



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 93 of 2015 (OS)

PETER THUO KAMAU.....1ST PLAINTIFF

GRACE MUTHONI THUO.....2ND PLAINTIFF

=VERSUS=

LUCY WAMAITHA KIARIE.....1ST DEFENDANT

SAMUEL KIARIE.....2ND DEFENANT

FAITH MUTHONI CHURU

JOSEPH NDUNGU NJOROGE

LUCY WAMBUI WAWERU.....3RD, 4TH, 5TH DEFENDANTS

(SUED AS THE TRUSTEES OF P.C.E. A THINDIGUA CHURCH)

THE CHIEF LAND REGISTRAR, NAIROBI.....6TH DEFENDANT

JUDGEMENT

1. This is the Originating Summons dated 9th February 2015 brought under Section 38 of the Limitation of Actions Act, Cap 22 Laws of Kenya, Order 37 Rule 3 of the Civil Procedure Rules, 2010.

2. LET Lucy Wamaitha, Samuel Kiarie, Faith Muthoni Churu, Joseph Ndungu Njoroge And Lucy Wambui Waweru (registered as trustees of P.C.E.A Thindigua Church) within 15 days after service of these summons to enter appearance to this summons which is issued on the application of Peter Thuo Kamau and Grace Muthoni Thuo.

3. WHERE the Applicants now seek orders that:-

(a) He occupied the parcel of land LR NO 76/364 in 1979 and he continuously occupied the parcel of land (hereinafter referred to as the suit land) peaceably and without any interruptions.

(b) The plaintiff occupy approximately 0.230 ha of the suit land in exclusive possession.

(c) The plaintiffs have lived on this parcel of land for over 36 years without interruption.

(d) The limitation period for bringing any action against the plaintiffs herein has lapsed and the plaintiffs have acquired rights over the suit land by prescription.

(e) The defendants and the original owner of the suit land knew of the applicants' occupation as the same was open and without secrecy.

4. The Originating Summons is supported by the affidavit of Peter Thuo Kamau, the 1st plaintiff herein sworn on the 9th February 2015 and a

further affidavit sworn on the 5th May 2015. There is also a supporting affidavit sworn by Grace Muthoni Thuo the 2nd plaintiff herein, on the 9th February 2015.

5. The 1st, 3rd – 5th defendants entered appearance through the firm of M/S Kariuki Muigua & Co. Advocates on the 2nd May 2015. There is an affidavit sworn by Lucy Wamaitha Kiarie, the 1st defendant herein on the 25th March 2015. There is also an affidavit in reply sworn by Faith Muthoni Churu, the 3rd defendant and trustee of P.C.E.A Thindigua church on the 31st March 2015.

6. On the 13th April 2017, the court with the consent of the parties directed that the Originating Summons herein do proceed by way of *viva voce* evidence. Further that the affidavits in support and in reply be treated as pleadings.

7. PW1 Peter Thuo Kamau, the 1st plaintiff testified on 23rd September 2020. He adopted his supporting affidavit and the further affidavits dated 9th February 2015 and 5th May 2015 respectively as part of his evidence in this case. He told the court that he was given the suit property by Onesmus Mwenje Kinyanjui also known as Mzee before he died. He further stated that he has lived on the land since 1979 and prays that he be declared the registered owner. He also told the court that he is a member of P.C.E.A Thindigua Church.

8. He denied claims that the church has bought the land. The said church was established in the area in the 1990s when he was already on the land. His children were born on the land. He has annexed the identity cards to the supporting affidavit. He further stated that the church brought building materials and deposited on the land.

9. That Onesmus Mwenje Kinyanjui bought the land from Thindigua Company and gave him permission to live on the house which was on the land. He also worked for the said Kinyanjui on the said farm. This was in 1977. He stated that he has never paid rent for the said house and that the 1st defendant was aware he was on the land. He also stated that his earlier relationship with the 1st defendant was good and they treated each other as family. That the 2nd defendant is a brother to the 1st defendant. He urges that the prayers in the Originating Summons be granted.

10. PW2, Grace Muthoni Thuo, the 2nd plaintiff also testified on 23rd September 2020. She adopted her supporting affidavit sworn on the 9th February 2015. She adopted her supporting affidavit sworn on the 9th February 2015 as part of her evidence in this case. She confirmed what PW1 told the court. She said they entered the land peacefully and have never been threatened with eviction. She also said she had a good relationship with the 1st defendant, earlier on. She also stated that the 3rd – 5th defendants invaded the suit property. She said she has been on the land for forty three (43) years. She also urges that the prayers on the originating summons be granted.

11. The defence called two witnesses. DW1 Lucy Wamaitha Kiarie, testified on 23rd September 2020. She adopted her replying affidavit sworn on the 23rd March 2015 as part of her evidence in this case. She told the court that her mother was Esther Nduta Kiarie. That Onesmus Mwenje Kinyanjui was not her father but had worked for her mother for many years.

12. She further stated that her mother bought the land from Thindigua company and that her mother gave Onesmus Mwenje land as a sign of gratitude for many years of work. The said Onesmus Mwenje constructed rental houses. PW1 rented one of the houses as a tenant. She said the land now belongs to P.C.E.A Thindigua Church having bought from Samuel Kiarie, Phyllis Nyambura and Onesmus Mwenje. She further stated that the church should be allowed to use the land.

13. DW2, Faith Muthoni Churu the 3rd defendant also testified on 23rd September 2020. She adopted her affidavit sworn on 31st March 2015. She told the court that he is the Chairlady of P.C.E.A, Thindigua Church. She stated that the church bought the suit land in 2015 after doing due diligence. She prays that the plaintiff's suit be dismissed with costs.

At the close of the oral testimonies, parties tendered final written submissions.

The Plaintiffs' Submissions

14. They are dated 8th March 2021. The plaintiffs have been on the suit land since 1979. They bore and raised their children on the suit land. Their occupation on the land was open and without secrecy. They entered the land without force and their exclusive occupation has never been disrupted. The original owner Onesmus Mwenje never occupied the suit land as he lived in Mathare area of Nairobi. The plaintiffs were not tenants of the said Onesmus Mwenje. The plaintiffs initially occupied a mud walled house, later constructed a wooden house and now an iron sheet house. That all these houses were constructed without permission from anyone.

15. Claims for adverse possession are governed by the Limitation of Actions Act. Section 7 of the said Act provides that actions relating to land must be brought within a period of twelve (12) years from the time the cause of action arose. They have put forward the cases of **Peter Kamau Njau vs Emmanuel Charo Tinga [2016] eKLR, Celina Muthoni Kithinji vs Safiya Binti Swaleh & 8 Others [2016] eKLR.**

16. The law is settled that in an action for adverse possession one must show that they entered the land without force and their continuous occupation has been adverse to or contrary to the rights of the registered owner of the land. The plaintiffs were not tenants or lessees for over 33 years. Since they entered the suit land the plaintiffs have never been removed or in any other way discontinued their occupation. No notice of intention to interfere with their stay has ever been served on them.

17. The portion occupied by the plaintiffs is distinct and identifiable. The plaintiffs have occupied and lived on this land continuously and in exclusion of any other person. They have annexed photographs showing their occupation. They have put forward the case of **Paul Muthuita vs Wanoe [1982] eKLR.**

18. The sale of a land was subject to the rights of an adverse possessor. It does not override the interest of the adverse possessor. Both the vendor and the purchaser were fully aware of the plaintiffs' occupation of the suit land for a period in excess of 33 years. The 3rd – 5th defendants were aware of the rights of the plaintiffs. They have put forward the case of **Peter Kamau Njau vs Emmanuel Charo Tinga (Supra)**.

19. The plaintiffs have established that they have been on the suit land for an uninterrupted period exceeding twelve years hence the title to the land in the name of the registered owner is extinguished. They have put forward the case of **Benjamin Kamau Murima & Others vs Gladys Njeri CA No 213 of 1996**. The plaintiffs have proved their case for adverse possession and urges that the prayers sought be granted.

The Defendants' Submissions

20. They are dated 17th April 2021. They raise two issues for determination. They are:-

(a) Whether the plaintiffs are entitled to the orders sought in the Originating Summons.

(b) Who bears the costs of these proceedings?

The suit is premises on section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya. It is trite law that the plaintiffs must demonstrate the following:-

(a) The adverse possessor does not know the owner of the land.

(b) The adverse possessor must show that they occupied the land without permission or licence.

(c) The adverse possessor must demonstrate that they have been in exclusive occupation of the property without acknowledging the land owner's title.

They have put forward the cases of **Gabriel Mbui vs Mukindia Muranya [1993] eKLR**, **Muraguri Githitu vs Mathenge Thiongo [2009] eKLR**.

21. Before the suit property was transferred to the 3rd – 5th defendants as trustees of P.C.E.A Thindigua Church, it was jointly owned by Samuel Kiarie, Phyllis Nyambura Kinyanjui and Onesmus Mwenje as per the indenture dated 13th August 1983. In this case the plaintiffs stated that they knew Onesmus Mwenje who co-owned the suit property with Samuel Kiarie and Phyllis Nyambura. The plaintiffs occupied the land and continued to occupy the land with full knowledge of the owners of the land and in acknowledgement of the owners of the land.

22. The adverse possessor must enter the land without permission or licence from the owner of the land. They have put forward the case of **Gabriel Mbui vs Mukindia Maranya [1993] eKLR**, **Wambugu vs Njuguna [1983] KLR P. 172**. The plaintiffs testified that they were permitted to occupy the land by Onesmus Mwenje. The 1st plaintiff worked for Mr. Mwenje in the suit property. DW1 gave uncontroverted evidence that the plaintiffs were tenants of Mr. Mwenje in some mud houses that were constructed on the land. The plaintiffs did not give evidence to demonstrate that their permission to occupy suit property was withdrawn or denied at any time.

23. The plaintiffs cannot assert any claim to the suit property as adverse possessors because they occupied the suit property with the permission of the land owners and hence remained in occupation of the suit property with permission of the land owners.

24. An adverse possessor must be in exclusive possession of the suit property without acknowledging the land owner's title or recognizing any other person's interest.

25. The 1st plaintiff testified that he was hired as a farm hand by a co-owner of the suit property Mr. Onesmus Mwenje. This means that at the time of their occupation the land owners had possession and control of the property. No evidence was led to demonstrate that the plaintiffs occupy a portion of land measuring approximately 0.0230 ha of 0.2548. The plaintiffs admitted that another person, Wellington Njomo Gichanga resided on the suit property. They therefore have no exclusive possession of the property. The plaintiffs are not entitled to the reliefs sought in the originating summons. They pray that the originating summons be dismissed with costs to the 1st, 3 – 5th defendants.

26. I have considered the originating summons, the affidavits in support and the affidavits in response. I have considered the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-

(i) Whether the plaintiffs are entitled to the suit land by virtue of adverse possession.

(ii) Are the plaintiffs entitled to the reliefs sought?

(iii) Who should bear costs of this suit?

27. It is not in dispute that the plaintiffs are in occupation of a portion of the suit property. The defendants however stated that they entered the land with permission of one of the co-owners of the suit property Mr. Onesmus Mwenje.

28. The ingredients of the doctrine of adverse possession were stated by the Court of Appeal in the case of **Mtana Lewa vs Kahinndi Ngala Mwangandi [2005] eKLR** where it was held that:-

“Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such a person. In assertion of his title for a certain period, in Kenya 12 years”.

Similarly in the **Celina Muthoni Kithinji vs Safiya Bwinti Swaleh & 8 Others [2018] Eklr**, the Court stated:-

“12. It is also a well settled principle that a party claiming adverse possession ought to prove that this possession was nec vi, nec clam, nec precario” that it peaceful open and continuous. The possession should not have been through force nor in secrecy and without the authority of or permission of the owner.

13. This being a claim for adverse possession the plaintiffs must show that they have been in continuous possession of the land for 12 years or more; that such possession has been open and notorious to the knowledge of the owner and that they have asserted a hostile title to the owner of the property”.

