



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 21 OF 2019 (O.S)

DORIS MATHA WACHIRA.....1ST PLAINTIFF

JAMES NGARUIYA KOINANGE.....2ND PLAINTIFF

VERSUS

EMILY NUNA NGARUIYA.....DEFENDANT

JUDGMENT

Background

The plaintiff vide Originating Summons dated 3rd June 2019 sought determination of the following questions:-

- (1) Whether the applicants have acquired L.R. No. MWERUA/KIANDAI/282 having been in open, continuous, un-interrupted possession and occupation of the whole of MWERUA/KIANDAI/282?*
- (2) Whether the applicants having lived on the said L.R. No. MWERUA/KIANDAI/282 openly, continuous and un-interrupted have developed the said land?*
- (3) Whether the respondent's title to L.R. No. MWERUA/KIANDAI/282 has been extinguished?*
- (4) Whether the applicants have acquired the suit land by way of adverse possession/constructive trust of proprietary estoppels?*
- (5) Whether the respondent who is the legal representative and administrator of the estate of the late JOSEPH MURAGE NGARUIYA (deceased) who was the registered owner of L.R. No. MWERUA/KIANDAI/282 acquired proper title to the said land upon succeeding him?*
- (6) What order is to be made as to costs of this suit?*
- (7) Whether the registration of L.R. MWERUA/KIANDAI/282 to the respondent should be cancelled and the applicants be registered as owners thereof having acquired the same under adverse possession?*
- (8) Whether the applicants are entitled to be registered as joint owners of L..R. No. MWERUA/KIANDAI/282?*

By a Notice of Motion dated 19th June 2019, the plaintiffs moved this Honourable Court for leave to effect service of summons upon the defendant by way of substituted service through advertisement in the Daily Nation Newspaper. Upon hearing the plaintiffs/applicants Ex-parte and upon considering the applicable law, the plaintiffs/applicants were granted leave to effect service of summons upon the defendant/respondent by way of substituted service through advertisement in the Daily Nation Newspaper once.

By an affidavit of service sworn by **Ayub Kabute Anampiu** advocate sworn on 11th September 2019 and upon being satisfied that the service upon the defendant/respondent was proper, the Court directed this matter to be heard as undefended suit. The Court also directed that the case to proceed by viva voce evidence.

Plaintiffs Case

Both plaintiffs gave their testimony on oath when this case came up for hearing on 14/10/2020.

First Plaintiff's Case

Doris Matha Wachira (PW1) stated that she is a resident of Kiandai in Baricho within Kirinyaga County. She said that she is the wife of one Henry Wachira Koinange (deceased) and that they were blessed with five children. She stated that James Ngaruiya Koinange is the son to her brother-in-law. She recalled that they have lived in the suit land parcel No. MWERUA/KIANDAI/282 with her family from the year 1978 to-date. When her husband passed on, he was buried in the suit land. They have constructed a permanent house and a water tank. They have also connected water and planted cash and food crops such as coffee and bananas. She stated that she does not know Emily Nuna Ngaruiya who is the registered owner of the suit land and how she acquired the same. She only knows that the suit land was originally registered in the name of Koinange Kibuthu who is the father to the defendant but she does not know where they live. She stated that they have lived in the suit land openly and continuously for an interrupted period of more than 12 years and sought to be declared as having acquired the same together with her co-plaintiff herein by adverse possession. She did a valuation of the suit land and the development which she produced as Plaintiffs Exhibit No. 1.

Second Plaintiff's Case

The 2nd plaintiff James Ngaruiya Koinange (PW2) on his part stated that he also lives in the suit land registration No. MWERUA/KIANDAI/288 together with the 1st plaintiff who is the wife of his uncle. He said that he has lived in the suit land since 1997 after his mother retired from Government Employment. He stated that he found his grandparents and uncle Henry Wachira Koinange (deceased) who is the husband of the 1st plaintiff and his family living on the suit land. He said that he later learnt with shock that the defendant got registered as proprietor of the suit land without his knowledge. He produced a certificate of official search of the suit land as Plaintiffs Exhibit No. 2. He also stated that he has lived in the suit land openly, continuously, peacefully and un-interrupted for the last 22 years.

Legal Analysis and Disposition

I have considered the viva voce evidence by both plaintiffs and the evidence adduced thereto. The issues for determination in this suit are the questions that were put forward by the plaintiffs for determination in the Originating Summons herein which are as follows:-

- (1) *Whether the applicants have acquired L.R. No. MWERUA/KIANDAI/282 having been in open, continuous, un-interrupted possession and occupation of the whole of MWERUA/KIANDAI/282?*
- (2) *Whether the applicants having lived on the said L.R. No. MWERUA/KIANDAI/282 openly, continuous and un-interrupted have developed the said land?*
- (3) *Whether the respondent's title to L.R. No. MWERUA/KIANDAI/282 has been extinguished?*
- (4) *Whether the applicants have acquired the suit land?*
- (5) *Whether the respondent acquired proper title to the said land which was originally registered in the name of JOSEPH MURAGA NGARUIYA (now deceased)?*
- (6) *What order should be made as to costs?*
- (7) *Whether the registration of L.R. MWERUA/KIANDAI/282 to the respondent should be cancelled and the applicants be registered as owners thereof having acquired the same through the doctrine of adverse possession?*

The law in respect to adverse possession is now settled for a party to succeed in a claim of adverse possession, he must prove that the title holder has been dispossessed or his possession discontinued for a period not less than 12 years. The party must also demonstrate that his possession must be non-permissive or non-consensual and that his use of the land has been open, notorious, exclusive and adverse by him or those under whom he claims the same without interruption.

In the case of **Mbira Vs Gachuhi (2002) E.A.L.R 137**, the Court pronounced itself as follows:-

"..... A person who seeks to acquire title to land by the method of Adverse possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and Adverse use by him or those under whom he claims for the statutory prescribed period without interruption"

These ingredients were discussed in a recent decision by the Court of Appeal in the case of **Mtana Lewa Vs Kahindi Ngala Mwangandi (2005) e K.L.R** where it was held:-

"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 action against such person in assertion of his title for a certain period, in Kenya 12 years"

The claim by the plaintiff is based on the doctrine of Adverse possession. The plaintiff has stated in their sworn testimony that they have been in occupation of the suit property without the consent of the owner openly and without interruption for more than 12 years. This Court having directed that this case proceeds as undefended, the averments by the plaintiffs on oath have not been challenged and/or controverted. The plaintiffs produced a copy of the Green Card for the suit land parcel No. MWERUA/KIANDAI/282 and a Valuation Report as Plaintiff's Exhibits 1 & 2 respectively. The copy of the Green Card indicates that the current registered owner is Emily Nuna Ngaruiya who acquired the same by way of transmission through a Succession Cause. The Valuation Report produced as Plaintiffs Exhibit No. 2 shows that there are some permanent and semi-permanent structural developments owned and occupied by different individual members of an extended

family. The rest of the land is partly under coffee cultivation to a fairly small section while the rest was under subsistence cultivation planted with maize, bananas, beans and sweet potatoes. I have no doubt in my mind that such vast developments must have been undertaken over time and openly.

Considering the totality of the evidence which was undefended and applying the legal principles outlined herein above, it is clear beyond peradventure that the plaintiffs have established the threshold for the grant of the orders and have brought themselves within the limits of the doctrine of Adverse possession. In the upshot, the plaintiffs suit instituted by way of Originating Summons dated 3rd June 2019 is merited and the same is hereby allowed and judgment entered as follows:-

(1) The plaintiffs have acquired L.R. No. MWERUA/KIANDAI/282 by doctrine of Adverse possession.

(2) That the title to land parcel No. MWERUA/KIANDAI/282 originally registered in the name of JOSEPH MURAGA NGARUIYA (now deceased) was acquired un-procedurally and illegally.

(3) The respondent's title to the suit land parcel No. MWERUA/KIANDAI/282 has been extinguished and is therefore liable to be cancelled and the plaintiffs/applicants be registered as owners thereof as follows:-

(4) The Land Registrar Kirinyaga to cancel the name of the respondent as owner of the suit land L.R. MWERUA/KIANDAI/282 and register the same in the name of the applicants as per paragraphs 3(a) & (b) Above.

(5) Since this suit is undefended, I make no order as to costs.

READ, DELIVERED physically and SIGNED in open Court at Kerugoya this 12th day of February, 2021.

.....

E.C. CHERONO

E.L.C JUDGE

In the presence of:-

1. 1st Plaintiff – absent

2. 2nd Plaintiff – present

3. Defendant – absent

4. Kabuta (Court clerk) – present