



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO.1 OF 2019(OS)

BEATRICE WAMBUI GACHANGO	-	1 ST PLAINTIFF
HENRY MUCHOKI GACHANGO	-	2 ND PLAINTIFF
GEOFREY MBURU GACHANGO	-	3 RD PLAINTIFF
VS		
MARY WANJIKU NJUGUNA	-	DEFENDANT

JUDGMENT

1. By way of Originating Summons the Plaintiffs sued the Defendant seeking the orders as follows;
 - a. A declaration that the Plaintiffs have acquired 0.5 acres of LOC 5/KABATI/25 by adverse possession.
 - b. An order that the Defendants title to the 0.5 acres has been extinguished in favour of the Plaintiffs and that the Defendant holds the title in trust for the Plaintiffs.
 - c. An order that the Defendant transfer the 0.5 acres of the suit land to the Plaintiffs.
2. The summons are supported by the affidavit of the 1st Plaintiff where she states that the Defendant is the registered proprietor of the suit land; That the Defendant's husband Njuguna Thiaka, the original owner of the suit land allowed her husband Gachango Itheru and herself to live/occupy 0.5 acres of the suit land in 1964 after her husband paid him Kshs 500/- for the land; that on the 4/11/1964 she and her husband entered the suit land and constructed a house and commenced cultivation on 0.5 acres of the portion of the land; That she bore the 1st and 2nd Defendants in 1968 and 1974 and raised them on the land; that upon attaining the age of majority they have built houses where they live with their families on the suit land; other developments made on the suit land are cultivation of food crops and trees; that the occupation and developments are on a distinct portion of the land which measures 0.5 acres; The Defendant is aware of their long occupation and presence on the portion of the land.
3. Further she averred that her husband Gachango lost the case at the Tribunal in Kandara in favour of the Defendant but was prevented from pursuing the Appeal at the Provincial Appeals Tribunal when the tribunals were disbanded.
4. On the 14/8/19 this suit was consolidated with MCLE No 27 OF 2018 with this file being the lead file and the Defendants claim in 27/18 became the counterclaim.

5. The Defendant denied the Plaintiffs claim and, in her counterclaim, sought the following orders;
 - a. A permanent injunction restraining the Defendants from trespassing building occupying cultivating and or meddling with the Plaintiffs quiet and peaceful enjoyment of the suit land.
 - b. An order that the Defendants be evicted from the suit land belonging to the Plaintiff.
 - c. An order that the OCS Kabati Police station enforce compliance of the order for eviction
 - d. Costs of the suits and any other just relief in the circumstances.
6. It is the Defendant's case that the Plaintiffs are trespassers on the land.
7. At the hearing, the Plaintiffs evidence was led by the 1st Plaintiff who adopted her witness statement dated the 16/1/19 and informed the Court that she and her husband were allowed to occupy the land by the Defendant's husband, Njuguna Thiaka on the 4/11/1964 after her husband paid Thiaka Kshs 500/-. They then commenced building a house and cultivating the suit land while raising her children some of whom are the co-Plaintiffs who were born in 1968 and 1974 respectively on the 0.5 acres of the suit land.
8. Further she stated that the Plaintiff sued her husband in the tribunal at Kandara in 2011 claiming the portion of the suit land. That Gachango lost the case and on Appeal the tribunals were disbanded. That the tribunal ordered the Defendant to compensate Gachango with Kshs 5000/-. Gachango died in 2012 leaving them on the suit land which they have occupied since 1964 to date.
9. In addition, she informed the Court that the house she lives in was not built by Thiaka but by her husband, Gachango. That at no time did they vacate the portion of the suit land since 1964. She refuted that the Defendant has not been tilling the land. She stated that at no time was she and her husband employed by the Defendant's husband.
10. PW2 – Henry Muchoki Gachango stated in evidence that the 1st Plaintiff is his mother and that he was born and raised on the 0.5 acre land and he has constructed a house where he lives with his family. That although his father was ordered to vacate the suit land and remove the caution within 90 days they have never moved out of the land. That the Defendant's husband and the Defendant have never lived on the suit land nor built a house
11. PW3- Geoffrey Mburu Gachango led similar evidence with PW2 and further reiterated that his parents were not employees of the Defendant's husband.
12. DW1 – Mary Wanjiku Njuguna testified that she is the wife of the late Njuguna Thiaka. That upon his death she succeeded the estate of her husband and became registered as owner of the suit land in 1998. That the Defendants started to interfere with her peaceful enjoyment of the suit land on the 1/12/18. That the Plaintiffs are trespassers on her land and sought eviction and permanent injunction.
13. Further she stated that the panel of elders determined that the land belongs to her and ordered that Gachango to vacate the land but the Plaintiffs have not complied. That she has been tilling the land since demarcation and that the house being occupied by the 1st Plaintiff was built by her husband. That the 1st Plaintiff was one of the employees of her husband who has refused to vacate the suit land despite the orders issued in the Land Dispute Tribunal. On cross examination she conceded that she lives at Kenol and not on the suit land.
14. Both parties have filed written submissions which I have read and considered.
15. The key issues for determination are;
 - a. Whether the Plaintiffs have occupied the suit land for a period in excess of 12 years.

