



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 9 OF 2018 (OS)

REGINA WANJIRU MWAGO.....1ST PLAINTIFF

JOYCE WANJIKU KIAGO.....2ND PLAINTIFF

VS

LUCY WAIRIMU GICHUHI.....1ST DEFENDANT

VERONICA MUTHONI MUGURE.....2ND DEFENDANT

PHYLLIS NJERI MACHARIA.....3RD DEFENDANT

JUDGMENT

1. The Applicants took out summons dated the 2/2/18 for the determination of the following questions;

- a. That there be a declaration that the Applicants have acquired all rights and title to the land parcel LOC20GIKINDU//MIRIRA/183 by way of Adverse Possession
- b. Title to land parcel LOC20/GIKINDU/MIRIRA/183 be accordingly cancelled to read Applicants and the Respondents be restrained from interference.

2. The application is premised on the grounds annexed thereto and the Supporting Affidavit of Regina Wanjiku Mwago where she deponed *inter alia* that she and her late husband Kiago Gatimu purchased the suit land measuring 0.44 ha in 1998 for Kshs 60,000/- from the 1st Respondent's husband Alexander Gachuhi Macharia. They took possession in 1998 and started developments on the suit land to wit; building a house, cow sheds and farming. Her husband died in 2009 leaving her and her children and grandchildren settled on the suit land. Their occupation of the land continued peacefully and openly without any interruption to date. In 2016 the Applicant deponed that she enquired of the title from the 1st Respondent who ganged up with the other Respondents and declined to give her title arguing that the Applicants are only entitled to 1/2 of an acre instead of the full 0.44 ha she had acquired with her husband.

3. The Respondents in a joint replying affidavit dated the 21/2/18 denied the Applicants claim and deponed that the suit land belonged to estate of Macharia s/o Gichuhi who died in 1972. That they are beneficiaries and administrators of the estate. Opining that there was no valid agreement for sale as the seller one Alexander Gichuhi did not hold letters of legal representation in the estate of his father Macharia Gichuhi. They deponed that the suit is incurable and a claim of Adverse Possession is not maintainable in the circumstances since no interest legally passed to the Applicants and that their only remedy is for refund of the purchase price from the imposter seller. Finally, they argued that the Applicants should give vacant possession of the suit land.

4. On the 14/11/18 the parties elected to prosecute the motion by way of Written Submissions.

5. The Applicants submitted that they are in occupation from 1998 to date as evidenced by the order of the Court dated the 20/3/18 entered by consent of the parties as follows;

“that the Applicants continue being in peaceful occupation of the parcel of land LOC20/GIKINDU/MIRIRA/183 pending the hearing and determination of this suit”

6. Further that the Applicants have developed the suit land by *inter alia* building a brick house of 3 rooms. Upon the demise of her husband in 2009 the 1st Applicant submitted that she continued in peaceful open occupation with her children. That her husband was buried on the suit land and the Respondents never raised any objection.

7. In respect to occupation and entry into the suit land, the Applicants purchased the suit land measuring 0.44 ha in 1998 for Kshs 60,000/= which was fully paid to Alexander Gichuhi Macharia, the father of the 1st Respondent.

8. The Applicants submitted that the matter was referred to the local chief for arbitration wherein the Respondents had agreed to give them title but later changed their minds on account of demanding more money from the Applicants. In an annexed letter by the Chief Gikindu location dated the 23/1/18 it stated that the Applicants have been on the land for the last 19 years. That there is no dispute about the agreements of sale entered into in 1998 by the parties. That there is also no dispute that the Applicants entered into the land illegally and have been in occupation openly and peacefully.

9. Finally, the Applicants relied on the case of **Wensley Barasa Vs Immaculate Awino Obongo CA 115 of 2015** that the title of the Respondents was extinguished in the year 2010 and the change of ownership has not affected the prescriptive rights of the Applicants accrued pursuant to section 30(f) of the Land Registration Act.

10. The Respondents on the other hand submitted that the land was registered in the name of Macharia Gichuhi who died in 1972. That the said deceased owner could not have allowed the entry into the land for purposes of calculating time for adversity. The 1st Applicant and her husband therefore bought land from Alexander Gichuhi who had letters of representation to act in the estate of the late Macharia Gichuhi and hence acquired land from an intermeddler according to section 45 of the Succession Act. The Respondents further submitted that under section 38(1) of the Limitation of Actions Act a claim of Adverse Possession can only be brought against the registered owner of the land as a proprietor.

