



REPUBLIC OF KENYA



KENYA LAW
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**Mutitu v Ruku (Environment & Land Case 525 of 2014)
[2022] KEELC 12619 (KLR) (28 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12619 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 525 OF 2014
L WAITHAKA, J
SEPTEMBER 28, 2022**

BETWEEN

EVANS MUTITU PLAINTIFF

AND

PETER KARIMI RUKU DEFENDANT

(FORMERLY NYERI HCC NO.138 OF 2011 (O.S))

JUDGMENT

1. Evans K Murutu, hereinafter referred to as the plaintiff, took up the summons dated October 3, 2011 for determination of the question as to whether he has acquired the parcel of land known as Gikondi/Gikondi/798 (suit property) by adverse possession.
2. The plaintiff's suit is premised on the grounds that he has been in use and occupation of the suit property since 1976; that the suit property is registered in the name of the defendant and that his use and occupation of the suit property has been open, continuous and uninterrupted by the defendant.
3. The suit is opposed on the grounds that the defendant is the registered owner of the suit property; that the registration of the defendant as the owner of the suit property was pursuant to a court order issued vide Nyeri SMCC No 100 of 1989 in which he had sued the plaintiff and his uncle Kahiti Kimani; that the plaintiff has never been in possession of the suit property and that the defendant has occupied and worked on the suit property since 1962. Terming the plaintiff's suit an attempt to enforce the sale of the suit property to the plaintiff by the defendant's uncle, which sale was nullified by the court, the defendant urges the court to dismiss the suit.
4. Pursuant to directions given on May 16, 2013, the Originating Summons was converted into a plaint and the replying affidavit to a defence and the matter set down for hearing by viva voce evidence.



Evidence

The plaintiff's case

5. When the matter came up for hearing, the plaintiff availed five (5) witnesses himself included. The plaintiff who testified as PW 1, informed the court that he has been in use and possession of the suit property since 1976; that he took possession of the suit property after he bought it from the then registered owner of the suit property, Kahiti Kimani; that after he bought the suit property he was registered as the owner; that his registration as the owner of the suit property was cancelled vide Nyeri SMCC No 100 of 1989 between the defendant and the person who sold the suit property to him, Kahiti Kimani and that he was not a party to the suit between the defendant and Kahiti Kimani.
6. The plaintiff further informed the court that there is a suit pending in court between him and the defendant to wit Nyeri CMCC No 522 of 2002; that by the time he bought the suit property, it is Kahiti Kimani who was in use and possession of the suit property and that he met the defendant for the first time in 1988.
7. The plaintiff asserted his averment that he has been in use and occupation of the suit property without interference by the defendant and that he cultivates several crops thereon.
8. In support of his case, the plaintiff produced the following documents: - Certificate of official search in respect of the suit property (Pexbt1); Extract of green card in respect of the suit property (Pexbt 2); Application for consent to the Land Control Board (Pexbt 3A; Consent to transfer (Pexbt 3B) and title deed issued to him as Pexbt 4.
9. The testimony of the plaintiff to the effect that he has been in use and occupation of the suit property was corroborated by his witnesses namely Aureria Wanjiru Kahiti (PW 2); Ceaser Maina Kamami (PW 3); Beatrice Waigumo Mugo (PW 4) and Mwangi Murugu (PW 5).

The defendant's case.

10. The defendant relied on his statement recorded on November 15, 2012 and replying affidavit as his evidence in chief. He informed the court that he purchased the suit property from his uncle Kahiti Kimani in 1962; that the suit property was always utilized by his parents (father and mother) and his wife and that the plaintiff entered the suit property after his parents died in 2010.
11. In cross examination, the defendant acknowledged that PW 2 and PW 4 are his step-mother and neighbour respectively and stated that they lied to the court when they testified that it is the plaintiff who has been in use and occupation of the suit property.

Analysis and Determination

12. As pointed out herein above, the plaintiff instituted this suit seeking a declaration that he has acquired title to the parcel of land known as Gikondi/Gikondi/798 (suit property) by adverse possession and that he should be registered as the proprietor of the suit property.
13. This being a claim for entitlement of land registered in the name of another person based on the doctrine of adverse possession, for the plaintiff to succeed in his claim, he must proof that the suit is registered in the name of another person other than himself; that he has been in open and exclusive possession of the suit property in an adverse manner to the title of the owner and that he has been in occupation of the suit property for a period in excess of twelve years having dispossessed the owner or



there having been discontinuance of possession by the owner. In that regard see the case of *Wilson Kazungu Katana & 101 others vs Salim Abdalla Bakshwein & another* (2015) e KLR.

14. In applying the above legal test/principle to the circumstances of this case, there is evidence that the suit property is registered in the name of the defendant having been so registered on November 11, 1998 (Pexbt 1 and 2). There is evidence that the plaintiff had been in use and occupation of the suit property way before the property was registered in the name of the defendant (since 1976) and that the plaintiff's use and occupation of the suit property did not cease/ stop after the defendant was registered as the proprietor thereof in 1998. From 1998 to 2011 when this suit was filed, the plaintiff had been in use and occupation of the suit property in a manner adverse to the title of the defendant (openly, peacefully and without the permission of the defendant) for a period in excess of twelve years. Even if there is no evidence of dispossession of the defendant as he was not the one in use and occupation of the suit property, there is evidence of discontinuance of possession of the defendant for a period exceeding the twelve years stipulated in law for acquiring land by adverse possession.
15. Although in his evidence the defendant claims that the plaintiff took possession and occupation of the suit property in 2010, after his (defendant's) parents passed on, I find that claim to be unbelievable firstly because it is at variance with his witness statement recorded on November 15, 2012 and filed in court on November 20, 2012. In that statement, the defendant stated that he was the one farming the land and that when away, he would leave it to a caretaker to farm on his behalf or to lease it to other persons for rent. That statement slightly differs with his oral testimony to the effect that it is his parents/and his wife who were farming the land. Secondly, his evidence is not supported by the evidence adduced in this case, comprised in documentary evidence produced by the plaintiff showing that he had interest in the suit property way before the defendant was registered as the proprietor of the suit property and the testimonies of the plaintiff's witnesses attesting to the fact that it is the plaintiff as opposed to the defendant who was in use and occupation of the suit property.
16. Being convinced that the plaintiff has proved his case for adverse possession as against the defendant, I allow his case as prayed.
17. Orders accordingly.

DATED AND SIGNED AT ITEN THIS 19TH DAY OF SEPTEMBER, 2022.

L. N. WAITHAKA

JUDGE

READ, SIGNED AND DELIVERED AT NYERI THIS 28TH DAY OF SEPTEMBER, 2022.

J. O Olola

JUDGE

