



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 118 OF 2011 (OS)

ALEXANDER MBUGUA.....1ST PLAINTIFF

MWARI MBUGUA.....2ND PLAINTIFF

VERSUS

BEATRICE MUTUNGI M'TUAMIKWA.....1ST DEFENDANT

EVEREST ENTERPRISES LIMITED.....2ND DEFENDANT

JUDGMENT

1. The Plaintiffs were husband and wife. They filed this Originating Summons suit claiming entitlement to land parcels LR. NO. LAIKIPIA/KALAU/618 and 619 measuring approximately 30 acres by way of adverse possession. Their claim was that the two suit parcels are registered in the name of the 1st defendant and came into existence after being excised from parcel No. LR. NO. LAIKIPIA/KALAU/438 measuring approximately 39 hectares, which was registered in the name of Joram Mutungi M'Twamikwa, the deceased husband of the 1st defendant. That the deceased sold to the plaintiffs 20 acres of land in 1992 for a consideration of Kshs. 1,200,000 and later sold another 10 acres.

2. The plaintiffs took possession in 1995 after making substantial payments, survey was carried out, boundaries were fixed and they built a farm house. They posted a worker by the name Francis Muthuri who has since resided there and taken care of the farm. They have extensively developed the land and have continuously been cultivating the same without interruption.

3. The 1st defendant opposed the suit via her replying affidavit dated 7th September 2011. She contends that indeed land parcel No. LR. NO. LAIKIPIA/KALAU/438 was registered in her deceased husband's name which was later sub-divided into 8 parcels of which she is the registered owner of 2 of the parcels namely, LR. NO. LAIKIPIA/KALAU/618 and 619. She denies that her husband ever sold the suit parcels. She added that the 1st plaintiff was cultivating the suit land jointly with her husband and when the latter passed on, she immediately told the plaintiffs to desist from cultivating the land. She continued issuing demand letters to the plaintiffs. She contends that the plaintiffs have never been in occupation of the suit land for a period of over 12 years, nor have they developed the land. She avers that she leased the suit land to the 2nd defendant who has cultivated it. She prays for the dismissal of the suit with costs.

4. The only pleading filed by the 2nd defendant is the Notice of claim against co-defendant filed in court on 5.6.2012. The 2nd defendant averred that it was entitled to full indemnity from the 1st defendant regarding the claims made by the plaintiff. Apparently, the 2nd defendant had entered into lease agreements with the 1st defendant in respect of the suit parcels.

5. On 3.3.2021, counsel for the 2nd defendant informed the court and the advocates present that the 2nd defendant was no longer on the land. Counsel for the plaintiff agreed with this averment and hence made an application to withdraw the case, of which there was no objection from counsel for the 1st defendant. **Thus the case against the 2nd defendant, as well as the notice of claim against the 1st defendant were withdrawn with no orders as to costs.**

6. Apparently, 1st plaintiff is not alive. I have stumbled upon this information by perusing an application filed on 15.8.2016 by the 1st defendant for dismissal of the suit for want of prosecution. In response thereof, the 2nd plaintiff filed a replying affidavit on 9.5.2017 averring that calamity had struck her family like a thunder-bolt whereby, her husband who is the 1st plaintiff had passed on hence the delay in the prosecution of the case. That application was withdrawn on 30.6.2017. Thus the issue of the death of the 1st plaintiff was not determined. Nevertheless, having come across that affidavit of the 2nd plaintiff of 9.5.2017, and noting that 2nd plaintiff introduced herself as the widow of 1st plaintiff during her testimony in court, I will proceed on the basis that the 1st plaintiff is no more.

7. This matter proceeded for hearing on 1/11/2017 before a visiting Judge, the Hon. Judge G. Kemei with the plaintiffs having 3 witnesses and the defence having 1 witness. While the matter was pending the writing of the Judgment before Hon. Judge G. Kemei, the plaintiff made an application dated 30.4.2018 to reopen the case and recall the 1st defendant for further cross examination, which application was allowed vide a ruling delivered on 8.4.2019. In that regard, I took over the case of which I gave directions on 9.5.2019 for the matter to proceed from where case had stopped.

Plaintiff's case

8. **PW1, Mwari Mbugua**, is the 2nd plaintiff. She introduced herself as the widow of the 1st plaintiff. She adopted her statement filed on 28.7.2017 as her evidence. She also produced the following documents as her exhibits;

- a) Green Card marked AM 1 (a) for LR. No. 618
- b) Green Card marked AM 1 (b) for LR. No. 619
- c) Copy of sale agreement marked AM 2(a)
- d) Further payment for consideration dated 24/7/93 marked AM 2(b)
- e) Receipt of Kshs. 140,000 dated 25/4/1993 marked AM 2(c)
- f) Receipt of Kshs. 60,000 dated 28/8/1994 marked AM 2(d)
- g) Receipt of Kshs. 40,000 dated 30/9/1994 marked AM 2(e)
- h) Receipt of Kshs. 30,000 dated 1/11/1994 marked AM 2(f)
- i) Receipt of Kshs. 30,000 dated 7/12/1994 marked AM 2(g)
- j) Receipt of Kshs. 20,000 dated 10/01/1995 marked AM 2(h)
- k) Receipt of Kshs. 20,000 dated 5/6/1995 marked AM 2(i)
- l) Receipt of Kshs. 40,000 dated 15/3/1995 marked AM 2(j)
- m) Picture of the home of the shamba marked AM 3(a)
- n) Picture of the land marked AM 3(b)

9. The evidence of the 2nd plaintiff is that vide an agreement of 17.11.1992, they commenced the process of buying 20 acres, completing the payments in 1993. The completion of this deal was marked by pw3 delivering a he goat to "mzee" (husband of the 1st defendant). On 26.8.1994, they again embarked on buying 10 more acres completing the payments in 1995. They then brought a surveyor called Mwangi but the subdivision was not finalized. The plaintiffs then entered the land in 1995, clearing the forests and occupying the land without questions from anyone.

10. On cross examination, pw1 averred that her husband entered into an agreement for the purchase of land @ Kshs. 50,000 per acre. She was not involved in the purchase, she however did make payments. She could not trace some of the receipts for payments made and she cannot know the amount paid in total. However, they did complete making payments for the 20 acres in 1994 and for the additional 10 acres in 1995.

11. They took possession in 1993 and the land was surveyed in 1995. They did not live on this land, but they were cultivating it. They also hired someone to work on the land, who in turn used to lease it out with her permission.

12. Pw1 further stated that she was not aware of any letters demanding that her husband do vacate the suit land. She is however aware of the lease to the 2nd defendant. She also states that the 1st defendant has been grazing on the land though she did not know the acreage thereof.

13. On re-examination she stated that they have never vacated the suit land since 1993 and the seller never asked them to do so. That the defendants occupied the land for 1-2 years and then left the farm.

14. **PW2, Francis Gitima Muthuri**, adopted his statement dated 28.7.2017 as his evidence. He introduced himself as the employee of the plaintiffs. He contends that he has lived on the suit land since 1994 to date. He averred that one John Karuga came to the land in year 2011 and started cultivating the land which was not under cultivation for about 2 years when the plaintiffs had gone to South Africa. He further stated that he cultivates 15 acres, the rest is forested.

15. On cross examination, pw2 reiterated that he started working as a farm caretaker for the plaintiffs in 1994, of which a 2 bed-roomed timber house was built. He initially started cultivating 7 acres. He has never stopped cultivating that land since he went there. He contends

that 5 more people cultivate the land. The 1st defendant grazes on the land which used to be utilized by one John Karuga, which is now a thicket/forest.

16. **PW3, Dr. Mworja Mugambi**, adopted his statement filed on 28/07/2017 as his evidence. He identifies pw1 as his elder sister. He is the one who took her to the home of the seller of the land, one Joram M'Mutungu to negotiate the price. They initially negotiated for 20 acres at sh. 50000 per acre, and an agreement to that effect was made on 17.11.1992. Thereafter, 10 more acres were added which was paid up to year 1997. Thus in August- September of 1997, pw3 took a ram to the seller as a gesture of thanking him. From henceforth, plaintiffs took over the land fully.

17. On cross examination he averred that he was a witness to the plaintiffs when they paid Kshs. 50,000 per acre for the 20 acres. He did not witness the payment of the balance and he could not recall if the full purchase price had been paid, nor was he involved in the purchase of the 10 acres.

Defence case of 1st defendant

18. **DW1, Beatrice Mutungi**, the 1st defendant adopted her statement dated on 29/06/2017 as her evidence. She averred that the original parcel of land no. Laikipia/Kalalu/438 was registered in the name of her husband Joram M'Mutungu who died on 16.8.1999. The aforementioned land parcel was subdivided into 8 parcels no's, 617-624 Laikipia/Kalau. She then became the registered owner of the suit parcels 618 and 619.

19. Dw1 denies that her husband ever sold the suit land parcels. Instead, sometime in the year 1998-1999, the 1st plaintiff was cultivating the land jointly with her husband. They would then share profits. After the death of her husband, Dw1 told the 1st plaintiff to stop using the land, but he didn't heed this warning, prompting Dw1 to issue a demand letter through her advocates S.M.Mwingi M'Inoti Advocates on 3.8.2001.

20. Dw1 further stated that 1st plaintiff did stop the cultivation in December 2001, but resumed cultivation in year 2004. Again Dw1 told him to stop cultivation. He declined. Thus on 12.5.2004, Dw1 instructed the firm of Kahiu Mbugua advocates to write another demand letter. The 1st plaintiff vacated the land, but resumed cultivation in year 2009. This time round, Dw1 lodged a case with the Lands tribunal. On 12.3.2010, again Dw1 instructed the firm of Gichure advocates to issue a demand letter to 1st plaintiff.

21. Dw1 went on to state that the both plaintiffs have never occupied/resided on the suit land. She added that she had leased the suit land to the 2nd defendant who had embarked on cultivating horticultural crops.

22. In support of her claim, Dw1 produced the documents in her list of 29.6.2017 as her 12 exhibits itemized as follows;

- a) Green Card for parcel 438
- b) Death certificate of Dw1's husband
- c) Mutation forms
- d) Title deed No. LAIKIPIA/KALAU/618
- e) Title deed No. LR. NO. LAIKIPIA/KALAU/619
- f) Letter dated 3/8/2001
- g) Letter dated 12/5/2004
- h) Application to file a claim to the Lands Tribunal
- i) Letter dated 9/8/2011
- j) Letter dated 12/3/2010
- k) Lease agreement
- l) photographs

23. On cross examination, Dw1 averred that LR. NO. LAIKIPIA/KALAU/438 was registered in her deceased husband's name which he divided into 8 portions and she inherited them and she has 7 titles as one was given out. She is not aware that the plaintiffs bought LR. NO. LAIKIPIA/KALAU/618 and 619. She only knows that the 1st plaintiff was farming with her husband and this is when the timber structure was built. She does not know who is currently cultivating the land but she knows there are many people cultivating it. She does not know the caretaker of the 2nd plaintiff, Francis Gituma Muthuri, or that he cultivates the land. However, she states that they were cultivating the land in the year 1998-1999.

24. On re-examination she stated that her husband and the 1st plaintiff jointly cultivated the land in 1998/1999 and would share the proceeds and after his death, the 1st plaintiff did not continue to cultivate the land though he would vacate and return. She added that the land is being cultivated by many people and she herself grazes on a portion of the land.

Submissions

25. The plaintiffs filed their submissions on 28.3.2018 averring that by virtue of the sale agreement, the plaintiffs were to buy 20 acres of land at Kshs. 50,000 per acre, but the agreement was voidable due to the non-compliance with the 6 months period set out under section 6 (1) of the Land Control Act. Nevertheless, the seller received full payment for the 20 acres and he decided to sell to the plaintiffs an additional 10 acres at the same price. By 5th June 1995, the seller had received full payment for the entire 30 acres. The seller then died in 1999 after sub-dividing the land. That the plaintiffs have been in occupation since then. Thus, the vendor became a trustee of the plaintiffs by virtue of the operation of law of equity and the claimants' possession became adverse upon payment of the last installment. The plaintiffs urge the court to hold that they have proven their case on a balance of probability.

