



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO 397 OF 2011 (O.S)

JOSEPH KAMAU NGIRIA.....PLAINTIFF

VERSUS

ROSELYN DOLA OUKO.....1ST DEFENDANT

AARON TAFARI OUKO.....2ND DEFENDANT

ANDREW ATINDA OUKO.....3RD DEFENDANT

JUDGMENT

Introduction

On 8/8/2011, the plaintiff, Joseph Kamau Ngiria, took out an originating summons under Section 38 of the Limitation of Actions Act, dated 5/8/2011, seeking determination of the following verbatim question:-

Is Joseph Kamau Ngiria entitled by adverse possession to be registered as the proprietor of Land Reference Numbers 3589/52 and 3589/53 in place of the personal representatives of the Estate of Jason Atinda Ouko (deceased)?

In the event that the determination was in the affirmative, the plaintiff prayed that an order do issue directed to the Registrar of Titles to register the plaintiff as the proprietor of leasehold interest for a term of 999 years from 1/7/1919 of Land Reference Numbers 3589/52 & 3589/53. He also prayed for costs of the originating summons.

The originating summons was supported by the plaintiff's affidavit sworn on 5/8/2011. The originating summons was opposed by the defendants through a replying affidavit sworn on 7/11/2017 by Aaron Tafari Ouko, to which was annexed a prior replying affidavit by the same deponent dated 31/1/2012 and filed in this suit as a response to a preceding interlocutory application. At the hearing, oral evidence was tendered by the plaintiff (PW1). The 2nd defendant (DW1) testified on behalf of the defendants.

The case of the plaintiff was that he had acquired title to Land Reference Numbers **3589/52** and **3589/53 (the suit properties)** pursuant to the doctrine of adverse possession. He contended that he had been in continuous possession of the suit properties for over 25 years. He produced 28 documents marked as PExh 1- 28. He stated that the defendants occupy part of the large parcel out of which the suit properties were parcelled.

The case of the defendants was that the suit property belonged to their late father and they were not aware that the plaintiff bought land from their father. They contended that there was a judgment in **Nairobi HCCC Number 673 of 1985 Joseph Kamau Ngiria v Martin T. Waithaka** in which the plaintiff sued Mr. Waithaka claiming 2 ½ and the court awarded the plaintiff only one acre.

Evidence

The plaintiff testified as **PW1**. He adopted his affidavit as his sworn evidence in chief. He testified that he was introduced to the deceased by one Mr Martin Thuku Waithaka with the intention of purchasing land from the deceased. He contended that he had resided on the suit properties since 1983 and did not receive notice to vacate the suit properties until 27/11/2010. During cross examination, he stated that he made payment of Kshs 100,000/= to Mr. Ouko (deceased) through Mr Waithaka for the purchase of 2 ½ acres of land. He stated that he sued Mr Waithaka and judgment was delivered in his favour. The court awarded him one acre of land from Mr Waithaka. He conceded that he was in the suit property with the permission of the deceased. He stated that Mr Ouko died in 1996 and he did not know if letters of administration were obtained in respect of Mr Ouko's estate. He added that a caveat was registered against the land in 2006. He stated that he had never talked to the administrators of the estate of the late Ouko regarding the suit properties. He further stated that Waithaka died in

2018.

The defendants led evidence by one witness, Aaron Tafari Ouko – DW1. He adopted his affidavit dated 7/11/2017 as his sworn evidence in chief. He stated that he was one of the administrators of the Estate of the late Jason Atinda Ouko who was his late father. He added that the late Jason Atinda Ouko is the registered proprietor of the entire parcel of land known as Land Reference Number 3589/6 which is comprised in Title Number IR 23229. He further testified that the said land has never been subdivided. He added that the plaintiff entered into the suit property through a judgment delivered in HCCC No. 673 of 1985 which was a suit between the plaintiff and Mr Waithaka. He stated that a caveat was issued in Succession Cause No. 2276/2014 and has never been revoked. He added that the grant has not been confirmed to date. He stated that the plaintiff's claim does not meet the threshold for adverse possession.

Submissions

The plaintiff filed written submissions on 2/11/2018. He submitted that he had met all the conditions necessary to sustain a claim for adverse possession. Reliance was placed on **Gatimu Kiguru v. Muya Gathangi 1976] eKLR** where Madan J outlined the principles of adverse possession.

He submitted that adverse possession is not an arbitrary or unconstitutional limitation of the right to property as contended by the defendants. Reliance was placed on **Mtama Lewa v Kahindi Ngala Mwanghandi [2015] eKLR** where it was held that the doctrine of adverse possession is not unconstitutional. Finally, he submitted that as a purchaser, he could properly claim adverse possession. He relied on the case of **James Maina Kinya v Gerald Kwendaka 2018 eKLR** where it was held that a purchaser can qualify to be an adverse possessor.

The defendants filed their submissions on 28/11/2018. They submitted that the plaintiff was bound by his pleadings. They contended that the plaintiff in his pleadings stated that he bought the suit property from Mr. Waithaka but during hearing, he stated that Mr. Waithaka was his agent. They relied on **Wambugu Njuguna (1983) KLR172** where it was held that where a party pleads the right to land under an agreement and in the alternative he pleads adverse possession, the claimant's possession is deemed to have become adverse to that of the owner after paying the last instalment of the purchase price. They argued that in the present case, the plaintiff stated that he was a purchaser but he was not willing to pay the balance of the purchase price. They submitted that the plaintiff had not met the threshold for adverse possession as laid down in **Gabriel Mbui v Mukindia Maranya [1993]eKLR**. They argued that the plaintiff did not demonstrate that he was in exclusive possession of the suit property. They also argued that the claim for adverse possession fails where the claimant was in the suit property with the permission of the owner. They relied on **Samuel Miki Waweru v Jane Njeri Richu C.A No. 122 of 2001 (UR)**.

The defendants further submitted that the plaintiff failed to demonstrate that possession of the suit property had been continuous and uninterrupted. They argued that the plaintiff filed a suit in 1984 against Mr Waithaka and judgment was delivered in 1991 and the court found that the plaintiff was entitled to only one acre out of the suit land. Finally, they submitted that the plaintiff maintained that he entered the suit land as a purchaser and therefore, he had failed to prove that he had the intention to dispossess the rightful owner of the property. They relied on **Priscilla Gaceri Mugambi v Richard Karl Zips & 2 others [2013]eKLR** where the court held that the intention to dispossess must be manifested unequivocally to signify an intention to dispossess the owner.

Determination

I have considered the originating summons together with the evidence tendered in support of the summons. I have also considered the rebuttal evidence tendered by the defendants. Similarly, I have considered the parties' respective submissions, relevant legal framework and the jurisprudence applicable to the key question in this suit. The single issue falling for determination in this suit is whether the plaintiff has satisfied the criteria for acquisition of title over land described as Land Reference Numbers 3589/52 and 3589/53 under the doctrine of adverse possession. Before I make specific pronouncements on the issue, I will outline the relevant common law, statutory, and jurisprudential underpinnings of the doctrine of adverse possession within the context of Kenya's legal system.

Adverse possession is a common land law doctrine which connotes possession which is inconsistent with and in denial of the title of the true owner of land. To establish adverse possession, a claimant must prove that he has both the factual possession of the land and the requisite intention to possess the land [*animus possidendi*]. Secondly, he must prove that he has used the suit land without force, without secrecy, and without persuasion [*nec vi, nec clam, nec precario*] for the prescribed limitation period. Thirdly, he must demonstrate that the registered owner had knowledge [or the actual or constructive means of knowing] that he (the adverse possessor) was in possession of the land. In **Titus Kigaro Munyi v Peter Mburu Kimani, ca no 28 of 2014**, the Court of Appeal held that computation of time starts from when there is actual or constructive knowledge by the registered proprietor. Fourthly, the possession must be continuous; it must not be broken or interrupted.

The doctrine of adverse possession has its statutory underpinnings in **Sections 7, 9, 13, 37 and 38 of the Limitation of Actions Act**. The Court of Appeal examined the constitutionality of the doctrine of adverse possession in the context of the Constitution of Kenya 2010 in **Mtama Lewa v Kahindi Ngala Mwanghandi, [2015] eKLR** and held that the doctrine does not offend the spirit and letter of the Constitution of Kenya 2010 on protection of the right to property.

Under Section 38 of the Limitation of Actions Act, an adverse possessor is entitled to initiate court proceedings in the appropriate court for an order that he be registered as the proprietor of the subject land in place of the registered proprietor against whom the claim of adverse possession is made. Order 37 rule 7 (1) (2) and (3) of the Civil Procedure Rules provide the following mandatory legal framework on how the application under Section 38 of the Limitation of Actions Act is to be made:

Adverse Possession (Order 37, rule 7)

An application under Section 38 of the Limitation of Actions Act shall be made by originating summons.

The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

The court shall direct on whom and in what manner the summons shall be served.

