REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 25 OF 2009 (O.S)

TABITHA CIOMBOROKI M'THIRUANE.....PLAINTIFF

VS

TWAMWARI MUMIIRA.....DEFENDANT

JUDGMENT

Introduction

1. Both parties herein had filed separate suit which were consolidated by this court. The Plaintiff filed Meru ELC No. 25 of 2009 whereas the Defendant had filed civil suit Meru ELC No. 16 of 2009 which suits were consolidated by this court on 9/5/2012 pursuant to the defendant's application as it relates to the same subject matter being land parcel L.R NO. NYAKI/KITHOKA/926 (hereinafter referred to as the subject land) between same parties.

2. The Plaintiff herein through an Originating summon ELC No. 25 of 2009, which is the lead suit is brought under ***Section 38 of the Limitation of Action Act*** and sought the following orders:-

> **1. An Order that the plaintiff/applicant has become entitled by adverse possession to 2 acres of L.R NO. NYAKI/KITHOKA/926 which is registered in the name of the Defendant/Respondent.**
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> **3. An Order that the Plaintiff/Applicant be registered as proprietor of the said 2 acres of the parcel of land known as L.R NO. NYAKI/KITHOKA/926 which area of the said land the plaintiff /applicant has occupied for over 12 year.**
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> **3. Such Orders as may meet just ends of justice.**
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> **4. Costs provided for**.

3. The Defendant vide ELC No. 16 of 2009 on the other hand sought the following orders against the Plaintiff and her sons:-

> **a. An Order for eviction from L.R NO. NYAKI/KITHOKA/926.**
>
> **b. Permanent Injunction against the defendants, their employees, agents, servants, assignees and/or anybody else acting on their behalf from trespassing, entering and/or dealing in any way with the plaintiff's land parcel L.R NO. NYAKI/KITHOKA/926**
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> **c. Costs of the suit**.

Background

Plaintiff's Case

4. In support of her case the Plaintiff called three witnesses. She testified as PW1, where she told the court that the defendant is her brother-in-law having been married to his brother. It was her testimony that she moved into the subject property when she got married to the defendant's brother, that is just about the time we got independence and that since then she has been living in the property with her deceased husband.

5. She told the court that the defendant's began disturbing her after her husband died in the year 1978. It is her position that the subject property belonged to her father in law and not bought by the defendant, and in support of this she alleges that if indeed the defendant had purchased the subject land there is no way he would have allowed her husband (his brother) to be buried in the subject land.

6. Further, she denied being aware of any other suit filed in respect to the subject parcel of land, specifically alleging that she is not aware of Civil Appel No. 75 of 2000 an appeal emanating from a suit filed by Joseph Bundi (her son) and one Joseph Kiruki.

7. In regard to the defendant's claim that their stay on the subject property was temporary and that they were to move to a land they owned known as Land No. 560 situated at Ruiri, she denied being aware of such plan or the existence of such parcel of land.

8. It is her case that the defendant began disturbing her after her husband died and has made attempts to sale the subject property to third parties, and that she filed the instant suit after she was served by summons to vacate the property by the defendant.

9. Furthermore, she told the court that pursuant to their stay in the subject property she has been able to do developments thereof, including planting trees and coffee and has constructedsemi-permanent houses for herself and her sons, which were done without the defendant raising any objection

10. In sum she claims ownership of the subject property pursuant to their long stay in the same and the fact that they have made developments thereof, including the fact that her husband is buried in the property, insisting that her stay thereof has never been contested by the defendant and that he only began disturbance after the death of her husband.

11. PW2 Sammy Ntobiri Mugambi testified that he is the neighbor of both the defendant and the Plaintiff, and that he was born 1952 and since then she has seen the plaintiff live in the subject property to date and has made developments thereof, as she has planted coffee, bananas and other crops and has structures which were built when her husband was alive, and were built without an objection of the defendant

12. PW3 Ester Ncoro Gikundi testified that she was the immediate neighbor of both parties and her testimony is similar to that of PW2, only adding that issues began when the Plaintiff husband died. And that since 1957 when she got married, she had never seen the defendant ploughing the subject parcel of land. And to her she knew the land belonged to the Plaintiff.

