



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 116 OF 2014

(FORMERLY KERUGOYA ELC NO. 446 OF 2013)

AGNES GATAVI NYAGA.....1ST APPLICANT

JOHN KINYUA NYAGA2ND APPLICANT

KIURA CHEGE.....3RD APPLICANT

LGN.....4TH APPLICANT

JOSEPH NJERU NYAGA.....5TH APPLICANT

PATRICK NDWIGA NYAGA.....6TH APPLICANT

VERSUS

IRERI JOHANA MUITA.....RESPONDENT

JUDGEMENT

1. On 25th June 2010 the 6 Applicants filed an originating summons dated 14th June 2010 under the provisions of Order XXXVI Rule 3D of the former Civil Procedure Rules, seeking the following orders as against the Respondents;

a. That the Applicants herein be declared to be entitled by adverse possession of over twelve years to the whole parcel of land Kagaari/Kigaa/xx registered under the Registered Land Act.

b. That the Applicants be registered as the proprietors in common of the said parcel of land Kagaari/Kigaa/xx.

c. That the costs of this application be awarded to the Applicants.

2. The said summons was based on the grounds that the Applicants had enjoyed continuous, uninterrupted and peaceful possession of Title No. KAGAARI/KIGAA/xx (hereinafter known as the "suit property") hence the Respondent's title to any portion of the suit property had been extinguished.

3. The said summons was supported by a brief affidavit sworn by the 1st Applicant, Agnes Gatavi Nyaga, on 3rd June 2010 to which was annexed an authority to execute, swear and plead on behalf of the other Applicants. A copy of the land register of the suit property was also annexed to the said affidavit.

4. The supporting affidavit stated that the Respondent was the registered proprietor of half share of the suit property whereas the other half was registered in the name of one, MG (hereinafter "G"). It was further stated that the Applicants had lived on the suit property uninterrupted for 12 years in the portions shown in paragraph 4 of the said affidavit. It was further stated that the Respondent had never lived on the suit property.

5. The 1st Applicant also filed a further affidavit sworn and filed on 29th September 2017 on behalf of all the Applicants. She stated that her mother, the 4th Applicant herein, got married to one JN in 1964 but the marriage ended in divorce in consequence of which she returned to her father, G, in 1976 who was already residing on the suit property by then. The said G died in 1978 and apparently left the Applicants in possession of the suit property.

6. The Respondent filed a replying affidavit sworn on 23rd July 2010 in opposition to the said originating summons. He conceded that he was a co-owner of the suit property with the late G who was the grandfather of the 1st, 2nd, 5th and 6th Applicants. He stated that no application had been made by the Applicants under the law of succession for them to inherit the share of G.

7. It was the Respondent's case that he had all along been asking the Applicants to vacate his portion of the suit property hence they could not claim to have been in possession for over 12 years without interruption.

8. When the said originating summons came up for directions before Hon Justice H.M. Okwengu on 16th February 2011, the court directed, with consent of the parties, that the originating summons shall be disposed of by way of *viva voce* evidence and that the originating summons shall be treated as a plaint and the replying thereto treated as a defence. It was further directed that the parties shall file and exchange witness statements and documentary evidence within 30 days.

9. However, when the suit was listed for hearing before me on 12th April 2017, the advocates for the parties consented to dispose of the suit on the basis of witness statements, documentary evidence and statement of issues filed and exchanged by the parties. The parties further agreed to file and exchange written submissions within 41 days. The record, however, indicates that it was not until 19th October 2017 that the Applicants filed their submissions whereas the Respondent filed his on 16th November 2017.

10. The parties herein filed an agreed statement of issues for determination dated 29th September 2017. These issues are as follows;

- a. Whether the Applicants have been in peaceful, open, continuous, exclusive and uninterrupted possession of the whole of land parcel No. Kagaari/Kigaa/xx for a period of 12 years.
- b. Whether the Applicants have acquired adverse title to the whole of land parcel No. Kagaari/Kigaa/xx within the meaning of section 39 of the Limitation of Actions Act, Cap 22.
- c. Whether the Applicants should be registered as proprietors in common for the whole land parcel No. Kagaari/Kigaa/xx in place of the current registered proprietors.
- d. Are the Applicants entitled to only half share of the piece of land parcel No. Kagaari/Kigaa/xx with the other half belonging to the Respondent as per the register?
- e. Should land parcel Kagaari/Kigaa/xx be sub-divided into two portions so that Applicants take half and the Respondent takes the other?
- f. Are the Applicants related to MG; the registered co-owner of land parcel No. Kagaari/Kigaa/xx?
- g. Did the Applicants occupy ½ of land parcel No. Kagaari/Kigaa/xx with consent of and by virtue of blood relation with MG?
- h. Who should pay the costs of this suit?

11. As pointed out by the Applicants' counsel, the first 3 issues are intertwined and can be determined as one issue. They all deal with the question of adverse possession. The legal requirements of proving adverse possession are fairly well settled in Kenya. They were re-stated in various cases such as *Wambugu Vs Njuguna [1983] KLR 172*, *Githu Vs Ndeete [1984] KLR 776*; *Kasuve Vs Mwaani Investments Ltd & 4 Others [2003] 1KLR 184* and *Kimani Ruchire Vs Swift Rutherfords & Co Ltd [1980] KLR 10*.

12. In the case of *Kasuve Vs Mwaani Investments Ltd* (supra), the requirements for 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 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*.

13. The court has considered the evidence on record on the issue of adverse possession. The court has considered the affidavits and statements filed on behalf of the Applicants as well as the replying affidavit and witness statement of the Respondent. The court is satisfied that the Applicants have been in possession of the suit property to the exclusion of the Respondent for periods exceeding 12 years prior to the filing of the suit. The Respondent conceded in his replying affidavit that he had for a long time asked the Applicants to vacate without success.

14. The court is further satisfied from the evidence on record that LGN (4th Respondent) went back to stay with her father on the suit property when her marriage to JN ended at around 1976 or thereabouts. There is no evidence on record that the Applicants' possession was ever interrupted in the legal sense. A request to vacate by the Respondent, or even several such requests could not constitute interruption. Possession in law can only be interrupted through an effective entry into the land or the filing of legal proceedings.

15. In the case of *Githu Vs Ndeete* (supra), the Court of Appeal held that;

“Time ceases to run under the Limitation of Actions Act when the owner takes or asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land; see Chesire’s Modern Law of Real Property, 11th Edition at P. 894.”

16. The court has considered the statements by the Respondent filed on 16th March 2015 and 3rd October 2017 alleging the use of force by the Applicants. The court does not believe or accept those allegations. The court is of the view that they are an afterthought cleverly contrived to defeat the claim for adverse possession. One may ask, how come those allegations were not brought out in the replying affidavit to the originating summons dated and filed on 23rd June 2010? How come the alleged violence or threats of physical violence were not reported to law enforcement agencies? And why didn’t the Respondent take legal proceedings for protective orders and eviction of the Applicants in the face of the alleged actions?

17. The court is satisfied that the Applicants have satisfied the legal requirements for proving adverse possession with respect to one half of the suit property of which the Respondent was the owner. The Applicants have been in possession of the suit property *nec vi, nec clam, nec precario*. The court also finds that their possession has never been interrupted. The court, therefore, answers the 1st, 2nd and 3rd issues in favour of the Applicants.

18. It should, however, be clarified that the Applicants have only established adverse possession with respect to half share of the suit property of which the Respondent was owner. The same does not apply to the other half owned by the late G whose legal representative was not made a party to these proceedings for adverse possession. The Applicants are at liberty to deal with his share in accordance with the law relating to inheritance of real property.

19. On the 4th and 5th issues, it is obvious that the court’s determination on the 1st, 2nd and 3rd issue also resolves these two issues as well. The court has found that the Applicants have established their claim for adverse possession against the Respondent in respect of his half share. The share belonging to the late G remains intact as part of his estate. No valid claim for adverse possession was brought against his estate.

20. The 6th issue is on the relationship of both the Applicants and the late G. It is obvious from the evidence on record that the Applicants are all related to the late G. It is, however, unclear of what consequence such relationship would have on the Applicants’ claim for adverse possession against the Respondent.

21. In view of the court’s findings and holdings on the preceding issues, a determination of the 7th issue would be superfluous since the substantive issues in dispute have already been determined.

22. The last issue is on costs. The general rule is that costs of an action shall follow the event as provided for under **section 27 of the Civil Procedure Act (Cap 21)** unless, for good reason, the court orders otherwise. In this particular case, there is no good reason why the successful Applicants should not have costs of the suit.

23. The summary of the court’s findings on the issues for determination is as follows;

- a. The Applicants have been in peaceful, open, continuous, exclusive and uninterrupted possession of the whole of suit property for a period of at least 12 years.
- b. The Applicants have acquired adverse title to one half (1/2) of the suit property belonging to the Respondent within the meaning of section 38- of the Limitation of Actions Act (Cap 22).
- c. The Applicants should be registered as proprietors in common for one half (1/2) share of the suit property belonging to the Respondent.
- d. The suit property should not be sub-divided into 2 portions so that the Applicants take one half while the Respondent takes the other half.
- e. The Applicants are entitled to one half share of the suit property belonging to the Respondent with the consequence that the Respondent gets nothing.
- f. Yes, the Applicants are related to the late MG.
- g. A determination of the 7th issue is not necessary in view of the court’s findings and holdings on the preceding issues.
- h. The costs of the suit shall follow the event with the consequence that the Applicants shall be awarded the costs of the suit.

24. The upshot of the foregoing is that the Applicants’ suit is merited and judgement is hereby entered in favour of the Applicants against the Respondent as prayed for in the originating summons dated 14th June 2010 but only for one – half (1/2) share of the suit property belonging to the Respondent together with costs of the suit.

25. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **21st** of **MARCH, 2018**.

In the presence of Mr Okwaro holding brief for Mr Morris Njagi for the Plaintiffs and Ms Rose Njeru holding brief for Ms Ndongoro for the Defendant.

Court clerk Njue/Leadys

Y.M. ANGIMA

JUDGE

21.03.18