



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

E.L.C NO. 472 OF 2017 (OS)

DOUGLAS KARIUKI MACHARIA..... 1ST PLAINTIFF

MILKA MUTHONI MACHARIA..... 2ND PLAINTIFF

MARY WANGARI MACHARIA.....3RD PLAINTIFF

VS

JAMES MACHARIA KARIUKI.....1ST DEFENDANT

PETER IRUNGU MOSES..... 2ND DEFENDANT

JUDGMENT

1. By an Originating Summons dated 4/10/2017 and filed on the following day the 1st, 2nd and 3rd Plaintiffs/ Applicants sued the 1st and 2nd Respondents seeking the following orders;

a. A declaration that the titles of the said JAMES MACHARIA KARIUKI and PETER IRUNGU MOSES being title numbers LOC.13/GITUGI/3088 and 2085 have been extinguished and now belongs to the Plaintiffs.

b. An order do issue requiring and directing the Land Registrar Murang'a to register land parcel number LOC.13/GITUGI/2088 and LOC.13/GITUGI/2085 now in the names of JAMES MACHARIA KARIUKI and PETER IRUNGU MOSES in the names of DOUGLAS KARIUKI MACHARIA, MILKA MUTHONI MACHARIA and MARY WANGARI MACHARIA.

c. That costs of the suit be borne by the Defendant.

2. The Summons are brought on the grounds that the Defendants in collaboration with Kagima Co-operative Society transferred the said parcels of land to themselves while the said parcels of land were purchased by the deceased MACHARIA GUTU THUNGU, the father of the 1st and 2nd Plaintiffs and the Husband to the 3rd Plaintiff which the Plaintiffs have occupied since 1981 and 1983 respectively.

3. In her Supporting Affidavit to the summons sworn on behalf of the other Plaintiffs the 3rd Plaintiff avers that her late husband MACHARIA GUTU THUNGU purchased two parcels of land namely LOC.13/GITUGI/2088 and LOC.13/GITUGI/2085 from MOSES MWANGI and BEDAN KARIUKI who are the fathers to the 1st and 2nd Defendants respectively, in the year 1981 and 1983 respectively. That the two parcels LOC.13/GITUGI/2088 and LOC.13/GITUGI/2085 measuring 2 acres and 0.5 acres were sold at a consideration of Kshs. 45,000/- and Kshs. 5,000/- respectively. That there were attempts to transfer the said parcels of land to the 3rd Plaintiff's husband on two occasions during which the necessary consents from the Land Control Board were obtained during the respective years of purchase and later in the year 2011 with no success.

4. It is averred that that the Plaintiffs gained entry into the said parcels of land upon purchase, occupied the same and proceeded to extensively develop the same and have built their houses thereon.

5. It was also averred that at the time of purchase the said parcels of land were registered in the name of Kagima Farmer's Co-operative Society in place of the said vendors as they had exchanged their own parcels of land with that Society for the purpose of building a coffee factory. That upon purchase it was agreed that the said parcels of land would be transferred and registered directly in the name of the 3rd Plaintiff's husband's name but unfortunately he passed on before the transfer was done. That the Defendants then mysteriously got the said parcels of land registered in their names.

6. In the premises the Plaintiffs state that at the time the titles were transferred from the Cooperative Society to the Defendants, the title in the said parcels had been extinguished by the doctrine of adverse possession in favour of the Plaintiffs.

7. Vide a joint Replying Affidavit dated 18/11/2017 the Defendants opposed the Plaintiff's claim terming it as an attempt to irregularly acquire their lands. They admit to be the sons of BEDAN KARIUKI THIGE(deceased) and MOSES MWANGI(deceased) and their rightful beneficiaries thereof. They also admit the Plaintiffs are son, daughter and wife of MACHARIA GUTU(deceased). That their fathers donated their land to the Kahiriga Coffee Factory one of the affiliate societies under the Kagima Farmers' Co-operative Society Ltd those parcels of land being LOC.13/GITUGI/1001 owned by MOSES MWANGI and LOC.13/GITUGI/925 owned by BIDAN KARIUKI and in exchange were compensated for their respective acreages with land parcel number LOC.13/GITUGI/1911 registered in the name of Kagima Farmer's Co-operative Society Ltd, to be shared among themselves and 2 others.

8. It is contended that the Defendants' fathers' and their families took possession of the said land in some unspecified year and developed the same with knowledge of the Plaintiffs to date.

9. They deny that the Plaintiffs ever occupied the suit parcels of land and claim that the late MACHARIA GUTU encroached on the said land sometimes in 2016 claiming ownership which issue was arbitrated before the Assistant County Commissioner and the Defendants were declared owners. That in the same year they had lodged an eviction suit against MACHARIA GUTU who voluntarily moved out of the land so they opted to withdraw the suit.

