



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. CASE NO. 5 OF 2015 (O.S.)

NJIRU GIKINGI.....APPLICANT

VERSUS

NYAGA MUTHANGATO.....RESPONDENT

JUDGEMENT

1. By a notice of motion dated 16th January 2015 brought under **Section 38** of the **Limitation of Actions Act (Cap. 22)** and **Order 37 Rule 7** of the **Civil Procedure Rules** the Applicant sought determination of the following nine (9) questions:

- a) *Who is the registered proprietor of Land Parcel Nthawa/Siakago/1683?*
- b) *Does the Applicant freely, openly and exclusively live in Land Parcel No. Nthawa/Siakago/1683?*
- c) *For how long has the Applicant occupied Land Parcel Nthawa/Siakago/1683?*
- d) *During the period of the occupation, what activities has the Applicant engaged in within the suitland?*
- e) *Has the registered proprietor of the suitland been privy to the Applicant's presence and activities in the suitland?*
- f) *Has the Applicant's activities in the suitland been consistent, continuous and uninterrupted for a period of not less than 12 years?*
- g) *What other/further orders that benefit justice should this court grant to the Plaintiff?*
- h) *What orders ought to be made as to costs?*

2. The said originating summons was based upon the grounds and facts set out in the supporting affidavit of the Applicant sworn on 16th January 2015 and the annexures thereto. The Applicant contended that he had been in continuous, exclusive and uninterrupted possession of *Title No. Nthawa/Siakago/1683* (the *suit property*) since 1960 and that he had resided thereon with his family members to the knowledge of the Respondent who had never attempted to evict them.

3. The Applicant further contended that he had extensively developed the suit property over the years by constructing dwelling houses and planting trees, cash crops and food crops on the suit property without any objection by the Respondent. He further stated that both his late mother and late grandmother were buried on the suit property upon their death. He, therefore, contended that the Respondent's right to recover the suit property had been extinguished by operation of law and that he had acquired the suit property on account of adverse possession.

4. The material on record indicates that the Respondent did not file a response to the originating summons despite service. There is an affidavit of service on record sworn by G.M. Karuoro on 19th February 2015 stating that the Respondent was served on 29th January 2015 at his home in Kianthawa village in Siakago at 1.40 pm. It was indicated that the Respondent was pointed out to the process server by the Applicant. The suit, therefore, proceeded in the absence of the Respondent.

5. The record indicates that the suit was fixed for hearing on 4th May 2015 before the High Court (Hon. Bw'ongwa J). The Applicant testified on his own behalf as PW1 and called two of his sons who testified in his favour as PW2 and PW3 respectively before closing his case. The suit was thereupon scheduled for judgement on 14th May 2015. However, due to jurisdictional issues beyond the control of the High Court it was unable to deliver judgement on time or at all. The jurisdictional issue was resolved with finality in **Republic Vs Karisa Chengo & 2 Others [2017] eKLR** in which the Supreme Court of Kenya held that the High Court had no jurisdiction to entertain environment and land matters.

6. It would appear from the material on record that the file was sometime in 2019 referred by the Deputy Registrar to Hon. Justice Bw'onwonga in Narok for the purpose of preparing judgement. When the matter was placed before the honourable Judge, he declined to entertain the matter on account of want of jurisdiction. He consequently referred the file back to the Environment and Land Court at Embu for preparation of the judgement.

7. Although the Applicant framed a total of nine (9) questions for determination in the originating summons, the court is of the opinion that those questions may be condensed into the following two determinative questions:

a) *Whether the Applicant has demonstrated his claim for adverse possession with respect to the suit property.*

b) *Who shall bear costs of the suit.*

8. The elements of adverse possession were summarized in the case of **Kasuve Vs Mwaani Investments Ltd & 4 Others [2004] 1KLR 184** as follows:

“...and in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, Wanja Vs Sakwa No. 2 [1984] KLR 284. A title by adverse possession can be acquired under the Limitation of Actions Act for part of the land...”

9. The court has considered the pleadings, documents, and evidence on record on adverse possession. The Applicant's evidence on record indicates that the Applicant was born and brought up on the suit property. The evidence also indicates that he and his sons have built some residential houses on the suit property where they have resided for several years. The material also indicates that the Applicant has developed the suit property by planting trees, banana stems, Muguka, avocados, mangoes and other crops over the years.

10. The court has noted that the Applicant's evidence was not controverted since the Respondent did not appear in the proceedings. The court is thus satisfied on the basis of the material on record that the Applicant has satisfied the requirements of adverse possession as set out in law. The court is satisfied that the Applicant has dispossessed the registered owner of the suit property for the statutory period of at least 12 years prior to the filing of the originating summons. The court has noted that the Respondent was not the first registered owner of the suit property. However, it has been held that a change of ownership does not necessarily affect a claim for adverse possession.

11. The second issue is on costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. Accordingly, a successful litigant should ordinarily be awarded costs of the suit unless, for good reason the court directs otherwise. The court has noted that the Respondent did not defend the Applicant's claim for adverse possession. In the circumstances, the court is of the opinion that there should be no order as to costs.

12. The upshot of the foregoing is that the court finds merit in the Applicant's originating summons dated 16th May 2015. The court finds and holds that the Applicant has demonstrated his claim for adverse possession. Consequently, the court makes the following orders for disposal of the suit:

a) The Respondent's right to recover the suit property from the Applicant has been extinguished under the **Limitation of Actions Act (Cap. 21)**.

b) A declaration is hereby made that the Applicant, Njiru Gikingi, has become entitled to be registered as proprietor of *Title No. Nthawa/Siakago/1683* in place of the Respondent, Nyaga Muthangato.

c) There shall be no order as to costs.

13. It is so decided.

JUDGEMENT DATED and SIGNED in Chambers at EMBU this 9TH DAY of JULY, 2020 and delivered via Microsoft Teams in the presence of Mr. Eddie Njiru for the Applicant and in the absence of the Respondent.

Y.M. ANGIMA

JUDGE

09.07.2020