Kabiru & 3 others v Wainaina & another (Land Case 526 of 2016)
[2022] KEELC 2689 (KLR) (14 July 2022) (Judgment)

Neutral citation: [2022] KEELC 2689 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

LAND CASE 526 OF 2016

FM NJOROGE, J

JULY 14, 2022

BETWEEN

LUCY WANJIRU KABIRU ..... 1ST PLAINTIFF

GEORGE TIBI GACHUHI ..... 2ND PLAINTIFF

LUCY WANGUI WAINAINA ..... 3RD PLAINTIFF

STEPHEN KARANI MACHARIA ..... 4TH PLAINTIFF

AND

NYOKABI WAINAINA ..... 1ST DEFENDANT

SAMUEL NJUGUNA WAINAINA ..... 2ND DEFENDANT

JUDGMENT

1. In the Originating Summons dated 24/11/2016 the Plaintiffs pray for judgment against the Defendants for:

   a) An order that the Plaintiffs herein have become entitled by adverse possession to land parcel No. 13542/7 now sub-divided into 13542/110 and 13542/111, which measures approximately 2 acres and registered in the names of the Defendants.

   b) An order that the Plaintiff/Applicants be registered proprietors over the said land parcel(s) 13542/7 (new sub-divisions 13542/110 and 13542/111) which land the Plaintiffs/Applicants have occupied for over 12 years.

   c) Such other or further orders as my meet the ends of justice in this case.

   d) Costs of this suit be provided for.

2. Each of the 4 plaintiffs swore an affidavit in support of the claim, which were filed with the Originating summons.

3. The 2nd defendant filed a replying affidavit on 29/4/2017 through the firm of S.W. Ndegwa & Co advocates which he later withdrew vide a notice filed on 25/7/2017 together with a fresh replying affidavit dated 11/7/2017. The 1st defendant did not file any response to the Originating Summons.

4. During the pendency of the proceedings the original 3rd plaintiff died and was substituted with her legal representative.

5. Each of the plaintiffs filed their respective witness statements and bundle of documents.

6. Hearing took place ex parte on 15/2/2022 and on 21/4/2022 since the defendants and their advocate, the latter who had been served, failed to attend court on the two days.

7. Though there is evidence that the suit land was acquired by way of purchase the plaintiffs have opted not to come to court under contract as a cause of action; the plaintiffs' case is that they have become entitled to own and to be registered as owners of the suit land by virtue of adverse possession. According to the documents filed by the plaintiffs, the 1st plaintiff's husband bought 1 acre of land out of Parcel No 13542/7 in 1986 from the 1st defendant and his family settled thereon. Later he sold most of the land to third parties who also settled on their respective portions. Both the 1st plaintiff's family and the third parties who bought land from her family have developed their respective portions extensively and have been in possession thereof for a period in excess of 12 years without any interruption and with the defendants' full knowledge. At one point the 1st plaintiff commenced the process of transfer of the land but left it incomplete. The 2nd plaintiff states that he purchased and settled on one quarter-acre piece of land in 1989 and commenced construction. His parcel falls within LR NO 13542/110. The 3rd plaintiff's claim is that her family purchased their one quarter acre plot in 1997 and developed it. They have their residence on that parcel. The 4th plaintiff purchased his one quarter acre land parcel in 1989, took possession thereof in 1990, developed it with houses and shops and has been in occupation ever since; according to him his land parcel falls within LR NO 13542/111.

8. Each of the plaintiffs testified in their respective cases, adopted their written witness statements and produced their bundles of documents in support of their cases. It is clear from the evidence given by the plaintiffs that the 1st plaintiff's husband purchased one acre of land from the defendants and subsequently sold three quarter-acre plots to the rest of the plaintiffs on various dates. It would appear that the land originally belonged to Kiratina Farmers Cooperative Society Ltd (Kiratina) and the defendants were entitled to some of it; the certificate of confirmation of grant at page 33 of the 1st plaintiff's bundle shows that both the defendants were entitled to 1 acre plus half a plot of an unspecified dimensions. A copy of a letter dated 27/8/1986 to the chairman of that Kiratina asking him to effect the transfer of 1 acre belonging to the 1st defendant to the 1st plaintiff's husband (now deceased) was produced in evidence. It appears that the land entitlements of the two defendants were consolidated into one parcel that was later christened LR NO 13542/7 and title issued both their names on 28/11/2005. Copies of the 1st defendant's identity card and KRA PIN of a transfer executed between one Charity Nyokabi Wainaina as vendor and Stephen Kabiru Mwenja as purchaser in respect LR no 13542/110 was also relied on by the plaintiffs. It is safely presumed that the vendor in the transfer is the same person as the 1st defendant. It is apparent that LR NO 13542/7 was in the year 2010 subdivided into two parcels each of 0.405 ha., christened LR NO 13542/110 and 13542/111 respectively vide survey plan number F/R 496/151.

