



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO. 30 OF 2020(OS)

JAMES MUNGAI KIMANDO.....1ST PLAINTIFF/APPLICANT

PETER NGUGI KIMANDO..... 2ND PLAINTIFF/APPLICANT

DANIEL KARIUKI KIMANDO.....3RD PLAINTIFF/APPLICANT

PRISCILLAH MUTHONI KAMAU.....4TH PLAINTIFF/APPLICANT

VERSUS

WILLIAM WAWERU KARUGA.....1ST DEFENDANT/RESPONDENT

JOSEPH KARENJU KARUGA.....2ND DEFENDANT /RESPONDENT

DAVID MANJI KARUGA.....3RD DEFENDANT /RESPONDENT

SAMUEL GATERU KARUGA.....4TH DEFENDANT /RESPONDENT

PETER MUNGAI KARUGA.....5TH DEFENDANT /RESPONDENT

JOHN KARIUKI KARUGA.....6TH DEFENDANT /RESPONDENT

NJOROGE KARUGA.....7TH DEFENDANT/RESPONDENT

JUDGEMENT

1. Vide Originating summons dated 03/11/2020 the Applicants sought orders that
 - a) The Applicants have become entitled by adverse possession to both parcels of land comprised in No. LOC.4/NAARO/197 and LOC. 4/NAARO/ 198.
 - b) The 4 Applicants be registered commonly as the proprietors of the two land parcels in substitution of the 7(seven) Respondents.
 - c) The Chief Land Registrar enter into the said substitution under the Land Registration Act no. 3 of 2012
 - d) Cost of this application be provided for.
2. The summons are premised on the dispositions of the Applicants joint supporting Affidavit. It is the Applicants' contention that since 1989 they have settled and lived on the suit land. That the land was previously registered in the name of NJUGUNA KINYANJUI, who died in 1989. That they have established their dwelling homes on the suit land and are carrying out cultivation including planting of trees. Further that they have been in occupation of the land as of right openly and without any interference.
3. It is their averments that the Respondents claimed ownership of the suit properties on 3/2/2020 by dint of transmission. That the Respondents live in Kiambu and Nairobi and have no claim on the land. In response to the summons, the Respondents filed a joint Replying Affidavit. It is their averments that the suit property was registered in the name of their grandfather WAWERU WAMANJI who died on 23/12/1981. That their father died in 1975 and they were left in the care and custody of their grandfather.

4. That their grandfather cultivated on the suit property and on certain occasions would let the Applicants' father to cultivate thereon. That before completing the process of transmission, their mother passed on. That the Applicants are in occupation of LOC 4/NAARO/197 and not LOC4/NAARO/198. It is their contention that the Applicants claim is tainted with falsehood and is meant to grab their land.
5. PW1 -JAMES MUNGAI KAMONDO testified that they occupy both parcels of land having been left to them by their parents. He stated that the parcels of land are adjacent to each other and they have lived and cultivated thereon. That they have erected permanent stone houses and planted coffee and avocado trees thereon. That on 3/2/2020, the chief and some strangers visited the parcels of land claiming ownership. That he was shown a title for parcel LOC4/NAARO /198 which was procured in 2017 indicating the Respondents were the owners of the land. It was his testimony that parcel No. 197 is registered in the name of NJUGUNA KINYANJUI who he has no relationship with.
6. Further that he has lived on the suit land for over 15 years and could not remember for how long his father had lived there. That his parents were not buried on the suit land but on another land 2 parcels away from the suit land. He clarified that the suit land and the grandfather's land is separated by their two uncle's parcels of land.
7. In cross-examination he testified that his interest was on parcel No. LOC4/NAARO /198 registered in the name of Respondents. That as a young boy he knew NJUGUNA KINYANJUI the registered proprietor of parcel No. 197. That both parcels were sub-divided by his deceased' father into four to cater for his children. He informed the Court that parcels LOC.4/NAARO /198 and 197 are separate but adjacent to each other.
8. DW1- WILLIAM WAWERU KARUGA testified that parcel No. LOC.4/NAARO /198 belonged to their paternal grandfather who lived on it. That after the death of his father and grandfather, their mother took out letters of grant of administration but died before succession of the estate was completed. That he only got to know about the 2nd Applicant after he went to check on the land.
9. In cross-examination, he testified that he did not know whether his grandfather ever lived on parcel LOC.4/NAARO /198. He informed the Court that there are no buildings on parcel LOC.4/NAARO /198 save for trees planted by the owner of parcel No.197. Further that there are no buildings on parcel No. 197 and went ahead to state that the plaintiffs have erected a stone house on their parcel. In re-exam he informed the Court that the land was known to the entire family and his grandfather would visit the land often.
10. DW2 JOSEPH KARENJU KARUGA relied on his written statement of 12/03/2021 as evidence in chief. In cross-examination he testified that in the company of his grandfather they visited the land in 1980. That they found that some maize had been planted thereon but he did not know who had done it.
11. It is the plaintiffs' submissions that the parcels of land though distinct are one. That the parcels were prior to 26th September, 2017 registered in the names of NJUGUNA KINYANJUI and WAWERU WAMANJI who died 1989 and 1981 respectively. That their father, NAHASHON KIMANDO GACHIHU was cultivating both parcels of land. That after the death of NJUGUNA KINYANJUI, their father shared both parcels of land equally among his four children.
12. They maintain in their submissions that they entered into the parcel of land in 1989 and have erected permanent structures thereon. They submit that after the death of the Respondents' grandfather, none of them ever claimed the land. That the succession cause could not in any way extinguish the rights as adverse possession that had already accrued.
13. The Respondents submitted on the legal requirements for adverse possession and relied on **Wilson Kazungu Katana & 101 Others vs Salim Abdala and Kamataka Board of Wakf vs Government of India & Others**. It is their submission that the plaintiffs have not led any evidence to show that they lived on the land. That the plaintiffs tilled the land with the permission of their grandfather and that did not amount to abandonment. It is their submissions that the Applicants planted seasonal crops on the land as evidence of permission. That their occupation has not been uninterrupted since the Respondents attempted to gain entry into the land but were rebuffed by the Applicants.
14. In submitting on continuous occupation for 12 years, the Respondents state that the fact that their grandfather visited the land intimates that he had no intention of giving up possession of the land. It is their submission that the Applicants have not demonstrated their entitlements to parcel No LOC.4/NAARO /198. Lastly that their right to own property should not be taken away as it would amount to infringement of their proprietary rights.
15. The evidence on record indicates that the two parcels of lands are distinct but adjacent. According to the certificate of search Land parcel LOC.4/NAARO /197 was registered in the name of NJUGUNA KINYANJUI on 26/8/1965 and a title issued on 25/4/1996. Parcel No. LOC.4/NAARO/198 was registered in the name of WAWERU WAMANJI up until 26/9/2017 when it was registered in the names of the Defendants. It is also clear WAWERU MANJI died on 23/12/1981 based on the certificate of death on record.
16. The Court notes that the Plaintiffs have not enjoined the estate of Njuguna Kinyanjui in this suit. Their right to be heard must be preserved. For that reason, the claim of the Plaintiffs with respect to parcel LOC.4/NAARO /197 is struck out.
17. I shall then proceed with the claim with respect to parcel LOC.4/NAARO/198.
18. The law on adverse possession is provided for under the Limitation of Actions Act. Section 7 of the Act provides that; -

“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”.
19. Section 13 of the said Act provides as follows;

“(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land”.

20. Section 17 of the said Act extinguishes the rights of a registered owner where there is a successful claim for adverse possession. Section 38 on the other hand provides (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, 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.

21. The Court of Appeal in Kisumu Civ App. No. 110 of 2016 **Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] eKLR** opined that a person claiming adverse possession must establish the following;

- a) On what date he came into possession.
- b) What was the nature of his possession?
- c) Whether the fact of his possession was known to the other party.
- d) For how long his possession has continued and
- e) That the possession was open and undisturbed for the requisite 12 years.

22. In the case of **Samuel Kihamba v Mary Mbaisi [2015] eKLR** The Court held:

“Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land **openly**, that is, **without force, without secrecy, and without license or permission of the land owner**, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, *nec vi, nec clam, nec precario*. The additional requirement is that of *animus possidendi*, or intention to have the land”.

23. The Applicants led evidence that their father occupied the land with the permission of the owner the late Waweru Wamanji. That upon his death in 1985 they continued to occupy the suit land to date. The Applicants led evidence that they occupied the suit land exclusively since 1989 to date. This evidence was confirmed by the DW1 when he stated that he visited the land in 1980s and found maize growing on the land. He stated that he did not know who was cultivating the maize. Evidence led by the Applicants point to their father as being the occupant of the land at this time. DW1 stated in evidence that he visited the suit land and found trees growing on the land which trees he expressly states were planted by the 1st Plaintiff. That the 1st Plaintiff chased him away and he was not able to ascertain the position of the beacons on the suit land. Further he stated that he could not remember whether his parents ever lived on the land; that his grandfather visited the land once in a while.

24. This evidence supports the claim of the applicants that they have been in occupation since their childhood. That their father entered the suit land with the permission of the Defendant’s grandfather and upon his death they continued to occupy and till the land to date. That his father merged the two plots LOC.4/NAARO /197 and 198 into one and subdivided it into 4 portions for each of the Plaintiffs. That they farm coffee, avocado and trees on the land.

25. The Defendants led evidence and stated that the Applicants occupy the suit land. There was no evidence that the Applicants have relinquished their possession and or that the Defendants have taken back possession from them. They have not been dispossessed.

26. It is the conclusion of the Court that the original owners permission ceased upon his death and the occupation of the Plaintiffs commenced in 1989 and by the year 2001 adversity had crystallized and vested. The Defendants therefore held the title in trust for the Plaintiffs.

27. The Court is satisfied that on a balance of probabilities, the Applicants have proved their claim on adverse possession on parcel No LOC.4/NAARO /198 and I grant judgement in their favour in respect to parcel No LOC.4/NAARO /198 only.

28. Their claim with respect to parcel LOC.4/NAARO /197 is struck out for the reasons given under para 16 of the judgment.

29. Costs shall be in favour of the Plaintiffs.

30. **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:

1st – 4th Applicants; Absent

Wanjiru HB for Mburu Macharia for the 1st – 7th Respondents

Court Assistant: Kuiyaki/Alex