



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 224 OF 2017 (OS)

JAMES MWANIKI KINUTHIA.....PLAINTIFF/APPLICANT

VS

HEMED IDD MUKUI1ST DEFENDANT/RESPONDENT

KANGETHE ABDULLAHI IDDI2ND DEFENDANT/RESPONDENT

(substituted as legal representatives

Of IDD RAJAB)

CONSOLIDATED WITH ELC 517 OF 2017

HEMED IDD MUKUI.....1ST PLAINTIFF

KANGETHE ABDULLAHI IDDI2ND PLAINTIFF

(substituted as legal representatives

of IDD RAJAB)

VS

WANJIRU GATHEKIA.....1ST DEFENDANT

KAGIRI GATHEKIA.....2ND DEFENDANT

MWANGI GATHEKIA.....3RD DEFENDANT

KIMEMIA GATHEKIA4TH DEFENDANT

KAMAU GATHEKIA.....5TH DEFENDANT

JAMES MWANIKI KINUTHIA6TH DEFENDANT

JUDGMENT

1. The Plaintiff took out originating summons (ELC 39 of 2014 OS-Nyeri, later renamed ELC 224 of 2017-Muranga) against Idd Rajab on the 11/3/2014 seeking the following Orders;

a. A declaration that the title of IDD RAJAB to the land parcel number LOC.11/MARAGI/2175 has been extinguished by the Plaintiff's adverse possession thereof for a period of more than Twelve (12) years in terms of the Limitation of Actions Act.

b. That the Plaintiff has become entitled by adverse possession to Land Parcel comprised in title number LOC.11/MARAGI/2175 and registered under the Land Act in the names of the Defendant.

c. An Order that the District Registrar Murang'a do register the Plaintiff as absolute proprietor of the whole land parcel number LOC.11/MARAGI/2175 in place of the Defendant.

d. That the District Land Registrar Murang'a be directed that the Order herein shall be instrument of transfer of ownership of the whole parcel of land reference Number LOC.11/MARAGI/2175 from the Defendant to the Plaintiff.

e. That the costs of this suit be provided for

2. Idd Rajab died on the 21/7/15 and was substituted by Orders of this Court issued on the 30/4/2019 by the legal representatives of his estate namely Hemed Iddi Mukui and Kangethe Abdullahi Iddi (the respondents/Defendants herein).

3. It would appear that on the 21/12/17 the Defendants herein filed a case vide ELC 517 of 2017 against Wanjiru Gathekia, Kagiri Gathekia, Mwangi Gathekia, Kimemia Gathekia, Kamau Gathekia and James Mwaniki Kinuthia (the Defendants in ELC 517 of 2017 who are mother and siblings to James Mwaniki Kinuthia, the Plaintiff in this case).

4. By consent of the Parties the two files were consolidated on the 7/10/19 and ELC 224 of 2017 was deemed the lead file while ELC 517 of 2017 became the defence and counterclaim of the Defendants/Respondents in this case.

5. The Plaintiff's case is that his father the late Gathekia Kihethu, deceased purchased the suit land measuring 1.6 acres in 1968 from one Wamiti Ndogoto, deceased and was put in possession whereupon he set down to developing the land, established his family home and settled there to date openly, peacefully and uninterrupted. That the occupation has been in full knowledge of the Defendants.

6. That the said Wamiti Ndogoto failed to transfer the said land to his father and instead transferred it Idd Rajab in 2001.

7. That Gathekia filed a case in Kiharu LDT in 2007 vide LDT No 56 of 2007 seeking title to the suit land against Wamiti and the elders Ordered that the suit land be transferred to Gathekia.

8. Gathekia could not enforce the decree because at this time the land had been transferred to Idd Rajab. He then filed another LDT 54 of 2008 against Idd Rajab where the panel of elders Ordered that Wamiti to transfer the land to Gathekia and find Idd Rajab an alternative land.

