



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. CASE NO. 149 OF 2014

MARTIN MUGO MIGWI.....APPLICANT

VERSUS

NJERU M'UTHI.....1ST RESPONDENT

NANCY NJOKI MWANGI.....2ND RESPONDENT

ALICE MWAKERA THUMI.....3RD RESPONDENT

JUDGEMENT

1. By an originating summons dated 2nd September 1983 and amended on 7th August 1991 the Applicant sought the following orders:

a. That the Applicant by adverse possession and/or purchase is entitled to land parcel No. Gatari/Nembure/2778 (new Nos. 4439 and 4440) by virtue of the fact that he paid purchase price and he has been in possession thereof since 1969 under Section 37 and 38 of the Limitation of Actions Act Cap. 22 of the Laws of Kenya.

b. That Nancy Njoki Mwangi and Christopher Thumi Difather transfer the said parcels Gatari/Nembure/4439 and 4440 respectively to the Applicant.

c. That the 2nd and 3rd Respondents be ordered to transfer the said parcels of land No. Gatari/Nembure/4439 and 4440 to the Applicant.

d. That the honourable court may make any other order as the same may deem fit and just.

2. The said originating summons was supported by an 'amended' affidavit sworn by the Applicant on 5th August 1991. It was contended that sometime in 1969 the Applicant entered into a sale agreement with the 1st Respondent for the purchase of the original suit property, that is, *Title No. Gatari/Nembure/2778* (hereafter parcel 2778) at a consideration of Kshs. 1,000/- per acre which was later on increased by the 1st Respondent to Kshs. 2,000/- per acre.

3. The Applicant further pleaded that he thereupon took possession of parcel 2778 and developed it by planting trees, nappier grass and various crops thereon. He further stated that he built four (4) dwelling houses thereon and a granary hence he considered to have acquired the suit property through adverse possession. It was further pleaded that parcel 2778 had since been sub-divided into *Title No. Gatari/Nembure/4439* (hereafter parcel 4439) and *Title No. Gature/Nembure/4440* (hereafter parcel 4440).

4. The 1st Respondent filed a replying affidavit sworn on 30th November 2018 in response to the said amended originating summons. He stated that he was the original owner of parcel 2778 which was registered in his name whilst he was a minor. He further stated that upon attaining the age of majority in 1976 he was issued with a title deed for the said property. It was his case that in 1984 or thereabouts he sub-divided parcel 2778 into parcels Nos. 4439 and 4440 and thereafter transferred the former to the 2nd Respondent and the latter to the 3rd Respondent. It was further stated that the 2nd and 3rd Respondents had since asserted their property rights hence the issue of adverse possession could not arise.

5. The 2nd Respondent filed a replying affidavit sworn on 12th September 1991 in opposition to the amended originating summons. She stated that she was the registered proprietor of parcel 4439 having bought it for valuable consideration from the 1st Respondent in 1984. She stated that due process was followed in the purchase of the said parcel and that there were no encumbrances registered against the title at the

material time. She further stated that in 1987 she filed *Embu RMCC No. 37 of 1987* against the Applicant in order to assert her property rights. It was also the 1st Respondent's case that she was a purchaser for value without notice of any defect in title hence her title should be upheld.

6. The original 3rd Respondent filed a replying affidavit sworn on 12th September 1991 in opposition to the amended originating summons. He stated that he was the registered proprietor of parcel 4440 having bought it for valuable consideration from the 1st Respondent in 1986 or thereabouts. He stated that there were no encumbrances registered against the title at the material time. It was his case that when he asked the Applicant to vacate the land he refused to oblige hence he lodged a complaint of trespass against him in consequence of which the Applicant was charged with trespass in *Embu Criminal Case No. 351 of 1987*. The material on record indicates that the original 3rd Respondent died during the pendency of the suit in consequence whereof his widow, Alice Mwakera Thumi was joined in his place.

7. It would appear from the material on record that part of the dispute between the Applicant and the 2nd Respondent had been submitted to the defunct Land Disputes Tribunal (hereafter Tribunal) for resolution. The material on record indicates that the Tribunal found for the 2nd Respondent and consequently directed the Appellant to vacate parcel 4439. The award of the Tribunal was subsequently adopted as a judgement in *Embu RMCC No. 37 of 1987*.

