



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 256 OF 2015

(FORMERLY KERUGOYA ELC NO. 763 OF 2013)

FLORENCE WANJIRU MATI.....PLAINTIFF

VERSUS

FREDRICK NJAGI MBURIA.....DEFENDANT

JUDGEMENT

1. By an originating summons dated 16th January 2006 brought under **sections 7, 37 & 38 of the Limitation of Actions Act (Cap 22)**, the Plaintiff sought determination of the following questions;

- a. *Whether the Plaintiff has acquired absolute title of land parcel No Kagaari/Weru/4149.*
- b. *Whether the Plaintiff is entitled to be registered as the absolute proprietor of the parcel of land aforesaid and whether she has been in actual possession and occupation since 1976 to date.*
- c. *Whether the Defendant should be ordered to execute all the necessary statutory documents to effect transfer.*
- d. *Whether the Plaintiff is entitled to costs of this suit.*

2. The said summons was supported by an affidavit sworn by the Plaintiff on 16th January 2006. It was deposed that the Plaintiff had been in occupation of *Title No. Kagaari/Weru/4149* (hereinafter called the *suit property*) for over 30 years peacefully and that she had planted 300 stems of coffee, banana stems and other subsistence crops thereon.

3. The Defendant filed a replying affidavit sworn on 2nd March 2006 in which he denied the allegations in the Plaintiff's supporting affidavit *in toto*. It was denied that the Plaintiff was in occupation of the suit property. He stated that the Plaintiff was actually residing on *Title No. Inoi/Kamondo/1868* (hereinafter called *parcel No. 1868*) which was registered in the name of her son. He further stated that the person who was in actual occupation was the wife of the Plaintiff's son known as Tito Mati.

4. It was further contended by the Defendant that he bought the suit property in 1995 from the Plaintiff's father in-law one, Tito Mati Kathiru and there was no way any occupation by the Plaintiff prior to that date could have given rise to a claim for adverse possession in favour of the Plaintiff.

5. The Defendant further stated that prior to the filing of the originating summons he had already filed *Embu PMCC No 368 of 1995* seeking the Plaintiff's eviction from the suit property. The Defendant, therefore, considered the instant originating summons as frivolous, vexatious and an abuse of the process of court and urged the court to dismiss it with costs.

6. The record shows that when the said originating summons was listed for directions on 14th December 2006, it was directed that the parties shall be at liberty to tender oral evidence in addition to the affidavits on record. Consequently, the parties filed their respective witness statements and lists of documents in preparation for trial.

7. At the hearing hereof, the Plaintiff testified on her own behalf as the sole witness. It was her case that the suit property was initially owned by her father in-law who later on gave it to her late husband. She stated that her late husband had sold the suit property secretly in 1995 even though she had been residing on the land since 1976. It was her further testimony that she had developed the suit property by cultivating bananas, coffee and miraa stems.

8. The Defendant, on the other hand, testified on his own behalf as the sole witness. He adopted his witness statement dated 6th December

2017 as his sworn testimony. The Defendant's evidence was to the effect that the suit property was not occupied by the Plaintiff at the time of purchase in 1995. He stated that it was the wife of the Plaintiff's son who was in occupation of the suit property.

9. During cross-examination, the Defendant stated that he had sued the Plaintiff in a previous civil suit and obtained an eviction order against her. He also stated that during the purchase of the suit property, the Plaintiff's husband was residing on his father's land in Kirinyaga. The Defendant maintained that the Plaintiff was still resident in Kutus in Kirinyaga County.

10. Upon conclusion of the hearing on 25th June 2018, the Plaintiff was granted 30 days within which to file and serve her written submissions whereas the Defendant was to file and serve his within 30 days upon service by the Plaintiff. However, by the time of preparation of the judgement, none of the parties had filed submissions.

11. The court has considered the pleadings, affidavits and documents on record. The court has also considered the oral evidence of the parties tendered at the trial hereof and taken into account the questions for determination enumerated in the originating summons. The main question for determination boils down to the issue of whether or not the Plaintiff has established or demonstrated her claim for adverse possession.

12. 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.**

13. In the case of **Kasuve Vs Mwaani Investments Ltd & 4 Others** (supra) the elements of adverse possession were summarized 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...”

