



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 2794 of 1995

NORMAN KARIUKI & 27 OTHERS PLAINTIFF

VERSUS

NDORONGO GATHERU 1ST DEFENDANT

PETER KUNGU KAHARI 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

GATUNDU & MANGU FARM CO.LTD 4TH DEFENDANT

JUDGMENT

I: Background

1. The Originating Summons before court concerns land parcel LR No.8569/5 situated at Kahawa West Originally known

LR No.8569 and Registered under the Registration of Titles Act Cap.281 Laws of Kenya.

2. A brief history of that land parcel was that the “Colony and Protectorate of Kenya” issued title under the Registration of Titles Ordinance (chapter 160) being LR8569 containing 865 acres to Paris John Savage for a term of 949 years with effect from 1 June 1954. The locality then was East of the Kiambu township. The purpose originally granted from the colonial government to the grantee was for agricultural purposes only.

3. On the 22 April 1955 the parcel of land was transferred to Kahawa Quarries Ltd. The crown placed a caveat on the land. The electricity supply company East African Power and Lighting Company placed a caveat on the same land. M/s Humphrey Chemicals (EA) placed a caveat on 3.5 acres.

4. This occurred between the years 1955 to 1956. In 1957 the Crown withdrew its caveat and the guarantee surrendered 504 acres of LR 8569/1 back to the Colonial Government. As a result he was released from the caveat held by the East African Power and Lighting Co. Ltd. The land 8569/1 having now transferred back to the Colonial Government there remained 371 acres.

5.1 On 2 October 1958

5.20 acres was transferred to

M/s Humphrey Chemicals (E.A.) LR 8569/2

5.2. On 19 September 1961

7.0 acres was transferred to Mr. Cecil Hillary Greenwood – Penny.

6. M/s Kahawa Quarry Ltd went into voluntary liquidation on 19 September 1961. On 4 February 1966 a total of 359 acres less 5 acres was transferred to M/s Pecon Ltd subject to another caveat by the East African Power and Lightning.

7. It is in April, 1966 that the defendant No.1 and others come into the picture. It is when Ndorongo Gatheru (defendant No.1) together with Peter Kungu Kahari (defendant No.2) Rufus Wamae and Wilfred Mwai placed a caveat against the property claiming a purchaser's interest.

8. In 1966 Kenya had gained its independence, already. The law that governed the Land was the Registration of Titles Act Cap.281 Laws of Kenya. The caveat remained in force until the 17 April 1974 when the Kenyan Government removed the caveat in question through the Registrar of land under section 57(6) of the said act.

9. On the same day of 17 April 1974, the Government gave an acquisition notice acquiring part of the land, now referred to as 8569/5 (part) totaling 55.88 hectares.

10 An attempt by a company, known as Gatundu and Mangu Farm company Ltd to transfer the land to itself for a consideration of Ksh.180,000/- was rejected by the government.

9. The reasons given was that the initial owners M/s Pacon Limited whom the 1st defendant and three others had placed a caveat against the 359 acres less 5 acres had been struck off the register of Companies. The said company no longer existed. The government on the 6 June 1989 through the Registrar of Titles proclaimed that LR 8569/5 “by virtue of the Government and Section 8 of the Government Land Act Cap.280” [was now] vested in the Government as “Bona vacatia.”

10. Section 340 of the Companies Act provides:-

“Where a company is dissolved, all property and rights whatsoever vested in or held in trust for the company immediately before its dissolution (including leasehold property but not including property held by the company in trust for any other person) shall, subject and without prejudice to any order which may at any time be made by the court under section 338 (Power of court to declare dissolution of company void) and section 339 (Registrar may struck a defunct company off [the] registered] be deemed to be Bona vacantia, and shall accordingly belong to the Government.”

11) Section 8 of the Government Lands Act Cap.280 relates to actions brought by the Government relating to the Government Lands Act. Thus:-

“all actions suit and proceeding by or on behalf of the President or the Government respecting Government Lands ... may be commenced, prosecuted and carried out by in the name of the Commissioner.”