Defendants Case

13. Only the defendant testified in support of his case. In his testimony he urged the court to consider his plaint filed in ELC No. 16 of 2009 where he has sued the Plaintiff, Joseph Bundi and John Kiruki seeking orders to have them evicted from the subject parcel of land.

14. He gave the history of how he acquired the subject parcel land, alleging that he bought the land and was first registered as Plot No. 272, and he was the first registered owner, and he later subdivided it into two, that is Plot No 926 and 927. He told the court that he gave Plot No. 927 to one Jackson Kibetero, a son to his brother, the reason being that by then he did not have a son of his own and therefore wanted him to take care of him at old age.

15. Additionally, he told the court that their ancestral land was plot no. 73, and that he moved out of the land after he bought the subject property, and that his deceased brother, who is the husband to the plaintiff sold his share of the ancestral land in Plot 73 and drank away the proceeds, and later became a squatter at one Mr. Ruckwaro's Land. Thereafter, he alleges that Mr. Ruckwaro called him and advised him to come for his people and that is when he allowed the Plaintiff and her husband to move into his parcel.

16. It is his case that he allowed them to stay temporally as they were to move to their land No. 560 situated at Ruiri. However, this never happened as his brother passed on. And In respect to allowing his deceased brother to be buried in the subject parcel land, he stated that he allowed the same as their land in Ruiri was bushy and therefore out of sympathy he acceded to him being buried in his land.

17. Further, he told the court that after the burial of his brother he reminded the plaintiff and her sons to move out of his Property and move to their land in Ruiri, but they since refused. And in 1994 Joseph Bundi and Jackson Kipetero who are the sons of his brother sued him vide Meru Civil Suit No. 100 of 1994 claiming the subject parcel of land, which case he lost at the lower court and filed an appeal to the High Court Civil Appeal No. 75 of 2000, where the High Court reached finding that the land belonged to him and in was not an ancestral land.

18. In regard to the plaintiff developments on the property, he alleged that he allowed only temporary developments as both parties knew all along that the plaintiff and her sons were to relocate to their land in Ruiri.

Submissions

19. Both parties filed their respective submissions. The plaintiff's submissions are dated 16th January, 2019 and filed on 18th January 2019, whereas the defendant's submissions were filed on 18th January, 2018.

Plaintiff's Submissions

20. They submitted that the plaintiff is an octogenarian and quite frail, and has been living in the subject parcel of land since 1964 when she got married a period of over 12 years. They went ahead and addressed various issues in support of their case.

21. The first issue addressed by the plaintiff is whether she had lived on the subject parcel of land for a period of 12 years. In this regard they

submitted that the plaintiff has stayed in the subject land for a period of over 40 years, and thus they qualify to acquire the same vide adverse possession as envisaged under section 38 of the Limitation of Action Act. They submitted that the defendant ought to have notified the plaintiff to vacate the subject land when her husband was alive, but instead watched the plaintiff and her husband develop the land, insisting that their occupation of the land was open, continuous, exclusive and adverse possession. In this they rely in the case of ***Adnam Vs Earl of Sandwitch (1877) 2 QB 485.***

22. The second issue addressed by the plaintiff is on whether her occupation of the subject property was permissive. In this regard they submitted that her occupation of the subject property that is the 2 acres she claims was not out of a license but on a permanent basis. They argue that it is not a disputed fact that the plaintiff is living in the land that is registered in the name of the defendant, and that she has been in open, continuous exclusive and acknowledged possession of the 2 acres land she claims as corroborated by her witnesses PW2 and PW3, thus proving that the defendant had been disposed of the subject parcel of land. In this they rely in the Court of Appeal case of ***Wambugu Vs Njuguna (1983) e K.L.R 172.***

23. The third issue raised by the plaintiff is on whether she has developed the subject parcel of land, and in this regard she answered the same in the affirmative, submitting she has a homestead and she has crops therein.