14. The first element relates to possession of the suit property for the statutory minimum period of at least 12 years. Although the Plaintiff contended that she had been in possession since 1976, the Defendant contended otherwise. The Defendant's case was that it was the wife of the Plaintiff's son who was in occupation at all material times. When the Plaintiff testified at the hearing hereof, she introduced herself in her examination in-chief as hailing from Kirinyaga County. She also produced a letter dated 17th October 2017 by the Assistant Chief of Nthagaiya sub-location in Runyenjes which introduced her as hailing from Kirinyaga County. The material parts of the said letter state that;

“This is to confirm that the above named person hails from Kirinyaga County. That her late husband namely Gathiru Mati had a piece of land within my jurisdiction i.e. Kagaari/Weru/4149. Kindly accord (sic) the necessary assistance”.

15. The Plaintiff produced some photographs showing cultivation of some cross on the suit property. The Plaintiff claimed to have planted some coffee, banana stems and other crops. The Defendant, however, maintained that whatever long term crops are on the land were already there when he bought the land from the Plaintiff's father-in-law.

16. The court is not satisfied, on the basis of the material on record that the Plaintiff has been in continuous occupation of the suit property for the minimum statutory period. The letter dated 17th October 2017 from the Assistant Chief of Nthagaiya Sub-location contradicts and betrays the Plaintiff's case. It does not state that the Plaintiff has been in occupation but that she hails from Kirinyaga County. That letter clearly corroborates the Defendant's evidence that the Plaintiff is a resident of Kutus in Kirinyaga County. It is also strange that the Plaintiff who claimed to have resided on the suit property since 1976 could not speak Kiambu and she had to testify in Kikuyu language.

17. The court is also not satisfied that the Plaintiff has demonstrated her occupation for the requisite statutory period because the copy of the green card for the suit property indicates that it was opened on 21st December 1994 when her father in-law was registered as proprietor. The suit property was transferred to her late husband on 7th September 1995 and later on to the Defendant on 19th September 1995.

18. The court record further indicates that the instant originating summons was filed on 16th February 2006 which was a period below 12 years since the date of first registration. It is also doubtful if the limitation period could start running with effect from 21st December 1994 when her father in-law was registered as proprietor because possession must be hostile and adverse to the title of the registered owner. The only time at which time could start running for the purpose of the Limitation of Actions was 19th September 1995 when the Defendant was registered as proprietor. A computation of time from 19th September 1995 would obviously fall short of 12 years.

19. In the case of **Wilson Kazungu Katana & 101 Others Vs Salim Abdalla Bakshwein & Another [2015] eKLR** it was held, *inter alia*, that;

“...from all these provisions, what amounts to possession? First, the parcel of land must be registered in the name of a person other than the Applicant, the Applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the land owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner...”

20. The other reason why the Plaintiff's claim for adverse possession must fail is that her purported possession was not uninterrupted in the legal sense. It was held in the case of **Githu Vs Ndeete** (supra) that;

“...Time ceases to run under the Limitation of Actions Act either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land; See Cheshire’s Modern Law of Real Property 11th Edition at P. 894...”

21. There is evidence on record that the Defendant herein asserted his right over the suit property by obtaining an eviction order in *Embu PMCC No. 368 of 1995* against the Plaintiff. Although that suit was initiated by the Plaintiff challenging the sale of the suit property to the Defendant, the court eventually issued an eviction order against the Plaintiff in 2003.

22. The upshot of the foregoing is that the court is not satisfied that the Plaintiff has demonstrated and proved the elements of adverse possession as required by law. The court will, therefore, answer questions for determination in the originating summons dated 16th January 2006 as follows;

- a. The Plaintiff has not acquired title to the suit property through adverse possession under the provisions of sections 7, 37 and 38 of the Limitation of Actions Act.
- b. The Plaintiff is not entitled to be registered as the absolute proprietor of the suit property or at all.
- c. The Defendant shall not be ordered to execute any statutory documents to facilitate transfer of the suit property to the Plaintiff.

23. The final issue for consideration is on costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event. See **section 27 of the Civil Procedure Act (Cap 21)**. Consequently, a successful party should be awarded costs of an action unless, for good reason, the court directs otherwise. See **Hussein Janmohammed & Sons Vs Twentsche Overseas Trading Co Ltd [1967] EA 287**. In the instant suit, there is no good reason why the successful party should not be awarded costs of the suit.

24. The court, therefore, makes the following orders for disposition of the suit;

- a. The Plaintiff’s originating summons dated and filed on 16th January 2006 be and is hereby dismissed in its entirety.
- b. The Plaintiff shall bear the costs of the suit.

25. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **17th** day of **JANUARY, 2019**.

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

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

17.01.19