



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 267 OF 2018 (OS)

LUCY WAMBUI KAMAU.....1ST PLAINTIFF

PETER KIBE KAMAU.....2ND PLAINTIFF

VERSUS

LEONARD NGANGA KARUGA.....DEFENDANT

JUDGMENT

Vide an Originating Summons dated 5th November 2018, the Plaintiffs herein brought this suit against the Defendant and sought for determination of the following questions;

1. *THAT the rights of the Defendant and his predecessors in title to recover the land known as LR No Kabete/Gathiga /T.180, from the Plaintiffs are barred under sec 7 of the Limitation of Actions Act and their titles are extinguished under Section 17 of the said Act, on the grounds that the Plaintiffs have openly and peacefully been in occupation of the suit property for a period of over 12 years.*
2. *THAT the Kiambu Registrar of Lands be ordered to register the Plaintiffs as the absolute proprietors' of the suit land.*
3. *THAT the costs of the suit be borne by the Defendant.*

In her Supporting Affidavit, Lucy Wambui Kamau, averred that she has lived on the suit property since the year 1967, in open and peaceful possession. That the Defendant acquired title to the suit property while she was in open and uninterrupted possession, with full knowledge and notice of this fact having been her neighbor for many years. That the Defendant has never been in occupation of the suit property and that he has threatened to demolish her house and that of her children rendering them destitutes and homeless.

Further that the Defendant has disconnected electricity at the power pole leaving them in darkness in an attempt to evict them. She averred that she has been advised by her Advocates, which advice she believes to be true that the Defendant and his predecessor's title have been extinguished and she has acquired indefeasible rights under the law of Adverse Possession.

In opposing the Originating Summons, Leonard Ngángá Karuga swore a Replying Affidavit dated 10th November 2018, through the Law Firm of Mwaura Shairi & Co Advocates, and averred that he became the registered proprietor of L.R No Kabete/Gathiga/T.180, on 3rd October 2018, after he purchased the same from the previous owner. That as at 3rd October 2018, there was no caution registered against the title to the suit property, showing that the Plaintiffs had any interest in the suit property. That he has been advised by his Advocates, which advice he believes to be sound that the orders sought against him ought to have been sought against the previous registered owner.

The matter proceeded by way of viva voce evidence on 27th October 2020, wherein the Plaintiffs called 2 witnesses and the Defendant testified for himself and closed his case.

PLAINTIFFS' CASE

PW 1- LUCY WAMBUI KAMAU adopted her witness statement as part of her evidence. She further produced her list of documents as Exhibits 1 to 4. She testified that she lives in Kabete at Gathiga area and she has lived on the suit property with her children for more than 50 years. That no one has ever come to the suit property to claim it. That the Defendant is her neighbor and has never

claimed the land before.

That she owns the land and has a document to prove the same. Further that she paid monies to the City Council for the land. That she did not know the former registered owner. That she did not have any other parcel of land.

PW2- Peter Kibe Kamau testified that he has lived on the suit land for more than 50 years and no one else has claimed ownership of the said land apart from the Defendant. He testified that he took photographs which show his house on the suit property, and he produced a certificate of electronic photographs as exhibit 5.

DEFENCE CASE

DW1- Leonard Ng'ang'a Karuga, adopted his statement as part of his evidence. He produced his list of document as Exhibit 1. He testified that that he has known the Plaintiffs for more than 10 years, but did not know their exact houses. That he bought the suit property in the year 2018, while the houses were intact. It was his testimony that he conducted a search and noted that the land belonged to James Mungai who lives in Kibiku. That he bought the land and the houses and he followed due process in acquisition of the suit property. That he gave the Plaintiffs Notice.

Thereafter the parties herein filed thier written submissions. Plaintiffs filed their written submissions on 23rd November 2020, through the Law Firm of P.W Kamau & Co. Advocates, while the Defendant filed his written submissions on 11th December 2020, through the Law Firm of Mwaura Shairi & Co. Advocates, which the Court has carefully read and considered.

The issue for determination is *whether Plaintiffs have proved their Claim for Adverse Possession and therefore entitled to the orders sought*.

The guiding provisions of law as to the claim for Adverse Possession are to be found in Section 7 and 38 of the Limitations of Actions Act. In the case of *Ravji Karsan Sanghani ...Vs... Peter Gakunu [2019] eKLR* the Court held that;

“Section 38 of the Limitation of Actions Act provides that where one claims entitlement to land by adverse possession they may apply to be the registered proprietor in place of the person then registered as proprietor of the land. The principles applicable in a claim for adverse possession in relation to registered land were considered and set out in case of Wambugu -vs- Njuguna [1983] KLR 172, where the Court of Appeal held that;

“In order to acquire by the statute of limitations 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 of which he intended to use it.”

