



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 1210 OF 2014 (O.S)

PETER KAROBIA RIBIRO.....1ST APPLICANT

MUNYWE RIBIRO MUNYWE.....2ND APPLICANT

VERSUS

MARY WAMBUI MUNGAI.....1ST RESPONDENT

REGISTRAR OF TITLES KIAMBU COUNTY..2ND RESPONDENT

JUDGMENT

The applicants brought this suit by way of an Originating Summons dated 11th September, 2014 seeking the determination of the following questions;

1. Whether the applicants are entitled by adverse possession to a parcel of land known as Kiambaa/Ruaka/639 (“hereinafter referred to as “the suit property”) measuring approximately 2.30 acres and any subsequent sub-divisions thereof.
2. Whether a permanent injunction ought to issue restraining the 1st respondent, her agents, servants and/or employees or in any manner howsoever from effecting any conveyance, trespassing, entering, remaining on, creating nuisance or in any way dealing with and/or interfering with the parcel of land known as Kiambaa/Ruaka/639(the suit property) measuring approximately 2.30 acres and/or interfering with the applicants’ proprietorship interest and/or rights of quite possession, occupation and enjoyment thereof.
3. The 2nd respondent be ordered by the court to transfer to the applicants all that parcel of land known as Kiambaa/Ruaka/639 (the suit property) measuring approximately 2.30 acres and any subsequent sub-divisions thereof.
4. Whether the court should direct the respondents to pay the applicants’ costs.

The application was brought on the grounds set out on the face thereof and on the supporting affidavit of the 1st applicant, Peter Karobia Ribiro. The applicants contended that they occupied the suit property before Kenya gained independence from the British rule as descendants of one, Ribiro Munywe and were residing on the property together with their grandchildren and great grandchildren. The applicants averred that in breach of and in defiance of their rights to the suit property, the respondents attempted to illegally evict the applicants and their families from the suit property so as to render them destitute and homeless. The applicants contended that they were senior citizens aged over 80 years and Mau Mau freedom fighters and that the respondents’ actions aforesaid were aimed at defeating their equitable interest in the suit property.

The applicants contended that the respondents through their agents had resorted to acts of harassment against the applicants and their extended families with a view to frustrate them and had attempted on numerous occasions to subdivide the suit property illegally. The applicants averred that they were entitled to be registered as proprietors of the suit property under the principle of adverse possession. The applicants averred further that they had been in peaceful, continuous, uninterrupted use, enjoyment and occupation of the suit property with full knowledge of the respondents. The applicants contended that the 2nd respondent should rectify the register in respect of the suit property and register the applicants as the proprietors thereof.

The applicants contended that the respondents had interfered with their right to quiet possession of the suit property and had also occasioned them loss and damage. The applicants contended further that unless the orders sought were issued, the respondents would continue to interfere with their rights and interests in the suit property. The applicants averred that they would suffer irreparable loss if the orders sought were not issued and urged the court to grant the orders sought.

The application was opposed by the 1st respondent through a replying affidavit sworn on 27th June, 2016. The 2nd respondent did not respond

to the application. The 1st respondent averred that she was the registered owner of the suit property which she purchased from one, Hannah Ribiro who was a sister to the applicants. The 1st respondent averred further that she had been in occupation of the suit property and that the averments contained in the applicants' affidavit in support of the application were not true. The 1st respondent averred that the applicants had made numerous fraudulent attempts to be registered as proprietors of the suit property and had misled various courts for the same purpose to no avail. The 1st respondent averred that after purchasing the suit property, she was issued with a title deed on or about 25th August, 2014 and thereafter given vacant possession of the property. The 1st respondent contended that the application was an abuse of the court process and urged the court to dismiss the same.

The Originating Summons was heard orally on 16th October, 2018. By the time the matter came up for hearing, the 2nd applicant had passed on. In his testimony, the 1st applicant, Peter Karobia Ribiro (PW1) relied on the affidavit filed in support of the Originating Summons and the attachments thereto as part of his evidence in chief. He told the court that a group of people led by the District Officer, Kiambaa came to demolish their houses on the suit property. The 1st applicant stated that the 1st respondent was not known to him and that as far as he was concerned, the suit property belonged to his mother. The 1st applicant stated that the District Officer told them that he had an order issued by the court for the demolition of the structures on the suit property but failed to show him a copy of the said order. The 1st applicant stated that the said group of people demolished several structures and took possession of the suit property on which they constructed a guard house. He told the court that he was born on the suit property in 1934 and that he was not given a notice to vacate the property. The applicant stated that his parents lived on the suit property and when they died, they left the suit property to him.

