



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 254 OF 2016(O.S)

(FORMERLY HCCC NO. 488 OF 2001(O.S))

MARGARET WANJIKU MUHIA.....PLAINTIFF

VERSUS

MARY NJERI NG'ANG'A (Sued as the legal representative of the estate of

NG'ANG'A MUTURA).....1ST DEFENDANT

ANTHONY NJOROGE NYUMU (Sued as legal representatives of the estate of

STEPHEN NYUMU NJOROGE).....2ND DEFENDANT

JUDGMENT

The Plaintiff brought this suit on 26th March, 2001 by way of an Originating Summons of the same date seeking the determination of the following questions;

1. Has the Plaintiff acquired a portion measuring 0.1825 hectares out of all that parcel of land known as GITHUNGURI/KANJAI/846(hereinafter referred to as “the suit property”) by way of adverse possession having been in open, continuous and uninterrupted possession and occupation of the said portion of land for over 30 years?
2. Is the Plaintiff entitled to be registered as the owner of the said portion of the suit property and should the Defendants sub-divide the suit property and transfer a portion thereof measuring 0.1825 hectares to the Plaintiff?
3. Should the Land Registrar-Kiambu register the Plaintiff as the proprietor of a portion of the suit property measuring 0.1825 hectares?
4. Should the Defendants be condemned to pay the costs of this suit together with interest at court rates?

The Plaintiff's case:

In her affidavit in support of the Originating Summons, the Plaintiff set out her case as follows:

The Plaintiff married one, Muhia Mutura, deceased who was a brother to Ng'ang'a Mutura, deceased (hereinafter referred to only as “the 1st Defendant”) in 1957. They initially lived on a parcel of land known as GITHUNGURI/KANJAI/177. In 1971, they moved to the suit property where she had stayed since with her family. The suit property measures 0.73 hectares. Her family comprising of herself, her four sons and their eight children, and her two unmarried daughters and their five children occupy a portion of the suit property measuring 0.1825 hectares. They have built four semi-permanent houses on the said portion of the suit property and planted coffee, maize, bananas and other subsistence crops. Her daughter, Rahab Wangari Muhia, and her (the Plaintiff) husband, Muhia Mutura who died in 1998 and 1991 respectively were buried on the said portion of the suit property.

In 1995, the 1st Defendant sued her at Githunguri Resident Magistrate's Court in Civil Case No. 91 of 1995 seeking her eviction from the suit property. The Magistrate's Court entered judgement in favour of the 1st Defendant. Her appeal to the High Court in Nairobi Civil Appeal No. 284 of 1996 was dismissed. Her second appeal to the Court of Appeal in Civil Appeal No. 142 of 2000 was however allowed and the

judgements of the two lower courts set aside. While her appeal was pending in the Court of Appeal, the 1st Defendant transferred the suit property to Stephen Nyumu Njoroge (hereinafter referred to only as “the 2nd Defendant”).

The Plaintiff contended that she should be declared the owner of a portion of the suit property measuring 0.1825 hectares by way of adverse possession having been in open, continuous and uninterrupted possession and occupation of the said portion of the suit property since 1971.

During the hearing of the suit, the Plaintiff testified as PW1. In her evidence in chief, the Plaintiff stated that the 1st Defendant was her brother-in-law. She stated that her father-in-law had four wives, one of whom was called Wangari Mutura. Wangari had four sons who included the 1st Defendant and her (the Plaintiff’s) husband. During the distribution of the estate of her father-in-law, the suit property was allocated to the house of Wangari and as such the same was to be shared by the four sons of Wangari. She stated further that the suit property was registered in the name of the 1st Defendant to hold in trust for the four sons of Wangari.

She stated that she had been living on the suit property with her children since 1971. The Plaintiff produced a copy of Certificate of Succession in respect of her father-in-law’s estate dated 2nd November, 1978, a copy of the Register for the suit property certified on 16th July, 1999, a copy of Certificate of Official Search dated 19th March, 2001, a copy of the judgment of the Court of Appeal dated 16th March, 2001 and a copy of the judgment of the High Court dated 18th June, 2008 as exhibits. The Plaintiff also adopted his witness statement dated 16th August, 2018 as part of her evidence in chief.

The Plaintiff urged the court to grant her prayers together with the costs of the suit. On cross-examination the Plaintiff stated that she had been using the whole of the suit property. On the 2nd Defendant’s offer to give her a quarter of the suit property on humanitarian grounds, the Plaintiff stated that she had no problem with the offer.

After the close of evidence, the court directed the parties to file written submissions. The Plaintiff filed written submissions on 30th April, 2019. The Plaintiff submitted that she had proved her case to the required standard and as such she was entitled to the reliefs sought. The Plaintiff submitted that she had established that together with her family, she had been in occupation of the suit property since 1970s and that she had developed the same. The Plaintiff submitted that there was a binding decision of the High Court made in HCCC No. 570 of 2001 to the effect that the 2nd Defendant could not evict the Plaintiff from the suit property. The Plaintiff urged the court to find that she had become entitled to a portion of the suit property measuring 0.1825 hectares by way of adverse possession and that she was entitled to be registered as the owner thereof.

The Defendants’ case:

The Defendants responded to the Originating Summons through a Replying Affidavit sworn by the 1st Defendant on 26th April, 2001. The 1st Defendant denied that the Plaintiff had been in continuous possession of a portion of the suit property measuring 0.1825 acres. He stated that the Plaintiff started living on the suit property after her husband’s death in 1991. He stated that prior to 1991, the Plaintiff was living in Mtito Andei with another man after deserting her husband in 1975.

With regard to the burial of the Plaintiff’s daughter, Rahab Wangari Muhia on the suit property, the 1st Defendant stated that Rahab Wangari Muhia was buried on the suit property following a request by the District Officer, Githunguri Division, as it was too costly to transport her body to Mtito Andei where the Plaintiff was staying. On the issue of the structures and coffee trees that the Plaintiff claimed to have on the suit property, the 1st Defendant stated that that the Plaintiff did not have any coffee trees on the suit property and that the Plaintiff put up a few shanties after the 1st Defendant had filed Civil Case No. 91 of 95 against the Plaintiff.

During the hearing, Mary Njeri Nyumu(DW1) gave evidence on behalf of the Defendants. DW1 told the court that together with Anthony Njoroge Nyumu they were the administrators of the estate of the 2nd Defendant. She stated further that the suit property was registered in the name of the 2nd Defendant but she was ready to give the Plaintiff a quarter of the same and retain the rest. She adopted her witness statement as part of her evidence in chief. She stated that she was not liable for the costs of the suit since the Plaintiff had already subjected her to a lot of losses by keeping her away from the suit property for several years.

On cross-examination, she stated that the 2nd Defendant began the process of purchasing the suit property in 1988. DW1 stated that while purchasing the suit property, they did not know that there was a pending court case over the same. She stated that at the time when the 2nd Defendant was purchasing the property, there was a house on the suit property which they were told belonged to the 1st Defendant’s deceased brother. She stated that she did not go near the house and as such could not tell if it was occupied or not. DW1 stated that the Plaintiff and her children put up structures on the suit property after the 2nd Defendant had purchased the same. DW1 stated that the 1st Defendant had told them that the coffee trees and other crops that had been cultivated on the suit property belonged to him. She stated that after purchasing the suit property, they cultivated it until they were chased away by the Plaintiff’s son. She stated that they did not cultivate the portion of the suit property which had a house which was about a quarter of the suit property. She reiterated that she was willing to transfer a quarter of the suit property to the Plaintiff on humanitarian grounds and that she could not do so earlier because the case was being prosecuted by deceased Defendants.

The 2nd Defendant filed submissions on 18th February, 2020. The 2nd Defendant submitted that the 2nd Defendant was not related to the Plaintiff. The 2nd Defendant submitted that while purchasing the suit property from its original owner, the 1st Defendant, the 2nd Defendant was not notified that the Plaintiff and her family were residing on a portion of the suit property. The 2nd Defendant submitted that it was on account of the foregoing that the 2nd Defendant was ready to give the Plaintiff a quarter of the suit property. The 2nd Defendant submitted that the 2nd Defendant had no objection to the Land Registrar, Kiambu registering the Plaintiff as the proprietor of a quarter portion of the suit property. The 2nd Defendant however urged the court not to condemn the 2nd Defendant to pay the costs of the suit. The 2nd Defendant submitted that each party should bear its own costs.

Determination:

In my view, this is one case in which the parties should have recorded a consent and closed the matter. In her Originating Summons, the Plaintiff has claimed a quarter of the suit property. The suit property measures 0.73 hectares. A quarter thereof measures 0.1825 hectares. This is what the Plaintiff is claiming by adverse possession. The 2nd Defendant who is registered as the owner of the suit property has agreed in her evidence and submissions to surrender a quarter of the suit property to the Plaintiff. With this concession, there is no more issue in contention as between the Plaintiff and the Defendants save for the costs of the suit. For record purposes in case the matter goes on appeal, if I was to determine the suit on merit, the following would have been my view.

The only issues arising for determination in this suit are, whether the Plaintiff has acquired a portion of the suit property measuring 0.1825 hectares by adverse possession, and who is liable for the costs of the suit. On the first issue, I am not persuaded that the Plaintiff has established her adverse possession claim.

The Plaintiff's claim for adverse possession is anchored on the fact that her family had occupied a portion of the suit property measuring 0.1825 hectares continuously for uninterrupted period of over 30 years from 1971. The burden was upon the Plaintiff to prove her claim. The Plaintiff did not bring this suit on behalf of the estate of her deceased husband. She brought the suit in her own right. She had a duty to convince the court that she had occupied the said portion of the suit property for uninterrupted period of at least 12 years as at the time of filing suit and that her occupation was not with the consent of the Defendants.

The Plaintiff did not controvert the Defendants' claim that she deserted her husband Muhia Mutura in 1975 and that she only came to settle on the suit property in 1991 after her husband's death. The Defendants placed evidence before the court showing that in a suit that was filed by the Plaintiff's husband against the 1st Defendant at the Resident Magistrate's Court at Sheria House, namely, RMCC No. 2 of 1983, the court ordered that the Plaintiff's husband had no claim or interest in among others the suit property and restrained the Plaintiff's husband from trespassing on the suit property. In the same suit, the court made an order that the Plaintiff's husband be evicted from the suit property. In light of these orders, I am not persuaded that the Plaintiff had uninterrupted occupation of the suit property from 1970s up to the time she brought this suit.

From the evidence on record, the Plaintiff claims to have entered the suit property in 1971 through marriage to the 1st Defendant's brother. I do not know how this could have been possible since the suit property came into existence on 19th December, 1978 when it was also registered in the name of the 1st Defendant. In 1983 barely 5 years from the date when the suit property was registered in the name of the 1st Defendant, the Plaintiff's husband filed a suit against the 1st Defendant in which suit, the 1st Defendant obtained a declaratory order on 6th March, 1985 to the effect that the Plaintiff's husband had no interest in the suit property. Even if it is assumed that the Plaintiff and her husband were in occupation of the suit property between 1971 and 1985 when the order in RMCC No. 2 of 1983 was given at Sheria House Resident Magistrate' Court, they could not be said to have been having uninterrupted occupation of the suit property as there was an active case during that period. I have noted that the Plaintiff's husband died in 1991 about 6 years after the said order by the Resident Magistrate's Court. In 1996 about 11 years after the said order, the 1st Defendant sued the Plaintiff seeking her eviction from the suit property. The suit that was filed at Githunguri Magistrate's Court went up to the Court of Appeal and was not determined by that court until 16th March, 2001 by which time, the 1st Defendant had transferred the suit property to the 2nd Defendant in 1999. With all these suits between the 1st Defendant, and the Plaintiff and her husband, I am not persuaded that the Plaintiff had uninterrupted possession of a portion of the suit property measuring 0.1825 hectares from 1971 until 2001 when she brought this suit.

I have also noted that the Plaintiff's suit although brought as an adverse possession claim was based on trust. The case that was put forward by the Plaintiff in her evidence and written submission was that the suit property was an inheritance from her father-in-law and that the same was registered in the 1st Defendant's name in 1978 to hold in trust for his brothers among them the Plaintiff's husband. The Plaintiff's claim was therefore for her husband's share in the suit property that was held by the 1st Defendant in trust. The Plaintiff even cited the case of Ithongo v Thindiu[1981] KLR 197 in support of her claim based on trust. If indeed the 1st Defendant held the portion of the suit property claimed by the Plaintiff in trust for the Plaintiff's husband, that meant that the Plaintiff's husband was the beneficial owner of the said portion of the suit property. If that is the case, then neither the Plaintiff's husband nor the Plaintiff could claim the property by adverse possession.

In Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another [2015] eKLR the Court of Appeal stated as follows on adverse possession:

“This concept of adverse possession has been the subject of many discourses and decisions of this Court. Suffice to mention but two, Kasuve v Mwaani Investments Limited & 4 others [2004] 1KLR 184 and Wanje v Saikwa (supra). In the first decision, the court was emphatic that in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of twelve years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition. In the Wanje case, the Court went further and took the view that in order to acquire by statute of limitations a title to land 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 and that what constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use. Further, the court opined that a person who occupies another's persons land with that person's consent, cannot be said to be in adverse possession as in reality he has not dispossessed the owner of the land and the possession is not illegal. What these authorities are emphasizing is that for one to stake a claim on a parcel of land on the basis of adverse possession, he must show that he entered the parcel of land more or less as a trespasser as opposed to by consent of the owner. In other words his entry must be adverse to the title of the owner of the land. It is also possible to enter the land with the consent of the owner, but if the owner at some point terminates the consent and the applicant does not leave but continues to occupy the land and the owner takes no steps to effectuate the termination of the consent for a period of twelve years after then, such applicant would be perfectly entitled to sue on account of adverse possession. Besides adversal entry into the land, the applicant must also demonstrate exclusive physical

possession of the land and manifest unequivocally the intention to dispossess the owner. The occupation must be open, uninterrupted, adverse to the title of the owner, adequate, continuous and exclusive as already stated. The burden of proving all these is on the person asserting adverse possession.”

In Githu v Ndeete [1984] KLR 776 it was held that:

“Time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his rights or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes an effective entry into land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act.”

I am not satisfied that the Plaintiff had acquired the portion of the suit property being claimed by the Plaintiff by adverse possession as at 12th July, 1999 when the suit property was transferred by the 1st Defendant to the 2nd Defendant. By the time the Plaintiff brought this suit in 2001, the 2nd Defendant had owned the suit property for barely 2 years. No adverse possession claim could therefore arise as against the 2nd Defendant in relation to the suit property. I therefore find no merit in the Plaintiff’s adverse possession claim.

It follows therefore that if the 2nd Defendant had not agreed to give the Plaintiff a portion of the suit property measuring 0.1825 hectares (a quarter) on an ex-gratia basis, I would have dismissed the Plaintiff’s suit with costs to the 2nd Defendant. However, in view of the 2nd Defendant’s agreement to give the Plaintiff the said portion of the suit property that the Plaintiff is claiming by adverse possession, the following would be my final orders on the matter;

1. The 2nd Defendant shall subdivide all that parcel of land known as Githunguri/Kanjai/846(the suit property) and shall transfer a portion thereof measuring 0.1825 hectares to the Plaintiff within 90 days from the date hereof.
2. While subdividing the suit property, the 2nd Defendant shall ensure that the Plaintiff’s residence is on the portion of the suit property measuring 0.1825 hectares that is to be transferred to her.
3. The Parties shall share the cost of subdivision equally but the Plaintiff shall be responsible for the cost of registration of the said portion of the suit property into her name.
4. Once the suit property is subdivided and a portion thereof measuring 0.1825 hectares transferred to the Plaintiff, the Plaintiff whether by herself or through her servants, agents or anyone claiming under her shall not interfere or deal in any manner whatsoever with the other portion of the suit property that shall remain in the name of the 2nd Defendant.
5. Each party shall bear its own costs of the suit.

DELIVERED AND DATED AT NAIROBI THIS 6TH DAY OF OCTOBER 2021

S. OKONG’O

JUDGE

Judgment delivered through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Muriithi for the Plaintiff

Mr. Kinyanjui for the Defendants

Ms. C. Nyokabi-Court Assistant