



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 20 OF 2019 (O.S.)

MICHAEL MALING'A MBITO.....PLAINTIFF

VERSUS

FLORENCE KETHLEEN LAW.....DEFENDANT

JUDGMENT

(On Adverse Possession)

INTRODUCTION

1. By way of Originating Summons dated 27/2/2019, the Plaintiff asked this Court to determine the following questions in reference to **Land Reference Number LR No. 11005 IR No. 18979** (*hereinafter known as the "suit land"*).

- (a) Whether the Defendant/Respondent is the registered owner of the suit land?
- (b) Whether the Plaintiff/Applicant has had possession of 9 acres out of the suit land over 12 years?
- (c) Whether the Plaintiff/Applicant has been in such possession, the same has been open, continuous, peaceful and uninterrupted for over the said period of time?
- (d) Whether the Applicant/Plaintiff has acquired ownership of 9 acres out of the suit land by way of adverse possession?
- (e) Whether the Plaintiff/Applicant should be declared the owner of the 9 acres of the suit land?
- (f) Whether the registration of the respondent as proprietor of the suit land should be cancelled and the plaintiff/applicant accordingly registered as the owners of the 9 acres he occupies?
- (g) Whether costs should be awarded in the suit?

2. The Plaintiff therefore urged this court to issue the following orders in his favour:

- (a) A declaration that the plaintiff acquired the suit land by way of adverse possession
- (b) The defendant's registration over the suit land be cancelled and the plaintiff accordingly be registered as the owner of the said 9 acres thereof.
- (c) Costs of this suit be borne by the defendant.

3. The Summons was supported by the affidavit sworn by the plaintiff dated 27/2/2019. It was brought under **Order 37 Rule 6 (1), 7 (1) and 8 of the Civil Procedure Rules** and **Sections 27 and 38 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya** and **Section 143 of the Registration of Titles Act, Cap 281 Laws of Kenya**.

4. The defendant was served through substituted service as ordered by the Court on the 21/3/2019. This was done via the Daily Nation dated 6/4/2019, a magazine of nationwide circulation, in compliance with the court order. On record is an Affidavit of Service sworn on 18/4/2019 by **Mr. Edward Katama Ngeywa**, learned counsel for the Plaintiff, evidencing the service. He deponed that the Plaintiff resorted to use this mode of service after attempts to serve the defendant in person failed to materialize. The many attempts made were demonstrated by an affidavit of service sworn on 8/3/2019 by a court process server one **Mr. Jackson Nyongesa Simiyu**.

5. After considering the contents of the Affidavit by **Mr. Ngeywa Advocate**, the Court was satisfied that the Plaintiff was properly served in accordance with **Order 5 Rule 17 (4)** of the **Civil Procedure Rules**. Since that was so and she failed to enter appearance within the requisite time (of 15 days after service) or at all and never filed any defence, the Court permitted the Plaintiff proceed with the matter *ex parte*. This was after directions were taken that the matter proceeds as though it was commenced by way of Plaintiff.

6. On the **4/10/2021**, the matter proceeded for hearing by viva voce evidence. Two witnesses testified. The Plaintiff himself, one **Michael Maling'a Mbitio**, did so as **PW1**. He adopted his supporting affidavit dated **27/2/2019** as his evidence in-chief. It was his testimony that in the year **1979** or thereabouts, his grandfather and one **Mr. Enock Psenje** bought the suit land which measures **25 acres** from one **Florence Kathleen Law**, the Defendant herein. Out of that land, **Enock Psenje** was to receive **16 acres** and his grandfather was to receive **9 acres**. In **1990**, his grandfather bequeathed him the land and he has been in possession of it since **1991**. He testified further that the defendant left the country and he cannot trace her.

7. He testified that after the demise of Enock Psenje, his widow and son moved this court vide **Kitale ELC No. 10 of 2016** and were granted the **16 acres** of part of the suit land by way of Adverse Possession. He produced a certified copy of title for the suit land as **P. Exhibit 1**, a Letter of consent dated **1/12/2005** as **P. Exhibit 2** and marked for identification court file **Kitale ELC No. 10 of 2016** as **PMFI 3**. He further stated that all his neighbours know him as the owner of the suit land.

