



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 208 OF 2013

IBRAHIM WACHIRA KARAGURI.....APPLICANT

-VERSUS-

MARY MWIHAKI SIMON.....1ST RESPONDENT

MARGARET WAITHERA WACHIRA.....2ND RESPONDENT

JUDGEMENT

1. By an Originating Summons dated 11th October 2013, the Plaintiff/Applicant herein who claims to be entitled to be registered as the sole absolute proprietor of LR No. Ruguru/Karuthi/720 measuring approximately 2.0 acres **by adverse possession** seeks for the determination of the following questions:

i. Whether the Plaintiff has acquired title by way of adverse possession of LR No. Ruguru/Karuthi/720 measuring approximately 2.0

ii. Whether the Plaintiff should be registered as absolute proprietor of LR No. Ruguru/Karuthi/720 measuring approximately 2.0 acres having acquired the title thereto by way of adverse possession.

iii. Who should bear the costs of this suit.

2. The Originating Summons is premised on the Supporting *Affidavit* sworn on the 11th October 2013 by Ibrahim Wachira Karaguri the Plaintiff herein.

3. On 12th November 2013 the Originating Summons as well as the annexures were served upon the Defendant/Respondents herein wherein on 23rd January 2014 and the matter came up for mention but there was no appearance by the Respondents. However the 2nd Respondent filed their joint Replying Affidavit dated the 27th January 2014 on the 31st January 2014 to the effect that the Applicant's occupation and use of the suit land was upon the license by their predecessor in title and their consent upon being registered as proprietor thereof.

4. That they had been registered as proprietors of the suit land on 28th June 2011 pursuant to orders of the court in Succession Cause No. 4 of 2006 to which the applicant never objected and that was when time started running in respect of his claim.

5. Pursuant to the filing of the Respondents' Replying Affidavit, on the 19th June 2014, the Court directed for the matter to proceed by way of viva voce evidence and the Plaintiff was at liberty to file further affidavits.

6. The matter was scheduled for hearing on the 19th November, 2014, on which day Counsel for the Respondents sought an adjournment on the basis that he intended to file a further affidavit which had not been signed by his client who was unwell. Subsequently the matter had been fixed for hearing for the 11th March, 2020 on which day after the Court had allocated time for the hearing of the suit, there was no appearance for the Respondent and the matter proceeded pursuant to the provisions of Order 12 Rule 2(a) of the Civil Procedure Rules.

Plaintiff's case

7. The Plaintiff's testimony was to the effect that he would adopt his Affidavit dated 11th October, 2013 in support of his application as his evidence well as rely on the documents therein annexed which documents he produced as follows:

i. A certificate of official search dated 24th June, 2013, produced as Pf Exh. 1.

ii. A green card in respect to LR No. Ruguru/Karuthi/720 dated 24th June, 2013, produced as pf Exh. 2.

iii. A certificate of official search in respect of the same parcel of land dated 27th February, 1978, produced as Pf Exh. 3.

8. He also sought to rely on another list of documents dated 24th January, 2017 and produced the same as Pf Exh. 4-18 and a supplementary list of documents filed on 9th November, 2017 which he produced as Pf Exh 19 – 22 which documents the Court did not deem vital for this particular case)

9. The Plaintiff testified that he wished to get title to the land which he together with his parents and his children had lived on for more than 50 years.

10. He also confirmed that he had not seen the Defendants who just bought the land and further that they not related. That he only saw Simon Wachira when he was summoned to Court but later came to learn that he was deceased.

11. When interviewed by the Court, the Plaintiff testified that he had built semi-permanent houses on the land, planted trees which included avocado trees and had also carried on some farming on the land which he had fenced.

12. That he had started living on the suit property in the year 1959 wherein and had never left and nobody had ever tried to evict him save for one time when Simon wanted to sell it.

13. Francis Muriuki Kiraguri testified as PW 2 to the effect that the Plaintiff was his brother and confirmed that indeed he, Plaintiff, had started living on the suit land in 1959 and has never left the same ever since.

14. He also confirmed that he too had once lived on the suit land and that his brother had developed the same wherein he had planted trees, coffee, bananas, had built several houses and further that there had been nobody who had tried to evict the Plaintiff from the land.

