



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

E.L.C NO 179 OF 2017

VIRGINIA NJERI NDUNG'U.....1ST PLAINTIFF

PETER MBURU NDUNG'U.....2ND PLAINTIFF

VS

SAMSON WAWERU.....1ST DEFENDANT

SAMSON WAWERU GITAU.....2ND DEFENDANT

AND

ESTHER NJERI WAWERU.....INTENDED THIRD PARTY

JUDGEMENT

1. The facts giving rise to the instant suit are that, one Cipriano Ndung'u John Gatune, the 1st Plaintiff's deceased husband, bought the suit land from the 1st Defendant herein whereupon they gained ingress into the land and begun developments thereon. It was the Plaintiffs' contention that the land was acquired in 1968. They produced a chief's letter dated 30/6/2008 to substantiate their claim. The Plaintiffs aver that they have lived on the suit property and have buried some family members thereon as well as setting up structures and planted tea. That by dint of quiet and peaceful occupation and use of the suit property they acquired prescriptive rights by application of adverse possession.

2. The Plaintiffs in 2011 filed an application dated 20/5/2011 seeking leave to substitute the Defendants with the Interested party on the premise that the 2nd Defendant had since died. In the application the Plaintiffs in paragraph 6 stated that 1st Defendant fraudulently transferred the land to the 2nd Defendant. A similar application was made on 22/2/2013 which application allowed vide a ruling dated 20/6/2014.

3. The intended third party entered appearance and filed a Replying Affidavit. She stated that her husband is the registered owner of the suit property and that the Plaintiffs were in occupation of an adjacent land. She averred that she has been unable to access the land due to the Plaintiffs' violence and as such the Plaintiffs have not had a quiet use and occupation of the land. Further, she stated that her husband lived on the suit property until his demise.

4. At the hearing, the 2nd Plaintiff testified that it was at the point of filing for succession that his mother discovered that the land was registered in the name of SAMSON WAWERU a person they did not know, though he confirmed SAMSON WAWERU sold the land to their deceased father. He went on to further reiterate the content of his supporting Affidavit and produced exhibits to buttress his claim.

5. The Defendant called two witnesses; DW1 entirely relied on her Replying Affidavit affirming the contents therein. She testified that she noted the Plaintiffs were occupying the land in 2008 and it is then that she got legal advice and a demand letter was issued to them asking them to vacate the land. It was her testimony that she did not know how the Plaintiffs got to occupy the land as she and her family lived in Nairobi.

6. DW2 testified that he was the area chief from 1995 till 2016 and was well known to the 2nd Defendant. He testified that the Plaintiffs gained illegal ingress into the land despite his advice to them to desist. He stated that he did not know whether the Plaintiff's husband was buried on the suit land but to his knowledge the Plaintiffs' entered into the land in 1999 illegally.

7. Having analysed the pleadings, the evidence adduced at the trial, the written submissions and case law, the issues for determination are; whether the Plaintiffs have established title by way of adverse possession.

8. The initial 1st Plaintiff died and was substituted by the 2nd Plaintiff. The 2nd Defendant was substituted by the 3rd Party. There appears to be a misnomer in the way the pleadings have been done. I say so because after the orders of substitution were granted, the pleadings ought to have been amended to reflect the correct parties. This was not done and left a lot to be desired in the manner and style in which the suit has been impleaded. I am cognizant of the procedural rule that states that no suit shall be defeated by reason of the misjoinder or non-joinder of parties. The Court is mandated to deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. Having said that parties are bound by their pleadings.

9. In the case of **Kimani Ruchire –v– Swift Rutherfords & Co. Ltd. (1980) KLR 10 at page 16 letter B**, 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.

10. In order to acquire title by adverse possession in 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. 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.

11. 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.

12. The Plaintiffs’ case is that their father purchased the suit land from the 1st Defendant in 1968 and immediately took possession, settled his family, developed the land and lived on the land until today. That their father was buried on the land without any objection and that they have constructed residential and permanent houses thereon. When challenged to show evidence of occupation PW1 explained to the Court that he did not present any. He relied on a chief’s letter dated the 30/6/2008. This letter was challenged by DW2, the retired chief of the area who refuted ever writing the said letter as he was under interdiction during the period and could not have written the letter.

