



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

E.L.C NO. 61 OF 2018

MARY WANJIRU KANYAU.....PLAINTIFF

VERSUS

SOLOMON MUCHAI NGANGA (deceased).....1STDEFENDANT

NGANGA NJOROGE.....2ND DEFENDANT

JUDGEMENT

1. Vide an Originating Summons dated the 29/6/2004 and amended on 14/12/2009, the Plaintiff took out summons against the Defendants seeking orders as hereunder;

a. That the Plaintiff MARY WANJIRU KANYUA has been in occupation of the parcel of land known as Plot No. LOC.16/KIMANDI/WANYAGA/T.52 peacefully, openly, continuously and without interruption for a period exceeding 12 years.

b. That the 1st and 2nd Defendants right to the land parcel known as Plot No. LOC.16/KIMANDI/WANYAGA/T.52 be declared as having extinguished.

c. That the 2nd Defendant be ordered to execute documents of transfer in respect of the suit land in favour of the Plaintiff failing which the Deputy Registrar of this Honourable Court be so empowered to sign the documents of transfer in favour of the Plaintiff in place of the Defendant.

d. That the costs of this suit be provided for.

2. It is the Plaintiff's case that she purchased the suit land from Daniel Kungu Nganga (also known as Daniel) in 1980 at the consideration of Kshs 3000/- which final installment was made on the 4/8/1980. That she entered into occupation of the suit land in 1981 and commenced developments thereon. That the said Kungu persisted in his subtle refusal to transfer the land to her forcing her to seek the intervention of the village elders and the local administration who ordered the vendor to effect transfer of the suit land to him in vain. That later she discovered that the land was in fact in the name of Kungu Nganga, the Vendor's father.

3. That in 1993 she discovered that Daniel had become registered owner of the land through transmission. In 1994 the land became registered under the name of Muchai Nganga who later in 1995 unsuccessfully sued her for vacant possession in CMCC No 168 of 1995, Thika.

4. The summons are opposed vide the Replying Affidavit dated the 24/2/2009. Muchai Nganga made general denials and in addition contended that the summons having been amended without the leave of the Court, were incompetent before the Court.

5. Njoroje Nganga too opposed the suit through his Replying Affidavit dated the 7/4/2011. He stated that he is the registered owner of the suit land in trust for the 1st Defendant, Muchai Nganga. That upon purchase of the land in 1969 the 1st Defendant fenced the land and constructed a cow shed for rearing cows. That Nganga Kungu the original owner passed away before transferring the land to the 1st Defendant. That the Plaintiff invaded the suit land in 1986 and destroyed his cow shed claiming ownership of the land on account that she had been sold the suit land by Daniel, the son of the original owner. That whilst undertaking to dispossess the Plaintiff, Daniel demanded the sum of Kshs. 10,000/- as additional purchase price which was paid by the 1st Defendant paving way for the registration of the title in the name of the 1st Defendant in 1994. This was after successful administration of the estate of Nganga Kungu in Succ cause No 238 of 1992. In 1995 the 1st Defendant filed a case for eviction of the Plaintiff.

6. It is on record that the 1st Defendant died during the pendency of the suit and an application for substitution was unsuccessful.

7. It is to be noted that the suit proceeded *ex parte*, the 2nd Defendant having been served failed to defend the suit. See Affidavit of service dated the 8/2/2021.
8. At the hearing the Plaintiff led evidence and relied on her written statement dated the 25/10/2018 and her supporting affidavit of 14/12/07.
9. She led evidence that she purchased the suit land from Daniel in 1980 and paid the full purchase price. She annexed the agreements of sale in support of her averments. That she was put in possession in 1981 whereupon she started constructing her house among other developments. She pursued the title from Daniel for sometime but on further inquiries she discovered that the suit land was registered in the name of Nganga Kungu, Daniel's father. She sought help from the local administration who impressed on Daniel to transfer the land to the Applicant/Plaintiff. She relied on a letter dated the 26/1/1996 authored by the District Commissioner ordering Daniel to transfer the land to her. On further inquiry she discovered that the suit land had been registered in the name of Daniel in 1993 and in the name of Muchai Nganga in 1994. In 1996 the suit land was registered in the name of the 2nd Defendant herein. See the official search dated the 28/7/1997. That she lodged a caution on the suit land on the 5/8/1997.
10. That in 1995 Muchai Nganga sued her seeking for orders of eviction in CMCC No 168 of 1995, Thika. The Court rendered its judgement on the 6/3/1996 to the effect that she had become entitled to the title on adverse possession but because of lack of jurisdiction advised her to lodge her claim at the High Court, which was vested with jurisdiction to entertain her claim. That she finally filed the case in 2004 in Nairobi, which case was transferred to ELC Murang'a for hearing and determination in 2017 (the current suit).
11. That she has been in occupation of the suit land from 1980 until 29/6/2019 when some people appeared and demolished her house on the basis of Court orders obtained from Kandara Court in SRMCC No 64 of 2018. That she was unaware of the existence of the case that was filed against her by one Daniel Gakuya Muchai. That the orders in the said suit referred to land reference LOC 16/KIMANDI-WANYAGA/T.53 which is a separate and distinct parcel from the suit land.
12. The Plaintiff filed written submissions which I have read and considered.
13. The issues for determination are; whether the Plaintiff has proved title by way of adverse possession and who meets the costs of the suit.
14. It is not in dispute that the suit land was registered in the name of Nganga Njoroge in 1962. It later became transferred to Daniel in 1993, to Muchai Nganga in 1994 and to the 2nd Defendant in 1996.
15. **In the case of Mbira –v- Gachuhi, (2002) IEALR 137** where it was held that:
- “..... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption....”
16. The Plaintiff led uncontroverted evidence that she entered into an agreement of sale in 1980 with Daniel, the son of the original owner. She entered the suit land in 1980/81 pursuant to a right of purchase and constructed her house and settled and raised her family and lived thereon uninterrupted until 2019 when she was removed in unclear circumstances.
17. in the case of **Public Trustee – v- Wanduru, (1984) KLR 314 at 319** where Madan, J.A. stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run. Suggested
18. It is not in dispute that the Plaintiff entered the suit land in 1980/81 as a purchaser from Daniel. The agreement of sale dated the 12/1/1980 is disclosed to be between the Plaintiff and Daniel. The land the subject of the purchase was said to be belong to Daniel. However, the Plaintiff led evidence that she later discovered that the suit land Daniel had sold to her was registered in the name of his father, Nganga Kungu. See the copy of the green card adduced in evidence. According to the evidence of the 1st and 2nd Defendants in SRMCC No 168 of 1995, it is said that the said land had been sold to the 1st Defendant by Nganga Kungu (the original owner) in 1968. The 1st Defendant admitted that though he had purchased the land he had not taken possession and indeed kept his silence at the time the son of Kungu was selling the land to the Plaintiff. The reason he advanced was because at that time in 1981 he did not have a title for the suit land. Further evidence is led how Daniel was paid more money by the 2nd Defendant leading to the transfer of the suit land to the 1st Defendant in 1994 after the successful administration of the estate of Kungu. Indeed, Daniel agreed with the Court that the reason why he transferred the land to the 1st Defendant was because his father had sold it to him. That he sold the same land to the Plaintiff when it had been sold to the 1st Defendant.
19. It is clear from the history of the land that the Plaintiff was sold land by Daniel at the time that he held no title and before the estate of his father had been administered. It is not clear when Kungu died. However, Daniel became the registered owner in 1993. By this time the Plaintiff had occupied the suit land for a period of 13 years. She occupied the land with the permission of the owner's son. Can it be said that her occupation was adverse to the original owner? I do not think so. The reason being that there is no evidence that Daniel acted as an agent of the owner in selling the land and putting her in occupation. Adversity must start and maintained in open exclusive and notorious and inconsistent occupation to the title of the owner. It is clear the owner did not put her in occupation. She purchased the property from a stranger. In my view time did not start running against the registered owner until 1993 when the title became registered in the name of Daniel. Before a period of one year Daniel transferred the land to the 1st Defendant.
20. Did the case in 1995 interrupt adverse possession. This case was filed by the 1st Defendant against the Plaintiff for eviction. The Plaintiff

filed a counterclaim and sought orders for title based on adverse possession. The Court held that it had no jurisdiction to determine the matter, it having been premised on adverse possession. In my considered view this case did not interrupt the possession of the Plaintiff.

21. Fast forward and in 1996 the title became registered in the name of the 2nd Defendant. The Plaintiff occupation continued until the year 2004 when she filed this suit. By the time she filed suit time had run for a period of 8 years, which is below the threshold of 12 years that is required by statute.

22. The suit dragged on in Court for so long which on perusal is attributed to the Plaintiff's laxity in prosecuting the same.

23. In the case of **Githu Vs Ndeete 1984 KLR 776** it was held that the mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession. I have already found that time for adverse possession did not accrue in favour of the Plaintiff either under Kungu, Daniel, the 1st and or the 2nd Defendant. Had it accrued when the title was in the name of Kungu, it would have mattered little how many transfers the suit land would have gone through since adverse possession is an overriding interest/encumbrance that runs and clings to the land. Once it matures it moves with the land.

24. My attention has been drawn to the eviction of the Plaintiff in 2019 through a Court order in SRMCC No 64 of 2018. I note the orders refer to LOC.16/KIMANDI/WANYAGA /T. 53 and not T. 52, the subject matter of this suit. I wish to say no more so as not to prejudice the matter that is not before me for determination.

25. In the end I hold and find that the Plaintiff has not proven her claim in adverse possession on a balance of probabilities. I proceed to dismiss it with no orders as to costs.

26. It is so ordered.

DATED, SIGNED & DELIVERED ONLINE THIS 10TH DAY OF JUNE, 2021.

J.G. KEMEI

JUDGE

Delivered online in the presence of;

Wanjiru HB for Mburu Machua for the Plaintiff

1st – 3rd Defendants – Absent

Court Assistant: Alex