



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. CASE NO. 183 OF 2009

**MARIA GORETTI MUTHONI KARURI(Legal Representative of
Eustace Karuri Githenya).....PLAINTIFF**

- VERSUS -

JORETH LIMITED.....1ST DEFENDANT

TIMOTHY LELGO.....2ND DEFENDANT

TERESIA MISTI LENGES3RD DEFENDANT

JUDGMENT

Background

1. The dispute in this suit relates to ownership of Land Reference Number 13330/51 measuring approximately 0.496 hectares (**the suit property**). The land was surveyed as a sub-division out of Land Reference Number 13330 which belonged to Joreth Limited (**the 1st defendant**). The 1st defendant sold the suit property to the 2nd and 3rd defendants who were subsequently registered as proprietors in June 2009.

2. The late Eustace Karuri Githenya (**the deceased**) initiated the suit through an originating summons dated 24/4/2009. He sought to be declared to have acquired title by adverse possession to the suit property. He also sought an order cancelling the registration of Timothy Lelgo and Teresia Misti Lenges as proprietors of the suit property. The originating summons was taken out under Section 38 of the Limitation of Actions Act, among other provisions of the law.

3. Upon the death of Eustace Karuri Githenya, the originating summons was amended on 23/1/2017 to bring on board **Maria Goretti Muthoni Karuri** in her capacity as the personal representative of her late husband (hereinafter referred to as "**the plaintiff**"). The said amended originating summons is the subject of this judgment. The amended originating summons was expressed to have been brought under Order XXXVI, Section 3D of the Civil Procedure Rules (sic), Section 38 of the Limitation of Actions Act, Section 64 of the Registration of Titles Act, and Sections 25, 28 and 106 of the Land Registration Act.

4. The application was supported by two affidavits sworn by the deceased on 24/5/2009 and 26/6/2009 respectively. It was also supported by a subsequent affidavit sworn by the current plaintiff on 23/1/2017. Lastly, it was supported by the deceased's written statement dated 9/12/2011 and the witness statement of Maria Goretti Muthoni Karuri dated 2/3/2016.

Case of the Plaintiff

5. The case of the plaintiff was that the deceased purchased a share in an entity known as Thome Farmers No 5 Limited. Upon purchase of the share, the plaintiff entered into the suit property and took possession and control thereof. Subsequently, while the plaintiff was in occupation, the suit property was surveyed as Land Reference Number 13330/51. It was contended by the plaintiff that upon entering the suit property, the deceased planted crops, maize, beans, napier grass, trees and other crops and continued to cultivate and generally use the suit property without interruption from any quarter from 1991 to April 2009. In April 2009, the deceased's workman informed the deceased that some strangers were seen inspecting the suit property. Upon inquiry, the deceased established that the 1st defendant had sold the suit property to the 2nd and 3rd defendants. The case of the plaintiff was further that the deceased had acquired adverse title over the suit property because he entered the suit property in 1991 and occupied it without any interruption for a period of 17 years. It was on the above basis that the above orders were sought.

Case of the 1st Defendant

6. The case of the 1st defendant was contained in the replying affidavit sworn by James Njenga Karume on 25/6/2012. It contended that it held title to two parcels of land; LR No 4920/3 and LR No 4921/3. The two parcels were subsequently consolidated into LR No 13330. The suit property was a subsequent sub-division out of LR No 13330. At all times prior to the disposition of the suit property to the 2nd and 3rd defendants, the 1st defendant was the registered proprietor of the suit property and did not sell, let or assign its rights to any party. The 1st defendant was a separate entity from Thome Farmers No 5 Limited. The 1st defendant asserted its rights against Thome Farmers No 5 Limited in **Nairobi HCCC No 6206 of 1992** where all identifiable occupiers of LR No 13330 by virtue of being Thome Farmers No 5 Limited shareholders were sued for trespassing on the suit property and orders of eviction were sought against them. The 1st defendant contended that upon filing Nairobi HCCC No 6206 of 1992, time stopped running for the purpose of adverse possession.

