



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. CASE NO. 292 OF 2015 (O.S.)

MBAYANI MWINUKIE.....PLAINTIFF

VERSUS

NJIRU KAGANE.....DEFENDANT

JUDGEMENT

A. Introduction

1. By an originating summons dated 18th March 2015 brought under the provisions of **Section 38 of Limitations of Actions Act (Cap. 22), Order 37 Rules 7 and 19 Civil Procedure Rules, Section 3A of the Civil Procedure Act (Cap. 21) and all other enabling provisions of the law**, the Plaintiff sought the following reliefs against the Defendant:

- a. That the honourable court do declare that the Plaintiff herein Mbayani Mwinukie has become entitled to ownership of 1½ acres out of land parcel No. Nthawa/Siakago/846 as against the Defendant by virtue of Section 7 of the Limitations of Actions Act on the ground that since 1970 the Plaintiff has openly, peacefully and of right been in occupation of the said parcel of land, that is to say, for a period exceeding 12 years preceding the presentation of this summons.
- b. That in the alternative there be a declaration that the Defendant was registered as a proprietor of the 1½ acres out of land parcel No. Nthawa/Siakago/846 set out in paragraph 1 on behalf of and in trust for the Plaintiff herein.
- c. The costs of the suit be awarded to the Plaintiff.

B. The Plaintiff's case

2. The said summons was based upon the grounds set out in the summons and the supporting affidavit sworn by the Plaintiff on 19th March 2015 and the annexures thereto. The Plaintiff contended that he had been in open, peaceful and continuous occupation of 1½ acres out of *Title No. Nthawa/Siakago/846* (hereafter the *suit property*) since 1970 hence had acquired adverse possession thereof by operation of law. It was the Plaintiff's case that although the suit property measured about 5 acres, he occupied only 1½ acres whereas the Defendant occupied about 3½ acres.

C. The Defendant's case

3. The Defendant filed a replying affidavit sworn on 26th August 2019 in opposition to the said summons. The Defendant refuted all the allegations contained in the Plaintiff's supporting affidavit. It was denied that the Plaintiff had occupied the suit property since 1970. The Defendant further stated that the Plaintiff had lost a previous suit he had filed to recover the portion of the suit property he claimed to have bought in *Siakago RMCC No. 58 of 1996*. The Plaintiff is also said to have lost in his appeal to the High court.

4. The Defendant also denied that the Plaintiff had developed the suit property by planting mangoes, khat (*miraa*), banana stems or indigenous trees as claimed by the Plaintiff. The Defendant, therefore, asked the court to dismiss the Plaintiff's suit with costs.

D. The summary of evidence at the trial

a. The Plaintiff's evidence

5. At the trial hereof, the Plaintiff testified on his own behalf and called one more witness in support of his case. The Plaintiff stated that he

cultivated a portion of the suit property before the land demarcation and adjudication was done. He further stated that when demarcation was finally undertaken the portion he was utilizing was allocated to the Defendant who later on agreed to sell that portion to him.

6. It was the Plaintiff's evidence that he could not remember in which year he started utilizing the portion of the suit property he is seeking in the suit. He further stated that he could not tell the exact acreage he was utilizing but he gave a rough estimate of about 2 acres. When asked by the court whether the portion of land he was claiming was fenced, he answered that it was not.

7. The 2nd Plaintiff's witness was Anastasio Mwinuke who was his brother. He stated that the Plaintiff started utilizing the suit property in 1984 or thereabouts. He further stated that he witnessed the sale agreement between the Plaintiff and the Defendant but he could not remember the acreage being sold.

b. The Defendant's evidence

8. The Defendant testified at the trial on his own behalf and called 2 other witnesses in support of his defence. He adopted the contents of his replying affidavit and his witness statement dated 24th February 2016 as his sworn testimony. He maintained that he was in occupation of the suit property and that the Plaintiff had not built even a single dwelling house on the land.

9. The Defendant contended that the Plaintiff was residing some distance away from the suit property and that they did not share a common boundary. He stated that his immediate neighbours were Ngai Kibweshe and Kaumbuthu Mashamba and that the Plaintiff was not his neighbour.

10. The Defendant's daughter, Jemimah Njiru Kaunyu testified as DW2. She stated that she was the one currently residing on the suit property and that she was the one cultivating it. It was her case that the Plaintiff's late wife, Felonika Mbayani, was cultivating a small portion of the suit property (about ½ acre) during her lifetime. She, however, conceded that the Plaintiff's son had recently forcibly cultivated beans on a small portion of the suit property.

