



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC SUIT NO. 6 OF 2018 (O.S)

FRANCIS GUANTAI MUNYUA.....PLAINTIFF

VERSUS

EVANGELINE KAIMURI KABURI

(THE LEGAL REPRESENTATIVE OF

THE ESTATE OF M'IBURI M'MCHIRU

ALIAS IBURI NCHIRU DECEASED).....1ST DEFENDANT

FRANCIS MUTHURI.....2ND DEFENDANT

SAMSON KIMATHI M'IBURI.....3RD DEFENDANT

PIUS NDUBI4TH DEFENDANT

JUDGMENT

1. On 19/2/2018 the plaintiff filed this Originating Summons claiming entitlement to land parcel LR NO. ABOTHUGUCHI/L-KIIJA/363 by way of adverse possession and in the alternative that the plaintiff has become the rightful owner of the suit land through the doctrine of constructive Trust. The suit was opposed via the replying affidavit of the 1st defendant dated 18/4/2018 where she indicated that she is the wife of the late M'IBURI M'CHIRU and also the legal representative of his estate. Her co-defendants are her sons and her late husband was the registered owner of the suit land.

2. The case for the plaintiff is anchored on his pleadings, the recorded statements dated 28.5.2018 and the list of documents in the list dated 11.7.2018. Plaintiff, Francis Guantai Munyua avers that himself and his son Stephen Mutwiri Munyua (now deceased) entered into a sale agreement over LR NO. ABOTHUGUCHI/L-KIIJA/363 then known as MWANGATHIA/L-KIIJA/363 whereby they purchased the land for Ksh. 13,000 from one M'IBURI M'NCHIRU in June 1988. He was put in possession of the suit land and he has been in full and exclusive occupation, possession and use of the said land from 24/6/1988 to date. The seller of the land passed away and a succession cause was filed without his knowledge. However LR NO. ABOTHUGUCHI/L-KIIJA/363, the suit land was never included in the properties of the deceased and the Plaintiff availed a copy of the confirmed grant to buttress this averment. PW2, one KABOKO RUKARIA gave evidence to the effect that he knows plaintiff bought the suit land from the deceased and that it is even the plaintiff who actually sourced the land which pw2 eventually bought which is just across the road from where the suit land is.

3. Defendants' case is that plaintiff was a tenant of the deceased in so far as the land parcel LR NO. ABOTHUGUCHI/L-KIIJA/363 is concerned. The 1st defendant contended that plaintiff has been occupying the suit land with permission and authority from the deceased. The suit land was registered in the name of the deceased on 12/8/1988 and it never existed at the time of the alleged agreement. The reason the suit land was not included in their succession cause is because the parcel was erroneously indicated as LR NO. ABOTHUGUCHI/L-KIIJA/303 instead of 363.

Determination

4. The issue for determination is whether the plaintiff is entitled to the suit land through the doctrine of adverse possession. The requirements for Adverse Possession in Kenya have been set out in various case law. In the case of **Mbira -v- Gachuhi (2002) IEALR 137** the court held that:

i. ".....a person who seeks to acquire title to land by the method of Adverse Possession for the applicable statutory period must

prove non-permissive or non-consensual actual, open, notorious, exclusive and Adverse use by him or those under whom he claims for the statutory prescribed period without interruption....”

5. Likewise, in Jandu –v- Kirplal & Another (1975)EA 225, it was held that:

a. “.....to prove title by Adverse Possession, it is not sufficient to show that some acts of Adverse Possession must be adequate in continuity, in publicity and in extent to show that it is Adverse to the owner. It must be actual, visible, exclusive, open and notorious.”

6. The ingredients of adverse possession were recently discussed by the Court of Appeal in the case of Mtana Lewa –v- Kahindi Ngala Mwangandi (2005)eKLR where it was held that:

“Adverse Possession is essentially a situation where a person takes Possession of land, asserts rights over it and the person having title to it omits or neglects to take a action against such person in assertion of his title for a certain period, in Kenya 12 years.”

7. It is also a well settled principle that a party claiming Adverse Possession ought to prove that this Possession was *“nec vi, nec clam, nec precario,”* that is, peaceful, open and continuous. The Possession should not have been through force, nor in secrecy and without the authority or permission of the owner.

8. While being cross examined, DW1 had stated that;

“According to me, Francis entered the land many years ago. He even sold the trees which were on that land and he even excavated stones. He even bought another parcel using proceeds from that land. He was using the land by force.”

9. The plaintiff herein contended that he has been in full and exclusive possession of the suit land since 24/6/1988 this being a period of over 12 years. The defendants as per the evidence of DW1 recognizes this lengthy period of occupation, where such occupation was hostile. The defence side did not provide any evidence to contradict the plaintiff’s averments though they claimed that the plaintiff was a tenant. Considering the totality of the evidence availed in this case, and applying the legal principles as outlined above, it is clear that the plaintiff has proved his case on a balance of probability and has brought himself within the ambit of the doctrine of Adverse Possession.

10. Consequently, plaintiff’s claim is allowed and I enter judgment as follows:

1. It is hereby declared that the plaintiff has become entitled to the land parcel no ABOTHUGUCHI/L-KIIJA/363 through the doctrine of adverse possession.

2. An order is hereby issued for the plaintiff to be registered as the owner of land parcel no.ABOTHUGUCHI/L-KIIJA/363.

3. The deputy Registrar of this court is hereby authorized to sign all requisite documents to facilitate the transfer of the land ABOTHUGUCHI/L-KIIJA/363 into the name of the plaintiff.

4. Any inhibition, injunction restriction and or caution that may be subsisting in respect of land no ABOTHUGUCHI/L-KIIJA/363 is hereby discharged in order to give effect to the implementation of this Judgment.

5.. Each party is to bear their own costs of this suit.

6. I hereby grant a stay of execution of this Judgment for a period of 30 days.

DATED, SIGNED AND DELIVERED AT MERU THIS 20TH DAY OF MAY, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this ruling was given to the parties at the conclusion of the hearing and by a fresh notice by the Deputy Registrar. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE