



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC (OS) NO 37 OF 2016

SAMSON MBAABU NKARICHIAPLAINTIFF

VERSUS

SACINTA KINYA GITUMADEFENDANT

JUDGMENT

1. On 25.4.2016, the plaintiff filed this suit against the defendant claiming entitlement to land parcel No. Abothuguchi/Gaitu/2897 (the suit land) measuring 0.44 ha by way of adverse possession. He contended that the suitland was a result of sub-division of the original parcel no. Abothuguchi/Gaitu/433 which gave rise to parcel no. Abothuguchi/Gaitu/1368.

2. The suit was opposed by the defendant through her replying affidavit as well as the affidavits of her two witnesses namely: Felix Kiirinya M'Ikiao and Silas Muriungi Murwithania all filed on 22.6.2016.

Case for the plaintiff

3. The plaintiff testified as Pw1 and he adopted the contents of his affidavit dated 22.4.2016 as well as his statement dated 2.6.2016 as his evidence. He also produced the 9 documents in his list dated 2.6.2016 as Plaintiff-exhibits 1-9 respectively. The plaintiff contends that on 3.11.1992, he entered into a sale agreement with defendant's son for the sale of 1 acre to be excised from land parcel no. Abothuguchi/Gaitu/433. The said sale agreement is plaintiff exhibit 1.

4. He avers that he took possession of the land, built a two roomed house, began constructing a permanent 4 bed-roomed house and he also put up a perimeter live fence. He further states that the parcel he was buying was to be excised from the bigger portion Abothuguchi/Gaitu/433. This original parcel was later sub-divided to give rise to Abothuguchi/Gaitu/1368 as reflected in the green card availed as plaintiff exhibit 5. In turn, parcel 1368 was sub-divided to give rise to parcel no. Abothuguchi/Gaitu/2897 measuring 0.44 ha.

5. The plaintiff states that the parcel of land he was buying actually belonged to the defendant but the son was selling his share with authority and encouragement of the defendant. In his evidence in chief, the plaintiff stated that he entered the land on 3.11.1992, but in cross examination he mentioned the year of entry as 1993 and that he continued to use the land until year 2016 when he was evicted by the defendant. That is when he decided to go to court.

6. In his submissions the plaintiff urged the court to allow his claim averring that he has been in exclusive possession of one acre of land for the requisite period of 12 years. He contends that the act of subdividing the land does not stop time from running. He also avers that when he completed 12 years on the suit land, the defendant's title was extinguished hence defendant held the title as a trust. Thus the eviction which took place in 2016 was unlawful.

7. In support of his case the plaintiff relied in the case of **Gatimu Kinguru vs Muia Gathangi (1976) eKLR** and the case of **Wilson Njoroge Kamau vs Ng'ang'a Mucheru Kamau (2020) eKLR**.

Case for the defendant

8. DW 1, the defendant adopted the contents of her replying affidavit filed on 22.6.2016 and the annexures thereof as her evidence. She contends that she is the registered owner of land parcel no. Abothuguchi/Gaitu/2897. She says that the plaintiff has never been in continuous occupation of that parcel of land as alleged. She avers that it is only on 8.9.2000 when she was admitted in hospital that the plaintiff entered the land, cut down her trees and built 3 stone courses upon a house foundation. When she came from hospital, she found that indeed a house had been built using timber which had been sourced from her land. That is when she instructed her advocate to issue the plaintiff with a demand letter which is annexure "SK G1". The plaintiff stopped the trespass upon the land never to return.

9. She contends that she is not able to farm on the land so she has been leasing out the same, initially to one Felix Kiriinya M'Ikiao (DW 2) from 1988 to year 2007 and then to Silas Muriungi Murwithania (DW 3) from year 2007 to date. She contends that her child had never informed her that he had sold the land. She has never seen the plaintiff utilize the suit land.

10. DW2 Felix Kiriinya M'Ikiao also adopted his replying affidavit filed on 22.6.2016 as his evidence. He contends that from year 1988 to year 2007, he was continuously cultivating the suit land which was about 1 acre and it was part of parcel 433. However in the month of August/September 2000 the plaintiff came to the land, cut down trees dug, trenches and built a house. DW 2 reported the matter to the defendant who was by then admitted in hospital. Defendant managed to ward off the plaintiff from the suit land. DW 2 continued to utilize the land until year 2007 when he quit and the land was leased to one Silas Muriungi Murwithania. DW 2 therefore contends that save for the isolated incident of cutting trees and attempting to build on the land, the plaintiff has never occupied or used the land.

11. DW 3 Silas Muriungi Murwithania also adopted the contents of his replying affidavit filed on 22.6.2016 as his evidence. He contends that he has been cultivating the suit land as a tenant from year 2007 to date. Prior to him taking up the land, the same had been leased to Felix Kiriinya.

