



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 40 OF 2019

WINNIE WAKIO NGARI.....PLAINTIFF

VERSUS

ESTHER MICERE NYUMU.....1ST DEFENDANT

ALICE WANGUI MWANIKI..... 2ND DEFENDANT

ESTHER WAKUTHII KATHONI.....3RD DEFENDANT

JUDGMENT

INTRODUCTION

By an Originating Summons dated 19th September, 2019, the Plaintiff sought the following orders:-

- (1) *That the Appellant be registered as the proprietor of Land Parcel Number Kabare/Nyangati/6156 and Kabare/Nyangati/6157.*
- (2) *That the costs of the application be provided.*

The Respondents filed a joint replying affidavit sworn by Esther Micere Nyumu on 27.11.2019.

PLAINTIFF/APPLICANT'S SUMMARY OF FACTS

According to the Applicant/Plaintiff, the Land Parcel Number Kabare/Nyangati/6157 is currently registered in the name of Misheck Mwangi Nyumu who is the 2nd Respondent/Defendant while Land Parcel Number Kabare/Nyangati/6156 is registered in the name of Esther Wakuthii Kathoni who is the 3rd Defendant/Respondent.

She contends that she has lived on the two parcels of land exclusively and has had quiet possession over the same for more than 23 years having occupied the same in the year 1996. She produced copies of photographs indicating that she has developed the land with semi-permanent and permanent houses and planted assorted trees. She further stated that Esther Micere Nyumu (1st defendant) subdivided the original parcel of land number Kabare/Nyangati/3158 in the year 2012 and at that time, she was still in occupation of the land and in the year 2013, she transferred a portion of the resultant sub-division being parcel number Kabare/Nyangati/6156 to the 3rd Defendant /Respondent and Land Parcel Number Kabare/Nyangati/6157 to the 2nd Defendant/Respondent in the year 2018.

The plaintiff also stated that none of the respondents have ever taken possession nor occupied the suit land since her possession of the same in the year 1992. The plaintiff further contends that she came into Land Parcel Number Kabare/Nyangati/3138 after the then Kerugoya/Kutus Municipal Council had sub-divided plots out of Land Parcel Number Kabare/Nyangati/3158 and was allotting the said plots to members of the public.

She stated that her occupation has been un-interrupted by the Respondents and subsequent to the sub-division, she was allocated the Jua Kali Plot Number 59 in the year 1996, a copy of which she produced in her evidence.

DEFENDANTS SUMMARY OF FACTS

The 1st Defendant/Respondent testified on oath and stated that she gifted the 1st and 2nd defendants who are her son and grand-daughter

respectively with the suit Land Parcels Number Kabare/Nyangati/6156 and 6157 after she inherited from the Estate of her late husband through Succession Cause No. 83 of 1995 (Embu) where she was a co-administratrix with her co-wife. She stated that upon acquiring the original Land Parcel Number Kabare/Nyangati/23 by way of transmission, she caused various dealings on the same including but not limited to sub-divisions and sale of some resultant parcels resting with gifting her children including her son and grand-daughter as aforesaid.

She further stated that at no one time did the defunct Kerugoya/Kutus Municipal Council own the said Land Parcel Number Kabare/Nyangati/23 or any resultant sub-division as claimed by the

Applicant/Plaintiff herein. The 1st Defendant/Respondent also stated that the Plaintiff/Applicant has never instituted any suit against her or anyone claiming under her for a claim over the lands subject of this suit and has only filed the instant suit following the other suits filed by the 2nd and 3rd Defendants/Respondents being ELC No. 47 and 48 of 2019 (Wang'uru).

DW2 was Misheck Mwangi Nyumu who is also the 2nd Defendant/Respondent. He stated that he is the registered proprietor of land Parcel Number Kabare/Nyangati/6157 after he acquired from his mother Esther Micere Nyumu who is the 1st Defendant/Respondent herein. He produced the green card for the said parcel of land in his evidence.

