



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC ORIGINATING SUMMONS NO. 10 OF 2012

JOHN KIMATHI M'MUTURI.....1ST PLAINTIFF

PAUL KIMATHI MUCEE.....2ND PLAINTIFF

JOSPHAT MWATHI M'RIRA.....3RD PLAINTIFF

SABELLA GATUKU.....4TH PLAINTIFF

MARGRET TIRINDIN MWITI.....5TH PLAINTIFF

VERSUS

ERASTUS GITURU CHABARI.....DEFENDANT

RULING

Background

1. Coming up for determination is the Plaintiffs amended Originating summons dated 17th March, 2016 brought under **Sections 7, 37 and 38 of the Limitation of Actions Act Cap 22 Laws of Kenya** seeking this court to make a declaration that they have acquired ownership of **Land Parcel No. NKUENE/MTUNGUU-KITHINO/139** vide adverse possession, from the defendant who is the registered owner.
2. In response to the plaintiffs' application, the defendant filed his Replying Affidavit dated 5th March, 2018 and filed on 8th March, 2018 in opposition of the plaintiffs' suit.
3. The Plaintiffs in support of their case called five witnesses whereas the defendant called four witnesses, and upon conclusion of the hearing both parties filed their respective written submissions.

Plaintiffs case

4. John Kimanti M'muturi (PW1) the 1st Plaintiff herein testified that he lives in a place called Muguruti where the subject property is situated and claims 4.5 acres of the subject parcel of land, which he claims he inherited from his father. He told the court that he only knew the Defendant after being served with summons in a case No. 44 of 2011 filed by the defendant at Nkubu Law Courts, and that he doesn't know the Land Reference Number. And that before being sued he was not aware that title to the property had been issued.
5. It is his case that he has been in the property since 1985 when he was born and has extensively developed the same by building his house where he lives, planted trees, fruits and other crops and that he has been in actual occupation and possession of his portion of the land for uninterrupted period of over 12 years, and prayed that the court finds that he is entitled to the 4.5 acres portion he occupies.
6. Paul Kimathi Mucee (PW2) the 2nd Plaintiff herein testified that he has lived in the subject parcel of land since birth, and that he succeeded his mother who had instituted this suit with the other plaintiffs herein and that she has since passed on. It is his testimony that he inherited 5 acres of the subject property from his parents, and that his deceased mother was buried in the property whereas his father was buried in a public cemetery. It was his case that he was told by his mother the land was inherited from his father, but doesn't know how his father acquired the property. And that he never saw or knew the defendant until when the case No. 44 of 2011 at Nkubu was filed and that is when he saw him in court.

7. Josphat Mwathi M’rira (PW3) the 3rd Plaintiff testified that he has lived in the subject property since the year 1968 when he was born, and that he was brought up in the property and that his father died in 1974 and his mother in 1984 and he is claiming 13.88 acres of the subject land. And that he only became aware of the defendant’s ownership of the subject property vide Nkubu case no 44 of 2011. It is his case that he has lived in his portion of the subject land continuously and uninterrupted for a period in excess of 12 years and prayed the court to order that he be registered as the owner of his portion of the subject land.

8. Reuben Waithaka (PW4) testified that the 4th Plaintiff is his mother and that she passed on in the year 2017, and that he is yet to file for succession. It is his case that her mother owned and occupied 3.6 acres of the subject property, which he claims to have lived in since he was born in the year 1990. And the other plaintiffs herein are their immediate neighbors, and that her mother informed him of the defendant claim.

9. Meshack Mifugo Kamwara (PW5) testified that the plaintiffs herein are his neighbors and are living in the subject property. He told the court that he is not staying in the property, and that the plaintiffs herein inherited their respective portions of the subject parcel of land from their parents, and that the defendant has a title but has never lived in the subject property. Additionally, he said that he became aware of the dispute herein through Nkubu Civil Suit No. 44 of 2011 where he also recorded a statement.