12. It was submitted for the defendant that at paragraph 6 of plaintiff's agreement produced as plaintiff exhibit 3, plaintiff clearly acknowledges the defendant's title to the suit land. Therefore by operation of section 23(1) (a) (i) of the Limitation of Actions Act cap 22, the period for purposes of adverse possession would be computed from that date of acknowledgment and which to date would be just over 4 years and 6 months to the date of filing suit. Defendant therefore urges the court to dismiss the suit with costs.

Determination

13. The pertinent question for determination is whether the plaintiff has met the criteria of an adverse possessor in so far as the suit parcel is concerned. In the case of **Mtana Lewa vs. Kahindi Ngala Mwagandi (2015) eKLR**, the court had this to say on the issue of adverse possession;

“The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the owner”.

14. In the case of **Kweyu vs Omutut (1990) KLR** the court of appeal stated as follows as far as the doctrine of adverse possession is concerned:

“By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor”.

15. In the case of **Gerard Murithi vs Wamugunda Muriuki and another (2010) eKLR** the court while making reference to the case of **Wambugu vs Njuguna (1983) KLR page 173** held that there are certain principles which must be met in the claim of adverse possession, one of which is that;

“Where a claimant claims the right to land under an agreement and in the alternative seeks adverse possession the rule is: The claimant possession is deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price. The claimant would succeed under adverse possession upon occupation for at least 12 years after such payment”.

16. The first telltale sign of a failed case is to be found in the contents of the agreements entered into by the plaintiff and the alleged son of defendant. These agreements have been produced by both parties as their exhibits whereby the initial one is dated 3.11.1992, the second one is dated 3.9.2008 while the final one is dated 19.10.2015. What resonates from these agreements is that the parties to the purported transactions were still in negotiations. Thus the original agreement remained in force upto year 2015. In the case of **M'mbaoni M'thaara vs. James Mbaka (2017) eKLR**, the court stated that ;

“There can never be an entry under a colour of right, when the alleged agreement between the plaintiff and the defendant has not collapsed”.

17. The second point to note is that the element of exclusive possession for the requisite period of 12 years is missing. Plaintiff's exhibit 3 is the agreement dated 19.10.2015 between him and Cerestine Ngari (the son of defendant). Clause 5 thereof indicates as follows: **“That the vendor now gives vacant possession to the purchaser immediately on or before 31st March 2016”.** Why would the parties insert this clause if the plaintiff had been in possession of the land?. The logical conclusion to make is that the plaintiff was not in possession of the land prior to the date of 19.10.2015.

18. The third point of consideration has to do with the identification of the suit land. In paragraph 4 of the plaintiff's affidavit dated 22.4.2016, he claims that the land he was buying was to be excised from the bigger portion no. 433 which was later subdivided to give rise to parcel 1368. Plaintiff's exhibit 5 is a copy of a green card for parcel no. Abothuguchi/Gaitu/1368 which parcel was registered in the name of the defendant on 13.6.1992. It therefore follows that by the time the plaintiff was entering into an agreement with Cerestine Ngari Kabutu the son of the defendant on 3.11.1992, the parcel no. 1368 was already in existence. Thus the element of exclusive possession of an identifiable portion of the land is missing.

19. The fourth point for consideration touches on the term “open and notorious”; Was the plaintiff's alleged occupation of the land open and

notorious?. The plaintiff has not given any details as to when he actually entered the land and started building thereon. However, defendant and one of her witnesses (Dw2) have given a plausible account of how plaintiff entered the suit land in year 2000 when defendant was admitted in hospital. Plaintiff was then served with the letter dated 3.9.2000 and he left the land. It therefore follows that plaintiff had entered the suit land through stealth. Thus plaintiff cannot claim to have occupied the suit land openly and without force.

20. Finally, it has emerged that by the time the suit was filed, plaintiff was not in occupation of the suit land. During re-examination by his advocate, the plaintiff stated as follows: ***“when we did the agreement on 19th October 2015, the crop on the land was not mine. I had seen that I was being threatened so I had long lost hope. The crop on the land planted on October 2015 to March 2016 was not mine and I can’t know who was on that land. I had been on that land from January 1993. That is when I started to plant up to 2016. I left the land at a time I can’t recall..... I had stopped using the house in 2016. When they were farming, my house was still there. I left because I was evicted by all of them”.***

21. From this piece of evidence, it is apparent that by the time the plaintiff was filing the suit in April 2016 he was neither using his house nor was he utilizing the land because he had already been evicted.

22. In the final analysis, I find that the plaintiff has not met the criteria of an adverse possessor. In the circumstances, his claim fails. This suit is therefore dismissed with costs to the defendant.

DATED, SIGNED AND DELIVERED AT MERU THIS 28TH DAY OF OCTOBER, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Judgment was given to the advocates for the parties through a virtual session via Microsoft teams on 21.9..2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the ***Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE