



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 346 OF 2011 (OS)

DAMARIS WANJIRU MUNGAI.....1ST PLAINTIFF

LUKA MUGUMA KIBUTHA.....2ND PLAINTIFF

- VERSUS -

MUCUA IGOGO.....1ST DEFENDANT

HINGA IGOGO.....2ND DEFENDANT

MWAURA IGOGO.....3RD DEFENDANT

NGUGI IGOG.....4TH DEFENDANT

JUDGEMENT

1. This is the originating summons dated 12th July 2011. LET MACUA IGOGO, HINGA IGOGO, MWAURA IGOGO and NGUGI IGOGO all of Mutuini location within 15 days after service of this summons on them inclusive of the date of such service enter appearance to this summons which is issued on the application of the above named Damaris Wanjiru Mungai and Luka Muguma Kibutha for orders:-

- a. That the defendants interest on LR No. Dagoretti/Mutuini/T.302 be declared to have been extinguished by operation of the law.**
- b. That the plaintiffs be declared to have become entitled by adverse of all that piece or parcel of land known as LR No. Dagoretti/Mutuini/T.302.**
- c. That the plaintiff's be registered as the sole proprietors of LR No. Dagoretti/Mutuini/T.302.**
- d. That the costs of this application be provided for.**

2. The originating summons is supported by the affidavit of Damaris Wanjiru Mungai, one of the plaintiffs herein, sworn on the 12th July 2011 and a further affidavit sworn on the 14th July 2012.

3. Upon being served the defendants entered appearance through the firm of M/S Ngugi Mwaniki & Co. Advocates on 5th August 2011. They also filed a replying affidavit sworn by Macua Igogo, the 1st respondent on the 8th June 2012.

4. In her affidavits, Damaris Wanjiru Mungai states that she is the wife of Nicholas Mungai Kangethe. They got married in 1964 and they established their matrimonial home at Dagoretti/Mutuini/T.302. She said they occupied half of the said plot while the other half was occupied by Luka Muguma Kibutha, the 2nd applicant/plaintiff. They constructed a dwelling house in 1967 which she occupies to date. She further told the court that the land belongs to Robinson Igogo Hinga who was aware they were residing on the said land without his consent but he never asked her to leave. She said she has been in occupation for 47 years and prays that the rights of Robinson Igogo Kamau be found have been extinguished by operation of law.

5. PW2 Rose Watiri Muguma told the court that she is the daughter of Luka Muguma Kibutha, the 2nd plaintiff/applicant. She told the court that she was born on the suit property. She lives there todate with her father and siblings. She further stated that she has never seen Robninson Kamau Igogo. She stated that their family has been on the land for 52 years. The plaintiffs in support of their case produced the

eviction letter by M/S Ngugi Mwaniki & Co. Advocates as exhibit P1, a caution in respect of Dagoretti Mutuini/T.302 lodged in 1984 and a copy of register as exhibit P2.

6. DW1, Andrew Muchua, the 1st defendant/respondent told the court that Plot No. Dagoretti/Mutuini/T.302 belongs to his late father, Robinson Hinga who passed on in 1992. He told the court that they had a dispute before the Land Registrar. She (1st plaintiff) had put a caution on the land. Her claim as a purchaser was dismissed and the caution removed in 2004. He produced the decision of the Land Registrar as exhibit D1 (a-e). He further told the court that the 1st plaintiff left the land in 2004 but came back in 2010. He prays that the plaintiffs suit be dismissed with costs. DW1 Andrew Muchua testified on behalf of himself and that of the other defendants/respondents.

7. At the end of the trial the parties tendered written submissions.

8. It is the plaintiffs' submissions that the parcel of land LR No. Dagoretti/Mutuini/T.302 (hereinafter referred to as the "suit property") was registered in the name of Robinson Igogo Hinga, now deceased. An extract of the register was produced as exhibit P2. It shows the said Robinson Igogo Hinga was registered as proprietor on 3rd October 1959. The said registered owner knew that the plaintiffs were residing on the suit but at no time did he bring a suit to evict them. He died in 1992 and left the plaintiffs still in possession of the suit property. By the time of his death, the plaintiffs had occupied the suit property for a continuous period of 28 years.

9. Further that the by the time the 1st plaintiff lodged the caution in 1984 they had occupied the premises for 20 years. Even by the date of lodging the caution the rights of the adverse possession had already accrued and the right of Robinson Igogo Hinga had been extinguished by operation of law. By the year 2005, when the caution was removed the plaintiffs had been in occupation for 39 years. The removal of the caution did not mean that the right of the plaintiffs on the suit property by adverse possession had been extinguished. The deceased Robinson Igogo Hinga did not seek to evict the plaintiff from the suit property. The plaintiffs are still in possession. The plaintiffs pray that the court finds that they have acquired prospective rights over the suit property and that the orders sought be granted.