Defendant’s case

10. Erastus Gituru Chabari (DW1) the defendant herein testified that he is the registered owner of the subject property claimed by the plaintiffs herein. He told the court that he acquired the property which was part of a settlement scheme in the year 1978 and that no one lived in the property prior to the year 2007. He denied that the plaintiffs lived in the property from the year 1980, and that he gave his land to one Mberia now deceased to farm the same in the years 2006, 2007 and 2008, and that he was using the whole land which is 34 acres.

11. In Addition, he told the court that when he discovered that some people had invaded his property he made a report to the area chief. He denied any knowledge of the plaintiff burying their loved ones in the property arguing that the plaintiffs have not lived in his property long enough. And that he sued them in the year 2011 vide Nkubu Civil Suit Number 44 of 2011 when the plaintiffs had stayed in the property for a period of five years. And the plaintiffs entered his land in the year 2006.

12. Henry Kiugu Rimberia (DW2) testified that their land is a kilometer from the subject property and that the subject land belongs to the defendant and not the plaintiffs and that the defendant had given his land to his deceased father who died in the year 2001, to use the land for grazing and thereafter in 2003 he entered the land and used it himself for grazing and farming. This was until the year 2007 when the plaintiffs entered the land and began cutting trees and burning charcoal prompting him to report the matter to the sub chief one Julius Murila, who summoned the defendant and later visited the plaintiffs in the property, who informed him that they were only burning charcoal and they were going to leave, and they actually left until 2009 when they moved in and started building houses in the property.

13. Josphat John Murira M’Marigu (DW3) testified that he is the retired Assistant chief for Kirendene Sub-location having served from the year 1995 to 2007. He told the court that the subject land is in Kirendene Sub-location and confirmed that DW2 together with the defendant in the year 2007 came to him complaining that there were people who had invaded his subject property. And that he requested the defendant to come with a title deed and on verifying the same, he visited the farm and summoned the invaders, who told him that they will burn charcoal and leave, which indeed happened, only to learn that they later came back. He told the court that at the time, there were people from Tharaka invading peoples land as a habit.

14. Irenous Nyamu Muturi (DW4) testified that he knows the defendant and he himself owns a Land Parcel Mitunguu/Kihino/186 which neighbors the Defendant’s subject parcel of land. He told the court that he had a similar case with the one facing the defendant where squatters had invaded his land prompting him to file Meru civil suit No. 143/2011, which suit was concluded in 2012 and eviction orders issued, he produced the said judgment. And that the persons evicted from his land allegedly went and invaded the subject land owned by the defendant. And that he has since sold his parcel of land.

Submissions

15. The Plaintiffs filed their written submissions dated 19th June, 2019 and filed on 20th June 2019. They identified six issues for determination. The first issue is on whether the defendant is the registered proprietor of the subject property, and in this regard they submitted in the affirmative, as the defendant has produced a certificate of title to that effect.

16. The second issue raised by the plaintiffs is on whether they have been in possession or occupation of their respective portions of land claimed herein continuously, and uninterrupted for a period in excess of 12 years. And in this regard they urged the court to find that their possession and occupation of the subject property was continuous and uninterrupted for a period in excess of 12 years and that they have acquired the same vide adverse possession. They argued that by the time the defendant filed Nkubu PMCC No. 44 of 2011, 12 years had lapsed. In this they rely in the cases of *Maliamu Ncurubu Mbiri Vs Francis M’Imanyara M’Ringera Civil Suit No. 80 of 2002* and *Gerald Murithi Kamonde Vs Wamugunda Muriuki and Jacob Waweru Muriqu Civic Case No. 41 of 2003*.

17. The third issue addressed by the plaintiffs is on whether their occupation and possession of the subject property was with the consent or permission of the defendant. And in this respect they submitted that their possession and occupation of the respective portions was without the consent or permission of the defendant and that their occupation is in excess of 12 years and therefore they have adversely acquired the same.

18. The fourth issue argued by the plaintiffs is on whether the defendant has lost his legal right over the subject property pursuant to Section 7 and 17 of the Limitation of Action Act. And in this respect they argued that the defendant has lost his legal rights as their occupation of the subject property was in excess of 12 years and therefore their claims meets the conditions in Section 7 and 17 of the Limitation of Action Act and urged the court to find so.