10. It was further contended that the said MACHARIA GUTU only brought up his purchaser's interest claim after the death of the Defendant's father with no evidence in proof. That MACHARIA GUTU had his own land namely LOC.13/GITUGI/425 measuring 1.3 acres in the same locality where his family lives to date and he was buried there. That during his lifetime MACHARIA GUTU had made attempts to cause the suit parcels of land transferred to himself and obtained some fraudulent letters of consent.

11. That the Kagima Farmer's Cooperative Society was then liquidated and the land parcel number LOC.13/GITUGI/1911 fell in the care of Rwaikamba Farmer's Cooperative Society Ltd where the Defendant's fathers were members. Its subdivision was later approved by the existing members into the resultant parcel numbers LOC.13/GITUGI/2085-2088 and transferred to the rightful owners among them the Defendants herein on 08/09/2010 having received approval from the Mathioya Land Control Board.

12. That the Plaintiffs are not entitled to the orders sought as they have never been in occupation of the suit parcels of land.

13. The suit was dismissed for non-attendance and then reinstated upon application by the Plaintiff. The Plaintiffs later abandoned their claim against the 1st Defendant whose suit had since abated.

14. The matter proceeded viva voce with one witness testifying for the Plaintiff's case and one for the defence.

15. PW1- the 3rd Plaintiff herein and widow to HIRAM MACHARIA GUTU testified that his late husband acquired land parcel number LOC.13/GITITU/2085 from the 2nd Defendant's father who put him in possession of the land. That she found her husband on the said land in 1977 when she got married and begun cultivating and planted various crops including coffee and bananas. That the 2nd Defendant did sue them for eviction in 2016 vide Murang'a CMCC No. 152 of 2016 and later forcefully evicted her from the land in September 2017. That while evicting her, they demolished her house, cut trees and fenced the land. That by the time she was evicted she had lived on the land for 40 years together with her children the 1st and 2nd Plaintiffs. She produced various letters of consent from the Land control board and a plaint in the Murang'a CMCC No. 152 of 2016 suit. That her husband was also known as MACHARIA GUTU.

16. DW1 - The 2nd Defendant herein testified that land parcel number LOC.13/GITITU/2085 belongs to him having acquired the same through inheritance from his father Moses Mwangi Githiaka who was a member of Kahiriga Factory and went on to narrate how his late father together with three others donated their land to the Kahiriga Society for constructing a factory and were in exchange compensated with parcel LOC.13/GITUGI/1911 that was subdivided amongst the following ; Samwel Migwi -2 acres; Moses Mwangi – 2 acres (parcel LOC.13/GITUGI /2085) ; Irebu Thige -1 acre and Biden Kariuki -0.5 acres (parcel LOC.13/GITUGI/ 2088). He categorically denied the Plaintiff's family ever occupied the suit land and claims to have always been in occupation of the same where he cultivates. That the Plaintiffs father attempted to encroach on the land sometimes in 2017 failed. He denied that he evicted the Plaintiffs after acquiring the title in 2017 and claims to have abandoned the eviction suit because the Society gave him the land, that it is James Macharia who sued to evict the Plaintiffs.

17. DW2 and DW3 further collaborated the testimony of DWI in its entirety.

18. The Plaintiff submits that after the purchase of the suit land by her husband they took possession of the same and developed it since the year 1981 until when they were violently evicted by the 2nd Defendant in the year 2017. That the fact of their occupation is evidenced in the pleadings filed by the 2nd Defendant against her husband in 2016 seeking to evict him from the suit land. That before the said forceful eviction the Plaintiffs had been in peaceful occupation of the suit land for a period in excess of 34 years hence had become entitled to ownership of the same under the doctrine of adverse possession. That there is admission by the 2nd Defendant that the Plaintiff's husband had encroached on the suit land in 2016. She also describes the 2nd Defendant as an untruthful witness for denying knowledge of her and her family while he had acknowledged knowing them in the Replying Affidavit.

19. The 2nd Defendant contends that the Plaintiffs claim is false for the following reasons; first, no evidence of the sale/ purchase was presented before the Court, secondly, no evidence of structures on the land, third there is a contradiction on the alleged year of entry to the land fluctuating between 1977 and 1981, fourth the consent forms presented by the Plaintiff are a forgery for purportedly having been obtained on the same date for both subdivision and transfer moreover they lack the signatures of the board.

