



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC NO.134 OF 2018(OS)

(FORMERLY NRB ELC 87 OF 2014(OS))

DUNCAN MUKABI KANGETHE.....1ST PLAINTIFF

FRASHIAH WANGUI MUIRURI.....2ND PLAINTIFF

VERSUS

JOSEPH NDUNGU MWAURA.....DEFENDANT

JUDGMENT

Vide an Originating Summon dated 10th December 2013, the Plaintiffs herein brought this suit against the Defendant seeking determination of the following questions;

- 1. Have the Plaintiffs acquired the titles to the said parcel of land known as Title No. Lari/Township/56, by reason of Adverse Possession thereof since the year 1993?*
- 2. Was the Defendant's title to the said parcel of land known as TITLE NO. LARI/TOWNSHIP/56, extinguished upon expiration of a period of 12 years, since the plaintiffs and their predecessors took possession thereof in the year 1993?*
- 3. Does the Defendant hold title of the said parcel of land in trust thereof for the Plaintiffs?*
- 4. Are the Plaintiffs entitled to an order of this honorable Court that they be registered as proprietors' of the said parcel of land known as Title No.Lari/Township/56, in place of the Defendant whose title was extinguished?*
- 5. Who as between the Defendant and a person authorized by this Honorable Court, should execute the transfer and in what form, if any is necessary, of the said parcel of land known as Title No. LARI/TOWNSHIP/56, to effectuate the registration of the Plaintiffs as the proprietors' thereof.*
- 6. Who shall bear the costs of this originating summons?*

In his Supporting Affidavit, Duncan Mukabi Kangethe, the 1st Plaintiff averred that he had the authority of the 2nd Plaintiff to swear the Affidavit. That the suit property is registered in the name of Joseph Ndungu Mwaura, the Defendant herein. That on 26th January 2005, he took physical possession of the suit property after the same was sold to him by one Peter Waweru for Kshs.160,000/= which he paid in full. That Peter Waweru was allotted the said property by the Kiambu County Council in the year 1993.

That upon purchase of the suit property, they paid all requisite dues owing to the Local Authority and dues necessary to effect an informal transfer which as approved by the County Council of Kiambu. That they have been in continuous, open, exclusive undisturbed and uninterrupted occupation, use and enjoyment of the said premises personally and through their predecessor since the year 1993, being a period of over 12 years as required by law. That he has been advised by his Advocates which advice he believes to be true that he is entitled to the Order of the Court to be registered as the proprietors of the suit property as the Defendant's title to the suit property was extinguished upon expiry of 12 years, since his predecessor was in physical occupation and the Plaintiffs took possession thereof in the year 1993.

In opposing the Originating Summon, the Defendant filed a Replying Affidavit and Counter Claim dated 16th April 2019, through

the Law Firm

of Mwaura Shairi & Co Advocates, and averred that he became the registered owner of the suit property on 7th June 2012. That he has been advised by his Advocates, which advice he believes to be sound, that the alleged Adverse Possession of the suit property as concerns him commenced on 7th June 2012, which is below 12 years statutory period.

Further that his predecessor in Title No.Lari/Township/56, was registered on the 2nd June 2010, as it appears in the abstract of title. Further that time did not run against the then County Council of Kiambu in favour of the Plaintiffs and his title is unchallengeable under Section 26(1) of the Land Registration Act 2012.

In his counterclaim, the Defendant contends that the Plaintiffs have no claim or interest in the suit property and are trespassers. He claimed mesne profits from the Plaintiffs of Kshs.10,000/= per year from 7th June 2012, to date.

By Consent of the parties, the Originating Summons was canvassed by way of written submissions.

Plaintiffs filed their written submissions on 7th August 2020, through the Law Firm of E. M Wachira & Co. Advocates and relied on various provisions of Law amongst them Sections 7, 13,17 and 38 of the Limitations of Actions Act. It was submitted that upon expiry of 12 years, since the Plaintiffs took possession and dispossessed the Defendant of his possession, of the suit property, the registered proprietors title to the suit property was extinguished by Adverse Possession.

