part appeared on 25th July, 2002 and filed defence to originating summons denying the plaintiff's claim and averred that the plaintiff had not acquired any title under the Limitations of Actions Act or by adverse possession. That before the suit was heard and determined but after the plaintiff had given evidence, the plaintiff died on 30th December, 2004 and one Luka Mureithi son of the deceased filed an application dated 12th May, 2005 to be substituted as the legal representative of the deceased. The application was granted on 21/2/2006 by Consent and Mr. Luka Mureithi was appointed as the legal representative of Henry Kithinji M'Mwongo.

The plaintiff gave evidence in support of his claim and called no witness. The defendant on the other hand gave evidence and called 5 witnesses in support of his opposition to the plaintiff's claim. At the conclusion of the case both advocates consented to put in written submissions. Mr. E. Ogoti for the plaintiff filed his submissions on 17th October, 2012 and attached list of authorities in support; whereas Mrs. Kaume Advocate for the defendant filed her submissions on 14th October, 2012. The court has considered the submissions. It has also considered the pleadings by both parties in support of their respective opposing positions. The court has also considered the evidence of both parties in support of their respective positions.

The plaintiff's case is that the plaintiff and the defendant are step-brothers. That the defendant is owner of land parcel Kiirua/Naari /1514 which land he had been given by the committee. The land is 16 acres. That in or about 1981, the defendant invited the plaintiff to live in the defendant's land Kiirua/Naari/1514.

That the plaintiff occupied 1½ acres. The plaintiff sued the defendant because the defendant wanted to sell the land. That the plaintiff sued the defendant before the chief and the chief found in his favour in 1998, the plaintiff averred that the defendant wanted to sell the plaintiff's portion to Kinoti who had built a house near his boundary. The plaintiff further asserted that he filed a suit before the Land Dispute Tribunal No.88/2000 which decided in his favour and produced the Tribunal Decision as Exhibit No.1. He urged the court to allow him to remain in the portion he was living on and get a title.

The defendant on the other hand testified that he had a one roomed mud house on land Kiirua/Naari/1514. That he allowed the plaintiff to be sleeping on the said house. The plaintiff used to come, and stay at the said mud house and used to stay alone, but was later joined by his young wife. The defendant testified that he had not given the plaintiff any portion to cultivate. The defendant had meanwhile subdivided his land into 4 portions and obtained title in respect of the same. The plaintiffs wives by then used to stay in different places. One wife was staying at Murinya and the plaintiff had 11 children and none of them were staying at the defendants' land. That the defendant sold land Kiirua/Naari.2565 being part of subdivided land to one Kinoti who has a permanent house on the said land. That the plaintiff had sued the defendant before the Meru Land Dispute Tribunal. The tribunal did order the plaintiff to be given plot No. Kiirua/Naari/2565. The defendant filed Judicial Review application against the decision of Meru Land Disputes Tribunal. The defendant produced the Land Dispute Tribunal proceedings as exhibit No D(1) (a) extracted order exhibit D(1) (b) and final orders as exhibit D(1) (c). The decision of the Land Dispute Tribunal was as per court's order quashed. The defendant testified the plaintiff stayed in the defendant's house for 5 years being the house the defendant had permitted the plaintiff to occupy. That when the plaintiff's wife decided to cultivate on the defendants' land, he decided to sell the land to Kirima, and told the plaintiff to vacate. The defendant transferred the land to Kirima, who took possession and now uses the land. The defendant remained with Kiirua/Naari/2568 of 1 acre and produced Exhibit No.2 being tile to the said plot. He concluded by stating the plaintiff's son Luke Mureithi has never settled on the suit land.

DW 2 Cyrus Mugambi and Dw6, Bernard Ringera neighbours to the defendant averred that they were called by defendant when he was allowing the plaintiff to stay at his mud house in 1990. He was only allowed to stay at the house as he was doing his business of cutting timber as he had no house nearby to stay. That the plaintiff stayed in the house for 5 years. That when the defendant sold the land where the house was situated to Kirima, the witnesses were called and the plaintiff was told in their presence that the defendant had sold the land and he should vacate from the land. The plaintiff vacated from the house. The plaintiff according to the witnesses vacated and stayed away for some months before he returned. The defendant had had sold one portion of his land to Kinoti who fenced the land whereas the other portion was sold to Kirima's family. The plaintiff according to DW2 shifted the house 6 months after the portion where the house was had been sold to Kirima. The house was shifted to plot No. 2565 owned by Mr. Kinoti.

DW 3 Samson Kinoti Mwarania testified that he is the owner of Kiirua/Naari/2565 and produced copy of Title Deed as Exhibit D3, which land is about 2 acre. Dw3 resides on the whole of the land and is fenced with stone wall. DW3 cultivated the whole of the land. He has 2 houses, cowshed and miraa trees. DW3 purchased the land in 1998 and was transferred to him on 24/4/2003. That when DW3 bought the land, it was vacated. It was not under cultivation. DW3 moved into the land in 2000. That in 2003, the plaintiff pulled down the DW3's wall and shifted his house into DW3's land. DW3 produced photograph of the demolished wall and mud house as Exhibit D4 and D4 (b). That when the plaintiff died, the plaintiff's son put another semi-permanent structure on plot no. 255. That when the plaintiff died he was buried on the DW3's land without his permission DW3 had prior to the burial reported the matter to police and chief but before chief and police could take action, the deceased had been buried at the DW3's land. According to DW3, the plaintiff had occupied a small portion of DW3's land of 10'x 5' and that the deceased had never cultivated on the DW3's land. The plaintiffs wife and her son came to the DW3's land in 2003. DW3 sued the plaintiff's wife for trespass into his land in CMCC 68/2005 seeking that she be ordered to vacate from the land and the suit is still pending. Copy of the plaint was produced as Exhibit D5. DW3 testified that he bought the land from defendant, obtained consent for transfer and no objection was raised. He averred that he was a bonafide purchaser for value consideration. Dw3 averred that todate he has not blocked the wall that the plaintiff had opened into his land, and the plaintiff's family still uses the

opening to gain access to his land. DW3 testified land KIIRUA/NAARI 2565 do not belong to the defendant and the plaintiff's family do not use the defendants' land.

DW4 Beatrice Kirima testified that she bought part of defendants land from Kiirua/Naari/1513 of 1 acre in 1997. That on the portion she bought there was a small mud house which was unoccupied. That after one month the plaintiff Henry Kithinji M'Mwongo asked DW4 and her husband to be allowed to be sleeping in the small house. They allowed him to stay for 2 years after which the plaintiff was requested to vacate. He kept quiet and stayed for 1 more year. DW4 sued the plaintiff before Kiirua Land Disputes Tribunal in which he was ordered to vacate. In 2003 the plaintiff pulled down the fence wall of DW3 Samson Kinoti M'Mwarania and shifted the mud house into DW3's land. That the house is still on DW3's land and he has put up other structures thereon.

DW5 James Gathambi Reuben, wife of the defendant testified that the plaintiff (Deceased) and his son Luka Mureithi are step-brother and nephew respectively to her. She testified that plaintiff was accommodated at the defendant's house on his land Kiirua/Naari/1514. That the house had been constructed by the defendant. That DW5 was present when plaintiff sought to be accommodated by the defendant when he was by then cutting timber and his two wives were staying away from defendant's land, however they would visit him. That the plaintiff was not staying or sleeping at the house throughout the time. That when DW5 and the defendant asked the plaintiff to vacate as they had sold the land to Kirima(DW3) he compiled and carried all his belongings and by the time he vacated he was staying alone. That his wives Esther and Syokiurya were not staying at defendant's land but were staying at Murinya.

The plaintiff listed the following issues for determination by court in this originating summons:-

- 1)Whether the plaintiff has been in continuous, open, exclusive and undisturbed possession of 1 ½ acres of the suit land herein for over twelve (12) years?
- 2)Whether parcel No.KIIRUA/NAARI/2565 originated from KIIRUA/NAARI/1514 where the plaintiff has stayed all these years to date?
- 3)Whether the plaintiff has any other land?
- 4)Whether the plaintiff has done extensive and permanent developments in this land?
- 5)Whether the plaintiff's sons were born and have built and married in this suit land?
- 6)Whether the plaintiff is entitled to be registered as proprietor of 1 ½ acres of the suit land?

The first issue is whether the plaintiff had been in continuous open, exclusive and undisputed possession of 1 ½ acres of the suit land for over two (12) years). The plaintiff in his affidavit of support deponed that the defendant called him to occupy part of the defendant's land. He admitted the occupation was with permission of the defendant hence his occupation was not inconsistent with the title of the defendant, the owner of the land. That still in the plaintiff's supportive affidavit under paragraph 4 he deponed that the defendant subdivided his land Kiirua/Naari/514 into 4 portions of land running from No.2465-2568, yet when he filed this suit in 2002 he did not specify the location of the land he was occupying. He did not specifically state the area that he claims of 1 ½ acres nor did he specify how the area was marked.

The evidence of the plaintiff and that of the defendant and defendant's witness is clear that the plaintiff entered into defendant's mud house as a licensee of the defendant. The entry was not hostile to the defendant's title. It was not adverse possession but an entry by a brother through permission of a brother and his sister in law. The occupation was limited to sleeping at defendant's mud house and nothing else. The plaintiff did not even put up any structures on Kiirua/Naari/1514 nor did he plant any crops or used the land in any way inconsistent with the title of the owner. The plaintiff to have a valid claim of adverse possession his occupation of the defendant's land should have been notorious, continuous, open,

exclusive and uninterrupted for a period of 12 years without permission of the defendant.