9. This suit is unopposed since the defendants never came to present their evidence in opposition to the plaintiff's claim. However, this does not entitle the plaintiffs to judgment for free since they must prove their case by establishing that the ingredients of adverse possession exist. In the case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR, it was stated as follows regarding an undisputed facts:

> " On perusing the judgment and hearing Mr. Mwangi, what comes through clearly and was repeated several times over, was the position that since the appellant did not deny the facts stated in the affidavits of the 1st respondent then he was deemed to have admitted those facts. With respect, that was entirely a wrong approach to this case and the entire practice of civil litigation. Whether or not the appellant had not denied the facts by affidavit or defence, when the 1st respondent came to court, he was bound by law and practice to lay the evidence to support existence of the facts he pleaded. That is what we understand Section 108 of the Evidence Act to be demanding of a party like the 1st respondent that:
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> > "The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side."
>
> That he did not do. The claim he put forth that three limited liability companies existed, they had shareholders including himself, each holding a certain percentage of shares, were not proved. The claim that those companies held certain properties which were sold and transferred was also not proved. Accordingly, the learned judge fell in error to assume that those facts indeed existed."

10. In *Wambugu Vs Njuguna* (1983) KLR 173, the Court of Appeal held as follows:

> " For an order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his rights to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it."

11. The plaintiffs must establish that they have dealt with the suit land adversely to the title and interest of the registered title holder. In the *Wambugu case* (supra) the court stated that:

> " 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 for the requisite number of years."

12. The plaintiffs have established that they are in possession of the suit land, and that they have been in such possession for a period in excess of 12 years each. And even where the 2nd, 3rd and 4th defendants may not have been on the land for more than 12 years, this court holds that they were insured by the period that the 1st plaintiff, from whom they derived their possession of the land, had been in occupation which should be aggregated with their own stay. This proposition has backing in the case of *Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees* [2016] eKLR where

the court cited Kakamega H.C.C.C. No. 33 of 2002 (O.S) - *Amos Weru Murigu v. Marata Wangari Kambi and Another*, with approval, stating as follows:

> " Trespassers are trespassers. That is why the common law principle holds true that where one trespasser removes another trespasser who is in adverse possession to the title of the owner and continues to occupy the land, the period of adverse possession is not broken and the second trespasser is entitled to combine the period of trespass of the first trespasser to his own (see Amos Weru Murigu v. Murata Wangari Kambi & Another (supra)"

13. The defendants have called no evidence and this court has been left in no doubt that the plaintiffs have been enjoying undisturbed and continuous possession of their plots for a period in excess of 12 years. The permanent buildings and other developments on the suit land as are evident in the photographs produced in evidence can only lead to conclusion that the occupation of the land by the plaintiffs has been adverse to the title held by the defendants.

14. It can not be known whether the parcels that were created by the subdivision have titles. However, this court is persuaded that despite the defendant's attempts to subdivide the land on paper the plaintiffs' plots emanated from the one-acre plot that was sold by the 1st defendant to the 1st plaintiff's husband.

15. The plaintiff's suit encounters one major hurdle, though. Whereas the defendants obtained title vide a grant executed by the Commissioner of Lands on 28/11/2005 and registered on 16/1/2006, the plaintiffs filed their claim on 25/11/2016. I must consider the latter date on the grant, that is 16/1/2006, to be the date the title was issued to the defendants in their names. Upon a simple computation of time, one can see plainly that the 12 years had not lapsed between the date of issuance of title in the defendants' names and the date of the filing of the plaintiff's claim. The period fell short of the 12 years requisite for prescription by some 52 days, thus disqualifying the plaintiffs from candidature for prescription. In the circumstances, the only evidence that could aid the plaintiffs is that which could demonstrate that title had been registered in the name of some other person before the registration of the defendants as proprietors; that would make it possible to deem the limitation period to have been running in favour of the plaintiffs, while in occupation, even before the registration of title in the defendant's favour.

