



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC APPEAL NO. NO 45 OF 2019

GEORGE NGARUIYA KARIUKI.....APPELLANT

VERSUS

HOSEA NJUGUNA NDITE.....RESPONDENT

(Being an appeal from the Judgment of Hon. C.Kutwa SPM at Githunguri Law Court in ELC No. 14 of 2018 delivered on 6th June 2019)

BETWEEN

HOSEA NJUGUNA NDITEPLAINTIFF

VERSUS

GEORGE NGARUIYA KARIUKI.....DEFENDANT

JUDGMENT

The Appellant **George Ngaruiya Kariuki**, was the Defendant in **ELC No. 14 of 2018 at Githunguri SPM Court** while the Respondent **Hosea Njuguna Ndite** was the Plaintiff. By a Plaint dated **30th July 2018**, the Plaintiff (Respondent) brought the suit against the Defendant (Appellant) and sought for the following orders;

- i. That the Defendant and/or his agents be forcefully evicted from land parcel No. Githunguri/ Gathangari / T.293.*
- ii. That the Defendant by herself, her agents, servants, employees and or any other person claiming for / and or on her behalf be permanently restrained by an order of injunction from interfering with the Plaintiff's possession to enjoyment and/or in any other manner the Plaintiff's quiet use and possession of land parcel No. Githunguri/ Gathangari/T.293.*
- iii. That the OCS Githunguri Police Station to assist in the observance of this order and maintenance of peace.*
- iv. Any other or further reliefs that this Honourable Court may deem fit to grant.*
- v. That the Plaintiff be granted costs of the suit with interest thereof.*

In his statement of Claim, the Plaintiff (Respondent) averred that he is the registered owner of the suit property. That on **10th March 1993**, the Plaintiff executed a Sale Agreement with one **Richard Njoroge Gathirua**, who was the original owner of the suit property. That pursuant to the sale agreement, the Plaintiff (Respondent) purchased the suit property at **Ksh. 190,000/=** and the transfer process undertaken and title issued in his name.

Further, that the Defendant (Appellant) unlawfully infringed upon the Plaintiff's right of occupation and enjoyment of the suit property by illegally occupying it hence depriving him of his right of possession, enjoyment and occupation of the suit property.

The suit was contested and the Defendant (Appellant) filed a Defense and Counter Claim dated **23rd August 2018**, and denied all the allegations made in the Plaint. It was his contention that if there were any transfers, the same are fraudulent and ought to be set-aside. That he is occupying the suit property as of right and he is the lawful owner of the suit property.

In his Counter Claim, he averred that he has been in the suit property for over **20 years**, since the fraudulent acquisition of the suit property and the Plaintiff's claim is therefore time barred since **12 years** have lapsed since the acquisition of the property and therefore his title has

been extinguished by **Adverse Possession**. He sought for orders that;

- a) ***A Declaration that the Defendant is the rightful owner of Title Number Githunguri/ Gathangari/T.293 by way of Adverse possession.***
- b) ***A cancellation of the Plaintiff's name from the Title Number Githunguri/Gathangari/T.293 and a registration of the same in the name of the Defendant Mr. George Ngaruiya Kariuki.***
- c) ***Costs of the suit and Counter claim.***

The matter proceeded by way of viva voce evidence wherein the Plaintiff (Respondent) testified for himself and closed his case, while the Defendant (Appellant) also testified for himself and closed his case.

PLAINTIFF'S CASE

PW1 Hosea Njuguna, adopted his witness statement dated **30th July 2018**. He produced his list of documents dated **30th July 2018**, as Exhibits 1 to 4 and the green card. It was his evidence that he bought the suit property in **1998** and he was registered as the owner. That he has been in possession and he has been ploughing the land. That he filed a case in the High Court in **2013**, against the Defendant's mother. That the High Court matter was decided in **2004**. Further, that the Defendant's mother died in **2005**, after conclusion of the case and he planted food crops on the plot in **2018**. He denied that the Defendant has been in possession of the suit property.

DEFENDANT'S (APPELLANT'S) CASE

DW1 George Ngaruiya Kariuki adopted his witness statement dated **20th August 2018**. He produced the list of documents dated **23rd August 2018** as Exhibits 1 and 2. It was his testimony that he found the Plaintiff in the suit property in **2005** and that he is the one ploughing the land. That the Plaintiff came to the land in **2018**, and that is when he was arrested and he has been in the land for over 12 years.

That all the documents produced by the Plaintiff are fake and the title was fraudulently obtained. That his father did not register the land nor is it in the green card. That they have been in possession since **1961**, and the High Court case was filed in **1991**, and he has not filed any Appeal against the decision.

Further, that he has been in possession since **2005** and using the land for agricultural purposes and that he has never moved the Court for Adverse possession. That the Judgment against his mother was in **2004**, and it is not valid because it is abated. That the Plaintiff did not give him consent to occupy the land and he only realized that there was a judgment in **2018**.

