



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MERU

ELC NO. 94 OF 2018(OS)

MWANGI MUCHAI

-

APPLICANT

VS

DANIEL WAINAINA

-

1ST RESPONDENT

TABITHA NJERI NGANGA

-

2ND RESPONDENT

HANNAH NJERI NGANGA

-

3RD RESPONDENT

SIMON CHEGE MURAYA

-

4TH RESPONDENT

JUDGMENT

1. By way of Originating Summons the Applicant filed suit against the Respondents seeking the following orders;
 - a. A declaration that the 4th Respondent's title land parcel LOC 1/CHOMO/20 (suit land) has become extinguished by operation of the law and that the Applicant herein has become entitled to the whole parcel of land through Adverse Possession.
 - b. An order that the suit land be registered in the name of the Applicant.
 - c. The 4th Respondent do execute all the necessary documents to effectuate the transfer of all that parcel of land known as LOC1/CHOMO/20 to the Applicant and in default the Deputy Registrar of the Court be empowered to do so.
 - d. Cost of the suit be payable by the Respondents.
2. The Originating Summons is based on the grounds that the Applicant is in open peaceful possession and occupation of the suit land as of right for a period of over 48 years; the Applicant's user and possession of the suit land has been open uninterrupted exclusive and without force and that the Applicant has been entitled to ownership of the suit land through Adverse Possession.
3. The application is supported by the supporting affidavit of the Applicant sworn on the 11/12/2018 and filed on the 13/12/2018. The Applicant has reiterated the grounds underpinning the originating summons. Briefly he stated that he purchased the suit land in 1964 from the late Makeri Muriu and immediately took possession, developed the land and been in occupation to date.
4. Vide a Replying affidavit dated the 28/6/18 and 25/2/19, the supplementary Replying Affidavit sworn on the 10/4/19 and the further affidavit of the 25/5/19 the 1st Respondent opposed the Plaintiff's claim and contended that Makeri Muriu his father allowed the Applicant and his wife to

- cultivate the suit land. That they planted food crops and bananas for subsistence and Makeri utilized another portion for planting trees as well as for grazing cows. It was his case that the Applicant owns land parcel No LOC 1/CHOMO/49 measuring 5.5 acres adjacent to the suit land where he lives with his family and that he has never lived on the suit land.
5. Further that Makeri died in 1968 and at no time did he inform his family that he has sold the land to the Applicant or that he was paid with goats. That upon his demise the land was under the control of his two widows who administered and distributed his estate to his children and beneficiaries. That the suit land was transmitted to him on the 10/2/2011 vide Succ Cause No 128/1999 and that in 2000 he planted 150 Mikima trees on the suit land. Thereafter he sold and transferred the suit land to the 4th Respondent on the 8/3/2017 who took possession of the suit land but the Applicant has denied him peaceful possession claiming ownership of the said suit land.
 6. He denied that the Applicant has been in open peaceful continuous and quiet possession of the suit land.
 7. The 2nd Respondent filed a Replying Affidavit sworn on the 10/4/2019 and stated that she is the 2nd wife of Makeri Muriu. That her co-wife was called Beth Wambui, deceased. Makeri owned two parcels of lands, the suit land and parcel LOC 1/CHOMO /154 where he and his family lived. That the Applicant married one of Makeri's daughters Eunice Wakonyo (from Beth's house). That Makeri allowed the Applicant and his wife to cultivate the suit land on one portion while on another portion Makeri planted coffee and trees and used it for grazing cows. That the Applicant and his family live on their land parcel No LOC 1/CHOMO/49. That Makeri did not inform her that he sold the suit land to the Applicant and upon his death in 1968 she succeeded him and later transferred the land to his son the 1st Respondent who sold it to the 4th Respondent. Like the 1st Respondent she denied the Applicant's claim.
 8. The 3rd Respondent in her sworn Replying Affidavit dated the 15/7/19 stated that the suit land belonged to his father, Makeri which he received as dowry from Muigai Njuguna her former husband whom he separated with in 1964. That Makeri sold the suit land to the Applicant. She contended that the 1st and 2nd Respondents have never been in occupation of the suit land. That Eunice Wakonyo, the deceased wife of the Applicant was her sister. She stated that the Applicant is in occupation of the suit land to date. She contended that she was unaware that the suit land was transferred to the 1st Respondent even though she was a co – administrator of the estate. She rebutted the evidence of the 1st Respondent that the Applicant was being assisted to occupy the suit land by his father noting that he had his own land. She termed the sale of the land to the 4th Respondent as unjust.
 9. The 4th Respondent deponed that he purchased the suit land from the 1st Respondent through the right procedure including obtaining the land control board consent. He denied the Applicants case and contends that his claim of Adverse Possession is untenable.
 10. At the hearing of the suit the Applicant led evidence and stated that he bought the land from Makeri with 5 goats and a lamb in 1964. That Makeri was his father in law. That the agreement was written in a book and witnessed by Gachachi Muriu Muturi Njoroge, Beth Wamboi among others. That the book was kept by his father in law and later when he asked for it, it could not be located from Makeri's household. He stated that Makeri got the land from Muigai Njuguna as dowry for marrying Hannah Njeri Nganga, the 3rd Respondent. Hannah Njeri was the daughter of Beth Wamboi. That upon completion of the purchase, Makeri gave him some receipts marked PEX1 a-c .That he took possession of the suit land and planted 100 coffee trees, macadamia, avocado grivellia and nappier grass. That he does not live on the suit land but on parcel LOC 1/CHOMO/49 which he inherited from his father, which land is adjacent to the suit land. By the time he bought the suit land from Makeri he had constructed his house on parcel LOC 1/CHOMO/49 and hence the reason why he did not build any house on the suit land.
 11. He informed the Court that at the time he purchased the land Makeri was old and frail and could not move about much.
 12. He informed the Court that Makeri died in 1968 before transferring the suit land to him. That notwithstanding he has been in possession of the suit land to date, he stated. That the family of Makeri live on parcel LOC 1/CHOMO /154 measuring 6 acres and have never occupied the suit land.

