



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 336 OF 2017 (O.S)

JACKTONE OPIYO SANDE.....PLAINTIFF

VERSUS

SIMON NJUGUNA CHEGE.....DEFENDANT

JUDGMENT

The plaintiff brought this suit by way of an Originating Summons dated 8th May 2017 and filed on 19th May 2017 seeking the following orders;

1. That the Honourable Court be pleased to declare the plaintiff as the owner of all that parcel of land known as Title No. NAIROBI/DAGORETTI/KARANDI-INI/20 (“the suit property”) having acquired title thereto by adverse possession.
2. That the name of the defendant or any other person who is registered as the owner thereof be deleted from the register and the name of the plaintiff be entered in place thereof.
3. That any subsisting title in respect of the suit property issued in the name of the defendant or anybody else be cancelled and a Certificate of Title in respect of the property be issued in the name of the plaintiff.
4. That the costs of the suit be provided for.

In his affidavit filed in support of the Originating Summons, the plaintiff stated as follows: on or about 1991 he started a garage business on the suit property. He fenced the property and put up temporary structures thereon. He had been operating his business from the suit property since then. Possession of the suit property was given to him by one a Mr. Kirenga who had held himself out as the owner thereof. He used to pay rent to the said Mr. Kirenga. In 2010, he was served with a notice to remove the structures that he had constructed on the suit property. The notice was from the City Council of Nairobi. He instructed his advocates on record to respond to the notice. In the meantime, he conducted a search on the suit property. The search revealed that the suit property was registered in the names of Samuel Maina Kagochi and Kagunda Gichuka and not Mr. Kirenga. Following his discovery that the property was not owned by Mr. Kirenga, he stopped paying rent to him and from then on used the suit property as his own.

Towards the end of 2016, the defendant came to the suit property and claimed to be the owner thereof. The defendant demanded that he vacates the property. He was advised by his advocates on record that having traded on the suit property for 26 years without interruption from the owners thereof, he was entitled to be registered as the owner of the property by adverse possession.

The Originating Summons was opposed by the defendant through a replying affidavit sworn on 21st May, 2018. In response to the plaintiff's claim, the defendant stated as follows: He was the registered owner of the suit property having been allocated the same in 1998. He had actual ownership, possession and usage of the suit property until 2009 when he relocated to his rural home and left the property in the hands of a relative. In 2016, he visited the suit property and was informed by the plaintiff that the plaintiff was the owner of the property. He was the one paying land rates for the suit property to the Nairobi City County. He contended that the plaintiff's claim over the suit property by adverse possession was bad in law for several reasons. He stated that the plaintiff did not have the necessary *animus possidendi* to sustain an adverse possession claim since the plaintiff got into the suit property as a tenant. He stated that the plaintiff had not provided any evidence showing that he had been in open, continuous and uninterrupted occupation of the suit property for twelve years as required by law. He contended that the plaintiff was a trespasser on the suit property and that he had asked him to vacate the premises.

On 25th June, 2018, the court directed that the Originating Summons be heard by way of oral evidence and listed the same for hearing on 17th December, 2019 in the presence of the advocates for both parties. When the matter came up for hearing only the plaintiff and his advocate attended court. Neither the defendant nor his advocates appeared in court for the trial. In his testimony, the plaintiff told the court that he was

a motor vehicle mechanic and that he was operating a motor vehicle garage at Dagoretti Corner on the suit property under the name, Simbi Motors. He stated that he started operating a garage on the suit property in 1991. When he came to the suit property, the same was in occupation by one, A.K. Githehu who was selling sand and stones on the property. It was the said A.K. Githehu who allowed him to set up a garage beside him on the suit property. A.K. Githehu moved out and left him as the only occupant of the suit property. He then fenced off the property for safety. He stated that in 2010, the City Council of Nairobi gave him a notice to vacate the suit property. The notice looked suspicious to him. He consulted his advocates on record who responded to the said demand by the City Council of Nairobi. No further action was taken by the City Council of Nairobi on the matter. A search that he carried out thereafter showed that the suit property was registered in the names of Samuel Maina Kagochi and Kagunda Gichuka. He stated that on 13th April, 2017, the defendant came to the suit property and claimed that he was the owner thereof and that he wanted to sell the same. He stated that the defendant had a ready buyer. He stated that it was a result of this development that he decided to file this suit.

After the close of evidence, the court directed the parties to make closing submissions in writing. The plaintiff filed his submissions on 22nd June, 2020 while the defendant did not file submissions. The plaintiff submitted that he had satisfied the ingredients of adverse possession.

Determination.

From the pleadings the following in my view are the issues arising for determination in this suit;

1. Whether the plaintiff has proved his adverse possession claim in respect of the suit property.
2. Whether the plaintiff is entitled to the reliefs sought against the defendant.
3. Who is liable for the costs of the suit?

