



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 186 OF 2014 (O.S)

IN THE MATTER OF ORDER 37 RULE 1 CIVIL PROCEDURE RULES

AND

IN THE MATTER OF L.R. NO. 19960 & L.R. 11344 R /R (PART) AND L.R. 11344R/R & L.R. No. 41/3/6 OF LAND REGISTRATION ACT

AND

IN THE MATTER OF ARTICLES 10, 40, 60, 67(2) (a), (3), 159 AND 162 (2) (b) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 7(e), 12(1) (b), 43(3), 44, 134(1), 155(10) (a) OF THE LAND ACT 2012

AND

IN THE MATTER OF SECTIONS 13(7) (h) OF ENVIRONMENT AND LAND COURT ACT 2011

BETWEEN

SILANGA ESTATE PLOT OWNERS

WELFARE SOCIETY.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF NAIROBI.....1ST DEFENDANT

THE NATIONAL LAND COMMISSION.....2ND DEFENDANT

JUDGEMENT

1. This is a claim for adverse possession over land reference number (L.R. No.) Grant Number I.R 19900 originally known as L.R. No. 11344/R (part) and currently L.R 18229 up to 18269, 18468 which originally was L.R. No. 41/3/6 situated in Nairobi Area. The suit was commenced through the Originating Summons dated 21/02/2014 and was made on the grounds that the Plaintiffs' members have lived on the suit land uninterrupted for many years and are now aged with children and grandchildren all born and brought up on the suit land and as such they are entitled to ownership of the land.

2. The application was supported by the affidavit of Pastor Mwaura Githiora, the Plaintiffs' chairperson sworn on 21/02/2014 in which he deponed that he had the authority of the members of Silanga Estate Plot Owners Welfare Society who reside on the suit land to represent them in this suit. He deponed that he was born in 1942 and that he settled on the suit land before independence when he was 12 years old with his father who was working in the nearby Silanga Sisal Farm owned by colonialists. He added that they stayed on the land until his father died. He deponed that the suit land was later divided into several camps which are now referred to as L.R No. Grant Number IR No. 19900 original L.R. Nos. 11344/R (part) current L.R 18229 up to 18269, 18468 which originally was L.R No. 41/3/6, all situated in Nairobi.

3. He averred that the suit land was occupied by Kenyans drawn from different tribes and that they had lived on the land without interruption

from the Defendants until recently when the area Chief started disturbing their peace. He deponed that they had developed the land by putting up permanent residential and commercial buildings as well as schools and churches. He further deponed that most residents have their plots serviced with piped water and electricity for which they pay bills to Nairobi Water Company limited and Kenya Power Company limited respectively.

4. The suit was also supported by the affidavits sworn by Njoki Njenga, Esther Kamene Makau, Mary Mwhaki Ng'anga, Margaret Wangui Gachoka, Godfery Mwangi Mugo, Francis Mwaniki Gathige and Kelvin Maina Mwangi all sworn on 21/02/2014. They deponed that they had lived on the suit land peacefully without interruption for many years.

5. The 1st Defendant filed a replying affidavit sworn on 10/03/2015 by its Chief Officer of land, S.G Mwangi in which he deponed that the suit land and specifically L.R No. 13344/R (original L.R No. 41/3/6) on land survey plan No. 80563 which was registered in the lands Registry in Nairobi as Number I.R 19900/63 was granted to the City Council of Nairobi by the government after independence.

6. He added that L.R. No. 11344/R was sub-divided by the City Council into separate portions with one of the subdivisions being L.R. No. 18242 which was leased to Jenville Motor Works Limited for a term of 99 years from 20/05/1994. He annexed the lease which is the lease that was annexed to the affidavit of Mwaura Githiora sworn on 21/02/2014. He deponed that the other subdivisions were set aside by the 1st Defendant for industrial development. He also deponed that L.R. No. 18242 was privately owned and as such the 1st Defendant had no authority to transfer it to the Plaintiff by virtue of the private owner's statutory and constitutional rights. He asked the court to dismiss the suit.

7. In response to the 1st Defendant's replying affidavit, the Plaintiff filed what it referred to as a supporting affidavit sworn on 13/02/2020 by Kevin Maina Mwangi where he deponed that the lease annexed to the affidavit of Mwaura Githiora which was sworn on 21/02/2014 and which the 1st Defendant mentioned in its replying affidavit should be expunged from the record as it was causing confusion and it appeared that their previous advocate had annexed the lease in error to bring an unintended effect.

8. The Defendants did not participate at the hearing of this matter despite being aware that the case was coming up for hearing. Francis Mwaniki Gathigi testified on behalf of the Plaintiffs. It was his testimony that Silanga Estate Plot Owners Welfare Society was duly registered and that its members had lived on the suit land harmoniously. It was also his testimony that the Defendant had never interfered with or challenged or interrupted their continuous stay, possession, occupation, development and quiet enjoyment of the suit land. He stated that the 1st Defendant had built Jehovah Jireh Primary and Secondary Schools on the suit land in a bid to improve the welfare of the Plaintiff's members. The testimony of Kelvin Maina Mwangi who also gave evidence on the Plaintiff was that the whole neighborhood consisted of members of the Plaintiff and that they had lived on the land uninterrupted for many years.

9. The court has considered the suit, the 1st Defendant's Replying Affidavit the Plaintiffs' affidavits as well as the evidence adduced for the Plaintiff and its written submissions. The issue for determination is whether the Plaintiff is entitled to ownership of the suit land through adverse possession.

10. The Plaintiff brought its claim under Order 37 Rule 7 of the Civil Procedure Rules which provides that Originating Summons under Section 38 of the Limitation of Actions Act must be supported by an affidavit to which a certified extract of the title to the land in question has been annexed. The Plaintiff did not annex a certified copy of title to the suit land. In **Teresa Wachuka Gachira v Joseph Mwangi Gachira, Civil Appeal No.325 of 2003**, cited with approval by the Court of Appeal in **Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR** the Court emphasized the importance of following the prescribed procedure in adverse possession claims. It stated that since a claim for adverse possession was anchored on the fact that the suit property belonged to a registered owner, evidence in the form of a copy of the document of title must be exhibited for the court to ascertain its existence and ownership.

11. The rule requires that summons together with a copy of the document of title must be served on the registered owner of the suit land. There is evidence that L.R No. 11344/R was subdivided by the City Council into separate portions. There is evidence that L.R. No. 18242 was leased to Jenville Motor Works Limited for a term of 99 years. Even though the Plaintiff laid claim to that portion as well, it did not serve Jenville Motor Works Limited with the application as the rules dictate.

12. The Plaintiff produced a copy of the letter dated 02/07/2012 addressed to the Town Clerk, Nairobi City Council authored by the Plaintiff's advocates in which the Plaintiff admitted that the suit land was granted to the Nairobi City Council by the government for a housing scheme. The correspondence exchanged between the Commissioner of Lands and the Director of City Planning and Architecture produced in evidence show that the subdivision of L.R No. 11344/R (part) was done for the City Council of Nairobi and that several blocks were earmarked for industrial and commercial use by the City Council.

13. Looking at the documents the Plaintiff relied on and the Replying Affidavit of the 1st Defendant, the court is convinced that save for the portion of land leased to Jenville Motor Works Limited, the suit land was government land at some point. Without a certificate of title, it is not possible to establish whether the land changed hands to a private person or whether it still belongs to Nairobi City Council which is now the County Government of Nairobi. These are some of the matters that the Plaintiff was required to prove on a balance of probability but failed to do so. Section 41 of the Limitation Act, which is the law through which the Plaintiff brought its claim excludes government land from the application of that Act.

14. In **Gitu v Ndungu & 2 Others (2001) eKLR**, the Court of Appeal affirmed that when land was held by the government, a person could not claim it under adverse possession until title had moved from the government. The suit land constitutes public land pursuant to Article 62 (1) (a) of the Constitution and is vested in the 1st Defendant by virtue of Article 62 (2) to hold in trust for the residents of Nairobi County. The 2nd Defendant's constitutional role is to administer the land.

15. The Plaintiff's claim for adverse possession fails with no order as costs.

Delivered virtually at Nairobi this 16th day of December 2020.

K.BOR

JUDGE

In the presence of:-

Mr. Gerald Muthuri for the Plaintiff

Mr. V. Owuor- Court Assistant

No appearance for the Defendants