



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 51 OF 2014 (O.S)

JOHN MWANGI NDEGWA.....PLAINTIFF

VERSUS

ELIUD MACHARIA MAINA.....DEFENDANT

JUDGMENT

The facts in this case are fairly straightforward and un-disputed.

The property subject matter of this suit being land parcel No. LOC.15/GEITWA/70 (hereinafter the suit property) is registered in the names of WAIRATU WAIMIRI (deceased) as per the certificate of search annexed to the plaintiff's Originating Summons filed herein on 27th February 2014. The defendant is his personal representative by virtue of a Grant of letters of administration issued to him by the High Court of Kenya in Muranga Succession Cause No. 1121 of 2013. The same was confirmed on 25th November 2014 and the whole of the suit property measuring 1.0 acres was granted to one KANYI GICHOHI. However, in 1994, the plaintiff purchased a portion measuring 0.6 acres out of the suit property from one NJARO WAIRATU and one BENJAMIN MWANGI KIHUNGI who represented themselves to the plaintiff as the only beneficiaries of the Estate of the deceased. The plaintiff went into possession of the said portion of the suit property and remains in possession to-date awaiting formal sub-division and transfer. That possession is well known to the defendant who, together with the plaintiff's neighbours, have accepted the plaintiff as the owner of the said portion of the suit property. Plaintiff's possession and occupation of the said portion of the suit property is also well in excess of the period prescribed in law for which a claim of adverse possession may be brought against a registered proprietor of land.

Emboldened by those facts, the plaintiff moved this Court by way of the Originating Summons referred to above seeking the following orders:-

- 1. A declaration that the title of the said WAIRATU WAIMIRI, now deceased to a portion measuring zero point five (0.5) acres or thereabout out of land parcel No. LOC.15/GEITWA/70 and which portion is well defined and occupied by the plaintiff has been extinguished by the plaintiff's adverse possession thereof for a period of more than 12 years in terms of Sections 17 and 38 of the Limitation of Actions Act.***
- 2. A declaration that the plaintiff has acquired title to the said portion measuring zero point five (0.5) acres out of land parcel No. LOC.15/GEITWA/70 by his adverse possession thereof for a period of more than 12 years from the year 1994 or thereabout to-date.***
- 3. An order requiring and directing the Land Registrar Muranga to sub-divide land parcel No. LOC.15/GEITWA/70 in such a manner that the portion of 0.5 acres aforesaid is excised from the said land parcel and to register that portion in the name of the plaintiff JOHN MWANGI NDEGWA in place of WAIRATU WAIMIRI, deceased and in place of any other person succeeding the said WAIRATU WAIMIRI.***

4. The costs of this suit be borne by the defendant.

The Originating Summons was supported by the plaintiff's affidavit and that of his witness MARY MWIHAKI GITHINJI who confirmed that she has seen the plaintiff cultivate on the suit property since 1995 and has also constructed a house on the same. Annexed to the Originating Summons is a copy of certificate of search in respect of the suit property confirming that it has been registered in the names of the deceased since 1963. Also annexed is a copy of a sale agreement dated 27th September 1994 by which NJAIRO WAIRATO and BENJAMIN MWANGI KIHUNGI sold a portion measuring 0.6 acres out of the suit land to the plaintiff at a consideration of Ksh. 30,000/= out of which Ksh. 9,000/= was paid at the signing of the agreement and Ksh. 21,000/= was to be paid on execution of the transfer.

The defendant resisted this claim by way of a replying affidavit in which he deponed, inter alia that he is the personal representative of the deceased's Estate and that neither he nor NJARO WAIRATU or BENJAMIN MWANGI KIHUNGI or KANYI GICHOHI had the right to sell or distribute the suit property and therefore the agreement dated 27th September 1994 by which the plaintiff bought a portion of the suit property is void. Further that the plaintiff has been warned severally by the Provincial administration that the suit property was not available for sale.

Both parties filed their issues with the defendant acting in person and the plaintiff being represented by the firm of Waiganjo Gichuki Advocates. Directions having been taken on 7th October 2014, both parties agreed that there would be no need to proceed by way of viva voce evidence and that the suit be determined on the basis of the documents filed by each side. Parties however agreed to file written submissions which they did. I must at this stage

observe that the defendant annexed to his submissions an additional document being the confirmation of grant issued in his name in Muranga High Court Succession No. 1121 of 2013. This is evidence which ordinarily is not introduced by way of submissions and without leave. Nonetheless, this fact is not in dispute and no challenge to it was raised by the plaintiff and besides, no prejudice was caused by its production.

I have considered the Originating Summons, the reply thereto and the rival affidavits of the parties herein. As indicated above, the facts in this dispute are largely un-disputed. These are:-

- 1. The suit property is registered in the names of WAIRATU WAIMIRI now deceased. He died in 1964.**
- 2. The defendant was granted letters of administration with respect to deceased's Estate on 11th February 2014 and the same was confirmed on 25th November 2014 in Muranga High Court Succession Cause No. 1121 of 2013.**
- 3. The plaintiff bought a portion of the suit land measuring 0.6 acres from NJARO WAIRATU and BENJAMIN MWANGI KIHUNGI in 1994 at a purchase price of Ksh. 30,000/=.**
- 4. The plaintiff has been in possession and occupation of the said portion of the suit land since 1994 and has even built his home thereon.**
- 5. The said NJARO WAIRATU and BENJAMIN MWANGI KIHUNGI who are a son and grandson respectively of the deceased had not obtained any grant of administration in respect of the Estate of WAIRATU WAIMIRI.**

In my view, the issue for determination is whether a claim for adverse possession in respect of the portion of suit land occupied by the plaintiff can in fact be sustained against the defendant herein.

In **KASUVE VS MWAANI INVESTMENT LIMITED & FOUR OTHERS 2004 1 K.L.R. 184**, the Court of Appeal re-stated what a plaintiff in a claim for adverse possession has to prove in the

following terms:-

“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 dispossessing the owner or by discontinuation of possession by the owner on his own volition”

I have no doubt in my mind that the plaintiff has been in open continuous and un-interrupted possession and occupation of a portion of the suit property measuring 0.6 acres for over 12 years. That possession and occupation has also been with the knowledge of the defendant. Indeed this is conceded by the defendant when he depones in paragraph 14 of the replying affidavit as follows:-

“That the plaintiff’s stay in the suit property herein has been illegal and no member of the family of the late WAIRATU WAIMIRI sanctioned nor blessed his stay as erroneously alleged in his application which is frivolous and vexatious from the word go”

This is a claim for adverse possession premised upon **Section 17 and 38 of the Law of Limitations of Actions Act Section 38 (1)** of the said Act provides 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 then registered as proprietor of the land”

Although the defendant has taken issue with the fact that the plaintiff purchased the 0.6 acres of the suit property from persons who had no right to sell the same to plaintiff because the proceedings in the Succession Cause No. 1121 of 2013 were not complete, the plaintiffs claim is not based on any equitable interest nor does he seek to enforce the agreement by which he purchased the portion of the suit property from NJARO WAIRATU and BENJAMIN MWANGI KIHUNGI in 1994. The plaintiff’s claim is based on adverse possession and his counsel made this clear in his written submissions when he stated as follows:-

“But the plaintiff’s claim is based on adverse possession, not on the void contract of sale”

It is now well established that the combined effect of the relevant provisions of **Sections 7, 13 and 17 of the Law of Limitation of Action Act** is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of the adverse possession of that land – see **BENJAMIN KAMAU & OTHERS VS GLADYS NJERI C.A CIVIL APPEAL NO. 2132 of 1996**. It is also noteworthy that the new Land Laws promulgated after 2010 recognize the doctrine of adverse possession. **Section 28(h) of the new Land Registration Act 2012** recognizes some of the overriding

interests as

(h) ***“rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription”.***

Similarly Section 7 of the new Land Ac 2012 provides as follows:-

“Title to land may be acquired through –

- a. ---
- b. ----
- c. ----
- d. ***prescription”***

The defendant has deponed in his replying affidavit that the plaintiff ought to have ventilated his claim in MURANGA HIGH COURT SUCCESSION CAUSE NO. 1121 of 2013 and he has also annexed to his submissions the grant in that succession cause showing that the suit land is now the property of one KANYI GICHUHI. This Court can only state that the High Court in Muranga Succession Cause No.

1121 of 2013 could not have been in a position to adjudicate the plaintiff's claim because he was a stranger in that suit. Further, the succession proceedings could not determine the claim for adverse possession. There is no title document showing that the suit property has finally been transferred to KANYI GICHUHI or any other person and even if that was the case, it would still not defeat a claim founded on adverse possession. In **GITHU VS NDEETE 1984 K.L.R. 776**, the Court of Appeal stated as follows:-

“The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession”.

The defendant has also wondered why the plaintiff has not pursued NJARO WAIRATU and BENJAMIN MWANGI KIHUNGI who sold him the land in question. A party is entitled to pursue the claim that he feels will yield his expectation. The plaintiff herein opted to pursue a claim of adverse possession rather than a claim based on a void contract. That was well within his rights.

Although the registered proprietor of the suit property is deceased, the defendant is his personal representative having obtained a grant in respect of his Estate on 1st February 2014. The defendant is therefore sued in that capacity and indeed that explains why this suit was filed on 27th February 2014. It is clear from the case of **AMOS WAINAINA VS BELINDA MURAI & OTHERS HIGH COURT CIVIL CASE NO. 811 of 1975 (NBI)**, that such a claim can be brought against the personal representative of the registered proprietor of the land which is the subject of a claim for adverse possession. A similar position was taken by the Court of Appeal in the case of **ALEX NJONJO KARU & THREE OTHERS VS JOHN KAMAU GITUNGO C.A. CIVIL APPEAL NO. 278 of 2004 (NBI)**. The Originating Summons ought to have made it clear that the defendant was being sued in his capacity as the personal representative of the deceased. However, that omission is not fatal and did not cause any prejudice to the defendant.

Having considered all the evidence in this case, I am satisfied that the plaintiff is entitled to the orders sought in his Originating Summons. There is clear evidence that his occupation of 0.5 acres of the suit land has been exclusive, open, un-interrupted and with the knowledge of the defendant for over 12 years. The case of **GITHU VS NDEETE** (supra) is also authority that a party can claim only a portion of the land and not necessarily the whole land so long as possession of that area is exclusive and it can be identified. In his affidavit in support of this Originating Summons, the plaintiff has deponed as follows in paragraph 9:-

“That in 1994 the two sellers put me in occupation of what they estimated to be 0.6 acres pending formal sub-division and transfer and I fenced the portion using a live hedge and immediately started using the portion as my land. On the land I grow maize, bananas, napier grass, avocado trees, mango trees and grevillea trees and I also constructed my house on that portion”

It is obvious therefore that the portion of the suit land occupied by the plaintiff is well defined by the development thereon and also it is fenced and identifiable. And although the agreement refers to the portion purchased by him as being 0.6 acres, in his Originating Summons, he lays claim to 0.5 acres out of the suit land. The Court can only grant him what he claims in his pleadings.

Ultimately therefore, judgment is entered for the plaintiff against the defendant as prayed in the Originating Summons. Each party shall meet their own costs.

B.N. OLAO

JUDGE

4TH DECEMBER, 2015

4/12/2015

Before

B.N. Olao - Judge

Mbogo – CC

Mr. Miano for Waiganjo for Plaintiff – present

Defendant in person – present

COURT: Judgment dated, delivered and signed this 4th day of December, 2015 in open Court.

Mr. Miano for Waiganjo for Plaintiff present

Defendant in person – present

Right of appeal explained.

B.N. OLAO

JUDGE

4TH DECEMBER, 2015