



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. NO. 13 OF 2019 (OS)

NICHOLAS IRERI KAMWENDE.....PLAINTIFF

VERSUS

VICTOR WARUNGU NDIRANGU.....1ST DEFENDANT

VINCENT GIKONYO NDIRANGU.....2ND DEFENDANT

ESTHER WAMBUI NDIRANGU.....3RD DEFENDANT

JUDGMENT

A. INTRODUCTION

1. By an originating summons dated 24th April, 2019 brought under **Section 38 of the Limitation of Actions Act (Cap. 22) and Order 37 Rule 7 of the Civil Procedure Rules** the Plaintiff sought adverse possession of **Title No. Gaturi/Weru/1718 (the suit property)** which was registered in the name of the Defendants. The Plaintiff sought determination of several questions in relation to the suit property and ultimately sought the following orders:

- (a) That the Defendants Title to Land Parcel No. Gaturi/Weru/1718 that is occupied and utilized by the Plaintiff has been extinguished.*
- (b) That the Plaintiff Nicholas Ireri Kamwende has acquired Title to Land Parcel No. Gaturi/Weru/1718 by way of adverse possession.*
- (c) That the Defendants names be cancelled and/or deleted from the Proprietary Section of Land Parcel No. 1718.*
- (d) That the Plaintiff Nicholas Ireri Kamwende be registered as the Proprietor of Land Parcel No. Gaturi/Weru/1718 by way of adverse possession and a Title Deed for the said land be issued to the Plaintiff by the Land Registrar.*
- (e) That the production of the original Title Deed to Land Parcel No. Gaturi/Weru/1718 in the name of the Defendants to the Land Registrar for purposes of the registration of the said land in the name of the Plaintiff be dispensed with.*
- (f) That costs be provided for.*

B. THE PLAINTIFF'S CASE

2. The originating summons was based upon the grounds contained in the supporting affidavit sworn by the Plaintiff on 26th April, 2019 and the annexures thereto. The Plaintiff contended that he entered the suit property in 2001 and that he had been in open, continuous and exclusive occupation thereof for a period exceeding 12 years. The Plaintiff further stated that he had developed the suit property by cultivating exotic trees, keeping bees and constructing fish ponds for a very long time without interruption from the owners.

3. The Plaintiff contended that the registered owners of the suit property had never occupied or utilized it since he took possession and that their right to recovery thereof had been extinguished by operation of law. Accordingly, the Plaintiff asserted that he had acquired adverse possession thereof under the **Limitation of Actions Act (Cap. 22)**.

C. THE DEFENDANTS' RESPONSE

4. The 2nd Defendant, Vincent Gikonyo Ndirangu, swore an undated replying affidavit which was filed on 19th July, 2019 in answer to the originating summons. He swore the said affidavit on his own behalf and on behalf of his co-defendants. The Defendants contended that the originating summons was a non-starter and that it was merely aimed at denying them their proprietary rights. The Defendants denied that the Plaintiff had ever been in occupation of the suit property or that he had constructed any fish ponds thereon and asserted that he had failed to satisfy the requirements of adverse possession.

5. The Defendants contended that they had lawfully acquired the suit property from their late mother, Philomena Wanjiku (*Philomena*), through succession proceedings vide *Milmani High Court Succession Cause No. 1401 of 2017*. The Defendants further contended that the Plaintiff was out to forcibly grab the suit property from them. They consequently prayed for dismissal of the Plaintiff's suit.

D. THE SUMMARY OF EVIDENCE AT THE TRIAL

(a) The Plaintiff's evidence

6. At the trial hereof, 5 witnesses including the Plaintiff, testified at the trial. The Plaintiff adopted his witness statement dated 19th July, 2019 as his evidence-in-chief. He reiterated the contents of his affidavit in support of the originating summons and maintained that he had been in open, continuous, exclusive and uninterrupted possession of the suit property since 2001. He produced documents to demonstrate that he bought various seedlings for planting and also produced photographs of the exotic trees and other developments he claimed to have on the suit property.

7. The rest of the Plaintiff's witnesses supported the Plaintiff's evidence that he had been in occupation since 2001 and that he had developed the suit property by planting trees and establishing fish ponds over the years. Both PW2 and PW3 stated that they were the Plaintiff's neighbours and that he had been occupying and utilizing the suit property for many years.

