



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 259 OF 2017(OS)

WILSON NJOROGE KAMAU.....PLAINTIFF/APPLICANT

VS

NGANGA MUCERU KAMAU.....DEFENDANT/RESPONDENT

JUDGMENT

1. On the 8/3/2011 the Plaintiff filed suit against the Defendant and sought the following orders;

- a. A declaration that the title of NGANGA MUCERU KAMAU to the land parcel number LOC 2/KANGAARI/506 (suit land) has been extinguished by the Plaintiffs Adverse Possession thereof for a period of more than 12 years in terms of the Limitations of Actions Act.
- b. That the Plaintiff has become entitled to Adverse Possession to the suit land in Kugumo District and registered under the Land Act in the name of the Defendant.
- c. An order that the Land Registrar Murang'a register the Plaintiff as absolute proprietor of land parcel Number LOC2/KANGARI/506 in place of the Defendant
- d. That the Land Registrar Murang'a be directed that the order herein shall be an instrument of transfer of ownership of the whole suit land from the Defendant to the Plaintiff.

2. The Originating Summons are supported by the grounds adduced thereto and the Supporting Affidavit of the Plaintiff sworn on the 8/3/11. In it he deponed that he and his late father Kamau Kagama entered the suit land in 1971 following a purchase and sale of the suit land by Njoroje Muceru, the then registered owner of the suit land. That they took possession of the suit land in 1971 and lived there until the demise of his father in 1999. He avers that he was left on the suit land where he has continued to occupy and utilize it to date, a period in excess of over 30 years. He stated that the Defendant had full knowledge of his occupation and possession and that his occupation has been open peaceful, continuous and uninterrupted. That he and his family have continued to develop the suit land by planting trees subsistence crops since 1971 and the Defendant did not interfere with their occupation and possession until 2005 when he filed a Land Tribunal Dispute case at Kigumo claiming a right in the suit land. After hearing the case, he pleads, the panel of elders advised the parties to seek redress in a Court of law.

3. Undeterred, the Defendant filed RMCC No 35 of 2005 at Kigumo claiming injunctive orders, which suit was dismissed for want of prosecution. On his part the Plaintiff stated that he filed HCCC No 350 of 2005 which suit was dismissed for want of prosecution on the 2/3/2011.

4. It was his case that the Defendant has never lived nor utilized the suit land. That he has been in continuous occupation and possession of the sit land since 1971, a period in excess of the statutory 12 years and urged the Court to grant his prayers.

5. This suit was heard exparte and determined and judgement rendered on the 24/2/2015 in favour of the Plaintiff.

6. On application of the Defendant vide a notice of motion on the 24/9/15, the Court on evaluation determined that the service of summons was in issue and granted the application thus setting aside the judgement issued on the 24/2/15 in its entirety setting the stage for the hearing and determination of the suit interpartes.

7. The suit was opposed by the Defendant vide his Replying Affidavit dated 2/8/16 and filed on the 3/8/16. He contends that he is the registered owner of the suit land and annexed the copy of the title in support. In it he deponed that the Plaintiff has never been in occupation nor possession of the suit land. That contrary to the Plaintiffs averments, it is him who has been in possession of the suit land since 1971 planting tea, trees and nappier grass. He denied that the Plaintiff has had uninterrupted occupation of the suit land as alleged or at all. He accused the Plaintiff of being on a fishing expedition as shown in the previous filed suits. He denied that the Plaintiff is entitled to any

beneficial interest as stated in the caution registered against the title on the 4/4/05.

8. Whilst disclosing that he has filed suit No ELC 872 of 2014 in Nairobi, he accused the Plaintiff of being an insolent litigant as can be seen in the proceedings in HCCC No 350 of 2005.

9. On the 9/10/17 directions were issued by the Court upon application by the parties that the OS be deemed as the plaintiff and the Replying Affidavit be deemed as the statement of defence.

10. At the trial, the Plaintiff led evidence and relied on his witness statement as well as list of documents dated the 8/3/11. In brief he stated that he and his father Kamau Kagema, deceased entered into the suit land in 1971 upon completion of a purchase of the suit land from Njoroge Muceru and took possession and have been in occupation since then. That his father died in 1999 leaving him on the suit land to date. That he has developed the land and is in control of the same and his claim of title in Adverse Possession has accrued to him having occupied the land in excess of 12 years. That the Defendant has not sought to remove him from the land for a period of over 45 years. He informed the Court that the title was registered in the name of Njoroge Muceru in 1962. That in 2005 the Defendant transferred the land to his name. That the cases filed previously to wit; HCCC No 350 of 2005 was dismissed for want of prosecution. That the panel of elders in LDT 11 of 2005 advised the parties to seek legal redress in Court and therefore did not determine the matter.