The Case of the 2nd and 3rd Defendants

7. The 2nd and 3rd defendants filed a joint replying affidavit which was sworn by the 2nd defendant on 5/7/2010. Their case was that they came across a newspaper advertisement by the 1st defendant indicating that there was land for sale. They subsequently entered into a sale agreement with the 1st defendant and bought the suit property at a consideration of Kshs 1,500,000. They were issued with a deed plan and the transfers were processed. They took vacant possession of the suit property on 20/12/2006. They were in possession of the suit property until 20/4/2009 when the deceased destroyed their fence. The matter was reported at Kasarani Police Station.

Evidence

8. Hearing commenced on 29/5/2017. The plaintiff called two witnesses. Erick Muraya testified as PW1. He stated that he lived in Thome Estate, off Thika Highway. He adopted his written statement dated 12/4/2017 as his sworn evidence in chief. His testimony was that he used to work for a Mr Wachira who was a neighbour of the deceased. The deceased requested him to look after the suit property in 1993. He (PW1) grew tomatoes, potatoes, trees and napier grass on the suit property. The suit property was fenced. During that time, no one ever questioned the deceased's use and occupation of the suit property. He left for Naivasha in 2008 and left someone else in charge of the suit property. When he came back, he learnt that the 2nd and 3rd defendants were claiming ownership of the suit property. In 2009 the 2nd and 3rd defendants removed the deceased's fence.

9. During cross examination, he stated that he was an employee of Nelson Wachira. The suit property was four plots away from Nelson Wachira's plot on which he worked as a caretaker. He did not know the land reference number of Wachira's plot.

10. In re-examination, he stated that he started cultivating the suit property in 1993 and continued to cultivate it until 2009. The deceased always visited the suit property.

11. Maria Goretti Muthoni Karuri testified as PW2. She testified that she was the widow of the deceased. She adopted her written statement dated 2/3/2016 as her sworn evidence-in-chief. She stated that her late husband bought the suit property measuring 0.5 of an acre (sic) from James Ndirangu Nganga and David Njeru Wainaina in October 1991. James and David had a share in Thome Farmers No 5 Limited. They were shown a vacant plot which had beacons. A sale agreement was drawn between the vendors and her late husband. They visited the offices of Thome Farmers No 5 Limited where upon payment of the transfer fee, the name of the deceased was entered in the register. Subsequently, the deceased was issued with a share certificate, share transfer fee receipt, ballot paper and a survey fee receipt. They intended to put up a residential house on the suit property. They had been in open and peaceful occupation of the suit property for 17 years. In April 2009, they were informed by their caretaker that there were some trespassers on the suit property. On inquiry, they established that the 1st defendant was purporting to sell the suit property to the 2nd and 3rd defendants. The 1st defendant had no property to pass to the 2nd and 3rd defendants.

12. During cross-examination, she stated that she had lived in South B, Nairobi, since 1987. Prior to buying the suit property, her husband conducted a search at the offices of Thome Farmers No 5 Limited in Githunguri. The 1st defendant sold the suit property to Honourable Magugu. She was not aware that Thome Farmers No 5 Limited was joined as a party in HCCC 6206/1992. She was involved in the purchase of the suit property.

13. During re-examination, she stated that ownership of the suit property was confirmed at the Offices of Thome Farmers No 5 Limited in Githunguri. As at 1991, there was no title in respect of the suit property. There was a resolution by Joreth Limited authorizing sale of the suit property. There was an agreement between Thome Farmers No 5 Limited and Joreth Limited for sale of some properties.

14. The defendants called three witnesses. Teresia Misti Lenges testified as DW1. She adopted her replying affidavit dated 5/6/2010 and her written statement dated 22/5/2012 as her sworn evidence in chief. Her evidence was that the suit property was advertised for sale by the 1st defendant. Together with the 3rd defendant, they entered into a sale agreement with the 1st defendant and bought the suit property for a consideration of Kshs 1,500,000. They paid Kshs 148,000 for stamp duty. They took possession on 20/12/2006. The suit property was not fenced. On 20/4/2009, the deceased destroyed their fence claiming to be the owner of the suit property. The matter was reported to the 1st defendant and to Kasarani Police Station. They have been in possession of the suit property since 2006. The title show that they are the registered owners. She produced a bundle of 8 documents.

