



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. CASE NO. 101 OF 2014

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS

ACT (CAP.22)

AND

IN THE MATTER OF THE REGISTERED LAND ACT AND CIVIL PROCEDURE

RULES, 2010

AND

IN THE MATTER OF PARCEL LAND NO. NTHAWA/RIANDU/1235

AND

IN THE MATTER OF ADVERSE POSSESSION

BETWEEN

DANIEL KAMAU NDICHU.....PLAINTIFF

VERSUS

PETER NJERU STANLEY.....DEFENDANT

JUDGEMENT

A. INTRODUCTION

1. By an originating summons dated 14th October 2011 brought under **Section 38** of the **Limitation of Actions Act (Cap. 22)** and **Order 37 Rule 7(1) (2) & (3)** of the **Civil Procedure Rules 2010** the Plaintiff sought the following reliefs against the Defendant:

- a) *That this honourable court be pleased to make a declaration that the Applicant Ndichu Kahuha has obtained an adverse title to parcel of land No. Nthawa/Riandu/1235.*
- b) *That this honourable court be pleased to make an order that the Defendant's title to the land has been extinguished.*
- c) *That this honourable court be pleased to cancel the registration of the Defendant Peter Njeru Stanley as the proprietor of parcel of land No. Nthawa/Riandu/1235, and in place thereof order the registration of the Plaintiff Ndichu Kahuha as the new owner.*
- d) *That costs of this application be awarded to the Applicant.*

B. THE PLAINTIFF'S CASE

2. The said originating summons was supported by an affidavit sworn by the original Plaintiff, Ndichu Kahuha (*deceased*), on 14th October 2011. The deceased was the father of the current Plaintiff, Daniel Kamau Ndichu. It was stated that sometime on 2nd March 1998 the deceased bought a portion of 2½ acres out of *Title No. Nthawa/Riandu/1235 (the suit property)* at an agreed purchase price of Kshs.

62,500/-. It was further stated that the deceased paid Kshs. 42,500/- in 1998 and that the Defendant thereafter disappeared with the consequence that the deceased was unable to pay the balance of the purchase price. It was contended that the deceased took possession of the entire suit property in 1998 hence was entitled to adverse possession thereof.

C. THE DEFENDANT'S RESPONSE

3. The Defendant filed a replying affidavit sworn on 3rd October 2019 in answer to the said originating summons. The Defendant admitted that he had made an agreement with the deceased for the sale of 2½ acres out of the suit property which measured about 5 acres. It was contended that the sale was subject to partitioning being done and the consent of the Land Control Board being obtained which events never materialized. It was contended that the deceased had never occupied the suit property since his attempts to do so in 2009 were thwarted by the Location Chief. The Defendant further contended that he refunded the purchase price to the deceased due to his default in payment of the balance of the purchase. He then sold the entire suit property to one, Peter Nyaga Ngari who took occupation in 2011 and extensively developed the same.

D. DIRECTIONS ON THE HEARING OF THE ORIGINATING SUMMONS

4. It was directed that the originating summons shall be treated as the plaint whereas the replying affidavit shall be treated as the defence thereto. It was further directed that the suit shall proceed through *viva voce* evidence and that the parties shall file and exchange documents and witness statements as provided for under **Order 11** of the **Civil Procedure Rules, 2010**.

E. DIRECTIONS ON SUBMISSIONS

5. Upon conclusion of the trial on 12th February 2020 the Plaintiff was given 30 days to file and serve his written submissions whereas the Defendant was to file his within 30 days upon the lapse of the Plaintiff's period. The record shows that the Defendant filed his submissions on 24th April 2020 but the Plaintiff's submissions were not on record by the time of preparation of the judgement.

F. ISSUES FOR DETERMINATION

6. The court has considered the originating summons, the replying affidavit in answer thereto, the documents and evidence on record in this matter. The court is of the opinion that the following issues arise for determination in this suit:

- a) *Whether the Plaintiff has demonstrated his claim for adverse possession to the required standard.*
- b) *Whether the Plaintiff is entitled to the reliefs sought.*
- c) *Who shall bear costs of the suit.*

G. ANALYSIS AND DETERMINATIONS

a) Whether the Plaintiff has proved his claim for adverse possession

7. 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.**

8. 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...”

