



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. CASE NO. 42A OF 2014 (O.S.)

(FORMERLY HCC NO. 53 OF 2010)

HENRY NJAGI NTHUNGURI.....PLAINTIFF

VERSUS

ELIZABETH MUTITU MUTURI.....DEFENDANT

JUDGEMENT

1. By an originating summons dated 19th April 2010 brought under the provisions of **Order XXXVI Rule 3D (1) (2) and 3F of Civil Procedure Rules, Sections 17, 37 & 38 of Limitation of Action Act (Cap. 21) and any other enabling provisions of law** the Plaintiff sought the following reliefs against the Defendant:

- a) *That the Applicant be declared to have acquired title over Title No. Kagaari/Weru/1564 by adverse possession.*
- b) *That the Defendant be permanently restrained from entering upon Title No. Kagaari/Weru/1564.*
- c) *That costs of this application be provided for.*

2. The said originating summons was based upon the grounds set out on the face of the motion and the body of the supporting affidavit sworn by the Plaintiff on 19th April 2010. It was contended that the Plaintiff had been in possession of *Title No. Kagaari/Weru/1564* (hereafter the *suit property*) for a continuous and interrupted period of at least 12 years prior to the filing of the suit. The Plaintiff further contended that the suit property initially belonged to his grandfather one, Chirigu Gakonja and that the same had been fraudulently transferred to one Rungu Karienyé in 1974. The said Rungu Karienyé later on transferred it to Stanley Rungu Karienyé who in turn sold it to the Defendant in 1984.

3. The Defendant filed a lengthy replying affidavit sworn on 4th June 2010 in answer to the said originating summons. The Defendant contended that she and her late husband purchased the suit property in 1984 from one Stanley Rungu Karienyé for valuable consideration. It was denied that the Plaintiff was in possession of the suit property at the time of purchase or at all. It was contended that upon purchase she ploughed the entire suit property measuring 35 acres for the purpose of growing grapes and mangoes.

4. The Defendant also contended that she allowed one Nyaga Kinja to utilize part of the suit property while acting as caretaker whereas another one called Njagi Kabogo was also allowed to cultivate and utilize another portion of the land. It was denied that the Plaintiff was in possession of the suit property at all. The Defendant contended that it was the Plaintiff's brother, Nicholas Njage, who started laying a claim on the suit property at around 2008 and consequently cautioned it. The dispute finally ended up in court in *Embu HCCC No. 110 of 2009 – Stachys Njagi Muturi & Elizabeth Mutitu Vs Nicholas Njagi*.

5. When the suit came up for trial on 5th November 2019 the Plaintiff called three witnesses and closed his case. He adopted his witness statement dated 9th October 2019 as his evidence in chief. He maintained that the suit property rightfully belonged to his late grandfather and he wanted the same returned to him.

6. During cross examination by the Defendant's advocate, the Plaintiff stated that it was one Nyaga Kinja (DW2) and not him who was residing on the suit property. He further stated that he was the owner of *Title No. Kagaari/Weru/1565* which he had since sub-divided into nine (9) plots and distributed amongst his children. He also conceded that he was residing on a portion of parcel 1565. It was his case that he last cultivated the suit property in 2011.

7. The Plaintiff's second witness was Kangithi Posta who testified as PW2. He could not remember on which parcel number the Plaintiff was residing. He conceded that what he stated in his witness statement that the Plaintiff was residing on the suit property was simply what the Plaintiff had told him! The evidence of PW3 was equally unhelpful since he was unable to tell the parcel number on which the Plaintiff resided.

8. The Defendant testified on her own behalf at the trial and called two more witness in support of her defence. The Defendant adopted her replying affidavit and witness statement as her evidence in chief. She maintained that the Plaintiff was not in occupation of the suit property at the time of purchase in 1984. She further stated that the suit property was bushy at the time and there was no one in occupation.

9. The Defendant's second witness was Nyaga Kinja who testified as DW2. He testified that he knew the Plaintiff in this suit and that the two were cousins. He stated that he was the caretaker of the suit property and that he had utilized parts of it since 1985. He stated that the Plaintiff was resident in a place called Kiang'ombe which was far from the suit property.

10. Upon conclusion of the trial the parties were directed to file and exchange their written submissions within certain timelines. The Defendant was given 30 days to file and serve her written submissions whereas the Plaintiff was given 30 days thereafter to file his submissions. The record shows that the Defendant filed her written submissions on 18th December 2019. However, by the time of preparation of the judgement, the Plaintiff had not filed any submissions.

11. The court is aware from the pleadings, documents and affidavits on record that the main question for determination in this suit is whether or not the Plaintiff has demonstrated his claim for adverse possession. The requirements for proving adverse possession were restated in the following cases: **Wambugu Vs Njuguna [1983] KLR 172; Githu Vs Ndeete [1984] KLR 776; Kasuve Vs Mwaani Investments Ltd & 4 Others [2004] 1KLR 184 and Kimani Ruchine Vs Swift Rutherfords & Co Ltd [1980] KLR 10.**

12. The elements of adverse possession were summarized in the case of **Kasuve Vs Mwaani Investments Ltd** (supra) as follows:

“...and in order to be entitled to 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 dispossession of the owner or by the discontinuation of possession by the owner on his own volition, Wanja Vs Sakwa No. 2 [1984] KLR 284. A title by adverse possession can be acquired under the Limitation of Actions Act for part of the land...”

13. The court has considered the pleadings and the entire evidence on record on the question of adverse possession. The Plaintiff in his originating summons dated 19th April 2010 pleaded that he had been in occupation of the suit property for over 40 years. At the trial hereof, however, it emerged that the Plaintiff was not even residing on the suit property. The Plaintiff himself conceded that it was DW2 who was in occupation of the suit property. The Plaintiff's witnesses PW2 and PW3 did not even know the parcel number of the land which the Plaintiff was claiming.

14. It must also be remembered that in order for a claimant to succeed in a claim for adverse possession, he must demonstrate exclusive possession of the subject property. Such possession must be to the exclusion of the true owner of the land. Although the Plaintiff claimed to have last cultivated the suit property in 2011, there is ample evidence on record to demonstrate that DW2 was also cultivating the suit property from a much earlier date.

15. The court is further of the opinion that mere cultivation of another person's land does not necessarily connote possession or exclusive possession. The claimant must demonstrate dispossession of the owner. See **Wambugu V Njuguna (supra)**. He must demonstrate actions on his part which are clearly inconsistent with the owner's title or the purpose for which the owner intended to use his land. In this suit, there was no evidence that the Plaintiff ever fenced off any portion of the suit property. There was no evidence that he erected any houses or that he undertook any developments which were inconsistent with the owner's intended user. There was simply no evidence of dispossession of the registered owner. Consequently, the court finds that the Plaintiff has failed to prove any of the elements of adverse possession as required by law.

16. The court has noted from the Plaintiff's pleadings and evidence on record that the suit property was once owned by his late grandfather, Chirigu Gakonja. The Plaintiff emphasized that the suit property was fraudulently transferred to third parties and ultimately to the Defendant. He, therefore, wanted the court to direct the return of the suit property. As was held in the case of **Wasui V Musumba [2002]1 KLR 396**, the only legitimate question for determination in an originating summons for adverse possession is one, that is, whether or not the claimant has demonstrated his claim for adverse possession.

17. In the said case, Ringera J (as he then was) held as follows on that issue:

“Lastly, I desire to say that the Applicant's claim that he may have an overriding interest over the Respondent's land under the provisions of the Registered Land Act cannot be a matter for adjudication in this originating summons as the only relief sought and indeed the only relief which could be sought in an originating summons of this nature was the registration of the Applicant as proprietor of the suit land by virtue of adverse possession. I will, therefore, express no opinion on the merits or otherwise of that claim.”

18. The upshot of the foregoing is that the court finds and holds that the Plaintiff has failed to demonstrate his claim for adverse possession on a balance of probabilities as required by law. Accordingly, the court finds no merit in the originating summons dated 19th April 2010 and the same is hereby dismissed with costs to the Defendant.

19. It is so decided.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 6TH DAY OF FEBRUARY, 2020.

In the presence of Ms. Nzekele holding brief for Mr. Mogusu for the Plaintiff and Mr. Njeru for the Defendant.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

06.02.2020