11. The Respondents relied on the case of **Mwinyi Hamisi Ali and AG & Anor CA No 125 of 1997**, where the Court held that;

“Adverse Possession can only be claimed against a properly registered owner that is to say the possession must be adverse to that of the Registered proprietor.”

12. Equally in **Kasuve Vs Mwaani Investments Limited & Others 1KLR** the Court of Appeal stated that a claim for Adverse Possession has to prove as follows;

“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 without interruption for a period of 12 years either after dispossessing the owner or by discontinuation by the owner of his volition.”

13. Finally, the Respondents submitted that the Applicants having purchased the suit land from a stranger the Plaintiffs cannot be heard to say that they have acquired land by Adverse Possession as the registered owner of the suit land was dead by 1972.

14. Having considered the pleadings and the submissions before me the issues that fall for determination are;

- a. Whether a claim for Adverse Possession can be urged against the estate of a deceased person
- b. Whether the Applicants have established a claim under Adverse Possession.
- c. What orders should the Court issue.

15. It is not in doubt that the 1st Applicant's husband entered the suit land by way of purchase in 1998 where upon the purchase price was paid in instalments until 2000. It is also not in dispute that they have been in continuous uninterrupted and open occupation and possession from 1998 to date. The Respondents have urged the Court to disallow the claim for adverse on two grounds; firstly, that the registered owner of the suit land was already dead by 1972 and therefore the purchase of the suit land by the Plaintiff from his son who had no capacity to sell the suit land to the Plaintiff on behalf of the deceased owner. Secondly a claim for adverse can only be brought against the registered owner of the suit land as proprietor and therefore in 1998 the deceased owner could not have allowed the Applicants entry for purpose of calculating Adverse Possession.

16. For Adverse Possession, to mature into title to land the following conditions must be fulfilled:

- a. The trespasser has to demonstrate that he/she has been in *Continuous and uninterrupted* possession without the consent of the owner of the land;
- b. The trespasser's interest has to be *inconsistent* to the interests of the true owner of the land;
- c. The possession has to be *open and notorious*, to enable the owner be on notice that there is a trespassing on his/her land;
- d. The possession has to be *actual*, to enable the owner have a cause of action which if he/she fails to act on within the required legal period then he/she will be estopped by the law of Limitation to claim back the land.
- e. The possession has to be *exclusive*, to avoid confusion on who is entitled to obtain the title to the suit land once the limitation period lapses.

17. For a party to succeed in summons for Adverse Possession, it must be demonstrated that there was open, continuous, notorious and

uninterrupted possession for a period of at least twelve years. Further, for a party to qualify as an Adverse Possessor, they have to prove they did not have permission to enter into the suit land. The Plaintiff is expected to furnish in Court evidence to prove that the suit land where he/she is claiming Adverse Possession indeed belongs to the Defendant.

18. In the case of **Wambugu Versus Njuguna 1983 KLR 174 cited in Karuntimi Raiji Vs. M'makinya (2013) eKLR**, the Court of appeal held that 'in order for a person to acquire title by the operation of the statute of limitation to land which has a known owner, the owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the suit for purposes for which he intended to use it.

19. The Applicants have stated that they have occupied the suit land openly uninterrupted from 1998 to date. It is on record that the parties entered into a consent that was recorded as an order of the Court that the Applicants continue in occupation of the suit land. Further the Respondents have not demonstrated if the Applicants have ever been dispossessed of the suit land. The Applicants have led evidence by way of affidavit that since 1998 they have not relinquished the suit land to the Respondents. They have occupied the land as of right exclusively openly and have shown animus possidendi so much so that they have continued to develop the land as of right including burying their kin without any objection from the Respondents.

20. As to Whether a claim for Adverse Possession can be urged against the estate of a deceased person, I rely on the case of **Titus Kigoro Munyi v. Peter Mburu Kimani (2015)eKLR** where it was observed:

“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. (See **Peter Thuo Kairu – v- Kuria Gacheru, (1988) 2 KLR 111**).”

21. I also I adopt the decision in **Karuntimi Raiji v. M'Makinya M'itunga (2013)eKLR** where the Court of Appeal observed:-

“...Another issue raised by the appellant is that a claim for Adverse Possession does not survive a deceased person. Section 30 (f) of the Registered Lands Act and Section 2 of the Law Reform Act provide an answer to the issue. Section 30 provides that:

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same without them being noted on the registers:

a.;

b.;

c.;

d.;

e.;

f. rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;

Section 30 (f) preserves rights being acquired by virtue of limitation of actions.....