9. 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 ... Dispossession of the proprietor that defeats title are acts which are inconsistent with the enjoyment of the soil for the purpose for which he intended to use it ...”

10. The Plaintiff's evidence at the trial was that the deceased had bought 2½ acres out of the suit property in 1998. It was contended that the deceased took possession of the suit property in 1998. He stated that it was the Defendant who showed the deceased his portion of land. However, during cross-examination, the Plaintiff conceded that the Defendant's mother was residing on a portion of the suit property and that the suit property was never sub-divided to excise the 2½ acres which the deceased had bought from the Defendant. During re-examination, the Plaintiff stated that the Defendant's mother vacated the suit property only in 2008.

11. The court has also considered the evidence of Joel Njue who testified as PW2. He adopted his witness statement dated 29th May 2014 as

his evidence-in-chief. In his said statement, he stated that no one was occupying the suit property even though the Defendant was the one cultivating it. He conceded during cross-examination that the Defendant's mother was in occupation of part of the suit property at the time the deceased bought 2½ acres of the same.

12. So, has the Plaintiff in the circumstances demonstrated that the owner of the suit property had been dispossessed for the statutory minimum period of at least 12 years prior to the filing of the suit? The court is not satisfied on the basis of the evidence on record that such dispossession has been demonstrated. There is adequate evidence on record to demonstrate that the Defendant's mother had a house on part of the suit property and that she resided thereon at least until 2008. So, if the deceased had any exclusive possession of the suit property, then computation of time could only run after the Defendant's mother vacated in 2008 and not earlier. The material on record indicates that the originating summons was filed in 2011 meaning that only 3 or so years had lapsed.

13. The court is also of the opinion that the deceased had entered into possession of the suit property on the basis of the sale agreement of 1998 which provided for payment of the purchase price by instalments. The completion date was not specified in the agreement. The date of payment of the final balance of the purchase price was pegged upon transfer of the portion sold. There is no indication on record that any of the parties gave notice of breach of the agreement within a reasonable time. In the circumstances, there is no indication that the Defendant's consent for the deceased to occupy a portion of the suit property was determined in 1998. The only time the Defendant could be said to have repudiated the sale agreement was in 2011 when he sold the suit property to a third party (DW2) who has since occupied and developed the suit property.

14. In the case of **Wambugu V Njuguna** (*supra*) the Court of Appeal made the following pronouncements on when possession can be deemed to have become adverse:

a. 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. For the Respondent's claim for adverse possession to succeed, he must have an effective right to make entry and recover possession of land. He could not have that effective right because the occupation was under contract, or licence, which had not been determined.

b. 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 a 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 therefore only become adverse once the contract is repudiated. In this instance, time began to run once the Appellant sent a letter to the Respondent terminating the agreement.

There being no evidence that the sale agreement was repudiated in 1998, time for purposes of limitation of actions could not be computed from that date.

b) Whether the Plaintiff is entitled to the reliefs sought

15. The court has found and held that the Plaintiff has failed to demonstrate his claim for adverse possession to the required standard. It would, therefore, follow that the Plaintiff is not entitled to the reliefs sought in the originating summons, or any one of them. The 2nd issue is accordingly answered in the negative.

c) Who shall bear costs of the suit

16. 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 litigant in this suit should not be awarded costs of the suit. Accordingly, the Defendant shall be awarded costs of the suit.

H. CONCLUSION AND DISPOSAL ORDERS

17. The upshot of the foregoing is that the court finds and holds that the Plaintiff has failed to prove his claim for adverse possession to the required standard. Accordingly, the Plaintiff's originating summons dated 14th October 2011 is hereby dismissed with costs to the Defendant. It is so decided.

JUDGEMENT DATED and SIGNED in Chambers at EMBU this 28TH DAY of MAY 2020. Judgement delivered via zoom platform in the presence of Ms. Mukami for the Plaintiff and in the absence of the Defendant.

Y.M. ANGIMA

JUDGE

28.05.2020