



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. CASE NO. 32 OF 2014 (O.S.)

(FORMERLY KERUGOYA ELC NO. 420 OF 2013 (O.S.))

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT ORDER 37 RULES 7 AND 9 OF THE CIVIL PROCEDURE RULES AND SECTION 3A OF THE CIVIL PROCEDURE ACT AND ALL THE OTHER ENABLING PROVISIONS OF THE LAW

BETWEEN

NJAGI KIANGAMWE.....PLAINTIFF

VERSUS

WINSTON MUGO LUKA.....1ST DEFENDANT

GITHUMBU NJERU.....2ND DEFENDANT

JUDGEMENT

A. INTRODUCTION

1. By an originating summons dated 4th April 2013 and amended on 19th December 2014 brought under **Section 38** of the **Limitation of Actions Act (Cap. 22)**, **Order 37 Rules 7 & 19** of the **Civil Procedure Rules, 2010**, **Section 3A** of the **Civil Procedure Act (Cap. 21)** and **all enabling provisions of the law**, the Plaintiff sought the following reliefs against the Defendants:

*a) That the honourable court do declare that the Plaintiff herein Njagi Kiangamwe has become entitled to ownership of a portion measuring 11.21 hectares out of original land parcel No. Mbeere/Mbita/2466 measuring approximately 12.01 hectares resultant sub-divisions Nos. Mbeere/Mbita/4808-4829 all inclusive as against the 1st Defendant (parcels of land Nos. Mbeere/Mbita/4808, 4809, 4810, 4811, 4812, 4813, 4814, 4815, 4816, 4817, 4819, 4820, 4821, 4822, 4823, 4824, 4826, 4828 and 4829) and 2nd Defendant (Mbeere/Mbita/4825 and 4827) by virtue of **Section 7** of the **Limitation of Actions Act** on the ground that since 1981, the Plaintiff has openly, peacefully and of right been in occupation of the said parcel of land, that is to say, for a period exceeding 12 years preceding the presentation of this summons.*

b) That in the alternative, there be a declaration that the 1st and 2nd Defendants are registered as proprietors of the portions set out at paragraph 1 out of original parcel of land No. Mbeere/Mbita/2466 resultant sub-divisions Nos. Mbeere/Mbita/4808 to 4829 all inclusive on behalf of and in trust for the Plaintiff herein.

c) That costs of the suit be awarded to the Plaintiff.

B. THE PLAINTIFF'S CASE

2. The Plaintiff pleaded that in or about 1918 his late father purchased *Title No. Mbeere/Mbita/2466 (parcel 2466)* from one, N. Nthegeeny of Kamumu clan and settled thereon. He further pleaded that he was born and brought up on parcel 2466 and that he continued residing thereon even after his father passed on in 1932.

3. The Plaintiff contended that during the land adjudication process he entrusted the 1st Defendant's late father one Luka Kithumbu (*Luka*) with the responsibility of following up on his claim for parcel 2466 on the understanding that he would allocate him (*Luka*) 4 acres as his own. It was further pleaded that after *Luka* passed on it was discovered that the entire parcel 2466 had been registered solely in his name. The 1st Defendant, who is the son of *Luka*, thereafter took out letters of administration for the estate of *Luka*, sub-divided it into several parcels and sold one of them, *Title No. Mbeere/Mbita/4825*, to the 2nd Defendant.

4. The Plaintiff contended that since he had exclusive and continuous possession of 11.21 ha out of the 12.01 ha comprised in parcel 2466, the Defendants had lost their right to recovery thereof. He, therefore, wanted a declaration of adverse possession in his favour with respect to the parcels he had occupied all along.

C. THE DEFENDANTS' RESPONSE

a. The 1st Defendant

5. The 1st Defendant filed an undated replying affidavit in opposition to the said originating summons. The Plaintiff's claim for adverse possession was denied in its entirety. It was denied that the Plaintiff was in occupation of parcel 2466 or any sub-divisions thereof. It was further contended that the Plaintiff's attempts to occupy the suit properties were forceful and illegal which constituted trespass and criminal conduct.

b. The 2nd Defendant

6. There is no indication on record of the 2nd Defendant having filed a response to the originating summons

D. DIRECTIONS ON THE HEARING OF THE SUIT

7. The record indicates that on 24th April 2015 the advocates for the parties by consent agreed to have the originating summons treated as a plaint and the same to be canvassed through *viva voce* evidence. It was further directed that the parties were to file and exchange documents and statements in compliance with **Order 11** of the **Civil Procedure Rules, 2010**.