24. The fourth issue argued by the plaintiff is in regard to the intended eviction, and they submit that it is not tenable to evict the plaintiff as she is entitled to the subject land by way of adverse possession**.**

25. The final issue addressed by the plaintiff ison whether the suit is res judicata, and in this respect she submitted that there is no suit that has been filed to address the issue of adverse possession, and that previous suits filed only dealt with the issue of trust.

26. In sum, the plaintiff submitted that she has been in open and continuous occupation of 2 acres of the subject parcel of land herein for a period of over 12 years and urged the court to reach a finding that she has adversely acquired the subject parcel of land.

Defendant's Submissions

27. The Defendant in their written submissions also addressed various issues. The first issue addressed is on whether the plaintiff proved her case in ELC No. 25 of 2009 on the balance of probabilities as required by law. In this they submitted that the plaintiff has failed to prove her originating summons to the required standard as envisaged under ***Section 7*** as read with ***Section 38 of the Limitation of Action Act*** *and as was held in* ***Wambugu Vs Njuguna (1983) 1 KLR 172.***

28. They submitted that her occupation of the defendant subject parcel of land was with his permission, and that she knew all along that they were on temporary basis as they would relocate to their parcel of land No. 560 situate at Ruiri. Additionally, they submitted that the defendant's version of events on how the plaintiff and her husband ended up in the property stands uncontroverted in that he accommodated them after a request from one Mr. Eliud M'Ruckaro that he takes in his people, and that his license was short-lived, something he alleges the plaintiff was aware of. In this they relied in the case of ***Benjamin Makuy Vs Gladys Ruguru w/o Twanduku Meru ELC No. 75 of 2005.***

29. Therefore it is the defendant position that the plaintiff and her children occupation of his land arose from his permission or consensual entry by virtue of lineal consanguinity and affinity and with full knowledge that they will vacate and thus the same cannot give rise to adverse possession. This they argue is supported by the plaintiff assertion that the defendant started disturbing her in the year 1978 after her husband had passed, hence confirming that indeed their stay in the property was pursuant to a license. In this they rely in the case of **Mbira Vs Gachuhi (2002) 1 EA 137.**

30. Further in support of this assertion the defendant relies in the proceedings in Meru CMCC No. 100 of 1994 and Civil Appeal No. 75 of 2000 relating to the subject parcel of land between himself and the sons of the plaintiff herein, where the High Court on appeal reached a finding that the subject land is not a trust land, but acquired by the defendant through purchasing it.

31. Furthermore, they submitted that none of the plaintiff witnesses had any knowledge of the circumstance under which the plaintiff, her husband and her children occupied the suit land .And thus they argue that no valuable evidence was offered in support of the plaintiff case. In sums it is their submission that the plaintiff did not prove their case to the required standard.

32. The second issue raised by the defendant is on whether it has tendered a good defence in response to the plaintiff case. In this regard they submitted they have put in a straight forward, consistent and unconverted defence backed up by the exhibits produced attesting to his ownership of the subject property, and in particular to court proceedings in **CMMC 100 OF 1994 and Civil Appeal No. 75 of 2000.**

33. The third issue addressed is in regard to his suit ELC No. of 2016, which he submits that the plaintiff herein has not challenged the same and did not tender evidence to challenge the suit and urged the court to allow the same.

34. The fourth issue addressed by the defendant is on whether this suit is res judicata. And in this regard they submitted in the affirmative, arguing that the matters in issue here were directly in issue in CMCC 100 OF 1994 and Civil Appeal No. 75 of 2000, as the subject matter of the suit was the subject parcel of land NO. NYAKI/KITHOKA/926 where the parties therein claimed the land under trust, and the High Court found in his favour on appeal.

35. They challenged the plaintiff assertions that she was not aware of the said cases, alleging that they pursued common interest therein In this they rely in the case of ***Lotta Vs Tanaki & Others(2003)2 EA*** and urged the court to dismiss the suit on this ground.

36. The final issue addressed by the defendant is on the prayers that this Court ought to issue, and in sum they argued that the plaintiff failed to prove his case, and urged the court to dismiss the same with cost and allow their case ELC No. 16 of 2009.

37. In response to the plaintiff submissions, they argued that this court is a court of law and equity and not morals and therefore should ignore the submission that the plaintiff is an octogeneration and frail.

Issues and Determination

38. 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 Plaintiff applicant herein has acquired the 2 acres of the subject property registered in the Defendant's name by way of adverse possession. As submitted by the plaintiff, which position I agree, which is that the other suits referred to herein by the defendant over the subject parcel of land never considered the issue of Adverse possession, which is directly in issue herein, and neither was the Plaintiff herein a party in the said suits, hence the issue of res judicata does not arise.

39. 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.

40. 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."**

41. 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, necprecario. 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."**

42. The Court went further and stated that:-

> **"Occupation of land by consent or license does not 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."**
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> **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"**

43. In regard to the African set up on the issue of consent to family members, the Court of Appeal cited with approval the High Court decision in **Mbui Vs Maranya [1993] KLR 726, where Kuloba J** had noted as follows:

> **"Now, in this country, go to the country side, where our largest population resides, and see for yourself how people are so caring and mindful of one another's welfare. In the countryside, a lot of people are living on other people's land, thanks to the African milk of generosity and kindness. Our way of living has always been to depend on one another for mutual survival and progress. This is at every level.**
>
> **To us, if you want any help, if you want a cow, if you want a piece of land for as long as the owner does not immediately require it, you are given this things, because the owner knows that it does not matter for how long you borrow this things; he can always recover whatever he has lent to you and whatever he has let you use. There are many people who, by a gentleman's agreement, all over the country, are actually living on the land of their friends, their clansmen, neighbours or even void land sale agreements. They do not ever think of claiming or losing title, by adverse possession…… I would be surprised if anyone pretended to be ignorant of these things. And ignorance on the part of a judge would be a calamity for the innocent.**
>
> **The keeping on our land of landless relatives, clansmen…for long periods of time until they are able to buy their own land is a custom we all know…. The doctrine of adverse possession if not reasonably qualified and properly trimmed shall destroy the cherished ideals and sound cultural foundations, and destabilize the society."**

44. 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.

45. 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 the Defendant has alleged that he allowed the Applicant together with her husband who is his brother into his subject parcel ofland temporally after one Ruckwaro advised him to take back his people who were squatters in his land, and as a result he took them into land, which land he stated that it was not an ancestral land, as his deceased had disposed of his share of the ancestral land and engaged in alcohol.

46. It is his case that after his brother passed on in the year 1978, he allowed him out of sympathy to be buried in his land because their land situated at Ruiri was bushy. It is further his evidence that after his brother's demise, he advised the applicant and her family to move from his land to their land in Ruiri, a fact corroborated by the applicant who has alleged that the defendant began disturbing her after the demise of her husband.

47. Having considered the respective averments and submissions herein, I am convinced that the occupation by the applicant on the defendant's property was with his consent or license, with the intention that the applicant would at the appropriate time move out of the property, and therefore adverse possession in the circumstances does not arise. In this regard am persuaded by the above finding of **Kuloba J.** (as he was) in the case of ***Mbui Vs Maranya*** (supra).

48. On the Second question as to whether the claimant has been in uninterrupted possession for 12 years with an intention to own the land. This also does not arise in this case as the applicant and her husband entry into the subject property was with the consent and license of the defendant and therefore time would not begin to run. This was settled in the case of ***Hughes Vs Griffin (1969) All ER 460*** where it was held that a licencee or tenant at will, does not have time running in his favour, for the purposes of a claim for Adverse Possession. Furthermore, the subject parcel of land is not an ancestral land as was held by the High Court in Civil Appeal No. 75 of 2000 filed by the defendant herein.

Conclusion

In view of the forgoing, the applicant/plaintiff claim herein fails and the same is dismissed with no orders as to costs.

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

In the presence of: