



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 818 OF 2013 (OS)

NAHASHON MURIITHI JEREMIAH
..... PLAINTIFF

VERSUS

NELSON MWANGI KINGURU (Being sued as the Legal Representative of the Estate of the late ESTHER WANJIRU KINUMBI
..... DEFENDANT

JUDGMENT

The land parcel No. MWERUA/KAGIOINI/687 hereinafter the suit land) was originally registered in the names of one MBIRU KINUMBI the uncle to the defendant herein. Following his death on 3rd June 1983, he was succeeded by his sister ESTHER WANJIRU KINUMBI and the suit land was registered in her names on 6th February 1992 after succession proceedings in Cause No. 80 in 1984 at the Nyeri Resident Magistrate's Court. ESTHER WANJIRU KINUMBI herself passed away on 20th October 1997 and following Embu High Court Succession Cause No. 397 of 2008, the suit land was bequeathed to the defendant who became the registered proprietor thereof and the title was issued to him on 30th January 2014.

On 3rd December 2013 (a month before the issuance of the title deed to the defendant), the plaintiff filed an Originating Summons seeking a declaration that he has acquired title to the whole of the suit land by adverse possession and should therefore be registered as proprietor thereof. The claim was based on the pleading that he has been in exclusive possession of the suit land which he has extensively developed for over 60 years having succeeded the late MBIRUI KINUMBI who he says was related to him by virtue of sharing a great grandfather. That no one has even attempted to evict him from the suit land.

The defendant filed a statement objecting to that claim adding that in fact the plaintiff lives on his own parcel of land being MWERUA/KAGIOINI/199 which is adjacent to the suit land and only took advantage of the death of the plaintiff's mother (ESTHER WANJIRU KINUMBI) to encroach on the same. Defendant added that the land was registered in his names following Succession Cause No. 397 of 2008 at Embu High Court following the death of his late mother who had in turn succeeded her brother MBIRUI KINUMBI. Defendant added that although the plaintiff had been asked to vacate the suit land by the firm of Iseme and Krugat Advocate, he has refused to do so.

The above is a summary of the pleadings that the parties canvassed before me when the hearing proceeded by way of viva voce evidence on 16th December 2014. Before that, this Court had on 11th July 2014 dismissed the plaintiff's application seeking to injunct the defendant from dealing with the land.

I have considered the pleadings herein and the evidence by both parties including the defendant's witness JOSEPH KABIDU (DW2).

In his oral evidence in support of his claim, the plaintiff said he was born on the suit land where his parents are buried and that the original owner (MBIRU KINUMBI) brought him up. He added that since MBIRU KINUMBI had no wife or children of his own, he allowed plaintiff to cultivate it. He added that MBIRU KINUMBI gave the suit land to him.

In response, the defendant's evidence was that the suit land belonged to his late uncle MBIRU KINUMBI who was living there with his sister and mother to defendant (ESTHER WANJIRU KINUMBI). Following the death of MBIRU KINUMBI, the suit land passed on to ESTHER WANJIRU KINUMBI and thereafter to the defendant after Succession proceedings in Nyeri and Embu Court. Defendant added that the plaintiff has never lived on the land nor did he bury his parents there as alleged and infact he lives on his own parcel of land being MWERUA/KAGIOINI/199 which is adjacent to the suit land.

Section 38 (i) of the Limitation of Actions Act authorizes a person who claims to have become entitled to land by adverse possession to apply to the High Court for an order that he be registered as proprietor in place of the registered proprietor and in order to be so entitled, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition - **WANJE VS SAIKWA NO. 2 1984 K.L.R 284**. Therefore, the plaintiff herein has to prove the following in order to be entitled to the orders sought in his Originating Summons.

- ***Clear possession of the suit land***
- ***That such possession was not with the consent of the owner***
- ***That the possession or occupation was continuous and un-interrupted for a period of 12 years and more***

The defendant has stated that the plaintiff has never been in occupation of the suit land and infact lives on his own land adjacent to it. The plaintiff did not deny that he has a parcel of land No. MWERUA/KAGIOINI/199 adjacent to the suit land. Indeed in cross-examination by the defendant he said:-

“It is true that I have my land MWERUA/KAGIOINI/199. The land subject of this suit is not your land”

If indeed the plaintiff was living on the suit land with his family as alleged, nothing would have been easier than for him to produce evidence such as photographs of his home as proof. That is why this Court is inclined to believe the defendant's evidence when he said:-

“The plaintiff has lied. There is no house there and neither did he bury his parents there as alleged. He lives on his land No. MWERUA/KAGIOINI/199 which is adjacent to my land. He has never been in occupation of my land”

The defendant added in his evidence in chief that the plaintiff took advantage of the death of ESTHER WANJIRU KINUMBI and started trespassing onto the land and cutting trees thereon. Indeed even before ESTHER WANJIRU KINUMBI's death on 20th October 1997, her lawyers ISEME and KURGAT Advocates had addressed the plaintiff vide their letter ref CIV/200-73/92 dated 22nd April 1992 demanding that he stops interfering with the suit land. By that letter, the late ESTHER WANJIRU KINUMBI was infact asserting her right to the suit land and so the plaintiff cannot claim continuous and un-interrupted occupation of the suit land.

There is further evidence that by a letter dated 30th June 1980 from the Land Registrar Kirinyaga addressed to the plaintiff (see defendant's annexure NMK 1) he was advised that although he had lodged a caution against the suit land claiming interest as a beneficiary on 15th August 1979, he had failed

to establish his claim and the caution had been removed. If indeed he had been on the suit land from the time of his birth and even planted coffee thereon in 1952 before the emergency (as per his evidence in chief), he ought to have filed these proceedings long ago and indeed during the life times of the previous registered proprietors namely MBIRU KINUMBI and ESTHER WANJIRU KINUMBI. That he did not do so is a clear indication that he was aware that such a claim either in adverse possession or otherwise would be resisted as un-founded. It is also instructive to note that the defendant's witness JOSEPH MWANGI KABIRU (DW2) was emphatic in his testimony that the plaintiff does not live on the suit land and has his own land adjacent to it. On the basis of the above, this Court is not inclined to make a finding that the plaintiff has been in continuous and un-interrupted occupation of the suit land in order to rule that he is entitled to have acquired possession of the same through adverse possession. His claim must therefore fail on that ground.

Secondly, a claim for adverse possession is a claim against the registered proprietor of the land that the claimant seeks to have registered in his names. Indeed the relevant parts of **Section 38 of the Limitation of Actions Act** reads as follows:-

“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 these 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 registered as the proprietor of the land” emphasis added.

The plaintiff's claim for orders on adverse possession are against the defendant herein who was only registered as owner of the suit land and the Certificate of title issued to him on 30th January 2014. This suit was filed on 3rd December 2013. If any claim for adverse possession in respect to the suit land has to be sustained against the defendant, it has to be brought after 12 years from the date when the defendant became the registered proprietor of the suit land. The defendant had only been registered as the proprietor of the suit land for a period of under two months. This claim is clearly pre-mature – see the case of **FRANCIS GITONGA MACHARIA VS MUIRURI WAITHAKA C.A CIVIL APPEAL NO. 110 of 1997 (NBI)** where the Court of Appeal stated that the limitation period for purposes of adverse possession only starts running after the registration of the land in the name of the defendant. It is therefore obvious that the law does not support the plaintiff's claim to be declared to have become entitled to the suit land through adverse possession since the defendant was only registered owner thereof just under some two months before this suit was filed. This claim cannot therefore succeed.

It is clear from both the evidence on record and the law that not only is this claim pre-mature but that also, the plaintiff's evidence does not support his claim to have been in continuous possession of the suit land even during the life-time of the two previous registered owners of the suit land. The plaintiff then decided to try his luck and filed this suit against the defendant.

Ultimately therefore, upon considering all the evidence herein, I am not satisfied that the plaintiff is entitled to the orders sought in his Originating Summons filed herein on 3rd December 2013. I find no merit in his claim which I hereby dismiss with costs.

It is so ordered.

B.N. OLAO

JUDGE

4TH MAY, 2015

4/5/2015

Before

Hon. Justice R. Limo

CC – Willy

Nahashon Muriithi Jeremiah

Plaintiff - present

Defendant - absent

COURT: Judgment signed and delivered in open Court in the presence of Plaintiff – Nahashon Muriithi Jeremiah and in the absence of the Defendant. The judgment delivered is translated to Kikuyu, a language the Plaintiff says he understands.

R.K. LIMO

JUDGE

4TH MAY, 2015

NAHASHON MURIITHI JEREMIAH: I pray for a copy of the judgment.

COURT: Copy of judgment to be awarded to the Plaintiff upon payment of requisite Court fees.

R.K. LIMO

JUDGE

4TH MAY, 2015