13. That in 2012 he filed suit ELC 258 of 2012 to assert title by way of Originating Summons but the suit was dismissed on the 29/10/18 due to want of prosecution. That during the pendency of this suit he discovered through official search of the title that the 1st Respondent had sold the suit land to the 4th Defendant. He then filed ELC 702 of 2017 in Thika where he obtained prohibitory orders against the 4th Respondent and status quo orders preventing the disposition of the suit land. This suit was stayed pending the hearing and determination of ELC 258 OF 2012 in Nairobi.
14. That the 2nd and 3rd Respondents were the administrators the estate of Makeri and are sued in that capacity. He produced photographs showing the developments carried out on the suit land and marked PEWX 6 a and b. He stated that none of the Respondents have sued him over the suit land nor has the 1st Respondent planted any trees thereon as he lives on parcel LOC 1/CHOMO /154. That he was not aware of the succession cause and that is why he never objected to the issuance of the letters of grant of administration.
15. Further that he lodged a caution on the suit land upon hearing rumours at the shopping centre that the suit land had been sold. That he did not expect the land to be sold whilst the suit ELC 258 /12 was pending.
16. DW1- Daniel Wainaina Makeri testified and relied on the documents produced and marked as DEX1-12. He stated that he is the son of Makeri and that after the distribution of his estate he got the suit land through his mother. Thereafter he sold it to the 4th Respondent.
17. He informed the Court that he was born in 1970 and therefore has no knowledge of the sale that took place in 1964. That he relies on information given to him by his father and an unnamed chief. That Eunice Wakonyo, the Applicant's wife died in 1980 when he was at the age of 10 years. Asked why he has not evicted the Applicant from the suit land after the death of his wife or any other time, he responded that he could not do so because he was an in-law. He stated that he sent an elder to ask him to vacate although he did not support the averment with any evidence. He conceded that they have never removed the Applicant from the suit land and that he only sent him a demand letter to vacate which he has not. That upon being summoned by the local administration and asked to vacate the Applicant rushed to Court in Thika and filed ELC 702/17 for which he did not file any counterclaim.
18. That since he was born the Applicant has been on the land planting coffee, pasture to date. That he planted trees on the boundaries of the suit land in 2000.
19. Though he informed the Court that his father planted 150 coffee trees on the suit land, he admitted that the Applicant has a grower's licence and harvests the coffee on the suit land and that he has none. That they did not involve the Applicant in the succession cause in keeping with Kikuyu traditions and that he was neither served any succession proceedings on the Plaintiff.
20. Asked by the 3rd Respondent to clarify whether he received any land from her, he Respondent in the negative. This is in spite of the 3rd Respondent being a co- administrator of the estate of Makeri.
21. DW2- Stephen Ngugi Makeri testified that he is the brother of the 1st Respondent and a son of Makeri. He adopted his witness statement dated the 10/4/19. That he was born in 1955 and by 1964 he was about 9 years old. He insisted that the land belonged to his father and that he accompanied his father to the meeting where the land was discussed. That the Applicant married his step sister Eunice Wakonyo, deceased. He informed the Court that he did not know how Makeri acquired the suit land. That he did not know that the land was sold to Makeri by Muigai Njuguna in 1962. He affirmed that the Applicant has been in possession of the suit land since 1964 and that Makeri allowed him to so occupy the land by virtue of his marriage to his daughter Eunice Wakonyo. That Muigai Njuguna married the 3rd Respondent and was unaware if he paid dowry for her or not. He admitted that since the Applicant has his own land, he could not have been assisted with land by Makeri. He informed the Court that he has not attempted to evict the Applicant since 1964.
22. DW3- Hannah Njeri Nganga testified and informed the Court that she could not confirm whether the statement dated 15/7/19 on record was hers. After being shown the statement and the Replying Affidavit on record by the Court clerk, she appeared confused and stated that she could not remember filing the same in Court.
23. On cross examination however she testified and stated that she is one of the administrators of the estate of Makeri, his father. That the suit land was in possession of the Applicant when she got