13. Further it does not escape the attention of the Court that the Plaintiffs did not present any evidence to support the allegations of purchase of the suit land by their father from the 1st Defendant’s father or anyone else. PW1 explained to the Court that he was only 6 years in 1968, the alleged period when his father is said to have purchased the land from the 1st Defendant. His evidence in short amounts to hearsay.

14. In addition, PW1 informed the Court that he did not know who the 1st Defendant was as he never met him. It is trite that the Plaintiffs must show that the paper owner had knowledge (or the means of knowing actual or constructive) of the possession or occupation. If the Plaintiffs did not know the 1st Defendant, then the occupation could be assumed to be in secrecy that is to say not open and would fall short of the standard required to establish title by adverse possession. The Paper owner must have knowledge of the occupation, which occupation should be open and elects to do nothing about it. There has to be explicit evidence that the Plaintiff dispossessed the owner or the owner lost his right to the land by discontinuing his possession.

15. There was uncontroverted evidence by the third party that once she arrived at the suit land in 2008, the Plaintiffs deployed violence to keep her away from the land. This evidence was supported by the DW2, the chief who stated that the land was taken over by the Plaintiffs by force and against his advice as the local administrator that the land belonged to the husband of the third party.

16. Though the Plaintiff claimed that his father was buried on the suit land in his pleadings while under intense cross examination he stated that his father was buried in his land parcel No 462 which is next to the suit land. I have seen the sketch map that shows that the suit land borders the Plaintiffs’ parcel No 462. There is no evidence that the stone houses on the land were constructed by the Plaintiffs. None was supplied to the Court.

17. The Plaintiffs have claimed that they have lived on the land for 40 years. No evidence has been adduced to show the period in which the Plaintiffs entered the suit land. This is a critical point because the establishment of title by adverse possession depends on the duration of continuous occupation which occupation should not be broken for the period of 12 years.

18. 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. See Section 109 of the Evidence Act.

19. The burden of proof rested with the Plaintiff to prove that they occupied the suit land to the exclusion of the Defendants and the 3rd Party.

20. There seem to be a confusion in the pleadings either by default or deliberate, about the role of the 1st and 2nd Defendants in the suit. According to the Plaintiffs their father purchased land from the 1st Defendant and that the 2nd Defendant is an imposter for which they allege to have acquired the land through fraud. It was their evidence that the 1st Defendant was an old man during demarcation and that he may have died. However, no substitution was sought on the estate of the 1st Defendant.

21. It is on record that the suit land is now registered in the name of the 2nd Defendant. The Plaintiffs attempted to persuade the Court that the 1st Defendant and the 2nd Defendant are two different persons. I have perused the green card which shows that the suit land was registered in the name of Samson Waweru on the 23/3/1961 and on the 27/10/08 through a change of name the title became registered in the name of Samson Gitau Waweru. It is instructive that the title reads Samson Waweru Gitau. The third party stated in evidence that her deceased

husband was Samson Waweru Gitau. The whole scenario lends credence to serious doubt as to the description of the Defendants and who exactly is the owner of the suit land.

22. The Plaintiff has averred that the 2nd Defendant by fraud registered himself as owner by passing himself as the 1st Defendant through a change of name. Fraud is a serious charge and it must be proved to the standard higher than in civil cases. The Plaintiffs failed the test of proving fraud. Ordinarily, one who seeks to establish title by adverse possession must acknowledge the title of the paper owner. Where a claimant in adverse possession claim challenges the title of the paper owner, the challenge destroys the claim of adverse possession. Both cannot co-exist in one claim. It is either one or the other but not both.

23. In the end I find that the claim fails and I proceed to dismiss it with costs to the 3rd Party.

24. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 11TH DAY OF MARCH 2021

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Kirubi HB for Kimwere for the Plaintiff

1st and 2nd Defendants: Absent

Mr. Macharia HB for Karuga Wandai for the Intended Third Party

Court Assistants, Njeri & Kuiyaki