20. That the 2nd Defendant's father Moses Mwangi after surrendering his land parcel number LOC.13/GITUGI/001 to the society was compensated with the suit land as a whole piece of land to share with 3 others, which he died before transfer was done to his name hence the

2nd Defendant pursued the same to his name as his successor. That no claim of purchase had ever arose from the Plaintiff's husband until the year 2016. That his evidence was corroborated by his two other witnesses who testified before this Court. He is of the view that having acquired title in 2017, adverse claim would not run against his title in the short period.

21. Having heard the parties in the suit, read and considered the pleadings, the evidence as adduced at the hearing and the written submissions together with all the materials before me the issue that commends itself is whether the Plaintiffs have proved a case in support of adverse possession on the 2nd Defendants parcel of land.

22. The 1st and 2nd Plaintiffs are the children of the 3rd Plaintiff and her husband namely Hiram Macharia Gutu also known as Macharia Gutu Thungu.

23. The 1st Defendant was the son of Bedan Kariuki while Moses Mwangi was the father of the 2nd Defendant.

24. It is not in dispute that the Defendants fathers were among 4 farmers who surrendered their parcels of land for the purpose of establishing the Kagima Farmers' Cooperative Society Limited. The farmers were Moses Mwangi, Irebu Thige, Bedan Kariuki and Samwel Migwi. It is not in dispute that the said farmers were compensated with equivalent land in parcel no LOC.13/GITUGI /1911. It is also not in dispute that this parcel was later subdivided into four plots namely parcel No LOC.13/GITUGI /2085, 2086, 2087 and 2088 and registered in the name of Kagima Farmers Cooperative Society Limited on the 8/9/2010.

25. It is commonly acknowledged that the 4 parcels of land were given to; Moses Mwangi – 2.0 acres, Irebu Thige- 1 acre, Bedan Kariuki- 0.5 acres and Samwel Migwi – 2.0 acres.

26. From the official searches coupled with the copies of the titles adduced in evidence the Defendants became registered as owners of the two parcels of land on the 30/8/2017. The titles were transferred to their names by Kagima Farmers' Cooperative Society.

27. The Plaintiff's claim is that their father and husband purchased two parcels of land namely LOC.13/GITUGI/2085 and 2088 from Moses Mwangi and Bedan Kariuki in 1981 and 1983 at the costs of Kshs 45000/- and 5000/- respectively. That as fate would have it the lands were not transferred during the lifetime of the sellers to Hiram Macharia Gutu despite two attempts in 1983 and 2011 as evidenced by the Land Board consents adduced in evidence. That later Hiram Macharia died before the lands were transferred to his name.

28. It is the Plaintiffs case that they have occupied the said parcels from 1981 and 1983, cultivating coffee, trees and bananas upto and until 2017 when the Defendants forcefully, violently and unlawfully evicted them from the suit lands after the demise of her husband. That they have been in peaceful occupation and use of the suit lands for over 34 years. That by the time the titles were transferred and registered in the names of the Defendants the titles therein had been extinguished by the doctrine of adverse possession.

29. It is commonly acknowledged by the parties that the 1st Defendant died on the 5/5/2018. On the 28/1/2020 the Plaintiffs' Counsel on record informed the Court that the Plaintiffs had abandoned the case against the 1st Defendant because the suit had abated. That claim is therefore struck out. The Defendants Counsel did not object to the Plaintiffs course of action. The Plaintiff's case against the 1st Defendants therefore abated and this Judgment is in respect to the case of the 2nd Defendant only.

30. Was there a sale between the Plaintiffs father and the father of the 2nd Defendant? Evidence was led that Hiram Macharia purchased parcel 2085 from Moses Mwangi, the father of the 2nd Defendant at the cost of 45,000/-. The 2nd Defendant contends that no sale took place as claimed by the Plaintiffs. It is our law that he who asserts must prove. In particular Section 109 of the Evidence Act states as follows;

“The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

31. Evidence was adduced in form of Land Control Board consents issued in 1981 in respect to parcel LOC.13/GITUGI /1518 for subdivision and transfer of 2 acres from Kagima Farmers' cooperative Limited to Macharia Gutu Thungu and another one issued in 1983 between the same parties for the transfer of unspecified acreage of land to Hiram Gutu Thungu. It is not clear as to the fate of these consents. It is sufficient to state that the parcels of land cited in those consents are different and perhaps they were the original parcels. The parties did not see the need to expound further for the Court.

32. Further letters of consent dated the 21/9/2011 were adduced to support the claim of the Plaintiff that Hiram Macharia purchased the suit land. However, the consent dated the 21/9/2011 in respect to parcel LOC.13/GITUGI/2085 is not executed and the same cannot be taken as a legal document. In any event it is not an agreement for sale.

