



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ORIGINATING SUMMONS NO. 6 OF 2007

GATINGU NJAUMBE.....APPLICANT

VERSUS

CAMIRO MUTHENGI.....1ST RESPONDENT

AGOSTINO M'MUCEGE.....2ND DEFENDANT

JUDGMENT

1. By an originating Summons dated 28th November, 2007 the Applicant herein Gatingu Njaumbe has sued the 1st and 2nd respondents herein Camiro Muthengi and Agostino M'Mucege seeking for an order that he has acquired title to that parcel of land known as **L.R .S. THARAKA/TUNYAI"B"/646** and **S.THARAKA/TUNYAI"B"/36** by adverse possession. The applicant listed the following questions to be determined by the court:

- 1) Whether the Plaintiff/Applicant has been in occupation of the two parcels of land known as L.R .S.THARAKA/TUNYAI"B"/646 and 36 for a period of over 12 years.*
- 2) If so, whether the said occupation has been continues, open, exclusive and uninterrupted for a period of over 12 years.*
- 3) Whether by virtue of the said occupation, the Applicant/Plaintiff has become entitled to the said parcel of land.*
- 4) Whether an order should issue for the transfer of the said parcels of land to the plaintiff absolutely.*
- 5) Whether the defendants should pay the costs of this suit.*

2. The applicant's case was supported by an affidavit which was sworn on the same date as the Originating Summons.

3. In response to the application, the 1st and 2nd Respondent filed their respective replying affidavits dated 11th April, 2007.

Applicant's Case

4. The applicant in support of his case called 4 witnesses. He testified as PW1 where he told the court that in the Month of September 1975 he entered into agreement to purchase a parcel of land measuring 35 acres from one M'Mugambi M'Mwarania, which land is in an area that was declared as adjudication Section SOUTH THARAKA/TUNYAI"B" during adjudication in the year 1989. It is his case that in 1989 when adjudication was done, he demarcated his land and boundaries with the adjudication officers, however the adjudication officers went behind his back and divided his land into three portions that is as **L.R .S.THARAKA/TUNYAI"B"/646** and **S.THARAKA/TUNYAI"B"/36** registered in the names of the 1st and 2ndrespondents and **L.R .S.THARAKA/TUNYAI"B"/38** which was registered in his name. He alleges that pursuant to the said developments he continued occupying and possessing the land inclusive of the 3 parcels exclusively and uninterrupted, where he has developed the same, planted trees and fruits and raised his family in the land.

5. The applicant contends that in the year 2006, the defendants came to the subject parcel of land and began disturbing him alleging that he had trespassed on their land and that they have a tittle over the two parcels which they allege are registered in their names. This he alleges necessitated him to file the instant suit claiming that he is entitled to the subject parcel of land. He urged the court to grant the orders as prayed in the originating Summons

6. PW2 Kamwara Kagundu told the court that he is the plaintiff's immediate neighbor and they share boundary and that he moved into his parcel of land in the year 1980 and found the plaintiff there. In addition, he told the court that the plaintiff has been in occupation and possession of the subject parcel of land until the year 2006 when the defendants began alleging their claim.

7. PW3 Charles Mwindi Githuma testified that he is also the neighbor of the plaintiff, and has known him since the year 1975 and has been living in the disputed property with his family to date, and that the defendants came and demanded the land seeking the arrest of the plaintiff.

8. PW4 Francis Muturi testified that he is the son of the plaintiff and that he is 47 years old and was born and brought up in the suit property. He told the court that they have developed the property planted trees and food crops and that in the 2006 the defendants came and claimed their father's land and stated that he had never seen them before. He insisted that his father land is 35 acres and not 13 acres as alleged. Further, he told the court that title deeds in respect of the suit property were issued in 2005 but his father refused to collect his on realizing that his land had been sub divided.

Respondent's case

9. The Respondents testified in support of their cases. DW1 Camuru Muthengi in his testimony told the court that he was given the land parcel L.R S.THARAKA/TUNYAI"B"/646 by the Nyaga clan in the year 1989, where upon adjudication he put up a fence, and that he was not using the land. He told the court that on 31/8/2005, he was issued with a title deed to the property and when he attempted to take possession he was chased away by the plaintiff and his sons, where he reported the matter to the police.

10. DW2 Agostino M'Mucege testified that he was allocated S.THARAKA/TUNYAI"B"/ 36 in 1989 by the Nyaga Clan where he is the chairman. He told the court no objection was raised on his registration as the owner of the subject parcel of land, which he claims was a bush until 2002 when the plaintiff's son trespassed on the same, and in response he reported to the chief and attempted to gain accesses but was chased away just like the 1st Defendant. In addition he told the court that the one M'Mugambi Mwarania who allegedly sold the land to the plaintiff was chased and stopped from fraudulently selling clan land and was removed as chairman of the clan and he took his place. It is his case that he was issued with the title to the subject property on 31/8/2005 but has never taken possession because of threats from the plaintiff family.

