



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO.28 OF 2019(OS)

MUTHEE HARRISON KAARA.....1ST PLAINTIFF

MICHAEL NDABIA MWANGI.....2ND PLAINTIFF

VS

NELSON MWANGI THUO.....DEFENDANT

JUDGMENT

1. The Plaintiffs vide an originating summons dated 30/07/2019 and filed the following day sued the Defendant in his capacity as the legal representative to the estate of Francis Thuo Kaara (deceased) seeking the following reliefs;

- a. A declaration that the title of the land parcel number LO.13/GAKOE/566 has been extinguished by the Plaintiffs' adverse possession thereof for a period of more than twelve (12) years in terms of the Limitation of Actions Act.
- b. That the Plaintiffs' have become entitled by way of adverse possession to the whole land parcel comprised in the title number LOC.13/GAKOE/566 in Gakoe location in Mathioya Sub-county within Murang'a county and registered under the land Act in the names of FRANCIS THUO KAARA(Deceased).
- c. An order that the District Land Registrar Murang'a to register the Plaintiffs as absolute proprietors of the land parcel comprised in title number LOC. 13/GAKOE/566 in place of the Defendant.
- d. That the District Land Registrar, Murang'a be directed that the order herein shall be instrument of transfer of ownership of the land parcel reference number LOC.13/GAKOE/566 to the Plaintiffs.
- e. That the costs of this suit be provided for.

2. The grounds upon which the originating summons is premised are that the land parcel number LOC.13/GAKOE/566 (hereafter referred to as the suit land) is registered in the names of FRANCIS THUO KAARA (deceased) who was the father to the Defendant and brother to Mwangi Kaara (deceased) who was the father to the Plaintiffs . That the suit land was owned by FRANCIS THUO KAARA (deceased) while his brother MWANGI KAARA owned land parcel number LOC.13/GAKOE/562. That sometimes in 1965 the two brothers mutually agreed to sell off MWANGI KAARA's land and share the proceeds amongst themselves, however FRANCIS THUO KAARA shortchanged his brother and took off with all the sale proceeds to Nairobi which he used to start up a business there and never returned home. As a result, MWANGI KAARA forcefully entered the suit land without the consent of his brother and lived there with his family all his life and even after his death the family continued to live there and upon his death his remains were interred there. That after his departure to Nairobi the Defendant's father acquired another parcel of land in Nyandarua county.

3. The Plaintiffs' claim to have been brought up on the suit land from childhood to adulthood and continue to live there openly, peacefully with no interruptions from anyone for a period of over 50 years. That in the period of occupation they have made various developments on the suit land including building permanent houses and carrying out various farming activities by planting food crops and cash crops such as coffee, trees, napper grass and bananas.

4. That the Plaintiffs have exclusively occupied the suit land since 1965 and at no time did the Defendant utilize or occupy the land in any way. That their occupation of the suit land was with the knowledge of the Defendant's father and he never interrupted their occupation in any way through his lifetime. That their occupation having been continuous and uninterrupted in excess of twelve years has been adverse to the title of the deceased and his successors and the Plaintiffs have become entitled to the suit land by adverse possession.

5. The Plaintiffs swore a joint affidavit in support of the originating summons in which they reiterate the grounds on the face of the summons and pray that they be registered as the absolute owners of the suit land. They also add that their father died in 1981 and was buried on the suit

land whilst the Defendant's father passed on three years later in 1984 and was buried on his land in Nyandarua County.

6. In opposition to the application and the suit the Defendant denies the alleged mutual agreement to sell the Plaintiffs' father's land and contend that if at all the said sale ever happened only the Plaintiffs' father could have been in control of the sale proceeds of his own land. He also refutes claims that his father took off with the proceeds of sale. On the contrary the Defendant claims that the entry on the suit land by the Plaintiffs' father was with consent of his father thus his occupation of the suit land was as a mere licensee and the issue of adverse possession could not arise. Further that the developments thereon were with authority and permission from the Defendant's father.

