



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.163 OF 2017

PETER MBURU KAMAU PLAINTIFF

-VERSUS-

LAWRENCE KAMAU KARIUKI DEFENDANT

JUDGEMENT

There are two suits herein which were *consolidated* vide a *Court Order* of 10th July 2013. The first suit is *ELC No.366 of 2012*, wherein the Plaintiff *Lawrence Kamau Kariuki (Suing as the Administrator of the Estate of the late John Kariuki Kamau)* sought for Judgement against the Defendants therein being *Peter Mburu Kamau* and the *Land Registrar Kiambu* for the following orders:-

- a) An order requiring the 1st Defendant to remove the semi-permanent structures he has erected on Title No. Lari/Kambaa/281, the building materials and debris he had deposited thereon and to restore the suit property to the condition it was in before he commenced the trespass.*
- b) A permanent injunction restraining and/or prohibiting the 1st Defendant whether by himself, his servants, and/or agents from trespassing on title No.Lari/Kambaa/281.*
- c) An order requiring the 2nd Defendant to discharge, remove, cancel and/or lift the caution registered against title No.Lari/Kambaa/281.*
- d) Aggravated damages against the 1st Defendant for unlawful trespass on the suit premises.*
- e) Costs of this suit and interest thereon at court rates from the date of filing suit until payment thereof in full.*
- f) Any other or further relief this Honourable Court may deem just and expedient to grant.*

The said suit was contested by the 1st Defendant, *Peter Mburu Kamau* who filed his *Statement of Defence* on 27th September 2012 and averred that he had had exclusive and uninterrupted possession of *LR.No.Lari/ Kambaa/281*, for more than 12 years, and the Plaintiff and/or his father did not file a suit to evict him. Therefore, the Plaintiff's claim over the suit property *Lari/Kambaa/281*, has been extinguished by the Defendant's adverse possession due to his exclusive and uninterrupted possession of the same for more than 12 years. Further the 1st Defendant urged the Court to dismiss the Plaintiff's suit with costs.

The second suit is the *Originating Summons No.641 of 2012*, filed by *Peter Mburu Kamau* (Defendant in *366 of 2012*) against *Lawrence Kamau Kariuki (being sued as the administrator of the Estate of the late John Kariuki Kamau)*. He is the Plaintiff in *ELC No.366 of 2012*. The Applicant in the *Original Summons* sought for the following orders:

- a) That the Applicant be declared to be entitled by adverse possession under Section 38 of the Limitation of Actions Act Cap 22 Laws of Kenya over land parcel Lari/Kambaa/281.*
- b) That the Applicant be registered as proprietor of the said land parcel Lari/Kambaa/281.*
- c) That the costs of this suit be awarded to the Applicant.*

The above *Originating Summons* was filed on 27th September 2012, the same date the said *Peter Mburu Kamau*, filed his *Defence* in *ECL No.366 of 2012*.

The said **Originating Summons** was opposed by the Respondent (**Lawrence Kamau Kariuki**) who denied that **Peter Mburu Kamau**, has been in adverse possession of the suit property. He further averred that if he was in possession, such possession was prior to the demise of his deceased father and was permissive and the Applicant (**Peter Mburu Kamau**) was allowed to occupy the suit property by the deceased as a licensee. Further that prior to the **Notice to Vacate**, the Applicant had only erected a single dwelling house for himself and wife but upon receipt of the **Notice to Vacate**, he illegally put up other semi-permanent structures. He also averred that the Applicant (**Peter Mburu Kamau**) illegally proceeded to register a caution on the suit property falsely claiming to have beneficiary interest in the suit property as evidenced from annexure **PMK-1**. It was his contention that the Plaintiff's occupation and use of the suit property was not hostile and/or inconsistent with the title of the deceased in the suit property. He further contended that the Plaintiff is not entitled to be registered as proprietor of the suit property by virtue of adverse possession or for any other reason and that the Plaintiff's claim is bad in law.

It is the two above suits that were **consolidated** on **10th July 2013** and **ELC No.641 of 2012** became the leading file.

The matter proceeded for hearing on **12th July 2017** when the Plaintiff gave evidence for himself and called no witness. The Defence hearing proceeded on **27th September 2017** wherein **Lawrence Kamau Kariuki** gave evidence and called no witness.

Briefly, the facts of the case are that the suit property herein **Lari/Kambaa/281**, is registered in the name of **John Kariuki Kamau** who was registered as such on **19th July 1990**. A title deed to that effect was attached to the pleadings and the said registration was under **'The Registered Land Act, Cap 300 (now repealed)**.

The said **John Kariuki Kamau** and the Applicant in the **Originating Summons**, **Peter Mburu Kamau** are biological brothers being sons of **Kamau Wanja (deceased)**. Further **Peter Kariuki Kamau** is also deceased having died in the year **2005**. It is also evident that during the lifetime of **John Kariuki Kamau**, the Applicant, **Peter Mburu Kariuki** resided on the suit property **Lari/Kambaa/281**. The Applicant averred that this suit property was an ancestral land which belonged to their father **Kamau Wanja** and **John Kariuki Kamau**, his elder brother was registered as a proprietor of the same to hold it on his behalf and on behalf of **Peter Mburu Kamau (in trust)**. He averred that he has been on the suit property for **over 50 years** and has brought up his family thereon. Therefore, he is entitled to ownership of the same through adverse possession. The Applicant (Plaintiff herein) claimed that his brother **John Kariuki Kamau** never sought to evict him from the suit property or filed any suit against him. He urged the Court to allow his claims as stated in the **Originating Summons**.

However, the Respondent in the **Originating Summons** or Plaintiff in **ELC No.366 of 2012**, **Lawrence Kamau Kariuki** alleged that the suit property was purchased by his father in the year **1957** for **Kshs.700/=**. He denied that the said suit property is an ancestral land and also contended that his father **John Kariuki Kamau**, was rightly registered as the proprietor of the suit property as he had purchased the same using his own money. He also contended that the Applicant lived on the suit property as a **licensee**, having been allowed by the deceased (**John Kariuki Kamau**) to put up a house thereon on temporary basis. He urged the Court to dismiss the instant **Originating Summons** and allow the orders sought in the **Plaint** filed in **ELC No.366 of 2012**.

After the parties gave their viva voce evidence, the respective advocates filed their rival **written submissions** and relied on various decided cases.

The **Law Firm of Gatitu Wang'oo & Co. Advocates** for the Applicant (Plaintiff herein) in the **Originating Summons** filed their written submissions on **5th December 2017** and relied on the case of **Peter Mhiri Michuki...Vs...Samuel Mugo Michuki (2014) eKLR**, which relied on the decision in the case of **Kimani Ruchine...Vs...Swift Rutherfords & Co. Ltd (1980) KLR**, where it was held that:

"The Plaintiffs have to prove that they have used this land which they claim as of right *Nec vi, Nec clam, Nec precario* (No force, no secrecy, no persuasion). So the Plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavor to interrupt it or by way of recurrent consideration".

On the part of the Defendant, the **Law Firm of Kembu Gitura & Co. Advocates** relied on the case of **Wambugu...Vs...Njuguna (1983) KLR 172**, where the Court held that:-

"Where the claimant is in exclusive possession of the land with leave and licence of the Appellant (owner) in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence the occupation is not adverse but with permission. The occupation can only be either with permission or adverse, the two concepts cannot co-exist".

They further relied on the case of **Malcom Bell...Vs...Daniel Toroitich Arap Moi & Another (2012)eKLR**, where the Court of Appeal held that:-

"A claim in adverse possession could not be sustained as the trial court had overlooked the circumstances in which the respondents came into possession – namely, through the permission of the deceased father of the Appellant".

This Court has now carefully considered the available evidence, the exhibits produced thereto, the written submissions and the cited authorities and it will render itself as follow:-

The issues for determination herein are:-

i. Is the Applicant (Peter Mburu Kamau) entitled to the suit

property by virtue of adverse possession?

ii. Was Peter Mburu Kamau justified in placing a caution on the suit property?

iii. Should the said caution be removed?

iv. Is the Defendant herein (Lawrence Kamau Kariuki) entitled to the orders sought in ELC.366 of 2012?

v. Who should bear costs of this suit?

It is evident that **John Kariuki Kamau (Deceased)** is the registered owner of the suit property **Lari/Kambaa /281**, which was registered so on **19th July 1990**. The title deed is registered under **Cap 300 (now repealed)**

Under the above registration **Section 27(a)** provides that:-

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”.

Therefore *prima-faciely*, the late **John Kariuki Kamau**, is the absolute owner of the suit property by virtue of holding the title deed issued on **19th July 1990**. However, as provided by **Section 28 of Cap 300**, the said right can be defeated as provided by the Act. Further **Section 30** of the above stated Act provides that registered owner’s rights can be affected by the overriding interests stated therein and specifically **Section 30(f)** provides:-

“rights acquired or in the process of being acquired by virtue of any written law relating to the Limitations of Actions or by prescriptions”.

The Applicant(Plaintiff) herein has claimed that he is entitled to be registered as a proprietor of the suit property by virtue of adverse possession. Therefore, if the Court was to find that the Applicant, **Peter Mburu Kamau** has been on the suit property adversely against the proprietor for a period of **over 12 years**, then the right of the proprietor can be defeated even though he/she is the absolute owner.

Further, **Section 38(1)** of the **Limitations of Actions Act Cap 22 Laws of Kenya** provides that:-

“where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 or land comprised in a lease registered under any of these 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”.

The Applicant herein has claimed that he is entitled to be registered as proprietor of the suit property of the suit property **Lari/Kambaa/281** by adverse possession and thus this suit. Has the Applicant availed sufficient evidence to prove his claim? The Court will not turn to the issues for determination as framed herein above.

i) Is the Applicant (Peter Mburu Kamau) entitled to the suit property by virtue of adverse possession?

As was submitted by the Defendant herein, **Black Law Dictionary 9th Edition** defines ‘adverse possession’ as

“The enjoyment of real property with a claim of right when that enjoyment is opposed to another person’s claim and is continuous, exclusive, hostile, open and notorious”.

The Applicant herein alleged that the suit property **Lari/Kambaa/ 281**, was owned by their late father **Kamau Wanja** and the late **John Kariuki Kamau** got registered as a proprietor during land demarcation and consolidation in 1957, to hold it in trust for the family of **Kamau Wanja**, the Applicant(Plaintiff) included. However, the Plaintiff’s claim is one of **adverse possession** but not for **declaration of trust**. Indeed as submitted by the Defendant, that parties are bound by their pleadings and they cannot submit and/or avail evidence outside their pleaded facts. I will concur with the findings in the case of **Independent Electoral & Boundaries Commission & Another...Vs...Stephen Mutinda Mule & 3 Others (2014) eKLR**, where the Court cited with approval the case of **Adeloun Oladeji (Nig) Ltd...Vs...Nigeria Breweries PLC S.C 91/2002**, and held that:-

“It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings or put in another way which is at variance with the averments of the pleadings, goes to no issue and must be disregarded”.

Since the Plaintiff herein did not plead the issue of trust in his claim, the Court will disregard his evidence that the suit property was originally owned by their father **Kamau Wanja** and that the late **John Kariuki Kamau** was holding it in trust for the family of the said **Kamau Wanja**, the Plaintiff herein included.

However, the Plaintiff testified that he has lived on the suit property for many years and that he brought up all his 12 children on the suit land. But the Defendant contended that the said occupation was with the permission of the late **John Kariuki Kamau** and therefore Plaintiff was a **licencee** and his possession was never adverse.

It is trite that for an occupation to be adverse, it must be done *without force, without secrecy* and should be *open*. The above position has been held in many judicial pronouncements. In the case of *Kimani Ruchire...Vs...Swift Rutherfords & Co, Ltd (1980) KLR*, the Court held that:-

“The Plaintiffs have to prove that they have used this land which they claim as of right Nec vi, Nec clam, Nec precario (No force, no secrecy, no persuasion). So the Plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavor to interrupt it or by way of recurrent consideration”.

However, the Plaintiff in his evidence alleged that he was allowed by his father to live on the suit property and therefore, it was his evidence that he had permission from his father. However, the Defendant has stated that the Plaintiff herein was a *mere licensee*, of the late **John Kariuki Kamau** and therefore his occupation cannot be adverse. Indeed the Plaintiff did state in his evidence that his brother (*late John Kariuki Kamau*) allowed him to occupy the suit property and never gave him eviction Notice. If the Plaintiff had permission of his brother to occupy and use the suit property, then his occupation cannot be adverse. See the case of *Wambugu...Vs...Njuguna (supra)*

“Where the claimant is in exclusive possession of the and with leave and licence of the Appellant (owner) in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence the occupation is not adverse but with permission. The occupation can only be either with permission or adverse, the two concepts cannot co-exist”.

The Plaintiff admitted that he occupied the suit property with

permission and *consent* of his deceased brother **John Kariuki Kamau**. The said **John Kariuki Kamau** died in the *year 2005*. Therefore the Plaintiff's occupation cannot be said to have been adverse to this brother and there was no evidence that he ever disposed the deceased herein. His brother died in the *year 2005* and the suit was filed in the *year 2012*. That period is *less than 12 years* and the **Plaintiff therefore cannot claim that his occupation was adverse** to the Defendant herein who is the administrator of the estate of **John Kariuki Kamau**.

ii) Was the Applicant Peter Mburu Kamau justified in placing a caution on the suit property?

Indeed the Applicant placed a *caution* on the suit property on *9th March 2012*, claiming beneficiary interest. However, it is not in doubt that the Plaintiff placed the caution when he was given *Notice to vacate*. The Court has held that the Plaintiff occupied the suit property as a *licensee* of his brother **John Kariuki Kamau** who died in the *year 2005* and therefore that licence was determined. The Court held that his possession of the suit property was not adverse and therefore he has not proved what beneficial interest he had on the suit property. The Court has seen a title deed for *Escarpment Jet Scheme/1776*, in the name of the Plaintiff. The Plaintiff therefore has his parcel of land registered in his name and he can certainly not have beneficial interest over a suit property owned by his late brother **John Kariuki Kamau**. The **Court finds that the Plaintiff was not entitled or justified to place a caution on the suit property herein Lari/Kambaa/281.**

iii) Should the said caution be removed?

Having found that the Plaintiff was not justified in placing a caution on the suit property, then the same **should definitely be removed** as provided by *Section 73(1)* of the *Land Registration Act 2012*, which provides:-

“A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar”.

iv) Is the Defendant herein entitled to the orders sought in ELC No.366 of 2012?

The Court has found that the Plaintiff herein has not proved that he has a beneficial interest over the suit property. The Court has also found that his occupation of the suit property is not adverse and therefore cannot be entitled to the suit property. He occupied the suit property with the permission of his deceased brother. The Defendant is the administrator of the estate of his late father **John Kariuki Kamau** and he should be allowed to administer the said estate freely and even distribute the same. With the existence of the caution lodged by the Plaintiff herein, then any disposition on the suit property would be impossible. The Court has held that the Plaintiff owns another parcel of land *Escarpment Jet Scheme/1776*, which is registered in his name and he cannot claim to have nowhere to move to. The Plaintiff should therefore remove the caution on the suit property. Consequently, the **Court finds that the Defendant is entitled to the prayers sought in ELC No.366 of 2012 in terms of prayers No.(a), (b) and (c) only** but not to aggravated damages as the Plaintiff's occupation of the suit property was with permission of his brother the late **John Kariuki Kamau**.

v) Who should bear costs of the suit?

Ordinarily, costs do follow the event. The Defendant is the successful litigant. Therefore the Plaintiff herein should bear costs of this suit.

Having now carefully considered the available evidence, the Court finds that the Plaintiff herein did not prove his case on the required standard of balance of probabilities. Consequently, the **Court dismisses the Plaintiff's claim as stated in the Originating Summons filed in court on 27th September 2012 entirely, with costs to the Defendant.**

However, the **Defendant claims in the Plaint dated 21st June 2012 in ELC.No.366 of 2012 succeeds in terms of prayer No.(a), (b) and (c).**

It is so ordered.

Dated, Signed and Delivered at Thika this 6th day of June 2018.

L. GACHERU

JUDGE

In the presence of

No appearance for Plaintiff

M/S Njoki Gachihi for Defendant

Lucy – Court clerk

L. GACHERU

JUDGE

Court – Judgement read in open court in the presence of M/S Njoki Gachihi for Defendant and absence of Plaintiff and his advocate.

L. GACHERU

JUDGE

6/7/2018