



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 39 OF 2019

BEATRICE WANJIRU WARUI.....APPELLANT/APPLICANT

VERSUS

ESTHER MICERE NYUMU.....1ST RESPONDENT

ALICE WANGUI MWANIKI.....2ND RESPONDENT

JUDGMENT

The applicant filed Originating Summons dated 19th September, 2019 seeking the following orders:

- 1. That the applicant Beatrice Wanjiru Warui be registered as the proprietor of the land parcel Number Kabare/Nyangati/6154***
- 2. That the respondents bear the costs of this application.***

Summary of Facts

The Originating Summons dated 19th September, 2019 was supported by the supporting affidavit of BEATRICE WANJIRU WARUI dated 19th September, 2019 where she deponed thus:

The Applicant submitted that the 2nd respondent is the registered proprietor of land parcel number Kabare/Nyangati/6154. The applicant has been in exclusive and quiet possession of land parcel number Kabare/Nyangati/ 6514 without interruption for a period of more than 12 years. She has lived on the land continuously since 1992 and has fully developed it by building permanent and semi-permanent houses.

That the 1st respondent subdivided the original parcel of land which is Kabare/Nyangati/3158 in 1997 when the applicant was still in occupation. In the year 2012, the 1st transferred the land parcel number Kabare/Nyangati/6154 to the 2nd respondent. Further, none of the respondents has ever taken possession nor occupied the suit land since the applicant took possession of the same in 1992.

The applicant came into possession of land parcel number Kabare/Nyangati/3158 after being allotted the same by the Kerugoya/Kutus Municipal Council. Subsequently, she was allotted Jua Kali Plot Number 56 in the year 1992. She has been in occupation of the land parcel number Kabare/Nyangati/6154 for a period of over 12 years and hence entitled to the orders sought.

The respondents filed an affidavit dated 27th November, 2019 where they deponed as follows:

That the 1st respondent gifted the 2nd respondent land parcel number Kabare/Nyangati/6154 sometimes in November, 2018 the said parcel having arisen from subdivision of land parcel number Kabare/Nyangati/3158 which arose from partitioning of land parcel number Kabare/Nyangati/23. She inherited the said Kabare/Nyangati/23 from the estate of her late husband through Embu Succession No. 83 of 1995 where she was a co-administratrix with the co-wife. Upon inheriting, she proceeded to subdivide, sell and gift her children including her daughter as foretasted.

That at no time did the defunct Kerugoya/Kutus Municipal Council own the said Kabare/Nyangati/23 nor any resultant sub-division as claimed by the applicant herein. There had been attempts to claim ownership of these parcels over the past few years by various parties affiliated to the applicant. Further, the defunct Kerugoya/Kutus Municipal Council was never an interested party and neither has it ever commenced any suit against the respondents.

The applicant has filed the instant summons following the suit filed by the 2nd respondents in Wang'uru ELC 49 of 2019. Further, the claim

of adverse possession should fail as the respondents have been dealing with land on several occasions. The claim that none of the respondents has ever taken possession or occupied the land subject to the dispute is misleading. Finally, the Originating Summons filed by the applicant be disallowed with costs to the respondents and the court does proceed to allow the prayers in Wang'uru ELC 49 of 2019 dated 22nd July, 2019 consolidated herewith.

The matter proceeded for hearing 6th October, 2020.

Applicant Hearing

The plaintiff/applicant reiterated the evidence contained in the supporting affidavit to the originating summons sworn on 19th September, 2019 and adopted her statement as evidence in court.

The applicant told the court that land parcel number Kabare /Nyangati/6154 is currently registered in the names of the 2nd respondent. The applicant testified that she lived on the parcel of land and has had quiet possession for more than 12 years since 1992. The respondents have never tried to evict the applicant from the suit land for the period of 28 years she has been in occupation of the same.

Further, the applicant told the court which evidence was not challenged that the 1st defendant/respondent subdivided land parcel number Kabare/Nyangati/3158 in the year 1997 and during that time the plaintiff was in occupation. The plaintiff produced a copy of the green card for land parcel number Kabare/Nyangati/3158 (P. Exhibit 3).

The 1st respondent was the registered proprietor of the land parcel number Kabare/Nyangati/3158 from 1996 which she subdivided in the year 2012 giving rise to the resultant parcels which is the subject matter herein. The suit land herein is a resultant parcel out of the land parcel number Kabare/Nyangati/3158.

The plaintiff/applicant produced an allotment letter dated 2nd June, 1992 which indicated that the plaintiff entered that land the same year the plot was allocated to her by the defunct Kerugoya/Kutus Municipal Council. Since then she has been in occupation of the property. The letter dated 2nd June, 1992 was produced as plaintiff Exhibit 4. On cross-examination she confirmed that the allotment letter was not an authority to put up a Jua Kali Shelter.

On re-examination, she reiterated that if she was not living on the suit land she could not have been sued by the respondents in Wang'uru ELC 49 of 2019. Further, the structures in the land were constructed a long time ago.

Respondents hearing

The 1st respondent relied on the averments in the replying affidavit sworn on the 27th November, 2019.

She testified that she lived on the suit land and the plaintiff had leased the same. She had constructed a house in land parcel No. 6154. She did not avail photographs of the house. She testified that she had been sued on several occasions regarding the land and won all the cases.

The 1st respondent testified that the applicant leased her land from unknown people and hence lives in it. Further, she lives in a different section of land from where the respondent lives. She suspects that she leased the land from the County Council of Kirinyaga where she works.

The defendant admitted that the plaintiff was on the land but denied the period of time that the plaintiff has been in occupation. On cross-examination, the defendant told the court that the plaintiff came into the suit land in the year 2013. The respondents admitted that the plaintiff was on their land without their permission and despite allegations that she occupied it in 2013; no steps have been taken to evict her.

The 2nd respondent testified that she was the daughter of the 1st respondent. She had been gifted the suit land by 1st respondent. The suit land is Kabare/Nyangati/6154. The original parcel was Kabare/ Nyangati/3158 which was subdivided into 14 parcels 6146-6159. She was issued with the title deed of Kabare/Nyangati/6154 after a 2014 restriction by Kirinyaga County Government was lifted in 2017. She was issued with the title deed in 2018. The 2nd respondent came to know the applicant when she sued her in Wang'uru ELC 49 of 2019. Further, she lived on the suit land from 2013. She erected temporary structures on the land from 2013.

The parties filed their rival submissions and submitted as follows:

Plaintiff's Submissions

The plaintiff rehashed the prayers in her Originating Summons dated 19th September, 2019.

The plaintiff/applicant submitted that she had been sued by the 2nd defendant/respondent vide Wang'uru ELC 49 of 2019 where she was seeking for orders of eviction of the applicant from the land parcel Number Kabare/Nyangati/6154.

On the 7th October, 2019, the parties entered into a consent for injunction against eviction, sale or transfer of the land pending the hearing and determination of the main suit. Further, that Wang'uru ELC 49 of 2019 be forwarded to Kerugoya High Court for consolidation with this case.

The plaintiff/ applicant submitted that Paragraph 11 of the 1st defendant/ respondent own affidavit clearly shows that the then Kerugoya/Kutus Municipal Council had dealings with the land the reason a restriction had been placed by the county Government of Kirinyaga. The defendant/ respondent at paragraph 4 of the Plaint in Wang'uru ELC 49 of 2019 averred that the plaintiff without consent encroached on their land.

Principles of Adverse Possession

The plaintiff submit that the main issue to determine is whether she had acquired title to land parcel number Kabare/Nyangati/ 6154 by way of adverse possession.

The requirements of adverse possession are set out in the case of *Mbura Vs Gachuhi [2002] 1 E.A.L.R. 39* where the court 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 open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption...”

The plaintiff submitted that she had been in quiet possession of the land parcel number Kabare/ Nyanguti/ 6154 for a period of 12 years.

The court restates the principles of adverse possession in the case of *Simon Gituto Ngari Vs Michael Kaaru Njoroge & another [2019] e KLR*.

Another case decided in favour of the plaintiff is *The Seventh Day Adventist Church (EA) LTD being sued on behalf of S.D.A Church & Another Vs Salome Wamutira Mukuria [2018] e KLR*.

Finally, the plaintiff/ applicant prays for the orders in the Originating Summons to be granted and the claim in Wang'uru ELC 49 of 2019 be dismissed with costs.

Respondents Submissions

The respondent reiterated the averments in the replying affidavit sworn on the 27th November, 2019 by the 1st respondent.

The question for determination was whether the applicant's occupation of land parcel number Kabare/Nyangati/ 6154 amounts to adverse possession. The respondent submitted that there was no allotment letter for plot No. Jua Kali 56 produced by the applicant to prove allocation of the suit land by the defunct Kerugoya/Kutus Municipal Council. There is proof of payment of allotment fees or land rates. Further, there was no beacon certificate produced.

The 1st respondent submitted that she has been the subject of suits emanating from the suit property such as High Court Suit No. 1691 of 2001 at Nairobi confirming that she was in possession of the suit land. The respondents submit that being holders of title albeit at different times becomes the absolute indefeasible owners of land parcel number Kabare/ Nyangati/6154.

The respondents submit that they have known the existence of the applicant on the suit land since 2014. They have been tilling the land before 2014 and the structures mentioned by the applicant were erected in 2014. The County Government removed the restrictions it had placed on the suit land allowing the 1st respondents to subdivide and gift a parcel of it to the 2nd respondent. The 2nd respondent sought to evict the applicant from the land. Consequently, since 2014 time has not accumulated to 12 years to sustain claim of adverse possession.

The respondent rely on the decision in *Chairman, Board of Governors Murang'a College of Technology Primary School Vs Julius Ngigi Munjuga [2018] e KLR*, the court was of the opinion that, *“a claim based on allotment is not the same as a claim based on adverse possession. The appellant could not assert right of an adverse possessor and in the same breath claim to have been allocated land in 1990.”*

The applicant is trying to gamble both sides in that when adverse possession fails, they will lean on the claim of allotment. The Originating Summons should thus fail.

The respondents pray for the Originating Summons to be struck out with costs to the respondents. Further, the court to allow the eviction orders and reliefs sought in Wang'uru ELC 49 of 2019.

Issues

1. Whether the applicant BEATRICE WANJIRU WARUI should be registered as the proprietor of the land parcel number Kabare/ Nyanguati/6154.

Analysis

Proof of adverse possession

The applicant testified that she had been in exclusive and quiet possession of land parcel number Kabare/Nyangati/6154 without interruption for a period of more than 12 years. She has lived on the land continuously since 1992 and has fully developed it by building permanent and

semi-permanent houses.

The plaintiff/applicant produced an allotment letter dated 2nd June 1992 which indicated that the plaintiff entered the land the same year the plot was allocated to her by the defunct Kerugoya/Kutus Municipal Council. Since then she has been in occupation of the property. The letter dated 2nd June, 1992 was produced as plaintiff Exhibit 4.

The applicant testified that the 1st respondent subdivided the original parcel of land which is Kabare/Nyangati/3158 in 1997 while the applicant was still in occupation. In the year 2012, the 1st respondent transferred land parcel Number Kabare/Nyangati/6154 to the 2nd respondent. Further, none of the respondents has ever taken possession nor occupied the suit land since the applicant took possession of the same in 1992.

On the part of the Respondents

The 1st respondent testified that she lived on the suit land and the plaintiff had leased the same. She had constructed a house in the land parcel no 6154. She did not avail photographs of the house.

The 2nd respondent testified that she was the daughter of the 1st respondent. She had been gifted the suit land by 1st respondent. The suit land is Kabare/Nyangati/6154. The original parcel was Kabare/Nyangati/ 3158 which was subdivided into 14 parcels running from parcel 6146-6159. Further, the 2nd respondent is the registered proprietor of land parcel number Kabare/ Nyangati/ 6154. She was issued with title deed of Kabare/ Nyangati/6154 after a 2014 restriction by Kirinyaga County Government was lifted in 2017. She was issued with the title deed in 2018.

