Mutahi v Ndegwa & another (Environment & Land Case 687 of 2014) [2023] KEELC 15985 (KLR) (9 March 2023) (Judgment)

Neutral citation: [2023] KEELC 15985 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ENVIRONMENT & LAND CASE 687 OF 2014

JO OLOLA, J

MARCH 9, 2023

BETWEEN

JAMES GITHITHO MUTAHI .... PLAINTIFF

AND

DUNCAN NDERITU NDEGWA .... 1ST DEFENDANT

KEREMARA HOLDINGS LIMITED .... 2ND DEFENDANT

JUDGMENT

1. By his Originating Summons dated November 24, 2014, James Githitho (hereinafter the Plaintiff) claims to be entitled by way of adverse possession to eight (8) aces out of LR No 6381/20/1 and prays for the determination of the following questions:

    (a) Has the Plaintiff been in actual open and adverse occupation and utilization of approximately eight (8) acres out of the parcel No LR 6381/20/1 since 1999?

    (b) By reason of such occupation has be acquired prescriptive rights over the said eight (8) acres out of LR 6381/20/1?

    (c) If the answer to (a) and (b) are in the affirmative (should) the Chief Land Registrar registering titles be ordered to transfer eight (8) acres out of LR No 6381/20//1 conforming to the ground occupation by the Plaintiff? and

    (d) Who should bear the costs of these summons?

2. The Originating Summons is supported by an Affidavit sworn by the Plaintiff on December 5, 2014 wherein he avers that the 1st Defendant is the director and Chairman of the 2nd Defendant and that he has served as his personal driver for a period in excess of 20 years.

3. The Plaintiff avers that in 1999, the 1st Defendant started a scheme at the 2nd Defendant's farm situated at Game Rock area in Nyeri where long serving and/or outstanding employees of the 2nd Defendant would buy land at subsidized rates from the Defendants. The Plaintiff further avers that he was considered for the scheme and was duly allocated a portion of land which he took possession of and started developing in 1999.

4. The Plaintiff further avers that in accordance with the scheme, he made arrangements and paid Kshs 200,000/- to the Defendants on May 3, 2003. It is his case that while his allocation is shown as 4 acres, a major part of the land was rocky and incapable of being called land and he was therefore allowed to extend his occupation to the lower area which could be farmed.

5. The Plaintiff avers that he has tried in vain to have the Defendants to transfer the land to himself and that recently, one of his former co-workers by the name Eluai Lokale indicated to him that he had been allocated the part of the land where the Plaintiff has built his house. The Plaintiff is therefore apprehensive that the Defendants are silently moving to defeat his claim and hence this suit.

6. Duncan Nderitu Ndegwa (the 1st Defendant) and Keremara Holdings (the 2nd Defendant) are opposed to the grant of the orders sought. In a lengthy Replying Affidavit sworn on April 21, 2015 by the 1st Defendant, the Defendants aver that the Plaintiff's suit is devoid of merit as it does not satisfy the legal and factual threshold for the grant of the reliefs sought.

7. The 1st Defendant avers that he is the registered proprietor of the

suit property situated in Nyeri and that sometime in or about 1984, the 2nd Defendant employed the Plaintiff at its Nyeri Office as a personal driver to the 1st Defendant.

8. The Defendants aver that sometime in 1999, the 1st Defendant in his individual capacity started a scheme whereby persons employed to work directly under him albeit employed by the 2nd Defendant, were eligible to purchase land from the 1st Defendant at a subsidized rate based on the goodwill of the employment. Around the same time, the 1st Defendant allowed the Plaintiff to take possession of 4 acres of the suit property at the Plaintiff's request pending negotiations to offer the same for sale to the Plaintiff under the scheme at a cost of Kshs 50,000/- per acre.

9. The Defendants aver that they have never received any complaint from the Plaintiff indicating that the 4 acres offered constituted a rocky plot. The Plaintiff however requested to be offered an additional 4 acres that had been allocated to another employee. The said employee however died before completion of the purchase and the Plaintiff extended his possession into the said plot pending negotiations to sell the 4 acres to himself.

10. The Defendants further aver that whilst the negotiations were pending, the Plaintiff deposited Kshs 200,000/- in the 1st Defendant's personal account on or about 3rd May, 2003 when he proceeded on retirement.

11. The Defendants aver that sometime in 2013, they discovered that prior to his retirement the Plaintiff had without the 2nd Defendant's consent or authority secretly and wrongfully misapplied funds deposited by the 2nd Defendant into an account held at HCFK that had been opened by the 2nd Defendant in the Plaintiff's name and deposited with funds to be released to the Plaintiff as his retirement benefits upon departure.

12. The Defendants assert that the discovery of the said misconduct broke down the negotiations irretrievably and the 1st Defendant formally advised the Plaintiff that the offer for sale stood withdrawn. He did not however ask the Plaintiff formally to grant vacant possession of the land. It is the

Defendant's case that in July, 2014, the 1st Defendant refunded the Plaintiff the Kshs 200,000/- paid into his account.

13. The Defendants therefore assert that the Plaintiff's occupation and possession of the suit property has at all times been pursuant to the owner's consent but the consent has since been withdrawn.

The plaintiff's case

14. The Plaintiff (PW1) testified as the sole witness in his case in which testimony he reiterated the averments made in the Supporting Affidavit to the Originating Summons as reproduced in the background herein.

15. On cross-examination, PW1 conceded that he worked for the 2nd Defendant and that the 1st Defendant was a director of the 2nd Defendant. He told the Court that the 1st Defendant set up the scheme to reward his workers and that it was the 1st Defendant who took him to the suit plot and showed him the 4 acres.

16. PW1 told the Court there was no formal agreement and no specific price was agreed upon. He further told the Court the employees were not given equal portions. He confirmed that all the time he occupied the land, he did so with the 1st Defendant's permission and as a reward for the good work done to the Company.

17. PW1 told the Court he was aware the land had been subdivided some three years before he testified in Court. He told the Court he did not know who instructed the Surveyor and that he did not raise any objection when the survey was taking place for the reason that the land belonged to the 1st Defendant.

The defence case

18. The Defence equally called one witness in support of their case.

19. DW1 – Robin Muriuki Ndegwa is a donee of a Power of Attorney from the 1st Defendant who is also his father. Testifying at the trial herein, DW1 adopted the Replying Affidavit sworn by his father (the 1st Defendant) in reply to the Originating Summons as produced at the background herein.

20. On cross-examination, DW1 told the Court he was aware they had filed an application for joinder of one Eluai Lokale as a Defendant but the application was dismissed.

21. DW1 testified that his Power of Attorney was issued on July 25, 2007 and that the same was registered on December 4, 2007. He conceded that his father made applications directly in the case

after the Power of Attorney was issued to him. He told the Court he was unaware that by swearing the affidavits himself, his father had withdrawn the Power he had donated to him.

22. DW1 conceded that 2 surveys had been carried out on the land. The first survey by Mr. Kamwere was for purposes of sale of an adjoining piece of land and was done in 1992. It shows the road at the apex of the property. There are two rivers on the land – Murungato and Chania and that the land runs from the apex to the River Chania.

23. DW1 testified that he was aware before 1993, the 1st Defendant offered to reward long-standing employees. The Plaintiff was given 4 acres toward the riverine. He told the Court he could not confirm there is a steep cliff on the land. The property slopes towards the River Chania side from the apex.

24. DW1 told the Court it was the upper part of the land that was the subject matter in a criminal case between the Parties. The contention was who between the Plaintiff and Eluai Lokale was in possession

of the land and the properties that were destroyed. He told the Court that there was no conviction in the criminal case but the issue of ownership was never in contention.

25. DW1 further told the Court the Plaintiff had once dug a foundation on one of the properties closer to the apex. He was later requested to move what he wanted to build to the lower side.

26. DW1 conceded that he drafted the Memorandum dated 30th May, 2003 and that as at that time the Plaintiff was using the land. He told the Court he was aware of a counter offer over the land which arose from various discussions that the Plaintiff would have with his father (the 1st Defendant) wherever the 1st Defendant visited the property. The 1st Defendant had once mooted the idea that the Plaintiff could be given more land but DW1 did not know what they agreed.

27. DW1 testified that later his father had issues with the Plaintiff being given more land because he accused the Plaintiff of misappropriating money he had requested the Plaintiff to deposit in an HFCK account in 1986.

28. DW1 told the Court the land that was agreed on was 4 acres and

not 8 acres. The Plaintiff had paid Kshs 50,000/- per acre and was in possession of the land. He told the Court Eluai Lokale occupied two acres of land next to the road before he was removed.

29. DW1 further told the Court the second survey was done in 2002-2003. That was when the Plaintiff was asked to remove his foundation. He told the Court when the offer given to the Plaintiff was withdrawn in 2014, he had been on the land for 15 years.

Analysis and determination

30. I have carefully perused and considered the pleadings filed by the Parties herein, the testimonies of the witnesses as well as the evidence adduced at the trial which commenced before the Honourable Justice L. N. Waithaka in October, 2016. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the Parties herein – Mr. Karweru for the Plaintiff and Dr. Gibson Kamau Kuria, S.C. for the Defendant.

31. By the Originating Summons dated November 24, 2014, the Plaintiff herein claims to be entitled by way of adverse possession to 8 acres out of LR No 6381/20/1. Accordingly the Plaintiff urges the Court to find that he has been in actual, open and adverse possession of the said 8 acres and that by reason of such occupation he has acquired prescriptive rights over the same and hence the Chief Land Registrar should be directed to transfer the 8 acres to his name.

32. In his Supporting Affidavit, the Plaintiff asserted that in the year 1999, the 1st Defendant started a scheme at the 2nd Defendant's farm situated at Game Rock area in Nyeri where the long-serving and/or outstanding employees of the 2nd Defendant would buy land at subsidized rates from the Defendants herein.

33. The Plaintiff told the Court that he was considered for the scheme and was duly allocated a portion of land which he took possession of and started developing in 1999. The Plaintiff told the Court that in accordance with the rules of the Scheme, he made arrangements and paid Kshs 200,000/- to the Defendants on May 3, 2003. It was his case that while his allocation was shown to be 4 acres, a major part of the land he was allocated was rocky and incapable of being called land. He was subsequently for that reason allowed by the Defendants to extend his occupation to a lower area of the land which could be used for farming.

34. The Plaintiff told the Court that he has since tried in vain to have the Defendants to transfer the portion of the land he occupies to himself and that he recently came to learn that one of his former co-workers

by the name Eluai Lokale had been allocated the portion of land where the Plaintiff has built his house. He is now apprehensive that the Defendants are silently moving to defeat his claim and hence the prayers made herein.

35. The Plaintiff submits that his occupation of the land since 1999 and after making the payment in the year 2003 was as a matter of "right" as opposed to the Defendant's position that he occupied the same with their consent and knowledge.

36. The doctrine of adverse possession is captured in our laws under the *Limitation of Actions Act*, cap 22 of the laws of Kenya. Section

7 of the said Act provides thus:

> "7. An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him, or, if it first accrued to some person through whom he claims, to that person."

37. On the other hand, Section 13 of the said *Act* provides that:

> "(1) A right of action to recover 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 is in this Act referred to as adverse possession), and, where under Sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
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> (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land."

38. As was stated by the Court of Appeal in *Wambugu v Njuguna* [1983] KLR 173:

> "The general principle is that until the contrary is proved, possession in law follows the right to possess.
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> In order to acquire by the Statute of Limitation 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 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 for which he intended to use it.
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> 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 whether or not the claimant has proved that he has been in possession for the requisite number of years."

39. Considering the same issue in *Mtana Lewa v Kahindi Ngala Mwagandi* [2015] eKLR, the Court of Appeal held that:

> "Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it, and the person having title to it omits or neglects to take action against the person in assertion of his title for a certain period, in Kenya twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner."

40. As it were, the period of 12 years starts to run from the moment the trespasser takes adverse possession of the land and the registered proprietor is regarded as having been dispossessed or having discontinued his possession.

41. In the matter before me, it was apparent that the suit property was registered in the name of the 1st Defendant and that it was the said 1st Defendant who showed the Plaintiff the 4 acres of land he occupied and took possession of in 1999. At Paragraph 8 and 9 of the 1st Defendant's Replying Affidavit, he avers as follows:

> "8. That on or about 1999, the 1st Defendant allowed the Plaintiff to take possession of 4 acres of the suit property at the Plaintiff's request pending negotiations to offer the same for sale to the Plaintiff under the scheme as an ex-gratia retirement benefit for the Plaintiff's long service at the Defendant's. The Plaintiff had requested and was allowed to proceed to early retirement in January, 2003 ...
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> 9. That the 1st Defendant offered the said 4 acres plot on the suit property at a cost of Kshs 50,000/- per acre subject to terms to be agreed upon by the 1st Defendant and the Plaintiff based on the goodwill of the employment relationship."

42. On account of that position, it was the Defendants' submission that the Plaintiff had entered the said plot with the knowledge and permission of the Defendants and that hence his possession was not adverse to that of the 1st Defendant who was the registered proprietor of the land.

43. While that position was certainly true for the subsequent 4 acres of the land that the Plaintiff is said to have subsequently started utilizing on the lower side of the suit land, it was apparent that following the offer referred to at Paragraph 9 of the 1st Defendant's Replying Affidavit hereinabove, the Plaintiff made arrangements and paid the sum of Kshs 200,000/- to the Plaintiff on or about May 3, 2003.

44. Upon receipt of the said payment, the 1st Defendant wrote a Memo dated May 30, 2003 acknowledging receipt of the payment as follows:

    Payment Acknowledgment

    We are in receipt of your bankers cheque of shilling Two Hundred Thousand Only (Shs.200,000/-) in lieu (sic) of payment for a parcel of land.

    This letter acknowledges that you have paid this to the account of Mr. D. N. Ndegwa at Standard Bank Nyeri, for a parcel of four acres priced therefore at (Shs.50,000.00) shillings Fifty Thousands only per

acre. Any further understanding are to be confirmed between yourself and the owner of the said land in his personal capacity."

45. In my considered view, once the Plaintiff accepted the offer to buy and indeed went ahead to pay the purchase price, the sale agreement between the Plaintiff and the 1st Defendant was consummated the fact that it was not in writing notwithstanding.

46. In such a scenario and as was stated in *Peter Mbiri Michuki -vs- Samwel Mugo Michuki* (2014) eKLR:

> " Adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed of possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run."

47. That being the case, it was apparent that the time herein started running as regards the Plaintiff's occupation and possession of that portion of the land on May 3, 2003 when he paid the purchase price for the 4 acres of land. As it were, as at the time this suit was instituted on November 24, 2014, those 12 years were yet to elapse and the Plaintiff was yet to acquire any prescriptive rights over the land.

48. It follows that the Plaintiff's claim for adverse possession of 8 acres out of the suit property is premature and must fail. I hereby dismiss the same.

49. In the circumstances herein each Party shall bear their costs.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 9TH DAY OF MARCH, 2023.

In the presence of:

Ms Miriti holding brief for Karweru for the Plaintiffs

Dr. Gibson K. Kuria S.C for the Defendant

Court assistant - Kendi

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J. O. OLOLA

JUDGE