



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 112 OF 2014

(FORMERLY KERUGOYA ELC CASE NO. 515 OF 2013)

JAMES KARIUKI MURETE.....APPLICANT

VERSUS

NICHOLAS NGUTHI KIVINDA.....1ST RESPONDENT

ANTHONY NDII.....2ND RESPONDENT

JUDGEMENT

1. By an originating summons dated 25th April 2006 brought under the provisions of **section 38 of the Limitation of Actions Act (Cap 22)**, the Plaintiff sought the following reliefs against the 1st Respondent;

a. A declaration that the applicant has acquired adverse possession of the property LR Nthawa/Gitiburi/2444 and that the Respondent is holding the title thereto in trust for the Applicant.

b. An order directing the Respondent to execute all necessary documents to transfer the said property to the Applicant failure to which the Executive Officer of this Honourable court be mandated to execute/sign all the necessary documents transferring the said land to the Applicant.

c. Costs of this application be provided for.

2. The said originating summons was based upon the grounds set out on the face thereof. It was contended that the Plaintiff's father had bought Title No. Nthawa/Gitiburi/2444 (hereinafter the *suit property*) from Nditi clan way back in 1971 and that the Plaintiff had been living on the suit property since then. It was also contended that members of Nditi clan had never resided on the suit property and that they had secretly sold it to the 1st Defendant.

3. The said summons was supported by the Plaintiff's own supporting affidavit sworn on 8th May 2006 in which he expounded upon the grounds set out on the face of the originating summons. The Plaintiff stated that his late father Nyaga Murete (hereinafter *the deceased*) was registered as proprietor of the suit property upon full payment of the purchase price and that the deceased had built a house and settled thereon together with his family. It was further contended that the Plaintiff continued in occupation even upon the death of the deceased.

4. The Plaintiff also contended that the deregistration of the deceased as proprietor of the suit property was fraudulent, null and void for breach of the rules of natural justice. He further stated that the title of the deceased having been acquired through a first registration, it was absolute and indefeasible under the provisions of the **Registered Land Act, Chapter 300 of the Laws of Kenya** (now repealed.)

5. The record shows that the 2nd Defendant was later on joined in the proceedings pursuant to a court order dated 27th July 2006. The 2nd Defendant was joined for the reason that the 1st Defendant had sold and transferred the suit property to him.

6. The 1st Defendant filed a replying affidavit sworn on 27th November 2006 in answer to the said originating summons. He stated that he was registered as proprietor of the suit property on 31st July 1996 and later on sold it to the 2nd Defendant on 15th May 2006. He also stated that he had previously instituted *Embu HCCC No. 37 of 2004* against the Plaintiff seeking his eviction from the suit property in which he obtained judgement in his favour.

7. There is no indication on record of the 2nd Defendant having filed a reply in answer to the originating summons. However, he filed a replying affidavit sworn on 1st August 2006 in opposition to the Plaintiff's application for interlocutory injunction dated 27th July 2006. In

the said affidavit, he asserted that he was the registered proprietor of the suit property having bought it from the 1st Defendant on 15th May 2006. He stated that there were no encumbrances registered against the title at the time of purchase and that if any had existed the Land Control Board would not have granted consent for the transaction and the Land Registrar would not have registered the transfer.

8. The 2nd Defendant denied any fraud in his acquisition of the suit property and stated that time for purposes of limitation could not run until *Embu HCCC No 37 of 2003* between the Plaintiff and the 1st Defendant was concluded.

9. It would appear that in the course of the proceedings the Plaintiff was unable to prosecute the suit on his own due to mental infirmity in consequence of which his brother, Stanley Mbogo Nyaga stepped in to prosecute the suit on his behalf.

10. At the trial hereof, the said Stanley Mbogo Nyaga (PW 1) was the sole witness for the Plaintiff. He testified that he had sued the Defendants for grabbing his late father's land which he asserted was *Title No. Nthawa/Gitiburi/886* (hereinafter *parcel 886*). It was his evidence that he was residing on parcel 886 which was about 25 ha with his mother, sister and brothers. He adopted his witness statement dated 17th May 2018 as his sworn testimony. He also produced the documents in the Plaintiff's list of documents dated 17th May 2018 as exhibits. Among the exhibits was a sale agreement which indicated that the deceased had bought some land for Kshs 2,700/-. However, the agreement did not indicate the parcel number of the land the subject of the sale.

11. During cross-examination, PW 1 conceded that he was aware that parcel 886 had been sub-divided into 4 parcels namely *Title Nos Nthawa/Gitiburi/2440 – 2044*. He stated that he did not know where his homestead was located amongst the four parcels. He also stated that he was claiming the entire parcel 886 on his own behalf and on behalf of his family members.

12. The 1st Defendant testified on his own behalf as DW 1. He confirmed that the suit property was a sub-division of parcel 886 and that he was registered as proprietor on 31st July 1996. It was his evidence that when he visited the suit property upon registration, he found that the Plaintiff had built a house thereon. He gave the Plaintiff notice to quit which the latter did not heed. He thereupon sued the Plaintiff for eviction in *Embu HCCC No. 37 of 2004* and obtained an *ex-parte* judgement against him.

13. It was the testimony of DW 1 that by the time he sued the Plaintiff in 2004 the statutory period of twelve (12) years had not lapsed since the time of his registration hence the claim for adverse possession could not lie. The 1st Defendant confirmed having sold the suit property to the 2nd Defendant in 2006 even though the Plaintiff had not vacated the suit property.

14. The 2nd Defendant, Anthony Ndi (DW 2) testified on his own behalf as the sole witness. He adopted his witness statement dated 12th February 2016 as his sworn testimony. His case was that he bought the suit property from the 1st Defendant in 2006 and that due process was followed in executing the transaction. He poured cold water on the Plaintiff's claim for adverse possession by stating that the title deed was only ten (10) years old at the time he purchased the suit property.

15. Upon conclusion of the trial on 15th October 2018, the Plaintiff was given 30 days to file and serve his written submissions whereas the Defendants were given 30 days from the date of service to file theirs. The record shows that the 1st Defendant filed his submissions on 27th February 2019 whereas the 2nd Defendant filed his on 6th March 2019. There is, however, no indication on record of the Plaintiff having filed any submissions.

16. The court has considered the pleadings, affidavits, documents and oral evidence on record. The court has also considered the written submissions on record filed by the Defendants. The court has noted that the parties did not file an agreed statement of issues for determination. The record shows that the Plaintiff and 1st Defendant each filed a list of 7 issues for determination whereas the 2nd Defendant filed a list of ten (10) issues for determination.

17. The court has noted from the affidavit in support of the originating summons and the evidence of PW 1 that the Plaintiff is also challenging the 2nd Defendant's title to the suit property. The Plaintiff's angle of attack is hinged on alleged land grabbing and fraudulent acquisition of the suit property by the Defendants. The court has also noted that the Defendants have through their oral and documentary evidence endeavored to demonstrate that they lawfully acquired the suit property. The court is afraid that those matters cannot be a legitimate issue for determination in an originating summons brought pursuant to **section 38 of the Limitation of Actions Act (Cap 22)**.

18. As was held in the case of **Wasui Vs Musumba [2002] 1KLR 396** the only legitimate question for determination in such an originating summons is the issue of adverse possession. In the said case, Ringera J (as he then was) held as follows;

“Lastly, I desire to say that the Applicant's claim that he may have an overriding interest over the Respondent's land under the provisions of the Registered Land Act cannot be a matter for adjudication in this originating summons as the only relief sought and indeed the only relief which could be sought in an originating summons of this nature was the registration of the Applicant as proprietor of the suit land by virtue of adverse possession. I will, therefore, express no opinion on the merits or otherwise of that claim.”

19. In the opinion of the court, the following two issues constitute the main issues for determination herein;

- a. Whether the Plaintiff has demonstrated his claim for adverse possession against the Defendants.
- b. Who shall bear the costs of the suit.

20. 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.

21. In the case of **Kasuve Vs Mwaani Investments Ltd and 4 Others** (supra) 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*.

22. The 1st aspect for consideration is whether the Plaintiff has been in continuous, exclusive possession of the suit property in a manner adverse to the owner. The court has considered the entire evidence on record and the submissions on record on this issue. The record shows that the deceased was the 1st registered proprietor of parcel 886 and that he was so registered on 28th April 1984.

23. The court is of the opinion that time for purposes of limitation could only start running upon registration of parcel 886. The material on record shows that it was the deceased who was in possession. The Plaintiff was in occupation as a child residing with his parent and not in his own right during the lifetime of the deceased. Time for purposes of limitation could not run against the deceased while he was in possession and whilst he was the registered owner. There was no evidence that the Plaintiff had dispossessed the deceased during his lifetime. The Plaintiff and his siblings could only have been in possession with the consent of the deceased who was their father. See **Situma Vs Cherongo [2007] 2KLR 84**.

24. The court is of the opinion that time for purposes of limitation could only start running with effect from 8th November 1995 when parcel 886 was registered in the name of 1st Defendant and his co-proprietors. The computation of time between 8th November 1995 and 8th May 2006 when the originating summons was filed shows that the period which had lapsed was about 11 years and 6 months which falls short of the statutory minimum of 12 years. The court, therefore, agrees with the Defendants' submission that the Plaintiff has failed to demonstrate one of the crucial elements of adverse possession.

25. The court has borne in mind that a change of ownership of land does not necessarily affect the running of time for purposes of adverse possession. This is because a claim for adverse possession is in the nature of a prescriptive right which runs with the land regardless of change of ownership. See **Wasui Vs Musumba** (supra) and **Githu Vs Ndeete** (supra). The court, nevertheless, finds that the Plaintiff has failed to meet the requirement of the statutory minimum period of 12 years.

26. The court is further of the opinion that the Plaintiff's possession of the suit property was uninterrupted before the expiry of the minimum statutory period of 12 years when the 1st Defendant filed a suit for eviction in *Embu HCCC No. 37 of 2004*. By that time, the Limitation period had only run for about 9 years as from 8th November 1995 when the deceased lost his title to the suit property.

27. In the case of **Githu Vs Ndeete** (supra) the court addressed the issue of interruption of possession as follows;

“Time ceases to run under the Limitation of Actions Act when the owner 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.”

28. The 2nd issue for consideration is 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 in accordance with the provisions of **section 27 of the Civil Procedure Act (Cap 21)**. A successful party should, therefore, be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Jammohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful parties should be deprived of their costs.

29. The upshot of the foregoing is that the court finds no merit in the Plaintiff's originating summons dated 25th April 2006 and filed on 8th May 2006. Accordingly, the same is hereby dismissed with costs to the 1st and 2nd Defendants.

30. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **21ST** day of **MARCH 2019**.

In the presence of Ms. Rose Njue holding brief for Mr. P.N. Mugo, Ms Muriuki holding brief for Mr. Ithiga for the 1st Defendant and Mr. Okwaro for the 2nd Defendant.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

21.03.19