19. The fifth issue addressed by the plaintiff is on whether they are entitled to be registered as owners of the respective portions of the subject land claimed, and in this regard they submitted that in view of the evidence tendered, this court ought to find that they are entitled to registration as owners of the subject parcel of land vide adverse possession.

20. The final issue addressed by the plaintiffs is the issue of costs and they urged the court to allow the suit with costs.

21. The defendant through their filed written submissions dated 20th June, 2019 addressed only one issue with several facets, which is as to whether the plaintiffs have acquired the claimed portions of Parcel No. NKUENE/MITUNGUU-KITHINO/139 (the subject property). The first facet is that the 5th Plaintiff who claims 7.60 acres never testified nor called any witness in pursuit of her claim and therefore the claim ought to automatically fail.

22. The second facet of the defendant submission is that the plaintiffs claim herein for adverse possession is riddled with falsehood and contradictions. In this respect they submit that their collective claims that they didn't know the land registration details, the acreage and the owners of the subject land creates doubt as to their claim was continuous and uninterrupted stay in the property

23. The third approach by the defendant is that the plaintiffs have not proved that they have occupied their respective portions of land openly, and without secrecy or force. In this regard he submitted that the evidence of the defence witnesses and specifically the retired Assistant chief clearly establishes that the plaintiffs stay was not openly and not secretive, as a report was made to the retired chief in the year 2007 over the plaintiffs invasion of the subject property. Therefore he submitted that the plaintiffs have not demonstrated that they have occupied the land openly, without secrecy and without license or permission of the owner as was held in the case of ***Kuria Kiarie & 2 Others Vs Sammy Magera Nairobi Civil Appeal No. 326 of 2017.***

24. Further, they submitted that the filing of Nkubu Civil Suit No. 44 of 2011 by the defendant points out to the fact that the plaintiff's occupation of the subject property was with a hitch and that the defendant had not been dispossessed of his land. Furthermore, he submitted that the retired chief assertion that Tharaka speaking people had a habit of invading people's property is prove that the plaintiffs claim has no basis as their invasion into the subject property was forceful. In this they rely in the case of ***Christopher Shivambo Karamoja & 2 Others Vs Jane Njer & 2 Others ELC No. 104 of 2005 (O.S).***

25. Moreover, the defendant submitted that the allegations by the plaintiffs that they inherited the subject property from their parents ought to be treated with suspicions as they are the only ones residing in the property as their other siblings live elsewhere and the fact that they are not related. Additionally, he submitted that the fact that the plaintiff would not tell the exact positions of their respective portions of land nor provide sketches or maps or surveyors' reports is fatal to their cases. In this he rely in the case of ***Wilson Kazungu Katana & 101 Others Vs Salim Abdala Bakweshein & Another Malindi Civil Appeal No. 11 of 2014.***

26. In addition, the defendant submitted that the evidence that he had planted trees on subject land and was also undertaking farming activities is enough prove of his presence in the property warranting the protection of his proprietary rights and enough to deny the plaintiffs claim vide adverse possession.

27. In sum the defendant submits that the plaintiffs have failed to prove their case to the required standard and urged the court to dismiss the same with costs.

Analysis and Determination

28. I have considered the pleadings herein, parties' respective submissions, and in my view only one issue arise for determination, which is as to whether the plaintiffs/applicants herein have acquired their respective portions of land vide adverse possession.

29. The issue on whether or not a claimant is in adverse possession of land is a matter of evidence with the standard of proof being that of a balance of probabilities. ***Section 7 and 38 of the Limitation of Action Act*** allow an applicant to make an application seeking to have land registered in their favour vide adverse possession after lapse of 12 years.

30. The Court in the case of ***Wambugu Vs Njuguna (1983) KLR 173***, in this regard held that:

“For an order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his rights 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 of which he intended to use it.

The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.”

