



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL SUIT NO. 18 OF 2011(OS)

SAMUEL KIRIMI NGATUNI..... APPLICANT/PLAINTIFF

VERSUS

IMATHIU NAITIRA.....RESPONDENT/DEFENDANT

J U D G M E N T

1. By an Originating Summons dated 19th February, 2011 brought under **Section 38 of Limitation of Actions Act CAP 22** and **Order 37 Rule 7 of the Civil Procedure Rules**, the Plaintiff sought amongst other questions, the determination of whether the applicant has been in occupation of **Ntima/Ntakira/700 (“the suit property”)** adversely to the respondent’s title for a period in excess of 12 years consequent whereof, the respondent’s title thereto has been extinguished.

2. The Summons was supported by the applicant’s affidavit dated 19th February, 2011. He deponed that the suit property is registered in the respondent’s name. In or about 1970, the plaintiff entered, occupied and developed the suit property and has lived therein to date. In 1980, the respondent claimed the suit property and asked the plaintiff to vacate but he refused. He continued to live there peacefully, openly and uninterrupted and has built houses, and developed the property by keeping cows and chicken, planted nappier grass, trees, maize, beans and other subsistence crops. The suit property has clear marked boundaries which he has used openly and adversely to the defendant’s title which has been extinguished by operation of law.

3. The claim was opposed through the replying affidavit of **Imathiu Naitira** sworn on 4th April, 2011. He averred that the suit is unfounded and fraudulently made. That at no time has the plaintiff been in exclusive use of the property. According to him, the plaintiff had leased his houses as a tenant from 17th January, 1980 for a monthly rent of Kshs.600/-.

4. He contended that the suit property was being farmed by his children who had planted seasonal crops. That the plaintiff has always paid rent as agreed and therefore the allegation of adverse possession on the suit property does not arise.

5. The plaintiff and the defendant filed further and supplementary affidavits, to buttress what they had contended in their supporting and replying affidavits. On 20th June, 2011, the court ordered that the Summons be determined by way of viva voce evidence. The Summons was therefore treated as a plaint while the Replying affidavit was deemed to be a defence.

6. The plaintiff called five witnesses to support his case. **PW1 was the plaintiff**. He reiterated what he stated in his affidavits and produced documents in support of his case. He told the court that he entered the suit property in 1970, cleared the bushes thereon and first constructed a grass thatched house and occupied the same. He got married in 1978 and came to know the defendant when the latter took him to Chief Thiora in 1980. The Defendant wanted him to vacate the suit property but he refused. That the chief and elders told the defendant that he could not evict him as he had been in the land for over 10 years.

7. The Plaintiff stated that he had never seen the agreement of lease produced by the defendant. That agreement was allegedly made between the plaintiff and Kaura and Rwito Ltd on behalf of Imathiu Waitira. He further denied ever having paid any rent for the houses he occupied on the suit property. According to him, he had constructed all the five houses standing on the suit property together with a cow shed.

8. PW2 Isaac Kiambi M’Mukiri was employed as assistant chief of Tunka location in 1988. He told the court that he knew the plaintiff but not the defendant. He was born in 1962 and came to know the plaintiff in 1970s since he was a young man and he was friendly to his father. He did not know who plants and harvests the seasonal plants farmed on the property occupied by the plaintiff.

9. PW3 M’Rugongo M’Anampiu told the court that he lives near the suit property. He recalled that in 1970, the plaintiff contracted him and one Gitonga, now deceased, to construct for him a mud grass thatched house which they did on the suit property. Later on, timber houses were constructed on that property but he did not know by who.

10. PW4 Dickson Kinoti M’Ringera told the court that he has known the plaintiff since 1979. That in 1980 the plaintiff contracted him to

construct two houses. Later in 1983 he constructed three houses and a cattle shade.

11. **PW5 Monica Kajuju Japhet** is a neighbor to the plaintiff in the suit property. She has known the plaintiff since 1970 when he started clearing bushes and settled near her house. His wife asked her for *fundis* who could build a house on that land whom she provided. In cross-examination, she told the court that the land was not fenced when the plaintiff entered thereon. That he is the one who created the boundary. She did not know whether the plaintiff was paying rent to the defendant for the land, but she has never seen any other person working on the land apart from the plaintiff.

12. After the close of the plaintiff's case, the defendant testified and called two witnesses. **DW1 Imathiu Waitira** relied on his affidavit sworn on 4th April, 2011 and reiterated the contents thereon. He told the court that he authorised Kaura and Rwito Limited to lease the premises on the suit property to the plaintiff in 1980. He used to receive rent on the lease until 2011. That the plaintiff stopped paying rent in 2007. He denied that the plaintiff entered the suit property in 1970 nor that he had carried on any developments thereon.

