



REPUBLIC OF KENYA

IN THE REPUBLIC OF KENYA AT MERU

ELC. CASE NO. 120 OF 2011

CHARLES NGARUNI.....PLAINTIFF

VERSUS

ZIPPORAH KATHENGU.....1ST DEFENDANT

MOSES MURIUNGI M'IKUNYUA.....2ND DEFENDANT

MOSES MUTUMA M'IKUNYA.....3RD DEFENDANT

NAMAN KAILIBI MEME.....4TH DEFENDANT

JUDGMENT

1. This matter was filed by way of originating summons dated 24th August 2011 where the Plaintiff claims that he has become entitled under **Section 38 of the Limitations of Actions Act CAP 22 Laws of Kenya** to be registered as proprietor by adverse possession of 5 ½ Acres out of Land Parcel No. KIAMURI "A"/1890 and prayed that the court orders the District surveyor Meru and the Land Registrar to subdivide and register his portion under his name.

2. The grounds in support of the Originating summons are set out in the affidavit of Charles Ngaruni Ngitui, the plaintiff sworn on 24th August 2011. He averred that in 1971 M'Ikiunyua M'Nguari, the deceased husband of the 1st Defendant, sold and gave him vacant possession of 5 ½ Acres of Land parcel No. Kiamuri/ "A"/1890 and since then he has continuously, openly, peacefully, exclusively and without interruption occupied the said portion of land. He has extensively developed the said land by planting mango and banana trees, peas, beans and maize.

3. He further states that M'ikunya M'Nguari died in 1996 and consequently without his knowledge the 1st defendant commenced succession cause no 56 of 2001 where land parcel Kiamuri /"A"/ 1890 was transferred to the 2nd and 3rd defendants (her sons). In December 2010 again without his knowledge the 2nd and 3rd defendants sold the land to the 4th defendant.

4. The suit was opposed vide a replying affidavit by Naman Kailibi Meme (4th defendant) sworn on the 6th day of October 2011. In summary he deponed that the plaintiff has not been in continuous, open, exclusive and undisturbed possession of the 5 ½ acres for a period of 12 years, he has not made any substantial developments, that his title has no overriding interest under Cap 300 in respect of the plaintiffs claim, and that he had filed land dispute tribunal case No. 16 of 2011 and the verdict was that the plaintiff be evicted. Further, the 4th defendant deponed that he is an innocent bonafide purchaser for value and at the time he bought the land the title was clean.

5. **PW1, Charles Ngaruni Ngitui** adopted his statement dated 16th July 2013 where he states that sometime in 1971 before land adjudication commenced in Kiamuri, he bought 5 ½ Acres of land from M'Mikunya M'Nguari for Shs.12,500. He took possession and started growing cotton, maize, beans and bananas. When land adjudication started, M'Ikunya Nguari told him that he would subdivide and transfer his portion afterwards. He did not keep his promise and he died in 1996. Consequently without his knowledge the 1st defendant commenced succession cause No.56 of 2001 and upon confirmation of grant in 2004 transferred the parcel of land to the 2nd and 3rd Defendants who then sold the land to 4th defendant. **PW1** stated that 4th Defendant had then filed a case before the land Dispute tribunal which ordered him to vacate this land. He maintained that he has been occupying his portion since 1971 and has developed it extensively. He prays for this court to find that he is entitled to a declaration that he has acquired the 5 ½ Acres by adverse possession and therefore, the land should be subdivided and transferred to him.

6. **PW2, STANELY KINOTI NKIRUTA** relied on his statement filed on 16th July 2013 and stated that he knows the parties to this suit except the 4th defendant. In 1971 M'Ikunya M'Nguari sold 5 ½ Acres of his land at Kiamuri "A" to the Plaintiff before land adjudication took place. That since 1971, the Plaintiff has been occupying the said land and has extensively developed it. **PW3 CHARLES KABURU**

reiterated what PW2 stated in his statement.

7. **DW1, ZIPPORAH KATHENGU**, in her testimony adopted her statement dated 14th November 2013 where she stated that in 2004, she applied for grant of letters of administration on her late husband's parcel of land No. ABOTHUGUCI/KIAMURI "A"/1890. She was not aware that the land had been transferred to the plaintiff since there was no official legal documentation to prove it. She then transferred the said land to her sons who are the 2nd and 3rd defendants since it was within their right to inherit their late father's property as there was no objection raised. She confirmed that her sons thereafter sold the land to the 4th defendant. She said that at the time her husband died he had not sold any land to the Plaintiff and also she had not seen any agreement to that effect. She also contested that the plaintiff had developed and built on the said land. One Marete is the person who apparently has a case with the plaintiff and their land borders her land. She further stated that it is her children who developed the land before selling it. When she gave that land to her children she permanently relocated elsewhere.

8. **DW2, MOSES MURIUNGI** and **DW3, MOSES MUTUMA** are brothers whose evidence is more or less similar. They are also the 2nd and 3rd defendants in this suit. They testified and adopted their statements dated 14th November 2013 as their evidence. They aver that they inherited ABOTHUGUCI/ KIAMURI/ "A"/1890 from their late father through grant of letters of administration that was granted to the 1st defendant. They stated that it was within their right to dispose of the property as they deemed fit including selling it to the 4th defendant.

9. **DW2** added that he did show the 4th defendant, the boundaries of the land which was sold to the latter. He also stated that plaintiff has a land dispute with one Marete but he doesn't know to what extent, and that plaintiff has not stayed on the land for 40 years as he alleges.

10. **DW4, NAMAN KAILIBI MEME** testified and relied on his statement dated 21st March 2014 and affidavit dated 6th October 2011. In summary, DW4 averred that the Plaintiff has not been in continuous open exclusive and undisturbed possession of 5 ½ Acres of ABOTHUGUCHI/KIAMURI "A"/ 1890 for a period of 12 years. He filed Land Disputes Tribunal Case No. 16 of 2011 where it was ruled that the plaintiff be evicted. He claims to be an innocent bonafide purchaser for value as the title was clean when he bought it as the plaintiff had no interest whatsoever over the land.

11. I have carefully considered the facts of this case and the issue for determination is **whether the Plaintiff acquired 5 ½ Acres through adverse Possession in respect of the suit land L.R Kiamuri "A" 1890**

12. Bryan A. Garner, *Black's Law Dictionary*, Ninth Edition, 2009, Thomson Reuters at page 62 defined adverse possession as:

"The enjoyment of real property with a claim of right when that enjoyment is opposed to another person's claim and is continuous, exclusive, hostile, open, and notorious."

Accordingly, to acquire land through adverse possession there must be an exclusive, uninterrupted possession and occupation of the land for a period of twelve years. The occupation must be one that is without the consent of the owner.

13. In the case of **James Mwangi and others vs. Mukinye Enterprises Ltd Nairobi High Court civil case number 3912 of 1986**, it was held that a person relying on adverse possession must show:

a) Clear possession;

b) Lack of consent of the owner; and

c) Occupation for more than 12 years before action

14. **Did the Plaintiff occupy the land in exclusive and open possession?** **PW1** in his testimony stated that he had possession of the land since 1971 when the previous owner of the parcel, M'lkunya M'Nguari sold 5 ½ acres to him. This was contested by DW1 as she said that there were no documents to show that her husband had sold the land to him. Further, defendants refuted the claim that the plaintiff was in occupation of the said land.

15. In the case of **Simon Gatutu Kimano and 87 others vs. East African Portland Cement Co. LTD (2011)eKLR**, it was stated that;

"Adverse possession is a question of fact. Possession is hostile if it is open, without right, without force or fraud and is exclusive..."