Later amended to read that

“the Commissioner shall be represented by the Attorney General or by any public officer or other person appointed by the Commissioner in any particular case.”

12. “Bona vacantia”

Means:-

“Personal property which escheats to the state because there is no heir/person to claim it.”

This is a common law doctrine which dates back to feudalism in England. Eg. Where a tenant died with no heir the land reverted to the Government.

13. As of the year 1989 and or before that year the

1st defendant and or M/S Gatundu and Mangu Farm Company Ltd were never the registered owners of LR.8569/5.

14. Now, there are twenty eight plaintiffs who filed an originating summons on 4 September 1995 against 4 original defendant/respondents:-

1) Ndorongo Gatheru 1st defendant/respondent

2) Peter Kungu Kahari 2nd defendant/respondent

3) The Attorney General 3rd defendant/respondent

4) Gatundu and Mangu Farm Co.

Ltd. 4th defendant/respondent.

(Who have since been registered as the owners of land

LR 14847).

15. They claimed adverse possession for the portion they occupy of LR 8569. In their Originating Summons of 1995 they claimed that the 12th defendant merely made out to be owners of the property but they had since ceased being such purchasers nor were they owners.

16. Their basis of so doing is that they had occupied the land since 1964. Their parents had been on the same land since 1932.

II: Procedure

17. Order XXXVI r 8a, 12 Civil Procedure Rules requires that parties to an Originating Summons apply to court for directions. Hayanga J directed that *vivo voce* evidence be given. This meant that the Originating Summons was treated as a plaint. Ojwang J gave the same direction on 28 September 2005. Ten years after the matter had been filed to court. He commenced to hear the evidence of one plaintiff. The case was adjourned and had since not been concluded as the Hon. Judge was transferred to another division and referred the matter to the Civil Division.

18. It was only until 16 June 2008, when the parties were heard from where the Hon. Judge had left hearing the 1st witness. The judgment before court was adjourned severally and this is regretted.

III: The Trial

19. From the pleading before court the case of all the plaintiffs was that the defendants obtained orders from Magistrates Court Class I at the City Hall on 11 April 1995 whereby a medical officer of health ordered Ndorongo Gatheru to abate a public health nuisance under section 118(1) (b) that existed on plot 8569 Nairobi. The public health officer ordered under section 120(2) of the public Health Act that the 1st defendant herein abates the nuisance by constructing new pit latrines, provide water shower rooms. Demolish dilapidated rooms and maintain a clean condition of the premises. That goats and sheep should not be kept on the premises.

20. The trial magistrate had the building condemned and that the tenants do vacate the premises. The said occupiers nonetheless obtained a stay of execution order granted by the High Court for such (High Court civil application 640/03).

21. I believe it was due to this threat of eviction that made the plaintiff/applicants file this matter for a claim in adverse possession.

22. The first witness for the plaintiff applicant stated that he had come into the land in 1949. He worked for a European called John. His work then was quarry work. The farm was a large farm. They were on the land living on 2½ acres of workers camp. According to the witness the 4th defendant were given land but this did not include the camp. He resided in the house the European had build for him. His children were born there.

23. The second witness recalls her parents being on the land. She grew up and later got married on the same land and since 1957.

24. The third witness gave a similar version and how he too has been on the land for the various period of time. That his father left him the land since 1985.

25. A fourth witness claim to have been on the land since 1962.

26. The 1st defendant stated he was a farmer and a businessman. He lives in Gatundu. He knows all the plaintiffs. As to the other defendants he claims that the 2nd defendant (who did not attend court) bought the land in question. They appear to have sold the land to the 4th defendant M/s Gatundu & Mangu Farm Company. He then purchased shares and is a share holder of the said company for about 85 shares.

27. Mr. Ndorongo Gatheru went on to inform the court how the parties were his tenants and were paying regular rent to him from the year 1978. The said tenants soon stopped payment. He admitted that the persons in court were different from those paying rents. The houses he collected rent from were 64 person. The health department requested he cleans and rebuilds. That the houses were not in good condition.

