



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. CASE NO. 141 OF 2015 (O.S.)

(FORMERLY EMBU CM'S ELC 53 OF 2018)

BEATRICE GICUKU MWANIKI.....PLAINTIFF

VERSUS

MOSES NTHIGA KARUCL.....1ST DEFENDANT

BERNARD NJAGI ROBERT.....2ND DEFENDANT

JUDGMENT

A. Introduction

1. By an originating summons dated 8th March 2012 brought under the provisions of **Section 38 of the Limitation of Actions Act (Cap. 22)** and **Order 37 Rule 7** of the **Civil Procedure Rules**, the Plaintiff sought the following reliefs against the 1st and 2nd Defendants:

- a. *That the applicant herein be declared to have acquired adverse title to the whole of parcel of land Gaturi/Weru/5743 by virtue of long continuous and uninterrupted possession of 12 years.*
- b. *That the registration of the second respondent be cancelled and the applicant be registered as the proprietor thereof.*
- c. *The costs of this application be awarded to the applicant.*

B. The Plaintiff's case

2. The said originating summons was based on the grounds set out on the face of the summons and supported by the Plaintiff's affidavit sworn on 21st February 2012 and the single annexure thereto. The Plaintiff contended that she had been in continuous, open and peaceful occupation of *Title No. Gaturi/Weru/5743* (hereafter *suit property*) since 2000. It was the Plaintiff's case that she and her late husband had bought the suit property from the 1st Defendant in 2000 whereupon they took possession immediately upon payment of the initial deposit.

3. The Plaintiff further stated that although she had developed and settled on the suit property the 1st Defendant had secretly transferred the same to the 2nd Defendant on 24th November 2011. It was further contended that the Defendants had resorted to threatening the Plaintiff and her family members with forcible eviction from the suit property.

C. The 1st Defendant's Response

4. The 1st Defendant filed a replying affidavit sworn on 12th April 2012 in answer to the said originating summons. He denied having sold the suit property to the Plaintiff and her late husband and of having received any purchase price from them. He contended that he was not the registered proprietor at the time of the alleged sale since he was only registered as owner in 2002.

5. The 1st Defendant's further response was that sometime prior to his registration as proprietor he had allowed the Plaintiff's late husband to cultivate the suit property but not to live on it. He stated that later on he sold the suit property to the 2nd Defendant in November 2011. It was his case that the 2nd Defendant was the one in occupation of the suit property. He denied that the Plaintiff had any developments thereon save for a small semi-permanent house. Consequently, he urged the court to dismiss the Plaintiff's claim for adverse possession.

D. The 2nd Defendant's Response

6. The 2nd Respondent filed a replying affidavit similarly sworn on 12th April 2012 in answer to the said originating summons. He stated that he bought the suit property from the 1st Defendant in November 2011 free from any encumbrances. It was his case that he took possession thereof in January 2012 and that he had been utilizing it since then. Although he admitted that the Plaintiff had a semi-permanent house on the suit property, he stated that the Plaintiff had vacated the same and that the house was in occupation of a different person.

7. The 2nd Defendant in his further response stated that although she had served the Plaintiff with several eviction notices, she had refused to comply. He stated that the Plaintiff had instead put a stranger in occupation of the semi-permanent house on the suit property. The Plaintiff was said to be residing in Kamutungi whose location in relation to the suit property was not disclosed.

E. The summary of evidence at the trial

a) The Plaintiff's evidence

8. At the trial hereof, the Plaintiff testified on her own behalf as the sole witness. She adopted the contents of her supporting affidavit sworn on 21st February 2012 and her witness statement dated 23rd July 2018 as her evidence in-chief. She also produced the documents listed in her trial bundle dated 22nd January 2020 as exhibits. She maintained in her evidence-in-chief that she was still residing on the suit property together with her children.

b) The 2nd Defendant's evidence

9. The 1st Defendant did not testify at the trial but the 2nd Defendant did. He similarly adopted the contents of his replying affidavit sworn on 12th April 2012 and witness statement dated 2nd October 2018 as his evidence-in-chief. He testified that he bought the suit property from the 1st Defendant in 2011 and that he constructed a permanent house thereon. He stated that he moved into the house in 2013.

10. It was the 2nd Defendant's evidence that when he bought the suit property there was a small structure thereon which looked like a goat pen but it was not occupied. It was his case that the Plaintiff occupied the structure much later after he had purchased the suit property. During re-examination, he stated that he had built two houses on the suit property.

F. Directions on submissions

11. Upon conclusion of the hearing on 27th January 2020, the Plaintiff was granted 30 days within which to file her submissions whereas the Defendants were given 15 days upon the lapse of the Plaintiff's period to file theirs. The record shows that the Defendants filed their submissions on 12th February 2020 whereas the Plaintiff filed hers on 10th March 2020.

G. The issues for determination

12. The parties did not file an agreed statement of issues for determination in this matter. The record shows that the Plaintiff filed a statement of two (2) issues whereas the Defendants filed a statement of four (4) issues for determination. In the circumstances, the court shall frame the issue for determination as provided for in law. Under **Order 15 Rule 2** of the **Civil Procedure Rules**, the court may frame issues from any of the following:

- a) *The allegations contained in the pleadings.*
- b) *The contents of documents produced by the parties.*
- c) *The statements made on oath by or on behalf of the parties.*

13. The court has considered the pleadings, affidavits, documents and evidence in this matter. The court is of the opinion that the following

three (3) issues arise for determination herein:

- a) *Whether the Plaintiff had demonstrated her claim for adverse possession.*
- b) *Whether the Plaintiff is entitled to the orders sought in the originating summons.*
- c) *Who shall bear the costs of the suit.*

H. Analysis and determinations

14. The court has considered the pleadings, evidence and submissions on record on the 1st issue. The elements of 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.**

15. 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...”

16. In the case of **Wambugu V Njuguna** (*supra*) the test of dispossession was explained as follows:

“The Limitation of Actions Act, on adverse possession, contemplates two concepts: dispossession 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 ...”

17. Upon consideration of the entire evidence on record, the court is not satisfied that the Plaintiff has proved her claim for adverse possession for at least two reasons. First, even though the Plaintiff appears to have built a structure on a portion of the suit property, she does not appear to have dispossessed the registered proprietor of the land as contemplated in law. There was no evidence to demonstrate that the Plaintiff had exclusive possession of the suit property. On the contrary, there was abundant evidence to demonstrate that the 2nd Defendant was in possession of a substantial portion of the suit property since 2011 when he bought it from the 1st Defendant. In fact, the 2nd Defendant had two houses on the suit property one of which was a permanent house.

18. The second reason is that, in any event, the court is not satisfied that the Plaintiff had dispossessed the registered owner for at least twelve

(12) years prior to the filing of the originating summons. The material on record indicates that the land register for the suit property was opened on 28th March 2002 whereas the originating summons was filed on 9th March 2012. The court is of the opinion that the statutory period of 12 years could not start running before registration of the suit property. Accordingly, by the time the originating summons was filed, only 10 years had lapsed hence the suit was prematurely filed. The court is thus of the opinion that the Plaintiff has failed to demonstrate all the elements of adverse possession as required by law.

19. The 2nd issue is whether the Plaintiff is entitled to the reliefs sought in the originating summons. Since the court has found and held that the Plaintiff has failed to prove her claim for adverse possession, it would follow that the Plaintiff is not entitled to the reliefs sought in the originating summons or any one of them. The 2nd issue is consequently answered in the negative.

20. The 3rd 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**. There is no good reason why the successful party herein should not be awarded costs of the suit. Accordingly, the 2nd Defendant shall be awarded costs of the suit.

21. The upshot of the foregoing is that the court finds and holds that the Plaintiff has failed to prove her case to the required standard hence she is not entitled to the reliefs sought in the suit. Accordingly, the court makes the following orders for disposal of the originating summons dated 8th March 2012.

a) The Plaintiff's originating summons dated 8th March 2012 be and is hereby dismissed in its entirety.

b) The Plaintiff shall bear the 2nd Defendant's costs of the suit. The 1st Defendant shall not be entitled to costs since he did not tender any evidence at the trial.

22. It is so adjudged.

JUDGEMENT DATED and SIGNED in Chambers at **EMBU** this **30TH DAY** of **APRIL 2020**.

In the absence of the parties due to the prevailing Covid-19 situation. The Judgement was transmitted to M/s Morris Njage & Co. Advocates for the Plaintiff and M/s Njeru Ithiga & Co. Advocates for the Defendants through the email addresses which they provided.

Y.M. ANGIMA

JUDGE

30.04.2020