The rationale informing the above mandatory legal framework is that an order of adverse possession under Section 38 of the Limitation of Actions Act only issues against a registered proprietor of land. It does not issue against any other person. Secondly, an order of adverse possession under Section 38 relates to a specific registered and defined piece of land. Thirdly, an order of adverse possession under Section 38 serves to direct the land registrar to alter the parcel register by changing ownership from the registered proprietor to the adverse possessor. The mandatory requirement for a certified extract of the title is intended to ensure that the above two parameters are satisfied before the order is granted.

The determination and order sought in the present originating summons were sought under Section 38 of the Limitation of Actions Act and specifically relate to Land Reference Numbers 3589/52 and 3589/53. No certified extracts of titles in respect of the two alleged parcels of land were attached to the originating summons. Similarly no certified copies of relevant registered survey plans and deed plans relating to the two alleged parcels were produced. What was attached to the originating summons was a 1999 copy of Title in respect of Title Number 23229. Given that the plaintiff seeks a determination and adverse possession order under Section 38 of the Limitation of Actions Act relating to specified parcels of land purportedly bearing specified registered land reference numbers, it was mandatory that he places before the court certified extracts of the relevant titles. In my view, failure to annex certified extracts of the titles in respect of the specified parcels of land is fatal because existence of the land registers relating to the alleged parcels cannot be vouched. My understanding of Section 38 of the Limitation of Actions Act is that an order of adverse possession would not issue under that section unless the court is satisfied that the subject parcel exists in the register and the land registrar can properly be directed to delete the name of the registered proprietor and enter the name of the adverse possessor. Consequently, in the absence of certified extracts of titles relating to Land Reference Numbers 3589/52 and 3589/53 whose existence the plaintiff has alleged, the plea for determination and grant of adverse possession orders under Section 38 of the Limitation of Actions Act is unsustainable. Even if the plaintiff satisfied all the other elements relating to adverse possession but failed to annex the certified extracts of titles, in my view, an order under Section 38 would not issue. Accordingly, the originating summons herein fails for non-compliance with the mandatory requirements of Order 37 rules 7 (1), (2) and (3) of the Civil Procedure Rules.

Secondly, what emerges from the judgment of Shields J in Nairobi HCCC 673 of 1985, Joseph Kamau Ngiria v Martin T. Waithaka which the plaintiff produced as exhibit 9 and relied on is that the late Jason Ouko owned a substantial tract of land in Langata. He offered to sale to Martin Waithaka 2½ acres at Kshs.500,000/=. The plaintiff lent Waithaka Kshs.100,000/= to enable Waithaka pay Ouko part of the purchase price. The defendant who lived in a rented house in Buru Buru approached Waithaka and they agreed that Waithaka would sell to him one acre out of the portion he was purchasing from Mr. Ouko. Waithaka gave the plaintiff the one acre and the plaintiff moved in and built a house on the one acre and started living there. Accordingly, Shield J rejected the plaintiff's claim for 2½ acres against Waithaka but awarded him one acre. Instead of the plaintiff liaising with the estate of the late Ouko to process title for the one acre which he purchased through Mr. Waithaka, he has made a claim for adverse possession in respect of titles that do not exist. In my view, that claim is dishonest and untenable.

Thirdly, in his testimony under cross-examination, the plaintiff testified that Mr. Ouko gave him permission to enter the suit property and he continued to live on the suit property with the permission of Mr Ouko. He further confirmed that he paid Kshs.100,000/= which was purchase price for one acre. He further stated that the family of the late Ouko lives on the same parcel of land. Further, he stated that there are no registered deed plans relating to the suit properties. Quite clearly, the above testimony is inconsistent with the essential elements and requirements of adverse possession which I outlined in the opening paragraphs of my determination.

The totality of the foregoing is that the plaintiff's plea for title under the doctrine of adverse possession is unsustainable. My finding on the question in the originating summons therefore is that there is no evidence of existence or registration of land reference numbers 3589/52 and 3589/53. Secondly, the plaintiff is not an adverse possessor; he is a purchaser of one acre from Martin Waithaka out of Land Reference Number 3589/6. The answer to the question in the originating summons is therefore in the negative.

In light of the above findings, the plea for an order directing the Land Registrar to register the plaintiff as proprietor of the alleged parcels is rejected for lack of merit.

In summary, the plaintiff's suit is dismissed for lack of merit. The plaintiff shall bear costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF FEBRUARY 2019.

B M EBOSO

JUDGE

In the presence of:-

Ms Gachomba for the defendant

June Nafula - Court Clerk