



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

ELC CASE NO. 2 OF 2010 (OS)

ANGELO M'IKIAO PLAINTIFF

VERSUS

JOHN M'RUKARIA M'IMATHIU DEFENDANT

JUDGMENT

BACKGROUND

The plaintiff instituted this suit against the defendant, seeking answers to the following questions:-

- (1) Whether the plaintiff has been in actual possession of the said parcel No. NYAKI/THUURA/624 uninterrupted for a period exceeding twelve (12) years.
- (2) Whether the title to land parcel No. NYAKI/THUURA/624 held by Imathiu Irware (deceased had extinguished by the time of his death on 17th July 1993.
- (3) Whether the plaintiff has acquired the right of ownership by virtue of adverse possession over Land Parcel No. NYAKI/THUURA/624.
- (4) AND for declaration that the plaintiff is the legal owner to land parcel No. NYAKI/THUURA/624 by adverse possession and be issued with a title deed to the said parcel of land.

In the supporting affidavit sworn on the 11th January 2010, the plaintiff stated that on or about the year 1978, he purchased land parcel No. NYAKI/THUURA/624 from one Fredrick Kinoti of Nthimbiri location. Apparently the said Fredrick Kinoti had purchased the same Parcel of land from Imathiu Irware sometime in 1973 and had settled therein.

However no transfer was effected since Imathiu had settled in Tharaka where he conducted his business. The plaintiff further stated that since Imathiu had not transferred the said parcel of land to Kinoti, the same could not be transferred to him and the title remained in the name of Imathiu Irware (deceased). He took vacant possession of the land wherein he settled and developed it to date. On 17th July 1993 Imathiu Irware passed on without transferring the suit land to him. He approached the defendant and his siblings to take out letters of administration to the estate of the late Imathiu Irware so that they could transfer the said parcel of land to him.

The defendant declined prompting him to file succession Cause No. HC. Succession No. 113 of 2000 wherein he obtained letters of administration to the estate of the said Imathiu Irware, and that he was issued with Title deed to land Parcel NYAKI/THUURA/624. Sometime in October 2002, he was served with an application for revocation of Grant dated 21st October 2002. The matter was heard and the court granted letters of administration to the defendant and the title deed issued to him in respect of the Land No. NYAKI/THUURA/624 was revoked and the same reverted to the deceased. The plaintiff further averred that he has lived in the suit property without interruption since the year 1978 (32) years. The plaintiff also stated that the title is only registered in the name of Imathiu Irware (deceased) but extinguished in or about 1990 by his continuous and exclusive adverse possession for a period of more than 12 years.

In a replying affidavit sworn on 10th December 2011, the defendant denied the plaintiff's claim that he has acquired title to the suit land by virtue of adverse possession. The defendant argued that he is the son of Imathiu Irware (deceased) and also the administrator of his estate. The defendant further argued that his late father was the registered owner of the suit land until the plaintiff herein fraudulently filed Succession Cause No. 113 of 2000 (Meru) and obtained the registration of the suit land through transmission. When he learnt about the fraudulent activities of the plaintiff, he applied for the revocation of the grant which was allowed by the court on 17th December 2009 and on 10th November 2010 the said grant was confirmed in his favour. The defendant stated that the suit property is an ancestral land which they used to farm and cultivate and plant bananas and yams. He argued that after the demise of his late father they continued farming on the suit property and that the plaintiff has no legal right over the suit property which he attempted to steal by fraudulently filing succession cause

NO. 113 of 2000 where the court pronounced itself on the same saying that the plaintiff had no right to inherit it.

PLAINTIFF'S CASE

The plaintiff gave sworn testimony and repeated his averments in the supporting affidavit saying that he bought the suit property registration No. NYAKI/THUURA/624 from one Fredrick Kinoti. He stated that the said Fredrick Kinoti had himself bought the property from M'Imathiu M'Irware (deceased) who is the father to the defendant herein. He stated that he started living in the suit land in 1978. The plaintiff also admitted that sometime in the year 1974, the late Imathiu M'Irware complained that Kinoti had taken his land without his consent and/or permission. He also recalled a time when the late M'Imathiu Irware (deceased) had complained about the suit property to the District Officer (DO). His complain was heard by the said DO and the complaint was dismissed. Mr. Kinoti had produced a sale agreement at the DO's office showing that he had bought the suit property from M'imathiu M'Irware. He referred to the document No. 1 in the plaintiffs list of documents dated 1993. The plaintiff also stated that in 1987 the late M'Imathiu M'Irware complained to the police against Kinoti and his son saying that they were trespassers on his land. Based on that complaint Mr. Kinoti and his son were charged in Criminal Case No. 3092 of 1987 (Meru) but the case was dismissed and Kinoti and his son acquitted for lack of evidence.

PW2 was Justus Nturibi. He is the plaintiff's son born in 1980. He said that he was born on the suit property and that he has never seen anybody come to lay claim on the same. He also stated that they buried most of their relatives in the suit property including his step-mother. He took photographs of the suit property showing their home and other developments therein.

DEFENDANTS CASE

The defendant who also gave sworn testimony stated that he knows the plaintiff after he occupied their Land No. Nyaki/Thuura/624 in 2002. He trespassed into the land and started cutting down traditional trees. He questioned what he was doing in their ancestral land and the plaintiff chased him away. He then filed for the succession of his late father's estate and was surprised that the plaintiff had filed one through the firm of Mukira & Company advocates. He went back to court in the same Succession Cause where he sought to revoke the grant which had been issued to the plaintiff. He produced the same as P. Exhibit No. 1.

PLAINTIFFS SUBMISSIONS

The plaintiff through Mr. Kioga submitted that his client has acquired the suit property by operation of the law. He cited Section 7 of the Limitation of Actions Act Cap. 22 Laws of Kenya. Mr. Kioga also submitted that from 1978 to date the plaintiff has lived on the suit land without interruption except when the Succession court allowed the defendants to be registered as the heir to the original owner. But that notwithstanding the plaintiff had acquired his rights under adverse possession and prescription doctrine long before the defendant got himself registered in the year 2011.

Counsel submitted that the change of name did not affect the dispossession and ouster. He cited the following cases in support of his client's position:-

(1) Wambugu – Vs – Njuguna (1983) KLR 172

(2) Hosea – Vs- Njiru (1974) EA 526

(3) Bridges – Vs- Mees (1957) 2All ER 577

(4) Githu – Vs – Ndeete (1984) KLR 776.

DEFENDANTS SUBMISSIONS

Mr. Mutegi instructed by Kiautha Arithi & Co. Advocates submitted that the plaintiff has no proprietary right and therefore has no claim over the suit property. Learned counsel also submitted that the plaintiff attempted to take over and have the suit property registered in his name fraudulently as noted by Justice Lesiit in her ruling in succession Cause No. 113 of 2000. The learned counsel cited the following authorities:

1. Mwambeja Ranching Company Limited & Another Versus

Kenya National Capital Corporation Limited & 6 Others (2015) eKLR

ANALYSIS AND DECISION

I have considered the viva voce evidence adduced by the plaintiff and his witness together with that of the defendant. The issue for determination in this case is whether the plaintiff has acquired the suit property registration No. Nyaki/Thuura/624 by adverse possession. The plaintiff in his evidence stated that he bought the suit property from one Fredrick Kinoti who himself had bought it from the late M'Imathiu M'Irware on 3/07/73.

The agreement between the plaintiff and the said Fredrick Kinoti has not been produced by the plaintiff. It is not clear why the plaintiff decide to refer to an agreement between Fredrick Kinoti and the defendant's late father M'Imathiu M'Irware and not his own agreement with the alleged Fredrick Kinoti. From his own evidence the plaintiff admitted that the defendants late father M'imathiu M'Irware made a

complaint against Fredrick Kinoti and his son in 1987 and lodged a report with the police who charged them in Criminal Case No. 3092 of 1987. For a right of adverse possession to crystallize the plaintiff has to prove that he has used the land in question as of right, *nec vic nec clam nec precario* (no force no secrecy no persuasion). It is imperative for the plaintiff to show that the owner had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it by way of recurrent consideration.

In this case the plaintiff was invited to the suit properly by a person other than the defendant or his late father M'Imathiu M'Irware. In the year 1987 the defendant's father made a report of trespass against Mr. Fredrick Kinoti and his son and all others who were living in that land for trespass. The mere complaint and subsequent charging of the two accused persons who invited the plaintiff to the suit land is a clear indication that the plaintiff was occupying the suit property by force which is contrary to the principles for acquisition of land by adverse possession.

I find the complaint by the defendant's late father M'imathiu M'irware to the police regarding the illegal trespass and occupation of the suit property by Fredrick Kinoti and his son including the plaintiff who had been invited by the two is a clear manifestation that their occupation has not been peaceful and uninterrupted. I also find and hold that the plaintiff's averment that he is entitled to adverse possession having been given occupation and possession as a purchaser for value is farfetched and without legal basis.

The plaintiff's purported sale agreement has not been produced and his remedy in my view lies elsewhere. I have also perused the ruling by Hon. Lady Justice Lesiit in Succession Cause No. 113 of 2000 (Meru) where the plaintiff had applied for letters of grant in the Estate of M'Imathiu M'Irware. In that ruling, the learned Judge observed the judgment which revoked the grant issued to the plaintiff and stated as follows;

“In this case, I find Angelo (the Applicant herein) obtained the grant fraudulently by making false statements. He failed to state his relationship if any to the deceased or his right of claim over the deceased property and more seriously annexed a death certificate which the children of the deceased now claim to be a forgery.....

All in all, in my view the grant issued to Angelo ought to be revoked..... He had no right to inherit the deceased land.”

These damning evidence against the plaintiff in this case have not been reviewed. It is the same plaintiff who was said to have presented forged documents who is now approaching this court when those allegations of forgery have not been set aside.

I find and hold that the plaintiff has not proven his claim for adverse possession to the required standard. In the result, I dismiss this suit with no order as to costs.

Read, delivered and signed in the open court this 6th July 2018.

MR. E. C. CHERONO

ELC JUDGE

In the presence of:-

(1) Ms Mbijiwe holding brief for Kioga for the plaintiff

(2) Angelo M'ikiao

(3) John M'Rukaria M'Imathiu

Court Clerk Galgalo