



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. CASE NO. 43 OF 2019

DANSON NYAGA NJERU.....PLAINTIFF

VERSUS

JEREMIAH NJUE NAMU (Being sued on behalf of the Estate of

NAMU NJANGURU Deceased).....DEFENDANT

JUDGMENT

A. Plaintiff's case

1. By an originating summons dated 30th September 2019 brought under **Sections 7, 17, 37 (a) and 38 of the Limitation of Actions Act, Order 37 rule 7 of the Civil Procedure Rules, 2010, Sections 1A, 1B, (1) and 3A of the Civil Procedure Act and other enabling provisions of the law**, the Plaintiff sought the following orders against the Defendant:

- a. A declaration that the Plaintiff is entitled to be registered as the owner of the whole of land parcel registration No. Mbeere/Mbita/994 (suit land) of which he has been in adverse possession since August 2005 to date for a period exceeding 12 years immediately preceding the presentation of this suit and which he has openly and continuously occupied as of right and in adverse possession without any interruption from the Defendant and that the Defendant's father's title to the said parcel of land has been extinguished in favour of the Plaintiff herein under Sections 37 and 38 of the Limitation of Actions Act Laws of Kenya. (sic)*
- b. The Registrar of Lands at Siakago rectifies the land register with respect to land registration No. Mbeere/Mbita/994 and the same be registered in the names of the Plaintiff, Danson Nyaga Njeru, in place of the Defendant's father, Namu Njanguru.*
- c. The Deputy Registrar of this honourable court be authorized to sign and execute all the necessary documents to effect the transfer of the suit land to the Plaintiff.*
- d. A permanent injunction do issue restraining the Defendant either by himself or agents, servants, employees, worker or whosoever may be acting under his instructions or authority from entering or interfering with land registration No. Mbeere/Mbita/994.*
- e. Costs be provided for.*

2. The said originating summons was supported by the affidavits of the Plaintiff and one Julian Ikamba Mboco both sworn on 30th September 2019. The Plaintiff contended that he had acquired *Title No. Mbeere/Mbita/994* (hereafter the *suit property*) through adverse possession in that he had been in open, notorious, continuous and exclusive possession thereof since 2005. He contended that he had developed the suit property by erecting a house and cultivating various cash crops and food crops thereon for over a period of 12 years without interruption by the Defendant or anyone else.

B. The Defendant's case

3. The Defendant filed a replying affidavit sworn on 15th November 2019 in answer to the said originating summons. The Defendant denied that the Plaintiff has been in occupation of the suit property since 2005 openly, as of right and without interruption. He contended that it was his family which had been in occupation and that all the developments were undertaken and crops thereon were planted by his late father.

4. The Defendant further contended that the suit property had been the subject of disputes before the Land Disputes Tribunal (hereafter Tribunal) and civil proceedings in *Siakago MCL & E No. 29 of 2019 – Jeremiah Njue Namu V Danson Nyaga Njeru*. The latter suit was said

to be pending before the Principal Magistrates' court at Siakago.

5. Finally, the Defendant contended that the Plaintiff's remedy lay in seeking a refund of the purchase price from one Mboco Kauga since had had purported to purchase the suit property from a person who did not have a title thereto. He, therefore, urged the court to dismiss the Plaintiff's suit with costs.

C. The Plaintiff's response

6. The Plaintiff filed a further affidavit sworn on 26th November 2019 in response to the Defendant's replying affidavit. He denied that the Defendant's family had ever utilized the suit property and contended that they started trespassing thereon in January 2019. He stated that it was the Defendant who had demolished his (Plaintiff's) house on the suit property in consequence whereof he was arrested by police officers from Kiritiri police station.

D. The Defendant's counterclaim

7. The Defendant filed a counterclaim dated 15th November 2019 in which he sought a declaration that the registration of his late father, Namu Njanguru, as proprietor of the suit property was a first registration under the repealed **Registered Land Act** hence absolute and indefeasible. He also sought a declaration that any inhibition, caution, restriction or encumbrance against the suit property was null and void. He also sought an order for the Land Registrar to be directed to lift such encumbrance. The Plaintiff filed a defence to counterclaim denying the same in its entirety.

E. The summary of evidence at the trial

8. When the suit was listed for hearing on 27th November 2019 the Plaintiff testified on his own behalf and called two other witnesses in support of his case. He adopted his witness statement dated 3rd November 2019 and the supporting affidavit sworn on 30th September 2019 as his evidence in chief. It was the Plaintiff's case that he bought the suit property from Mboco Kauga in 2005 whereupon he took possession immediately and started cultivating it. He testified that he cultivated bananas, mangoes, khat (*miraa*) and other crops on the suit property. The consent of the Land Control Board was, however, never obtained and the said Mboco died before he could transfer the suit property to him.

9. The Plaintiff's second witness was Juliana Ikambi Mboco who testified as PW2. She was the wife of the vendor and she stated that the suit property was indeed sold to the Plaintiff in 2005 and that the Plaintiff paid the purchase price by installments between 2007 and 2010. It was her evidence that the Plaintiff took possession in 2005 even though the sale agreement was reduced into writing in 2007.

10. The Plaintiff's third witness was Harun Ngari Makena who testified as PW3. He testified that the late Mboco Kauga was his uncle. It was his testimony that he was the one who introduced the Plaintiff to his uncle for the purpose of buying the suit property. It was his evidence that the Plaintiff started utilizing the suit property in 2005. It was also his evidence that although his uncle did not have a title deed for the suit property he had already won a case before the Tribunal against the Defendant's father over the same property.

11. The Defendant testified on his own behalf as the sole witness. He relied upon the contents of his replying affidavit sworn on 15th November 2019 which he adopted as his evidence in-chief. He also prosecuted his counterclaim on the basis of the same evidence as contained in his replying affidavit and witness statement. The Defendant stated that he was the legal representative of his late father who was the registered proprietor of the suit property.

12. During cross-examination by the Plaintiff's advocate, the Defendant conceded that he was aware that the Tribunal had awarded the suit property to Mboco Kauga. He also conceded that the said award was adopted as a judgement of the court. He further conceded that the said award and consequent decree were never challenged through appeal. The Defendant denied that the Plaintiff has been utilizing the suit property even though he conceded that the Plaintiff had lodged a police complaint against him for allegedly destroying his crops on the suit property. He insisted that the suit property belonged to his late father because his name was still in the land register and that it had never been cancelled.

F. Directions on filing of written submissions

13. Upon conclusion of the hearing on 27th November 2019, the Plaintiff was granted 30 days to file and serve his written submissions whereas the Defendant was given 30 days upon the lapse of the Plaintiff's period to file his. The record shows that the Plaintiff's submissions were filed on 20th December 2019. However, the Defendant's submissions had not been filed by the time of preparation of the judgment.

G. The issues for determination

14. The court has considered the pleadings, affidavits, documents and the evidence of the parties on record. The court has also considered the submissions which were on record by the time of preparation of the judgement. The court is of the opinion that the following issues arise for determination in this suit:

a. Whether the Plaintiff has proved his claim for adverse possession to the required standard.

b. Whether the Defendant has proved his counterclaim to the required standard.

c. Whether the Plaintiff is entitled to the reliefs sought in the originating summons.

d. Whether the Defendant is entitled to the reliefs sought in the counterclaim.

e. Who shall bear the costs of the suit and counterclaim.

H. Analysis and determinations

15. The court has considered the entire evidence on record on the 1st issue. 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.**

16. 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...”

17. The court is alive to the fact that the instant originating summons is not an action for enforcement of the sale agreement between the Plaintiff and the vendor. For purposes of the instant suit, it does not really matter whether the vendor had title to sell the suit property. What is important for purposes of the present suit is whether or not the Plaintiff has demonstrated the elements of adverse possession as required by law.

18. On the basis of the material on record, the court is satisfied that the Plaintiff has been in occupation of the suit property. The court believes the evidence of the Plaintiff and his witnesses that the Plaintiff has been utilizing and cultivating the suit property since 2005. The Plaintiff and his witness impressed the court as credible and truthful witnesses during trial. Their evidence was not shaken during cross examination.

19. The Plaintiff's evidence that the suit property was fenced was corroborated by the letter dated 29th January 2019 by the Chief of Mbita location which indicated that the Defendant had destroyed or interfered with the gate. The Chief's letter also indicated that the Plaintiff was the one cultivating the suit property whereas the Defendant had wrongfully harvested some napier grass and miraa therefrom. The court is thus satisfied from a consideration of the conflicting evidence on record that the Plaintiff has been in occupation of the suit property for a long time.

