



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT NAIROBI

ELC SUIT NO. 971 OF 2015(O.S)

JOYCE NJOKI MBURU.....PLAINTIFF

VERSUS

DAVID MBURU MARARO.....DEFENDANT

JUDGMENT

The plaintiff brought this suit by way of Originating Summons dated 5th October 2015 seeking the following orders:

1. **THAT** the plaintiff has acquired title to all that parcel of land comprised in title No. Gatamaiyu/Kamburu/251 (hereinafter referred to as “the suit property”) under sections 37 and 38 of the Limitation of Actions Act, Chapter 22 Laws of Kenya.
2. **THAT** the defendant’s title to the suit property has been extinguished in favour of the plaintiff under sections 37 and 38 of the Limitation of Actions Act, Chapter 22 Laws of Kenya.
3. **THAT** the defendant should transfer the suit property to the plaintiff forthwith.
4. **THAT** the defendant does pay the costs of the suit.

The Originating Summons was supported by the affidavit of the plaintiff sworn on 5th October 2015 in which she stated as follows. The defendant was the registered owner of the suit property. She took possession of the suit property in 1984 and started cultivating food and cash crops thereon. She also planted trees. Sometimes in 1988, she constructed a building on the suit property and settled therein with her 5 children. She continued to use the entire parcel of land measuring approximately 1.6 acres openly and as of right with her children. She had sustained herself on the suit property through cultivation of food crops and raising of dairy cattle. Prior to the filing of this suit, she had filed one suit against the defendant in relation to the suit property namely, HCCC No. 57 of 2012 which she withdrew. In June, 2015, the defendant entered the suit property without her knowledge and sprayed the Napier grass that she had planted for her dairy cattle with poisonous chemicals with the intention of disabling her economically. She had occupied the suit property for 30 years.

The Originating Summons was opposed by the defendant through a replying affidavit sworn on 8th December, 2016. In reply to the plaintiff’s claim, the defendant stated as follows. The defendant admitted that he was the registered owner of the suit property. He denied however that the plaintiff took possession of the suit property in 1984 and constructed a house thereon in 1988 which she occupied with her children. The defendant also denied that the plaintiff had planted trees, food crops and cash crops such as coffee on the suit property. The defendant averred that the plaintiff was staying a lone on a portion of the suit property measuring 1/8 of an acre. The defendant stated that a part from a portion measuring 1/8 of an acre which is occupied by the plaintiff who lives in a two roomed structure which was put up by the defendant thereon, the rest of the suit property which measures 1.6 acres in total is utilised by the defendant. The defendant stated that he had planted in the said remaining portion of the suit property tea bushes, blue gum trees and subsistence crops. He stated that the plaintiff was his tenant at will. He denied that the plaintiff was cultivating a portion of the suit property and also rearing dairy cattle thereon. The defendant stated that the plaintiff had filed a suit against him at the Land Disputes Tribunal in 1994 over the suit property which was dismissed. The defendant averred that since 1994, the plaintiff had not been in exclusive, quiet and peaceful possession of the suit property. The defendant denied that he sprayed the plaintiff’s Napier grass with poisonous chemicals and that the plaintiff had occupied the suit property peacefully for over 30 years. The defendant averred that the plaintiff had not demonstrated that she had acquired the suit property by adverse possession. He termed the Originating Summons frivolous, vexatious and an abuse of the process of the court.

At the trial, the plaintiff gave evidence and called two witnesses. In her testimony, the plaintiff adopted her witness statement dated 5th October, 2015 and affidavit sworn on the same date in support of the Originating Summons as her evidence in chief. The plaintiff produced the documents attached to her bundle of documents dated 13th September, 2016 as exhibits. The plaintiff reiterated that she had occupied the suit property since 1984. The plaintiff stated that initially, she was living on the suit property with the defendant as a husband and wife until the time when the defendant vacated the premises and went to live with his other wife. The plaintiff stated that she had planted tea bushes,

pears, avocados and mangoes on the suit property. The plaintiff stated that the defendant had been threatening to evict her from the suit property claiming that she was not his wife. The plaintiff stated that she had lived on the suit property openly as of right and that the defendant was registered as the owner of the suit property in trust for her. The plaintiff stated that the suit property should be transferred to her name and the defendant restrained from trespassing thereon.