E. Directions on submissions

11. Upon conclusion of the hearing on 21st November 2019 the Plaintiff was given 30 days to file his written submissions whereas the Defendant was granted 30 days upon the lapse of the Plaintiff's period to file his. The record shows that the Plaintiff's submissions were filed on 10th January 2020. However, the Defendant's submissions were not on record by the time of preparation of the judgement.

F. The issue for determination

12. The court has considered the pleadings, affidavits, documents and the evidence on record in this matter. There is no doubt that the main question for determination is whether or not the Plaintiff has demonstrated his claim for adverse possession. The question of trust cannot be a legitimate issue for determination in this suit (See **Wasui V Musumba [2002] 1 KLR 396**).

G. Analysis and determination

13. The elements of adverse possession were summarized in the case of **Kasuve Vs Mwaani Investment Ltd [2004] 1 KLR 184** 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 Sakwa No. 2 [1984] KLR 284. A title by adverse possession can be acquired under the Limitation of Actions Act for part of the land...”

14. The court has considered the evidence and submissions on record on the issue of adverse possession. Whereas in his originating summons the Plaintiff claimed to have been occupying a portion of 1½ acres out of the suit property since 1970 he informed the court at the trial hereof that he could not remember when he started utilizing the suit property. His brother who testified as PW2 claimed that the Plaintiff started utilizing the land in 1984 or thereabouts. Both the Plaintiff and PW2 could not tell the acreage the Plaintiff was allegedly utilizing.

15. The Defendant, on the other hand, did not shed much light on the issue of occupation and the acreage the Plaintiff was allegedly utilizing. Even though the Defendant had filed a statement of defence dated 24th February 2016 claiming that the Plaintiff's wife was only cultivating ½ acre during her lifetime, he maintained at the trial that his own daughter (DW3) was the one occupying and utilizing the entire suit property. DW3 complicated the situation further by stating that the Plaintiff's son had recently resumed cultivation of a small portion of the suit property. The court was never told when the Plaintiff's late wife, Felonika Mbayani, started cultivating and when she stopped cultivating the suit land.

16. There is no doubt that the Plaintiff or his wife may have utilized a portion of the suit property over the years. What has not been demonstrated by the Plaintiff is the length of such possession, the acreage in question and whether the true owner was dispossessed as a matter of law. There are various contradictions in the Plaintiff's evidence on the date or year of possession. The acreage of alleged utilization appears to be equally uncertain. The Plaintiff and his witness were unable to confirm at the trial the size of the land being claimed out of the suit property.

17. There are documents on record to demonstrate that the Plaintiff had sometime in 1996 filed a suit claiming the entire suit property of 5 acres. PW2 indicated in his written statement that the portion bought was 2½ acres whereas the originating summons sought 1½ acres. At

the trial hereof, neither PW1 nor PW2 could ascertain the size of land the Plaintiff was allegedly utilizing. The Plaintiff further stated that the portion he was claiming was not fenced. It was just some unidentifiable portion of land at large. The Plaintiff was unable to demonstrate with cogent evidence any developments he claimed to have undertaken on the suit property. There was no evidence of the bananas, khat and mangoes he claimed to have planted.

18. The mere fact that the Plaintiff's son may have cultivated seasonal crops on a portion of the suit property does not necessarily connote dispossession of the owner of the property especially where the portion claimed is not fenced or clearly identifiable. It was not demonstrated in this case that the Defendant had been dispossessed since he appears to have a house and other developments on the suit property. The court is satisfied on the basis of the material on record that the Defendant's daughter is still in possession and she is the one currently residing thereon. There was no evidence of dispossession in this suit. See **Wambugu V Njuguna [1983] KLR 172**.

19. Whereas it is possible for a claimant to establish adverse possession to a small portion of a given parcel of land, the burden of proof lies upon the Plaintiff to demonstrate that he has such a claim to a clearly identifiable portion of the land in question. The Plaintiff did not tender any surveyor's report or other expert's report marking out the portion of land being claimed. It has been held that proving such an identifiable portion of the whole is a necessary ingredient of adverse possession. See **Githu V Ndeete [1984] KLR 776**.

H. Conclusion and disposal order

20. The upshot of the foregoing is that the court is not satisfied that the Plaintiff has demonstrated all the elements of adverse possession given that he was claiming portion of 1½ of the suit property which was about 5 acres. Accordingly, the Plaintiff's originating summons dated 18th March 2015 must fail. The same is accordingly dismissed in its entirety. Each party shall bear his own costs of the suit.

21. It is so adjudged.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **27TH DAY** of **FEBRUARY, 2020**.

In the presence of Ms. Ndorongo holding brief for Ms. Muthoni Ndeke for the Plaintiff and the Defendant in person.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

27.02.2020