The 2nd Defendant/Respondent further testified that sometime in the year 2014, a restriction was placed on the suit land by the County Government of Kirinyaga and in the year 2017, the restriction was removed. In 2018, he was issued with a title deed and when he visited the land, he found some people had constructed on his land. He did not know the people and he enquired from the neighbours who told them that the people who were living on the houses were tenants who had rented the same. He later came to discover that the person who had constructed the houses was one Winnie Wakio who is the Plaintiff/Applicant herein. He filed a case at Wang'uru Magistrate's Court being PMCC No. 48 of 2019. In that suit he was seeking an order of eviction against the Applicant/Plaintiff. He said that Winnie Wakio started constructing on his land in the year 2013.

DW3 was Esther Wakuthii Kathoni. She is the 3rd Defendant/Respondent. She stated that she is the registered owner of Land Parcel Number Kabare/Nyangati/6156 which was given to her as a gift by her mother in 2013. She stated that she is not using the land as the Plaintiff/Applicant is using the same. She could not remember when the Plaintiff/Applicant took possession of the suit land. She was given the land in 2013 when she was an adult. She recalled that sometime in the year 2014, a restriction was placed by the County Government of Kirinyaga which was subsequently removed in 2017. She stated that she filed a case in Wang'uru Magistrate's Court being PMCC No. 47 of 2019 seeking an order of eviction of the Plaintiff/Applicant herein.

PLAINTIFF'S/APPLICANT'S SUBMISSIONS

The Plaintiff through the firm of R. Muthike Makworo & Co. Advocates submitted that the plaintiff testified and stated that she has lived on the suit Land Parcel Number Kabare/Nyangati/6156 and 6157 exclusively and has had quiet possession for more than 23 years since 1996. The learned counsel also argued that when the 1st defendant purported to sub-divide Land Parcel Number Kabare/Nyangati/3158 in 2012, the plaintiff stated in her evidence that she was still in occupation of the suit land. The learned counsel submitted that the 1st defendant was at all material time from the year 1996 the registered proprietor of Land Parcel No. Kabare/Nyangati/3158 until sub-division into the resultant parcels which are the subject matter of the suit herein in 2012 and that the plaintiff has been in occupation of the suit land without interruption. She cited the case of *Mbura Vs Gachuhi (2002) 1 E.A.L.R 39*.

The learned counsel also referred to the case of *Simon Gituto Ngari Vs Michael Kaaru Njoroge & Another (2019) e KLR*. Lastly, the counsel cited the case of *The Seventh Day Adventist Church (E.A) LTD* (being sued on behalf of *S.D.A Church & Another Vs Salome Wamutira Mukuria (2018) e KLR*.

DEFENDANTS/RESPONDENTS SUBMISSIONS

The counsel for the Respondents did not file their submissions within the timelines as directed by the court.

LEGAL ANALYSIS

I have considered the evidence by the plaintiff and the defendants in this case. I have also considered the documents produced by the parties in evidence together with the pleadings in PMCC 47 and 48 of 2019 (Wang'uru). The issue for determination in this case is whether the Plaintiff/Applicant Winnie Wakio Ngari has acquired the suit properties L.R Number Kabare/Nyangati/6156 and 6157 by Adverse Possession. In her testimony, the Applicant/Plaintiff told the court that she has lived on the suit property Land Parcel Number Kabare/Nyangati/6156 and Kabare/Nyangati/6157 exclusively from 1996 which is now more than 23 years.

She produced photographs showing developments done on the land which include semi-permanent houses and assorted trees. The Defendant/Respondent admitted that the Plaintiff/Applicant occupy the suit land but does not specify when she took occupation of the land. Nowhere in their evidence or their pleading before Wang'uru Law Court did the defendant state that the Plaintiff/Applicant entered into the suit premises in 2013 and what steps, if any they took to stop her from trespassing into their land.

I have looked at the photographs produced by the Plaintiff/Applicant which are both permanent and semi-permanent houses and assorted trees including a mature flowering Avocado tree. Some of the semi-permanent houses look old and from my assessment, they are not less than 12 years old. The mature flowering Avocado trees outside permanent houses do not appear to have been planted recently. It takes a long time for an Avocado tree to mature. These are clear indicators that support the Applicants/Plaintiff's contention that she has lived in the suit land for more than 12 years.