In the instant case the plaintiff was permitted to occupy the mud house and only sleep in the defendant's mud house. The occupation was not continuous and uninterrupted. The plaintiff did not object to vacate from defendant's land when it was sold to Beatrice Kirima(DW4). The defendant evidence on the plaintiff's vacating from the defendant's house is supported by DW2, DW3, DW4, DW5 and DW6. That evidence was not controverted in anyway. The evidence of the plaintiff seeking permission to use defendant's house is corroborated by the defendant's witnesses and is not controverted by the plaintiff. The evidence on record is that the plaintiff did stay at the defendant's land for 5 years. The plaintiff called no witness in support of his claim that he stayed at the defendant's land for 12 years. The defendant and his witnesses stated the plaintiff stayed at defendant's land for 5 years before he was asked to vacate and he complied.

In case of **NDATHO ITUMO & 2 OTHERS(002)eKLR 637 Court of Appeal** held:-

1. To defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.

Further in the case of **Ahmed Abdulkarim & Ano –V-Member for Lands and Mines and Another(1958) E.A.436 Court of Appeal for Eastern Africa** held :

iv. Before possession can be adverse, there must be a denial of another's right by an open assertion of a hostile title, with notice thereof to the other, either express or inferred from notorious acts and circumstances, and the burden of proof rests upon the persons claiming title by adverse possession.

In the instant case the plaintiff has failed to discharge the burden of proof that he has been in continuous , open, exclusive and notorious or hostile uninterrupted occupation for 12 years. The plaintiff did not call any witness to support his claim. He has not indicated when the occupation became hostile. Further he moved to plot 2565 in 2003 which was not where the defendant's house which he had allowed the plaintiff to occupy was. The house was on plot owned by DW4 who testified the plaintiff asked them for permission to occupy the land for 2 years and when asked to move out he broke the wall of DW3 and forcefully occupied 10'x5' feet. He did not produce any evidence to show he occupied 1 ½ acre either at the land of the defendant or any other.

On the issue number 2 as to whether the plaintiff was staying at Kiirua/Naari/2565 to date. The plaintiff was shown a house to occupy the land Kiirua/Naari/1514 before sub-division. According to the defendant and DW4 upon subdivision the house fell into land sold to DW4. DW4 allowed the plaintiff to stay on her land for 2 years. Plaintiff moved out after 1 year after expiry of the 2 years given by DW4. Plaintiff pulled down the wall of DW3 and shifted his mud house to the land of DW3. The plaintiff occupied 10'x5' of the land of DW3 from 2003. The title to land Kiirua/Naari/2565 was issued to DW3 in 2003.

In view of the foregoing the plaintiff was not at all times in occupation of part of Kiirua/Naari/2565.

On the issue of whether the plaintiff has other land the plaintiff denied he has other land whereas the defendant stated otherwise, however in view of the nature of the plaintiff's claim the issue as to whether the plaintiff has other land or not, is not relevant to plaintiff's claim based on adverse possession and I will rather not go to evidence on this issue as I do not find it relevant before this court and on matters in issue.

On issue number 4 the evidence is clear that the plaintiff has not done extensive developments in the land in dispute. The plaintiff shifted the mud house of the defendant to the land of DW3 and did not do any other works except semi-permanent structures which were put up recently on plot No.2565 by plaintiff's son.

On issue 5 evidence has been adduced by the defendant and his witnesses to the effect that plaintiff's sons

were not born and had not built and married in the suit land. The plaintiff did not adduce any evidence to support that his children were born or married or have built on the suit land.

On the issue No.6 as to whether the plaintiff is entitled to the use of land as proprietor of 1 ½ acres of the suit land, the plaintiff has not proved that he had been in occupation of 1 ½ acres. He did not describe and identify the portion of 1 ½ acres he claims to have been in its occupation. He did not describe its extension and what marked the same or its boundaries. The plaintiff failed to prove that or discharge the burden of proof that he had acquired the suit land through adverse possession.

An authorized entry into the proprietor's land with specific terms and conditions of occupancy which terms and conditions the authorized occupier did not breach by using and occupying the proprietor's property in an open and hostile manner inconsistent to the proprietor's title whether such occupancy is open, continuous and uninterrupted for a period exceeding 12 years, such occupancy is not adverse to that of the registered proprietor. Similarly gracious and generous gesture by the registered proprietor to a relative to occupy and use land whose terms of occupancy are particularized and limited in use and occupancy even without a limited period cannot amount to adverse possession unless the occupier's occupation is inconsistent with the title of the registered proprietor and such occupancy is open, hostile, continuous and uninterrupted for a period of not less than 12 years. The plaintiff in this case has failed to prove his claim to the required standard.

The upshot is that the plaintiff's suit is dismissed with costs to the defendant.

DATED, SIGNED AND DELIVERED AT MERU THIS 28th DAY OF NOVEMBER, 2012.

J. A. MAKAU
JUDGE

Delivered in open court in the presence of:

1. Mr. E.Ogoti for the plaintiff(present)
2. Mrs. Kaume for the defendant (absent)

J. A. MAKAU
JUDGE2