13. In cross-examination, he stated that he had 2 timber houses in or about 1980 on the suit property but he did not know how many there were at the time he was testifying. The trees were planted by him. The bananas were planted by Kibiti and the nappier grass was planted by a daughter of Kibiti. He could not remember when he gave the suit property to Kaura and Rwito Ltd.

14. **DW2 Mercy Nkatha Kibiti** testified that she knew the parties to this suit as well as the company known as Kaura and Rwito Limited. Her father, Henry Kibiti Rwito was the managing director of Kaura and Rwito Ltd. He was deceased by the time of trial. She knew the defendant for he had given the company the work of managing the suit property. The suit property was developed with timber houses which were rented to the plaintiff on 17th January, 1980. The agreement was in writing and she recognized the handwriting as that of her late father since she used to stay and work with him in the office.

15. According to her, she was in school in 1980 but started working for the company in 1989. The plaintiff was leasing 3 houses which were built by the defendant. The receipts were issued by one Florence Kairigo who is deceased. Her father used to sign the receipts and she could be able to identify his signature on the receipts. The last receipt issued was on 3rd February, 2007 for that was the last time payment was received. She produced the agreement and the receipts.

16. In cross-examination, she admitted that the plaintiff was still on the land. She denied that she started forcing herself onto the land after this case was filed because her father passed on in 1996. She stated that because she was working with her father, she went on using the land until 2007 when the plaintiff asked for permission to stop paying rent for some time to enable him to finish a case he had with his brother in Chuka.

17. **DW3 Mwirigi Fredrick Rimbera** relied on his statement dated 11th November, 2011 as his evidence. He was a driver employed by Kaura and Rwito Limited and used to drive the managing director of the company. He was aware that the plaintiff was a tenant in the houses on the suit property. He used to carry DW2 to the suit property where she has always farmed all the years and from where she harvested maize, beans and potatoes.

18. In his submissions, the plaintiff submitted that the defendant did not deny the plaintiff's long stay on the property. The plaintiff had denied entering into any lease agreement to lease the suit property as contended by the defendant. The alleged agreement was not witnessed. He submitted that the documents cannot be relied on as the Law of Contract Act requires such an agreement to be witnessed or attested to by one or more persons.

19. On his part, the defendant submitted that a claim for adverse possession must contain free entry without the knowledge or consent of the registered owner; it must be peaceful, open and uninterrupted possession for a period of 12 years. That the totality of the plaintiff's pleadings, evidence and witnesses cannot stand the truthfulness of facts for the whole case is founded on falsehood. That the court should find the defendant's evidence as truthful and the plaintiff's claim to be without merit and be dismissed with costs.

20. The issue for determination is ***whether the plaintiff's occupation of Ntima/Ntakira/700 has been one of adverse possession that has resultantly extinguished the defendant's title to the suit property.***

21. Adverse possession is a condition whereby a person enters another's immovable property, and occupies the same openly, peaceably and continuously for a period of twelve years or more. In **Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR**, the Court of Appeal stated:-

"... the doctrine of adverse possession is arbitrary. It must be borne in mind that before one can claim title to land by adverse possession and apart from proving 12 years of uninterrupted, open and peaceful possession, certain strictures must be satisfied. Those strictures are summarized in the Latin maxim, nec vi, nec clam, nec precario, that, one's possession has not been through use of force, not in secrecy and without the authority or permission of the true owner."

22. In **Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR** the Court of Appeal held:-

"Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it."

23. The plaintiff testified that he entered the suit property in 1970. That in 1980, the defendant asked him to vacate but he refused. A case brought by the defendant before the area chief collapsed and the defendant went away until 2011 when the defendant showed up with a

possible purchaser. That over the period, he had developed the property by constructing a total of five houses and a cow shed. He had given birth of up to 9 children while living on the suit property.

24. His witnesses stated that they knew him as he had lived on the suit property since 1970. He had constructed the premises on that property. They did not know who the real owner of the suit property was although the plaintiff had been in continuous occupation thereof.

25. On the other hand, the defendant refuted the plaintiff's allegations and stated that the latter had been a tenant on the houses erected on the property since 17th January, 1980. He relied on an agreement between a company known as Kaura & Rwito Ltd for the lease of premises on the suit property to the plaintiff for a sum of Khs.600/- per month. He also relied on two booklets of receipts issued in respect of the rent therefor.

26. The plaintiff had the burden to prove adverse possession. He paraded people who are his neighbors in the suit property. They were firm in their testimonies that the plaintiff took possession of the suit property in 1970. There was evidence that originally, the plaintiff occupied a mud grass thatched house that was constructed for him by **PW2**. That he later constructed a total of 5 timber houses on the suit property and a cow shed. He had continued to live thereon with his family until 2011. In addition, he cultivated seasonal food crops on the property.

27. The defendant's defence was to rely on unattested agreement which the plaintiff denied ever having signed. No officer from the company allegedly known as Kaura & Rwito Ltd came to testify in support of that agreement. That agreement was admitted in evidence on the basis that the person who signed it for the company, Henry Kibiti Rwito had since passed away. **DW2**, the daughter of the said Kibiti, did not witness its execution. There was no explanation why no other officer from that company did not appear to testify on that agreement or the receipts.