29. Also in the case of **Moraa Ndege vs Moenga Moenga [2015] eKLR**, the Court of Appeal relied on the case of **Kimani Ruchire & Another vs swift Rutherfords Co. Ltd [1980] KLR 10** where Kneller J (as he then was) observed thus:-

“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 persuasion) 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 by any endeavours to interrupt it or by any recurrent consideration, see Wanyoike v Beverly [1965] EA 514, 518, 519 Per Miles J.

No right of action to recover land accrues unless the lands are in possession of some person in whose favour the period of limitation can run. The possession is after all adverse possession, so the statute does not begin to operate unless, and until the true owner is not in possession of his land. Dispossession and discontinuance must go together, see section 9(1) and 13 of the Limitation of Actions Act. So where the use and enjoyment of the land are possible there can be no dispossession of the registered and rightful owner enjoys it”.

I am guided by the above authorities.

30. PW1, Peter Thuo Kamau told the court he was allowed to enter the land by one of the co-owners, Onesmus Mwenje. He stated he worked for the said Onesmus Mwenje but he was not paid for the work. He admitted in cross examination that he entered the land with permission. He again told the court that he is entitled to the land because he worked for Onesmus Mwenje. In the case of **Gabriel Mbui vs Mukindia Maraya [1993] eKLR**, the court stated thus in part:-

“....If one is in possession as a result of permission given to him by the owner, or if he is in possession of the land as a licensee from the owner, he is not in adverse possession, permissive occupation is inconsistent with adverse possession. The stranger must show how and where his possession ceased to be permissive and became adverse.....”.

31. Pw1 told the court that he first occupied a mud walled house and later a wooden house. He admitted that the iron sheet house he is currently occupying was constructed during the pendency of these proceedings and despite a court order not to put any structures.

32. PW1 also stated in paragraph 12 of the supporting affidavit sworn on 9th December 2015, that:-

“That Lucy Wamaitha the 2nd defendant had tried building on the plot I currently occupy on the suit land around or about the middle of the year 1991 and her father, Mr. Kinyanjui, told her to demolish the house, and told her that no one should interfere with my occupation of the suit land”.

In paragraph 15, he states:-

“That Mr. Kinyanjui built a small house measuring approximately 36” X 36” near my house on the said land and he told me that he wanted to be resting on that house when he visits from Nairobi”.

33. He also attached a letter Annexure PTK4” allegedly written by the 1st defendant, stating that he had accepted to give half (1/2) of LR NO 76/364 to the plaintiff. The said letter has been denied by the 1st defendant. She says it is a forgery. However, if the contents of the said letter were true, then this confirms the owners of the land had not been dispossessed of the land. It appears the plaintiff claims that he was given land by Onesmus Mwenje while on the other hand he claims land through adverse possession.

34. It is not in dispute that the suit land has been transferred to the P.C.E.A Thindigua Church. The indenture dated 8th April 2014 shows that the suit property was transferred to the church by the last surviving joint owner of the suit property Samuel Kiarie. The plaintiffs know the owners of the suit property.

35. No evidence was led by the plaintiffs to show that they occupy a portion of land measuring approximately 0.230 hectares. It is therefore not true that the plaintiffs have exclusive possession of the suit property.

36. Order 37 rule 7 of the Civil Procedure Rules provides that:-

(1) An application under section 38 of the Limitation of Actions Act shall be made by originating summons.

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

(3) The court shall direct on whom and in what manner the summons shall be served.

It is clear that the certified extract of title to the land in question is not annexed to the supporting affidavit of the plaintiffs. I find that this offends the mandatory provisions above.

37. I have considered the evidence in totality. I find that the plaintiffs have not made out a case for adverse possession. Their case must fail. They are not entitled to the reliefs sought.

38. The plaintiffs are in occupation of the suit property with permission. The suit property is now registered in the name of P.C.E.A Thindigua and the plaintiffs ought to vacate the suit property.

39. In conclusion, I find no merit in the plaintiff's case. The same is dismissed with costs to the 1st, 3rd and 5th defendants.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 23RD DAY OF SEPTEMBER 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Mwangi K. M advocate for the Plaintiffs

Mr. Njuguna advocate for the 1st, 3rd – 5th Defendants

No appearance for the 2nd Defendant

Steve - Court Assistant