The Plaintiffs relied on the case of Makuyu Club...Vs... Kakuzi (2019) citing the case of MbiraVs... Gachuhi (2002) 1EALR 137 where the Court held that;

“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 nonconsensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption.”

It was further submitted that though the Defendant is the registered proprietor of the suit property, he has never been in possession. That the Defendant and his predecessor in title were thus dispossessed of the suit property. That the circumstances under which the Plaintiffs and their predecessor took possession could not be controverted. That the allocation of the Plaintiff's predecessor was in the year 1993, while the Defendant's predecessor is alleged to have obtained the title in 2010, being 17 years later. It was further submitted that by adopting the principle of tacking, time does not start to run when the Plaintiffs physically took possession, but from the time when their predecessor in interest took possession.

It was further submitted that the Plaintiffs have met all the tenets for declaration of prescriptive rights and are thus entitled to be registered as owners of the suit property by virtue of Adverse Possession.

The Defendant filed his submissions on 12th February 2020, through the Law Firm of Mwaura Shairi &Co. Advocates and submitted that the Plaintiffs claim must fail because even if the Plaintiffs took possession in 2005 before the period up to 14th June 2010, the suit property was government land and the Plaintiffs could not claim Adverse Possession against the government. That time did not run against public bodies.

He relied on Section 43 of the Limitations of Actions Act. That the Plaintiffs had been in possession for one year since the Defendant became the registered owner and that time did not run after the suit was filed. It was further submitted that the allotment letter, sale agreement and approval of transfer are not documents in law that confer ownership. That the Defendant has a Certificate of Lease which are documents that confer ownership The Defendant relied on HCCC No. 283 of 1990 Gabriel Mbui...Vs... Mukinda Maranya and urged the Court to dismiss the suit with costs.

The Court has now carefully read and considered the Originating Summons, the Affidavits in support and against and the rival written submissions, and finds that the issues for determination are;-

1. *Whether Time for purposes of Adverse possession runs as against Public land*
2. *Whether the Plaintiffs are entitled to the orders sought*
3. *Whether the Defendant is entitled to the orders sought*
4. *Who should Bear the Costs of this proceedings*

1. *Whether Time for purposes of Adverse possession runs as against Public land*

Section 41 of the Limitation of Actions Act, excludes Public Land from the application of the Act. Section 41(a) of the Act provides:-

41. Exclusion of public land

This Act does not -

(a) enable a person to acquire any title to, or any easement over -

- i. Government land or land otherwise enjoyed by the Government;
- ii. Mines or minerals as defined in the Mining Act (Cap. 306);
- iii. Mineral oil as defined in the Mineral Oil Act (Cap. 307);
- iv. Water vested in the Government by the Water Act (Cap. 372);
- v. Land vested in the County Council (other than land vested in it by Section 120(8) of the Registered Land Act (Cap. 300)); or
- vi. Land vested in the Trustees of the National Parks of Kenya; or

Further in the case of Ann Itumbi Kiseli ...Vs... James Muriuki Muriithi [2013] eKLR the Court held that:

1. *“The definition of what Government land is for the purpose of computing time in a claim for adverse possession should be considered in the light of the Constitution, 2010.*

53. *Just like state corporations established under specific Acts of Parliament, the Settlement Fund Trustee is in essence a public enterprise.*

54. *The classification of land held by State organs, like the Settlement Fund Trustees, as public land is reinstated in Article 62(i) (b) of the Constitution which provides as follows:*

“Public land is land lawfully held, used or occupied by any State organ...”

Therefore, the Court finds and holds that as a person cannot claim **Adverse Possession** as against land that is public owned i.e owned by any state organ. It therefore follows that time cannot run as against title held by the government and therefore as against public land .