15. The Plaintiff closed their case and filed their submissions to which they submitted that pursuant to directions of the Court and in the absence of the Defendants, the Plaintiff herein had proceeded to testify by adapting the facts in his affidavit dated 11th October 2013 and 9th November 2017 wherein he had also produced documents on their list of documents dated 24th January 2017 and called one witness in support of his evidence.

16. The Plaintiffs set out the following issues for determination:

i. Whether the Plaintiffs occupation of the suit land was by consent of the owner.

ii. Whether the reckoning of time only started running on 28th June 2011 when the Defendants were registered as owners of the suit land or in 1978 when the predecessor in title was registered as owner of the land.

17. On the first issue for determination, it was their submission that the Defendants were wives and administrators of the estate of Simon Wachira Kimondo who died on 18th April 1994 and who knew of the Plaintiff's presence on the suit land. That in a suit filed at Nyeri SRMCC No. 23 of 1979 between the Plaintiff and Simon Wachira Kimondo, which suit was never heard following the demise of Simon Wachira Kimondo, the Plaintiff had been termed as a trespasser to the subject suit herein

18. On the second issue for determination it was their submission that since the Defendants herein were appointed as personal representatives of the estate of Simon Wachira Kimondo on the 29th January 2009, that pursuant to Section 16 of the Limitation of Actions Act, administration of the estate dates back to the date of death of the deceased and therefore time started running from the date in 1978 when Simon Wachira Kimondo was registered as proprietor.

19. That having found the Plaintiff as a trespasser from the word go, the Defendants cannot now turn around and say that he was on the suit land with the permission or that of the predecessor in title. The Defendants had the onus by virtue of Section 107 of the Evidence Act to prove that they had given permission to the Plaintiff to be on the suit land but which onus they had failed to discharge.

20. That the Plaintiff has been on the suit land without the Defendant's permission and therefore his occupation and use of the suit parcel of land for all those years has been adverse to the Defendant's title. The Plaintiff placed reliance on the decided case of **Peter Mbiri Michuki vs Samuel Mugo Michuki [2014] eKLR**.

21. That the adverse possession started running in 1978 when Simon Wachira Kimondo and as the proprietor of the suit land and once adverse possession started running in 1978 neither the death of Simon Wachira Kimondo nor the subsequent registration of the Defendants as owners of the suit land could interrupt the running of the time. In any event by the time the Defendants were registered as owners time had run for purpose of adverse possession and the owners have lost the capacity to file any suit for recovery of the land from the Plaintiff. Reliance was also placed on the case of **Peter Thuo Kairu vs Kuria Gacheru [1988] eKLR** and **Githu vs Ndeete [1984] eKLR**.

22. The Plaintiff sought for the prayers in his application for adverse possession to be allowed and for costs be paid by the Defendants.

Determination

23. The court is mindful of the legal attribution to the doctrine of adverse possession in Kenya which is embodied in Section 7 of the Limitation of Actions Act, (Cap 22) 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 is first accrued to some person through whom he claims, to that person”.

24. Section 13 of the Act is in these terms:

“(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession.....”

25. Section 17 of the said Act stipulates that upon the expiry of the period (12 years) prescribed by the Act for a person to bring an action to recover land, the title of that person to the land stands extinguished.

26. The Court of Appeal in the case of **Benjamin Kamau Murma & Others vs Gladys Njeri, C A No. 213 of 1996 held as follows:**

“The combined effect of the relevant provisions of sections 7, 13 and 17 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.”

27. The onus is on the person or persons claiming adverse possession:

“.. to prove that they have used this land which they claim as of right: Nec vi, nec clam, nec precario (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 purpose or by any endeavors to interrupt it or by any recurrent consideration”

The main the elements of adverse possession that a claimant has to prove include :

- i. actual,
- ii. open,
- iii. exclusive
- iv. and hostile possession of the land claimed.

Has the Plaintiff herein demonstrated the said elements?

28. As stated herein above, the critical period for the determination as to whether possession is adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it. See **Littledale vs Liverpool College (1900)1 Ch.19, 21.**

29. This being a matter where the Plaintiff has sought for orders that he be registered as proprietor of parcel LR No. Ruguru/Karuthi/720 measuring approximately 2.0 acres having acquired the title by virtue of the doctrine of adverse possession, I find the issues arising for my determination as being:

iii. Whether prescription affects not only present holders of the title but their predecessors

i. Whether the Plaintiff has acquired title by way of adverse possession of LR No. Ruguru/Karuthi/720.

