



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO 11 OF 2019

JACKSON KABIRI KARURU.....PLAINTIFF/APPLICANT

VS

MARY NJOKI NJUGUNA.....DEFENDANT/RESPONDENT

JUDGMENT

1. The Plaintiff / Applicant seeks possessory ownership rights over a portion of 0.17 HA of land parcel number LOC.1/KIUNYU/512 measuring 3.2HA or thereabout registered in the name of Mary Njoki Njuguna.

2. By an Amended Originating Summons dated 21/6/2019 the Plaintiff/Applicant sued the Defendant/Respondent seeking the following pertinent orders;

a. That the temporary injunction do issue restraining the Defendant herein whether by herself, assigns, agents, servants, employees, persons claiming under their authority from interfering with the Plaintiff's ownership, quiet possession, enjoyment and or user of 0.17 Hectares out of land LOC.1/KIUNYU/512 measuring 3.2HA pending he hearing and determination of this matter.

b. A declaration that Jackson Kabiri Karuru, the Plaintiff herein has become entitled by adverse possession to 0.17HA out of land measuring 3.2HA or thereabout registered in the name of Mary Njoki Njuguna.

c. An order that Jackson Kabiri Karuru be registered as the sole proprietor of the said 0.17 Hactres of the said parcel of land LOC.1/KIUNYU/512 in place of Mary Njoki Njuguna.

d. Such other or further orders as may meet the ends of justice in this case.

3. The summons are premised on various grounds set out on the face of the originating summons and harnessed in the Supporting Affidavit sworn on 21/6/2019 by Jackson Kabiri Karuru the Plaintiff /Applicant herein. First the Plaintiff claims to be the absolute beneficial owner of 0.17 Ha of LOC.1/KIUNYU/512. Secondly that the Plaintiff who was born in 1956 together with his deceased mother and his other family entered the said portion of land in 1963, occupied the same and continued in open, continuous, exclusive, uninterrupted adverse occupation and use of the same since then to date. Thirdly the Plaintiff states that the Defendant in collusion with a private surveyor she has put on beacons on part of the Plaintiff's land claiming that the Plaintiff's houses and structures are built on the Defendant's parcel of land. Fourth that the Defendant has destroyed crops, coffee bushes and trees of great value belonging to the Plaintiff causing untold emotional trauma and detriment to the Plaintiff. Fifth the Appellant is apprehensive that if the Defendant proceeds with the sub-divisions on the land his properties and those of his family including the house which they live in will be demolished to irreparable loss to himself and his family. Sixth that after the death of the Plaintiff's mother he continued to live on the aid land with his family. Seventh that the Plaintiff has done several developments on the said land by building a permanent family house where the lives and planting coffee bushes, many trees and carries out other forms of farming on the said land.

4. In view of the foregoing the Plaintiff contends that he has become entitled to the 0.17 ha of LOC.1/KIUNYU/512 having been in occupation of the same openly, continuously, uninterrupted and exclusively for a period in excess of forty (40) years.

5. The suit proceeded undefended with evidence of service upon the Defendant duly on record. When the matter came up for hearing the Plaintiff testified for the Plaintiff's case.

6. **PW1 – Jackson Kabiri Karuru** adopted his amended Supporting Affidavit and reiterated that he entered the suit land in 1963 together with his parents who occupied a portion of 0.17ha. He claims to have built a permanent home and other structures on the said land and produced photographs of the said structures and farming activities done on the land. That he has lived on the said land as of right and no one has ever required him to vacate. The Plaintiff was aware that the entire parcel of land was registered in the name of the Defendant and produced a certificate of official search in proof. He admitted that the Defendant is also in occupation of the said land but has a distinct portion of the land that she occupies adjacent and neighboring that of the Plaintiff. He seeks protection from the Court against the malicious

acts by the Defendant of destroying his properties as evidenced in the photographs produced. Finally, he sought to be declared the owner of the portion of land he occupies and also for restraining orders to issue against the Defendant as prayed.

