



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

E.L.C NO. 26 OF 2020 (OS)

ANTHONY IRUNGU J. KANGETHE.....1ST APPLICANT/PLAINTIFF

JOHNSON WAWERU NGURE.....2ND APPLICANT/PLAINTIFF

DANIEL WAWERU MUCHOKI.....3RD APPLICANT/PLAINTIFF

VS

BERNARD MWANGI WAWERU.....RESPONDENT/DEFENDANT

JUDGEMENT

1. The Applicants/Plaintiffs initiated suit against the Respondent/Defendant seeking declaratory orders that the Plaintiffs and their families have been in adverse possession of LOC11/GAITEGA/522 for a period of over 12 years; the Plaintiffs have become entitled to ½ of the suit land by adverse possession; The Defendant to transfer the ½ share of the suit land to the Plaintiffs in default the Deputy Registrar to be mandated to so; a permanent injunction do issue restraining the Defendant from claiming and interalia interfering and or disposing the suit land.

2. The suit is supported by the supporting affidavit of the 1st Plaintiff filed on the 19/10/2020.

3. Via his Replying affidavit filed on the 25/11/2020 the Defendant opposed the suit of the Plaintiffs and denied the Plaintiffs claims.

4. The Plaintiffs evidence was led by 6 witnesses while the Defendant presented 4 witnesses in support of his defence.

5. PW1- Anthony Irungu Kangethe relied on his supporting affidavit and the witness statement dated the 14/10/2020 and 19/10/2020 and the list of documents marked as PEX No 1-14.

6. He stated that he is one of the grandsons of the owner of the original suit land namely Daniel Waweru Kibiru. That during his lifetime he gifted the suit land to all the grandsons (the Plaintiffs) named after his name. Making reference to the letter dated the 28/9/1980, he informed the Court that his grandfather distributed his land to all his sons in his lifetime. That the Defendant held one acre of the suit land in trust for the Plaintiffs. That he constructed a permanent house on the suit land in 2005. That the 2nd and 3rd Plaintiffs only cultivate the suit land as they live on their father's lands. That he has lived on the land for a period exceeding 30 years until 2018 when the Defendant started demanding that they vacate the land.

7. PW2- John Waweru Ngure testified and relied on his witness statement dated the 19/10/2020. That though the suit land is registered in the name of Defendant, he holds 1 acre therein on behalf of the Plaintiffs. That prior to 2018, the Plaintiffs have occupied ½ of the suit land for 30 years carrying out subsistence farming. That he lives on his father's land parcel No LOC11/GAITEGA /524 measuring 2 acres. The 1st Plaintiff has built on the land.

8. That he entered the suit land with the 1st Plaintiff in 1983 with the consent of his father and that of the Defendant.

9. PW3- Benson Ngure Waweru testified and reiterated the evidence of PW1 and PW2. That the 1st and 3rd Plaintiffs are his nephews and the Defendant is his young brother. That the 2nd Plaintiff is his son. That he was given parcel No LOC11/GAITEGA /523 by his father just like all his brothers. That his two sisters were not given any land because they were married. That he authored the letter dated the 28/9/80 in which he alleges that his father allocated all his sons, land. That the Defendant holds 1 acre on behalf of the Plaintiffs. That his son was given land by his grandfather along with the 1st and 3rd Plaintiffs.

10. PW4- Simon Mucheke Waweru stated that the Defendant is his younger brother. Like the rest of the witnesses, he stated that all his brothers got land from their father. That according to his father the Defendant held 1 acre out of the suit land in trust for the Plaintiffs. That

the 1st Plaintiff has built a house on the land while the 2nd and 3rd Plaintiffs are cultivating the land.

11. PW5- Hannah Wamaitha Kangethe testified that the 1st Plaintiff is her son and that she has been farming on the ½ portion of the land on behalf of her son who lives in Nairobi. She estimated the time that she commenced farming to be three years ago before she was denied access by the Defendant. That her son has built a house but has never farmed on the land as he lives in Nairobi.

12. That in 1986 the 1st Plaintiff got permission from the Defendant for her son to construct the house. That his brother in law, the Defendant assured her that his son would not be removed if he built the house. That with the assurance she went ahead and built him a brick house. That later the 1st Plaintiff built a house in 1999 in which she claimed the Defendant even supervised it. That in 2009 she convened a family get together at her son's house in 2009 in which the Defendant was present.

13. PW6 – Wilston Wahuga Kibiru, the land surveyor in Murang'a County testified that in compliance of a Court order, he visited the site and filed a report on record. That the suit land is not subdivided on the ground but is demarcated into two parts. That the 1st Plaintiff has a house on the top right hand corner and that the Defendant also lives on the land (Defendant's homestead).

14. DW1- Bernard Mwangi Waweru testified and relied on his Replying affidavit dated the 19/11/2020 and witness statement dated the 9/2/2021 as well as the list of documents marked as DEX No 1-8.

15. He stated that he inherited the suit land through succession of his late father's estate in 1993. That his other brothers also got land from his father's estate. That he has lived on the land carrying out extensive developments thereon. That the plaintiffs are his brother's sons (nephews). He insists that they are not entitled to the suit land on account that each of their fathers got land from his father's estate. That he holds the land absolutely and not in trust for anyone. He stated that the 1st plaintiff has built a house on his father's land. He denied that the Plaintiffs occupy the suit land at all.

16. DW2- Monica Wanjiku Irungu informed the Court that she is the sister and aunt to the Defendant and the Plaintiffs respectively. That the land belongs to the Defendant having inherited it from her father. She stated that the Defendant was given 2 acres to hold ½ share in trust for her and their other sister in case they left their matrimonial homes. She stated that the 1st Plaintiff has not built any house on the land.

17. DW3- Priscillah Muthoni Nganga testified that she is the sister to the Defendant and relied on her witness statement dated the 9/2/2021. That the Defendant was given two acres so that he could settle the two sisters in the event that they returned from their matrimonial homes. That the 1st Plaintiff has not constructed a house on the land.

18. DW4- Alice Njeri Mwangi stated that she is the wife of the Defendant and denied that the Plaintiffs have occupied the suit land. Like DW1-3 She stated that the land is registered in the name of the Defendant and that he does not hold it in trust for the Plaintiffs. In addition, she informed the Court that it is not only the Defendant who got two acres of land in the family. That Paul Mukundi, a son of the original owner, also got two acres. She refuted the claim that the 1st Plaintiff has constructed any house on the land.

19. The parties elected to file written submissions which I have read and considered.

20. The key issue that commends itself for determination is; whether the Plaintiffs have proved their claim to title by way of adverse possession.

21. It is not in dispute that the suit land is a subdivision of the mother title parcel LOC11/GAITEGA/67 which was registered in the name of the family patriarch, Daniel Waweru Kibiru, deceased.

22. From the evidence on record it is indisputable that the parties are related. They are the grandsons and son of the late Mzee Kibiru. Upon his death the original suit land was subdivided into parcel Nos LOC11/GAITEGA/520-523. The said lands were distributed to his sons following the successful succession of his estate. It is not in dispute that each son got 1 acre with the exception of the Defendant and one Paul Mukundi. The Plaintiffs are claiming that the additional 1 acre given to the Defendant was to be held in trust for them whilst the DW2-4 informed the Court that it is to cater for the daughters of the original owner in the event that they return from their matrimonial homes.

23. According to the Plaintiffs, the 1st Plaintiff has occupied the suit land for over 30 years. The Defendant on the other hand denied the same. However, the site report filed by the Surveyor, there are two homesteads on the land on each side of the parcel. Although the Defendant insisted that the 1st plaintiff has not built a house, the Court is persuaded that there is a house on the land belonging to the 1st Plaintiff.

24. It is not in dispute that the 2nd and 3rd Plaintiffs do not reside on the land.

25. The question is whether the Plaintiffs have proven title by way of adverse possession.

26. **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....”

27. The Court is persuaded by the evidence tendered by PW3 that she cultivated the land on behalf of the 1st plaintiff and that the 1st Plaintiff constructed a house with the permission of the Defendant who even supervised it. PW3 stated that the period of cultivation was only 3 years. This does not lend credence to the 1st Plaintiffs claim that he had occupied the land for a period of 30 years.

28. In order to acquire title to land by the statute of limitations which has a known owner, that owner must have lost his right to, the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The adverse possessor must prove that through his occupation the true owner has been dispossessed or his possession discontinued. See **Wambugu v Njuguna (1983) KLR 172**.

29. In this case no evidence was led that the Defendant had been dispossessed of the land. Indeed, the site report bears testament to the fact that there were two homesteads on the land; that of the 1st Plaintiff and that of the Defendant.

30. It is equally established that adverse possession does not arise merely by occupation and use. In the case of **Samuel Miki Waweru v Jane Njeri Richu, Civil Appeal No. 122 of 2001, (UR)**, the Court held that;

“...it is trite law 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 (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in **Jandu v Kirpal [1975] EA 225** possession does not become adverse before the end of the period for which permission to occupy has been granted.

31. Going by the evidence of the PW3 it follows that the permission ceased in 2018 when the 1st Plaintiff was asked to move out of the land by the Defendant.

32. The Plaintiffs have argued in their submissions that the Defendant held the title in trust for them. This claim cannot be entertained by the Court for several reasons. The same was not pleaded nor proved. Submissions are the summation of a party's case and cannot be taken as pleadings.

33. In the end the Plaintiffs have not proved their claim of adverse possession and the same is unfounded.

34. The Plaintiffs suit is dismissed.

35. The parties being related; I order that each meet their costs of the suit.

36. **It is so ordered.**

DATED, SIGNED AND DELIVERED ONLINE AT MURANG'A THIS 14TH DAY OF SEPTEMBER 2021

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Ms Gachango for the Plaintiff

Mwangi Ben HB for Kimani for the Defendant

Court Assistant: Kuyiki/Alex