Section 2 (1) of the Law Reform Act stipulates that on the death of any person, all causes of action subsisting against or vested in him shall survive against or as the case may be, for the benefit of, his estate. The proviso to the sub-section indicates the causes of action that do not survive namely defamation or seduction or inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.....”.

22. It is clear from the foregoing provisions of the law and case law that a claim for Adverse Possession can be urged against the estate of a deceased person.

23. In the cases of **Sisto Wambugu v Kamau Njuguna [1982-88] 1 KLR 217**; and **Samuel Miki Waweru v Jane Njeri Richu, Civ. Appeal No. 122 of 2001** – in which the Court held that where a purchaser occupies land which is subject to a sale agreement, but with the consent of the vendor, time does not start running for purposes of Adverse Possession, until the agreement is terminated.

24. In the instant case the Applicants acquired possession and occupation of the suit land not from the deceased owner but from his son who sold to the Applicants. Their entry therefore was in other words wrongful and that is the core of Adverse Possession.

25. In **Mwangi & Another –v – Mwangi, (1986) KLR 328**, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights. Adverse Possession is thus more about the equitable interest of a party in possession than a substantive declaration as to the legal right or validity of ownership.

26. The Applicants have been in occupation of the suit land since 1998. Under section 28 of the Registered Land Act the Applicants

processionary rights are recognised as overriding interests that are attached to the land.

27. When does adversity kick in? In the case of **Public Trustee – v- Wanduru, (1984) KLR 314 at 319 Madan, J.A.** stated that Adverse Possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run.

28. In the instant case Adverse Possession could be calculated at two points; firstly in 1998 when the Applicant entered into the suit land upto the year 2010; secondly the year 2000 when the final purchase price was paid ending in 2012. In both scenarios it is evidence that Adverse Possession has crystallised and accrued. The Applicants have occupied the suit land on their own right from 2009 when the husband died.

29. In the case of **Kweyu v Omuto, Court of Appeal, Civil Appeal No. 8 of 1990** The Court held that in deciding the issue of Adverse Possession, the primary function of a Court is to draw legal inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of fact, the question whether that possession is adverse or not is matter of legal conclusion to be drawn from the findings of acts.

30. Further in the case of **Samwel Nyakenogo v Samwel Orucho Onyaru [2010] eKLR**, the Court of Appeal held as follows: **‘For about 19 years, the Respondent was in exclusive possession of the portion of the land bought from the deceased openly and as of right, and during all this time, the Respondent’s said possession was not interrupted by the registered proprietor, the deceased. In our view, the purported application for letters of administration in respect of the deceased land West KITUTU/MWAKIBAGENDI/28 which was confirmed on 15th June, 1999 did not interrupt the respondent’s Adverse Possession of the portion he bought from the deceased.’**

31. It is against the background of decided case law and the evidence adduced in affidavits that I find that the deceased rights to the suit land became extinguished in the year 2010 and /or 2012 and the title was therefore being held in trust for the Applicants. The Respondents obtaining letters of grant of administration intestate, obtaining confirmation of grant in which the deceased estate was distributed did nothing to oust the rights of the Applicants. By the time they petitioned for the grants the deceased rights over the suit land had been extinguished. It matters not that the Respondents have transferred the title of the suit land to themselves.

32. It is in those circumstances and for the reasons I have given above, that I allow the Plaintiff’s Originating Summons dated the 22nd January, 2014, with costs.

33. Final orders;

- a. It is declared that the Applicants have acquired all rights and title to the land parcel LOC 20 GIKINDU/MIRIRA/183 by way of Adverse Possession
- b. Title to land parcel LOC20/GIKINDU/MIRIRA/183 be accordingly cancelled to read Applicants and the Respondents be restrained from interference
- c. The Deputy Registrar of the Court be and is hereby mandated to execute all documents necessary to effect the above orders.
- d. The District Land Registrar Murang’a be and is hereby ordered to register the Applicants as the proprietor of the suit land in place of the Respondents. He may dispense with the production of such original documents or other documents ordinarily required.
- e. Costs shall be paid by the Respondents to the Applicants.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 28TH DAY OF FEBRUARY 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Kimakia HB for Kimwera for the Applicant

Respondent: Advocate is absent.

Njeri and Irene, Court Assistants