8. However, when the suit came up for trial on 20th February 2020 the advocates for the parties recorded a consent dispensing with an oral hearing. They agreed to canvass the suit on the basis of the affidavits, documents and witness statements on record without calling any witnesses.

E. DIRECTIONS ON SUBMISSIONS

9. Upon the recording of the said consent, the Plaintiff was granted 30 days within which to file and serve his written submissions whereas the Defendants were granted 30 days upon the lapse of the Plaintiff's period to file theirs. The record shows that the Plaintiff's submissions were filed on 5th May 2020. However, the Defendants' submissions were not on record by the time of preparation of the judgement.

F. ISSUES FOR DETERMINATION

10. The court has considered the pleadings, affidavits, documents and statements on record in this matter. The court is of the opinion that the following issues arise for determination:

- a) *Whether the Plaintiff has demonstrated his claim for adverse possession with respect to the suit properties.*
- b) *Whether, in the alternative, the Defendants are holding the suit properties in trust for the Plaintiff.*
- c) *Whether the Plaintiff is entitled to the reliefs sought.*
- d) *Who shall bear the costs of the suit.*

G. ANALYSIS AND DETERMINATIONS

a. Whether the Plaintiff has demonstrated his claim for adverse possession

11. The court has considered the pleadings, documents, 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.**

12. 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...”

13. 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 ...”

14. The court has considered the entire material and the submissions on record. The Plaintiff and his witnesses mainly tried to demonstrate that the Plaintiff was the legitimate owner of the suit properties by laying out the lengthy history of the land. The 1st Defendant, on the other hand, made every effort to demonstrate that Luka was the rightful owner of the suit properties for having bought the same from somebody else. The 1st Defendant and his witnesses put great emphasis on the fact that Luka was found to be the legitimate owner upon undergoing a lengthy and rigorous land adjudication process.

15. The court is, however, aware that the instant originating summons is a claim for adverse possession grounded upon **Section 38 of the Limitation of Actions Act (Cap. 22)**. Accordingly, the court shall confine itself to a consideration of the elements of adverse possession only. The court has considered the affidavits and witness statements filed on behalf of the Plaintiff. It would appear that the Plaintiff and his family have been in occupation of the suit properties for a very long time. The 1st Defendant and his witnesses did not deny that the Plaintiff was born and brought up on the suit properties. They did not expressly deny that the Plaintiff had a dwelling house on the suit properties or that he had developed them.

16. The Plaintiff in this suit filed his witness statements on 8th March 2016 whereas the Defendants filed theirs on or about 11th April 2016. The court notes that the Plaintiff’s averments on occupation were not specifically controverted. The 1st Defendant’s evidence was essentially directed at demonstrating that Luka had legally acquired the suit properties by winning previous land disputes during the land adjudication process.

17. The 1st Defendant’s attempt to dispute the Plaintiff’s occupation of the suit properties in his replying affidavit were very feeble. He stated thus in paragraphs 5 and 6 of his replying affidavit:

“5. THAT the above stated expansionist attempts by the Plaintiff have been reported to the provincial administration and the Plaintiff ordered to stop in vain.

6. THAT the Plaintiff’s actions on the Defendant’s land parcel have at all times been acts of trespass, which are illegal and criminal.”

The court is thus satisfied that the Plaintiff has been in possession for a very long period of time. The Defendants did not dispute or respond to the Plaintiff’s photographs demonstrating some of the developments on the suit properties.