The 1st applicant stated that his mother had a case with his sister, Hannah Ribiro over the suit property which his mother won and had Hannah Ribiro thrown out of the suit property. He stated that the suit between his mother and Hannah Ribiro was filed in 1982 while the decision in Succession Cause No. 3519 of 2003 that the respondents had relied on was made recently. The 1st applicant referred the court to a number of photographs that were annexed to his affidavit in support of the application which he claimed showed the status of the suit property before the demolition squad landed on the premises. He stated that all the houses shown in the photographs which belonged to his sons were demolished. He told the court that the 2nd applicant was his brother and that he came to live with him on the suit property from Rift Valley and that he died in December, 2016 as a result of the shock that he suffered from frequent invasion of the suit property.

In cross-examination by the 1st respondent's advocate, the 1st applicant stated that he was not residing on the suit property and that he was using the same for farming. He stated that he was residing on his own land and that he inherited the suit property from his father. He stated that he had a case with his sister, Hannah Wanjira Ribiro concerning the suit property. He stated that the case was heard by Kimaru J. but he did not know the outcome. He stated that he was not aware of the ruling that was delivered by Kimaru J. in that case on 26th June, 2014. He told the court that he did not get justice in that case because the advocate who was representing him in the matter was bribed and that explained why he lost the case. He stated that the houses whose photographs he produced in court were no longer on the suit property. He told the court that the suit property had had been the subject of various court cases going back to 1979. He denied that his intention was to dispossess her sister of the suit property.

The 1st respondent called Hannah Wanjira Ribiro (DW1) as the first witness. DW1 adopted her witness statement recorded on 1st March, 2017 and filed in court on 2nd March, 2017 as her evidence in chief. She told the court that she sold the suit property to the 1st defendant and that no one was in occupation of the property. In cross examination by the applicants' advocate, DW1 stated that at the time she was selling the suit property to the 1st defendant, it was vacant. She stated that she was not aware of the alleged demolitions of the applicants' structures on the suit property as she was not residing in the area where the suit property is situated. She stated that she left the area soon after selling the property.

DW1 stated further that she entered into an agreement for sale of the suit property with the 1st respondent on 9th October, 2013 and that as of that date, she was not living on the suit property. She admitted that when she sold the suit property, there was an ongoing court case over the same. She reiterated that when she sold the suit property, the same was vacant. DW1 stated that the original parcel of land that was owned by the family was subdivided into 4 portions and that the suit property was given to her. DW1 stated that the applicants wanted to take the property from her.

The 1st respondent, Mary Wambui Mungai (DW2) gave evidence next. The 1st respondent adopted her replying affidavit sworn on 27th July, 2016 as her evidence in chief and produced the annexures to the said affidavit as exhibits. The 1st respondent also produced a copy of a ruling by Kimaru J. that was delivered on 26th June, 2014 as additional exhibit. The 1st respondent told the court that the suit property was under the occupation of her watchman. She told the court that after purchasing and taking possession of the property, the brothers of Hannah Wanjira Ribiro who sold the property to her came with machetes and chased her away. The 1st respondent stated that she was forced to seek police assistance. She stated that she had not developed the suit property because of the interlocutory orders that had been issued by the court.

In cross-examination by the applicants' advocate, the 1st respondent admitted that she had filed a suit at Kiambu Law Court to evict squatters who were on the suit property. She told the court that she had taken vacant possession of the suit property and that the orders that she sought at Kiambu Law Court were aimed at stopping the cutting of trees on the property. The 1st respondent stated that she was given possession of the suit property by the vendor and that she did not carry out any demolitions on the property. When asked about the police presence on the suit property, the 1st respondent stated that the police came to the property to give her protection. The 1st respondent denied that she invaded the suit property with the help of the police. She stated that when she was given possession of the property, it was vacant and it was not necessary to use force to gain entry. She stated that she went to the police because she wanted to fence the suit property and there was resistance by the applicants.

After the end of evidence, the parties made closing submissions in writing. The applicants filed their submissions on 29th May, 2019 while the 1st respondent filed her submissions on 14th May, 2019. I have considered the Originating Summons together with the affidavit filed in support thereof. I have also considered the replying affidavit by the 1st respondent. Finally, I have considered the evidence tendered and the

submissions by the parties. In my view the only issue that arises for determination in the Originating Summons is whether the applicants have acquired the suit property by adverse possession and should be registered as the proprietors thereof.

In Kasuve v Mwaani Investment Ltd & 4 Others, [2004] 1 KLR 184 the court stated as follows:

“.....in order to be entitled to the 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 dispossessing the owner or by the discontinuation of possession by the owner on his own volition.”

In Kimani Ruchine & Another v Swift, Rutherford Co. Ltd. & another (1977) KLR 10 Kneller J. stated as follows at page 16:

“The Plaintiffs have to prove that they have used this land which they claim as of right, necvi, nec clam, nec plecario (no force, no secrecy, no evasion).....The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”

In Wambugu v. Njuguna [1983] KLR 173, it was held among others that:

“In order to acquire by the statute of Limitations 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. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.”

From my analysis of the applicants' claim and the evidence adduced in proof thereof, I am not satisfied that the claim has been proved. From the evidence before the court, the suit property was at all material times ancestral land. The suit property was registered in the name of the applicants' sister, Hannah Wanjira Ribiro (DW1) in 1982 after succession proceedings at the Chief Magistrates Court at Kiambu. The said succession proceedings appear to have been in respect of the applicants' and DW1's father's estate. The applicants' and DW1's mother who was still alive then contested DW1's right to inherit the suit property and lost. In Nairobi High Court Succession Cause No. 3519 of 2003, the court held in a ruling delivered on 26th June, 2014 that DW1 was the lawful owner of the suit property. There is no evidence that that decision was appealed. It appears from the evidence on record that the suit property belonged to the applicants' and DW1's father before the same was registered in the name of DW1. I am of the view that if at all the applicants were in occupation of the suit property their occupation was with the consent of their father and subsequently that of DW1 who was their sister. The applicants' occupation of the suit property could not therefore be said to have been adverse to the proprietary interest of their father and subsequently that of DW1 who inherited the property from their father.

In Mwinyi Hamisi Ali v The Attorney General & Another [1997]eKLR the courts stated that:

“It can be seen straight away that Mr. Hamisi Ali was not in adverse possession of the plots in question. He was in possession by virtue of Captain Townsend's consent and somewhat nebulous implied consent of the other three co-owners of plot No. 334.....In a court of law, sympathy takes a second stand. We are governed by statutes.”

The applicants having occupied the suit property by permission or consent of the registered owners, they cannot claim that their occupation was adverse to their interests in the property. From the evidence on record, the 1st respondent acquired the suit property from DW1 on 25th August, 2014. As at that date, DW1 was the registered owner of the suit property and her title had been confirmed by the court on 26th June, 2014 in Nairobi High Court Succession Cause No. 3519 of 2003. Since the applicants had not acquired the suit property by adverse possession from DW1, the 1st respondent obtained a clean title from DW1 free from any encumbrance. The applicants brought the present suit on 11th September, 2014; less than a month from the time the 1st respondent acquired the suit property. If at all the applicants were in occupation of the suit property, they had not occupied the same for a sufficient period from the time the 1st respondent acquired the property that would have entitled them to claim the property from the 1st respondent by adverse possession.

The foregoing notwithstanding, the applicants did not also establish that they were in occupation of the suit property. The 2nd applicant died before the hearing of the suit and was not substituted. The 1st applicant on the other hand told the court that he was residing on his own land and not on the suit property. The 1st applicant testified that it was his sons who were in occupation of the suit property and that on his part, he only used to carry out farming on the property. The 1st applicant did not place convincing evidence before the court in proof of his farming activities on the suit property while his sons who were allegedly evicted from the suit property were not parties to the suit.

In the final analysis and for the foregoing reasons, I find the applicants' suit not proved. The suit is dismissed with costs.

Dated and delivered at Nairobi this 27th Day of February, 2020

S. OKONG'O

JUDGE

Judgment read in open court in the presence of

Mr. Odawa for the Applicants

Mr. Naibei h/b for Mr. Kimani for the 1st Respondent

N/A for the 2nd Respondent

Ms. C. Nyokabi-Court Assistant