Thereafter, the parties filed their written submissions and on **6th June 2019**, the trial Court entered Judgment in favour of the Plaintiff (Respondent herein) In his Judgment the Court stated;

“The Defendant did not plead and/or prove the fraud and misrepresentation. There is no evidence on record to show that the Plaintiff obtained the title deed illegally, unprocedurally or through a corrupt scheme. In my view, the Plaintiff has justified the provisions of Section 26 of the Land Act. He also shown that the Defendant has trespassed on the piece of land. I therefore find the Plaintiff suit has been proved on a balance of probabilities. I therefore enter Judgment in favour of the Plaintiff to the following terms.....”

The Defendant (Appellant) was aggrieved by the above determination of the Court and Decree thereon and he has sought to challenge the said Judgment through the **Memorandum of Appeal** dated **8th July 2019**. The Appellant sought for the following orders;

- a) ***That the Appeal be allowed and Judgment in the lower Court be set aside in its entirety.***
- b) ***That the Defendant's counter claim be allowed as prayed in the lower Court.***
- c) ***That the Appellant be awarded costs in the lower Court and for this Appeal.***
- d) ***That costs of this Appeals be borne by the Respondent.***
- e) ***Any other relief that this Honourable Court may deem fit to grant.***

The grounds upon which the Appellant sought for the Appeal to be allowed are;

1. ***That the Learned Magistrate erred in law and in fact in completely not considering the Defendant's documentary evidence on record.***
2. ***That the Learned Magistrate erred in both Law and in fact in failing to consider that the Plaintiff's case was time barred.***
3. ***That the Learned Magistrate erred in both law and in fact in failing to consider all the evidence of the Defendant.***

4. *That the Learned Magistrate erred in both Law and in fact in dismissing the Defendant's Counter Claim in total.*
5. *That the Learned Magistrate erred in both Law and in fact in failing to consider submissions of the Defendant.*
6. *The Learned Magistrate completely ignored evidence of the Defendant that the Plaintiff has never been in occupation of the suit land at any one given time.*
7. *The Learned Magistrate erred in Law and in fact in refusing to admit that the Defendant had been in the suit land for over 12 years and the Plaintiff registration of the land had been extinguished by Adverse Possession.*
8. *The Learned magistrate erred in law and in fact in ordering that the Defendant be evicted from the suit land within thirty days.*
9. *The Learned Magistrate erred in Law and in fact in granting an injunction to restrain the Defendant from using the suit land.*

The Appeal was canvassed with by way of written submissions. The Appellant through the **Law firm of Mbichi Mboroki & Kinyua Advocates** filed his written submissions dated **21st January 2020**, and submitted that the court failed to consider its documentary evidence proving that the title **L.R T.293**, has been extinguished and does not exist. It was further submitted that the trial Court failed in failing to find that the Plaintiff's (Respondent's) case was time barred as he alleges to have bought the suit property in **1998**, but has never occupied it nor brought any claim. That the Appellant demonstrate that he has been in occupation and possession of the suit property **openly and continuously** since **2005**, after the demise of his mother, and the suit property is vested in him and the trial Court misdirected itself in failing to look at his evidence. The court was therefore urged to allow the Appeal.

The Respondent filed his written submissions dated **5th March 2021**, through the Law Firm of **Selina Musungu & Company Advocates**, and submitted that both in oral evidence and his Pleint, the Plaintiff (Respondent) contends that he bought the suit property on **10th March 1998**, and has been in occupation despite constant harassment by the Appellant that was brought to the **notice** of the authorities, when the Appellant's mother filed a suit in **1999**. That after Judgment was delivered, he entered into his land and has been farming on it until **2013**, when the harassment resumed. He further submitted that the Appellant's occupation has not been continuous and uninterrupted.

Further that the Lower Court reached a just and fair conclusion in the circumstances of the case as the Respondent proved his ownership of the suit property. That the trial Court had no jurisdiction to issue the orders sought by the Appellant as per the provisions of **Section 38(1) & (2) of the Limitations of Actions Act**. The Court was urged to dismiss the Appeal.

The Court has carefully read and considered the written submissions, the Memorandum of Appeal, the Judgment of the trial Court, the Pleadings in the trial Court and the evidence adduced and finds that the issues for determination are;

1. *Whether the Lower Court had jurisdiction to hear and determine the Appellant's Counter Claim*
2. *Whether the suit was time barred*
3. *Whether the Appeal is merited*

1. Whether the Lower Court had jurisdiction to hear and determine the Appellants Counter Claim

It is not in doubt that the Appellant in his Counter Claim, was seeking to be registered as the owner of the suit property by way of **Adverse Possession**. The trial Court held that it did not have jurisdiction, but still went on and determined the issues.

The guiding provisions of law with regards to **Adverse possession** are to be found in **Section 7 of the Limitation of Actions Act**, which is in these terms:-

“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.”

Further **Section 38** of the **Limitation of Actions Act** which provides as follows:

(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, 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 or lease in place of the person then registered as proprietor of the land.

(2) An order made under subsection (1) shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

(3)

(4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.

(5) ...