15. During cross- examination, she stated that there were many plots advertised by the 1st defendant. Most of the plots were vacant. A search showed that the suit property belonged to the 1st defendant. She was not aware of any dealings in the suit property between 1991 and 2006 when they took possession. The sale agreement was signed on 20/12/2006, the deed plan was issued on 18/9/2007 whereas the title deed was issued in June 2009. The transfer dated 24/12/2007 was lodged and registered on 12/6/2007. The title was processed by the 1st defendant and was issued before an injunction was issued.

16. During re-examination, she stated that they did not buy the suit property from Thome Farmers No 5 Limited. The court order had never been served on them.

17. Timothy Jelgo testified as DW2. He adopted his replying affidavit dated 5/7/2010 and his written statement dated 22/5/2012 as his sworn evidence- in-chief. His evidence was that they saw an offer for sale by the 1st defendant in a newspaper advertisement. Together with the 3rd defendant, they visited the offices of the 1st defendant where they were shown the available plots for sale. They entered into a sale agreement with the 1st defendant for a consideration of Kshs 1,500,000. Deed plans were issued and a transfer was effected after a stamp duty of Kshs 148,000 was paid. They took possession on 20/12/2009 and fenced the suit property in 2007. On 20/4/2009, the deceased destroyed their fence claiming ownership of the suit property. He produced a bundle of 8 documents.

18. During cross-examination, he stated that the advertisement was dated 2/2/2005. He visited the suit property and it looked like it was not occupied. He did due diligence before purchasing the suit property. He never met the person who uprooted their fence. He did not know who was in possession of the suit property before they purchased it. The transfer was lodged on 12/6/2009 when the matter was in court. He was not aware that there was an order barring any party from dealing with the suit property. The photographs taken show that the land was vacant and rocky. No one had ever been charged with a criminal offence relating to their occupation of the suit property.

19. During re-examination, he stated that he was taken to the suit property by a Mr Nderitu. The suit property was bare and rocky. The transfer was prepared by the 1st defendant's lawyers. The suit property was bought at Kshs 1,500,000 and not Kshs 200,000. The suit property was assessed and valued at Kshs 1,700,000. He was not aware of any court order issued in this suit.

20. Robertson Nderitu testified as DW3. He stated that he was a site manager and operations manager of Joreth Limited (the 1st defendant). He adopted his written statement dated 25/5/2017 as his sworn evidence in chief. His evidence was that the plaintiff and Thome Farmers No 5 Limited have never been in possession of the suit property. LR Number 13330 was an amalgamation of LR Number 4920/3 and LR Number 4921/3. LR Number 13330/51 was a sub-division of LR Number 13330. Joreth Limited is not the same as Thome Farmers No 5 Limited. Thome Farmers No 5 Limited did not own shares in Joreth Limited. A suit was filed by the 1st defendant in 1992 against 24 persons including Thome Farmers No 5 Limited for trespass. By consent, it was agreed that the individuals do pay Kshs 200,000 each to the 1st defendant and have the land transferred to them. Thome Farmers No 5 Limited did not comply with the terms of the consent order. The 2nd and 3rd defendants bought the suit property after an advertisement by the 1st defendant. A claim of adverse possession will not stand because the 1st defendant was in possession throughout the relevant period. The 1st defendant had done more than 600 sub divisions for the past 30 years and the suit property was part of the sub-divisions. HCCC No 6202 was concluded in 2002.

21. During cross-examination, he stated that he took the 2nd and 3rd defendants to the suit property. The land was vacant and unfenced. The beacons were missing. The sub division was done by Kamwere & Associates in 1997. The missing beacons were replaced by the surveyor brought by the 2nd and 3rd defendants. The plaintiff was not a defendant in HCCC No 6206 of 1992. Only 6 defendants paid the required amount to the 1st defendant.