- married. That the suit land originated from Muigai Njuguna, her former husband which was given to Makeri as dowry. She stated that she was not sure if the land was sold by her father to the Applicant but she knows that the land has been in the possession of the Applicant and no one has evicted him since. She was categorical that the suit land should be given to the Applicant.
- 24.DW4- Simon Chege Muraya testified and relied on his witness statement dated the 1/4/19 as his evidence in chief. That he lives around 1.5 miles away from the Applicant and so is known to the parties in the suit including the Applicant whom he attended the same church with. He informed the Court that he came to learn that the Applicant has been in possession of the suit land in January 2017 when he visited the suit land and met with his children. He found the land was under cultivation. That this was after he had purchased the land and obtained Land Control Board consent. He informed the Court that he did not file any counterclaim in this suit. That he has never taken possession of the suit land.
- 25.Parties filed written submissions which I have read and considered.
- 26.The key issue in this matter is whether the Applicant has proved title by way of Adverse Possession.
- 27.Section 7 states that;

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”.

- 28.Further in Section 13 the Act states as;

“(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as Adverse Possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in Adverse Possession on that date, a right of action does not accrue unless and until some person takes Adverse Possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in Adverse Possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes Adverse Possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be Adverse Possession of the land”.

- 29.Section 16 provides as follows;

“For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration.”

- 30.It is not in dispute that the suit land is currently registered in the name of the 4th Respondent. I have perused the green card adduced in evidence and it is not in dispute that the suit land became registered in the name of Muigai Njuguna in 1962 and in the name of Makeri in 1962. It is commonly agreed by the parties that the suit land was given to Makeri as dowry for his daughter

- Hannah Njeri, the 3rd Respondent.
31. It is commonly accepted that the said Makeri died in 1968 and his estate was succeeded by the 2nd and 3rd Respondents vide succession No 128 of 1999. The land was devolved to the two parties on the 10/2/11 and later transferred to the 1st Respondent on the 10/2/11 and later to the 4th Respondent on the 28/3/11.
32. Was the Applicant in possession of the suit land? It is the case of the Applicant that he purchased the suit land in 1964 with 5 goats and a lamb and that there was a written agreement contained in a book that was kept by Makeri. That however when he asked for the book he was informed that it was lost. He stated that the agreement was in the presence of some witnesses including Beth Wambui, the 1st wife of Makeri. Although he did not call witnesses in support of his averments, his evidence was supported by the 3rd Respondent who categorically informed the Court that the suit land belongs to the Applicant. She reiterated that the land originated from Muigai Njuguna, her former husband to her father, Makeri as dowry. She testified that by the time she got married the land was in possession of the Applicant and that it has been so to date. The 1st and 2nd Respondents also agreed that the Applicant has been in possession and that at no time has he been evicted save for demand letters to so vacate the land which he has not heeded to.
33. The Applicant led unchallenged evidence that he obtained an injunction and prohibitory orders vide ELC 258 of 2018 barring the Respondents from evicting him from the suit land. I have seen a letter of 2012 authored by Karuga Wandai advocates on behalf of the 1st Respondent asking the Applicant to vacate the suit land, which he defied and remained on the suit land. In August 2017 the local administration demanded that he vacates by 1st August 2017 but he did not.
34. In the case of Chanan Singh J, in **Jandu v Kirpal [1975] E A 225, at p 237** and Simpson, J (as he then was), in **Wainaina v Murai and others [1976] Kenya L R 227 at p 231** were unanimous that the paper owner must have knowledge of the occupation of the adverse possessor and that he has been dispossessed. In this case the Defendant's father had knowledge of the open and exclusive possession of the suit land by the Plaintiff.
35. It is borne of evidence that the Respondents had knowledge that the Applicant was in possession of the suit land all along although the 1st Respondent would want the Court to believe that it was with permission of the father. It is therefore the finding of the Court that the Applicant is in possession and occupation of the suit land to date.
36. Is the Applicant's possession and occupation adverse to the registered owner of the suit land? To answer this question, I am guided by the decision of the Court of Appeal in the case of **Leonola Nerima Karani Vs William Wanyama Ndege (2012) EKLR** where the appellate Court affirmed the decision in the case of **Wambugu Vs Njuguna (1983) KLR 171** and laid down the following guiding principles:-

