



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 34 OF 2016

MERIRONI NYAKINYUA MULTI PURPOSE CO-OPERATIVE

SOCIETY LTD.....APPLICANTS

VERSUS

GITUAMBA HOLDING LIMITED.....RESPONDENTS

J U D G M E N T

1. The applicants commenced the present suit by way of Originating Summons dated 8th February 2016 filed in Court on 9th February 2016. The Applicants prayed for orders that:-

1. That the title to the whole parcel of land known as LR No.3777/325 situated in Gilgil be deemed to have been extinguished through adverse possession by the applicant.
2. That the Applicant herein be registered as the proprietors of the suit parcel of land on behalf of its members.
3. That the respondent herein to bear the costs of the application.

2. The application was predicated upon the following grounds amongst others:-

1. That the previous owner, Kanyeki Farmers Co-operative Society Limited, sold to the applicants herein the suit parcel of land vide sale agreement dated 7th day of December 1993 but no transfer was effected to the applicants herein at the Land Registry but nevertheless the applicants took possession of the suit land.
2. That the applicant herein entered and took possession of the land without secrecy, without force and without permission of the registered owner of the suit land.
3. That the applicants have enjoyed uninterrupted and actual possession of the suit land for twenty- two (22) years thereby acquiring title by way of adverse possession.

3. The Originating summons was further supported on the grounds set out in the affidavit sworn in support of the same by Ann Njoki Wachira, chairlady of Merironi Nyakinyua Multipurpose Co-operative Society Ltd, the applicant herein. In the affidavit sworn in support of the Originating Summons, the deponent has set out the background and history of the parcel of land under paragraphs 3, 4, 5, 6 and 7 of the supporting affidavit. The applicant stated the suit land originally was owned and registered in the name of Mrs. Army Kelsall who owned the land jointly with one Mr.Alfred Gould.

4. The Applicants averred that on 28th November 1978, Kanyeki Farmers Co-operative Society purchased the suit property and on 7th December 1993 sold the property to the applicants for the consideration of Kshs12,556,000/= as per the sale Agreement annexed as "ANW3". The applicants averred that Kanyeki Farmers Co-operative Society was liquidated before it had transferred the land to them. The applicants however stated that its members took actual occupation and possession of the suit property and have developed their homesteads thereon and have constructed a public primary school and a secondary school and effected other developments as depicted on the photographs annexed to the supporting affidavit as "ANW5". The applicant further averred that although they have occupied and possessed the suit property for over 20 years they were surprised when they carried out a search at the Registrar of Titles in Nairobi to discover that the suit property was registered in the Respondent's name on 27th November 2009 as per the certified copy of the abstract of title annexed to the supporting affidavit. The applicants contend that the registration of the Respondent as proprietor of the suit property was subject to their overriding interest as adverse possessors of the suit land.

5. The applicants swore a further affidavit on 13th February 2018 where the deponent Anne Njoki Wachira explained that Kanyeki Co-Operative Society Ltd in 1978 acquired the whole of land LR No.3777/325 but a portion measuring about 130 acres was later excised and transferred to Mburu Kinani by Alfred Gould. The applicant exhibited two survey plans marked “AMW 2(a) & (b)” showing the excision of the portion from the original LR No.3777/325 and transferred to the said Mr. Mburu Kinani. The applicant stated it was the remainder of LR No.3777/325 that their members occupy and it is that remainder that is the subject of the instant suit. The applicants state that it was on the strength of the 1993 agreement with Kanyeki Farmers Co-Op Society that their members entered into possession of the suit premises.

6. In a further Affidavit sworn by Anne Njoki Wachira on 17th May 2019 the applicants clarified that they had received confirmation from the commissioner of Co-operatives that the registration of Kanyeki Farmers Co-op Society was dissolved and cancelled by an order of the Commissioner of Co-operatives dated 26th November 2007 Gazetted vide Kenya Gazette No.12469 published in the Kenya Gazette on 21st December 2007. (“ANW2”). The applicants asserted that it is the balance of the land out of LR No.3777/325 transferred to Gituamba Holdings Ltd that they occupy and it is what they claim.