22. In re-examination, he stated that there was an executed sale agreement between Thome Farmers No 5 Limited and Joreth Limited. Thome Farmers No 5 Limited failed to pay the purchase price.

Submissions

23. The plaintiff filed written submissions on 2/9/2019 through the firm of Kingara & Company Advocates. Counsel for the plaintiff submitted that the deceased occupied the suit property from the year 1991 and by 2003, title by adverse possession had crystallized. It was argued that time started running in 1991 when the deceased took possession and there was no valid title to be passed to the 2nd and 3rd defendants by the 1st defendant. Reliance was placed on the Court of Appeal decision in **Githu v Ndeete 1964 KLR 776**. It was submitted that a person claiming title under adverse possession did not have to be in the suit property physically. Counsel added that the plaintiff had testified that there was a caretaker on the suit property who used to cultivate the suit property. Counsel argued that where there was evidence of cultivation, there was occupation. Reliance was placed on **Peter Njau Kairu v Stephen Ndungu Njenga & another, Civil Appeal No 57 of 1997** and **Gatimu Kinguru v Muya Gathangi ELC No 176 of 1973**. It was the plaintiff's submission that the defence by the 2nd and 3rd defendants cannot stand because the suit property was transferred to them after an injunction had been issued. It was argued that Section 52 of the Transfer of Property Act stated that where there was a pending case and an injunction had been issued, no party would transfer or interfere with the suit property. Counsel contended that the title held by the 2nd and 3rd defendants was acquired unprocedurally and illegally and therefore, the same could not stand. Reliance were placed on the case of **Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & another [2013] eKLR**.

24. The 1st defendant filed written submissions on 5/9/2019 through the firm of Nyiha, Mukoma & Company Advocates. Counsel for the 1st defendant submitted that the plaintiff did not prove that he enjoyed the suit property openly and uninterrupted for a period of 12 years. She argued that the essential features of adverse possession were spelt out in the case of **Kweyu v Omuutut [1990] KLR 709** where the Court of Appeal held thus;

“By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor.”

25. Counsel further submitted that adverse possession should be proved by the party claiming it on a balance of probability. It was submitted that one should prove continuity, publicity and extent. Reliance was placed on the decision in **Gabriel Mbui v Mukindia Manyara [1993] eKLR**. Counsel further submitted that the plaintiff was not in open and notorious use of the land because he was never on the suit property. Further reliance was placed on the decision in **Charles Ngaruni v Zipporah Kathengu & 2 others [2011] eKLR** where it was held that for one to prove adverse possession, physical custody and the intention to exercise such custody should be proved. It was argued on behalf of the 1st defendant that in adverse possession, time begins to run when there is somebody in adverse possession of the land.

26. Counsel for the 1st defendant argued that the plaintiff was relying on the evidence of PW1 who was the caretaker on a different suit property and therefore, there was no actual possession. The 1st defendant further argued that the plaintiff's possession was interrupted in 1992 when the 1st defendant filed HCCC No 6206 of 1992 to assert its rights over the suit property. It was contended that the plaintiff's

claim for adverse possession had failed on this account.

27. The 2nd and 3rd defendants filed written submissions on 2/10/2019 through the firm of Peter Gachuhi & Company Advocates. They framed two issues to be determined by this court: (i) Whether the plaintiff had been in possession and or occupation of the suit property and had therefore acquired title by way of adverse possession; (ii) Whether the transfer of the suit property to the 2nd and 3rd defendants by the 1st defendant was done legally and procedurally. On the first issue, counsel submitted that the plaintiff had not satisfied the conditions for grant of title under the doctrine of adverse possession. It was argued that adverse possession should be exclusive, continuous and uninterrupted for 12 years since possession began. Reliance was placed on the decision in **Joseph Kaburu v M'arimu Kamuru HCCC No 3 of 2014** and **Public Trustee v Wanduru Ndegwa, Civil Appeal No 73 of 1983**. It was further submitted that the plaintiff had never been in actual possession of the suit property because he never lived on the suit property. It was contended that the 2nd and 3rd defendants on the other hand had proved that they bought and took over the suit property when it was vacant.