7. The Defendant claims that the Plaintiffs have never set foot on the suit land after the Defendant applied for the revocation of grant which the Plaintiffs had obtained in Murang'a Succession cause No. 227 of 1989 and after its revocation the suit land was reverted back to the Defendant's father. That after the revocation of the grant, the Plaintiffs vacated the suit land but failed to pull down the houses they had built. That the Plaintiffs only re-entered the suit land after inception of this instant suit in 2019 but claims that they do not reside on it as they have constructed their homes on their other parcels of land. He is of the view that time for adverse possession only begins to run when a claim is lodged against the title owner. And is also convinced that the Plaintiffs' occupation having been of a licensee in nature could not confer any proprietary rights to the Plaintiffs and concludes that the Plaintiffs' claim must fail.

8. The matter proceeded *viva voce*.

9. PW1 the 1st plaintiff and retired teacher testified that his father forcefully entered the suit land in 1965 after he and the Defendants father had sold off his land leaving him with no land to live on. That after the sale the Defendant's father left and settled in north Kinangop and never returned to evict them. That he was seven years when his family entered the suit land and has lived there to date and is claiming the land as of right as he has done several developments on the land. In cross-examination he admitted that he had previously filed ELC No. 55 of 2018 in which he had stated in his affidavit in support that his father's entry to the suit land was permitted by the Defendant's father but had since recanted that testimony and withdrawn that suit. He also conceded to have been appointed the administrator to the estate of the Defendant's father without his involvement. That together with his siblings they obtained titles to the suit land which were later cancelled when the grant was revoked. That he continued to live on the suit land after the death of his father and his uncle never evicted him. That he also participated in some proceedings in 1986 before the local chief over the suit land.

10. In re-examination he clarified that the suit land is registered in the Defendant's father's name to date. That his brother and himself have lived on the suit land before and after the death of their father who died in 1981 to date. That the Defendant is now the administrator of his father's estate. And that the statements made in filed No.55 of 2018 were made in error.

11. PW2 the 2nd plaintiff and brother to the 1st plaintiff testified that though he lives in Nairobi he has built a permanent home on the suit land on his own portion which was shown to him by his father. He knew the Defendant, his siblings and father who are his relatives. He was also aware of the previously filed suit no ELC No. 55 of 2018 which was withdrawn because it had false information on how his father had entered the land.

12. PW3 - A cousin to the parties herein testified that the suit land though registered in the Defendant's father's name was occupied by the plaintiff's family since 1965. That their entry on the land was not permitted by the Defendant's father but was forceful. That he was present when the plaintiff's father entered the land as he was aged 19 years then. He recanted his statement in ELC No. 55 of 2018 in respect to the permitted entry on the land, that it was not correct information. The Defendant's siblings were also known to him. That the Plaintiffs have built permanent houses on the suit land.

13. PW4 – also a cousin to the parties herein in his testimony largely reiterated the testimony of the PW3.

14. DW1 – the Defendant adopted his witness' statement and produced one exhibit being the file for ELC. 55 of 2018. He stated that the suit land is not included in the succession cause in which he was appointed as administrator to his father's estate. He confirmed in evidence that he was appointed the administrator of the estate of his late father. He also claimed to have been informed by his father that the Plaintiffs' father entered the suit land with his consent after he (the Plaintiffs' father) sold his land to educate his children. That the Defendant was born in 1963 two years before the Plaintiffs' entered the suit land. That the Defendant had tried to demand the land in 1986 after his father's death but was chased away. He conceded that at no time did he visit the suit land in company of his father. Further that he and his father never evicted the Plaintiffs from the land. He was not aware when the grant was revoked and not sure when the Plaintiffs entered/ reentered the land.

15. The Plaintiffs submitted that after the revocation of the grant initially issued to the 1st plaintiff vide succession cause no. 227 of 1989 in 2013 through Murang'a succession cause no. 1301 of 2013 as lodged by the Defendant, the Defendant was appointed the administrator to his father's estate but did not provide any documentation in support. They went ahead to reiterate that their occupation of the suit land has been open and as of right for a period of over fifty years. That in the period of occupation they have done massive developments on the suit land. That the Defendant conceded to have never evicted the Plaintiffs from the suit land, that he and his family has never lived on the suit land and that he lives in his father's land in Nyandarua County. That even when the Plaintiffs were summoned by the chief, they did not vacate the land. That their continued occupation of the suit land for a period in excess of twelve years has been adverse to the Defendant's father's title to the suit land as such the same has since been extinguished.