16. The court *Benson Mukuwa Wachira* case observed as follows:

> " It is not difficult to discern that if the suit land is not registered, then compliance with Section 38 (1) may be problematic not least because, a litigant may be unable to show the court that he has become entitled to be registered in respect of land whose title is not yet in place and more importantly, because as at the date of institution of the suit for adverse possession there must be in existence a title which the court can declare to be extinguished by adverse possession under Section 38(1) (supra). Unless such suit land is registered at the time of institution of the suit under any of the statutes referred to in Section 37 of The Limitation of Actions Act, a claim for the title by a trespassing claimant would be misplaced and, a court order would be incapable of being effected."

17. The plaintiffs were quite silent on this issue. However, it would appear from the evidence produced that the defendants inherited the land from one Paul Wainaina Kingara, deceased, vide a certificate of confirmation of grant issued at Thika SRM's Court on 16/8/1990 in Succession Cause No 124 of 1982 while each of the defendants' land entitlements was still described as "one share and a plot" in Kiratina Farmers Cooperative Society Ltd (Kiratina). No copy of title was produced in the name of Kiratina to show that the land was owned by that entity and that a title or a letter of allotment had

been issued to it by the government before the plaintiffs acquired the suit land, or that the suit land was covered by an earlier title issued in its favour.

18. If previous title in Kiratina's name existing before the plaintiff's title had been proved at the hearing, the plaintiff's quest for title by prescription would have been easier. The limitation period would have been deemed to be running even before the defendant's title was issued. It is noted that the defendant's title is a leasehold grant from the government issued pursuant to a surrender by an unnamed person or entity. It can not be established when the surrender was ever registered or took effect. Without that there would be no way of knowing how long the land was in the hands of the government after surrender and before registration in the defendant's names. If there had been a letter of allotment issued before the defendant's registered title, this court would have taken cognisance of the Court of Appeal decision in the *Benson Mukuwa* case (supra) where it was stated as follows:

> " 20. The focus of the trial judge was spot on. But more significant in this case is the fact that the suit land (which initially had no registered title but was subsequently registered before the suit for adverse possession was instituted in the High Court by the respondent) was defined, delineated and surveyed by government as early as 1981. It was contended that in his letter dated 7th March 1981, the Commissioner of Lands required the appellant to pay survey fees for the suit land whose title reference No.LR 209/9010, Nairobi, was allocated as early as 7th March 1981, vide the Commissioner of Lands letter dated 7th March 1981 exhibited by the appellant as exhibit "BMW 3" in the High Court suit. The effect of the allocation and allotment by the Government was to divest the latter of its legal interest in the suit land and to constitute the appellant the new owner thereof. Following survey and allocation of the title number, a grant for the suit land was registered on 26th May 1995 by which time the respondent had been on the suit land for a period exceeding 14 years (from 1981). Clearly, when the respondent moved into possession of the suit land in 1980, the land belonged to the Kenya government and the issue of adverse possession could not arise. But after the government allocated the land to the appellant in 1981, and thus divested itself of interest in it, the appellant became the new owner and hence the doctrine of adverse possession became applicable." (Emphasis mine.)

19. Clearly, the plaintiffs did not focus on these issues while bringing their claim to court and this is the one issue that has cost them success in the present suit for they can not be deemed to have satisfied the 12 year possession period requirement to warrant issuance of prescriptive orders. Without establishing that they have been in the suit land for 12 years while it was registered in the name of some person or successive persons or entities other than the government, the plaintiffs do not stand any chance of proving their claim for adverse possession.

20. For the foregoing reasons I find that all the plaintiffs have failed to establish their claim on a balance of probabilities and I dismiss their Originating Summons dated 24/11/2016. Each party shall bear their own costs of the suit as it went undefended.

DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 14TH DAY OF JULY, 2022.

MWANGI NJOROGE

JUDGE, ENVIRONMENT AND LAND COURT, NAKURU