In cross examination, the plaintiff stated that the portion of the suit property that was under her occupation was about 1/2 of an acre. She stated that the rest of the property was covered with tea bushes. She stated that she picked tea from the tea bushes until 1988 when the defendant brought other people to pick the tea for him. She denied that she was the defendant's tenant on the suit property. She stated that she was residing in a three roomed wooden house with a detached kitchen and also had a cow shed. The plaintiff denied filing a petition for divorce against the defendant or a suit against him at the Land Disputes Tribunal over the suit property. The plaintiff's witnesses, Josephine Wambui Mburu (PW2) and John Waweru Harman (PW3) also adopted their witness statements as their evidence in chief. They corroborated some aspects of the plaintiff's evidence.

In his testimony, the defendant adopted his witness statement dated 8th December, 2016 as his evidence in chief and produced the documents attached to his bundle of documents of the same date as exhibits. In cross examination, the defendant stated that he had constructed residential buildings on the suit property that he rented out to tenants. He stated that he had asked the said tenants to vacate the said buildings and that all the tenants vacated except the plaintiff who remained in occupation of a three roomed house on the suit property. He stated that the plaintiff was his tenant and that he had demolished the buildings which were vacated by the tenants. The defendant denied that the plaintiff was his wife. In examination by the court, the defendant stated that he evicted the tenants who were occupying other buildings on the suit property in 1994. He stated that the plaintiff remained on the suit property not because she was his wife but on the allegation that she had not been given sufficient notice.

After the conclusion of testimony, the parties made closing submissions in writing. The plaintiff filed his submissions on 2nd August, 2019 while the defendant filed his submissions on 18th November, 2019. I have considered the Originating Summons together with the supporting affidavit. I have also considered the replying affidavit by the defendant, the evidence adduced by the parties and the submissions by their respective advocates. In Salim v Boyd and Another [1971] E.A. 550, it was held that for a claimant of land by adverse possession to succeed, he must prove that he has been in open, continuous and uninterrupted occupation of the land for a period of 12 years or more. In Kimani Ruchine & Another v Swift, Rutherford Co. Ltd. & another [1977] KLR 10 Kneller J. stated as follows at page 16;

“The Plaintiffs have to prove that they have used this land which they claim as of right, necvi, nec clam, necpccario (no force, no secrecy, no evasion)The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”

In Wambugu v Njuguna [1983] KLR 172 the Court of Appeal stated as follows:

“First in order to acquire by the Statute of Limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title entails acts which are inconsistent with his enjoyment of the soil and for the purpose for which he intended to use it. The Limitation of Actions Act (Chapter 22) on adverse possession contemplated two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”

In Dr Ojienda's, Principles of Conveyancing Hand Book, Law Africa Vol II at page 97 the author has stated that:

“Where the claimant is in possession of the land with leave and licence of the true owner in pursuance of a valid agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence, the occupation is not adverse but with permission, the occupation can only be either with permission or adverse, the two concepts cannot co-exist.”

In Jandu v Kirpal [1975] E. A 225 Chanan Singh J. stated that:

“The rule on ‘permissive possession’ is that possession does not become adverse before the end of the period during which the possessor is permitted to occupy the land”.

In Wilson Kazungu Katana & 101 Others v Salim Abdalla Bakshwen & another [2015] e KLR, the Court of Appeal cited with approval its decision in the case of Samuel Miki Waweru v Jane Njeri Richu, Civil Appeal No. 122 of 2001(UR), where it stated that:

“..it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in (accordance with) provisions of an agreement of sale lease or otherwise. Further as the High Court correctly held in Jandu vs. Kirpal [1975] E.A.225 possession does not become adverse before the end of the period for which permission to occupy has been granted....”

In Githu v Ndeete [1984] KLR 776 it was held that:

“Time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his rights or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes an effective entry into

land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act.”

It is on the foregoing principles that the Originating Summons before me falls for consideration. From the evidence on record, I am satisfied that the plaintiff entered the suit property in 1988 and was still in occupation of the property as at 6th October, 2015 when she filed this suit. Whereas the plaintiff claimed that she entered the suit property as the defendant’s wife, the defendant disowned that relationship and claimed that the plaintiff entered the property as his tenant. The issue as to whether or not the plaintiff was the defendant’s wife was determined by the lower court in, Nairobi Chief Magistrate’s Court, Divorce Cause No. 245 of 2011, Joyce Njoki Mburu v David Mburu Mararo. In that case, the court held that the plaintiff had failed to prove that she was married to the defendant and dismissed her prayer for divorce.

In view of that decision by the lower court, I will agree with the defendant that the plaintiff entered the suit property as a tenant. The defendant led evidence that in 1994, she ordered all his tenants on the suit property including the plaintiff to vacate the property. He stated that all the tenants vacated except the plaintiff who claimed that she had been given insufficient notice. The defendant did not place any evidence before the court showing that after he gave the plaintiff a notice to vacate the suit property in 1994 and the plaintiff refused to do so, he took any action to evict her from the property. There is also no evidence that after the plaintiff refused to vacate the suit property, she continued to pay rent to the defendant thereby creating a new tenancy between her and the defendant. The evidence before the court shows that the plaintiff continued to occupy a house that had been put up by the defendant on the suit property as her home. There is also evidence that the plaintiff kept dairy cattle and also cultivated food crops on a portion of the suit property. These activities in my view were inconsistent with the defendant’s ownership of the portion of the suit property that was occupied by the plaintiff. The evidence before the court shows that the defendant asserted his right to a portion of the suit property that was under tea cultivation but not the portion occupied by the plaintiff.

Due to the foregoing, I am satisfied that as at the time of coming to court, the plaintiff had occupied a portion of the suit property openly and peacefully for a continuous period of over 21 years (1994 to 2015) without the defendant’s permission. It is my finding therefore that the defendant’s title to the said portion of the suit property has been extinguished pursuant to the provisions of section 17 of the Limitation of Actions Act, Chapter, 22 Laws of Kenya. The defendant is therefore holding the said portion of the suit property in trust for the plaintiff.

The plaintiff led evidence that the portion of the suit property in her actual occupation was 1/2 of an acre. The defendant on the other hand contended that the portion of the suit property that was occupied by the plaintiff was 1/8 of an acre. Neither the plaintiff nor the defendant placed evidence before the court in proof of their respective claims. In the circumstances, the court will not adopt any of the measurements given by the parties but will make an appropriate order for the actual measurement of the portion of the suit property occupied by the plaintiff to be ascertained.

In the final analysis, I am satisfied that the plaintiff has proved her claim against the defendant on a balance of probabilities. Consequently, I hereby enter judgment for the plaintiff against the defendant on the following terms;

1. I declare that the plaintiff has acquired by adverse possession the portion of all that parcel of land known as Gatamaiyu/Kamburu/251 which she is occupying and using.
2. The defendant shall cause a survey and subdivision to be carried out by a Government Surveyor at the cost of the plaintiff for the purposes of demarcating the portion of all that parcel of land known as Gatamaiyu/Kamburu/251 occupied and used by the plaintiff and shall thereafter transfer the said portion to the plaintiff.
3. The portion of Gatamaiyu/Kamburu/251 to be transferred to the plaintiff shall under no circumstance be less than 1/8 of an acre.
4. In the event that the defendant fails to comply with the terms of the order given in paragraph 2 above, without prejudice to any remedy the plaintiff may have against the defendant, the Deputy Registrar of this court shall be authorised to execute any document or instrument necessary for the purposes of enforcing that order.
5. The plaintiff shall meet the statutory charges and other costs payable on the transfer of the said portion of Gatamaiyu/Kamburu/251 to her name.
6. Either party shall be at liberty to apply limited only to the issues that may arise in the course of the subdivision of Gatamaiyu/Kamburu/251 pursuant to the orders issued herein.
7. Each party shall be bear its own costs of the suit.

Delivered and Dated at Nairobi this 11th Day of June 2020

S. OKONG’O

JUDGE

Judgment read through Microsoft Teams video conferencing platform in in the presence of;

N/A for the Plaintiff

N/A for the Defendant