(b) The Defendants' evidence

8. The Defendants called 4 witnesses at the trial hereof. The 1st and 2nd Defendants were amongst the four who testified. The 2nd Defendant who testified as DW1 relied upon the contents of his replying affidavit and his witness statement as his evidence-in-chief. He conceded during cross-examination that he saw some mature trees on the suit property during a site visit. He conceded that the trees were planted by the Plaintiff. He further stated that he did not know for how long the Plaintiff had been utilizing the suit property. DW1 also conceded that neither he nor Philomena had ever utilized the suit property.

9. The 1st Defendant who testified as DW2 adopted his witness statement dated 20th November, 2019 as his evidence-in-chief. He stated that he first visited the suit property in 2015 when he saw some old and disintegrated bee hives thereon. He stated that he saw some mature exotic trees on the suit property but he did not know who had planted them. He conceded during cross-examination that Philomena had never utilized the suit property during her lifetime. He also stated that he did not know who was utilizing the suit property.

E. DIRECTIONS ON SUBMISSIONS

10. When the hearing was concluded on 22nd September, 2020, the Plaintiff was granted 21 days to file and serve his written submissions whereas the Defendants were granted 21 days upon the lapse of the Plaintiff's period to file theirs. The record shows that the Defendants filed their submissions on 30th October, 2020 whereas the Plaintiff filed his on 18th November, 2020.

F. THE ISSUES FOR DETERMINATION

11. The court has noted that the parties did not file agreed issues for determination. Accordingly, the court shall frame the issues for determination in accordance with the law. Under **Order 15 Rule 2** of the **Civil Procedure Rules** a court may frame issues from any of the following:

- a) *The allegations contained in the pleadings.*
- b) *The contents of documents produced by the parties.*
- c) *The statements made on oath by or on behalf of the parties.*

12. The court has considered the pleadings, affidavits, documents and evidence on record in this matter. The court is of the opinion that the following issues arise for determination in this suit:

- a) *Whether the Plaintiff has demonstrated his claim for adverse possession.*
- b) *Whether the Plaintiff is entitled to the reliefs sought in the suit.*
- c) *Who shall bear costs of the suit.*

G. ANALYSIS AND DETERMINATION

(a) Whether the Plaintiff has proved his claim for adverse possession

13. The court has considered the pleadings, evidence and material on record on the this issue. The elements of adverse possession were restated in the following cases: **Wambugu vs Njuguna [1983] KLR 172; Githu vs Ndeete [1984] KLR 776; Kasuve vs Mwaani Investments Ltd & 4 Others [2004] 1KLR 184 and Kimani Ruchine vs Swift Rutherfords & Co Ltd [1980] KLR 10.**

14. The elements of adverse possession were summarized in the case of **Kasuve vs Mwaani Investments Ltd** (*supra*) as follows:

“...and 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 dispossession of the owner or by the discontinuation of possession by the owner on his own volition, Wanja vs Sakwa No. 2 [1984] KLR 284. A title by adverse possession can be acquired under the Limitation of Actions Act for part of the land...”

15. As expected, the Plaintiff submitted that he had satisfied the above requirements for proving adverse possession whereas the Defendants contended that the Plaintiff had completely failed to establish his claim for adverse possession with respect to the suit property. The court shall not re-produce the respective submissions of the parties in support of their respective positions.

16. The court has considered the oral and documentary evidence as well as the submissions of the parties on the first issue. There is no doubt that the Plaintiff has been in exclusive and continuous possession of the suit property at least since 2001. The Plaintiff’s neighbours who testified as PW2 and PW3 confirmed as much. The court saw them testify and observed their demeanor at the trial. The court is satisfied that they were credible and straightforward witnesses and that their evidence was truthful.

17. The court is further satisfied that the Plaintiff had developed the suit property over the years by planting exotic trees, constructing fish ponds and undertaking bee keeping without interruption from the Defendants or their predecessors in title. Indeed, the Defendants and their witness confirmed at the trial that the suit property had mature exotic trees and that they were planted by the Plaintiff. The 1st and 2nd Defendants also conceded at the trial that neither they nor Philomena had utilized or occupied the suit property at all material times.

18. There was no evidence to suggest or demonstrate that the Plaintiff’s possession was with the consent or permission of the Defendants or their predecessors in title. In fact, the Defendants considered the Plaintiff’s occupation as trespass hence there is no way it could have been with their consent. Accordingly, the court finds and holds that such possession was hostile or adverse to the interests of the true owners.

19. The court is further satisfied on the evidence on record that the Plaintiff had the requisite *animus possidendi* with regard to the suit property. Even though he entered the suit property on the mistaken belief that it was his own land, all the activities and developments he undertook clearly showed an intention to keep it as his own. By the time he discovered the mistake of fact, he still opted to keep the suit property by offering the Defendants an alternative property in exchange.

20. The court is unable to accept the Defendants’ submission that time could not run for purposes of adverse possession unless the grant of letters of administration to the Defendants or Philomena had been confirmed. The Defendants did not cite any legal authority for this proposition. So far as this court is aware, confirmation of a grant has nothing to do with the running of time under **Limitation of Actions Act**. Time may, however, stop running where the Applicant’s possession has been interrupted by the owner asserting his rights by either making an effective entry or instituting legal proceedings for recovery of the property. See **Githu v Ndeete (supra)**.

21. The court does not also accept the Defendants’ submission that time could not run either because the Defendants were resident in Nairobi hence they could not know of the Plaintiff’s occupation or because Philomena had no knowledge of such occupation. The Defendants’ advocates put great emphasis on actual knowledge by the true owners. They did not address the court on constructive knowledge which is equally applicable in such circumstances. In the case of **Kimani Ruchire v Swift Rutherfords & Co. Ltd [1980] KLR 10** which the Defendants relied upon, it was held, *inter alia*, that:

“The Plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) or the possession of occupation.”

22. It was not contended that the Defendants or Philomena had no means of knowing that the Plaintiff was in occupation of the suit property. There is evidence on record to show that by the time the Plaintiff took possession in 2001 there was a pending *Succession Cause No. 1196 of 2000* concerning the estate of Defendants’ grandfather. The succession cause appears to have been concluded in 2011. The court is of the opinion that Philomena as administrator of the estate of her late husband had the means of inspecting the properties forming part of the estate during the pendency of the succession case. In fact, as an administrator whose duties included collecting and managing the assets of the estate she was duly bound to inspect and know the condition of those properties hence constructive knowledge could be attributed to her.

23. The Defendants’ suggestion that the limitation period should start to run afresh each time new proprietors of the suit property arose is for outright rejection. It has been held over a long period of time that time for purposes of limitation of actions does not stop to run on account of change of ownership of the land. A claim for adverse possession runs with the land irrespective of the change of ownership. It was held in **Kasuve v Mwaani Investments Ltd & 4 Others (supra) and Githu v Ndeete (supra)** that a mere change of ownership does not affect a claim for adverse possession.

24. The court is thus satisfied that the Plaintiff has satisfied all the requirements of adverse possession as required by law. There was no evidence of interruption of the Plaintiff’s possession and the successive changes in ownership of the suit property did not extinguish the Plaintiff’s claim for adverse possession.

(b) Is the Plaintiff entitled to the reliefs sought?

25. Since the court has found and held that the Plaintiff has proved his claim for adverse possession it would follow that the Plaintiff is

entitled to the orders which would facilitate his acquisition of the suit property and his registration as proprietor on account of adverse possession. The court is consequently inclined to grant the reliefs sought by the Plaintiff.

(c) Who shall bear costs of the suit

26. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. The court finds no good reason why the successful party should not be awarded costs of the suit. Accordingly, the Plaintiff shall be awarded costs of the suit to be borne by the Defendants jointly and severally.

H. CONCLUSION AND DISPOSAL ORDERS

27. The upshot of the forgoing is that the court finds merit in the Plaintiff's claim for adverse possession. The court finds that the Plaintiff has proved his claim to the required standard. Accordingly, the court makes the following orders for disposal of the originating summons dated 24th November, 2019.

(a) The Defendants' right to recover Title No. Gaturi/Weru/1718 has been extinguished by operation of law.

(b) The Plaintiff, Nicholas Ileri Kamwende, has acquired Title No. Gaturi/Weru/1718 by way of adverse possession.

(c) The Defendants' registration as proprietors be deleted from the proprietary section of Title No. Gaturi/Weru/1718.

(d) The Land Registrar Embu shall cause the Plaintiff, Nicholas Ileri Kamwende, to be registered as proprietor of Title No. Gaturi/Weru/1718 on account of adverse possession.

(e) The Land Registrar Embu shall dispense with the production of the original title deed for Title No. Gaturi/Weru/1718 for the purpose of executing order (d) above.

(f) The Plaintiff is hereby awarded costs of the suit against the Defendants jointly and severally.

JUDGMENT DATED and SIGNED NYAHURURU and DELIVERED via Microsoft Teams Platform this 18th of December, 2020.

In the presence of:

Ms. Nzekele holding brief for Mr. Okwaro for the Plaintiff

Ms. Mukuna for the Defendants

Court Assistant - Carol

Y.M. ANGIMA

JUDGE

18.12.2020