



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 120 OF 2014

MARY NJERI.....1ST PLAINTIFF

NICHASIO KABUNYI NGIRIGACHA.....2ND PLAINTIFF

VERSUS

SAMUEL CHOMBA.....DEFENDANT

JUDGMENT

By an Originating Summons dated 29th April 2014, the applicants/plaintiffs sought the following orders:

- (a) That the applicants to be declared to have become entitled by adverse possession of all that parcel of land No. BARAGWE/GUAMA/434 measuring 3.08 acres.***
- (b) That the plaintiffs/applicants be registered as proprietors of the said land parcel No. BARAGWE/GUAMA/434 measuring 3.08 acres.***
- (c) Costs of the suit be awarded to the applicants.***

The Originating Summons is supported by an affidavit of the applicants/plaintiffs sworn the same date. The supporting affidavit is further supported by a green card of the suit property L.R. No. BARAGWE/GUAMA/434. On the same date, the plaintiffs/applicants also filed their witness statements and on 2nd September 2014, two witnesses namely Simon Mugo Mboi and Karuthi Ndambiri also filed their witness statements. On 5th August 2014, the defendants instructed the firm of Ndegwa & Ndegwa Advocates who filed a Memorandum of Appearance and a Notice of Preliminary Objection and on 2nd December 2016, the defendant filed a replying affidavit to this Originating Summons.

PLAINTIFFS CASE

PW1 was Mary Njeri who testified on oath and stated that the suit land L.R. No. BARAGWE/GUAMA/434 is measuring approximately 4.8 acres and that she is claiming together with her co-plaintiff a total of 3.8 acres. She referred to Item No. 1 in her list of documents which is a green card in respect of the suit property. The 1st plaintiff stated that the first registered owner was one Matau Kiarago who was entered in the register on 20th January 1959. She stated that the second entry was on 3rd October 1962 where Magu Ngari bought $\frac{3}{4}$ shares of the suit land while the original registered owner remained with $\frac{1}{4}$ shares. She testified that Magu Ngare bought the $\frac{3}{4}$ shares with her father Mboi Maruga though the name of her father is not reflected in the register. She said that the original owner Matau Kiarago remained with $\frac{1}{4}$ shares which was equivalent to one acre. After her father and Magu Ngari bought $\frac{3}{4}$ shares of the suit land, they took possession which was equivalent to 3.8 acres. The original owner Matau Kiarago continued to occupy the remainder $\frac{1}{4}$ share which was equivalent to one acre. She stated that Matau Kiarago had no wife or children. The 1st plaintiff stated that his father took possession of the land and later took them to the land and they continued occupying the land until their father and Magu Ngari died. She stated that after the demise of her father, she continued using the land where she has built five houses and developed on the portion she is occupying with her family. She has also planted coffee, tea, bananas, nduma, sweet potatoes, beans etc. She said that she has lived on the land for more than 57 years. She stated that sometime in 2012, she received a demand letter asking her to vacate from the suit land. She conducted a search and found that the suit land is registered in the name of one Muchira Kiara who got registered on 11th September 1981. She stated that the said Muchira Kiara is the son to the brother to Matau Kiarago who was the original owner and on 3rd July 1989, title deed was issued. On 9th October 2012, there was a new proprietor namely Samuel Chomba Muchira and on the same date, a new title deed was issued. The 1st plaintiff further stated that Samuel Chomba Muchira is the son of Muchira Kiara who was the brother to Matau Kiarago. She produced the green card as Plaintiffs Exhibit No. 1. She stated that Matau Kiarago and Magu Ngari have since died and she filed succession cause in respect of her father's Estate at Gichugu Law Courts. She produced the same as Plaintiff's Exhibits No. 2. She also stated that sometimes in 1981, Mwaniki Musau had filed a case against one Njeru Magu and Mboi Maruga for a claim of Ksh. 500/= in respect of the suit property. She said that the case was RMCC No. 44/8 (Gichugu). She produced the proceedings as Plaintiffs Exhibit No. 3. She said that when her father died, he left her mother

in the suit land and before her mother passed on, she left a will in respect of the suit land which she also produced as Plaintiffs Exhibit No. 4. She stated that her mother passed away in 2011 and was buried in the suit land. She stated that when she discovered that the suit land was registered in the name of Samuel Chomba, she lodged a caution which she also produced as Plaintiffs Exhibit No. 5.

PW2 was Nichasio Kabunyi Ngrigacha who is also the 2nd plaintiff. He testified on oath and stated that he lives on land parcel No. BARAGWE/GUAMA/434 measuring approximately 4.8 acres. He stated that he has lived on the suit property since 1962 and has planted Avocado, Macadamia and bananas. He has also built five (5) roomed house. He stated that his father is Ngrigacha Magu (deceased) and his grandfather was Magu Ngari. The 2nd plaintiff further stated that the first registered owner was Matau Kiarago and in 1962, his grandfather Magu Ngari was registered as co-owner with a share holding of $\frac{3}{4}$ share while the remainder share of $\frac{1}{4}$ remained with Matau Kiarago. The 2nd plaintiff also stated that when his grandfather died, a succession cause was filed in Gichugu Law Courts. He stated that his grandfather bought the $\frac{3}{4}$ shares with one Mboi Maruga but the same is not reflected on the register. After they filed a Succession Cause, the Court gave Mboi Maruga 1.54 acres while the share of his grandfather was shared between Marucella Karugo and Margaret Wanjira whereby each was given 0.77 shares. However, the grant was not registered at the Lands office. He stated that in 1981, the whole land was transferred to one Muchira Kiara Gachoki and later transferred to Samuel Chomba Muchira in 2012.

PW3 was Simon Mugo Mboi who stated that land parcel No. BARAGWE/GUAMA/434 was first registered in the name of Matau Kiarago on 20th January 1959. He stated that sometime in 1962, Matau Kiarago sold 3 acres to Magu Ngari and Mboi Maruga. However, Mboi Maruga was not reflected in the register. He said that both Magu Ngari and Mboi Maruga were brothers. He said that Matau Kiarago sold the three acres and remained with one acre. After Magu Ngari and Mboi Maruga bought the three acres, she started occupying and utilizing the land by planting coffee, tea and bananas. He stated that Magu Ngari later passed on leaving his two widows namely Marucella Karugo and Margaret Wawira. He said that Mboi Maruga also died later and was buried on the suit land.

DEFENDANT'S CASE

The defendant Samuel Chomba testified and stated that the suit land parcel No. BARAGWE/GUAMA/434 belongs to him. He became registered in 2012. Before then, the land was in the name of his father Muchira Kiara. He said that his father inherited the land from his grandfather Matau Kiarago. He stated that he was not aware of any transaction between his grandfather Matau Kiarago on one hand and Mboi Maruga and Magu Ngari on the other hand regarding the suit land. He stated that Mary Njeri does not live on the suit land but lives about 500 metres away. He stated that Nichasio Kabunyi lives in the suit land and has constructed a temporary structure and that he is not cultivating on the same but only goes there to sleep. He stated that it is not true that the plaintiffs have lived on the suit land for more than 12 years.

ANALYSIS AND DECISION

I have considered the viva voce evidence of the plaintiffs and their single witness. I have also considered the testimony of the defendant and the submissions by their counsels. The plaintiffs claim is based on the acquisition of land by adverse possession. A claim for land by adverse possession is founded on **Section 38 (1) of the Limitation of Actions Act Cap. 22 Laws of Kenya** which stipulates thus:

“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

(2) An order made under sub-section (1) shall on registration take effect subject to any entry on the register which has not been extinguished under this Act”.

The plaintiffs in their evidence on oath stated that they have been in occupation of the suit property since 1962 to-date. They also testified that they constructed homes where they live with their families and have even planted food and cash crops such as coffee, tea, Avocado and bananas. Other than denying that the plaintiffs have not lived in the suit land continuously for a period of 12 years, the defendants did not say when the plaintiffs occupied the suit land. The defendant also stated that there has been a dispute over ownership of the portion without stating the nature of the dispute and any documents or correspondence relating to the alleged dispute. I am more inclined to believe the testimony of the plaintiffs that they have lived in the suit land since 1962. The green card for the suit land No. BARAGWE/GUAMA/434 shows that Magu Ngari acquired $\frac{3}{4}$ share of the suit land at a cost of 1,200/= on 3/10/1962 as reflected in the land Register. However, when Muchira Kiara acquired the land through succession on 11th September 1981, he did not disclose that there were other third parties who had acquired interest in the suit property. The said Muchira Kiara transferred the property to the defendant on 9th October 2012 without resolving the issue. The defendant did not even attempt to resolve the issue before acquiring the property into his name. The original registered owner Matau Kiarago sold a share of the suit land to one Magu Ngari who paid a consideration of Ksh. 1,200/= and the said Magu Ngari took possession and occupation of the same making extensive developments. The occupation and possession has extended in successive generations from 1962 to-date.

It is now a well settled principle that a party claiming Adverse possession ought to prove that his possession was “*nec vi, nec clam, nec precario*” which is translated to mean peaceful, open and continuous. The possession should not have been through force nor secrecy and without the authority or permission of the owner. The claimant must show that they have been in continuous possession of the land for 12 years or more and that such possession has been open and notorious to the knowledge of the owner and that they have asserted a hostile title to the owner of the property.

The plaintiffs have stated that they have been in occupation of the suit property from 1962 to-date which is a period of over 12 years. They also asserted that they have been in occupation and possession of the suit property openly and continuously and without interruption for all that period. There was no evidence availed to controvert the plaintiffs averments. The plaintiffs produced a copy of green card showing that the original proprietor of the suit land was Matau Kiarago who is the defendant's grandfather. Considering the totality of the evidence availed by the parties and the submissions by the counsels, it is clear that the plaintiffs have proved their case on a balance of probability and

have brought themselves within the confines of the doctrine of adverse possession.

In the final analysis, the suit instituted by way of Originating Summons (O.S) dated 29th April 2014 and filed in Court on 19th May 2014 is allowed and I hereby enter judgment in the following terms:-

- (1) The plaintiffs/applicants are declared to have become entitled by adverse possession of all that piece of land described as land parcel No. BARAGWE/GUAMA/434 measuring 3.08 acres.***
- (2) The plaintiffs be registered as proprietors of the said land parcel No. BARAGWE/GUAMA/434 measuring 3.08 acres.***
- (3) The Land Registrar Kirinyaga County to rectify the register to reflect the above changes.***
- (4) Each party to bear his own costs of the suit.***

READ, DELIVERED and SIGNED in open Court at Kerugoya this 12th day of June, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Mrs. Makworo for Defendant
2. Ms Magara holding brief for Muraguri for Plaintiffs
3. Mbogo – Court clerk.