8. **PW2** one **Mr. Griffin Leshan**, a court officer who works as a Clerk in the Kitale Environment and Land Court Registry produced court file No. **ELC No. 10 of 2016** initially marked as **PMFI 3** as **P. Exhibit 3**. He confirmed that the matter was finalized and judgment delivered on **13/2/2019**, with the Court finding in favour of the Plaintiffs in that case. That marked the close of the plaintiff's case in the instant suit. The Plaintiff filed his submissions on the **24/10/2021**.

DETERMINATION

9. Having carefully considered the pleadings herein, the evidence on record, the submissions on record, the case law and the statutes cited as well, I find the following to be the issues for determination:

(a) Whether the plaintiff has proved that he has acquired the suit land by way of adverse possession?

(b) What Orders should issue?

(c) Who bears the cost of the suit?

(a) Whether the plaintiff has proved that he has acquired the suit land by way of adverse possession?

10. Before delving into the merits or otherwise of this case, it is important to point out that the **Registration of Titles Act, Chapter 281** of the Laws of Kenya was repealed by the **Land Registration Act, Act No. 3 of 2012**. As a result, by virtue of **Section 105(b)** of the Act, the titles that existed under the old regime are deemed to be titles issued under the new law. Therefore, the proper provisions under which this suit ought to have been brought, if anything was to be borrowed from the repealed law were those under the Land Registration Act. However, by virtue of **Article 159 (2) (d)** of the **2010 Constitution**, I deem that as a technicality which may be cured by overlooking it and going into the substance of the matter.

11. On the merits of the suit: three Sections of the **Limitation of Actions Act**, provide to an interrelated theme: a person who is not the registered owner of a parcel of land acquiring title thereto without the consent of the proprietor except where the proprietorship is of the government. **Section 7** of the **Limitation of Actions Act, Chapter 22** of the Laws of Kenya lays out the principle of adverse possession. It states as follows:

“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 on him, or if it first accrued to some person through whom he claims, to that person.”

12. Section 13 of the **Limitations of Actions Act** further provides:

“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 the 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.”

13. **Section 17** of the Act is to the effect that where a person does not bring a suit for recovery of his land before the end of the period prescribed by the Act, that person's rights over the land are extinguished. The persuasive case of **Wanjira Waweru v Peter Kabuga (2008) eKLR**, while discussing the theme I have alluded to above cited the case of **Benjamin Kamau Murima & Others vs Gladys Njeri CA No. 213 of 1996** where the Court of Appeal stated:

“The combined effect to the relevant provisions of Sections 7, 13 and 17 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya is to extinguish the title of a proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of the land.”

14. Further, in the case of **Kasuve v Mwaani Investments Limited & 4 others 1 KLR 184**, the Court of Appeal restated what a Plaintiff in a claim for Adverse Possession has to prove;

“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 without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

15. In the recent Court of Appeal case of **Mtana Lewa v Kahindi Nala Mwangandi [2015] eKLR** the court summed up adverse possession as:

“... Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner...”

16. In a claim for Adverse possession, the burden is on the person making such a claim to prove the elements of the claim. They are basically four. These are that the person claiming must be in actual and not constructive possession of the land, that possession must be open and not secret or be clear to all and sundry who know and access the land, no other person should also be laying claim to it as him, and it should be as against the owner. The onus is on the claimant, under **Section 107 (1)** of the **Evidence Act**, to prove the elements stated above. The persuasive authority of **Ibrahim Wachira Karaguri v Mary Mwhaki Simon & another [2020] eKLR** which I agree with on the elements to be proven cited the case of **Benjamin Kamau Murima & Others vs Gladys Njeri CA No. 213 of 1996 (supra)** which held as follows:

“.. 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 evasion). So the Plaintiff must show that the defendant 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 purpose or by any endeavors to interrupt it or by any recurrent consideration”

17. In the case of **Francis Gicharu Kariri - vs- Peter Njoroge Mairu, Civil Appeal No. 293 of 2002 (Nairobi)** the Court of Appeal approved the decision of the High Court in the case of **Kimani Ruchire -vs - Swift Rutherfords & Co. Ltd. (1980) KLR 10** where Kneller J, held that:

"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)".

18. In the present case it was upon the plaintiff to prove that he has been in actual occupation of the suit land for a period more than **12 years** in a notorious peaceful and uninterrupted manner adverse to the interests of the registered owner. He testified that the suit land is registered in the name of the defendant. To prove that, he produced a copy of the title deed as **P. Exhibit 1**. He further stated that his grandfather together with one **Enock Psenjen** bought the suit land in the year **1979** and took possession of it in the respective portions. He stated that he took actual possession of the suit land in the year **1991** upon the demise of his grandfather who bequeathed him his portion comprising of **9 acres** and has been in possession thereof to date. His evidence was that the defendant left the Country in **1979** after she sold the land. She cannot be traced. There is no evidence to the contrary of that of the Plaintiff. Furthermore, **P. Exhibit 3**, contained similar facts in relation to a portion of the title owned by the Defendant. The court found for the plaintiffs in that case.

19. Further, the plaintiff told this court orally and in the Affidavit he swore in support of his case that the suit land comprised of **25 acres** and that his grandfather bought **9 acres** and **Enock Psenjen** bought **16 acres** out of that land. These averments are in line with the assertions made by the plaintiffs in **P. Exhibit 3**. The land which the Plaintiffs in the **P. Exhibit 3** were claiming is **16 acres** out of **25** of the title that belonged to the Defendant whereas the land being claimed by the plaintiff herein is **9 acres**. This evidence is not controverted by any other. Again, he testified that neighbours know that the land is his.

20. This court therefore finds that the Plaintiff has proved the existence of the not only the two essential elements stated in the case of **Celina Muthoni Kithinji v Safiya Binti Swaleh & 8 Others [2018] eKLR**, where Yano J in referred to the case of the case of **Wambugu v Njuguna [1983] KLR 173** in which the Court of Appeal but all the four. In the **Wambugu v Njuguna case** the Court held:

“...adverse possession contemplates two concepts: possession and discontinuance of Possession. It further held that the proper way of assessing proof of Adverse Possession would be whether or not the title holder has been disposed or has discontinued his Possession for the statutory period, and not whether or not the claimant has proved that he or she has been in Possession for the requisite number of years.”

21. I find that the Plaintiff has proved that indeed not only has he dispossessed the defendant but also discontinued her possession of the suit land for over **12 years** as prescribed by statute. The *nec vi, nec clam, nec precario* principle has been proved by the Claimant herein. According to him, he has been in actual possession of the suit land since **1991**. That translates to **28 years** in **2019** when the suit was filed.

DISPOSITION

22. In conclusion, the Plaintiff having proved that he is in adverse possession of the **9 acres** as against the registered owner, and whereas the suit land is registered under a land regime that does not entail cancellation of title but rather an entry of proprietorship in the register, **Prayer (b)** of the Summons (now Plaint) is not granted as prayed but rather as to comply with the procedure in the law. Instead, I enter judgment in his favour as against the Defendant as follows:

(a) A declaration that the Plaintiff has been in open and continuous, peaceful and uninterrupted possession of nine (9) acres out all that parcel of land known as Land Reference (LR) Number 11005 IR No. 18979.

(b) A declaration be and is hereby issued that the Plaintiff has acquired by way of adverse possession nine (9) acres out all that parcel of land known as Land Reference (LR) Number 11005 IR No. 18979 and is entitled to declared the owner of the 9 acres.

(c) The Plaintiff be and is hereby registered as the proprietor of the 9 acres he occupies within land parcel number Land Reference (LR) Number 11005 IR No. 18979.

(d) For the reason of the Defendant having not defended the suit, each party shall bear their own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 6TH DAY OF DECEMBER, 2021.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.