20. There is also evidence that the Plaintiff's occupation and utilization thereof has been open, continuous, and exclusive for a period exceeding 12 years. The Defendant's invasion of the suit property in January 2019 or thereabouts did not interrupt possession. It does not appear that the Defendant ever succeeded in obtaining effective possession of the suit property hence the filing of *Siakago MCL & E No. 29 of 2019* in April 2019.

21. The court is of the opinion that by the time the Defendant filed suit in 2019 to vindicate his perceived property rights, the Plaintiff's claim for adverse possession had already accrued under the **Limitation of Actions Act (Cap. 22)** since the right of recovery had already become statute barred under **Section 7** of the said **Act**. It would, therefore, follow that the Plaintiff's possession has never been interrupted by the Defendant in the legal sense.

22. The court is further of the opinion that the earlier proceedings before the Tribunal between the late Mboco Kauga and the Defendant's late father could not have interrupted the Plaintiff's possession for two reasons. First, the Tribunal case was concluded in 2002 long before the Plaintiff took possession in 2005. Secondly, the claim was not filed by the Defendant's late father to recover the suit property but by the late Mboco Kauga to enforce his perceived property rights.

23. The court is therefore satisfied on the basis of the material on record that the Plaintiff has satisfied all the requirements of adverse possession and that he has proved his claim to the required standard. The Plaintiff was not required to prove that he bought the suit property from the rightful owner or, indeed, any one else. The issue of a refund of the purchase price as suggested by the Defendant would, therefore, not arise.

24. The 2nd issue is whether the Defendant has proved his counterclaim to the required standard. The Defendant's counterclaim was hinged on the fact that his late father, Namu Njanguru was the registered proprietor of the suit property; that his registration was a first registration under the repealed **Registered Land Act**; and that such registration was absolute and indefeasible.

25. Whereas the Defendant's late father was the first registered proprietor of the suit property under the repealed **Registered Land Act**, that did not mean that his title was insulated from extinction under the **Limitation of Actions Act (Cap. 21)**. A title which is said to be absolute and indefeasible is capable of being acquired by adverse possession under the law. There was no material which was placed before court to demonstrate that the suit property enjoyed any immunity from acquisition through adverse possession. Since the court has already found that the Plaintiff has proved his claim for adverse possession then it would follow that the Defendant's title to the suit property has become extinguished under **Sections 7, 37 and 38 the Limitation of Actions Act**. In those circumstances, the Defendant's counterclaim is certainly statute barred hence untenable.

26. The 3rd issue is whether the Plaintiff is entitled to the reliefs sought in the originating summons. Since the court has found that the Plaintiff has proved his claim for adverse possession to the required standard, then it would follow that the Plaintiff is entitled to the reliefs

sought in the suit. Accordingly, the 3rd issue is answered in the affirmative.

27. The 4th issue is whether the Defendant is entitled to the reliefs sought in the counterclaim. The court has found that the Defendant has failed to prove his counterclaim to the required standard. The court has also found that the counterclaim is statute-barred under the **Limitation of Actions Act (Cap. 22)**. In those circumstances, the Defendant is not entitled to the reliefs sought in his counterclaim.

28. The 5th issue is on costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful Plaintiff should be deprived of costs. Accordingly, the Plaintiff shall be awarded costs of the suit.

29. In summary, the court makes the following holdings on the issues for determination:

- a. The Plaintiff has demonstrated his claim for adverse possession with respect to the suit property to the required standard.*
- b. The Defendant has failed to prove his counterclaim with respect to the suit property.*
- c. The Plaintiff is entitled to the reliefs sought in the originating summons.*
- d. The Defendant is not entitled to the reliefs sought in his counterclaim.*
- e. The Defendant shall bear the costs of the suit and counterclaim.*

I. Conclusion and disposal orders

30. The upshot of the foregoing is that the court finds and holds that the Plaintiff has proved his claim to the required standard whereas the Defendant has failed to prove his counterclaim. Accordingly, the court makes the following orders for disposal of the originating summons and the counterclaim:

- a. The Plaintiff's originating summons dated 30th September 2019 be and is hereby allowed in terms of Order Nos. 1, 2, 3 & 4 thereof.*
- b. The Defendant's counterclaim dated 15th November 2019 be and is hereby dismissed in its entirety.*
- c. The Defendant shall bear the costs of the originating summons and the counterclaim.*

31. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **12TH** day of **MARCH, 2020**.

In the presence of Mr. Joe Kathungu for the Plaintiff and Mr. Mugambi Njeru for the Defendant.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

12.03.2020