



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Suit 518 of 2000 (OS)

KINYANJUI CHEGE & ANOTHER..... PLAINTIFFS

VERSUS

MWORIA GATHUNGU..... DEFENDANT

JUDGMENT

The 1st Plaintiff Kinyanjui Chege is the uncle to the 2nd Plaintiff Stephen Mwangi Macharia. They both claim ownership, in adverse possession, of 3 acres of land parcel No. LOC 3/MUKURIA/236 in Maragua District. The said piece of land is currently registered in the name of the Defendant Mworia Gathungu. The Plaintiffs claim that the 1st Defendant together with the 2nd Defendants' father bought 2 acres of the suit land in 1977, took possession of 3 acres and that they have, by virtue of the said sale and taking of possession been in occupation and possession of the said 3 acres exclusively continuously, openly and without interruption since.

In his replying affidavit, as well as in his admissions through Counsel, the Defendant does not dispute the alleged sale but states only that his brother had no authority to sell the land which the Defendant claims belonged to their father and which was, on 28th November 1977, registered in the name of the Defendant as beneficiary to his fathers' estate and a certificate issued in his name on 13th December 1977. This is confirmed annexure "KC1" of the affidavit in support of the Originating Summons.

The Defendant's defence to the Plaintiffs' claim is based on the grounds that

- 1. There have been three prior suits namely, H.C.C.C. 1730 of 1978, Karanja Chege –vs- Mworia Gathungu, H.C.C.C. 3466 of 1987 Mworia Gathungu –vs- Karanja Chege and CMCC 58 of 2000 (parties thereto not disclosed) in which the claim by the Plaintiffs herein has been challenged.**
- 2. That the Defendant has since 1977 demanded that the Plaintiffs vacate the suit land.**
- 3. That Karanja Chege, the Defendant in H.C.C.C. No. 3466 of 1978 having laid a claim over the suit land as a purchaser, the Plaintiffs herein cannot claim to have had exclusive possession of the same.**
- 4. That the 2nd Plaintiff ought to have asserted his right of ownership, if any upon attaining the age of majority in 1985 and cannot claim any right in adverse possession accruing prior to that date.**

With due respect to Counsel for the Defendant, it is clear from the record, evidence and the law that the Defendant's submissions on the above grounds cannot hold for reasons appearing below.

Firstly the two suits H.C.C.C. 1730 of 1978 and H.C.C.C. 3466 of 1987 involved the Defendant and other parties and did not touch on the Plaintiffs' claim at all. CMCC 58 of 2000 on the other hand was instituted 23 years after the Plaintiffs took possession of the suit land. The legal position is that a right of ownership in adverse possession arises when dispossession of a rightful owner is demonstrated, by factors such as a sale and the taking of possession. The owner's right becomes extinguished after 12 years if he does nothing to assert his ownership. As seen from the case of BRIDGES -vs- MEES [1957] 1 CH. 475, of where a vendor receives the purchase price over an immovable property and does not transfer the same, the purchaser's possession of the land becomes adverse to that of the vendor, who becomes a mere trustee for the purchaser. The former's title will in those circumstances extinguish after 12 years.

An owner will however not be dispossessed where he has all possible enjoyment of the land. It seems to me Counsel for the Defendant has misconstrued the meaning of exclusive possession in submitting that the claim by Chege Karanja ought to be taken as having affected the Plaintiffs' claim herein. As seen from the definition of dispossession in Vol.24 Halsbury's Laws of England at page 252, it is "exclusivity" as against the owner of the land that is material. The said paragraph reads as follows:

**"To constitute dispossession acts done must have
been done inconsistent with the enjoyment of the soil
by the person entitled for the purpose for which he had a right to use..."**

Thus even where an owner abandons his land, without any intention of using it in future, possession taken by a trespasser may be adverse possession for which the owners' right will extinguish in the event that such possession remains uninterrupted for more than 12 years.

To reverse the position and in order to avoid adverse possession taking effect, an owner must assert his right over the land in a manner as would be effective to stop time from running. Such assertion will be inferred where an owner takes out legal proceedings against the person(s) in possession or makes an effective entry into the land. As seen in the case of GITHU -vs- NDEETE 1984 K.L.R. 776 the giving of notice to quit, without more, cannot be effective assertion of right as to stop time from running under the Limitation of Actions Act.

The Defendant herein claims to have demanded that the Plaintiffs vacate the land but did not commence any action against them until the year 2000 when he sought to bar them from burying the 2nd Defendant's father on the suit land. There is nothing to show that either the Plaintiffs herein or the 2nd Defendant's father were at any time sued for eviction from the suit premises. Nor has the Defendant either in his pleadings or evidence demonstrated to the Court any instance where he has had the use of the 3 acres claimed herein as to deny the Plaintiff's claim of exclusive use of the same during the 23 years they were in possession prior to the filing of CMCC No. 58 of 2000, which in any case sought to bar them from burying the remains of the 2nd Defendant's father on the suit land. It is clear from the unchallenged evidence on record that the Plaintiffs have been in actual possession of the three acres of L.R. Loc.3/MUKURIA/236 in the absence of possession by the Defendant since 1977 and that the Defendants only proven attempt to interrupt such possession was made in the year 2000, 23 years after the taking of possession by the Plaintiffs following the purchase of 2 acres of the suit land by the 1st Plaintiff and the father of the 2nd Plaintiff which purchase is not disputed by the Defendant.

The argument that the 2nd Defendant cannot claim adverse possession by reason of having been a minor until 1985 is not tenable. The true legal position is that the right having accrued to the 2nd Plaintiff on the taking of possession, the Defendant must be taken to have held the land in trust for the 2nd Defendant until and to the time he brought this action for the enforcement of his right of ownership. I have considered the authorities submitted herein which I find to operate in favour of the Plaintiffs other than the Defendant.

Taking all the above into consideration I find that the Plaintiffs herein have established their claim and have, on the balance of probabilities, proven the same. I find that they are indeed entitled to

ownership in adverse possession of the 3 acres they occupy in L.R. No. LOC 3/MUKURIA/236. I therefore enter judgment in their favour in respect of the said 3 acres and specifically order that:

1. The Plaintiffs herein Kinyanjui Chege and Stephen Mwangi Macharia are hereby declared to have become entitled to 3 acres of LOC 3/MUKURIA/236 by way of adverse possession since 1977 and are entitled to be registered as owners thereof. 2. The Defendant herein Mworia Gathungu is hereby declared to be holding 3 acres of Loc 3/MUKURIA/236 currently in occupation by the Plaintiffs in trust for them.

3. The Defendant Mworia Gathungu do forthwith execute all necessary documents to facilitate the registration of the said 3 acres of land in the names of the Plaintiffs failing which the Deputy Registrar of the High Court shall have the power and mandate to do so.

4. Costs of this suit are awarded to the Plaintiffs.

Dated and Delivered at Nairobi 13th day of July, 2005

M.G. Mugo

Judge

In the presence of:

N/A for the Plaintiffs

Onyancha for the Defendant