31. Additionally, the Court of Appeal sitting at Kisumu in the case of ***Samuel Kihamba Vs Mary Mbaisi [2015] e KLR*** noted in this respect that :-

“ Strictly, for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to

have the land. See Eliva Nyongesa Lusenaka & Anor Vs Nathan Wekesa Omacha Kisumu Civil Appeal No. 134 of 1993 (ur). These prerequisites are required of any claimant, irrespective of whether the claimant and the respondent are related or whether the claim relates to family/ancestral land.”

32. The Court went further and stated that:-

“Occupation of land by consent or license does not accrue any right of adverse possession on the claimant. In Mwinyi Hamis Ali Vs Attorney General & Philemon Mwaisaka Wanaka, Civil Appeal No. 125 of 1997, it was held that “adverse possession does not apply where possession is by consent and in a court of law, sympathy takes a second stand as the Court is governed by statutes.”

Consent, may be oral or written. It may also arise by way of a license, whether implied or written, or through a valid tenancy agreement. The question of whether one is a licensee, to water down a claimant’s case, is a question of fact that needs to be determined by court. The claimant’s case would only be watered down if the licence had not terminated or had terminated and the licensor (owner) interrupted the possession upon the determination of the license”

33. Therefore, it is apparent from the foregoing that to ascertain that one has acquired land vide adverse possession, the court must consider two questions: Firstly, whether the owner has been dispossessed openly or willingly and secondly whether the claimant has been in uninterrupted possession for 12 years with an intention to own the land.

34. In respect to the first question that is on whether the owner has been dispossessed openly or willingly, the occupation and possession must not have been with his license or consent. In this case it is clear that the plaintiffs herein dispossessed the defendant of his parcel land and have occupied the same without his consent, therefore it can be conclusive that this question can be answered in the affirmative. It is in no doubt that the defendant has been disposed of his land by the plaintiffs.

35. On the Second question as to whether the claimants have been in continuous, open and uninterrupted possession of the defendant subject parcel of land for over 12 years is an issue that is highly contested. PW1 alleges that he has been in occupation of the subject property since 1985 when he was born, PW2 alleges he inherited his parcel from his parents who have since died and that he has lived in the property since birth, PW3 also alleges that he has lived in the property since 1968 when he was born and also PW4 alleges that he inherited his portion from his parents and has lived in the property since 1990 when he was born, and PW5 testified as their neighbor and told court that the plaintiffs have lived in the property for long enough and inherited the same from their parents.

36. The defendant on the other hand alleges that the plaintiffs first came into his land in the year 2007, where they began cutting his trees and burning charcoal, and as result together with DW2 whom he had given the land to use for grazing made a report to the area chief (DW3) who approached the plaintiffs and on confronting them the plaintiffs insisted that they were only burning charcoal and would leave. DW2 and DW3 told the court that they indeed left only to return in the year 2009 and settle on the defendants land. The defendant as result of the plaintiffs’ action filed Nkubu PMCC No. 44 of 2011 seeking to evict the plaintiffs from his land. He alleges that by then, the plaintiffs had stayed for a period of 5 years and therefore the claim for adverse possession does not arise. Further, he refuted the plaintiffs claim that they lived in the property long enough with their families, submitting that it was questionable as the plaintiffs have no other relatives in the land and that all of them are not related by blood.

37. It is trite that the burden of proof in civil cases is that of balance of probabilities. Having considered the respective parties pleadings, evidence and submissions, it is my finding that the plaintiffs have not met the second question on whether they have lived in their respective portions continuously, openly and uninterrupted for a period of over 12 years. I agree with the defendant’s’ position that the plaintiffs entered into his land first in the year 2007 and left only to come back in the year 2009. Taking all that into considering, it is clear to this court that the cumulative period of possession and occupation of the plaintiffs in their respective portion of land does not meet the threshold of 12 years provided for in law.

Conclusion

The upshot of the foregoing is that the plaintiffs have failed to prove their case to the required standard, that is on balance of probabilities and therefore the instant application is dismissed with costs.

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

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E.C CHERONO

ELC JUDGE, KERUGOYA

DATED, DELIVERED and SIGNED at Meru this 10th day of February, 2020.

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L.N. MBUGUA

ELC JUDGE, MERU

In _____ the _____ presence _____ of: