



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

E.L.C. CASE NO. 69 OF 2015

(FORMERLY KERUGOYA ELC CASE NO. 69 OF 2013)

JOACHIM NJUGUNA MBUGUA.....1ST PLAINTIFF

JOHN NDUNGU MBUGUA.....2ND PLAINTIFF

PAUL NJOROGE MBUGUA.....3RD PLAINTIFF

VERSUS

ALBERT IRERI MUTURI.....DEFENDANT

JUDGEMENT

By an originating summons dated 7th May 2010 and amended on 10th July 2014 brought under the provisions of **section 38 of the Limitation of Actions Act (Cap 22)**, the Plaintiffs sought the following reliefs;

- a. That the Plaintiffs be declared to have become entitled to 0.43 acres out of land parcel Nthawa/Gitiburi/1316 registered under the Registered Lands Act (Cap 300) by having had adverse possession of the said land for over twelve (12) years.*
- b. That the Defendants title to the said land be declared extinguished and or invalid, null and void and the Plaintiffs be registered as proprietors of 0.43 acres out of the said land.*
- c. That the Defendant do execute the necessary documents to effect the transfer of 0.43 acres out of land parcel Nthawa/Gitiburi/1316.*
- d. That costs be provided for by the Defendant.*

2. The said originating summons was supported by an affidavit jointly sworn by the Plaintiffs on a date which was not indicated in the jurat of the affidavit. It was contended that the Plaintiffs had been in exclusive and continuous occupation of *Title No. Nthawa/Gitiburi/1316* (hereinafter the *suit property*) which is currently registered in the Defendant's name. It was contended that the Plaintiffs had been in possession since 1985 without interruption and that they had developed the suit property by erecting dwelling houses and cultivating crops thereon.

3. The Defendant filed a statement of "defence" dated 27th August 2013 in response to the said originating summons. The Defendant stated that he was allocated the suit property by his Nditi clan and that the Plaintiffs were not members of the clan hence not entitled to clan land. The Defendant averred that the suit property was a portion of a large parcel of land which was the subject of *Kerugoya ELC case No. 48 of 2012* involving Nditi and Muya clan. It was denied that there were any developments on the suit property.

4. When the suit was set down for hearing on 13th November 2018 the 3rd Plaintiff testified on behalf of all the Plaintiffs. He stated that he was born on the suit property and that he and his family have been residing there for over 40 years. He stated that they had erected a permanent dwelling house and some rental houses on the suit property. He further stated that they had cultivated some cash crops and food crops on the suit property such as khat (*miraa*), paw-paws, maize and beans.

5. The Plaintiffs' second witness was Benson Ireri who introduced himself as a farmer resident in Thika. He adopted his witness statement filed in court on 7th June 2018. He testified that the Plaintiffs have been residing on the suit property since 1972.

6. The Defendant did not attend court at the trial of the action despite service. The Plaintiffs were given 21 days within which to file written submissions upon conclusion of the hearing. The record shows that the Plaintiffs' submissions were filed on 20th December 2018.

7. The court has considered the pleadings, affidavits, documents, and evidence on record in this matter. The court has also considered the Plaintiffs' submissions on record. The court is of the view that the following two issues arise for determination in this matter;

a. Whether the Plaintiffs have demonstrated their claim for adverse possession with respect to the suit property.

b. Who shall bear the costs of the suit.

8. The requirements of 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 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...”

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 court has considered the entire evidence on record on the 1st issue as well as the Plaintiffs' submissions thereon. There is adequate evidence on record to the effect that the Plaintiffs have been in possession and occupation of the suit property for a very long period of time. There is also evidence on record to the effects that the Plaintiffs have developed the suit property over the years by building houses and cultivating crops on the suit property. Those actions were undoubtedly inconsistent with the owner's title to the suit property.

11. The Plaintiffs' evidence was not challenged at the trial since the Defendant did not attend court for hearing. There was no evidence to demonstrate that the Plaintiffs' possession was ever interrupted over the years. Although it was pleaded by the Defendant in his defence that there was a pending civil suit i.e. *Kerugoya ELC Case No. 48 of 2012* between Nditi and Mbuya clans there was no indication if the Plaintiffs and the Defendant herein were parties thereto. The Defendant did not attend court to shed more light on the nature of that suit and its effect, if any, on the Plaintiffs' claim for adverse possession.

12. For the foregoing reasons the court is satisfied that the Plaintiffs have proved their claim for adverse possession to the required standard.

13. The 2nd 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 this case the court finds no good reason why the successful litigants should not be awarded the costs of the suit. The Plaintiffs are therefore entitled to the costs of the suit.

14. The upshot of the foregoing is that the court finds and holds that the Plaintiffs have proved their claim for adverse possession. Accordingly, judgement is hereby entered in favour of the Plaintiffs in the following terms;

a. The Plaintiffs have become entitled to be registered as proprietors of 0.43 acres out of *Title No. Nthawa/Gitiburi/1316* on account of adverse possession in place of the Defendant herein, Albert Ileri Muturi.

b. The Land Registrar Mbeere shall cause the Plaintiffs to be registered as proprietors of 0.43 acres out of *Title No. Nthawa/Gitiburi/1316* in place of the Defendant, Albert Ileri Muturi.

c. The Defendant shall execute all necessary documents to effect transfer of the suit property to the Plaintiff in default of which the Deputy Registrar of the court shall do so on his behalf.

d. The Plaintiffs are awarded costs of the suit.

15. It is so decided.

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

In the presence of Ms Nzekele holding brief for Mr Ngaruiya for the Plaintiff and in the absence of the Defendant.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

28.03.19