7. The applicant following failed attempts to locate the whereabouts of the respondent to effect service of the originating summons upon them applied vide a Notice of Motion dated 15th March 2016 to be granted leave to serve the Respondent by way of substituted service by means of advertisement in the Daily Newspaper. The Court on 27th February 2017 granted leave to the Applicants to serve the originating summons on the Respondent through substituted service by means of advertisement in either the Daily Nation or the Standard Newspaper. The Respondent was required to enter appearance within 21 days. The Respondent was served by way of advertisement in the Daily Nation Newspaper of 21st March 2017. An affidavit of service was filed on 13th June 2017. The Respondent did not enter any appearance and/or file any response to the originating summons.

8. The Court on 26th February 2020, noting that the Respondent had failed to appear or file a response to the originating summons directed that the matter be heard and determined on the basis of affidavit evidence, documents tendered in support and written submissions. The applicants filed their submissions on 24th September 2020 together with the authorities they sought to rely on.

Analysis and determination.

9. As observed, the Respondent did not enter appearance and/or file any response to the originating summons. That being the position the evidence adduced by the applicant by way of the affidavit sworn in support of the originating summons and the further affidavits and documents has not been rebutted and/or challenged and the Court in the circumstances is obligated to accept the evidence as correct. The issues for determination therefore is whether the Applicants have proved that they were adverse possessors on the suit property for a period of 12 years immediately before the institution of the suit; whether the title of the registered owner was consequently extinguished in their favour; and, whether the applicants are entitled to be registered as the owners of the land on account of being adverse possessors.

10. The applicants claim is based on the doctrine of adverse possession and hence the ingredients that give rise to adverse possession must be proved and demonstrated for one to succeed in such a claim. The applicants must prove that they have been in peaceful continuous, open and uninterrupted possession of the suit property for a period of over 12 years and that during that period they have used the land as owners and that their actions in regard to the land were inconsistent with the interest of the real owner (registered proprietor). In the case of *Mtana Lewa -vs- Kahindi Ngala Mwangandi (2005) eKLR* the Court of Appeal stated thus:-

“ Adverse possession is essentially a situation where a person takes possession of land, 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 12 years”

11. In the case of *Mbira -vs- Gachuhi (2002) IEA 137* the Court held:-

“—person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive or non- consensual actual, open notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption.”

12. In the case of *Wambungu -vs- Njuguna (1983) KLR 173* the Court of Appeal inter alia held thus:-

1. In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost, his right to the land 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 purposes for which he intended to use it.

2. The Limitation of Actions Act, on adverse possession, contemplates two concepts; dispossession 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 had discontinued his possession for the statutory period and not whether or not the claimant had proved that he has been in possession for the requisite number of years.

13. In the case of *Kimani Ruchire -vs- Swift Rutherfords & Co Ltd (1980) KLR 10* a decision of the High Court by Kneller, J approved by the Court of Appeal in the case of *Francis Gicharu Kariri -vs- Peter Njoroge Mairu* (Nairobi Civil Appeal No. 293 of 2002) the judge stated as follows:-

“The plaintiff have to prove that they have used this land which they claim as of right: Necvi, nec clam, nec plecario (no force, no secrecy, no evasion) so the plaintiffs must show that the Company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or by any endeavors to interrupt it or by any recurrent consideration; See *Wanyoike Gathure –vs- Beverly (1965) EA*

14. I have made reference to the above judicial decisions to illustrate the applicable principles in adverse possession claims and how the Courts apply such principles. Having earlier summarized the facts albeit briefly, as deduced from the affidavit in support of the originating summons I have now to determine whether the applicants claim for adverse possession is sustainable.

15. It is the Applicant’s case that they purchased the suit land from Kanyeki Farmers Co-Operative Society Ltd vide an Agreement of sale dated 7th December 1993. Kanyeki Farmers Co- operative Society Ltd apparently had itself purchased the property from one **A. Gould** vide an Agreement for sale dated 28th November 1978 though as per the abstract of title annexed no transfer had been effected to Kanyeki Farmers as at the time it entered the Sale Agreement with the Applicants. As per the abstract of title the land was transferred to Kanyeki farmers Co- operative Society Ltd on 12th May 2003 under entry Number 34 endorsed on the original title LR No.3777/158.