- b. Whether the said occupation was adverse to the title of the Defendant.
- c. Whether the Plaintiffs are trespassers on the suit land.
- d. Whether the Defendant is entitled to orders of eviction of the Plaintiffs.
- e. Who meets the cost of the suit?

16. The concept of adverse possession has its origin in the English common law and developed at a time when title to land was rooted in the physical sustained possession or occupation of the land. This practice became law in England when the Limitations Act of 1623 was passed. The Act barred the owner holding the legal or paper title from recovering possession of the subject land after a certain (arbitrary) period of time. The limitation period is therefore the basis of a claim in adverse possession.

17. Adverse possession as a legal concept draws its principles from the historical importance of physical, factual possession of land, over documentary proof that, while conferring legal title does not directly imply that the owner will act on it. Thus the doctrine is a combination of common law (nature of possession) and statute (duration of possession).

18. The doctrine of adverse possession is one of the ways of land acquisition in Kenya. The key statutory provisions that underpin the doctrine are set out in sections 7, 13, 16, 17 and 38 of the Limitations of Actions Act Cap 22, section 28 (h) of the Registration of Land Act No 6 of 2012 and section 7 (d) and (i) of the Land Act, 2012.

19. The combined effect of these sections is to extinguish the title of the proprietor of the land in favour of the adverse possessor at the expiry of 12 years of occupation of the adverse possession on the suit land. The essence of adverse possession under the Limitation of Actions Act, cap 22 Laws of Kenya, is that the registered proprietor of land is prohibited from bringing an action to recover land after 12 years from the date when the cause of action accrued. Upon the expiry of that period the proprietor's title to the land is extinguished by operation of the law and any person who has been in occupation of the land peacefully, openly and as of right for the prescribed period is entitled to bring an action in the High Court to be declared the owner of the land.

20. The Court of Appeal in **Francis Gicheru Karini vs Peter Njoroge Mairu (Civil Appeal No. 293 of 2002 (NRB) UR)** - approved the High Court decision in **Kimani Ruchine vs Swift Rutherford & Co. Ltd (1980) KLR 10** as per Kneller J. stating:

‘...The Plaintiffs have to prove that they have used this land which they claim as of right. Nec vi, Nec Clam, Nec Precario (no force, secrecy or persuasion) ...show that the company had knowledge of possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavors to interrupt it or by way of recurrent consideration.’

21. Further in the case of **Wambugu v Njuguna (1983) KLR 172** the Court of Appeal stated that in order to acquire land by virtue of the statute of limitation, the claimant must show that the owner has lost his right to the land upon being dispossessed or by the owner discontinuing possession by his volition. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community, of the exercise of dominion over the land.

22. In this case, it is not in dispute that the suit land was registered in the name of Njuguna Thiaka as at 17/9/1962. Upon his death the land was succeeded by his wife the Defendant herein and became registered in her name on the 7/10/98.

23. It is the Plaintiffs' case that they entered into the suit land in 1964 with the permission of the Defendant's husband and they have never vacated the suit land to date. The Defendant stated that the 1st Plaintiff was an employee of her husband but failed to give any evidence in support of the averment. She also claimed that the Plaintiffs entered the suit land and interfered with her quiet possession in 2018. Evidence led by the Plaintiffs is that they have lived on the suit land since

1964. Gachango Itheru stated as such in the Tribunal case in 2011, which evidence has not been rebutted by the Defendant. The Plaintiffs produced in evidence pictures of very old houses on the suit land which on the face of it do not appear to have been constructed in 2018. It is the finding of the Court that the Plaintiffs have occupied the suit land for long and based on the evidence on record since 1964.
24. It is not in dispute that the Plaintiffs husband and that of the Defendant were brothers. It is alluded by the 1st Plaintiff in evidence that her husband occupied the land after giving Njuguna Thiaka Kshs 500/-. At the Tribunal Gachango led evidence that he purchased the suit land from his brother Njuguna Thiaka for Kshs 500/-. This evidence was not pursued or proved by the Plaintiffs. It is not clear whether the money was the purchase price or a loan between the brothers.
25. The 1st Plaintiff informed the Court that the tribunal ordered compensation to be paid to Gachango in the sum of Kshs 5000/-
26. Be that as it may, it was the 1st Plaintiffs' evidence that they entered the land with the permission of Njuguna Thiaka. She stated as follows;
- “That Njuguna Thiaka now deceased was the husband to the Defendant and was the owner of the suit land measuring one acre as on the 4/11/1964 when he allowed my late husband and myself to live and cultivate on that land after my husband gave him Kshs 500/-”
27. In the case of **Samuel Miki Waweru v Jane Njeri Richu, Civ. Appeal No. 122 of 2001** the Court held that where a purchaser occupies land which is subject to a sale agreement, but with the consent of the vendor, time does not start running for purposes of adverse possession, until the agreement is terminated.
28. It therefore follows that adverse possession does not accrue where the person is in occupation with the permission and license of the owner of the land.
29. Evidence was commonly led that the Defendant's husband, Njuguna Thiaka died sometime back. The date of his death was neither given by both parties but the Defendant led evidence that upon his demise she succeeded his estate and became registered as owner of the suit land on the 7/10/98. I have perused the green card of the title which indicates that Gachango lodged a caution on the suit land on the 21/12/98 claiming purchaser's interest.
30. With the death of Njuguna Thiaka came the end of the permission that he had allowed the Plaintiffs to occupy the suit land. There is no evidence that the Defendant took any action to remove the Plaintiffs. It is presumed that Njuguna Thiaka died before the year 1998 and even if it is taken that he died in 1998, evidence was led that the Plaintiffs have occupied the suit land since 1998 to date.
31. It is trite that time stops running for purposes of adverse possession when the registered owner constructively retakes actual possession of the suit land or the adverse possessor relinquishes possession back to the owner or where the owner files suit to assert title. Both parties led evidence and relied on the proceedings of the Land Dispute Tribunal at Kandara where the Defendant sued Gachango Itheru for land before the panel of elders. The Tribunal proceedings in my view are considered a suit and therefore time stopped running in 2011 when the suit was initiated at the tribunal.
32. That notwithstanding it is the finding of the Court that the occupation by the Plaintiffs from 1998 became adverse in 2010 at the expiry of 12 years. By the time the tribunal proceedings were filed in 2011, adverse possession had accrued and vested in the Plaintiffs. The tribunal proceedings did little to halt time from running. It was already spent as at 2010. Thereafter the Defendant held the title in respect to 0.5 acres of the land occupied by the Plaintiffs in trust for the Defendants.

33.The Court answers issue nos. a and b in the affirmative.

34.Having arrived at the findings in para 32 above the Court answers issues nos. c and d in the negative and the counterclaim fails. It is dismissed.

35.In the end the Plaintiffs have proved their case and I proceed to make the following orders;

- a. It is hereby declared that the Plaintiffs have acquired title to 0.5 acres of LOC5/KABATI/25 by adverse possession
- b. It is hereby ordered that the Defendants title to the portion of 0.5 acres has been extinguished in favour of the Plaintiffs and that the Defendant holds the title for the said portion in trust for the Plaintiffs.
- c. The Defendant is hereby ordered to subdivide and transfer the 0.5 acres of the suit land to the Plaintiffs.
- d. In default the Deputy Registrar of this Court is ordered to execute all the documents to effect the orders of the Court in favour of the Plaintiffs.
- e. The cost of the subdivision and registration of the suit land in the name of the Plaintiffs shall be borne by the Plaintiffs. The Defendant shall bear the cost of the subdivision and registration in respect to her portion.
- f. The subdivision shall as is practicable comply with the occupation of 0.5 acres by the Plaintiffs on the ground.
- g. In view of the COVID -19 Pandemic and in line with the practice directions issued in the Kenya Gazette Notice No 3137 published on the 17/4/2020, I order that there by a suspension/stay of execution for a period of 60 days from the date of this judgement.
- h. Parties are related and I order that each to meet their costs of the suit.

36.It is so ordered.

36.DATED, SIGNED & DELIVERED VIA EMAIL THIS 12TH DAY OF MAY 2020.

J G KEMEI

JUDGE

ORDER

The Clerical error in regards LR No. LOC.4/KABATI/25 is hereby corrected under Section 99 of the Civil Procedure Act to read LR No. LOC.5/KABATI/25 throughout the Judgment. Error corrected this 8th day of July 2020.

J G KEMEI

JUDGE