30. I have considered the evidence on record, as well as the applicable law on the doctrine of Adverse Possession, I have also gained sight of the certificate of official search dated 24th June, 2013, produced as Pf Exh. 1, the green card in respect to LR No. Ruguru/Karuthi/720 dated 24th June, 2013 produced as Pf Exh. 2, a certificate of official search in respect of the same parcel of land dated 27th February, 1978, produced as Pf Exh 3 and another official search in respect of the suit land dated 24th June 2013, produced as Pf Exh 19 which documents confirm that as at 19th January 1959 the suit land had been registered to one Mutero son of Kiraguri wherein the titles certificate was issued on 6th January 1978. Thereafter the title changed hands and the suit land was registered to Simon Wachira Kimondo on 7th February 1978 and a title deed issued.

31. I also note that via a certificate of confirmation of grant dated 29th January 2009 in the matter of the Estate of the late Simon Wachira Kimondo P & A Appeal No 4 of 2006, the suit property herein was to be shared equally between the Respondents as administrators of the

estate of the deceased. Both the Respondents were registered as proprietors of the suit land on 28th June 2011.

32. The Plaintiff's evidence to the effect that he took possession of a the suit land in the year 1959 and has not left the same ever since was not controverted and therefore the Respondents herein being administrators to the estate of Simon Wachira Kimondo, time started running against them on the 7th February 1978 when the said Simon Wachira Kimondo was registered as proprietor of the suit land. The record shows that the Plaintiff's possession of the suit property was *nec vi, nec clam and nec precario* and possession continued uninterrupted and without force until Simon Wachira Kimondo's death on 18th April 1994. At the time of filing the Originating Summons the Plaintiff had been in continuous possession for a period of almost fifty-four years and the Plaintiff's right and claim based on adverse possession had accrued.

33. In the case of **Githu v. Ndeete** (*supra*) the Court of Appeal stated:-

"Mr Gaturu attacked this part of the judgment on three grounds. Firstly, he submitted that change of ownership interrupts adverse possession, and that accordingly time did not begin to run against the appellant until he was registered as proprietor of the land in 1966. The answer to this submission is that immediately before the appellant became the registered proprietor in 1966 the Respondents were in the course of acquiring rights under section 7 of the Limitation of Actions Act, cap 22, and by virtue of section 30 (f) of the Registered Land Act, cap 300, those rights are overriding interests. The appellant even as a registered purchaser for value could never be in a better position than his predecessor in title and must take subject to the rights of squatters." [Emphasis added].

34. In **Douglas Mbugua Mungai v Harrison Munyi [2019] eKLR** the Court of Appeal held that;

*The issue in the **Githu case** was whether the mere change of ownership of land that is occupied by another person under adverse possession would interrupt such person's adverse possession. And the answer was correct that where the person in possession has already begun and is in the course of acquiring rights under **Section 7 of the Limitation of Actions Act**, those rights are overriding interests by virtue of **section 30(f)** of the RLA, to which the new registered purchaser's title will be subject.*

35. The same view was followed by the Court in the case of **Kairu v. Gacheru [1986-1989] E.A** where it was held that:

"The law relating to prescription affects not only present holders of the title but their predecessors (Section 7 Limitation of Actions Act)."

36. In the case of **Titus Kigoro Munyi v. Peter Mburu Kimani (2015)eKLR** it had been observed that:

"It must be noted that under Section 7 of the Limitation of Actions Act, the law relating to prescription affects not only present holders of the title but their predecessors.

37. It is therefore clear from the foregoing provisions of the law and case law that a claim for adverse possession can be sustained against the estate of a deceased person. Having said that, I find that the Plaintiff/applicant herein has made up a case for being granted the orders sought. The Land Registrar shall forthwith enter the name of the Plaintiff Ibrahim Wachira Karaguri as the proprietor of land parcel No. LR No. Ruguru/Karuthi/720.

38. Costs at a lower scale since the suit was undefended.

Dated and delivered at Nakuru this 17th day of December 2020

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE