



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC 8 OF 2020(OS)

JIMNAH MUGO KAARA.....PLAINTIFF

VERSUS

GEOFFREY THUO GACHANJA.....DEFENDANT

MARY WANJIRU MWANGI.....INTERESTED PARTY

JUDGEMENT

1. The Plaintiff filed the Originating Summons dated 10/06/2020 against the Defendant and the interested party and prayed for orders that;
 - a. a declaration be made that title of the land parcel number LOC.19/NYAKIANGATI/T.431 (*the suit land*) has been extinguished by the Plaintiff adverse possession thereof for a period of more than twelve (12) years in terms of the Limitation of Actions Act.
 - b. The Plaintiff has become entitled by adverse possession to the suit land registered in the name of Geoffrey Thuo Gacanja.
 - c. An order that the Murang'a Land Registrar to register the Plaintiff as the absolute proprietor of the suit land in place of the Defendant, the current registered owner.
 - d. The District Land Registrar Muranga be directed that the order herein shall be instrument of transfer of ownership of the suit land.
2. It is not disputed that the Defendant bought the suit land from the Interested party sometime in the year 2020. The interested party inherited the suit land from her late father, Mwangi Kiiru who died on 04/05/1980.
3. According to the Plaintiff, his late father one Kaara Karori advanced the late Mwangi Kiiru the sum of Kshs. 250/= on 29/05/1967 repayable over an unspecified time. The consideration for the said loan was allegedly to allow Kaara Karori to utilize the suit land until repayment of the advanced loan.
4. As fate would have it, the late Mwangi Kiiru passed on in 1980 before repaying the purported loan of Kshs. 250/= to the Plaintiff's father, Kaara Karori. Similarly, Kaara Karori died in 1981 after allegedly putting up a semi-permanent house that the Plaintiff occupied. The Plaintiff contends that he resided in the said semi-permanent house until 2018 when he demolished it and started the constructing a permanent house that is near completion.
5. The Plaintiff claims the he has been occupying and utilizing the suit land since 1981 without any interruption until May 2020 when the Defendant allegedly came to the suit land and started destroying the suit land on account that it belongs to him thus necessitating the filing of this suit.
6. Both the Defendant and interested party have vigorously opposed the Plaintiff's application. The Defendant avers that he entered into a sale agreement with the interested party for purchase of the suit land on 12/02/2020. That he paid the purchase price after carrying out due diligence and obtained requisite consents for transfer on 16/03/2020.
7. On the other hand, the Interested party swore a Replying Affidavit on 15/06/2020 and deponed that she inherited the suit land from her late father vide Murang'a Resident Magistrate Court Succession Cause No. 46 of 1983. That she was duly registered as the registered owner of the suit land on 16/02/1984 according to the copy of green card.
8. She discredited the Plaintiff's claim for adverse possession and faulted the purported loan agreement as untrue and fraudulent. She contended that neither the Plaintiff nor his family has ever been in occupation or cultivated the suit land as alleged. That it was only in 2018

when the Plaintiff commenced construction of the house without her knowledge and consent and she opposed the same through the local administration and village elders. The Plaintiff is then said to have admitted to confusing the suit land and ceased construction seeking time to consider the option to sell off the structure or demolish it altogether.

9. Learned Counsels for both parties compromised the said Application by consent dated 21/07/2020 that was adopted as a Court Order on 23/09/2020. In the said consent all the parties agreed to stay away from the land by entry or in any way interfering with the suit land. Parties further agreed to treat the Originating Summons and Replying Affidavits as Plaintiff and Statements of Defence respectively. Upon compliance with Order 11, the matter was set down for hearing.

10. At the hearing, the Plaintiff testified as PW1 and called two witnesses in support of his claim. He adopted his witness statement dated 05/10/2020 and testified that his late father left the suit land for him in 1981. That he built a temporary structure thereon before leaving for Bungoma where he resides to date.

11. In Cross-examination, PW1 was adamant that his claim was based on adverse possession. Relying on the sale agreement marked as 'JMK2(b)', he insisted that his late father bought the suit land from Mwangi Kiiru. PW1 admitted that the agreement was not signed and did not indicate details of the suit land. He informed the Court that he learnt of the sale through his late father's diary but could not trace it at the time of hearing and therefore the said diary was not produced in Court.

12. He testified that his father died in 1981 while Mr. Mwangi Kiiru died in 1980. That upon demolishing the old structure built by his father in 1981 he constructed the current stone house on site.

13. The witness stated that the Interested party has never occupied the suit land and the Defendant purchased the land with knowledge of his occupation.

15. PW1 informed the Court that he has been in peaceful, open continuous and uninterrupted use and occupation of the said land since 1981 to date, a period in excess of 12 years.

15. PW2, David Macharia Mwangi told the Court that he knew the Plaintiff since his childhood and that he lived with his late father on the suit land. That in 1981 the Plaintiff built a temporary house thereon. That his father lived on the adjacent land.

