



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

E.L.C NO.33 OF 2019 (OS)

DAVID NGANGA KIENJI.....PLAINTIFF

VS

KARIU MUHIKA.....DEFENDANT

JUDGMENT

1. The Plaintiff instituted a suit for adverse possession against the Defendant for orders; -

- a) That the Plaintiff having been in continuous uninterrupted occupation and possession of the whole suit land parcel number LOC. 2/KANGARE/183 for a period in excess of 12 years have acquired the title by adverse possession
- b) That the Land Registrar, Murang'a be ordered and directed to delete the name of the Defendant/ Respondent and register the name of the Plaintiff in place thereof.
- c) That the Deputy Registrar of this Honorable Court do execute all documents necessary to effect transfer
- d) That the costs of this suit be borne by the Defendant.
- e) That such further and other orders be made as this Honorable Court deems fit.

2. The Originating Summons is supported by Affidavit of David Ng'ang'a Kienji, the Plaintiff. He averred that the Defendant is the registered owner of the suit property. That he sold the same to his deceased father in 1986 but the transfer was never effected. Further that prior to his father's death he had lived thereon for a period of more than 12 years. It is further his contention that he has been in exclusive occupation of the suit property since 1994 as of right openly and continuously without any interruption for a period of more than 12 years and has significant developments thereon.

3. The Defendant was served by way of personal service but failed to enter appearance or file a defence thus the suit is undefended. The Plaintiff filed for a request for judgment which the same was endorsed on 8/07/2020 and the matter fixed for formal proof.

4. At the hearing the Plaintiff testified and relied on his supporting Affidavit dated 9/10/2019 together with the documents and annexures thereof. It was his testimony that his father purchased the suit land from the Defendant in 1986 and occupied the same immediately but the transfer was never effected. He stated that he lives on the land having entered thereon in 1994 and has made significant developments including cultivating 4,500 tea bushes, planting eucalyptus trees and constructing a three bedroomed house. He added that he has lived thereon since 1994 uninterrupted and the Defendant has not evicted or disturbed his occupation.

5. At the close of the hearing and with leave of the Court a site visit was made on 13/5/2021 by the Honorable Deputy Registrar and a report dated 17/5/2021 filed. As per the report, the land is approximately 3 acres and the Plaintiff has constructed a three bedroomed house where he lives. On the land are: a toilet, a pig sty, the deceased father's three bedroomed house, tea bushes planted on 2 acres, pumpkins, maize, banana and Napier grass.

6. The Plaintiff elected not to file submissions.

7. Before delving into the issue of adverse possession it is relevant to elaborate on service to the Defendant. The Affidavit of Service dated 28/2/2020 sworn by Francis Makau Itule deposes that there was personal service of the pleadings.

8. Order 5 Rule 13 of the Civil Procedure Rules provides for personal service as was in this case, the requirement of filing of Affidavit of

Service is provided for under Rule 15 which states;

“The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons”.

9. Based on the foregoing and the averments in the Affidavit of service it is evident that the Defendant was adequately served and the Affidavit of Service is competent. There was a period of close to five months before the Plaintiff filed for request for judgment which the Defendant failed to put in their response.

10. The Law on adverse possession is provided for under the Limitation of Actions Act. Section 7 of the Act provides;

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person. Section 13 “(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under Sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with Section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land”.

11. Section 17 extinguishes the rights of a registered owner where there is a successful claim for adverse possession. Section 38 on the other hand provides (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land.

12. The Court of Appeal in Kisumu **Civ App. No. 110 of 2016 Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] eKLR** opined that a person claiming adverse possession must establish the following;

- a) On what date he came into possession.
- b) What was the nature of his possession?
- c) Whether the fact of his possession was known to the other party?
- d) For how long his possession has continued and
- e) That the possession was open and undisturbed for the requisite 12 years?

13. The Plaintiff testified that his father bought land from the Defendant in 1986, no sale agreement was however provided but a Letter of Consent has been attached which gives evidence that there was an intended transfer. The deceased had the option of moving the Court for specific performance but opted not to, however being a purchaser who had completed the purchase price he had adverse possession of the property. (See **Kisumu Court of Appeal No. 101 of 2015 Prisca Narotso Etyanga v James Gitau Gachaiya Suing on behalf of a Legal Representative of Elizabeth Njeri Gitau [2017] eKLR**) It would follow that a claim for adverse would start running from the date of this letter. However, the Plaintiff has lead evidence that he entered into the suit property in 1994 having been placed there by the father and without the Defendant’s permission and has continued to live thereon since 1994. The claim therefore begun to run in 1994 when the Plaintiff gained entry into the land.

14. The nature of possession was settled in **Kisumu Civil Appeal no. 27 of 2013 Samuel Kihamba v Mary Mbaisi [2015] eKLR** as “Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land **openly**, that is, **without force, without secrecy, and without license or permission of the land owner**, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, *nec vi, nec clam, nec precario*. The additional requirement is that of *animus possidendi*, or intention to have the land”

15. The Plaintiff testified that he entered into the land having been placed there by his father and without the consent and knowledge of the Defendant. There was no evidence to controvert this and there being none, I find the Plaintiff has satisfied the foregoing. To demonstrate his intention of living there, the Plaintiff testified that he has made a lot of developments on the suit property which developments were captured in the site report. The report by the Deputy Registrar corroborated his testimony. The developments as per the report indicate his *animus possidendi* over the suit property. The report also indicates that his deceased father’s house is still on the suit property and relevantly tea bushes occupy a larger portion of the suit property totalling to 2 acres and undoubtedly the remainder of developments sits on the remaining 1 acre.

16. The Plaintiff contends that he has lived on the suit property since 1994, the claim for adverse possession thus crystalized in 2006. Kariuki J in HCC No. 86 of 2005 as was quoted by the Court of Appeal in **Gideon Mwangi Chege vs. Joseph Gachanja Gituto [2015] eKLR Nyeri Civ Appeal. 4 of 2015** held that to claim under Section 38 for adverse possession the person must adduce evidence to show that he became entitled to the land on account of his or her occupation of the land, openly and continuously and without interruption and with the knowledge of the registered owner for a period of twelve years or more adversely to the title of the registered owner.

17. In paragraphs 7-10 the Plaintiff deponed that he has lived on the suit property since 1994 and the Defendant has never interfered with his occupation. The report by the Deputy Registrar shows that the applicant is in occupation of the suit land; his father's house is still on site; all the land is vested in the Plaintiff.

18. To this end I find that the Applicant has on a balance of probability proved that he has enjoyed open, quiet, exclusive and uninterrupted possession of the suit property for the requisite statutory period.

19. I find that the claim for adverse possession has been proven and I enter judgement in favour of the Plaintiff.

20. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 24TH DAY OF JUNE 2021

J. G. KEMEI

JUDGE

Delivered in the presence of:

Kingangi HB for Mrs. Kimani for the Plaintiff

Defendant: Absent

Court Assistant: Alex