I have considered the Originating Summons together with the evidence that was tendered by the plaintiff in support thereof. In Gabriel Mbui v Mukindia Maranya[1993] eKLR, the court stated that a person claiming land by adverse possession must establish on a balance of probability the following elements;

- 1. The person claiming land by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period.**
- 2. The entry and occupation must be with, or maintained under, some claim or colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.**
- 3. The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied.**
- 4. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with the evinced unmistakable *animus possidendi*, that is to say occupation with clear intention of excluding the owner as well as other people.**
- 5. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter, unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.**
- 6. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community of the exercise of dominion over the land.**
- 7. The possession must be continuous uninterrupted, unbroken for the necessary statutory period.**
- 8. The rightful owner or paper title holder against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period.**
- 9. The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.**
- 10. The land, or portion of the land adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. The absence of a plot or title number need not present any difficulty, nor should it be a bar to establishing a claim of adverse possession.**

In Kimani Ruchine & Another v Swift, Rutherford Co. Ltd. & another [1977] KLR 10 Kneller J. stated as follows at page 16:

“The Plaintiffs have to prove that they have used this land which they claim as of right, necvi, nec clam, necpccario (no force, no secrecy, no evasion)The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”

In Wambugu v Njuguna [1983] KLR 172 the court stated as follows:

“First 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 entails acts which are inconsistent with his enjoyment of the soil and for the purpose for which he intended to use it. The Limitation of Actions Act (Chapter 22) on adverse possession contemplated 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 whether or not the claimant has proved that he has been in possession for the requisite number of years.”

The burden was on the plaintiff to establish the elements of adverse possession set out above. On the issue of possession, it was not disputed that the plaintiff was in possession of the suit property as at the time of filing this suit. What was disputed was the duration of the plaintiff's possession. As I have stated earlier in this judgment, the defendant did tender evidence at the trial. The evidence that was tendered by the plaintiff as to when and how he entered the suit property was not controverted. The same applies to the evidence that he led regarding the use and the developments that he had carried out on the suit property. Even, in the absence of evidence from the defendant, the plaintiff still had a duty to prove his case. The plaintiff told the court in his oral testimony and witness statement that he entered and occupied the suit property in 1991 on the invitation of one, Andrew Karenga Githehu. Andrew Karenga Githehu later on vacated the suit property and left him as the sole occupant. He was operating a motor vehicle garage on the property. After Andrew Karenga Githehu left, he fenced the suit property for his own safety and continued with his motor vehicle repair business. He did not tell the court when Andrew Karenga Githehu left the suit property to him.

The plaintiff produced various documents in support of his claim. The documents do not however place the plaintiff on the suit property in 1991 or any time before 2010. The Certificate of Registration of Simbi Motors (page 1 of PExh.1) which was the name in which the plaintiff was carrying out business issued in 1994 locates the business on L. R No. 2397/Riruta, Karandini Road, Off Naivasha Road and not on Title No. NAIROBI/DAGORETTI/KARANDI-INI/20 (the suit property). If the plaintiff was on the suit property as at the time of registering the said business name, nothing would have stopped him from giving that property as the location of his business. The single business permit issued on 19th February, 2003 (page 6 of PExh.1) also locates the plaintiff's business on Plot No. 2397. It is the single business permit issued on 6th April, 2010 (annexure “JSO1” to the affidavit in support of the Originating Summons) that locates the plaintiff's business on the suit property. The plaintiff did not explain this discrepancy. It casts doubt on the plaintiff's contention that he entered the suit property in 1991 and lends credence to the defendant's contention that the plaintiff trespassed on the suit property after 2009 when the defendant left Nairobi for his rural home.

The plaintiff produced in evidence a number of local service orders, registration of suppliers' application forms and tender documents going back to 2006 to show that he was doing motor vehicle repair work for The Kenya School of Law. These documents do not however prove that the plaintiff's garage business was being conducted on the suit property. Due to the foregoing, it is my finding that the plaintiff has failed to prove that he entered the suit property in 1991 or at any time prior to 2010. The plaintiff brought this suit in 2017. If he entered the suit property in 2010 which the evidence before the court suggests to be the case, he had not been in possession of the suit property for the statutory period of 12 years as at the time of filing suit.

The plaintiff has also not demonstrated that for the duration of his occupation of the suit property, he intended to dispossess the registered owner thereof of the property. The evidence before the court shows that the plaintiff occupied the suit property as a tenant of Andrew Karenga Githehu until 2010 when he discovered that the said Andrew Karenga Githehu was not the owner of the suit property. In fact, as at 2010, the plaintiff was not laying any claim to the suit property. In his advocates' letter dated 6th October, 2010 to the City Council of Nairobi in response to the enforcement notice that had been served upon the plaintiff, the plaintiff requested for two (2) months to vacate the suit property. The plaintiff also made it clear in the said letter that he had not put up any structures on the suit property. He claimed that the structures on the premises that the City Council of Nairobi had declared illegal belonged to his landlord to whom he was paying rent. These averments are inconsistent with adverse possession claim. It cannot be said in the circumstances that the plaintiff's occupation of the suit property was with clear intention of excluding the registered owner from the property.

In addition to the foregoing, there is no evidence that the defendant was aware of the plaintiff's occupation of the suit property. According to the evidence tendered by the plaintiff, the defendant appeared in the scene for the first time in 2017 and demanded that he vacates the suit property. The plaintiff did not place any evidence before the court that the defendant was aware of his occupation of the suit property. In Samuel Kihamba v Mary Mbaisi [2015] eKLR the Court of Appeal stated that:

“Open and willing dispossession has been interpreted to mean that the owner has knowledge, whether actual or not, or a means of having that knowledge of the occupation of his or her property by the claimant.”

Due to the foregoing, I will answer the first and second issues in the negative. On the issue of costs, each party shall bear its own cost of the suit since the defendant did not tender evidence at the trial in his defence.

In conclusion, I am not satisfied that the plaintiff has proved his claim against the defendant on a balance of probabilities. Consequently, the plaintiff's suit is dismissed with each party bearing its own costs.

Dated and Delivered at Nairobi this 22nd day of April 2021

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Plaintiff

N/A for the Defendants

Ms. C. Nyokabi-Court Assistant