2. Whether the Plaintiffs are entitled to the orders sought

The Plaintiffs have sought the determination of whether they are entitled to the suit property by way of Adverse Possession and or whether the Defendant’s title over the suit property ought to be extinguished.

Section 38 (1) and (2) of Limitation of the Actions Act provides:-

(1) *Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.*

(2) *An order made under subsection (1) of this Section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.*

In determining whether or not to declare that a party has acquired land by **Adverse Possession**, there are certain principles which must be met as quoted by **Hon. Justice Sergon** in the case of Gerald Muriithi ...Vs...Wamugunda Muriuki & Another (2010) Eklr, while referring to the case of Wambugu ...Vs...Njuguna (1983) KLR page 172 the where the

Court of Appeal held as follows;

“1. In order to acquire by statute of limitations title to land which has a known owner the owner must have lost his right to the land either by being dispossessed of it or by having continued 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. The respondent could and did not prove that the appellant had either been dispossessed of the suit land for a continuous period of twelve years as to entitle him, the respondent to title to the land by adverse possession.

2. The limitation of Actions Act, on adverse possession contemplates two concepts: dispossession 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 the claimant has proved that he has been in possession for the requisite number of years.”

From the above quotation, it is not in doubt that for the Plaintiffs to be able to succeed on a claim of adverse possession, they must be able to prove dispossession, discontinuance of possession for a continuous period of **12 years** and further that the dispossession occurred and the Defendant had knowledge of such dispossession.

It is not in doubt that the Plaintiffs are in possession of the suit property. The Plaintiffs aver that vide a Sale agreement dated **26th January 2005**, they bought the suit property from one **Peter Waweru**, who had been allocated the suit property in **1993**, and has been in possession of the suit property ever since. The Plaintiffs have further sought to rely on the principle of tacking which provides that time does not start to run when the Plaintiffs physically took possession but from the time when their predecessor in interest took over possession. The Plaintiffs have thus relied on the case of **Gabriel Mbui ...Vs... Mukindia Maranya(1993)eKLR** where it was held;-

“one interesting question within the subject of continuity is tacking that is to say, the adding together of periods of possession that are continuous but by different persons.....”

It is thus not in doubt that from the evidence produced by the Plaintiffs that the said **Peter Waweru** was allocated the suit property in **1993**, contents which have not been controverted by the Defendant and if the Court was to follow the principle of tacking, possession by the Plaintiffs and their predecessor would most definitely be more than **12 years** from the year **1993**.

However, in this instant case, the Plaintiffs having claimed **Adverse Possession** against the Defendant, they must thus prove that they have been in possession of the suit property for a period of over **12 years** as against the Defendant's rights. It is the Defendant's contention that by the time the Plaintiffs filed the instant suit, they had only been registered as proprietors for a period of over one year and therefore **Adverse Possession** cannot stand as against them.

In the case of **Paul Kamande Gicheha ...Vs... Jacob Kinyua Kiragu [2018] eKLR** the Court held that;

“It is trite that the mere change of ownership of land which is occupied by another person under adverse possession does not stop time from running or interrupt such person's adverse possession. See Githu v Ndeete [1984] KLR 776.”

Therefore, the mere changing of the title from **Rose Waithira Makimei** to the Defendant did not stop time from running and time computation would be computed from the time the said **Rose Waithira** was registered as the owner.

The Court has seen the green card produced in evidence by the Defendant that indicate that the said **Rose Waithira Makimei** was registered as the owner on **2nd June 2010**, and was issued with a Certificate of title on **15th June 2010**. As per the Green Card, it is therefore not in doubt that before the said **Rose Waithira Makimei** was registered as the owner, the suit property belonged to the Government of Kenya and was therefore public land.

As already held by the Court above, time does not run when the suit is public land. In the instant matter, time began to run on **15th June 2010**, when **Rose Waithira** was registered as the owner for purpose of claim for **Adverse Possession** by the Plaintiffs.