16. The title abstract under entry No.12 shows that LR No. 3777/325 (Orig No.3777/251/6) measuring 1256 acres was transferred to Hans Ridolphe De Jenner on 3rd October 1951 and through entry No.16 the same land was transferred to Amy Kelsall on 24th December 1958. Grant of probate to the estate of Amy Kelsall (deceased) was registered as entry No. 31 on the same date the transfer of the land to Kanyeki Farmers Co-operative Society was registered on 12th May 2003. A portion of 52.39 Hectares (130 acres approx.) out of **L.R No.3777/325** was excised and transferred to one Mburu Kinani and was registered under entry No.37 being LR No.3777/890 on 9th July 2004. The certified certificate of official search issued on 11th March 2019 shows that the respondent, Gituamba Holding Limited, was registered proprietor of the residue of LR No.3777/325 on 27th November 2009.

17. On the basis of the background I have set out herein above, I am satisfied the parcel of land the applicants purported to purchase from Kanyeki Farmers Co-operative Society Ltd was LR No.3777/325 which comprised 1256 acres. The applicants conceded that one Mr. Mburu Kinani occupies a portion of 130 acres that was sold and transferred to him. The applicants do not claim ownership of the portion occupied by Mr. Mburu Kinani but lay claim to the remainder of LR No.3777/325 measuring approximately 1,126 acres. The applicants stated that they entered into possession of the parcel of land immediately they entered into the sale agreement with Kanyeki Farmers Co-operative Society Limited in 1993 and that the applicants members have since developed and utilized the land as the owners thereof. The photographs exhibited as “**ANW5**” in the supporting affidavit show permanent buildings (perhaps homesteads) and a block of school buildings consistent with possession of the suit land. At the time the respondent was registered as proprietor of the remainder of LR No.3777/325 in 2009, the applicants were in possession of the suit property and had been in possession from 1993.

18. It is not clear under what circumstances the Respondent was registered as owner of the land though the endorsement of transfer on the abstract of title shows it was for consideration of Kshs2.5 million. As the Respondent did not appear and/or make a response to the originating summons there was no rebuttal of the applicants averments that they had been in possession of the land since 1993. The possession of the applicants was in my view inconsistent to the interest of the registered owner and constituted adverse possession.

19. The applicants on the basis of the evidence commenced development of homes and other community amenities on the suit land as soon as the sale agreement was entered into in 1993. This was inconsistent with the interests of the true owner (registered proprietor). The acts of the applicants were adverse to the true owner’s interest. As at 2009 when the Respondent, Gituamba Holdings Limited was registered as owner, the applicants were in possession and had acquired title to the land through adverse possession as they had adversely possessed the land for a period in excess of the statutory period of twelve years. The registration of the Respondent as owner of the suit land on 27th November 2009 was subject to the applicants acquired rights over the land on account of prescription. The applicants rights and interest over the land were overriding and did not require registration in terms of section 28 (h) of the Land Registration Act, 2012 which provides as follows:-

28. Overriding interests

Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interest as may for the time being subsist and affect the same, without their being noted on the register-

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

20. Rights acquired through adverse possession are overriding rights that affect registered land and need not to be noted in the register. The respondent was registered as owner subject to the applicants overriding interests over the land and did not therefore acquire any valid title to the land as the applicants had acquired and/or were in the process of acquiring title by way of adverse possession and/or prescription.

21. In the premises and upon evaluation of the evidence placed before the Court and the submissions made on behalf of the applicants, I am satisfied the applicants claim predicated on the doctrine of adverse possession is proved on a balance of probabilities and I accordingly enter judgment in favour of the applicants. I allow the originating summons dated 5th February 2016 and grant orders in terms of prayers 1 and 2 of the originating summons. I award the costs of the suit to the applicants.

21. Orders accordingly

Judgment dated signed and delivered virtually at Nakuru this 26th day of November 2020.

J M MUTUNGI

JUDGE