11. PW2 – Elijah Thiaya Ngunjiri stated that he lives at Gatabua village in Kang'ari location and are neighbors with the Plaintiff. That he knew Kamau Kagema who died on the 14/1/99. That he worked for the Plaintiff's father and planted tea in 1971 on the suit land. That the land was bought by the Plaintiff's father though he could not remember the name of the person who sold the land to him. He averred that the Plaintiff has extensively developed the suit land by planting tea, trees subsistence food crops all his lifetime. That their occupation has been open peaceful and continuous.

12. On the 31/7/19 the Court on application by the Defendant's Counsel on record to cease acting granted the application as prayed. Thereafter the Defendant took conduct of his case at the hearing.

13. DW1- Nganga Muceru Kamau testified and relied on his witness statement filed on the 2/11/17 wherein he stated that the title of the suit land is registered in his name and that he has been in possession of the suit land since 1960s and that his possession was only interrupted by litigation. He stated that the Plaintiff has tried to wrestle the ownership of the suit land from him since 2005 through the various suits filed in respect to the suit land. Such suits include HCCC No 350 of 2005, Nairobi which was dismissed for want of prosecution. That the Plaintiff obtained injunctive orders against him in 2005 which interrupted his occupation and possession. That he also filed RMCC No 35 OF 2005 in Kigumo against the Plaintiff which suit was dismissed for want of prosecution.

14. Further he stated that the land belongs to him and he is cultivating tea and trees thereon. He claimed that he had in possession the licence from Kenya Tea Development Authority to plant tea but on cross examination he admitted that he did not present the same in Court. He conceded that the license he has is in respect to another parcel of land that belonged to his father. He accused the Plaintiff of colluding with the Kenya Tea Development Authority to acquire the licence although when pressed on cross examination he did not lead any evidence of the alleged collusion.

15. In addition, he stated that the title was first registered in the name of Njoroge Muceru in 1962. He stated that the name Njoroge Muceru belongs to him and that through change of name in 2005 the title became registered in the name of Nganga Muceru. He also stated that Njoroge Muceru is his step brother who was his age mate. He alluded that the land belonged to his grandmother Wairimu Njuguna. He informed the Court that he was away in Mau Narok from 1964 and returned to Kangari around 1992. He admitted that the Plaintiff is currently utilizing the suit land.

16. At the close of the trial the Plaintiff sought leave to file written submissions while the Defendant informed the Court that he was not filing any.

17. I have read and considered the written submissions together with case law presented by the Plaintiff.

18. The key issue for determination is whether the Plaintiff has proved title by Adverse Possession.

19. The background of this case is that this title has been a subject of litigation for the last 14 years. In 2005 the Defendant sued the Plaintiff claiming the suit land. In that case the Defendant informed the tribunal that when he returned from Mau Narok in 1992 he found that the suit land had tea bushes thereon planted by the Plaintiff and therefore decided to build his house on his father's land (another land separate from the suit land). That on visiting the lands office to clarify if the suit land was still his, he found that the title was registered in the name of Njoroge Muceru who was his step brother and therefore embarked on the change of the registered owner of the title to the name of Nganga Muceru in 2005. That thereafter he collected the title in his name. He further stated that the Plaintiff had refused to surrender possession of the land to him. The Plaintiff on the other hand informed the elders that the suit land was sold to his father Kamau Kagema in 1971 by the then registered owner Njoroge Muceru who died before transferring the suit land to him. That they took possession of the suit land since 1972 to date. On realization that the matter related to ownership to land, the elders directed the parties to seek redress in Court.

20. On the 25/4/2005 the Defendant filed RMCC No 35 of 2005 at Kigumo claiming injunctive reliefs against the Plaintiff. The suit was dismissed for want of prosecution.

21. The Plaintiff filed HCCC No 350 of 2005 seeking cancellation of the Defendant's title but the suit too faced the same fate; dismissal for want of prosecution on the 2/3/11.

22. It is alleged that the Defendant filed HCCC No 782 of 2014 in Nairobi seeking similar prayers. The parties did not address the Court in respect to this suit, however I hold the view that that this suit may not see the light of day as the suit is barred by either Section 6 and 7 (or

both) of the Civil Procedure Act.

23. This suit had been heard and determined by the Hon Justice Ombwayo but the judgement was set aside to allow for interpartes hearing.

24. It is not in dispute that the suit land is registered in the name of the Defendant. My perusal of the green card shows that the title was transferred or changed into the name of the Defendant under unclear circumstances. I say unclear because in his evidence the Defendant stated that Njoroge Muceru was his step brother and at the same time he states that he is also called Njoroge Muceru. He appears to have sworn an affidavit to that effect on the 2/3/2013. I say no more on this aspect in recognition that this is not the case currently before the Court. For purposes of the case before me, it suffices that he is currently the registered owner of the suit land.

25. The doctrine of Adverse Possession is one of the ways of land acquisition in Kenya. I will highlight some of the statutory provisions that underpin the doctrine as set out in the Limitations of Actions Act Cap 22 and the Registration of Land Act No 6 of 2012;

Section 7 states 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”

Further in **Section 13**

“(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”.

Section 16 provides as follows;

“For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration.”

Section 17 goes on to state;

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished”.

Finally, **Section 38(1)** and (2) states;

“(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 or lease in place of the person then registered as proprietor of the land.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

26. The combined effect of these sections is to extinguish the title of the proprietor of the land in favour of the adverse possessor at the expiry of 12 years of occupation of the Adverse Possession on the suit land.

27. Section 28(h) of the Land Registration Act, 2012 recognizes overriding interests on land, some of which are rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription. Under Section 7 of the Land Act, 2012 prescription is one of the ways of acquisition of land.

28. In **Kasuve Vs 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”.

29. The key test is that the owner of the land must have been dispossessed or has discontinued possession of the property. In this particular case it is the Plaintiffs case that upon purchase of the suit land from Njoroge Muceru in 1971 he and his father settled on the suit land to date. His father Kamau Kagema died in 1999 leaving him on the suit land.

30. The Defendant has averred in his evidence that he has been in possession of the suit land since 1960s. However, his evidence given under oath in LDT No 11 of 2005 stated that he moved to Mau Narok in 1964 and returned to Kangari in 1992 thus negating his evidence that he had been in occupation of the suit land since 1960s. Further the Defendant stated that his possession was disrupted by the injunction orders granted in this case on the 17/6/11. I have reviewed the ruling of the Hon Justice Serگون issued on even date and it is clear that the orders sought are as follows;

“ That an order of injunction be and is hereby issued restraining the Defendant /respondent by himself , his servants and or agents from evicting destroying disposing or in any way entering and or interfering with the properties especially tea bushes and trees growing thereon in land parcel No LOC 2 /KANGARI/506 in Kangari location within Murang'a County until this suit is heard and determined.”(emphasis is mine).

31. The Learned judge observed that if the Plaintiff had been in possession of the suit land from 1971 -2005, declining to grant the injunctive orders as pleaded would have led to the Defendant evicting the Plaintiff hence defeating his claim of Adverse Possession (emphasis mine).

32. The import of the above orders are that it is the Plaintiff that was in possession at the time of issuing the injunctive orders and not the Defendant. The effect of the orders were to restrain the Defendant from interfering with the Plaintiffs possession and activities on the land which included inter alia the tea growing and trees on the land. There is nowhere in the said ruling that the orders sought to remove the Plaintiff from the land.

33. Further evidence of the Plaintiff's possession was adduced by PW1 and PW2 who stated that they knew the father of the Plaintiff as well as the Plaintiff and that they have occupied the suit land since 1971. This evidence was not successfully controverted by the Defendant.

34. The Plaintiff adduced evidence through PEX 9 which is the verification certificate No 118905 issued by Kenya Tea Development Authority dated the 17/9/92 which shows that the Plaintiff planted 3284 tea bushes on the land as at 1979 which tea is/was supplied to Makomboki buying centre. The Court is of the view that this evidence is further testimony that the Plaintiff planted tea on the suit land and the tea belongs to him. The Court disbelieves the evidence of the Defendant that the tea belongs to him. He failed to produce any licence or verification certificate to support his allegation that he has planted tea on the suit land.

35. The Court is of the view that the Plaintiff is in possession of the suit land and has been in occupation since 1971 to date.

36. Was possession adverse to the Defendant? There is no evidence that has been adduced to show that the possession of the land by the Plaintiff was with the permission of the Defendant. It is the Plaintiff's case that his father bought the land from Njoroge Muceru but died before he transferred the land to him. The Plaintiff adduced an agreement of sale in Kikuyu with the English translation marked PEX No 16 a and 16 b respectively. In it the land was sold by Njoroge Muceru to Kamau Kagema for the sum of Kshs 805/- on the 3/8/1971. The agreement is witnessed by several witnesses. The Defendant did not controvert this agreement and is taken as to be credible evidence in support of the Plaintiffs case.

37. In the case of **Wanyoike v Kahiri [1979]** KLR at page 239 Justice Todd (as he then was), held that in a purchase scenario, the period of limitation starts to run on the date of the payment of the last installment of the purchase. In the case at hand time started running from 1971 when the Plaintiff and his father took possession of the suit land and the title was extinguished in 1983.

38. In the case of **Joseph Gahumi Kiritu Vs Lawrence Munyambu Kabura CA No 20 OF 1993** Justice Kwach JA (as he then was) stated as follows;

“The passage from Chesire's Modern Law of Real Property to which Porter JA made reference in **Githu Vs Ndeete** is important and deserves to be read in full.Time which has begun running under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that merely formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. He must either make a peaceable and effective entry, or sue for recovery of the land.” (emphasis is mine).

39. It is therefore the view of the Court that the right to Adverse Possession accrued and vested in the Plaintiff as at 1983 so much so that by the year 2005 when the Defendant is changing the title in his name, title had been extinguished in favour of the Plaintiff and he therefore held the title to the suit land in trust for the Plaintiff. There is no evidence that the Defendant ever retook possession of the suit land nor that he successfully removed or ousted the Plaintiff from the possession of the suit land. The Court is of the firm view that the Land Dispute Tribunal case filed by the Defendant in 2005 did little to stop time from running nor dislodge the Plaintiff from the suit land. The subsequent cases cited above are not helpful either in assisting the Defendant to assert title to the suit land because title by way of Adverse Possession had accrued and vested in favour of the Plaintiff.

40. The Plaintiff led evidence that he has been in exclusive control of the suit land and demonstrated his *animus possidendi* in developing the suit land through planting and tending tea bushes, growing trees and practicing subsistence farming on the suit land as though it was as of right. That he has done this since 1971 to date openly and without interruption by anyone, least of all, the Defendant, is not under challenge. Evidence was led that the Defendant had knowledge of the Plaintiff's occupation of the suit land.

41. In deciding the issue of Adverse Possession, the primary function of a Court is to draw legal inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of fact, the question whether that possession is adverse or not is a

matter of legal conclusion to be drawn from the findings of facts” **Kweyu v Omuto, C A Civ Appeal 8 of 1990** (as yet unreported). This Court is satisfied that the Plaintiff has proved Adverse Possession and her case is for granting. The title of the suit land is being held in trust for the Plaintiff.

42. The totality of the evidence above is that the Plaintiff has proved his case.

43. Final orders;

a. A declaration that the title in the name of NGANGA MUCERU KAMAU in respect to LOC 2/KANGAARI/506 (suit land) has been extinguished by the Plaintiff’s Adverse Possession thereof for a period of more than 12 years in terms of the Limitations of Actions Act.

b. That the Plaintiff has become entitled to Adverse Possession to the suit land in Kigumo District and registered in the name of the Defendant.

c. An order that the Land Registrar Murang’a register the Plaintiff as absolute proprietor of land parcel Number LOC2/KANGARI/506 in place of the Defendant

d. That the Land Registrar Muranga be directed that the order herein shall be an instrument of transfer of ownership of the whole suit land from the Defendant to the Plaintiff.

e. The costs of the suit shall be in favour of the Plaintiff.

44. It is so ordered.

DATED, DELIVERED AND SIGNED AT MURANG’A THIS 27TH DAY OF JANUARY 2020

J.G. KEMEI

JUDGE.

Delivered in open Court in the presence of;

Plaintiff – Present in person. Advocate is absent.

Defendant – Present in person

Irene and Njeri, Court Assistants