



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

E.L.C. CASE NO. 243 OF 2014

(FORMERLY KERUGOYA ELC 312 OF 2013)

EPHANTUS MURIITHI OBADIAH.....PLAINTIFF

VERSUS

ISHUMAEEL JORAM.....DEFENDANT

JUDGEMENT

1. By an originating notice of motion dated 2nd June 1978 brought under the provisions of **section 38 of the Limitation of Actions Act (Cap 22) and Order LI Rule 1 of the former Civil Procedure Rules, 1948** the original Applicant Obadiah Kathanjagui (hereinafter called *Obadiah*) sought the following orders against the original Respondents Joram Gaciithire (hereinafter called *Joram*) and Ishumael Joram (hereinafter called *Ishumael*).
 - a. That the Applicant be registered as the sole proprietor of all that parcel of land known as Ngandori/Kiriari/1010 in the Embu District of the Republic of Kenya in place of the 2nd Respondent Ishumael Joram.
 - b. Costs of this application be provided for.
 - c. Such other or alternative relief as this honourable court may deem fit to grant.
2. The said motion was supported by the affidavit of Obadiah sworn on 22nd April 1978. It was stated by Obadiah that sometime in 1961 Joram and Ishumael agreed to sell to him *Title No. Ngandori/Kiriari/1010* (hereinafter called *the suit property*) at an agreed purchase price of Kshs 1,350/-. It was stated that no consent of the Land Control Board (LCB) was granted at the material time even though he took possession of the suit property, cleared the bushes thereon and developed it extensively.
3. It was contended by Obadiah that he had enjoyed exclusive and uninterrupted possession of the suit property for 16 years hence he sought to be granted a declaration to the effect that he had acquired the suit property through adverse possession.
4. The said originating motion was amended on or about 14th March 1979 to invoke the provisions of **Order XXXVI Rules 3D and 3F of the Civil Procedure Rules, 1948**. The said amendment also deleted reference to **Order LI Rule 1 of the Civil Procedure Rules**. All the other particulars of that pleading remained unchanged.
5. The record further shows that on or about 22nd February 1989 the dispute was by consent of the parties referred to the District Officer of Manyatta Division within Embu County for arbitration. The District Officer was to be assisted by four (4) elders whereby each party was to appoint two (2). The award was to be filed within 90 days.
6. It would appear that there was a considerable delay in the conduct of the arbitration process before the District Officer Manyatta. The delay was attributable partly to frequent transfers of District Officers and partly due to lack of cooperation on the part of the litigants to conduct the process expeditiously. Consequently, no award was ever filed within 90 days or at all.
7. The record further shows that after a delay of nearly 10 years before the District Officer, the court made an order on 14th October 2008 for the relevant file to be returned to court for hearing and determination of the case.
8. During the pendency of the proceedings, Obadiah passed on and he was replaced by his son Ephantus Obadiah (hereinafter the *Applicant*) as his personal representative. The record also shows that Joram passed on during the pendency of the suit. He was, however, not

substituted by a personal representative. The record shows that the Applicant's advocate opted to abandon the claim against him and opted to proceed against Ishumael as the registered proprietor of the suit property.

9. At the trial hereof, the Applicant testified on behalf of the estate of the late Obadiah whereas Ishumael testified on his own behalf. No other witnesses were called by the parties.

10. The main issue for determination in this suit is whether the Applicant has made out a case for adverse possession with respect to the suit property. 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.**

11. In the case of **Kasuve Vs Mwaani Investment Ltd** (supra) the requirements 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...”

12. The first element relates to Obadiah's possession of the suit property. The court is satisfied on a balance of probabilities that Obadiah and his family were in occupation of the suit property from 1961 or thereabouts. The supporting affidavit of Obadiah sworn on 22nd April 1978 described the condition of the suit property at the material time and the steps he took in order to develop it. The evidence of the Applicant also indicated that Obadiah bought the suit property from Joram in 1961 or thereabouts. He stated that he planted coffee stems on the suit property in 1964. He also indicated that there are some tea bushes on the suit property.

13. The Respondent on the other hand stated that he was allocated the suit property by his clan in 1960 but he did not utilize it. He was by then of majority age working in Nairobi. He would only occasionally visit the suit property. According to the Respondent, he only discovered that Obadiah had settled on the suit property in 1974.

14. The impression created by the Respondent's witness statement and oral evidence was that he was simply laid back and that he left everything to his late father, Joram. Even after discovering that the suit property had been cautioned and that Obadiah had settled on it, he would still send his father to ask Obadiah to move out of the suit property. He was mostly resident in Nairobi at the material time hence it was not possible for him to know exactly when Obadiah settled on the suit property.

15. The next aspect for consideration was whether Obadiah's occupation was hostile and adverse to the interests of the registered owner. The Respondent's evidence was that as registered owner, he had never given out the suit property to anybody else to cultivate it. He also stated that he had never allowed his father Joram to sell the suit property.

16. On the other hand, the Applicant's evidence was that the suit property was fully developed with houses, coffee stems and tea bushes. It was his evidence that the Respondent had never settled on or cultivated any part of the suit property. During cross-examination by the Applicant's advocate, the Respondent conceded that there are some houses, coffee stems and tea bushes on the suit property.

17. The court is satisfied on the basis of the evidence on record that Obadiah's possession of the suit property was adverse to the interests of the registered owner. He was not in occupation with the consent or permission of the Respondent. The developments which were undertaken by him were of a permanent nature which are inconsistent with the interests of the registered owner.

18. The court is further satisfied that Obadiah's occupation of the suit property was exclusive and without interruption. The Respondent conceded that he had never occupied or utilized any part of the suit property. There was no interruption of occupation in the legal sense since the Respondent never made an effective entry into the suit property nor did he take legal proceedings for eviction. He simply sent his late father, Joram, to ask Obadiah to vacate.

19. In the case of **Githu Vs Ndeete** (supra) it was held *inter alia*, that;

“Time ceases to run under the Limitation of Actions Act either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner makes an effective entry into the land. See Cheshire's Modern Law of Real Property, 11th Edition at p. 894. In my view the giving of notice to quit cannot be an effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act...”

20. The court is satisfied upon consideration of the evidence and material on record that the Applicant has proved all the elements of adverse possession. The Applicant is, therefore, entitled to the orders sought in the originating notice of motion taken out on 2nd June 1978 as subsequently amended.

21. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event. See **section 27 of the Civil Procedure Act (Cap 21)**. As such, a successful litigant will normally be awarded costs of the suit unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. In the premises, the Applicant shall be awarded costs of the suit.

22. The upshot of the foregoing is that the court finds merit in the originating notice of motion dated 2nd June 1978 as amended on 14th March 1979 and the same is hereby allowed in terms of Order (a) thereof. The Applicant is awarded costs of the suit.

23. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **4th** day of **OCTOBER, 2018**.

In the presence Mr Okwaro holding brief for Mr P.N. Mugo for the Plaintiff and Mr Njiru Mbogo for the Defendant.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

04.10.18