These averments given on oath have not been challenged or controverted. The Defendants/Respondents have not explained how the

Plaintiff/Applicant came into possession of their land.

They filed a suit in Wang'uru Magistrate's Court in 2019 against the Plaintiff/Applicant but did not give an account of how she took possession of the suit parcels of land. Failure to controvert the Plaintiff/Applicant's contention that he entered into the suit properties in the year 1996 or give an account of how the Plaintiff/Applicant entered into the suit property, this court is left with no alternative but to believe the evidence adduced by the Plaintiff/Applicant.

The doctrine of Adverse Possession and its application in Kenya is anchored under the **Limitations of Actions Act Chapter 22 Laws of Kenya**. I will highlight some of the statutory provisions as follows:-

Section 7 stipulates as follows:

“An action may not be brought 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”.

Section 13 further states as follows:-

(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 Section 9, 10, 11 and 12 of this Act, a right of action to recover land accrue 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.

(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.

(3) For the purposes of this Section, receipt of rent under a lease by a person wrongfully claiming, in accordance with Section 12 (3) of this Act, the land in reversion is taken to be Adverse Possession of the Land....”

Section 16 provides thus:

“For the purposes of the provisions of this Act relating to action for the recovery of land, an administrator of the Estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration”.

Again **Section 17** states as follows:-

*“Subject to **Section 18 of this Act**, at the expiration of the period prescribed by the Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”*

Lastly, **Section 38** states thus:

(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 Sub-section (1) of this Section shall on registration take effect subject to any entry on the register which has not been extinguished under this act”.

The provisions of the law as enumerated above is categorical on the acquisition by a trespasser who without consent takes possession of land belonging to another person and openly without secrecy, occupies the same and in a notorious manner uses the same to the exclusion of all others for a period of not less than twelve (12) years without interruption has the effect of extinguishing the title of the proprietor and may apply to the High Court to be registered as the proprietor of such land.

The Plaintiff/Applicant has brought herself within the confines of the law under the doctrine of Adverse Possession and is therefore entitled to the orders sought. Suffice to state that the actions by the Defendants/Respondents to take out Letters of Administration and have the 1st Respondent issued with a grant which caused the suit property to be sub-divided and resultant parcels given to the 2nd and 3rd Respondent did not affect the Plaintiff's/Applicant's right of Adverse Possession as stipulated under **Section 16 of the Limitation of Actions Act**.

The ingredients for Adverse Possession have been set out in numerous decisions by our courts. In the case of **Mbura Vs Gichuhi (2002) 1 EALR 137**, the court held as follows:-

“..... 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 non-consensual actual open, notorious exclusive and Adverse use by him of those under whom he claims for the statutory prescribed period without interruption”.

Again in the case of ***Jandu Vs Kirplal & Another 1975 EA 225***, it was held that:-

“.....to prove title by adverse possession, it is not sufficient to show that some acts of Adverse Possession must be adequate in continuity, in publicity and in extent to show. that it is Adverse to the owner.

It must be actual, visible, exclusive, open and notorious”.

I agree with the above decisions.

The upshot of my analysis is that the plaintiff has proved her claim for Adverse Possession to the required standard. For avoidance of doubt, 2nd and 3rd Defendants/Respondents counterclaim by way of their suits filed in Wang’uru Magistrate’s Court being PMCC No. 47 and 48 of 2019 respectively fails and the same are hereby dismissed. The Plaintiff’s/Applicant’s claim in this case succeeds and the same is hereby allowed as follows:

(1) The Plaintiff/Applicant WINNIE WAKIO NGARI be registered as proprietor of Land Parcel Number Kabare/Nyangati/6156 and Kabare/Nyangati 6157.

(2) In view of the fact that the Respondents have lost the suit properties by Adverse Possession, I order each party to bear her own costs of this suit and the counterclaim.

JUDGMENT READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 5TH DAY OF NOVEMBER, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Ms Ndungu for Applicant
2. Mr. Mugo holding brief for Njue Muriithi
3. Kabuta, Court clerk.