The 2nd respondent testified that she came to know the applicant when she sued her in Wang'uru ELC 49 of 2019. The applicant began to live on the suit land from the year 2013. She began to erect temporary structures on the land from 2013.

The applicant submitted that she has satisfied the requirements for proving that she had acquired title to land parcel number Kabare/ Nyangati/6154 by way of adverse possession.

She relied on the decision in the following case:

Mbura Vs Gachuhi [2002] 1 E.A.L.R. 39 where the court held,

“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 nonconsensual open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption”

The plaintiff submitted that she had been in quiet possession of land parcel number Kabare/ Nyangati/ 6154 for a period of 12 years. She has lived on the land for more than 28 years.

Further, when the 1st respondent subdivided the original parcel of land which is Kabare/Nyangati/3158 in 1997, the applicant was still in occupation. On the part of the respondents, they submitted that being holders of title albeit at different times becomes the absolute indefeasible owners of land parcel number Kabare/Nyangati/6154. The 1st respondent testified that the applicant's allotment letter dated 2nd June, 1992 was an

authority to put up a Jua Kali Shelter and not to occupy the suit land. The 1st respondent claims that she inherited the said Kabare/Nyangati/23 from the estate of her late husband through Embu Succession Cause No. 83 of 1995 where she was a co-administratrix with the co-wife. Upon inheriting, she proceeded to subdivide, sell and gift her children including her daughter as aforesaid.

The respondents submitted that they have known the existence of the applicant on the suit land since 2014. They have been tilling the land before 2014 and the structures mentioned by the applicant were erected in 2014. The County Government removed the restrictions it had placed on the suit land allowing the 1st respondent to subdivide and gift a parcel of it to the 2nd respondent. The 2nd respondent sought to evict the applicant from the land. Consequently, since 2014 time has not accumulated to 12 years to sustain a claim for adverse possession.

They rely on the following case to defeat the applicant's case:

Chairman, Board of Governors Murang'a College of Technology Primary School Vs Julius Ngigi Munjuga [2018] e KLR, the Court was of the opinion that,

“A claim based on allotment is not the same as a claim based on adverse possession. The appellant could not assert right of an adverse possessor and in the same breath claim to have been allocated the land in 1990”.

However, the applicant submitted that Paragraph 11 of the 1st respondent's replying affidavit clearly showed that the then Kerugoya/ Kutus Municipal Council had dealings with the land the reason a restriction had been placed by the county Government of Kirinyaga.

The 1st respondent could not remember the exact time the applicant occupied the suit land. The 2nd respondent was not aware when the

applicant occupied the land but suspect it was the year 2013. Nevertheless, the photographs produced by the plaintiff as evidence of occupation of the suit land are a confirmation that the structures were built more than 12 years ago. The respondents on their part did not produce any evidence to prove that they occupied the suit land. In this regard, I am satisfied that the applicant has been in adverse occupation of the suit land.

Disposition

The upshot of my analysis and evaluation is that the Applicant has proved that she has lived in the suit land continuously openly and exclusively notoriously without interruption for more than 12 years and that the title to the suit land has extinguished. Consequently, I enter judgment in the following terms:-

- (1) A declaration that the Applicant has acquired land parcel No. KABARE/NYANGATI6154 by Adverse Possession.*
- (2) That the Applicant, Beatrice Wanjiru Warui be registered as proprietor of land parcel No. KABARE/NYANGATI/6154.*
- (3) That the Respondents to bear the costs of this application.*

JUDGMENT READ, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT KERUGOYA THIS 23D DAY OF JULY, 2021.

.....

E.C. CHERONO

ELC JUDGE

In the presence of:-

Ms Ndungu holding brief for Mrs Makworo

Ms Wambui holding brief for Njue Muriithi

Kabuta – Court clerk.