28. He produced the rent schedule for them as of 1978. He also holds eviction orders against the plaintiff herein and does so under the Health Act.

29. The defendant holds a lease hold title under the Registration of Title Act issued with effect from 1 July 1989 and is in the name of Gatudnu and Mangu Farm Company Ltd LR14847, 70.61 hectares, IR51169, Land survey 137134.

III: Opinion

30. The parties issues for determination before this court.

This is a claim for adverse possession. The definition according to Black's Law dictionary 2nd edition (pocket) 2001.

States:- Adverse possession

“ A method of acquiring title to real property by possession for statutory period under certain condition espa non permissive use of the land with a claim of right under that use is continuous, exclusive possible open and notorious.”

31. Various cases law deals with adverse possession to mention two being:

Public Trustee V. Wanderi

(1984) KLR 314

And

Kasuve

V

Mwaani Investments Ltd & 4 Others

(2004) I KLR 184

A: Ownership of land

Issues (i) and (ii).

i) Are the defendants the registered owners of LR8569 and or 14847 Kahawa?

32. The documentary evidence shows that the original parcel of LR 8569 was further sub divided to LR8569/1 LR 8569/2

LR 8569/5. This was over taken by event when the Kenya Government in 1989 took over the property under the Common Law Doctrine of “Bona vacantia”. The defendants 1 and 2 had claimed the purchasers rights in 1966 from a Limited Liability Company that had been dissolved.

33. The defendants 1 and 2 have therefore never been the registered owners of LR8569 nor of LR8569/5.

34. The further question then arises:-

Whether the Kenya Government had issued LR.14847

IR 51109 70.61 hectares survey plan 137134 with effect from 1.7.1989 to M/s Gatundu Mangu Farm Co. Ltd. The 4th defendant herein. Is this parcel of land the one and same as LR 8569/5 IR10823 survey 56142 leased out for a lease 949 years on 359 acres less 5 acres.

35. Both parties to this suit did not pay attention to the details on both the two leases. The state counsel on behalf of the Attorney General failed to assist the court in this issue and failed to attend court for hearing.

36. The arguments by the plaintiff is that the defendants were allocated land by the Kenya Government but it did **NOT** include the portion they occupied. What the defendants did was to grab the land.

37. If I go by the rent collection of 1978 as evidence put forward by the 1st defendant that he had been collecting rent from the plaintiffs or others who were previously on the land since 1978, the plaintiffs therefore were his tenants, then the land had never belonged to the 1st, 2nd defendants nor the 4th defendant. They therefore had no colour of right to collect rent on property that never belonged to them.

38. The plaintiffs claim clearly shows that a quarry and not agriculture activities took place in portion of the land. Some claim they were quarry workers for the original land owner by the name of Paris John Savage. They remained on the land even after the said owner left. From the evidence PW1 stated an area of 2½ acres was designated as the workers camp. Others said 7 acres – whatever it is the area had old

houses that were said to have been built by the original owner. It is therefore clear that between 1966 to 1978, 1978 to 1989 the defendants 1,2 and 4 respectively were never the registered owners of the said suit premises.

39. In this case the said plaintiffs were always on land parcel LR8569/5. The plaintiffs have been in possession of this area as squatters and according to their admission it was a portion of the area of 2 ½ acres, where a camp originally was situated.

40. The plaintiff by being in occupation of LR8569/5 were there but need not have the consent of the defendants 1,2 and 4 as they were never the registered owners of the land.

41. The law requires in a claim for adverse possession that the identification of the land in possession of an adverse possession be proved. That demarcation of each title required to be established (see the case law of **Kasuve v Muaani Investments Ltd & 4 Others (2004) IKLR 184.**

42. From the pleading the plaintiffs claim and description of the suit land was vague.

43. They claimed LR title No.8569 IR10823 which they were aware remitted to the Government of Kenya sometime in 1989. The subsequent land title issued of LR 14847 claimed by the 4th defendant has annexed and identical survey map for LR8569. This cannot be as sub-divisions have since taken place and the survey numbers of 56142 for the original title.

44. I can only conclude that since 1989 the plaintiff have been on LR 8569/5 (Now repealed) with the consent of the Kenyan Government.

45. Adverse possession cannot be against the government. Section 41 of the Limitation of Actions Act probabilities acquisition of Government Land or Land otherwise enjoined by the government.

46. The history of this matter is after 1954 the land was given to Paris John Savage. On exchange hands the land belonged to the Government for less than a month or 30 days. The Bona vacantia was declared on 6 June 1989 while the 4th defendant was issued with a new lease on 1 July 1989.

47. Therefore when in 1992 the medical officer of health sued and charged the 1st defendant for nuisance under section 118 (1) (b) of the Public Health Act plot No.8569 was no longer in existence. It ceased to exist in 1989.

48. In the case of **Wanja v Sakiwa (No.2) (1984) KR 1**

(Hancox JA, Chesoni and Nyarangi Ag JJA) it dealt with the claim of eviction of squatters from the suit land. There was an assumption that the applicants original defendants may wish to claim adverse possession. This having not been pleaded was rejected by the court (Scoofield J). On appeal to the court of Appeal it dealt with the issue of adverse possession and held:-

“i) In order to acquire by the statute of limitations a title to land which has a known owner, that owner must have lost his right to the land either by being disposed of it or by having described his possession of it in what constitute dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the sale for the purpose for which he intended to use it.

ii) A person who occupies another persons land which the persons consent cannot be said to be in adverse possession as in reality he has not disposed the owner of the land the possessor is not illegal.

iii) The appellants had been tenants at will under the previous owner of land and had not been trespassers.

49. The application herein would have claimed adverse possession against M/s Pecon Ltd especially so

when the said company became dissolved and lost their title. The Government had the land for a very brief period indeed.

50. The plaintiffs were on the land but it cannot be said that they were there with the consent of the defendants because the defendant 1 and 2 were never registered owners of the land. Defendant No.4 became registered in 1989 as the owner of LR14847.

51. It is alleged that the 4 defendant sold the land in question to other persons and or its members. This seem to be areas outside where the plaintiffs reside.

52. As to the plaintiffs, if they have since died since the inception of the suit, then the claim by them abates. Where the claim is brought by the children they require to hold grant of letters of administration. Section 16 Limitation of Actions Act applies.

53. Thus in order for a person, as stated earlier, to be entitled to a claim to adverse possession, they must show that they are not on the land with the consent of the owner. Where they are tenants, they do not claim adverse possession. If they are squatters as may be seen in this case they must show that they dispossessed the owner of the land. This has to be proved.

54. From the evidence before court, all along 1, 2 and 4 defendants had made out to be the registered owner of the suit land. The area where the plaintiffs claim as a camp for the 1st original owner who subsequently sold and left indeed a last owner Pecon Ltd who lost the title.

55. I would, distinguish this case with that of **Wanja v Sakiwa (No.3 (supra))** in that a claim of adverse possession had not been pleaded by the plaintiff in that case.

56. I would hold that an area of 7 acres, as stated by the witnesses being the original camp of the 1st original owner Paris John Savage be demarcated and awarded to the plaintiffs in this suit who are alive.

57. I enter judgement for the plaintiff as regards to seven (7) acres being their rightful ownership of that portion of land originally known as LR5569/5.

59. I award costs to the plaintiff to be paid by all the defendants jointly and severally.

DATED THIS 26TH DAY OF JUNE 2008 AT NAIROBI.

M.A. ANG'AWA

JUDGE

S.G. Wachira instructed by Wachira & Co. Advocates for the plaintiff/applicant – present

D.M. Mwaura instructed by Mboya, Wangondu & Co. Advocates for the 1st, 2nd and 4th defendants – present

K. Maina instructed by the Attorney General for the 3rd defendant - present