26. The plaintiffs have relied on the following cases; **Alibhai & Others V Karia & another (1995) 2 EA 9, Wambugu V Njuguna (1983) KLR 172, Hosea V Njiru & others (1974) EA 526, Githu V Ndeete (1984) KLR 776, and Salim V Boyd & another (1971) EA 550.**

27. The 1st defendant submitted that the plaintiffs have not been in exclusive, open, continuous and uninterrupted possession or occupation of the suit parcels for a period of 12 years or more as the said occupation has been interrupted severally. Further, the 1st defendant has been grazing on the land which is registered in her name. It was also submitted that, plaintiff's never resided on the suit land. They only allege to have hired an employee who says he leases the land to other people. The plaintiffs have also not proven that they bought the suit land from the 1st defendant's deceased husband and time for adverse possession has not started running as they never paid the full purchase price. She urges the court to find that the plaintiffs have not proven their case and dismiss it with costs to the defendant.

Determination

28. The issue for determination is whether or not the Plaintiffs (*read 2nd plaintiff*) have acquired title to the suit lands by way of adverse possession?

29. Asike -Makhandia, JA described adverse possession in **Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR** as follows:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

30. The plaintiffs' claims is that they entered into possession of the land pursuant to an agreement of sale and they have been in possession of the same since the year 1995, when they paid the last installment. In **Wambugu v. Njuguna [1983] KLR 172**, which was quoted with approval in **Wilfred Kegenye Babu v Henry Mose Onuko [2019] eKLR** the Court held in part:-

“where the claimant is a purchaser under a contract of sale of land, it would be unfair to allow time to run in favor of a purchaser pending completion when it is clear that he was only allowed to continue to stay because of the pending purchase because had it not been for the pending purchase, the vendors would have evicted him. The possession can therefore only become adverse once the contract is repudiated”

31. The Court further held:

“Where a claimant pleads the right to land under an agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is: the claimant's possession is deemed to have been adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least twelve years after such payment”.

32. The key witness for the 2nd plaintiff is her brother pw3, who apparently participated in the first transaction relating to the sale of 20 acres. Pw3 had stated as follows during cross examination;

“I did not witness the payment of the balance. I do not recall whether the full purchase price was made.”

33. Pw1, the 2nd plaintiff gave more or less similar evidence on this point when she stated that;

“I cannot remember what we paid in total.....Some receipts were not found.....I do not know how my husband paid for the 10 acres. I cannot recall the exact dates when we completed purchase of the 20 acres”.

34. What resonates from the evidence of pw1 and 3 is that they do not know when the last instalment was paid or when full purchase was completed. The submissions of the plaintiff to the effect that full purchase had been completed on 5.6.1995 are not anchored on the evidence.

35. In the case of **Erick Chepkwony Aengwo V Jonathan Rutto Kibiesang [2013]eKLR** the court considered the case of **Waweru v Richu 2007 1 EA** where it was held;

“That it is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise. It was further held that a purchaser of land under a contract of sale, not subject to the Land Control Act, who is in possession of the land with the permission of the vendor pending completion, cannot lay a claim of adverse possession of such land at any time during the period of validity of the contract, unless and until, the contract of sale has first been repudiated or rescinded by the parties, in which case adverse possession starts from the date of termination of the contract. It was also held that where a purchaser or lessee of land in a controlled transaction is permitted to be in possession of the land by the vendor, or lessor, pending completion, and the transaction thereafter becomes void under Section 6(1) of the Land Control Act for lack of consent of the Land Control Board, such permission is terminated by the operation of the law and the continued possession, if not illegal, becomes adverse from the time the transaction becomes void.”

36. In paragraph 12 of the supporting affidavit to the originating summons, it is averred that the agreements between the parties became null and void for lack of consent of the land control board. The plaintiffs submitted at length on this point averring that the agreements between the parties were voidable after six months from the extension of the agreement of 1994. This is however an issue which was not advanced during the trial. It is trite law that what is pleaded must be proved during the trial and not in submissions. To this end, I make reference to the provisions of **Section 107 of evidence Act**, where it is aptly stated that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

37. This is therefore a situation whereby the plaintiffs are estopped from invoking the provisions of the Land Control Act as no evidence was led by the plaintiffs during the trial to support their averments.

38. Going by the evidence of pw3, that they took a thanks giving ram to the vendor in 1997. I can conclusively state that whatever kind of arrangements or agreement was between the plaintiffs and the vendor, the same was harmonious as the former were permitted by the said vendor to utilize the land. There is no indication that the said vendor ever told the plaintiffs to stop utilization of the land during his lifetime and there is no tangible evidence as to when the contract of sale was repudiated. Thus during the lifetime of the vendor there is no evidence to indicate that the plaintiffs occupied the land adversely to the title of its owner.

