



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 227 OF 2016 (O.S)

CHARITY NYAGUTHII KAMUTU.....1ST APPLICANT

FRANCIS MAINA KAGUCUL.....2ND APPLICANT

ESTHER WANGU MURIITHI.....3RD APPLICANT

VERSUS

ANTHONY MUNENE GITHUMBA

(Sued as the Administrator of the Estate of the late

GITHUMBA KANYUGI and on His own Behalf)

JOHN WACHIRA KITHUMBA

CLEMENT KARIMI GITHUMBA

BENSON WANJOHI GITHUMBA (as trustee for themselves and of .

MARGARET KARUANA GITHUMBA).....RESPONDENTS

JUDGMENT

Introduction

By an Originating Summons dated 19th December 2016, the Plaintiffs/Applicants posed the following questions:-

- (1) Whether the applicants have been in Adverse possession of one acre in land parcel No. INOI/KARIKO/280 for over 12 years?**
- (2) Whether the land should be sub-divided and one acre transferred to the applicants?**
- (3) Whether the applicants should be declared to be entitled to one acre in land parcel No. INOI/KARIKO/280 by way of adverse possession?**
- (4) Who should pay costs of this suit?**

In a replying affidavit sworn on 9th January 2017, the 2nd respondent on his behalf and with authority of the other respondents opposed the plaintiff's suit.

Plaintiffs Statement of Facts

The three plaintiffs gave sworn testimony and stated as follows:

Charity Nyaguthii Kamutu (PW1)

She stated that she knows one Kagucui Kanyingi as her father-in-law. She got married to his son one Stanley Waweru Kagucui in 1990. They first lived in a mud house with the wife of her brother-in-law Esther Wangu together with their families. Later in the year 1994, they agreed to demolish the mud house and built on the lower part of the suit land where she occupies approximately 0.33 of acre. She stated that in the year 1992 when she was just one year in the land, the late GITHUMBA went and uprooted the maize and potatoes she had planted on her land and fed them to his cows.

Esther Wangu Muriithi (PW2)

The 2nd plaintiff testified that she is the daughter in law to one Kagucui Kanyugi and is married to his son namely Muriithi. She stated that they constructed their homestead where her father in law was living in land parcel No. INOI/KARIKO/280. She further stated that they constructed their first house in the same land but outside the homestead on the upper part where they used to grow sugarcane. The 2nd plaintiff also stated that they later moved to her father-in-law mud house when the defendant grazed their sugarcane and later built their own house in the year 2000 on the suit land measuring approximately 0.33 of an acre where they live to-date.

Her father in-law died in year 1986 while her mother-in-law Beatrice died in 1981. She further stated that their stay has never been peaceful as Gathumba Kanyingi and his children have been hostile to them upto around the year 2000 when she moved to her current location. Prior to the year 2000, there is a time the defendants went and built a toilet on the portion where they occupy and they protested. The defendants had even diverted a water pipe into their land to flood their homestead and even graze their cows on their crops and also planted potatoes outside their houses but they protested. The defendants even cut down their bananas when they sprout and they complained to the area sub-chief and even had proceedings before the Land Disputes Tribunal.

She stated that they are entitled to be awarded a portion of one acre from the suit land parcel No. INOI/KARIKO/280 jointly with her brother-in-law Francis Maina Kagucui and his wife Charity Nyaguthii since they have acquired the same by way of Adverse possession having lived on the land continuously for over 50 years and have never been evicted by the registered owner and have nowhere to call home.

Francis Maina Kagucui (PW3)

The third plaintiff Francis Maina Kagucui on his part stated that he is the son of Kagucui Kanyingi. He said that he was entitled to a portion of land parcel No. INOI/KARIKO/280 from his brother Kithumba Kanyingi. He said that the suit land parcel Number INOI/KARIKO/280 was originally registered in the names of Kanyingi Kabiru on 30/01/1960 who transferred to his son Kithuba Kanyingi on 14/01/1966 mysteriously. He stated that Kanyingi Kabiru had three (3) wives and his children are Karani, Gachuki, Jeremiah Gichungi, Githumba, Jackson Kagucui and Wainoi.

He stated that the children of Kagucui Kanyingi used to occupy about 2 acres in the suit land and had sugarcane on the upper part. He said that he was born on the suit land and his father had a grass house and later constructed a mud house where he grew up. His father also constructed a wooden house where he moved into in 1986 and continued to occupy until today and would cultivate in the homestead. He moved to that house after his father died in 1986 and the family resolved that he moves to the house (wooden) which is on the lower part of the mud house measuring approximately 0.33 of an acre where he lives to-date. When his brother died in 1981, the defendants grazed their cows on their sugarcane and in 1987, they demolished their toilet and became hostile to them. When his son Albert Muthii died in the year 2007, they buried him on the suit land where they have lived all his life for more than 50 years together with his co-plaintiffs and their respective families.

The 3rd plaintiff said that he had even sued Githumba Kanyugi before the Kirinyaga Central Land Disputes Tribunal claiming part of the land. However, the Kirinyaga Central Disputes Tribunal heard the dispute and made an award that land parcel No. INOI/KARIKO/280 be divided into 2 portions and one portion was to be registered in his name and the other portion in the name of the Kithumba family. The said award was adopted as an order of the Court on 23/11/2005. The respondent filed an Appeal to the Provincial Appeals Tribunal and the Appeals Tribunal ruled that the parties were to first file succession. He stated that the 1st defendant filed succession cause of his father's estate and ignored the tribunal award and distributed all the land to his siblings. He produced a copy of the green card as an Exhibit in this case. The copy of the proprietorship section of the suit property on entry entered on 4th June 2012 shows that the suit property was to be held in equal shares amongst the respondents. On 9th January 2017, the 2nd respondent filed his replying affidavit in which he averred that the applicants were mere licencees given a portion of the suit property to build a house by the deceased Githumba Kayugi. That the applicants do not in fact occupy one acre of the suit property but a total of 100 by 120 metres. He averred that the applicants' presence on the suit property was enabled by the consent of the deceased and the respondents. He therefore denied the accrual of ownership by adverse possession and sought to have the suit dismissed.

On 3rd April 2017, the 2nd applicant filed a further affidavit disputing the 2nd respondent's averments that their stay was facilitated by the permission and consent of Githumba. The 1st and 3rd respondents on the same day filed further affidavits denying the averments made by 2nd respondent. On 2nd May 2017, the 2nd respondent filed a further affidavit reducing the acreage occupied by the applicants from the one initially stated in his first affidavit of 100 by 120 metres to 0.10 Ha. On 13th March 2020, the applicants filed their submissions, demonstrating the manner in which they had satisfied the requisite ingredients of adverse possession, to wit; that they had been living on the suit property for a continuous period exceeding 12 years; that their presence on the suit property was hostile, without the permission of the registered owners; that their continued living on the suit property has been open and without secrecy. They cited various cases including *Susan Mumbi Waititu & 2 others Vs Mukuru Ndata & 4 others (2008) e K.L.R*, *Wanyoike Gathure Vs Beverly (1965) E.A. 514, 518, 519*, *Eliva Nyongesa Lusenaka & Another Vs Nathan Wekesa Omacha Kisumu Civil Appeal No. 134 of 1993 (UR)*; and *Kasuve Vs Mwaani Investments Ltd & 4 Others (2004) K.L.R 184* to demonstrate that they had satisfied the ingredients of adverse possession.

Issues for Determination

The issues for determination are set out in the Originating Summons as follows:-

- (1) Whether the Applicants have been in adverse possession of one acre in land parcel No. INOI/KARIKO/280 for over 12**

years;

(2) Whether the land should be sub-divided and one acre transferred to the Applicants;

(3) Whether the Applicants should be declared to be entitled to one acre in land parcel No. INOI/KARIKO/280 by way of Adverse possession;

(4) Who should pay costs of the suit.

The issue of a previous case before the Kirinyaga Central Land Disputes Tribunal and the consequent order which was adopted by the Magistrate's Court as an order of the Court on 23rd November 2005 also presents another angle that cannot pass without being addressed.

Legal Analysis and Decision

On whether this Court is res-judicata, the 3rd applicant in his supporting affidavit avers that he sued one Githumba Kayugi (deceased) before Kirinyaga Central Land Disputes Tribunal claiming ownership of a portion of the suit property. He further stated that upon hearing the dispute, the Tribunal ordered that the suit property be divided into two portions, one portion to be registered in his name and the other in the name of the Githumba's family. He also contends that the said award was adopted as an order of the Court on 23rd November 2005. He further stated that prior to his demise, Githumba Kayugi filed an appeal in the Provincial Appeals Tribunal but passed on before the Appeal was heard and determined. However, the 3rd applicant did not file the Tribunal's decision nor the proceedings in his list of documents. Without supplying this Court with the evidence of a concluded case before the Kirinyaga Central Land Disputes Tribunal or the outcome of the determination of the Appeal at the Provincial Appeals Tribunal, it cannot be said that there has been a previous suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title has been subsequently raised heard and finally determined by such Court. On that issue whether the present suit is res-judicata, my answer is in the negative.