George Ogake Pius -vs- Esther Nyasani Makori & 2 Others [2018] eKLR, this Court had occasion to deal with the issue of what constitutes adverse possession and at paragraph 9 of the ruling rendered in the matter, I expressed myself thus;

“There is no express definition of adverse possession in the Limitation of Actions Act. However, Section 13(1) of the Act provides that a right of action in recovery of land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession in the Act is referred to as adverse possession). It is evident thereof, that the doctrine of adverse possession is invariably tied to Section 7 of the Act ... which bars an owner of a parcel of land from an action to recover it after the expiry of twelve years. In Black's Law Dictionary, 10th Edition adverse possession is defined as:-

“The enjoyment of real property with a claim of right when that enjoyment is opposed to another person's claim and is continuous, exclusive, hostile, open and notorious.”

For a claimant to succeed in a claim of adverse possession to land such claimant has to satisfy the following:-

- 1. The parcel of land must be registered in the name of a person other than the claimant.*
- 2. The claimant must be in open and exclusive possession of that parcel of land in an adverse manner to the title of the real owner.*
- 3. The claimant must have been in that occupation/possession for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.”*

Guided by the above findings, the Court will thus seek to determine whether the Defendant's right to recover the land was extinguished.

It is not in doubt that the Plaintiffs are in possession of the suit property. It is the Plaintiffs contention that they have lived on the suit property since 1967, allegations which have not been rebutted by the Defendant. Further the Defendant has in his evidence acknowledged that he has known the Plaintiffs who are his neighbors for over 10 years, and that when he bought the suit property, the houses were intact. It was his further testimony that he bought the houses and the land.

The fact that the Plaintiffs have been in possession of the suit property since 1967, has not been disputed nor has it been controverted. It is therefore not in doubt that they have been in uninterrupted possession for over 12 years. The Defendant also having acknowledged that he bought the suit property when the houses were intact, only goes to show that he was aware of the Plaintiffs position over the suit property so was the previous owner who sold it to the Defendant.

In the case of *Titus Kigoro Munyi ...Vs... Peter Mburu Kimani Civil Appeal No. 28 of 2014 [2015] eKLR* the Court held that;-

“Guided by the dicta as stated by Kneller J. hereinabove and as adopted by this Court in Francis Gicharu Kariri -vs- Peter Njoroge Mairu, - Civil Appeal No. 293 of 2002 (Nairobi), we are of the considered view that in a claim for adverse possession, actual or constructive knowledge of adverse possession by a third party on the part of the registered proprietor must be proved. The trial court established as a fact that actual knowledge on the part of the registered proprietor that the appellant was in possession of the suit property was established to exist either from the year 2004 or 2010. We see no reason to interfere with this finding of fact by the trial court.

In this instant case, the fact that the Defendant was well aware of the possession of the suit property by the Plaintiffs but still went ahead and bought it with the houses thereon would only mean that whoever he bought the property from, was well aware of the Plaintiffs possession of the suit property and had actual knowledge of the same. Therefore, this Court finds that the Plaintiffs have been able to prove that they have been in actual and uninterrupted possession of the suit property for a period of over 12 years and the same was exclusive.

As to whether time stopped running when the title changed hands as the Defendant has contended that he only acquired the suit property in 2018 and therefore 12 years has not lapsed, it is the Court considered view that time did not stop running and that by the time the Defendant acquired title over the suit property, James Mungai’s title to the suit property had already been extinguished as he was registered as the owner in 1985.

The Plaintiffs having taken possession that was exclusive in 1967, acquired the title by way of adverse possession in 1989, as the title was first registered in 1977. See the case of *Paul Kamande Gicheha ...Vs... Jacob Kinyua Kiragu [2018] eKLR* where 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.*”*

It follows that time for purposes of Adverse possession began to run on 30th July 1977, when Kamenwa Mungai, was issued with a Certificate of title and any registered owners title to the suit property were extinguished in 1989 when the 12 years lapsed.

From the above analysis of evidence before the Court, this Court finds and holds that the Plaintiffs have established a claim of Adverse Possession and that the Defendant’s title to the suit property has long been extinguished.

The Upshot of the foregoing is that the Court proceeds to find and hold that the Originating Summons dated 5th November 2018, is merited and the same is allowed entirely with costs to the Plaintiffs.

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. Kamau for the 1st and 2nd Plaintiffs

M/s Mwaura for the Defendants

L. GACHERU

JUDGE

29/4/2021