28. On the 2nd issue, counsel submitted that the plaintiff should not rely on the *status quo* order to impeach the title of the 2nd and 3rd defendants because the same was not pleaded. It was further argued that the order maintaining the *status quo* was not served on the 2nd and 3rd defendants. It was argued that the process of transfer begun prior to the date of issue of the court order.

Analysis & Determination

29. I have considered the originating summons, the affidavits in support and against the originating summons, the parties' respective evidence (both oral and written), the relevant legal framework, and the applicable jurisprudence. Before court for determination are two questions: (i) Whether Eustance Karuri Githenya (the deceased plaintiff) should be declared to have acquired title by adverse possession to the suit property, Land Reference No 13330/51, prior to his demise; and (ii) Whether the registration of the 2nd and 3rd defendants as proprietors of the suit property should be cancelled and the name of the administrator of the Estate of Eustace Karuri Githenya be entered in the register. The single issue to be determined in this suit therefore is whether, at the time of bringing this suit, the deceased had acquired title to the suit property under the doctrine of adverse possession.

30. The doctrine of adverse possession in Kenya is embodied in **Sections 7, 13, 37 and 38** of the Limitation of Actions Act. The Court of Appeal affirmed the constitutionality of the doctrine of adverse possession within the context of the Constitution of Kenya 2010 in the case of **Mtana Lewa vs Kahindi Ngala Mwangandi [2015] eKLR**.

31. The tenor and import of the doctrine of adverse possession was summarized by the Court of Appeal in **Alfeen Mehdimohammed v Basil Feroz Mohamed & 223 others [2016] eKLR** as follows;

“An order for relief by way of adverse possession can only be made in favour of an applicant against a respondent if the latter is the current registered proprietor of the land which the applicant seeks to have registered in his name; for an order to acquire title by the statute of limitation, the known owner of the land 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; a person who occupies another person's land with that other person's consent cannot be said to be in adverse possession because in reality he has not dispossessed the owner of his land and the possession is not illegal. The adverse possessor may stoutly possess the land but has no slightest interest until 12 years have lapsed and emerges after this period as the owner, and however absolute and indefeasible the owner's title is, it is lost forever; Adverse possession is a fact to be observed upon the land. It is not to be seen in a title and any person who buys land without knowing who is in possession of it risks his title, just as he does, if he fails to inspect his land for 12 years after acquiring it; The mere change of ownership of the land which is occupied by another under adverse possession does not interrupt time from running in that other person's favours; the identification of the land in exact possession of an adverse possessor is an important and integral part of the process of proving adverse possession; a person seeking to acquire title to land by adverse possession for the applicable statutory period, must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use by him, expressed in the Latin Maxim, *nec vi nec clam nec precario*. This denotes complete and exclusive physical control over the land in dispute and to have *animus possidendi*, or simply put, the intention to have the land; time which has begun to run in favour of the adverse possessor will stop when the owner of the land asserts his right by taking legal proceedings or by making effective entry into the land.”

32. The plaintiff in this suit contends that the deceased entered the suit property and was in occupation of the suit property without interruption from 1991 to 2009. The background to the deceased's claim of title to the suit property is that in 1991, he purchased a share in Thome Farmers No 5 Limited. He contends that acquisition of the share entitled him to the suit property. Evidence on record shows that Thome Farmers No 5 Limited was a land buying company. It entered into a land purchase agreement with the 1st defendant but the contract aborted because Thome Farmers No Limited was unable to pay the agreed purchase price. At that time, the suit property was part of two large parcels of land which were subsequently consolidated into LR No 13330.

33. There is also evidence that some shareholders of Thome Farmers No 5 Limited entered the suit property on the basis of the shares they held in Thome Farmers No 5 Limited. This prompted the 1st defendant to institute Nairobi HCCC No 6206 of 1992 in which it sought the following orders against the said persons:

a. General damages

b. An injunction restraining the defendants by themselves their servants employees and/or agents howsoever from entering/remaining thereon dispossessing trespassing on the suit premises namely LR No 4920/3 and 4921/3 Thika Road Nairobi and/or otherwise interfering with the same;

c. Mesne profits at the monthly rate of Kshs 300,000/- from the date of this suit until payment in full;

d. Interest profits at the monthly rate of Kshs 300,000/- from the date of this suit until payment in full;

e. Interest on (c) hereof at court rates;

f. An order for recovery of possession of the suit premises namely LR No 4920/3 and 4921/3 Thika Road Nairobi and eviction/ejectment from therefrom;

g. Costs of this suit and interest thereon

34. It is therefore evident that as against those whom the 1st defendant was able to identify, it asserted its right to the suit property through Nairobi HCCC No 6206 of 1992. The plaintiff was, however, not one of the defendants in the said suit.

35. From the evidence of PW1 and PW2, the suit property was never developed by the deceased. Secondly, between 1991 and 2009 when the deceased brought this suit, he had never lived on the suit property and he did not have a caretaker of his own on the suit property. PW1 stated that he worked as a care-taker on a piece of land belonging to a Mr Nelson Wachira. He was unable to tell the reference number of Nelson Wachira's land on which he lived. PW1 further testified that he used to cultivate the suit property. PW2 testified that the suit property was meant for development of a residential house. She added that they visited the suit property regularly between 1991 and 2009. In my view, in the absence of any development on the suit property and in the absence of actual physical possession of the suit property by the deceased, it cannot be reasonably concluded that the deceased was in actual open and physical possession of the suit property at the material time. Given the above evidence, it was not possible for the 1st defendant to know that the deceased or PW1 had intruded onto the suit property with the intention of dispossessing the 1st defendant the suit property.

36. The possession contemplated under the doctrine of adverse possession is one that can be noticed by a reasonable land owner. The fact that the deceased had the share certificate and internal allotment documents from Thome Farmers No 5 Limited does not demonstrate open possession of the suit property. Similarly, documentary evidence of purchase of shares from James Ndirangu Nganga and David Njeru Wainaina are not sufficient proof of adverse possession. Adverse possession must be open and physical. In my view, given the evidence before court, there was no open and physical possession of the suit property by the deceased.

37. One of the essential elements of the doctrine of adverse possession is that there must be a sufficient degree of physical control of the land. The possession of the land by the trespasser must be actual, open, notorious, exclusive and continuous [see **Kweyu v Omutut (1990) KLR 709**]. The possession must be apparent and manifest to a reasonable land owner; it must be one which a reasonable land owner can see and be able to tell that an intruder has invaded his land and has taken exclusive possession thereof and that if no action is taken to remove the intruder within 12 years, he will lose the land.

38. In the present dispute, PW1 testified that he served as a care-taker on a piece of land that was separated from the suit property by four other properties. PW2 testified that the suit property was rocky except near the river where napier grass and some subsistence crops were grown. PW1 testified that he is the one who used to grow the subsistence crops. The deceased only used to make intermittent visits to the suit property. The deceased did not have any developments on the suit property. In my view, the intermittent visits by the deceased and the cultivation of the land along the river by PW1 did not constitute sufficient open physical control over the land.

39. It is therefore my finding that the deceased did not acquire title to the suit property under the doctrine of adverse possession. My answers to the two questions in the originating summons are therefore in the negative. The estate of the late Eustace Karuri Githenya shall bear the costs of this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF FEBRUARY 2020.

B M EBOSO

JUDGE

In the presence of:-

Mr Kingara for the plaintiff

Ms Koech for the 1st defendant

Mr Gichuhi for the 2nd and 3rd defendants

June Nafula - Court Clerk