



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

ELC CASE NO. 15 OF 2014

(FORMERLY ELC KERUGOYA NO. 58 OF 2013)

(CONSOLIDATED WITH ELC NO. 82 OF 2011 O.S.)

SARAH KANYI MUGO.....1ST PLAINTIFF

LUCY WAMBUGI MUGO.....2ND PLAINTIFF

PETER NJERU MUGO.....3RD PLAINTIFF

VERSUS

NGARI KIGORO.....1ST DEFENDANT

JAMES IRERI GICHURI.....2ND DEFENDANT

JUDGEMENT

1. There are two consolidated suits in this matter. By a plaint dated 17th July 2009 and amended on 4th October 2011 the 3 Plaintiffs sought the following reliefs against the Defendants:

a. Eviction of the Defendants, their families or any persons claiming under them, their workers, agents or anyone else residing upon the Plaintiffs' land LR Mbeti/Gachuriri/446 without the Plaintiffs' permission.

b. The Officer Commanding Station (O.C.S.) Kiritiri Police Station do provide aid and security during the eviction.

c. Costs of this suit be provided for.

d. Any other or further relief this honourable court may deem fit to give.

2. The basis of the Plaintiffs' suit was that the 1st and the 2nd Plaintiffs were the registered proprietors of *Title No. Mbeti/Gachuriri/446* (hereinafter the *suit property*). The 3rd Plaintiff came in a very unusual capacity as "head of family" and as manager and controller of the affairs and finances of the 1st and 2nd Plaintiffs.

3. The Plaintiffs pleaded that the Defendants and their respective families were wrongfully occupying the suit property by way of trespass and that they had failed or neglected to vacate the suit property despite demand and notice of intention to sue, hence the suit.

4. By a defence dated 3rd August 2009 and amended on 7th October 2011, the Defendants contended that they had been in occupation of the suit property for a period exceeding 12 years openly and without disturbance hence the Plaintiffs had lost any claim over the suit property under the law of limitation of actions.

5. The second suit is an originating summons dated 8th July 2011 by the Defendants under **Section 38 of the Limitation of Actions Act (Cap. 22), Section 126 of the Registered Land Act, Order 37 Rules 7 and 19 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act (Cap. 21) and all enabling provisions of the law.** By the said originating summons, the Defendants sought the following orders:

a. That the honourable court do declare that the 1st and 2nd Plaintiffs herein, Ngari Kigoro and James Ireri Gichuri have each

become entitled to ownership of portions measuring 6.785 hectares out of land parcel No. Mbeti/Gachuriri/446 measuring approximately 13.57 hectares as against the 1st and 2nd Defendants by virtue of Section 7 of the Limitation of Actions Act on the ground that since 1984, the Plaintiffs have openly, peacefully and of right been in occupation of the said parcel of land, that is to say, for a period exceeding 12 years preceding the presentation of this summons.

b. That in the alternative, there be a declaration that the 1st and 2nd Defendants were registered as proprietors of portions as set out at paragraph 1 out of parcel of land No. Mbeti/Gachuriri/446 on behalf of and in trust for the Plaintiffs herein.

c. That the honourable court do declare that the 2nd Plaintiff herein, James Ileri Gichuri, has become entitled to ownership of a portion measuring 0.80 hectares out of land parcel No. Mbeti/Gachuriri/1669 measuring approximately 10.45 hectares as against the 3rd Defendant by virtue of Section 7 of the Limitation of Actions Act on the ground that since 1984, the Plaintiff has openly, peacefully and of right been in occupation of the said parcel of land, that is to say, for a period exceeding 12 years preceding the presentation of this summons.

d. That in the alternative, there be a declaration that the 3rd Defendant was registered as proprietor of a portion measuring 0.80 hectares out of land parcel No. Mbeti/Gachuriri/1669 on behalf of and in trust for the 2nd Plaintiff herein.

e. That costs of the suit be awarded to the Plaintiffs.

6. The said originating summons was supported by two affidavits sworn by the Defendants on 8th July 2011. They contended that each of them had been in occupation of one half of the suit property for periods exceeding 12 years. They contended that their occupation had been open, exclusive and without interruption since at least 1984.

7. The 2nd Defendant, additionally, claimed to have been in occupation of a portion of 0.80 ha comprised in *Title No. Mbeti/Gachuriri/1669* (hereinafter *Parcel 1669*) which is registered in the name of the 3rd Defendant in the originating summons, Albert Muchiri Karani.

8. The 1st Plaintiff, Sarah Kanyi Mugo, filed a replying affidavit on her own behalf and on behalf of the 2nd Plaintiff in response to the said originating summons. She stated that the Plaintiffs acquired the suit property from one Anon Herbert Mwathi (hereinafter Herbert) through purchase in 2008. She denied the claim for adverse possession and stated that the Defendant's were merely licencees on the suit property.

9. The 3rd Defendant in the originating summons filed a replying affidavit sworn on 15th November 2011 in opposition thereto. It was denied that the 2nd Defendant was ever in occupation of parcel 1669. The 3rd Defendant further stated that he had all along been in exclusive possession of his land and that the 2nd Plaintiff had his own land in Kianjiru but was merely trying to grab parcel 1669.

10. When the suit was listed for hearing on 5th March 2019 the advocates for the parties consented to have the consolidated suits disposed of on the basis of the pleadings, affidavits, witness statements and documents on record and without calling witnesses. The parties further agreed to file and exchange written submissions on the matter.

11. The Plaintiffs were to file their submissions and authorities within 30 days whereas the Defendants were to file and serve theirs within 30 days upon the lapse of the period granted to the Plaintiffs. The record shows that the Plaintiffs filed their submissions on 24th June 2019 whereas the 1st and 2nd Defendants filed theirs on 7th June 2019. The 3rd Defendant filed his submissions on 21st May 2019. There is, however, no indication of the 3rd Defendant in the originating summons, Albert Muchiri Kimani having filed any submissions herein.

12. The court has noted that the parties herein did not file any agreed statement of issues in the matter. As a result, the court shall frame the issues for determination in accordance with **Order 15 Rule 2 of the Civil Procedure Rules**. Under the said rule, the court may frame issues from:

- a. The pleadings.
- b. The contents of documents produced by the parties.
- c. Statements made on oath by or on behalf of the parties.

13. The court has considered the pleadings, statements, affidavits and documents on record in this matter. The court is of the view that the following issues arise for determination in the consolidated suits:

- a. Whether the 1st and 2nd Plaintiffs are the registered proprietors of the suit property.
- b. Whether the Defendants have demonstrated their claim for adverse possession.
- c. Whether the Plaintiffs are entitled to the reliefs sought in the amended plaint.
- d. Whether the Defendants are entitled to the reliefs sought in the originating summons.
- e. Who shall bear the costs of the consolidated suits.

14. Although the Defendants denied the Plaintiffs' ownership of the suit property, such denial cannot stand in the face of the Defendants' claim for adverse possession. By filing of the originating summons the Defendants were implicitly acknowledging that the 1st and 2nd Plaintiffs were the registered owners coupled with a plea that their title to its recovery had been extinguished by operation of law. Moreover, there is abundant evidence on record to demonstrate that the 1st and 2nd Defendants were registered proprietors of the suit property. There is a copy of the title deed and a copy of the relevant land register on record. The 1st issue is therefore answered in the affirmative.

15. The 2nd issue is on whether the Defendants have established their claim for adverse possession. There are two properties involved in the originating summons. The first is the suit property whereas the second is parcel No. 1669 which is the subject of the claim by the 2nd Defendant only. The court shall deal with each of those two claims in turns.

16. The legal requirements for proving adverse possession were restated in the cases of: **Wambugu Vs Njuguna [1983] KLR 172; Githu Vs Ndeete [1984] KLR 776; Kasuve Vs Mwaani Investments Ltd & 4 Others [2004] 1KLR 184 and Kimani Ruchine Vs Swift Rutherfords & Co Ltd [1980] KLR 10.**

17. In the case of **Kasuve Vs Mwaani Investment Ltd** (supra) the elements of adverse possession were summarized as follows;

“...and in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, Wanja Vs Sakwa No. 2 [1984] KLR 284. A title by adverse possession can be acquired under the Limitation of Actions Act for part of the land...”

18. The court has considered the entire material on record on this issue. The court has also considered the written submissions filed on behalf of the parties herein. There is abundant evidence on record to demonstrate that the Defendants have been in possession and occupation of the suit property for a considerable time. The Plaintiffs acknowledge that the Defendants have been in possession hence the reason for filing the suit for their eviction. The Plaintiffs, however, contend that the Defendants are not entitled to an order of adverse possession for some reason.

19. The first contention was that the Defendants were merely licensees on the suit property who had been authorized by the previous registered owner, Herbert to reside thereon. The evidence on record demonstrates that Herbert never recorded or filed a witness statement to that effect. He did not swear any affidavit to demonstrate how, where and when such consent or licence was given.

20. The second contention was that time for purposes of limitation could not run against Herbert because he was a minor at the time of his registration and that time could only start running upon his attainment of majority age. The court is unable to accept that contention. The material on record shows that the suit property was a sub division of *Title No. Mbeti/Gachuriri/172* which was at the material time registered in the name of Gekara Group Ranch in 1976.

21. The court is of the view that time for purposes of limitation started running from the time of the Defendants' possession in 1984 and not from the time sub division was done and Herbert registered as proprietor of the suit property in 1991. A computation of time from 1984 would show that 24 years had lapsed by the time the Plaintiffs acquired the suit property in 2008. Moreover, there is no evidence on record to demonstrate when the said Herbert attained the age of majority.

22. As was held in the case of **Githu V Ndeete (Supra)** a change of ownership does not necessarily affect the computation of time for purposes of adverse possession. The reason being that adverse possession is in the nature of a prescriptive right which runs with the land irrespective of changes in ownership. See **Wasui V Musumba [2002] 1 KLR 396.**

23. The court is thus satisfied on the basis of the material on record that the Defendants have demonstrated their claim for adverse possession with respect to the suit property. There is evidence to demonstrate that they have settled on the suit property *neq vi, neq clam, neq precario* and of right. They have since developed the suit property and built houses for their families thereon. There is no evidence to demonstrate any interruption of possession either through an effective entry by the owner or legal proceedings for eviction. There is no evidence to demonstrate that either Gekara Group Ranch or Herbert ever interrupted the Defendants' possession in the legal sense. The Plaintiff's suit was filed about 24 years after the Defendants settled on the suit property. The previous suits such as Embu ELC No. 224 of 2015 were not filed by the registered owners to assert their property rights.

24. The second aspect of the Defendants' claim for adverse possession related to a claim for a portion of 0.8ha out of parcel No. 1669 which is registered in the name of Albert Muchiri Karani. The court finds that there is scanty material on record to demonstrate this claim. In the court's opinion, the claim for a portion of 0.8ha out of the 10.45 ha comprised in parcel No. 1669 was not proved. The occupation of such a small portion of the entire land was not demonstrated through concrete evidence. The area in question was not identified with any measure of precision. No photographs, reports, plans other evidence was tendered to pin-point its location and that the 2nd Defendant was in exclusive possession of the 0.8 ha out of 10.45 ha. The replying affidavit of the registered owner sworn and filed on 15th November 2011 vehemently denied any such occupation. The owner swore that he was exclusively in possession of the entire parcel 1669.

25. The 3rd issue is whether the Plaintiffs are entitled to the reliefs sought in the amended plaint. Although the Plaintiffs have demonstrated their ownership of the suit property, the Defendants have demonstrated that the Plaintiffs have lost their right to its recovery through adverse possession. In the premises, the Plaintiffs are not entitled to the orders sought.

26. The 4th issue is whether the Defendants are entitled to the reliefs sought in the originating summons dated 8th July 2011. Since the Defendants have demonstrated their claim for adverse possession, they are entitled to some of the prayers sought as shall be specified hereinafter. However, the Defendants are not entitled to the declaration of trust sought in the summons. The 2nd Defendant is also not entitled to any declaration for adverse possession with respect to parcel 1669.

27. The 5th and final issue is on costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event as stipulated in the proviso to **section 27 of the Civil Procedure Act (Cap. 21)**. The court is, however, aware of the peculiar circumstances of this case and the circumstances under which the suit property was created upon sub-division of the original *Title No. Mbeti/Gachuriri/172*. The court is of the view that each of the parties should bear his own costs.

28. Before concluding the judgement, the court would like to comment on a matter which was raised by the 3rd Plaintiff in his witness statement dated 2nd May 2012 even though it was never raised in the pleadings. It was contended that the Defendants' claim for adverse possession was an abuse of the court process because there have been previous proceedings over the subject matter of the proceedings. The only suit which was cited was Embu ELC No. 224 of 2015.

29. The court has noted that the Defendants herein were among the 13 Plaintiffs in that suit. However, the nature of the action in that suit was totally different from the claim for adverse possession they have articulated in the originating summons. There is nothing in the previous suit which would stop an aggrieved party from filing a claim for adverse possession where the elements of adverse possession are present.

30. The upshot of the foregoing is that the court holds that the Defendants suit shall succeed to the extent stated earlier whereas the Plaintiffs suit shall fail in its entirety. Consequently, the court makes the following orders:

- a. The Plaintiffs' suit be and hereby dismissed in its entirety.
- b. The Defendants' originating summons dated 8th July 2011 is allowed in terms of order No. 1 thereof only.
- c. The reliefs sought in order Nos. 2-5 of the originating summons are hereby declined.
- d. Each party shall bear his own costs.

31. It is so ordered.

JUDGEMENT DATED, SIGNED AND DELIVERED AT EMBU THIS 4TH DAY OF JULY, 2019.

In the presence of Ms. Nzekele holding brief for Rose Njeru for the Defendants and in the absence of the Plaintiffs.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

4.07.19