The Instant suit was filed on **30th January 2014**, there is therefore no doubt that **12 years** had not passed from the time of registration in which the registered owner would have been dispossessed or discontinued of the possession of the suit property. See the case of **Mbarak Said Ali & another ...Vs... Sultan Palace Development Limited [2020] eKLR** where the Court held that ;

“the key test for a claim of adverse possession would be whether the registered owner of the land was dispossessed or has on his own discontinued possession for the period of 12 years.”

Further in the Case of **Ravji Karsan Sanghani v Peter Gakunu [2019] eKLR** the Court held that ;

“In my view, adverse possession can only run against the title of a registered proprietor and in the instant case the Defendant was first registered as proprietor of the suit land on 16th January 1990. Time could only run from that date.”

Therefore, this Court finds and holds that as **12 years** had not lapsed since the time running through which the Plaintiffs would have sought to have dispossessed the Defendant. There can be no claim of **Adverse Possession** that can be laid, as the law requires that for a person to claim **Adverse Possession** he / she must have been in possession for a period of over **12 years**. In this instant it has only been over **3 years**. The Court therefore finds and holds that the Plaintiffs are not entitled to the orders sought.

From the documentations provided in evidence and the written submissions, it is the Court's considered view that this claim would have best been articulated vide a Plaint wherein the Court would have answered the question who between the parties herein had been able to trace the root of their title as opposed to a claim for **Adverse Possession**.

3. Whether the Defendant is entitled to the orders sought

The Defendant has sought for mesne profits and for the Court to Order the Plaintiffs to vacate the suit property.

Section 2 of the Civil Procedure Act Cap 21 of the Laws of Kenya defines mesne profits as follows:-

“mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;

The Defendant has not led any evidence that will make the Court definitively hold that the Plaintiffs are in wrongful possession of

the suit property.

While the Court has held that the Plaintiffs cannot claim Adverse Possession, the Court has not made a finding on ownership of the suit property and therefore it cannot hold that the Plaintiffs are in wrongful possession and thereby grant mesne profits. This is further reinforced by the submissions by the Defendant/Respondent who submitted that the facts not in dispute are that the suit property was allocated to one Peter Waweru on 5th August 1993, who is the party that sold the suit property to the Plaintiffs and further that on 2nd June 2010, Rose Waithira Makimei who sold the suit property to him was registered as a Lessee. In essence the Defendant is acknowledging that there is need to probe the root of both parties' titles which was an issue that was not before this Court.

Consequently, the Court finds and holds that at this juncture, the Defendant is not entitled to the orders sought in his counter claim as the issue of ownership of the suit property as between the parties herein was not an issue before this Court and the court having made no finding on the same, then it cannot grant the Orders sought.

4. Who should bear the Costs of this proceedings

Section 27 of the Civil Procedure Act gives the Court discretion to grant Costs. However, it is trite that costs usually follow the events. In this instance the Claim by the Plaintiffs has failed and the Defendant's claim has also failed. Therefore, the Court finds and holds that it is prudent that each party should bear his/their own costs.

Having carefully read and considered the Pleadings by the parties, and the written rival submissions filed herein, the Court finds and holds that the Plaintiffs have not proved their case on the required standard of balance of probabilities and thus finds the Originating Summons dated 10th December 2013, is **not merited** and the same is dismissed entirely.

The Defendant has also not proved his claim in the Counter Claim dated 16th April 2019, on the required standard of balance of probabilities and again the Court finds that his Counter Claim is **not merited** and the same is dismissed entirely. Each party to bear his/their own costs of the proceedings.

It is so ordered.

Dated, signed and Delivered at Thika this 29th day of April 2021.

L. GACHERU

JUDGE

29/4/2021

Court Assistant – Phyllis

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020, this Judgment has been delivered to the parties online with their consents. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Wachira for the 1st and 2nd Plaintiffs

M/s Mwaura for the Defendant

L. GACHERU

JUDGE

29/4/2021