“(1) The general principle is that until the contrary is proved possession in law follows the right to possess.

(2) In order to acquire by the statute of limitation title to land which has a known owner, that owner must have lost his right 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 for which he intended to use it....

(3) The limitation of Actions Act, in Adverse Possession contemplates two concepts, disposition and discontinuance of possession. 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 for the requisite number of years.

(4) Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid sale or agreement, the possession becomes adverse and time begin to run at the time the licence is determined. Prior to the determination of the licence, the occupation is not adverse but with permission. The occupation can only be

either with permission or adverse; the two concepts cannot co-exist...

(5) The rule on permissive possession is that possession does not become adverse before the end of the period during which the possessor is permitted to occupy the land...

(6) Adverse Possession means that a person is in possession in whose favour time can run...

(7) Where the claimant is a purchaser under a contract of sale of land, it would be unfair to allow time to run in favour of the purchaser pending completion when it is clear that he was only allowed to continue to stay because of the pending purchase because had it not been for the pending purchase the vendors would have evicted him. The possession can only become adverse once the contract is repudiated...

(8) Where a claimant pleads the right to land under an agreement and in the alternative seeks an order based on subsequent Adverse Possession, the rule is the claimant's possession as deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under Adverse Possession upon occupation of at least 12 years after such payment.

37. This Court went on to stress further in the case of **Ng'ati Farmers Co-operative Society Limited versus Councilor John Ledidi & 15 others Nakuru CA 64 of 2004(UR)**, after drawing inspiration from the observation of Mr. Lindhoy in the case of **Kynoch Limited versus Rour Lands (1912) 1ch.527** and also **Little Dale versus Liver Pool College (1900) 1ch19, 21** that:-

"In order to acquire by the statute of limitations a Title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it... Two things appear to be contemplated by that enactment; disposition and discontinuance of possession... if this is the correct way to approach the problem, the question becomes, has the claimant proved that the Title holder has been dispossessed or has discontinued his possession of the land in question for the statutory period" Rather than has the claimant proved that he (through himself or others on whose possession he can rely) been in possession for the requisite number of years"

The next question therefore is what constituted dispossession of the proprietor. It simply means that in order to defeat a title by dispossession the former owner there must be demonstration of existence of acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.

Besides addressing acts inconsistent with the owners right to use, the claimant has also to address acts inconsistent with subsequent title holders' right to use the soil. See the case of **Githu versus Ndeete (1984) KLR 776** wherein the Court of appeal held inter alia that:-

(1) The mere change of ownership of land which is occupied by another person under Adverse Possession does not interrupt such persons Adverse Possession.

(2) Where the person in possession has already begun and is in the course of acquiring rights under section 7 of the limitation of Actions Act (cap 22) and by virtue of section 30(f) of the Registered land Act (cap 300) those rights are overriding interests to which the new registered purchasers' title will be subject.

(3) Time ceases to run under the limitation of Actions Act either when the owner takes or asserts his rights or when his right is admitted by Adverse Possession assertion occurs when the owner takes legal proceedings or makes an effective entry into the land. Giving

notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the limitations of Action Act.