33. That said there is no evidence in form of agreement of sale to anchor a sale of land which as the law guides ought to be in writing between the parties and executed in the presence of a witness.

34. It is the conclusion of the Court therefore that the Plaintiffs have not proved any sale or purchase of parcel LOC.13/GITUGI/2085 (suit land) by their father.

35. As to whether the Plaintiffs have occupied the suit land exclusively for a period in excess of 12 years, the 3rd Plaintiff led evidence that she found her husband occupying the suit land in 1971 when she got married to him. That she and her family remained on the land since then until 2017 when they were forcefully and unlawfully removed from the suit land.

36. The 2nd Defendant on the other hand claims that the Plaintiffs have never occupied the suit land and in fact the Plaintiffs father invaded the land sometime in 2016 but when the local administration intervened coupled with a suit case he and the 1st Defendant filed against Hiram Macharia, the said Macharia vacated the suit land on his own volition. That Macharia was not evicted.

37. In the case of **Leonola Nerima Karani v William Wanyama Ndege**[2012] EKLRL the Court citing the case of **Wambugu versus Njuguna (1983) KLR 171** laid down the following guiding principles in respect to adverse possession:-

a. The general principle is that until the contrary is proved possession in law follows the right to possess.

b. In order to acquire by the statute of limitation 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 are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.

c. The limitation of Actions Act, in adverse possession contemplates two concepts, disposition 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.

d. Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid sale or agreement, the possession becomes adverse and time begin to run at the time the licence is determined. Prior to the determination of the license, the occupation is not adverse but with permission. The occupation can only be either with permission or adverse; the two concepts cannot co-exist.

e. 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.

f. Adverse possession means that a person is in possession in whose favour time can run.

g. Where the claimant is a purchaser under a contract of sale of land, it would be unfair to allow time to run in favour of the purchaser pending completion when it is clear that he was only allowed to continue to stay because of the pending purchase because had it not been for the pending purchase, the vendors would have evicted him. The possession can only become adverse once the contract is repudiated.

h. Where a claimant pleads the right to land under an agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is the claimant's possession as deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation of at least 12 years after such payment.

38. Equally in the case of **Francis Gicheru Karini vs Peter Njoroge Mairu (Civil Appeal No. 293 of 2002 (NRB) UR)** the Court of Appeal approved the High Court decision in **Kimani Ruchine vs Swift Rutherford & Co. Ltd (1980) KLR 10** as per Kneller J. stating:

‘...The Plaintiffs have to prove that they have used this land which they claim as of right. **Nec vi, Nec Clam, Nec Precario (no force, secrecy or persuasion)** ...show that the company had knowledge of possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavors to interrupt it or by way of recurrent consideration.’

39. The 3rd Plaintiff failed to table evidence of occupation of the suit land. This evidence would have been in form of oral testimony to collaborate her evidence, photographs to show that she had built a residential house or a licence or permit to grow coffee. Better still a delivery note from the coffee factory would have supported the claim that she tended coffee on the land. The Plaintiffs bore the burden of proof to show that they have occupied the land peacefully exclusively and that the occupation is not broken. The Plaintiff admitted that she lives on another parcel of land in the same locality and not the suit land. I have seen the pleadings in CMCC 255 of 2016 where the 2nd Defendant sued Hiram for eviction to denote that he was on the suit land. The 2nd Defendant states that Hiram invaded the land in 2016 and left after the case was filed. The critical issue was for the Plaintiffs to prove exclusive possession of the land for a period of 12 years. Adverse possession is matter of fact which the Plaintiffs have failed to prove.

40. It is trite that adverse possession is one of the ways of property acquisition in Kenya and in the case of **Peter Njau Kairu v. Stephen Ndung'u Njenga & Another C.A. 57of 1997, CA the** Court of Appeal held that evidence must be stringent and straightforward because a property owner should be deprived of his title only in the clearest of cases. In the instant case it is the finding of the Court that the Plaintiffs have not proved adverse possession on a balance of probabilities.

41. It is the conclusion of the Court that the Plaintiffs have not proved possession sufficient to entitle them to a title by Adverse Possession.

42. Final orders and disposal

a. The Plaintiffs case against the 1st Defendant abated. It is struck out.

b. The Plaintiffs claim against the 2nd Defendant fails. It is dismissed.

c. The Plaintiffs shall pay the cost of the suit to the 2nd Defendant.

d. **It is so ordered.**

DATED, SIGNED & DELIVERED THIS 30TH DAY OF NOVEMBER 2020.

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of;

Mbuthia HB for Karuga Wandai for the 1st – 3rd Plaintiffs

Kinuthia for the 1st & 2nd Defendants

Njeri & Kuiyaki: Court Assistants