



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MURANGA
ELC NO. 31 OF 2018 (OS)

PETER IRUNGU WAINAINA.....PLAINTIFF/APPLICANT

VERSUS

CHEGE NJIHIA.....1ST DEFENDANT/RESPONDENT

NJUGUNA KIHARA.....2ND DEFENDANT/RESPONDENT

THE DISTRICT LAND REGISTRAR.....3RD DEFENDANT/RESPONDENT

JUDGMENT

1. The Plaintiff filed suit by way of Originating summons on the 5/11/2008 and later amended and filed on the 4/5/18. The Plaintiff sought the following orders against the Defendants;

- a. That the Plaintiff has been in adverse possession of parcel LOC18/KIRERE/210 (suit land) peacefully openly and as of right from the year 1991 that is to say for a period in excess of 12 years.
- b. That the title of Chege Njihia be declared as having been extinguished in favour of the Plaintiff under section 17 of the Limitations of Actions Act.
- c. That the Plaintiff be registered as proprietor of the suit land under the provisions of section 38 of the Limitations of Actions Act

2. . According to the affidavit of Irungu Wainaina sworn on the 3/5/2018 he entered the land in 1964 with his parents. That his father Wainaina Kihara died in 1991 and was left in occupation and possession of the suit land.

3. He adduced evidence that he lives on the suit land with his siblings and their families whereupon they practice subsistence and cash crop farming.

4. He informed the Court that his father lived on the suit land from 1964 to 1972 with the permission of Wamaitha, who was his step Mother. Wamaitha relocated to Nyandarua with her son, the 2nd Defendant and asked his nephew, Wainaina Kihara to care for the land that she had inherited from her husband.

5. That his father purchased the land from Wamaitha in 1972 at the consideration of Kshs 4000/- in the presence of witnesses. He produced a note book written in Kikuyu language with an English translation in support of his claim.

6. That the suit land was subject to a dispute in HCCC No 622 of 1989 between his late father and Wamaitha Kihara. When Wainaina Kihara died he was substituted with the Plaintiff and likewise Wamaitha was substituted by 2nd Defendant. The suit was initiated by his father seeking title by way of adverse possession against Wamaitha. This case was dismissed on the 23/9/2008 for non-joinder of the 1st Defendant in the suit, who had become the registered owner of the suit land.

7. Immediately following the dismissal of the above case he filed his own case HCCC 149 of 2008 at Nyeri (later ELC 608/14) seeking to acquire title under adverse possession. This is the case that was transferred to Muranga Court at the establishment of an ELC Court and renamed ELC 31 OF 2018.

8. It was his case that on the 18/9/1995 the 1st Defendant transferred the suit land to the 2nd Defendant who has since not evicted him from

the suit land.

9. That in 1995 the 2nd Defendant sued his mother Margaret Wainaina vide SRMCC No 464 /1995 which case was stayed pending the hearing and determination of succession cause No 7 of 1997. This case remains undetermined.

10. That throughout the whole time, his occupation and possession has not been interfered with.

11. PW2- Geoffrey Macharia Muthoka testified and stated that the Plaintiff lives on the suit land. He stated that Wamaitha and her only son, the 2nd Defendant relocated to Nyandarua and left the land in the hands of the Plaintiff's father. Later in 1972 the 2nd defendant at the behest of Wamaitha came back to Kigumo and sought to sell the land to John Kamau Njuguna at Kshs 2640/- but the Plaintiff's father objected to the sale at Kigumo land control board. That he witnessed the sale of the land to the Plaintiff's father by Wamaitha. That it is then that Wamaitha agreed to sell the land to Wainaina but at Kshs 4000/- .That the 2nd Defendant was also present. That initially Wainaina took care of the land on behalf of Wamaitha as he was a nephew to Wamaitha.

12. DW1- Njuguna Kihara testified and stated that he is the son of Wamaitha Kihara, the first registered owner of the suit land after demarcation. That he is 89 years old and lives in Nyandarua in Rift Valley. He confirmed that upon relocation to Nyandarua, the land was left in the care of Plaintiff's father Wainaina. That later Wamaitha demanded that the Plaintiff's father vacate the suit land because it was to be sold. That Wainaina expressed his willingness to buy the land but Wamaitha declined and sold it to the 1st Defendant. He stated that he knows as a fact that Wamaitha never sold the land to Wainaina, his wife Margaret Mugoiri or the Plaintiff.

13. That Wainaina filed suit HCCC No 622 /89 seeking title by way of adverse possession. Wamaitha and Wainaina died and were substituted by the 2nd Defendant and the Plaintiff respectively. This suit was later dismissed.

14. That upon the demise of Wamaitha he included the 1st Defendant as a beneficiary by way of purchase. That he did not personally sell the land to the 1st Defendant but was sold by Wamaitha.

15. He denied being present in the meeting where the Plaintiff claims the suit land was sold to Wainaina.

16. DW2- Chege Njihia led evidence and stated that he is the registered owner of the suit land having purchased it from Njuguna Kihara, the 2nd Defendant. That he was informed by the 2nd Defendant that the Plaintiff's father entered the suit land with the permission of Wamaitha. Then the Plaintiff was a minor and entered the land by virtue of their parent's occupation and not as of his own right.

17. That he filed suit against the mother of the Plaintiff, Margaret Mugoiri in SRMCC 464 /95 for eviction but the suit was stayed pending the hearing and determination of H C Succ cause No 7 of 1997, which case is still pending.

18. When cross examined by Learned Counsel Mrs Mungai for the Plaintiff, the 1st Defendant admitted that he bought the land from the 2nd Defendant and not Wamaitha. That he knew of the Plaintiff's father's possession of the suit land and went ahead to buy it notwithstanding.

19. I have read and considered the written submissions of the parties.

20. Having considered the pleadings, the rival affidavit evidence the witness statements and the written submissions, there are two issues that commend themselves for determination; whether the suit is resjudicata; whether the possession by the applicant is adverse to the title held by the 1st Defendant.

21. The suit land was registered in the name of Wamaitha Kihara on the 4/3/1964. Evidence was led that she relocated to another farm in Nyandarua with her son the 2nd Defendant and left the suit land in the care of Wainaina Kihara, the Plaintiff's father.

22. Wainaina died in 1991 leaving his wife, Margaret Mugoiri, the Plaintiff and her children in occupation of the suit land. Mugoiri lodged a caution on the suit land on the 15/9/93 claiming purchaser's interest through HCCC No 622 of 1989 issued on the 24/8/1993.

23. Wamaitha died on 28/3/1995. Vide succession cause No 150 of 1995 the grant of letters of administration was issued to the 2nd defendant in the estate of Wamaitha on the 6/9/1995. On the 7//8/95 it was confirmed and the land was awarded to the 1st Defendant allegedly pursuant to a purchase from the 2nd Defendant. On the 18/9/95 the suit land was registered in the name of the 1st Defendant. It is not clear how the 3rd Defendant effected the registration of the land in the name of the 1st Defendant when the caution lodged on the 15/9/93 subsisted. Though the 3rd Defendant was enjoined in the suit, it did not file any defence at all.

24. Immediately upon becoming the registered owner of the suit land the 2nd Defendant sued the Plaintiff's mother Margaret Mugoiri vide SRMCC No 464/95 seeking eviction orders from the suit land. Margaret Mugoiri, the defendant then brought to the attention of the court the existence of HCCC No 622 of 1989 as well as the caution lodged on the suit land pending the hearing and determination of the said suit seeking adverse possession.

25. Similarly, the Plaintiff filed an application seeking to revoke the grant issued and confirmed to the 2nd Defendant vide Succession cause No 7 of 1997.

26. On the 28/1/1999 the court ordered the hearing of the case in SRMCC No 464/95 to be stayed until HCCC Succ cause no 7 /1997 is heard and determined. There was no evidence produced in Court by the parties to show if the Succ cause and the SRMCC NO 464 / 1995

were ever heard and determined.

27. Margaret Mugoiri Wainaina died in 1997.

28. I now turn to the issue of Resjudicata. Resjudicata is governed by Section 6 of the Civil Procedure Act which provides as follows;

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.

29. The 1st and 2nd Defendants contend that the suit is resjudicata in view of HCCC No 622 of 1989. It is common ground that the Plaintiff's father Wainaina Kihara sued the 2nd Defendants' mother Wamaitha seeking for title by way of adverse possession. Wainaina died and was substituted by his wife Margaret Mugoiri and when she died she was substituted by the Plaintiff. Wamaitha also died and was substituted by the 2nd Defendant. It is not in dispute that this suit was dismissed on the 23/9/2008.

30. The Plaintiff did not respond or file submissions on the issue however given that it goes to the jurisdiction of the court I will determine the preliminary objection upfront.

31. I have looked at the Judgement of the court in HCCC No 622 of 1989 and it is not in dispute that the claim was in respect to title by way of adverse possession. The subject matter is the suit land herein. However, the parties to the suit were the current Plaintiff and the 2nd Defendant. The reason for the dismissal was because of non-joinder of the 1st Defendant, the registered owner of the suit land.

32. It is the view of the court that the current suit is not resjudicata as the parties are different and the issue was not finally heard and decided by the Court.

33. It is not in dispute that the Plaintiff is in possession of the suit land since 1964. It is commonly accepted that the Plaintiff entered the suit land with his parents, Wainaina and Mugoiri in 1964 as caretakers of the suit land on behalf of Wamaitha. Evidence was led by PW2 and the 2nd Defendant that Wamaitha settled in Nyandarua on or around 1964 with her only son , Njuguna leaving the suit land in the hands of Wainaina.

34. According to the evidence of the 2nd Defendant, the Plaintiff's father was a caretaker and occupied the land with the permission of his mother which occupation continued under the said permit to date. The 1st and 2nd Defendants contend that at the time the Plaintiff settled on the land he was a child and did so by virtue of the possession of their parents. That in law a child cannot claim adverse possession.

35. A claim for title by way of adverse possession cannot therefore be founded where possession is with the permission of the owner as in this case in time, they argued.

36. The Plaintiff led evidence that Wamaitha sold the suit land to his father in 1972. He produced a sale agreement dated the 12/3/1972 in respect to 2.2 acres between Wamaitha and Wainaina Kihara. The sale price was Kshs 4000/- out of which Kshs 3000/- was paid leaving a balance of Kshs 1000/-. The agreement is witnessed by 5 witnesses among them being PW2 and the 2nd Defendant.

37. According to PW2, the 2nd Defendant came back to Muranga at the behest of his mother seeking to sell the land to a John Kamau Njuguna but the sale collapsed because Wainaina objected at the land control board. He then asked Wamaitha to sell the land which Wamaitha agreed at Kshs 4000/- leading to the execution of the agreement alluded to earlier.

38. The 2nd Defendant has denied that Wamaitha sold the suit land to the Plaintiff's father. Given the evidence of PW2 and the particulars of the suit land disclosed in the agreement of sale including the acreage of 2.2 acres and the caution lodged by the Plaintiff's mother on the 15/9/1993, claiming purchasers interest, the court is of the view that this evidence is consistent and finds that there was indeed a sale between Wamaitha and Wainaina in 1972. According to PW2, the balance of Kshs 1000/- was payable upon transfer of the suit land to Wainaina however Wamaitha is said to have later declined to conclude the sale.

39. According to the evidence on record it would appear to the court that the suit land was sold twice; in 1972 by Wamaitha to Wainaina Kihara and later after the death of Wamaitha by the 2nd Defendant to the 1st Defendant.

40. It is noteworthy that the 1st Defendant has not raised a counterclaim in this suit. He led evidence that he allegedly purchased the suit land from the 2nd Defendant with the full knowledge of the Plaintiff's possession and occupation over the years. Be that as it may, the 2nd Defendant did not produce any evidence to support any purchase of the suit land from the said Njuguna. In any event the sale by Wamaitha to the Plaintiff's father was first in time and therefore takes precedence.

41. It is clear from the record that at no time did Wamaitha assert her right of ownership by dispossessing the Plaintiff's father from the land and he and his family continued to occupy the suit land until 1991 when he died leaving the suit land in the possession and occupation of the Plaintiff and his mother Margaret Mugoiri.

42. Time therefore started running for purposes of adverse possession from 1972. By the year 1984, 12 years had expired and adverse possession had accrued and vested in the name of Wainaina Kihara.

43. It is borne from the record that in 1989 Wainaina Kihara sued Wamaitha in HCCC No 622 of 1989 seeking title by way of adverse possession. It is the view of the court that by the time of filing this suit adverse possession had accrued to Wainaina Kihara so much so that neither this suit nor the suit No 464 of 1995 seeking eviction interrupted time from running. This is because time had run its full course in favour of the Plaintiff's father.

44. By the year 1989 Wamaitha held the title of the suit land in trust for Wainaina Kihara. I am guided by the decision of the court in **Mwangi & Another –v – Mwangi, (1986) KLR 328**, where it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights. Adverse possession is thus more about the equitable interest of a party in possession than a substantive declaration as to the legal right or validity of ownership.

13. In the case of **Joseph Gahumi Kiritu Vs Lawrence Munyambu Kabura CA No 20 OF 1993** Justice Kwach JA (as he then was) stated as follows;

“The passage from Chesire’s Modern Law of Real Property to which Porter JA made reference in **Githu Vs Ndeete** is important and deserves to be read in full. Time which has begun running under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that merely formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. He must either make a peaceable and effective entry, or sue for recovery of the land.” (emphasis is mine).

45. Chanan Singh J, in **Jandu v Kirpal [1975] E A 225, at p 237** and Simpson, J (as he then was), in **Wainaina v Murai and others [1976] Kenya L R 227 at p 231** were unanimous that the paper owner must have knowledge of the occupation of the adverse possessor and that he has been dispossessed. In this case both the 1st and the 2nd Defendants had knowledge of the open and exclusive possession of the suit land by the Plaintiff.

46. It is the holding of the court that the possession of the Plaintiff's father and subsequent possession of the Plaintiff of the suit land to date is adverse to the title held by the 2nd Defendant.

47. In the upshot, the Plaintiff's suit succeeds and I make the following orders;

- a. That the Plaintiff has proved title by way of adverse possession.
- b. That the title in the name of Chege Njihia be and is hereby declared extinguished in favour of the Plaintiff under section 17 of the Limitations of Actions Act.
- c. That the Plaintiff be registered as proprietor of the suit land under the provisions of section 38 of the Limitations of Actions Act.
- d. In default the Deputy Registrar of this court is ordered to execute all the documents to effectuate the above orders.
- e. The cost of the suit is in favour of the Plaintiff.

48. 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 stay execution for a period of 30 days from the date of this judgement.

49. It is so ordered.

DATED, DELIVERED 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 judgement 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