



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC 29 OF 2018

WILSON NJOROGE KAMAU..... PLAINTIFF

VS

WILSON MWANGI NGONI..... 1ST DEFENDANT

JAMES NGONI NDIRANGU..... 2ND DEFENDANT

JUDGMENT

1. The Plaintiff/Applicant sued the 1st and 2nd Defendant/ Respondent vide an originating summons dated 25th August 2005 seeking the following orders;

- a. That the Plaintiff/ applicant be declared proprietor of land reference no. LOC 2/KANGARI/34 (certified copy of extract of land register attached to affidavit) by virtue of adverse possession for the period prescribed in the Limitation of Actions Act cap 22 Laws of Kenya.
- b. That the replacement of ownership of the Plaintiff instead of Wilson Mwangi Ngoni and James Ngoni Ndirangu by virtue of the right of the Plaintiff of L.R Number LOC2/KANGARI/34 directed to the Land Registrar Murang'a and transfer of the said land be effected in the name of the Plaintiff.
- c. That the Land Registrar Murang'a be directed that the order herein shall be an instrument of transfer of ownership of L.R Number LOC 2/KANGARI/34 from the Defendants to the Plaintiff.
- d. That the Defendants / Respondents be restrained from entering, wasting, damaging or in any way alienating or disposing of this matter.
- e. That the Defendants/Respondents be directed to pay the cost of this suit.

2. The grounds upon which the application is brought are that the suit land be transferred by a Court order to the Plaintiff by virtue of his adverse possession for the stipulated period of time as per the limitations of actions act Cap 22. That the Plaintiff had stayed on the suit land for a long period of time and had developed the land extensively. That the Plaintiff had enjoyed exclusive possession of the land uninterrupted use and peaceful existence upon the suit land for over 12 years.

3. In his supporting affidavit to the originating summons the Plaintiff/ Applicant avers that his late father KAMAU KAGEMA (deceased) had purchased the suit land from one MUBENA NGONI way back in the year 1984 after having been in occupation of the same since 1962. That the sale was witnessed by the 1st Defendant and the Plaintiff. That after the purchase by his father the Plaintiff's family continued to live on the suit land and have done so to date. The Plaintiff claims to have lived on the suit land since 1984 to date in which period he has carried out various developments on the suit land including planting of crops and tea bushes which he relies on as a source of his livelihood as a farmer. That MUBENA NGONI died before effecting the transfer of the suit land to the Plaintiff's father and claims that all other formalities pertaining to agricultural land had been finalized. That the Defendants are the sons of the late MUBENA NGONI. The Plaintiff claims to have been in exclusive possession of the suit land since 1984 with no interruptions and has extensively developed the same since.

4. In his statement on record dated 17/06/2019 the Plaintiff claims that the suit land was initially sold to his father in 1962 by MUBENA NGONI at a consideration of Ksh. 400/=, and in the same year his father took possession of the suit land and continued to be in possession until the demise of MUBENA NGONI in 1980 who died without transferring the suit Land to him. Thereafter in 1984 the 1st Defendant, a grandson to MUBENA NGONI approached the Plaintiff and his father with an offer to transfer the suit land to him subject to paying a further Ksh. 12,910/- of consideration which he claims was duly paid in instalments of various amounts commencing on 20/12/1984 and

ending on 11/04/1985 and payments were witnessed by two individuals, now deceased. That the Plaintiff's father would then die in 1999 leaving the Plaintiff in exclusive possession of the suit land and he continued to prompt the Defendants to transfer the land to him which they ignored. That it was not until the year 2005 when the Plaintiff learnt that the title to the suit land had been transmitted to the Defendants herein that prompting him to file the instant suit.

5. The 1st Defendant on 04/10/2005 swore an affidavit in reply to the Originating Summons and on behalf of the 2nd Defendant in which he disputes that the Plaintiff's father had been in occupation of the suit land since 1962 but admits that the Plaintiff's father illegally encroached and trespassed on the suit land in 1986 and removed the beacons on the land. That the said MUBENA NGONI was a grandfather to the Defendants and had remained in possession of the suit land until his death which the deponent claims to have occurred in 1980. The suit land was latter transmitted to the Defendants in 1986.

6. The Defendant also disputes the alleged sale to the Plaintiff's father which the Plaintiff claims to have happened in 1984 that the same could not have been possible as the alleged vendor MUBENA NGONI was already deceased as they claim he had passed on 1980. That the Plaintiff's claim is also flawed by claiming that the suit land was sold to his father by MUBENA NGONI and also to himself in the same year by the 1st Defendant.

7. That the Plaintiff's claim seems to suggest an overlap in the periods of exclusive occupation by himself and his father of the suit land as he seems to say that his father and himself have been in exclusive occupation of the suit land since 1984. That under the Limitation of Actions Act the right of adverse possession cannot accrue to the Plaintiff while it had allegedly accrued to some other person being his father. That the Plaintiff is also estopped from claiming rights that accrued to his father unless he obtains letters of administration.

8. The 1st Defendant went on to deny that the Plaintiff is in actual possession of the suit land and claims that the Plaintiff wants to interfere with the Defendant's occupation of the suit land and interfere with the land boundaries. That the Plaintiff's claim is marred with contradictions which they believe are flawed attempts by the Plaintiff to obtain the land through unlawful means. To that extent the Defendants aver that the Plaintiff's claim ought to be dismissed and the Plaintiff be restrained from interfering with the Defendant's possession of the suit land. To the application they annexed a copy of the green card in respect to the suit land.

9. The Defendants reiterate the averments made in the Replying Affidavit in their statement dated 09/10/2019 and add that the Plaintiff's father owned land parcel number LOC.2/KANGARI/165 which borders the suit land which is in turn bordered by LOC.2/KANGARI/506, leaving the suit land in the middle. They claim that the Plaintiff's father encroached on the suit land in 1986 and interfered with the boundaries of the Defendant's land. They deny the alleged sale to the Plaintiff's father in 1962 and that they did not participate in the alleged subsequent sale after Mubena Ngoni's death. That the Plaintiff and his father have never been in exclusive possession of the suit land.

10. The Plaintiff had filed an application on the 6th of December 2005 seeking to amend the Originating Summons to include the Plaintiff's capacity as the administrator of the estate of the late KAMAU KAGEMA late father Kamau Kagema (deceased) on which the right of action accrued to and through whom he claims. And also include facts of when the Plaintiff's father had entered the suit land 1962, when he died in 1999, the appointment of the Plaintiff as an administrator of his father's estate vide HC Nairobi Succession cause No. 2104 of 2005 and letters of administration issued to him on 19/01/2005 and the various developments done by the Plaintiff's father on the suit land during the said period of occupation of the land. That application was later withdrawn vide a notice of withdrawal date 4/5/2006.

11. At the hearing the Plaintiff testified by adopting his statement and produced the documents as per his list of documents including the grant, copy of green card, copy of search, copies of sale agreements dated 1962 and 1984 with their English translations. He stated that the suit land was sold to his father in 1962 for 400/- then Mubena Ngoni changed his mind and demanded for more money to the tune of 12,910/- which was paid to the 1st Defendant under instructions from Mubena Ngoni. That the 1st Defendant did sign for the second purchase price and appended his identification number. That his father and himself entered the suit land in 1962 and he planted trees on the suit land in 1979. The 2nd Defendant was not known to him.

12. In cross examination he states that at the time of the first sale he was in primary school. That all the witnesses to the 1st sale agreement had all passed away. He took over the sale in 1984. That his father has sold the entire parcel of land. That no eviction suit had been filed upon him neither was a claim for trespass taken against him. He admitted to own the adjacent parcel of land.

13. DW1 – testified that the suit land had been transmitted to him and the 2nd Defendant his uncle as part of his grandfather Mubena Ngoni's estate. He admitted that the Plaintiff's father had trespassed on a portion of 1/8 of the suit land and that on the other portion of the suit land the Defendant planted trees. He denied any knowledge of the alleged sale of the suit land and also denied receiving any payments as consideration of the suit land.

14. In re-examination he admitted that even his grandfather had not lived on the land and maintained that the Plaintiff utilizes a portion of the suit land which his father had trespassed on and planted tea bushes.

15. DW2 - adopted the evidence adduced by the DW1.

16. The Plaintiff submitted that after the entry onto the suit land in the year 1962 the Plaintiff's father did constructive developments thereon by planting 3284 tea bushes in 1979 which obtained verification certificates from Kenya Tea Development Authority which have remained on the suit land since, after his demise in 1999 the Plaintiff took over the picking of the tea from the tea bushes on the suit land and has continued to do so to date. That no constructive entry has been made to the suit land by the Defendants to date. To that extent the Plaintiff believes that his occupation of the suit land has been adverse to the Defendant's title to the suit land. He has relied on several authorities and the relevant provisions under the limitation of actions Act.

17. The Defendants in their submissions largely addressed the issues around the viability of the alleged contractual agreements for sale of the

suit land to the Plaintiff and his deceased father, in respect to the modes of payments of the purchase price, the lack of any alive witnesses to the sale, the alleged sale after the demise of the original land owner. They explain how they acquired the title to the suit land through lawful means. They have clarified that the application by the Plaintiff for injunctive orders was indeed dismissed. And in what is a big departure from the oral testimony of the DW1 whose testimony was wholly adopted by DW2 submit that say they the Defendants at a point took over the full possession of the suit land whilst DW1 clearly admitted that the Plaintiff's tea bushes are still on the suit land for his own use, in the portion that was occupied by the Plaintiff's father.

18. What constitutes adverse possession is provided for under the Limitation of Actions Act Cap 22 of the Laws of Kenya in particular ;

Section 7 of the Act provides that an action for recovery of land cannot be brought after expiry of 12 years from the date on which the cause of action arose.

Section 17 provides that after expiry of the 12 years period for a person to bring an action to recover land, the title of that person in the land is extinguished.

19. There is also a long line of authorities by this Court established over a long period of time that define the principle of adverse possession. The case of **Kasuve v Mwaani Investments Ltd. & 4 others (2004) KLR 184 at page 188** states that;

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly and as of right and without interruption for a period of 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.”

20. Has the Plaintiff right of adverse possession accrued? The Plaintiff adduced evidence to show that his father had been in occupation of the suit land since 1962 had made constructive developments thereon by planting over 3000 tea bushes which he was picking until his death in 1999 when the Plaintiff took over the picking of the tea. That position was conceded by the DW1 in his oral testimony as he admitted that the Plaintiff still picks tea on the suit land to date. The Plaintiff adduced a verification certificate No 118905 in his name dated the 17/9/92 showing that 3284 tea plants were planted in 1979 on the portion of the suit land.

21. Did any right accrue to the Plaintiff's father? From the Plaintiff's testimony it would then appear that the adverse possession rights actually accrued to his father first by virtue of continued occupation of the suit land from the year 1962 to 1999 a period 36 years then he took over the occupation of the suit land the picking of the tea. The Plaintiff stated that “the tea he picks was planted by his father”. This evidence was admitted by DW1.

22. The Plaintiff testified that after the death of his parents, he remained in occupation of the land and continued picking tea to date in his own capacity and as of right; that is to say from 1999 to 2018 which is in excess of twelve years.

23. The denial of the sale agreement by the registered owners and on behalf of their predecessor and the admission that the Plaintiff father entered the suit land nevertheless as what the Defendants have described “as a trespasser” directly shows unpermitted entry on the suit land in the manner that would perfectly fall within the meaning of adverse possession.

24. The Plaintiff has proved his occupation of the suit land for a period in excess of 12 years and that that occupation is adverse to the Defendants.

25. The Final orders;

a. That the Plaintiff/ applicant be and is hereby declared proprietor of land reference no. LOC 2/KANGARI/34 by virtue of adverse possession.

b. It is hereby ordered WILSON Mwangi Ngoni and James Ngoni Ndirangu do transfer the said land to the name of Plaintiff.

c. In default the Deputy Registrar of this Honourable Court is mandated to execute all the documents necessary to effect the orders above.

d. That the Defendants / Respondents be and are hereby permanently restrained from entering and interfering with the quiet possession of the suit land.

e. The costs of this suit are in favour of the Plaintiff.

26. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 12TH DAY OF MARCH 2020.

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Plaintiff: Present in person. Advocate is absent.

1st Defendant – Present in person

Advocate is absent

2nd Defendant - Present in person

Irene and Njeri, Court Assistants