16. The Defendant in his submissions addressed various anomalies in the Plaintiffs' claim including the failure to annex certified extract of title in order to ascertain existence and ownership of the suit land as required under order 37 rule 7, the failure to provide documentation to prove that the Defendant is the legal representative of his father's estate and the failure to address the previous affidavit evidence in ELC No. 55 of 2018 in the current suit on the part of the Plaintiffs and their witnesses. The Defendant also contends that the fact that it was admitted the Plaintiffs entered on the suit land with their parents the right if any could only have accrued to their father and can only claim the same in a representative capacity on behalf of their father and lacked capacity to institute the claim in their own capacity. The Defendant then reiterated the Plaintiffs' father's entry on the land was permitted by his father hence there was no dispossession and his occupation of the land could not confer on him any proprietary rights in land. He concluded that the Plaintiffs claim is fatally defective, it must fail and urged

the court to dismiss the same with costs.

17. Section 7 of the Limitation of Actions Act cap 22 provides as follows;

“Actions to recover land 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.”

18. Section 38 of the Limitation of Actions Act cap 22

“Registration of title to land or easement acquired under Act (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.”

19. The real test in determining adverse possession is stated in the **Samuel Nyakenogo v Samuel Orucho Onyaru, (2010) eKLR:**

“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 will 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 period.”

20. The Court of Appeal in the case of Sarah Nyambura Kungu-vs- David Njuguna, **Civil Appeal No. 20 of 1988** held that;

“Adverse possession only arises in case of continuous uninterrupted occupation of the land for over 12 years.”

In the words of Gicheru, JA:

“In deciding the issue of adverse possession, the primary function of a court is to draw legal inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of fact, the question whether that possession is adverse or not is matter of legal conclusion to be drawn from the findings of acts” **Kweyu v Omuto, C A Civ Appeal 8 of 1990** (as yet unreported).

21. In 1975, the late Mr Justice Chanan Singh of the High Court of Kenya approved of the definition of “adverse possession” given by Mr Justice Markby in the Indian case of **Bejoy Chundra v KallyProsonno [1878], 4 Cal 1327, at p 329**, in the following words:

“By adverse possession I understand to be meant possession by a person holding the land on his own behalf (or on behalf) of some person other than the true owner, the true owner having a right to immediate possession”.

22. In the case of **Jandu v Kirpal and another [1975] E A 225, at p 232** the court observed that;

“While this definition is a fair starting point, from a consideration of the many cases decided, it is possible to define “adverse possession” more fully, as the nonpermissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owners enjoyment of the land for the purposes for which the owner intended to use it”.

23. The Plaintiffs’ family’s occupation of the suit land since the year 1965 is undisputed. The same was conceded by the Defendant in his oral testimony and submission, he admits that the Plaintiffs’ father entered the land with the consent of his father. The Defendant also conceded to have never utilized nor occupied the land and to have never managed to evict the Plaintiffs from the land. That he sometimes in the year 1986 had unsuccessfully attempted to evict them using the local area chief as he was chased away. The Defendant also did not clearly bring out in oral evidence his contention that the Plaintiffs had at some unspecified time vacated the land and demolished their houses thereon.

24. It is also not in dispute that the Plaintiffs entered the suit land along with their parents who later died around the year 1981 leaving the Plaintiffs behind and in occupation of the suit land. The Plaintiffs claim to have thereafter made several developments on the suit land by constructing their permanent homes and carrying out various farming activities. That the Plaintiffs resisted being evicted by the Defendant after the death of both parties’ parents in 1986. It appears that the Plaintiffs’ occupation of the suit land has thus been notorious and as of right since the year 1981 after the demise of their father to date and are thus entitled to claim proprietary rights in their own right.

25. The main contested issue is the manner in which the plaintiff’s’ family initially entered the land in 1965. The Plaintiffs’ contend that their father’s entry was forceful and unpermitted whilst the Defendant contends that the entry was with consent and permission of his late father and as such the Plaintiffs’ father was a mere licensee on the suit land. The Defendant has also strongly relied on the statements made by the Plaintiffs in the withdrawn suit as ELC No. 55 of 2018 which they explain as having contained false information particularly in respect to the permitted entry on the suit land. The court takes judicial notice of the fact that at the time of the entry the Defendant was only two years old and he therefore could not have been conversant with the proceedings relating to the land, he has only relied on what he was told that is to say hearsay. The Defendant did not call any witnesses to support his argument not even any of his other siblings.

26. Even if it is assumed that the Plaintiffs' father entered the suit land with the consent of the Defendant's father, that consent is presumed to have ended on the demise of the Plaintiffs father in 1981. Equally if the defendant's father allowed the Plaintiffs to continue occupying the land then any permission ended in 1984 when the defendant's father died. The Defendant has not demonstrated any action to retake the property and make a successful repossession of the land. Either way, the Plaintiffs have been on the land for a period of over 30 years whether 1981 or 1984 is taken to be the material date for the commencement of their adverse possession.

27. Since the Plaintiffs are not claiming under their father's entitlement to the suit land, the mode of entry onto the suit land by the Plaintiffs' father is therefore not material in this case. What the court needs to make a determination on is whether the Plaintiffs have been in occupation of the suit land in their own capacity as of right for a period in excess of 12 years. The Plaintiffs' father having died in 1981 the Plaintiffs' independent occupation of the land began in that year which they affirm to have been uninterrupted to date. The Defendants have not substantiated the claim that the Plaintiffs vacated the suit land after the revocation of the grant in 2013 then reentered the land in 2019. Even if that was so, the Plaintiffs' right as claimed would still have accrued by the year 1993 as from 1981. A keen look at the photographs produced by the Plaintiffs and not contested by the Defendant, the houses and the vegetation on the land could not have been planted on the land in the year 2019.

28. The Defendant admits to have been appointed the administrator to his father's estate. The Plaintiffs have sued him as such. The Defendant has not contested this in his pleadings or evidence tendered in court and indeed he has admitted as such in his testimony. The Defendants counsel has contended that since the copy of the grant was not presented in court the issue of representation is in doubt. An issue in law emanates from either the pleadings or the evidence. It is not clear where the counsel has picked this issue from given the admission of the Defendant that indeed he is the appointed administrator of the estate of his father. The evidence is very clear that he is the administrator of the estate of his father. I do not wish to say anything more.

29. Is the failure to annex an extract of the title fatal to the Plaintiffs' claim? Section 35 (1) and (2) of the Land Registration Act states that every document purporting to be signed by a Registrar shall, in all proceedings, be presumed to have been so signed unless the contrary is proved.

(2) Every copy of or extract from a document certified by the Registrar to be a true copy or extract shall, in all proceedings, be received as *prima facie* evidence of the contents of the document.

30. The Plaintiffs have presented a certified copy of the official search of the suit land which shows that it is registered in the name of the Defendant's father. I am prepared to take this as *prima facie* evidence of the registered owner of the suit land in compliance with Order 37 rule 7 of the Civil Procedure Rules which require every application to be supported by an affidavit to which a certified extract of the title to the land in question is annexed. The certified copy of the official search is executed by the Land Registrar and the Defendant has not shown any evidence to suggest that it is not genuine.

30. In the end the finding of this court is that the Plaintiffs have proved a case for adverse possession.

31. Final orders;

a. A declaration that the title of the land parcel number LO.13/GAKOE/566 has been extinguished by the Plaintiffs' adverse possession.

b. That the Plaintiffs' have become entitled by adverse possession to the whole land parcel comprised in the title number LOC.13/GAKOE/566 in Gakoe location in Mathioya Sub-county within Murang'a county and registered in the names of FRANCIS THUO KAARA (Deceased).

c. An order be and is hereby made mandating the District Land Registrar Murang'a to register the Plaintiffs as absolute proprietors of the land parcel comprised in title number LOC. 13/GAKOE/566 in place of the Defendant.

d. The Deputy Registrar of this Court is mandated to execute all the documents necessary to effect the transfer to the Plaintiffs names.

e. That the parties in this suit are related and I order that each to meet their own costs of the suit.

33. In view of the COVID -19 Pandemic and in line with the guidelines issued in the Kenya Gazette Notice No 3137 published on the 17/4/2020, I exercise my discretion to suspend/stay execution for a period of 45 days from the date of this judgement.

34. It is so ordered.

DELIVERED, DATED AND SIGNED VIA EMAIL THIS 7TH DAY OF MAY 2020.

J G KEMEI

JUDGE

ORDERS

In light of the declaration of measures restricting court operations due to the COVID - 19 pandemic and following the practice directions

issued by his Lordship, the Chief Justice dated 20th March 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice No. 3137, this Judgment has been delivered to the parties by electronic mail/video conferencing. In this case the parties 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.

J.G. KEMEI

JUDGE