8. When the Advocates for the parties appeared before me for mention for directions on 28th February 2018 they agreed to have the judgement and decree of the Magistrates' court set aside so that the entire dispute amongst all the concerned parties could be heard and determined by this court. Accordingly, a consent to that effect was recorded.

9. At the trial hereof the Applicant was the only witness who testified on his behalf. He stated that he bought parcel 2778 from the 1st Defendant in 1986. He testified that he started occupying parcel 2778 in the 1970s and that he was residing there with his family. As stated in his 'amended' supporting affidavit, he testified that he had developed parcel 2778 by building dwelling houses and cultivated various crops thereon.

10. The Applicant's case was that although the 2nd and 3rd Respondents were the current registered proprietors of parcel Nos. 4439 and 4440, they had never lived thereon. He stated that he knew the 1st Defendant in 1973 when he was selling parcel 2778.

11. During cross examination by the Respondents' advocate, the applicant stated that he took possession of parcel 2778 after completion of payment of the purchase price in 1975. He also conceded that he had told the Tribunal earlier on that he took possession in 1976. The Applicant also conceded that he chased away the 3rd Respondent after he planted coffee on the parcel 4440.

12. The 1st Respondent adopted his replying affidavit sworn on 30th November 2018 and witness statement of even date as his sworn testimony. He stated that he was registered as proprietor of parcel 2778 in 1961. He stated that he was a minor at the material time hence he did not have a national identity card. It was his evidence that the Applicant never bought any land from him and that in fact, he is the one who introduced the 2nd Defendant to purchase parcel No. 4439 from him. It was his case that during his minority the Applicant was allowed by his father (i.e. 1st Respondent's father) to occupy the parcel 2778 whilst taking care of it.

13. The 2nd Defendant similarly adopted her witness statement dated 13th November 2018 as her sworn evidence. She maintained that she was an innocent purchaser for value without notice of any defect in title. It was her evidence that she was introduced to the 1st Respondent by the Applicant himself and that is how she came to purchase parcel 4439. It was her case that the Applicant was cultivating part of the land whilst the rest was vacant. She reiterated that she sued the Applicant in *RMCC No. 37 of 1987* seeking his eviction.

14. The 3rd Defendant testified on her own behalf at the trial as the sole witness. She adopted her witness statement dated 7th May 2018 as her sworn testimony. She was not personally involved in the sale of parcel 4440 since it was purchased by her late husband, Christopher Thumi Difatha. It was her evidence that parcel 4440 was cultivated at the material time but it had no houses thereon. It was her evidence that she cultivated the said parcel for about 3 seasons before the Applicant uprooted her crops in consequence of which he was charged with a criminal offence.

15. Upon conclusion of the trial on 17th October 2019, the Applicant was given 30 days to file and serve his written submissions whereas the Respondents were given a similar period upon the lapse of the Applicant's period to file theirs. The record shows that the Applicant filed his submissions on 19th November 2019 whereas the Respondents' submissions were not on record by the time of preparation of the judgement.

16. The court has considered the pleadings and affidavits on record, the documents produced by the parties and the oral evidence tendered at the trial. The court is of the opinion that the following issues arise for determination:

- a) *When time for the purposes of adverse possession started running.*
- b) *Whether the Applicant has demonstrated his claim for adverse possession.*
- c) *Who shall bear the costs of the suit.*

17. The legal requirements for proving adverse possession were restated in the following cases; **Wambugu Vs Njuguna [1983] KLR 172; Githu Vs Ndeete [1984] KLR 776; Kasuve Vs Mwaani Investments Ltd & 4 Others [2004] 1KLR 184 and Kimani Ruchine Vs Swift Rutherfords & Co Ltd [1980] KLR 10.**

18. In the case of **Kasuve Vs Mwaani Investments Ltd and 4 Others** (supra) the elements of adverse possession were summarized as follows;

“...and 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 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, Wanja Vs Saikwa No. 2 [1984] KLR 284. A title by adverse possession can be acquired under the Limitation of Actions Act for part of the land...”

19. The court has considered the entire evidence on record on the 1st issue. There is contradictory evidence on when the Applicant took possession of the suit property. In both the original and amended originating summonses the Applicant swore that he bought parcel 2778 in 1969, took possession thereof immediately and developed it by erecting dwelling houses and cultivating various crops and trees thereon.

20. The Applicant sought to produce a copy of a sale agreement dated 1973 purportedly for the purchase of parcel 2778 from the 1st Defendant. The copy was, however, not produced because the Respondents insisted on production of the original. The Applicant also testified during cross examination that he took possession only after completing payment of the entire purchase price. The purchase price was supposedly paid in full in 1975. The Applicant also conceded during cross examination that he informed the Tribunal in earlier proceedings that he took possession in 1976!

21. There is documentary evidence before this court to demonstrate that the 1st Respondent was born in 1958 hence he could not possibly have sold parcel 2778 in 1969 whilst he was aged 11 years or in 1973 when was aged 15. The evidence before court demonstrates that the 1st Respondent was a minor at the time he is alleged to have transacted with the Applicant. In the absence of any evidence that the 1st Respondent adopted or ratified the alleged transaction, upon attaining the age of majority in 1976, he could not incur legal liability. In any event, the Applicant testified during cross examination that he occupied the suit property only after completing payment of the purchase price. So, the court takes it that he took possession in 1976 as he testified earlier before the Tribunal. Consequently, the minimum statutory period of 12 years had not lapsed by the time he filed the originating summons in 1983. The claim for adverse possession was therefore prematurely filed since only 7 or so years had lapsed since 1976.

22. The court has also considered the evidence and submissions on record on the 2nd issue. Although the Applicant claimed to have occupied parcel 2778 and its sub-divisions through adverse possession, it must be remembered that such possession must be as of right and without the permission of the owner. The evidence on record reveals that during the 1st Respondent's minority, his father had allowed the Applicant to utilize the parcel 2778 for the purpose of taking care of it. When the 1st Respondent became of age in 1976 he obtained a title deed and sought to sell the entire property. The Applicant's permission thus terminated and he was given the option of purchasing the property.

23. It would appear from the material on record that the Applicant intended to purchase only 2 acres out of parcel 2778. He was apparently requested by the 1st Respondent to look for potential buyers in consequence whereof he introduced the 2nd Defendant who purchased parcel 4439. In those circumstances, it could not be said that the Applicant was utilizing the properties in question as of right and in a manner hostile to the title of the owner. All indications on record are that the Applicant acknowledged the 1st Respondent's title and even assisted in selling parcel 4439 to the 2nd Respondent.

24. It is also trite law that an Applicant's possession must not be interrupted in any way because whenever interruption occurs then the limitation period stops running under the **Limitation of Actions Act (Cap. 22)**. In the case **Githu Vs Ndeete** (supra) the court addressed the issue of interruption as follows:

“Time ceases to run under the Limitation of Actions Act 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. See *Cheshire's Modern Law of Real Property*, 11th Edition at p. 894. In my view the giving of notice to quit cannot be an effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act...”

25. The court is thus of the opinion that the Applicant's possession was interrupted by the 2nd Respondent when she filed *Embu RMCC No. 37 of 1987* on 26th February 1987 for the eviction of the Applicant from parcel 4439. Since the court has found that time for purposes of adverse possession could only be computed as from 1976, then the statutory period of 12 years had not been attained.

26. The court is further of the opinion that the Applicant's possession was interrupted by the 3rd Respondent who took effective possession of parcel 4440 by farming thereon for three years, that is, 1986, 1987 and 1988 before the Applicant uprooted her crops and chased her away. An Applicant's possession must be peaceful and without the use of force or threats of force in order to succeed in a claim for adverse possession. The court is thus far from satisfied that the Applicant has demonstrated his claim for adverse possession.

27. The 3rd issue is on costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Jann Mohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful Respondents should be deprived of costs. Accordingly, the Respondents shall be awarded costs of the suit.

28. The upshot of the foregoing is that the court finds and holds that the Applicant has failed to prove his claim for adverse possession on a balance of probabilities as required by law. Consequently, the court makes the following orders for disposal of the suit:

a) The Applicant's originating summons dated 2nd September 1983 and amended on 7th August 1991 be and is hereby dismissed in its entirety against all the Respondents.

b) The Applicant shall bear the costs of the suit.

29. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **16TH** of **JANUARY, 2020**

In the presence of Ms. Mbwiria holding brief for Mr. Nzioki for the Applicant and Mr. Andande holding brief for Ms. Wairimu for the Respondents.

Court Assistant: Mr. Muinde

Y.M. ANGIMA

JUDGE

16.01.2020