39. However, after the death of the vendor, it is apparent that the permission to occupy the land was no more going by the demand letters issued to the plaintiffs by the 1st defendant. For purposes of calculation of time, I put the date as 16.8.1999, when Joram, the vendor died.

40. On the issue of interruption of plaintiffs' occupation on the land, I find that no cogent explanation has been given by the 1st defendant as to how the plaintiffs kept on leaving the land, only to occupy it after a while over the years. In the case of **Mweu v. Kiu Ranching & Farming Co-operative Society Ltd. [1985] KLR 430**, it was stated that;

“Adverse possession is a fact to be observed upon the land. It is not to be seen in the title even under Cap 300.....”

41. The question is; What was happening to the land after it was vacated by the plaintiffs? Is it a situation whereby the 1st defendant kept on being dispossessed of the land over the years by the plaintiffs? I find that the theory advanced by the 1st defendant that plaintiffs occupation of the land was interrupted severally is not plausible. After all, the plaintiffs have stated that they have never resided on the land. Instead, they had employed a work man to generally take care of it. The 1st defendant has said that she does not know this workman. She therefore ought to have given further details of the nature and extent of plaintiff's frequent occupation of the suit land.

42. It is also not lost to this court that the 1st defendant contradicted herself when she stated that she was not aware of the plaintiffs cultivating the land, then she goes on to say that *“The plaintiffs' refused to vacate the land”*. So if the plaintiffs were not residing on the land, they were not cultivating it either, and 1st defendant did not even know their worker, what then were the plaintiffs doing on the suit land to warrant the 1st defendant to issue demand letters to vacate this land on several occasions. Certainly, the evidence of 1st defendant is not credible and the element of interruption advanced by the 1st defendant is missing.

43. On the other hand, I have found pw2 to be a forthright, consistent and credible witness in so far as the utilization of the land is concerned. He states that he has lived on that land from 1994 when he was employed by plaintiffs. He avers that one John Karuga came to that land and started cultivating the portion which was not cultivated, though he left after 2-3 years. During cross examination, pw2 stated that;

“I started farming in 1994 starting with 7 acres, There are others who cultivate the same land. They are 5. The 1st defendant grazes on the portion of land (about 15 acres). This is the portion that John Karuga was cultivating.....The 1st defendant is using the thicketed/forested land for grazing goats”.

44. Indeed this evidence of pw2 seems to buttress the claim of the 1st defendant that there are other people utilizing that land. What is apparently clear is that plaintiffs are in control of a portion of the suit land, so much so that their worker, pw2 has the mandate to lease out portions of this land to other people. If pw2 was not a trust worthy witness, nothing could have stopped him from claiming that he uses the whole land. But he says he uses 15 acres, the 1st defendant uses 15 acres or so and some other people use the rest. To this end, I am inclined to find that plaintiffs have established the element of exclusivity and control of the suit land to the tune of 15 acres.

45. Considering the totality of the evidence availed in this case, and applying the legal principles as outlined above, I do opine that the plaintiffs have proven their case to the extent of 15 acres, calculating the period of adverse possession as from 16.8.1999 when vendor died. The suit was filed on 24.8.2011, hence the plaintiffs are within the bracket of the 12 years period.

46. I have seen the green cards of the suit parcels nos. Laikipia/Kalalu/618 and 619 which shows that each parcel measures 6.07 acres which is approximately 15 acres. However, there is no clear evidence on whether plaintiffs are utilizing parcel 618 or 619. In the circumstances, I proceed to give the following orders;

1) It is hereby declared that the 2nd plaintiff is entitled to the suit land parcels no 618 and 619 to the tune of 15 acres by way of adverse possession.

2) An order is hereby issued for the 1st defendant to sign all consents and documents to effect transfer of one of the parcels and in default the Executive Officer is hereby authorized to execute all necessary documents to effect the said transfer.

3) The parcel which shall be subjected to a transfer process is the one largely under the control of the 2nd plaintiff.

4) As to costs, I direct that each party bears their own costs of the suit.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 5TH DAY OF MAY, 2021 IN PRESENCE OF:

C/A: Kananu

Gitonga J for 1st respondent

Kimaita holding brief for Mr. Kaumbi for plaintiff

HON. LUCY. N. MBUGUA

ELC JUDGE