10. It is the defendants' submissions that the plaintiffs did not produce a title deed or certificate of official search in respect of the suit property. The only document was an extract of a green card which shows the owner of the suit property was the defendants' father and the 1st plaintiff had put a caution claiming purchaser's interest. The 1st plaintiff admitted that there had been proceedings between herself and the defendants' father at the Land Registrar's office over the caution. The said caution was removed in 2005.

11. The plaintiffs left the land and re-entered in 2010 which prompted the defendants to write a demand letter which triggered the present proceedings. The plaintiffs have failed to satisfy the conditions for grant of adverse possession. The plaintiffs' occupation has not been uninterrupted. A claim for adverse possession should be made against the registered owner of the subject parcel of land. In the instant case the registered owner is the defendants' father who is deceased. A claim against the defendants who are not the registered owners or administrators of the estate ought to fail. The plaintiffs have failed to establish their case on a balance of probabilities and the same ought to be dismissed with costs.

12. I have considered the originating summons, the affidavits in support and the annexures. I have also considered the replying affidavit and the annexures. I have considered the evidence on record and the written submissions made on behalf of the parties. The issues for determination are:-

i. Whether the defendants' interest on LR No. Dagoretti/Mutuini/T.302 has been extinguished by operation of law.

ii. Whether the plaintiffs are entitled to be registered as proprietors of LR No. Dagoretti/Mutuini/T.302 by adverse possession.

13. It is the 1st plaintiff's (PW1's) evidence that she joined her husband on the suit plot when she got married in 1964. She further told the court that they occupied a half portion of the suit property while the other half was occupied by Luka Muguma Kibutha (the 2nd plaintiff). She further told the court that she has been on the land for 47 years. That the registered owner Robinson Igogo Hinga was aware but did not evict them. PW2, Rose Watiri Muguma daughter to the 2nd plaintiff told the court that she was born on the suit property. That their family's occupation was open. They have built on it and planted trees on the suit property. When cross examined by the defendants' counsel PW1 (the 1st plaintiff) admitted that she lodged a caution in respect of the suit property in 1984 claiming purchaser's interest. She admitted that Robinson Igogo Hinga was alive by then. She also admitted that the registered owner died in 1992 but a succession cause has not been filed. She also admitted that the caution was removed in 2005.

14. PW2, Rose Waitiri Muguma told the court that she was not aware of the dispute before the land registrar.

15. DW1, Andrew Mucua produced the proceedings before the Land Registrar as exhibit D1 a-c, the Land Registrar after hearing the 1st plaintiff and the defendants came to the conclusion that the plaintiff had not proved that she had bought the suit property and the caution was removed. PW1 does not dispute this fact. These proceedings before the Land Registrar have not been challenged. She did not tell the court if she filed an appeal against the decision to the Chief Land Registrar. I find it rather curious that she now seeks to have acquired rights by way of adverse possession.

16. Section 38 of the Limitation of Actions Act (Cap 22 Laws of Kenya) provides that:-

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."

Order 37 rule 7 of the Civil procedure Rules provides that:-

- “1. An application under section 38 of the Limitation of Actions Act shall be made by originating summons.**
- 2. The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.**
- 3. The court shall direct on whom and in what manner the summons shall be served.”**

17. It is clear from the above provision that to succeed in a claim for adverse possession the plaintiffs must prove:-

- i. That they have been in occupation of the suit property for an uninterrupted period of twelve (12) years.**
- ii. That the occupation has been with the knowledge of the defendant.**
- iii. That the plaintiffs have exhibited a certified extract of the title of the registered owner.**

18. I note that the plaintiffs have not been in an uninterrupted occupation of the suit property. The 1st plaintiff did not challenge the evidence that she left in 2005 and returned in 2010. The proceedings before the Land Registrar upon which the caution was removed constitute an interruption. The occupation cannot be said to have been peaceful. The 1st plaintiff did not deny that she at first claimed purchaser’s interest. She cannot turn around and claim the suit property by adverse possession. The plaintiffs have failed to annex a certified extract of title in the name of Robinson Igogo Hinga. This is a mandatory requirement under order 37 rule 7 of the Civil Procedure Rules. The claim should be adverse to the registered owner. In the instant suit the claim is against the defendants who are not the registered owners of the suit property. No evidence has been led to show that they are the administrators of the estate of Robinson Igogo Hinga (deceased).

19. It is the defendants’ evidence that no succession proceedings have been instituted with respect to the said Estate hence their rights as beneficiaries has not accrued yet. I find that the plaintiffs’ suit fails, the same is dismissed with costs to the defendants.

It is so ordered.

Dated, signed and delivered in Nairobi on this 5th day of May 2020.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Mwangi Chege for the Plaintiffs

No appearance for the Defendants

Kajuju - Court Assistant