



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

E.L.C. CASE NO. 50 OF 2014 (OS)

ELISHA NJERU JAMES.....PLAINTIFF

VERSUS

FELISTER NGIMA ELIJAH (being sued as the administratrix of

the estate of Elijah Njagi Henry).....DEFENDANT

JUDGEMENT

1. By an originating summons dated 21st October 2010 brought under **section 38 of the Limitation of Actions Act (Cap 22)** the Plaintiff sought the following orders;

a. That Elisha Njeru James be declared as the registered proprietor of all parcels of land being land reference numbers Kagaari/Kanja/4793, 4794, 4795 and 4796 by adverse possession.

b. That a vesting order in respect of the above parcels do issue in favour of the Plaintiff.

c. That the Deputy Registrar of this honourable court executes all the necessary documents for the transfer of the above parcels to the Plaintiff.

d. That costs be provided for.

2. The said originating summons was based on the ground that the Plaintiff had been in open, continuous and uninterrupted occupation and possession of *Title Nos. Kagaari/Kanja/4793-4796* (hereinafter collectively called *the suit properties*) for a very long time. The summons was supported by the supporting affidavit of the Plaintiff sworn on 21st October 2010 together with the annexures thereto.

3. The Plaintiff's case was that sometime in May 1963 he bought the suit properties whilst they were still part and parcel of a larger parcel of land known as *Title No. Kagaari/Kanja/1923* (hereinafter called *parcel No. 1923*). He stated in his said affidavit that he thereupon took possession of the suit properties and planted trees, tea bushes and other crops. He continued in possession thereof over the years without interruption even though the vendor, Elijah Njagi Nyaga, never transferred the suit properties to him.

4. The Defendant, who is said to be the administrator of the estate of the vendor who is deceased, never entered an appearance to the originating summons despite service. There was no replying affidavit filed in response to the originating summons.

5. When the said originating summons was fixed for hearing on 3rd July 2018, the court directed that the Defendant be served again and an affidavit of service filed. The record shows that the Defendant was served by a senior court process server of this court and an affidavit of service filed.

6. At the hearing hereof, the Defendant did not attend court. Consequently, the Plaintiff was allowed to proceed with the suit *ex-parte*. The Plaintiff called 3 witnesses one of whom was his own son. The Plaintiff adopted his witness statement dated 6th March 2007 as his sworn testimony. He restated his case as contained in his supporting affidavit of 21st October 2010. He testified that upon purchase of the suit properties he took possession and planted about 4000 stems of tea and provided documentary evidence of registration as a tea farmer in Kagaari North.

7. The Plaintiff's other two witnesses supported the Plaintiff's evidence of possession of the suit properties. PW 2 testified that he was engaged by the Plaintiff in 1963 to clear the bushes on the suit properties and to assist in planting tea. He further stated that the tea bushes

were now mature and that the Plaintiff was the one picking the tea leaves. PW 3, who was the Plaintiff's wife, also confirmed the taking of possession and planting of tea bushes in 1963.

8. The court has considered the originating summons, the affidavit in support thereof as well as the documents on record. The court has also considered the evidence tendered at the trial on behalf of the Plaintiff. The main issue for determination is whether or not the Plaintiff has demonstrated his claim for adverse possession.

9. The legal requirements for proving adverse possession were re-stated 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.**

10. The elements of adverse possession were summarized in the case of **Kasuve Vs Mwaani Investments Ltd & 4 Others** (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 Saikwa No. 2 [1984] KLR 284. A title by adverse possession can be acquired under Limitation of Actions Act for part of the land...”

11. The court has considered the evidence on record on the aspect of possession. The court notes that the evidence of possession by the Plaintiff was supported by his witnesses. The court also notes that the evidence of possession was not challenged at the trial since the Defendant did not attend the trial. The court, therefore, accepts the Plaintiff's evidence on possession of the suit properties.

12. The next aspect for consideration is whether the Plaintiff's possession was open and adverse to the interest of the true owner. There is evidence on record that the registered owner handed over possession of the suit properties on the basis of an alleged agreement for sale. There is also evidence on record that upon the Plaintiff taking possession, he cleared the bushes and planted about 4000 tea bushes.

13. In the circumstances of this case, the court is satisfied that the owner of the suit properties discontinued possession on his own volition. The court is also satisfied that the Plaintiff's continued possession and user of the suit properties was adverse to the interest of the owner. The court has noted that there was a dispute between the Plaintiff and the registered owner over the suit properties which was submitted to various fora for resolution without success. It is unlikely that the Plaintiff was merely a licensee who was in possession of the suit property on temporary basis with the permission of the owner.

14. The court has noted that even though the original parcel No. 1923 was sub-divided to give rise to the suit properties, the latter have never been transferred to third parties. The court also notes from the record that the suit properties were distributed amongst some of the children of the deceased vendor vide *Runyenjes Succ Cause No. 15B of 2006* but they have never been registered as proprietors due to an existing court order preventing alienation thereof.

15. The upshot of the foregoing is that the court is satisfied that the Plaintiff has demonstrated the elements of adverse possession against the Defendant. The court shall accordingly make orders in favour of the Plaintiff as prayed in the originating summons dated 21st October 2010.

16. The final issue for consideration is on costs. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event. As such, a successful litigant will normally be awarded costs of the suit unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. There is no good reason why the successful litigant should not be awarded the costs of the suit.

17. In the result, the court makes the following orders;

a. That the Plaintiff, ELISHA NJERU JAMES, has become entitled to be registered as proprietor of Title Nos Kagaari/Kanja/4793, 4794, 4795 and 4796 on account of adverse possession.

b. That the Land Registrar, Embu shall forthwith cause the Plaintiff to be registered as proprietor of the aforesaid parcels of land.

c. The Deputy Registrar of this court shall execute all the necessary forms and documents on behalf of the Defendant to facilitate the transfer of the said parcels of land to the Plaintiff.

d. The prohibitory orders currently registered against the said parcels are hereby lifted to facilitate the registration of the Plaintiff as proprietor on the basis of this judgement.

e. The Plaintiff is hereby awarded costs of the suit to be borne by the Defendant.

18. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 22ND day of JANUARY, 2019.

In the presence of the Plaintiff in person and in the absence of the Defendant.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

22.01.19