Whether the Applicants have been in Adverse possession of one acre in land parcel No. INOI/KARIKO/280 for over 12 years

The doctrine of Adverse possession has been defined in numerous decisions and precedents to mean a person who seeks to acquire title to land for the applicable statutory period which in this country is 12 years. The claimant must in addition prove non-permissive or non-consensual actual, open, notorious exclusive and Adverse use by him or those under whom he claims without interruption for the stipulated period aforesaid. In the Court of Appeal case of *Mtana Lewa Vs Kahindi Ngala Mwangandi (2005) e K.L.R*, it was held as follows:-

“Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take an action against such person in assertion of his title for a certain period, in Kenya 12 years”.

The plaintiffs in their evidence have stated how they moved into the suit land where they settled openly and continuously save for intermittent harassment by Githumba Kanyugi (deceased) who uprooted their crops and feed them to his cows and attempted to flood their compound with water. Other than that, they have lived in the suit land for a period of over 20 years. It is now well settled that a party claiming Adverse possession ought to prove his possession was *“nec vi, nec clam, nec precario”*. That is to say peaceful, open and continuous. I am satisfied that the plaintiffs have proved that indeed they have lived openly, peacefully, continuously and without permission from the owner(s) of the suit property for a period not less than 12 years.

Whether the land should be sub-divided and one acre transferred to the Applicants.

The 1st applicant in her evidence stated that upon their marriage in 1990, she came to live on a portion of 0.33 of an acre of the suit property.

The 2nd applicant confirmed the testimony by the 1st applicant that they occupy a portion of 0.33 of an acre where she has occupied since 1979 to-date. The witness also referred to some proceedings before Kirinyaga Land Disputes Tribunal touching on the suit property instituted by the 3rd applicant against Githumba Kanyugi. The 3rd applicant in his evidence confirmed the filing of a complaint before the Kirinyaga Land Disputes Tribunal claiming part ownership of the suit property. He stated that upon hearing the dispute, the Tribunal ordered the suit property be divided into two portions, one portion to be registered in his name and the other in the name of the Githumba's family. Though he did not produce any proceedings or award from the Kirinyaga Land Disputes Tribunal or the Provincial Appeals Tribunal, those averments were not denied by the respondents. From the evidence adduced by the parties, it also comes out clearly that the suit property is a clan land where the applicants had laid claim before the Land Disputes Tribunal under Kikuyu Customary trust. All said and done, I find that the applicants have proved that they are entitled to one (1) acre which they have acquired by Adverse possession and which should be transferred from land parcel No. INOI/KARIKO/280.

Who should bear the costs of this suit

Ordinarily, costs follow the event. However, the applicants and the respondents are close relation. As such, I exercise this Court's discretion and order each party to bear their own costs.

Disposition

Considering the totality of the evidence availed in this case and applying the legal principles of Adverse possession outlined herein above, it is clear to me that the applicants/plaintiffs have proved their claim to the required standard and have brought themselves within the limits of the doctrine of Adverse possession.

In the upshot, this suit brought by way of Originating Summons dated 19th December 2016 and filed in Court on 20th December 2016 is allowed as follows:-

(1) The applicants are entitled to one acre out of land parcel No. INOI/KARIKO/280.

(2) The respondents to execute all statutory instruments and documents to effect the transfer of one acre out of the suit land parcel No. INOI/KARIKO/280 to the applicants.

(3) The Land Registrar, Kirinyaga County to rectify the register to reflect the transfer of one acre from the respondents to the applicants in respect to land parcel No. INOI/KARIKO/280.

(4) Each party to bear her own costs.

READ, DELIVERED physically and SIGNED in open Court at Kerugoya this 19th day of February, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Mr. Ngigi holding brief for C.S. Macharia
2. Ms Wambui holding brief for Ann Thungu
3. Kabuta, Court clerk.