(4) A Title by Adverse Possession can be acquired under the limitation of Actions Act to a portion of the piece of land which the owner holds”

38. The Applicant led evidence that he purchased the land in 1964 with 5 goats and a ram. This evidence was not challenged by the Respondents except to say that his possession and occupation was with the permission of Makeri. Except for the 3rd Respondents the rest of the Respondents did not rebut the fact of the sale of the land and on a balance of probabilities it is the finding of the Court that the Applicant purchased the suit land. The evidence of the 1st Respondent that the Applicant was being assisted with accommodation on the land is not believable because he led evidence supported by the 3rd Respondent that the Applicant inherited land parcel No LOC 1/CHOMO /49 from his father which he had built a house before purchasing the suit land. In any event the DW1 was not born at the time of the purchase in 1964. DW2 was hardly 9 years and therefore too young to understand matters of land transaction. The 2nd Respondent chose to stay away from the hearing despite being served.
39. It is the finding of the Court that the Applicant occupied the suit land as of right and without the licence or permission of Makeri. Time started running therefore from the payment of the purchase price which was in 1964 and by 1976, Adverse Possession had crystalized and accrued to the Applicant. It is trite that Adverse Possession accrues even to an estate of a deceased person. See section 16 of the Limitation of Actions Act which provides as follows;
- “For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration”
- See the decision delivered in January 2020 in respect to adverse.
40. Mere change of ownership of the land from makeri, the legal administrators, the 1st Respondent and finally the 4th Respondent did not interrupt Adverse Possession from running and accruing. In this case the possession and occupation of the suit land by the Applicant was not broken from 1964 to date.
41. Even if the evidence of the 1st Respondent was taken that the Applicant occupied the land (which is not the case) with the permission of Makeri, then it would follow that the licence terminated on the death of Makeri in 1968 and time started running for purposes of Adverse Possession accruing in 1980 to the Applicant. It is the finding of the Court that the ELC case 258 of 2012 which was filed by the Applicant did nothing to stop time from running because the suit was not filed by the registered owner for purposes of asserting title.
42. Whichever way it is looked at Adverse Possession accrued and vested in the Applicant in both scenarios.
43. Was the Applicant disposed of the suit land? It is commonly agreed that the Applicant has been in possession of the suit land since 1964 to date. There is no evidence and indeed the Respondents admitted severally that they have not disposed the Applicant or taken any steps to retake back the suit land. Even the 4th Respondent admitted that he has not filed suit to evict the Applicant.
44. The Applicant has demonstrated animus possidendi through cultivating crops of the land as of right inconsistent with the right of the paper owner. The 4th Respondent admitted that he visited the suit land and found crops being cultivated by the children of the Applicant. The 1st Respondent claim that he planted trees on the edge of the suit land is not credible given the overwhelming evidence of the 3rd and 4th Respondent.
45. The 4th Respondent stated that he hails from the area and knew or ought to have known that the Applicant was in possession and occupation of the suit land and he purchased the suit land at his own peril. He is however not without a remedy as he retains the liberty to seek for the appropriate

relief from the 1st Respondent.

46. In the upshot the Applicant's case succeeds and I make the following orders;

- a. It is hereby declared that the 4th Respondent's title to land parcel LOC 1/CHOMO/20 (suit land) has become extinguished by operation of the law and that the Applicant herein has become entitled to the whole parcel of land through Adverse Possession.
- b. It is hereby ordered that the suit land be registered in the name of the Applicant.
- c. The 4th Respondent do execute all the necessary documents to effectuate the transfer of all that parcel of land known as LOC1/CHOMO/20 to the Applicant within the next 30 days from the judgement herein.
- d. In default the Deputy Register of the Court be and is hereby mandated and ordered execute all the documents necessary to effect the orders of this Honourable Court.
- e. Cost of the suit shall be payable by the 1st and 4th Respondents in favour of the Applicant.

47. **It is so ordered.**

DATED, DELIVERED AND SIGNED AT MURANGA THIS 5TH DAY OF MARCH, 2020.

J.G. KEMEI

JUDGE.

Delivered in open Court in the presence of;

Ms Kilonzo HB for Nyambura Njuguna for the Plaintiff

1st Defendant: Present in person

2nd Defendant: Absent

3rd Defendant: Present in person

4th Defendant: Present in person

Irene and Njeri, Court Assistants