16. PW3, Jimnah Ngotho's evidence was similar to that of PW2. In cross-examination he admitted that he did not have any evidence to show that the Plaintiff lived on the suit land save to say that he built a temporary house in 1981. He added that the Plaintiff planted bananas and started constructing a permanent house in 2018 which stalled when he filed the instant suit.

17. The Defendant testified as DW1 and adopted his statement dated 23/09/2020. He stated that he visited the suit land and found a house under construction and upon inquiry, he learnt that the owner of the house was the Plaintiff. DW1 added that he got the Plaintiff's number from his (Plaintiff's) brothers, James Kirari and Wainaina Kaara who requested for a month for the Plaintiff to decide on either selling the house or demolish it.

18. As part of due diligence, DW1 testified that he carried out an official search on the suit land and confirmed the registered owner as Mary Wanjiku Mwangi, the interested party. DW1 also confirmed that he obtained the relevant land consent and therefore the land purchase was lawful.

19. DW2, Mary Wanjiku Mwangi confirmed that she was the sole heir of her late father's estate and sold the suit land to DW1. She was categorical that she did not know the Plaintiff and that her late father never informed her of any arrangement between him and the Plaintiff or Plaintiff's father.

20. DW2 added that nobody lived on the land as she was brought up in Londiani and later relocated to Nairobi where she carried on her business at Gikomba. However, DW2 stated that she would occasionally visit the suit land and no one occupied it. That in 2018 she learnt through an emissary that the Plaintiff was constructing a house and undertook to remove it when confronted. That she sent Peter Kaguri who confirmed that the construction was being done by the Plaintiff.

21. DW3, John Kuria Mugweru confirmed knowing DW2 and when he noted ongoing construction on the suit land, he probed DW2 about it. DW3 being a local resident of the suit land locality, confirmed that no one was residing on the land prior to 1981.

22. The last witness was DW4, Peter Kaguri, who stated that he was a former lands officer in the survey department. He stated that in 2020 DW1 asked him to establish beacons on the suit land before purchasing the same. He noted the incomplete house thereon and on inquiry, learnt that it belonged to the Plaintiff. DW3 alluded to meeting the Plaintiff's mother and sibling and discussed the house issue. He was shown a handwritten booklet with a record of plots owned by the late Kaara but did not see any entry with respect to the alleged loan agreement between Late Kaara and Late Mwangi. That he neither found the suit land listed in the said book despite his keen inspection of the same.

23. Parties agreed to file their respective written submissions. The Plaintiff did not file his submissions whereas the Defendant and interested party filed theirs dated 16/02/2021 and on 26/02/2021.

24. The Defendant and interested party outlined the history of the suit land leading to the instant case and summary of the evidence adduced in Court. They submitted that the Plaintiff's claim for title of the suit land based on adverse possession must fail. That if there was any entry to the land, it was by consent or authority of the registered owner at the time, the late Mwangi.

25. They argued that the supposed loan agreement was a forgery and never existed as confirmed by DW4. They discredited any allegation of constructing a temporary structure in 1981 because no evidence was tendered to prove the same. Lastly, it was argued that the Plaintiff failed to establish the statutory period of 12 years and the mandatory rudiments for a successful adverse possession claim. They cited the decisions in **Murang'a ELC No. 62 of 2017 Kariuki Murunji –vs- Magdaline Wanjohi** and **Kerugoya ELC No. 51 of 2014 John Mwangi Ndegwa –vs- Eliud Macharia Maina**.

26. From the pleadings and submissions on record, the core issue for determination is whether the Plaintiff has proved his claim for title of the suit land by adverse possession.

27. The Plaintiff based his claim on adverse possession pursuant to **Sections 7, 17 and 38** of the Limitation of Actions Act. For avoidance of doubt the sections 7 and 17 state; -

7. Actions to recover land

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.

17. Title extinguished at end of limitation period

Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.

28. In the case of **Nelson (City) v. Mowatt, 2017 SCC 8, [2017] 1 S.C.R 138** the Supreme Court of Canada defined adverse possession as a long-standing common law device by which the right of the prior possessor of land, typically the holder of registered title, may be displaced by a trespasser whose possession of land goes unchallenged for a prescribed period of time.

29. This definition has been adapted in numerous decisions locally to refer the doctrine of adverse possession as hostile occupation and use of land in a manner inconsistent with the rights of the registered owner and amounting to dispossession of the owner for a period of twelve years in our jurisdiction.

30. For a claim of adverse possession to succeed, certain requirements must be proven by the claimant besides the statutory occupation/possession period of 12 years. In the case of **Z F Stoffberg NO & others v City of Cape Town (1325/2017) [2019] ZASCA 70**, the Supreme Court of Appeal of South Africa stated; -

... the physical detention of the thing (*corpus*) with the intention of an owner (*animus domini*). In addition, that possession must be ***nec vi, nec clam, nec precario***. *Nec vi* means peaceably. *Nec precario* postulates the absence of a grant on the request of the possessor. *Nec clam* means openly, particularly 'so patent that the owner, with the exercise of reasonable care, would have observed it.'