Submissions

11. Only the Respondents filed their written submissions, which are dated 17th January, 2019 and filed on even date. They addressed two issues, the first being on the prerequisites of adverse possession. In this regard they submitted that to sustain a claim for adverse possession, possession must be nec vi, nec clam, nec precario, that is without force, without secrecy and without permission, which doctrine is captured under **Section 7 and 13 of the Limitation of Actions Act** and relied in the case of **Mtana LEWA Vs Kahindi Ngala Mwangandi (2015) e K.L.R.** They submitted that the plaintiff claim is disputable as he never raised an objection when the land was adjudicated in 1989 and that the fact that the whole parcel is 32 acres and not 35 acres as claimed by the plaintiff raises doubt to his possession.

12. The other issue addressed by the defendants is on whether time can run on unregistered land. In this regard they submitted that adverse possession cannot run on unregistered land, and in this case the Defendants Land were registered on 31st August, 2005 and therefore this is the time, which time ought to have begun running but this suit was filed in 2007 and therefore the same does not suffice. He relies in the case of **Peter Gichuki Wanjohi Vs Julia Mumbi Muturi (2017) e K.L.R.** In sum they urged the court to dismiss the applicant suit for being frivolous and an abuse of the court process.

Issues and Analysis

13. I have considered the parties pleadings, respective witnesses testimonies and submissions herein, and in my view only one issue arises for determination, which is as to whether the applicant has acquired Land Parcels L.R .S.THARAKA/TUNYAI"B"/646 and S.THARAKA/TUNYAI"B"/ 36 by way of adverse possession.

14. The law on adverse possession is now settled. Adverse possession has been defined as a method of gaining legal title to real property by the actual, open, hostile and continuous possession of it to the exclusion of its true owner for the period prescribed by law. A registered owner of land by the provisions of **Section 7 of the Limitation of Actions Act** may not bring an action -

“..... 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 “.

15. **Section 38 of Limitations of Actions Act** provides for the doctrine of **Adverse Possession**. It provides:-

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, 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”.

16. Therefore, at the expiration of the twelve-year period the proprietor's title will be extinguished by operation of the law and **Section 38 of the Act** permits the adverse possessor to apply to the High Court for an order that he be registered as the proprietor of the land.

17. Consequently, the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.

18. The rationale of this method of acquiring land by adverse possession was explained in the following passage from the decision

in *Adnam Vs Earl of Sandwich (1877) 2QB 485*.

“The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties “

19. Therefore the issue before me is as to whether the plaintiff has acquired the defendant’s parcels of land adversely, that is his occupation and possession open, hostile and continuous to the exclusion of the defendants. I agree with the Respondents submissions that a claim for adverse possession can only be maintained against a registered owner as was held in *Sophie Wanjiku John Vs Jane Mwihaki Kimani Nairobi ELC Civil Suit No. 490 of 2010*.

20. The Plaintiff herein contends that he bought the all parcel land herein inclusive of the respondents alleged portions all measuring 35 acres in the year 1975 and subsequently moved into the property and has raised his family therein. It is not disputed that adjudication was undertaken in the year 1989, when the land was subdivided and three portions registered with the defendants getting their respective portions L.R .S.THARAKA/TUNYAI”B”/646 and S.THARAKA/TUNYAI”B”/ 36 which titles were issued on 31/8/2005.

21. The Plaintiff alleges that it is during this adjudication in 1989 that his parcel was divided into three portions secretly without his knowledge, a fact confirmed by the defendants who allege they were allotted the land at this time; however, he continued being in occupation and possession of the entire parcel of land until the year 2006 when the Respondents attempted to enter into the portions registered in their respective names after titles were issued.

22. In this regard it is my finding that the respondents were registered as owners of the their two portions of the subject parcel of land in the year 1989, only that they secured titles over the same in the year 2005 and in 2006 attempted to gain possession and occupation. In this respect therefore time began to run from the year 1989 upto the year 2005, which is a period of over 15 years.

23. The evidence of PW2, PW3 and PW4 that the plaintiff has been in occupation of the property until 2006 when issues arose stands uncontroverted. The Respondents equally told the court that they have never taken possession of their parcels and their attempt to enter the property in the year 2006 after securing their titles was met with hostility from the Plaintiff apparently points that that they have never occupied or possessed the subject property.

24. Consequently, it is my finding that the Plaintiff’s occupation of the subject property including the portions registered in the names of the Respondents was adverse to any other claim including the Respondents claim herein and therefore the Plaintiff has acquired the two parcels registered in the respondents’ names vide the doctrine of adverse possession.

25. The upshot is therefore that the Plaintiff has proved his case to the required standard, that is balance of probabilities and I therefore allow the same as prayed.

DATED and SIGNED at Kerugoya this 7th day of February, 2020.

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E.C. CHERONO

ELC JUDGE, KERUGOYA

READ, DELIVERED and SIGNED in open Court at Meru this 10th day of February, 2020.

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L.N. MBUGUA

ELC JUDGE, MERU