18. There was no demonstration that the Plaintiff’s exclusive occupation had been interrupted in the legal sense. The mere fact that the Plaintiff’s occupation was reported to the provincial administration could not constitute interruption hence it could not stop time from running for purposes of the limitation of actions. The fact that the 1st Defendant considered the Plaintiff’s occupation to constitute trespass or criminal conduct could not affect the claim for adverse possession either. Accordingly, the court finds and holds that the Plaintiff has demonstrated his claim for adverse possession with respect to the suit properties.

b. Whether the Defendants are holding the suit properties in trust for the Plaintiff

19. Although the Plaintiff included an alternative prayer for a declaration of trust in his originating summons, the court is of the view that such prayer in a non-starter in an originating summons based upon **Section 38 of the Limitation of Actions Act (Cap. 22)**. The scope of **Order 37 Rule 7** upon which the originating summons was based is quite clear that it is intended solely for applications falling within **38** of the said **Act**.

20. In the case of **Wasui V Musumba KLR [2002] 1 KLR 396** Ringera J (as he then was) declined to entertain a claim for an overriding interest in an originating summons for adverse possession. He rendered himself on the issue as follows at page 405:

“Lastly, I desire to say that the applicant’s claim that he may have an overriding interest over the respondent’s land under the provisions of the Registered (sic) Act cannot be a matter for adjudication in this originating summons as the only relief sought and indeed the only relief which could be sought in an originating summons of this nature was the registration of the applicant as proprietor of the suit land by virtue of adverse possession. I will therefore express no opinion on the merits or otherwise of that claim.”

The court is of the same persuasion as Ringera J in the above case. Accordingly, the court shall not consider or make any findings on the alleged trust.

c. Whether the Plaintiff is entitled to the reliefs sought in the suit

21. The court has found and held that the Plaintiff has demonstrated his claim for adverse possession with respect to 11.21 ha out of 12.01 ha comprised in the suit properties. However, the court has found that the claim for a declaration of trust in his favour is not a legitimate claim for consideration in this suit. Accordingly, the court finds that the Plaintiff is entitled to the relief sought with respect to adverse possession only but the declaration of trust shall be declined.

d. Who shall bear costs of the suit?

22. The 4th and final issue is on costs of the suit. Although costs of an action or proceeding 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 Plaintiff shall be awarded costs of the suit to be borne by the 1st Defendant only.

H. SUMMARY OF THE COURT'S FINDINGS

23. In summary, the court makes the following findings on the issues for determination:

- a) The Plaintiff has proved his claim for adverse possession with respect to 11.21 ha comprised in the suit properties.
- b) The Plaintiff's alternative claim for a declaration that the Defendants are holding the suit properties in trust for him is not tenable in the instant originating summons.
- c) The Plaintiff is entitled to the relief sought with respect to his claim for adverse possession only.
- d) The Plaintiff is entitled to costs of the suit to be borne by the 1st Defendant.

I. CONCLUSION AND DISPOSAL ORDERS

24. The upshot of the foregoing is that the court is satisfied that the Plaintiff has proved his claim for adverse possession to the required standard. However, the claim for a declaration of trust is not tenable in the instant suit. Accordingly, the court makes the following orders for disposal of the originating summons dated 4th April 2013 and amended on 19th December 2014:

a) It is hereby declared that the Plaintiff herein Njagi Kiangamwe has become entitled to ownership of a portion measuring 11.21 hectares out of original land parcel No. Mbeere/Mbita/2466 measuring approximately 12.01 hectares resultant sub-divisions Nos. Mbeere/Mbita/4808-4829 all inclusive as against the 1st Defendant (parcels of land Nos. Mbeere/Mbita/4808, 4809, 4810, 4811, 4812, 4813, 4814, 4815, 4816, 4817, 4819, 4820, 4821, 4822, 4823, 4824, 4826, 4828 and 4829) and 2nd Defendant (Mbeere/Mbita/4825 and 4827) by virtue of adverse possession.

b) The alternative prayer for a declaration that the 1st and 2nd Defendants are registered as proprietors of the portions set out at paragraph (a) above on behalf of and in trust for the Plaintiff herein is hereby declined.

c) The Plaintiff is hereby awarded costs of the suit to be borne by the 1st Defendant only.

25. It is so decided.

JUDGEMENT DATED and DELIVERED in Chambers at EMBU this 28TH DAY of MAY 2020. Judgement delivered via zoom platform in the presence of Ms. Rose Njeru for the Plaintiff and in the absence of the Defendants.

Y.M. ANGIMA

JUDGE

28.05.2020