The Court is cognizant of the fact that the Magistrates Courts are empowered to hear and determine matters relating to land issues. However, in the case of **Adverse possession**, a party claiming ownership by virtue of **Adverse Possession** would move the Court through Section 38. The said Section is categorical that the party ought to move the High Court, so that even though the Magistrates Courts are empowered to hear and determine matters relating to land. On the specific issues of **Adverse Possession**, the Act has limited the same to be heard and determined by the High Court and in this case the **Environment & land Court**.

The Court therefore finds and holds that the magistrate Court did not have jurisdiction to hear and determine the Appellant's Counter Claim. See the case **Jesee Njoroge Gitau v Kibuthu Macharia & another [2019] eKLR** where the Court held that;

“In terms of Section 38 of the Limitation of Actions Act, where a person claims to have become entitled by adverse possession to land, (s)he must (Emphasis mine) apply to the High Court for an order that (s)he be registered as the new proprietor of the land in place of the registered owner. The elaborate procedure of moving the High Court is provided for in Order 37 Rule 7 of the Civil Procedure Rules as follows:

i. An application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons.

ii. The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

It is clear from the above provisions of the law that the Magistrates Courts have no jurisdiction to try matters where a party is seeking adverse possession. Indeed if both matters had been filed in this court, the best order suited to issue upon this application would have been an order for consolidation of both the matters. However this is not the case in question.”

2. Whether the suit was time barred

The Appellant claims that the suit was time barred by the provisions of **Section 7 of the Limitations of Actions Act** and that the trial Court failed to find so. **Section 7 of the Limitation of Actions 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.”

It therefore follows that a suit is time barred after the lapse of 12 years from the time the cause of action arose. When then did the cause of action in this suit arise? Though the Appellant's claims that his family and himself had been in possession of the suit property for over **20 years**, it is not in doubt that there is a suit that was filed between the Appellant's mother and the Respondent and the same was determined in **2004**. Therefore, it is clear that time did not run until then.

While the Appellant claims that he entered the suit property upon the demise of his mother in **2005**, and that the Respondent has never been in possession, it is the Respondent's contention that after the Judgment of the Court, he entered upon his suit property and fenced the same and that the Appellant only started interfering with the suit property in **2013**. In his testimony, the Appellant acknowledged that he found the Respondent on the suit property in **2005**. Further, in his statement of claim the Respondent avers that the cause of action arose in **2013**, and from **2013 to 2018**, when the suit was filed **12 years** had not lapsed. The Appellant did not produce evidence to disapprove the contention by the Respondent that the cause of action arose in **2013**. Therefore, the Court finds and holds that the suit was not time barred.

3. Whether the Appeal as merited

It is not in doubt that the Respondent is the registered owner of the suit property and to this effect, he produced in evidence a title deed dated **17th March 1998**. Further, though the Appellant contends that the documents produced in evidence by the Respondent were fraudulent, he did not produce any evidence to prove the said claim. It is trite that whoever alleges must prove and the Appellant failed to prove this. The Respondent produced in evidence a Judgment and Decree and in the said Decree in the Civil Case No. **1552 of 1999**, the Court dismissed the Plaintiff's suit and further issued a Permanent Injunction against the Plaintiff and or her agents from interfering with the Respondent's suit property.

It is not in doubt that the Appellant is claiming through his mother, who was the Plaintiff in the said suit. The Court Order clearly barred him from interfering with the Respondent's quiet enjoyment of the suit property.

Further, the Respondent was able to prove the root of his title as he produced in evidence his documents and in its Judgment, the Court in the said suit found that the Respondent had ownership of the suit property and the subordinate Court could not therefore disregard the same. The Respondent being the registered owner of the suit property and without the same having not been impeached, he holds all the right and privileges appertaining to it. As he had sought for eviction and injunction orders against the Defendant (Appellant), it would only be proper that the same be granted to be able to enable the Respondent enjoy quiet and peaceful possession of his property.

Therefore, this Court finds and holds that having proved proprietorship, the Respondent was entitled to all the rights and privileges that appertain to it. Hence the Appeal by the Appellant is **not merited** as the trial Court arrived at the proper determination and did not misapprehend the law.

Having carefully re-evaluated and re-assessed the available evidence before the trial court and the **Memorandum of Appeal** together with

the written submissions, the Court finds that the trial Magistrate arrived at a proper determination and exercised his discretion properly and this Court has no reason to interfere with the said determination.

The upshot of the foregoing is that the Appellant's Appeal is found **not merited** and consequently the said Appeal is **dismissed** entirely and the Judgment and Decree of the trial Court are **upheld**.

On the issue of costs, the Court finds that the same is granted at the discretion of the Court, though Costs usually follow the events. The Appeal is dismissed and therefore the Appellant will bear costs of the Appeal herein.

It is so ordered.

Dated, signed and Delivered at Thika this 29th day of July 2021.

L. GACHERU

JUDGE

29/7/2021

Court Assistant – Dominic

ORDER

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Kinyua for the Appellant

M/s Kavagi holding brief for M/s Musungu for the Respondent

L. GACHERU

JUDGE

29/7/2021