31. The same conditions were reiterated in the Court of Appeal Judgment in **Grace Wairimu Sorora v Chaka Limited & 6 others [2017] Eklr** which quoted with approval the decision of the Court in the case of **Kimani Ruchire v. Swift Rutherford & Co. Ltd. [1980] KLR. :**

“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 permission). So the Plaintiffs 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 endeavours to interrupt it or by way of recurrent consideration.”

32. According to the Plaintiff, he entered the suit land in 1981 after his late father constructed a semi-permanent house for his occupation. In his evidence in chief, the Plaintiff however admitted having left for Bungoma where he resides to date. The Plaintiff alleged that his late father took possession of the suit land way back in 1967 after advancing a loan of Kshs. 250/= to the late Mwangi. This evidence was rebutted by the Defendant through the evidence of DW3 who stated that upon perusing the diary of Kaaria held by the Plaintiffs mother which contained his properties, neither the suit land nor the agreement of sale was contained herein leading to the conclusion that the said agreement was not authentic. The Plaintiff also failed to produce the original handwritten note denying the Court the opportunity to determine the probative value of the alleged agreement on record.

33. The entry of the suit land and the occupation if any is put in doubt.

34. The Plaintiff did not tender any evidence of occupation or use of the suit land for the period starting **1981 to 2018** save for stating that there was temporary house thereon. That the alleged house was demolished in 2018 to pave way for construction of the permanent house. The Plaintiff claimed planting bananas on the suit land which were, according to him, wantonly destroyed by the Defendant. This claim was denied by the Defendant. The DW3 stated that he visited the suit land and there was no sign of a demolished house at all. This lends credence and corroborates the evidence of DW2. Evidence was led by DW1, DW3 that the house built by the Plaintiffs father was on the adjacent land owned by Kaaria and not the suit land.

35. None of the Plaintiff's witnesses adduced evidence to support any **open, notorious and continuous use** of the suit land by the Plaintiff to the exclusion of the interested party. On the contrary, it is the interested party's evidence that being desirous to sell the suit land, she learnt of the construction in 2018 and she initiated contact with the Plaintiff family to stop the same.

36. The interested party acknowledged that she did not live on the suit land and denied knowing the Plaintiff. Therefore, any possession or use of the suit land by the Plaintiff, if any, would not amount to adverse possession without the interested party's knowledge. On the issue of abandoning the suit land, the Court of Appeal in the case of **Christopher Kioi & another v Winnie Mukolwe & 4 others [2018] eKLR** cited with approval the case of **Alfred Welimo v. Mulaa Sumba Barasa, CA No 186 of 2011 that; -**

“It is trite that adverse possession is not established merely because the owner has abandoned possession of his land and ceased to use it; for as Robert Megarry aptly observed in his Megarry's manual of the Law of Property, 5th ed. page 490, the owner may have little present use for the land and that land may be used by others, without the users demonstrating a possession inconsistent with the title of the owner. So the mere fact that the Appellant abandoned possession of the suit property and went to live at Ndalua scheme by and of itself does not establish adverse possession. The abandonment of possession must be coupled with the respondent taking possession of the land with animus possidendi (the intention to possess) and asserting thereon rights that are inconsistent with those of the Appellant as the owner of the land. In such circumstances, the Appellant would be said to have been dispossessed of the suit property by the Respondent.”

37. In the **Christopher Kioi** case, the Court affirmed the trial Court decision dismissing the Appellants' claim for ownership of land by adverse possession. The Court agreed that the Appellants' entry was by consent and that occupation was seasonal and in secrecy as opposed to open as to qualify for adverse possession.

38. The Plaintiff herein has not demonstrated his possession of the suit land with an intention to possess the land as against the interested party prior to 2018. I agree with the Defendant's submission that the Plaintiff's entry was in 2018 when he commenced construction of the incomplete house. Upon getting wind of the same, the interested party asserted her rights over the suit land.

39. Such occupation from the year 2018 accounts for only 2 years thus falling short of the threshold to found title by way of the doctrine of adverse possession. See Section 7 of the Limitations of Actions Act.

40. The Plaintiff is resolute that he instituted this claim on his own behalf as opposed to his late father's interest. Even if the claim was to be filed on behalf of his late father, the same would fail because his father's entry was with late Mwangi's consent. See the case of **Samuel Miki v. Jane Njeri Richu CA No. 122 of 2001** as cited in the **Kioi** case above where it was held; -

“It is trite law that a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of or in pursuance of an agreement of sale or lease or otherwise.”

41. The Defendant has demonstrated that he is the registered owner of the suit land having purchased it from the interested party. The Defendant's certificate of title is held as conclusive evidence of proprietorship in line with Section 26 of the Land Registration Act.

42. Ultimately it is my finding that the Plaintiff has failed to prove his claim for adverse possession on a balance of probabilities.

43. The claim is for dismissal with costs in favour to the Defendant & Interested party and payable by the Plaintiff.

44. It is so ordered.

DATED, SIGNED & DELIVERED ONLINE THIS 3RD DAY OF JUNE, 2021.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Ms Macharia HB for Mbugua for the Plaintiff

Defendant: Absent

Interested Party: Absent

Court Assistants: Alex