7. The Plaintiff submits that his suit was necessitated by the Defendant's move to subdivide the land and destroying the Plaintiff's property to great loss and mental anguish to the Plaintiff. It is contended that the Plaintiff has enjoyed possession with no discontinuance for over 40 years the same being non-permissive and non-consensual. That in the said period of possession he made various developments on the suit land including building a permanent home where he stays with his family and carries on various farming activities.

8. The Plaintiff's claim is anchored on adverse possession. The Plaintiff demonstrated his claim through his supporting affidavit, oral testimony and documentary evidence. It was contended that the Plaintiff entered the suit land in the year 1963 together with his mother and his family and occupied a portion of 0.17ha thereof which they proceeded to develop by building their permanent home thereon, planting various crops and carrying out other forms of farming activities. That he the Plaintiff later got his own family who continued to live on the said land and have done so to date. The Court was further informed that the Plaintiff's mother died on or about the year 2017 leaving the Plaintiff in occupation of the said land.

9. It was contended that the Plaintiff's occupation of the suit land has been open, continuous with no interruptions whatsoever from the Defendant who is the registered owner over the entire parcel of land. That the Plaintiff's said occupation of the suit land was as of right and not with consent of the Defendant.

10. It is trite law for a party to succeed on a claim for adverse possession such a party must demonstrate the following: -

- a) That they have been in open possession for a period of more than 12 years.
- b) The occupation and possession must have been continuous and uninterrupted.
- c) The possession or occupation must have been hostile and/or inconsistent to the owner's interests and/or rights in regard to the use of the land.

11. The Court of Appeal elaborately considered the principles to be considered in cases where parties claim to be entitled to ownership by virtue of adverse possession in the case of **Wambugu –vs- Njuguna (1983) KLR 172** where the Court held: -

“in order to acquire by the Statute Limitations 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 property that defeats the title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it”.

12. The Court in the same case went on to state that two concepts are contemplated by the Limitation of Actions Act, Cap 22 Laws of Kenya for a claim in adverse possession to be actualized. These concepts are dispossession and discontinuance of possession.

The Court stated thus: -

“the proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed and 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.

13. Asike-Makhandia, JA described adverse possession in **Mtana Lewa v Kahindi Ngala Mwagandi [2015] eKLR** as follows:

Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. 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 title owner. This doctrine in Kenya is embodied in **Section 7 of the Limitation of Actions Act**, which is in these terms: -

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

14. The Plaintiff led undisputed evidence that he has lived on the land since childhood with his family. That he and his family entered the land in 1963, a period of 47 years ago. Therefore, this is a period in excess of 12 years.

15. The Plaintiff led evidence in form of photographs to show the development of houses, cultivation of coffee and other crops. This shows that he has control and exclusivity of the land and further it is a demonstration of the animus possidendi that is the intention to possess the land to the exclusion of the Defendant. He has also demonstrated that by cultivating and using the land he is doing it in an inconsistent manner to that of the paper owner. The open continuous occupation remained unbroken since 1963.

16. Considering the totality of the unchallenged evidence availed in the case and applying the legal principles as stated above the Court is persuaded that the Plaintiff has proved adverse possession on a balance of probability.

17. In the upshot the Plaintiffs suit succeeds and I enter judgement in favour of the Plaintiff as follows;

a. A declaration be and is hereby made that Jackson Kabiri Karuru, the Plaintiff herein has become entitled by adverse possession to 0.17HA out of land measuring 3.2HA or thereabout registered in the name of Mary Njoki Njuguna.

b. It is hereby ordered that Jackson Kabiri Karuru be registered as the sole proprietor of the said 0.17 Hectares of the said parcel of land LOC.1/KIUNYU/512 in place of Mary Njoki Njuguna.

c. To meet the ends of justice the Court makes the following orders;

i) The costs of subdivision and registration if any shall be met by the Plaintiff;

ii) That such registration shall follow as much as is practicable the occupation of the Plaintiff on the ground;

iii) That if the Defendant defaults to execute the documents, the Deputy Registrar of this Court is mandated to so execute all the necessary documents to effect the orders of the Court;

d. I make no orders as to costs.

15. **It is so ordered.**

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

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of;

Plaintiff: Absent

Defendant: Absent

Njeri & Kuyiki: Court Assistant