16. Plaintiff claims he bought the land in 1971. 40 or so years had passed by the time he filed this suit in year 2011. That is quite a long time. What evidence of constructive occupation does he have? He doesn't appear to have settled on this land. In the case of **Samuel Miki Waweru v. Jane Njeri Richu COA Civil Appeal No. 122 of 2001 NBI**, it was held that **" continuous cultivation which involved planting of long lasting crops like coffee and erecting thereon a residential house went beyond a mere licence and gave the applicant the position of an adverse possessor"**. Plaintiff doesn't state how he demarcated the 5 and half acres for his own exclusive use since the land is quite big, about 17 acres.

17. In the land dispute tribunal case no.16 of 2011, it has emerged that plaintiff had been in occupation of the suit land. The ruling was that he was to be evicted. However such occupation must meet the elements of an adverse possessor. In the case of **Kimoi and Another vs. Samwel Kipkosgei Keitany and Another, ELC no. 37B of 2012 ELDORET**, reference was made to the case of **JA Pye (Oxford) vs. Graham (2003)1 AC 419** where it was stated as follows;

“In order for possession to be one that is able to sustain a claim for adverse possession, such possession must have two elements being ;1) a sufficient degree of physical custody and control- factual possession and 2) an intention to exercise such custody on one’s own behalf and for one’s own benefit- the intention to possess. Thus its simple, mere possession without these two elements is not enough to hold up a claim for adverse possession.”

18. I am inclined to find that plaintiff has nothing to show in terms of the above mentioned elements of possession for this lengthy period he claims to have been in possession. His claim is therefore unmerited.

19. **Was the plaintiff in the occupation of the land for more than 12 years before action without interruption?** . This application was brought before this court in 2011, this is about 40 years since the Plaintiff claims to have taken possession of the land. However, in **In Gabriel Mbui vs. Mukindia Maranya eKLR**, it was correctly stated that the burden of proving title by adverse possession rests upon the person so asserting. In this case there is little evidence showing that the Plaintiff was in possession of the said property and it was up to him to prove this averment. Further, I have taken into account the fact that 4th defendant, the owner of the land did take steps to assert his title. He did this by filing the Land Dispute tribunal case. In the case of **In the case of Elija Ikaha Ikanjo vs Joseph Ngoina Asutsa (2006) eKLR**, it was held that;

“For there to be interruption, the proprietor must evict or eject the trespasser, but because eviction is not always possible without breach of peace institution of suit against the trespasser does interrupt and stop the time”.

Thus the claim of adverse possession is extinguished by assertion of right to title by the land owner –see; the case of **Kipketer Arap Marisin vs. Paul Kipkurui Kurgat (2005)eKLR**.

20. An argument has been advanced by the plaintiff in his submissions that the land dispute tribunal had no jurisdiction to hear the case hence the filing of a Judicial Review case. However, no court order has been availed to this court to indicate that the tribunal had no jurisdiction. I therefore find that plaintiff’s occupation of the suit land (if any) had already been interrupted by the title owner through the land tribunal case by the time this case was filed. The claim fails on this ground.

21. **Did the defendant consent to the plaintiff occupying the suit land?** The plaintiff from his testimony stated that the late M’Ikiunyua M’Nguari had sold the said land to him therefore it can be inferred that he had consent to occupy the land from the original owner. However, he certainly had no consent of the defendants. In particular, DW4 who is the current owner did not give consent as is evident from the Tribunal Case No. 16 of 2011.

22. It has been submitted by the plaintiff that an adverse possessor’s claim is not extinguished by transmission of the suit land to beneficiaries and subsequent purchasers. Indeed that is the legal position and the authorities cited by the plaintiff are relevant on this point.

23. In conclusion, I find that all the elements of an adverse possessor must be met for the claim to be upheld. The claim fails on the basis that **factual and intent of possession is missing** and that there is no evidence **of continuous occupation for the relevant statutory period**. The upshot of my findings are that plaintiff’s claim fails. The same is dismissed with costs to defendants.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 13TH FEBRUARY, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Ngugi holding brief for Mburugu for plaintiff

HON. LUCY. N. MBUGUA

ELC JUDGE