28. A look at that agreement would show that, it does not disclose how many houses on the suit property were being leased to the plaintiff. The alleged lease has no term. It is *ad infinitum*.

29. The testimony of the defendant was that he constructed 2 timber houses. He did not know the total number of houses on that property as at the date he was testifying. He suspected that the plaintiff may have constructed two more houses and a cow shed. He did not tell the court when the plaintiff did this. If the plaintiff was only a tenant, why he did not either terminate the alleged lease or sue or evict the plaintiff from the property for that action? This was not explained. Further, if he used to farm the land, how comes that he could not tell the actual number of houses on the suit property?

30. The witnesses for the defendant on their part told the court that the number of houses on the suit property were three (3) and that it was **DW2** who was utilizing the rest of the suit property other than the area occupied by the plaintiff.

31. As regards **DExh.2 (a) and (b)**, these were receipts allegedly issued to the plaintiff. The issue that was not clarified on the said receipts is whether the said company, Kaura and Rwito Ltd had only one property which it was leasing such that the entire two receipt books that were produced were exclusively in relation to the plaintiff and the suit property alone.

32. Secondly, it was alleged that the receipts were being issued by one Florence Kairigo and signed by Henry Kibiti Rwito. That Mr. Kibiti died in 1996. An examination of those receipts will show that the signature of Mr. Kibiti was there until 2nd August, 1997 yet his daughter, **DW2** testified that he had died in 1996. How did those receipts of between 1996 and August 1997, come to bear his signature? This was neither explained nor clarified.

33. Thirdly, those receipts show that they were not being issued each month. Although it was not explained, it was probably because the plaintiff was falling in "arrears". Be that as it may, several serious discrepancies can be discerned from those receipts as follows:-

a. Receipt dated 7/12/81 was for Kshs.2,800/- being rent for three months, October, November and December, 1981. How could that be the case yet the rent was allegedly KShs.600/- per month?

b. Receipt dated 13/5/82 was for Kshs.1,900/- being rent for three months, March, April and May, 1982. How could that be the case yet the rent for all the previous months seem to have been fully paid and there was no any arrears? What was the additional Kshs.100 for?.

c. Because of the block receipts issued, i.e. a receipt for several months between 17/4/1987 and 4/1/1989, one month rent cannot be accounted for. Why?

d. From January, 1990, the rent seems to have been increased to Kshs.1,000/- per month. Receipts dated 16/7/1994 and 3/10/1994, the rent paid was Kshs.1,000/- for two months and KShs.1000/- for three months, respectively!

34. The reason for pointing out the above discrepancies is to show that these documents (receipts) may not have been, prepared in the normal cause of the business of the alleged Kaura & Rwito Ltd, if it ever existed. It is most likely that they were prepared with this case in mind. That is why they are issued in block, i.e for several months yet there was no testimony that the plaintiff was sometimes in arrears or was ever warned for falling in arrears.

35. In a normal cause of business it would be expected that if a tenant is in arrears for upto 7 months, as in this case, he would be distressed, warned or even evicted all together. That is not the case here. In this regard, the court did not believe the evidence of the defence that the plaintiff was a tenant.

36. In the premises, the court is satisfied that the plaintiff has been able to prove on a balance of probability that, he entered the suit property

in 1970 without the permission of the defendant. That over time, he carried on developments that were in consistent with the defendant title to the suit property. That he remained in occupation thereof peaceably and uninterrupted until 2011 when the defendant brought buyers around thereby provoking the instant suit.

37. In the premises the questions posed in the Originating Summons are answered as follows:-

- a. **Imathiu Naitira** is the registered proprietor of **Ntima/Ntakira/700** measuring approximately 0.84ha;
- b. The plaintiff has been in occupation of the suit property openly, uninterruptedly and adversely to the defendant's title for a period in excess of 12 years;
- c. The defendant's title to **Ntima/Ntakira/700** has been extinguished by dint of **section 38 of the Law of Succession Act**;
- d. The plaintiff has acquired title to **Ntima/Ntakira/700** by way of adverse possession;
- e. Consequently, the plaintiff should be registered as the proprietor of **Ntima/Ntakira/700**; and
- f. The plaintiff was successful and costs follow the event. He will have the costs of the suit.

SIGNED at Meru

A. MABEYA

JUDGE

DATED and **DELIVERED** at Meru this 11th day of October, 2018.

In the presence of: -

Muchiri Adv for Plaintiff

Mr. Gikunda for Defendant

Court: Copies of Judgment shall be supplied to parties by Monday

15:10:18.

A. ONG'INJO

JUDGE

COURT: Copies of judgment shall be supplied to parties by Monday 15.10.2018.

A. ONG'INJO

JUDGE