9. This decision was finally quashed vide the Orders issued on 30/4/2009 in HCCC (JR) 239 of 2008 on account of want of jurisdiction by the Tribunal in determining title to land.

10. In denying the Plaintiff's claim the Defendants in their defence and counterclaim posit that the land was registered in the name of the Idd Rajab in 2001 and the Defendants have encroached on to the land. That the Defendants claim of adverse possession is untenable. That the 6th Defendant/Plaintiff has illegally lodged a caution on the land claiming beneficial interest.

11. The Defendants sought the following Orders in their counterclaim;

a. An Order that the 1st to 5th Defendants be barred by mandatory injunctions from entering, remaining on, carrying out acts of waste on, otherwise interfering, with the Plaintiff's to the exclusive possession of land parcel LOC.11/MARAGI/2175.

b. An Order that the 1st to 5th Defendants be evicted from Land Parcel LOC.11/MARAGI/2175 together with their servants or agents and relatives and all their crop and structure removed from the said land and the Officer Commanding Police Section Murang'a directed to provide the necessary security.

c. An Order that the caution lodged by the 6th Defendant over the land LOC.11/MARAGI/2175 forthwith removed and the Land Registrar Murang'a be directed to remove the said caution.

d. General damages for trespass and illegal caution.

e. The costs of the suit.

f. Interest.

g. Any further or better relief this Court may find appropriate.

12. The 1st -6th Defendants in ELC 517 of 2017 filed their defense to the Defendant's counterclaim and contended that they are in occupation of the suit land and their occupation is legal as beneficial owners having beneficial interest since 1968.

13. At the hearing of the case PW1 – James Mwaniki Kinuthia testified and relied on his supporting affidavit dated the 24/2/14, written statement dated the 28/5/18 and list of documents dated the 15/5/19 and marked as PEX No 1-11.

14. He stated that he lodged a caution on the suit land to protect his interests on the land. That he entered the suit land in 1968 with his father at the age of 3 years. His father died in 2013. That his mother and 6 of his siblings currently live on the suit land. That his brother Kamau has constructed a stone house while the rest have built brick houses. That Gathekia was buried on the suit land without any objection, least of all

from the Defendants. That Idd Rajab acquired the title in 2001 but he has never entered into the land.

15. The witness added that he filed the OS on his own behalf and not on behalf of the estate of his father. That he is the only claimant in the OS. That he does not live on the suit land but at a place called Kongoini. That he did not present any evidence to demonstrate occupation of the suit land by his mother and siblings. Neither has he included how he utilizes the land.

16. PW2 – Paul Kagiri Gathekia relied on the joint witness statement dated the 28/5/18 where he refuted the claim of trespass and asserted that they have acquired title by way of adverse possession on account of their occupation since 1968.

17. That he and his mother and other siblings live on the suit land. That he entered the land when he was 3 years old in 1969. That the land was occupied and utilized by his father since 1968.

18. DW1 – Hemed Iddi Mukui testified and relied on the replying affidavit dated the 14/6/17, and the witness statement dated 14/6/14 as well as the List of documents dated the 14/6/19 and marked DEX 1-5. That the suit land is registered in the name of his father Idd Rajab in 2001 and the Defendants are occupying the land as trespassers. That Idd utilized the land for 2-3 years before he died in 2015. He informed the Court that on the land are 2 stone houses, others are brick houses and chicken pens belonging to the Plaintiff/Defendants. That the Plaintiff/Defendants have lived and cultivated the land for long. That Idd Rajab did not occupy the land at all. It is exclusively occupied by the family of late Gathekia. That James Mwaniki filed a caution on the land in 2013 claiming beneficial interest. That he was aware that the panel of elders in 2008 Ordered Wamiti to give Idd Rajab another alternative land. That he had no evidence that this was not complied.

19. The Plaintiff submitted that the Plaintiff's father purchased the land in 1968, took possession and completed paying the purchase price in 1978. That the registered owner failed to transfer the land to him and instead transferred it to Idd Rajab in 2001. That the fact of occupation is depicted in ELC 517 of 2017 where the Defendants have sought Orders of eviction. That time started running in 1978 when the last payment was made.

20. The Defendants submitted that Gathekia filed suit in 2001 but withdrew it and pursued the LDT of 2007 and 2008. That the award of the LDT was quashed in 2009 and time started running afresh in 2009 and therefore 12 years runs to 2021.

21. With respect to the cause of action, the Defendants argued that the Plaintiff has brought the suit on his own and not on behalf of the estate of Gathekia. That, being the case, there is no claim on behalf of the estate of Gathekia. That in any event Gathekia occupied the land with the permission of Wamiti.

22. On the issue of pleadings, the Defendants contend that the only party in the Originating summons is the Plaintiff and the Defendants in ELC 517 have not raised any claim on the land.

23. Further that the Plaintiff has not proven any claim at all least of all one that is adverse to the Defendants because he does not reside on the land.

24. Having read and considered the pleadings, the evidence and the materials placed before me the key issues for determination are; whether the Plaintiff has established title by way of adverse possession; whether the 1st -5th Defendants in ELC 517 of 2017 have proved beneficial interest in the suit land; whether the 1st -5th Defendants have trespassed on the land and whether Orders of eviction should be granted; whether the caution lodged on the suit land should be removed; who meets the costs of the suit.

25. It is not in dispute that the root of this land was LOC11/MARAGI626 registered in the name of Nduguto Kariuki on the 10/3/1965. On the 3/10/1997 upon succession of the estate of Nduguto Kariuki the land was partitioned into parcel LOC 11/MARAGI/2174 and 2175. Parcel 2175 became registered in the name of Wamiti Ndogoto on the 18/5/1999. This is the land the subject of this suit.

26. It is the Plaintiff's case that he has acquired title by way of adverse possession. That his father purchased the suit land measuring 1.6 acres in 1968 and took possession and settled his family who have lived on the Suitland to date. That the land was sold to the Plaintiff's father Gathekia by Wamiti Ongoto, both deceased, through various agreements that were produced in evidence at the trial. That the payments were fully paid in 1978. That the seller Wamiti Ndogoto failed, neglected and or refused to transfer the suit land to Gathekia and instead resold the land to IDD Rajab, the father of the Defendants in 2001. The green card produced in evidence attests to the fact that the land became registered in the name of IDD Rajab on the 9/8/2001.

27. The Defendants case is that there was no adverse possession because it was agreed between Wamiti and Gathekia that he will built his house and in case of default by seller, the seller would refund the deposit plus the costs of his developments and crops on the land; That the Plaintiff had no independent interest different from his father; that Gathekia had litigated with Idd Rajab and Wamiti with respect to the land and therefore time stopped running in 2009 therefore time had not started running in 2001 when the Idd Rajab purchased the land from Wamiti; that Idd Rajab cultivated the land indirectly through third parties; That the Plaintiff and his mother and siblings should be evicted from the land.

28. As to whether the Plaintiff has established title by way of adverse possession, a claim of adverse possession is a claim founded on fact and law. The one who asserts adverse must proof the claim to the standard of balance of probabilities.

29. In the case of **Leonola Nerima Karani v William Wanyama Ndege [2012] EKLR** the Court citing the case of **Wambugu versus Njuguna (1983) KLR 171** laid down the following guiding principles in respect to adverse possession: -

- a. The general principle is that until the contrary is proved possession in law follows the right to possess.

b. In Order to acquire by the statute of limitation title to land which has a known owner, that owner must have lost his right 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 for which he intended to use it.

c. The limitation of Actions Act, in adverse possession contemplates two concepts, disposition and discontinuance of possession. 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.

d. Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid sale or agreement, the possession becomes adverse and time begin to run at the time the licence is determined. Prior to the determination of the licence, the occupation is not adverse but with permission. The occupation can only be either with permission or adverse; the two concepts cannot co-exist.

e. The rule on permissive possession is that possession does not become adverse before the end of the period during which the possessor is permitted to occupy the land.

f. Adverse possession means that a person is in possession in whose favour time can run...

g. Where the claimant is a purchaser under a contract of sale of land, it would be unfair to allow time to run in favour of the purchaser pending completion when it is clear that he was only allowed to continue to stay because of the pending purchase because had it not been for the pending purchase, the vendors would have evicted him. The possession can only become adverse once the contract is repudiated...

h. Where a claimant pleads the right to land under an agreement and in the alternative seeks an Order based on subsequent adverse possession, the rule is the claimant's possession as deemed to have become adverse to that of the owner after the payment of the last instalment of the purchase price. The claimant will succeed under adverse possession upon occupation of at least 12 years after such payment.

30. Equally in the case of **Kimani Ruchire –Vs – Swift Rutherfords & Co. Ltd. (1980) KLR**, Kneller J. held that:

“The Plaintiffs have to prove that they have used this land which they claim as of right: **nec vi, nec clam, nec precario** (no force, no secrecy, no persuasion). So the Plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it by way of recurrent consideration”.one must show that they are in long exclusive, uninterrupted possession, possession is hostile to the rights of the registered owner and the registered owner is aware; possession has as much publicity as not to be missed by the registered owner.

31. It is our law that he who asserts must proof. In particular section 109 of the Evidence Act states as follows;

“The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

32. In this case the Plaintiff led evidenced that he is the son of Gathekia. He stated that his father occupied the suit land until his death. That he entered the suit land when he was a child with his parents.

33. It is noteworthy that the Plaintiff in this case led evidence that he has filed the suit on his own. That his suit is not a representative suit and therefore is not representing the mother and the siblings who were Defendants in ELC 517/17 and whom he claims are in occupation of the suit land. One of them, PW2 led evidence that he, his mother and siblings have lived on the land since 1968 and have constructed houses made of stone and bricks.

34. The evidence of PW2 supports a claim of adverse possession however the problem is that PW2 is not a Plaintiff in this case. He therefore has no cause of action against the Defendants. Perhaps the fatal mistake made by the Plaintiff was not to amend the suit to enjoin his siblings and his mother, who, subject to evidence, would have been the right parties to put forth a claim for adverse possession.

35. The Plaintiff led evidence that his father occupied the land since 1968 till his demise. In cross examination he testified that he did not file the suit on behalf of the estate of his father. This in my view is the second fatal error that the Plaintiff made. Had he filed the suit as the legal representative of Gathekia, perhaps he might have stood a chance of adverting a claim of adverse possession on behalf of his estate. It is also not known when his father died but given the evidence that the father paid the consideration in 1978, then a claim of adverse possession would have crystalized by 1990 or thereabouts.

36. The Plaintiff led evidence that he lives in Kongoini and not the suit land. One of the key ingredients to proof in a claim of adverse possession is uninterrupted peaceful and exclusive possession of the suit land. Although the Plaintiff stated in evidence that he entered the land in 1968 as a child, he did not lead evidence when he left the land and whether the period of stay would amount to possession that is adverse. He did not demonstrate acts of his own that were adverse to the title holder so much so that he could sustain a claim on his own independent of his late father.

37. It is the view of the Court that none of the requirements of adverse possession were proved by the Plaintiff.

38. With respect to the 2nd issue, the record confirms that the Defendants never testified and /or filed pleadings after the parties agreed to consolidate the cases. The parties agreed that the plaint in ELC 517/17 forms the defence and counterclaim for ELC 224/17. The Plaintiffs and his siblings did not file reply to defence and counterclaim in the lead file. It was expected that the Defendants would file pleadings or be enjoined in the lead file as co-Plaintiffs with the Plaintiff in ELC No. 224 /17. This was not done.

39. In ELC 517/17, the 1st-5th Defendants claimed that they had beneficial interest over the land. The Plaintiff and the Defendants in ELC 517 are represented by one counsel. I have perused the file and am satisfied that they were duly served with the hearing notice as the date was taken in Court in the presence of their counsel on record. The 1st -6th Defendants (ELC 517) had filed a defense to the Defendants in this case and under para 3 averred that save that the 1st -5th Defendants are in occupation of the suit land, that the Defendants deny para 5 of the plaint and in particular carrying out acts of waste. The 1st -6th Defendants aver that their occupation of land is legal as beneficial owners having beneficial interest since 1968.

40. In the case of *Boyes v Gathure (1969) EA 385* It was held that "beneficial interest" is not an interest that is capable of registration because such "beneficial interest" unless defined as an interest such as a purchase, lease, charge etc, cannot be said to be an "interest capable of registration".

41. The same principle was applied in the case of *Ali Athman Mawiya -Vs- Maria Chausiku Msechu (2004) eKLR* where the Court basing its decision on *Boyes -Vs- Gathure* also held that the respondent did not disclose any interest capable of registration. unless the instrument is capable of registration, a caution ought not to be registered to cover it.

42. In this case the 1st -5th Defendants failed to lead evidence to show the nature of beneficial interest in the land nor proof any interest to their benefit.

43. Regrettably the 1st -5th Defendants failed to controvert the case of the Defendants in the consolidated suit.

44. Issue No 2 is answered in the negative.

45. Section 24 of the Land Registration Act No 3 of 2012 provides as follows:

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

46. Section 25 (1) of the said Act further provides that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an Order of the Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrances, set out in this section.

47. The entire evidence confirms that the land was registered in favour of the deceased Idd Rajab, the counterclaim is brought on behalf of his estate. The key issue for determination is whether the deceased estate is entitled to exclusive rights over the land. Though the 1st -5th Defendants aver that they are in occupation by virtue of beneficial interest, they failed to defend their right to continue occupying the land. They had an option of filing a counterclaim in Elc Case No. 517/17 and /or co-plead adverse possession with the Plaintiff.

48. The Court can only find that the proprietor enjoys exclusive title as per Section 24 as read together with Section 25 of the Land Registration Act. No evidence has been brought forward to impeach the title of the Defendants as contemplated under section 26 of the LRA or howsoever.

49. With respect with the removal of caution, the Plaintiff pleaded that he lodged the caution to protect his interest in land. The Court has found that the Plaintiff has not proved a claim of adverse possession nor offered a reason why the caution should subsist on the land.

50. According to the evidence placed before me in this case IDD Rajab being the registered owner of the suit land as evidenced, his estate therefore is entitled to quiet possession and enjoyment of his property. The caution is therefore hereby Ordered to be removed in accordance with section 73 (1) of the Land Registration Act.

51. The Defendants did not lead any evidence to demonstrate the damages and losses if any, that they have suffered as a result of the occupation of the suit land and therefore I decline to grant any damages.

52. In conclusion the Plaintiff's case fails and judgment is entered in favour of the Defendants as prayed in the counterclaim.

53. Final Orders and disposal;

- a. It is hereby Ordered that 1st to 5th Defendants do vacate the suit land within the period of 60 days from the date of this judgment.
- b. In default they shall be evicted from Land Parcel LOC.11/MARAGI/2175 together with their servants or agents and relatives and all their crop and structure removed from the said land and the Officer Commanding Police Section Murang'a directed to provide the necessary security, if required.
- c. Thereafter it is hereby Ordered that the 1st to 5th Defendants be barred by mandatory injunctions from entering, remaining on,

carrying out acts of waste on, otherwise interfering, with the land parcel LOC.11/MARAGI/2175.

d. It is hereby Ordered that the caution lodged by the 6th Defendant over the land LOC.11/MARAGI/2175 be removed forthwith.

e. The costs shall be in favour of the Defendants.

54. It is so Ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 20TH DAY OF JANUARY 2021

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Plaintiff: Mwaura HB Kirubi

1st & 2nd Defendant: Ms Macharia HB Mbutia

Kuiyaki: Court Assistant