



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 1 OF 2018 (O.S)

(FORMERLY NAIROBI ELC CASE NO. 465 OF 2015)

CATHERINE MUTHONI NGARI

GIBSON NYAGA NGARIPLAINTIFFS

{As Administrators of the Estate of **ANDREW NGARI RUMBIA (DECEASED)**}

VERSUS

GERALD KITHU MUCHANGE.....DEFENDANT

JUDGEMENT

1. By an originating summons dated 14th December 2001 brought pursuant to **Order XXXVI Rules 1, 2 and 3D of the Civil Procedure Rules, (1948 Edition), Section 3A of the Civil Procedure Act (Cap 21) and Section 38 of the Limitation of Actions Act (Cap 22)**, the original Plaintiff, Andrew Ngari Rumbia (hereinafter *the deceased*) sought the following orders against the Defendant;

a. That a declaration be issued that the Respondent's right to recover the eight (8) acre portion out of land reference number Mbeti/Gachuriri/5 from the Applicant is barred under section 7 of the Limitation of Actions Act (Cap 22 Laws of Kenya) and title extinguished under section 17 of the said Limitation of Actions Act on the grounds that the Applicant has become entitled to eight (8) acres from the aforesaid parcel of land by virtue of section 38 of the Limitation of Actions Act.

b. That the Applicant be registered as the proprietor of eight (8) acres out of land reference number Mbeti/Gachuriri/5 in place of the Respondent under section 38 of the Limitation of Actions Act.

c. That the costs of the summons be awarded to the Applicant.

2. The said originating summons was based upon the grounds set out on the face of the summons. It was contended that the deceased had been in open, exclusive and continuous occupation of eight (8) acres out of *Title No. Mbeti/Gachuriri/5* (hereinafter *the suit property*) for a period in excess of 12 years. It was further contended that the Defendant's title thereto had been extinguished by operation of law under the provisions of the **Limitation of Actions Act**.

3. The said summons was supported by an affidavit sworn by the deceased on 14th December 2001 in which he expounded upon the grounds set out in the motion. It was deposed that the deceased had entered the suit property in 1976 and taken possession of 8 acres thereof. It was further deposed that the deceased had undertaken various developments on the said portion of the suit property. It was stated that he had erected thereon dwelling houses, put up a fence around it and planted more than forty (40) trees.

4. The Defendant filed a replying affidavit sworn on 9th January 2002 in response to the said originating summons. The Defendant stated that he only came to know the deceased in 1996 after the two entered into a sale agreement for the sale of only 5 acres out of the suit property. It was deposed that the deceased was unable to raise the purchase price of Kshs 20,000/- per acre. The Defendant contended that the sale agreement became null and void for lack of consent of the Land Control Board. It was further contended that the deceased had only taken possession of a portion of 5 acres with the Defendant's permission hence the issue of adverse possession could not arise.

5. It would appear that upon the demise of the deceased his widow and son were granted letters of administration for the management of his estate. Consequently, Catherine Muthoni Ngari and Gibson Nyaga Ngari were substituted as Plaintiffs in place of the deceased.

6. At the hearing hereof, the Plaintiffs called 2 witnesses and closed their case whereas the Defendant was the sole defence witness. Upon conclusion of the hearing on 18th October 2018 the Plaintiffs were granted 45 days to file and serve their written submissions whereas the

Defendant was given 45 days upon service to file and serve his. The record shows that the Plaintiffs filed their submissions on 13th November 2018 whereas the Defendant filed his on 18th February 2019.

7. The court has considered the pleadings, affidavits, documents and the evidence on record. The court has also considered the respective written submissions of the parties on record. The court is of the opinion that the following issues arise for determination in this suit;

- a. Whether the Plaintiffs have demonstrated their claim for adverse possession of 8 acres out of the suit property.
- b. Who shall bear the costs of the suit.

8. The legal requirements for proving adverse possession were restated 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.**

9. In the case of **Kasuve Vs Mwaani Investment Ltd** (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 Saikwa No. 2 [1984] KLR 284. A title by adverse possession can be acquired under the Limitation of Actions Act for part of the land...”

Such possession must, of course, be without force, without secrecy and without evasion as expressed in the Latin rendition *nec vi, nec clam, nec precario*.

10. The 1st element for consideration is whether the deceased had been in continuous and exclusive possession of 8 acres out of the suit property for the statutory period of at least twelve (12) years. The 1st Plaintiff, Catherine Muthoni Ngari (PW 1), stated that the deceased bought the suit property around 1973 even though they had been residing there from as early as 1961. It was her case that her house and granary were built in 1961 and that they were still in existence. She produced various photographs depicting the existence of some houses and other structures thereon.

11. PW 1 further stated that all her children were born on the portion of the suit property where they reside and that some of them attended the nearby Kangeta Primary School. She produced copies of 3 school leaving certificates indicating that some of their children attended that primary school between 1972 and 1987.

12. Although the Defendant denied having known the deceased prior to 1996 in his replying affidavit, witness statement and evidence in-chief, he conceded during cross-examination that he had known the deceased for a very long time prior to 1996. He also conceded that he knew the father of the deceased as well. He also conceded that the portion being claimed had a fence or hedge around it.

13. The court has carefully assessed the evidence on record. The court believes the evidence of the Plaintiffs on possession and occupation of the suit property. The Defendant was clearly not a credible and truthful witness in view of what the court has stated in the immediately preceding paragraph. The evidence of possession has been supported well by documentary and photographic evidence.

14. It is, however, important for the court to identify the point from which the running of time for purposes of limitation of actions is to be reckoned. The court is of the view that time cannot run from the date on which the deceased took possession or the date from which the Defendant allegedly sold the claimed portion of the suit property in 1973. Time for purposes of adverse possession can only run once the land in question has been duly registered under any law relating to registration of interests in land.

15. The court has noted that even though the Defendant was issued with a title deed on 11th December 1991, the relevant land register was opened on 12th July 1976 and his name was entered as proprietor on the same date. Accordingly, time for purposes of adverse possession can only be computed as from 12th July 1976 and not earlier. A computation from that date would mean that the period of 12 years lapsed on or about 11th July 1988. So, by the time the instant originating summons was filed in 2001 the claim for adverse possession had already matured.

16. The Defendant submitted that time for purposes of adverse possession should be computed with effect from the date when the last or final payment of the purchase price was paid pursuant to the sale agreement of 1996. The court is unable to agree with that submission. The parcel of land the subject of the agreement of 1996 was not identified in the document the Defendant called a sale agreement. According to the Defendant's own testimony at the trial, it was one of the sons of the deceased who paid some money and that the deceased never paid a single cent towards that agreement. In any event, the deceased's claim for adverse possession had already crystallized by the time the agreement was allegedly made.

17. The next element for consideration is whether or not the occupation by the deceased was hostile to the interest of the owner. Although the Defendant stated in his replying affidavit as well as his witness statement that the deceased was all through in possession with his permission, he conceded during the trial that possession was against his will. During re-examination by his own advocate the Defendant was recorded stating as follows;

“All the bodies were buried on my land against my will. I was away when the burials were taking place. For all the years Andrew was in occupation, it was against my will.”

18. The court is satisfied on the basis of the evidence on record that the occupation of the suit property by the deceased was hostile and adverse to the interest of the registered owner. That element of adverse possession has, therefore, been established.

19. The court is also not satisfied that the possession by the deceased was ever interrupted. The mere fact that the Defendant protested his occupation could not be sufficient to interrupt possession. The fact of reporting to the village elders and the Assistant Chief could not interrupt possession either. As long as the Defendant did not make an effective entry into the suit property or file a suit for recovery thereof, there was no interruption of possession. See **Githu Vs Ndeete** (supra).

20. In the circumstances of this case the court is satisfied that the Plaintiffs have demonstrated their claim for adverse possession of eight (8) acres out of the suit property. The court shall, therefore, make appropriate orders in respect thereof.

21. The second issue 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. 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**. In the circumstances of this case, the court finds no good reason why the successful parties should not be awarded costs of the suit. Accordingly, the Plaintiffs shall be awarded costs of the suit.

22. The upshot of the foregoing is that the court finds and holds that the Plaintiffs have proved their claim for adverse possession to the required standard. Accordingly, there shall be judgement for the Plaintiffs against the Defendant in the following terms;

a. A declaration be and is hereby issued that the Plaintiffs have become entitled to be registered as proprietors of a portion of eight (8) acres out of Title No. Mbeti/Gachuriri/5 which is in their possession by virtue of adverse possession under **section 38 of the Limitation of Actions Act (Cap 22 of the Laws of Kenya)**.

b. The Land Registrar Mbeere shall cause the Plaintiffs to be registered as proprietors of the said portion of eight (8) acres of Title No. Mbeti/Gachuriri/5 in place of the Defendant Gerald Kithu Muchange.

c. The Defendant shall bear the costs of the suit.

23. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **28TH** day of **MARCH, 2019**.

In the presence of Mr Njagi for the Plaintiff and Mr Gathogo holding brief for Ms Nyangati for the Defendant.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

28.03.19