



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

ELC CASE NO. 24 OF 2014

(FORMERLY HCCC NO. 27 OF 2008)

BERNARD MBUTI KANG'OROTI.....PLAINTIFF

VERSUS

NJAGI GIKUNDI.....1ST DEFENDANT

LUCY WANJIKU MAGONDU.....2ND DEFENDANT

JUDGEMENT

1. By an originating summons dated 3rd March 2008 brought pursuant to the provisions of **section 38 of the Limitation of Actions Act (Cap 22)** the Plaintiff sought the following reliefs;

- a. A declaration that the Plaintiff has become entitled by adverse possession of over twenty years to parcel of land Nos. Mbeti/Gachuriri/1831, 1832, 1833, 1834 and 1835 (registered under the **Registered Land Act Cap 300 Laws of Kenya**)*
- b. That the Plaintiff be registered as proprietor of parcel numbers Mbeti/Gachuriri/1831, 1832, 1833, 1834 and 1835.*
- c. That the costs of this originating summons be awarded to the Plaintiff.*
- d. Such further orders or other orders as may be just.*

2. The said originating summons was supported by the Plaintiff's own verifying affidavit and supporting affidavit both sworn on 3rd March 2008. He stated in his supporting affidavit that vide a written agreement dated 16th July 1978 the 1st Defendant, Njagi Gikungi, sold him *Title No. Mbeti/Gachuriri/30 (hereinafter parcel 30)* at an agreed consideration of Ksh 7,150/- which he paid by instalments between 1978 and 1993. He further stated that he took possession of parcel 30 in 1980 and continued in uninterrupted possession thereof.

3. It was further stated that the 1st Defendant later on sub-divided parcel 30 into 5 parcels namely *Mbeti/Gachuriri/1831, 1832, 1833, 1834 and 1835 (hereinafter collectively the suit properties)* and transferred parcel Nos. 1833 and 1834 to the 2nd Defendant.

4. It would appear that the 1st Defendant filed a replying affidavit sworn on 17th March 2008 in response to the Plaintiff's originating summons. He admitted the existence of a sale agreement between him and the Plaintiff but stated that it was for an unspecified portion of parcel 30. He further stated that the Plaintiff paid the purchase price through unreasonable instalments running from 16th July 1978 to 21st January 1997.

5. It was stated that the Plaintiff had entered parcel No. 30 with the consent of the 1st Defendant and erected a small temporary house thereon and cultivated only part of the land. It was also contended that the Plaintiff's possession and occupation was not continuous or uninterrupted as he had severally been issued with notices to vacate parcel 30.

6. The 1st Defendant also stated that the Plaintiff had sued him in *Embu PMCC No. 2002/1997* claiming the transfer of parcel 30 to him but the suit was struck out in 2002. It was, therefore, contended that time for purposes of limitation could only start running after dismissal of that suit.

7. At the trial thereof, the Plaintiff called 4 witnesses in support of his claim. The Plaintiff's own testimony was essentially in line with the

contents of his supporting affidavit sworn on 3rd March 2008. He also adopted his witness statement dated 4th October 2011 as his sworn testimony. His case was simply that he took possession of parcel 30 in 1980 and had been in exclusive possession thereof since then. He had developed it by constructing houses and cultivating various cash crops and food crops thereon. He produced photographs depicting some of the developments on the suit land. He conceded having entered the suit property with the consent of the deceased. He also stated that the consent of the Land Control board (LCB) was not obtained for the sale transaction.

8. The rest of the Plaintiff's witnesses supported the Plaintiff's possession of the suit land and the existence of a sale agreement between the Plaintiff and the deceased. They also confirmed that the suit property was developed even though they were not all agreed on the extent of developments and the period they were undertaken.

9. The 1st Defendant's son, Bernard Gikungi, testified on his behalf since the 1st Defendant was said to be senile. He stated that he was familiar with the affairs of his father regarding parcel 30. It was his testimony that this father initially intended to sell the entire parcel to the Plaintiff but the latter could not afford to pay for it. The 1st Defendant thereafter offered to sell 3 acres but the Plaintiff could still not afford the purchase price. He stated that the Plaintiff was not cultivating the entire land but only a portion thereof. He contended that when the 1st Defendant sub-divided parcel 30 into 5 parcels and sold parcel Nos. 1833 and 1834 to the 2nd Defendant, the Plaintiff was not utilizing those two parcels.

10. The 2nd Defendant testified on her own behalf at the trial. Her case was that she was simply an innocent purchaser for value of parcel Nos. 1833 and 1834. She contended that all due process in their alienation was followed and that the consent of the LCB was obtained to validate the transaction. It was her case that those two parcels were not being occupied or utilized by the Plaintiff in 2008 when the transaction took place. It was her testimony that they were not developed at the material time. The 2nd Defendant further contended that she had no problem with the Plaintiff until 2013 when he started cultivating parcel Nos. 1833 and 1834 after filing the instant suit.

11. When the hearing of the suit was concluded on 4th October 2018, the Plaintiff was given 30 days to file and serve his written submissions whereas the Defendants were given 30 days upon service to file and serve theirs. The court has noted from the record that the Plaintiff did not file his submissions within the stipulated period or at least by the time of preparation of this judgement. The 1st Defendant filed his submissions on 20th December 2018 whereas the 2nd Defendant filed a notice on 9th January 2019 wholly adopting the 1st Defendant's submissions.

12. The court has considered the pleadings and affidavits on record, the documents produced by the parties as well as the oral evidence tendered at the trial hereof. The court has also considered the submissions on record filed on behalf of the Defendants. The court is of the opinion that the following issues arise for determination;

- a. Whether the Plaintiff has demonstrated his claim for adverse possession of the suit properties against the 1st and 2nd Defendants.
- b. Who shall bear the costs of the suit.

13. 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.**

14. In the case of **Kasuve Vs Mwaani Investments Ltd and 4 Others** (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*.

15. The 1st aspect of adverse possession for consideration is whether the Plaintiff has been in continuous, exclusive possession of the suit properties in a manner adverse or hostile to the interest of the owner. The court has considered the entire evidence on record. There is no doubt that the Plaintiff took possession of what was then parcel 30 in 1980 or thereabouts. What is unclear is whether he occupied and utilized the entire land or only a portion thereof. There is no doubt that such possession was exclusive in the sense of excluding the true owner of the land.

16. The Defendants submitted that the Plaintiff's possession was not continuous in that it was interrupted by the giving of notices to vacate and the existence of *Embu PMCC No. 2002 of 1997*. The court is not persuaded that the giving of quit notices could have interrupted the Plaintiff's possession. In the case **Githu Vs Ndeete** (supra) the court addressed the issue of interruption as follows;

“Time ceases to run under the Limitation of Actions Act either 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 *Cheshire's Modern Law of Real Property*, 11th Edition at p. 894. In my view the giving of notice to quit cannot be an effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act...”

17. Whereas the institution of legal proceedings by the owner may interrupt possession by the occupant, the court is not satisfied from the documents on record that there was such interruption for two reasons. First, the court finds that *Embu PMCC No. 202 of 1997* was not filed by the owner of the suit properties but by the Plaintiff. It was not a suit filed by the 1st Defendant to assert his property rights. Second, although there was a counterclaim by the 1st Defendant, that counterclaim was filed in 1997 long after expiry of the statutory period of limitation.

18. The next aspect for consideration is whether the Plaintiff's possession was adverse. The Defendants contended that the Plaintiff took possession of parcel 30 with the express permission of the 1st Defendant pursuant to an agreement for sale. It was, therefore, submitted that such possession could not be hostile or adverse. The court is unable to agree with the Defendants' said submission. The court is of the opinion that such permission may come to an end in at least two instances. First, it may be terminated upon rescission or repudiation of the agreement upon breach of the sale agreement. Second, it may be terminated by operation of law where, for instance, the sale agreement becomes void for lack of consent of the LCB. There is evidence on record that the last instalment of the purchase price was paid in 1993 and that the consent of the LCB for the transaction was never obtained by the parties. In whichever way one looks at it, the bottom line is that the statutory period of 12 years had lapsed by the time the instant originating summons was filed.

19. The court takes the view that once the sale agreement of 1978 became void by operation of law for want of consent of the LCB, then the 1st Defendant could not purport to continue granting consent or permission for the Plaintiff to continue in possession pursuant to a void transaction. In the case of *Situma Vs Cherongo [2007] KLR 85*, it was held, *inter alia*, that;

“In Samuel Miki Waweru Vs Jane Njeri Richu – Civil Appeal No. 122 of 2001 (unreported), this court held in part;

“In our view, where the purchaser of land or a lessee of land in a controlled transaction is permitted to be in possession of the land by the vendor or lessor pending completion and the transaction, thereafter becomes void under section 6 (1) of the Land Control Act for lack of consent of the Land Control Board, such permission is terminated by the operation of law and the continued possession, if not illegal becomes adverse from the time the transaction becomes void.”

In this case, the agreement for sale became void six months from date of the agreement – that is on or about 11th September, 1971 and the limitation period for purposes of adverse possession began to run on or about 12th September 1971.

20. The last aspect for consideration is whether the Plaintiff was in possession of the whole or only part of what was parcel 30. The court notes that there was contradictory evidence tendered by the various witnesses who testified at the trial. Whereas the Plaintiff insisted that he was in occupation of and utilized the entire land, the Defendants were of a contrary position. The only Plaintiff's witness who conceded that there were some portions of the suit properties which were still uncultivated and bushy was PW 2.

21. The court has considered the report by the Deputy Registrar which was prepared upon visiting the suit properties on the basis of the court order made on 23rd November 2017. The report confirmed that the Plaintiff and his family members had 6 houses on the suit properties and that a large part of the land was under cultivation of maize, tomatoes, bananas, passion fruits and khat (*miraa*). There was no indication as to when those developments were undertaken. The report did not indicate which of those developments lay on parcel Nos. 1833 and 1834. There was no indication as to which of those developments may have taken place before or after 2008.

22. During cross-examination of PW 4, it emerged that some of the houses on the suit land were fairly recent. At least one house was about 3 years old whereas another one was still under construction. It also emerged that the cow-shed appearing amongst the photographs taken by the Deputy Registrar was barely one year old.

23. It would appear to the court that upon the Plaintiff learning of the sub-division of parcel 30 and the sale of parts thereof, the Plaintiff accelerated and extended his developments on the suit properties. The photographs taken by the Deputy Registrar showed one incomplete permanent building which appeared to have stalled for a while. There is every possibility that its construction commenced during the pendency of this suit because the suit has been pending in court for over ten (10) years.

24. The court is inclined to believe the 2nd Defendant's evidence that parcels 1833 and 1834 were not developed at the time parcel 30 was sub-divided. The court believes that they were not developed at the time the 2nd Defendant bought them in 2008 for two reasons. First, there is evidence on record that beacons were placed on the ground and that the surveyor who undertook the sub-division showed the 2nd the boundaries of the two parcels. It is highly unlikely that this would have happened if the Plaintiff had already developed them. Secondly, the 2nd Defendant impressed the court as a truthful and straightforward witness. The court believes her evidence that the Plaintiff extended his agricultural activities to the two parcels after she had bought them.

25. The court has also observed that during the 2nd Defendant's cross-examination by the Plaintiff's advocate, it was suggested to her that the entire suit land was fully occupied and utilized at least by 2005 or 2008. Such suggestions from the Plaintiff are quite telling. They are indicative of a Plaintiff who accelerated and expanded his developments after filing the suit for adverse possession. The court is, therefore, inclined to believe the 2nd Defendant on the status of parcel Nos. 1833 and 1834 at the time of purchase of 2008. The court has also noted that the Plaintiff filed a supplementary list of documents dated 10th July 2017 attaching photographs of developments on the suit property. That was done nearly ten (10) years after the filing of the suit. That period was probably more than enough for the trees and crops shown in the photos to grow to maturity.

26. The court is aware that adverse possession is not necessarily affected by a change of ownership of the property in question because adverse possession is in the nature of a right of prescription. It runs with the land. See *Wasui Vs Musumba [2002] 1KLR 396*. It is also

recognized as an overriding interest under the Land Registration Act 2012 and as such it is not required to be noted in the register. However, in the instant case, the court is not satisfied that the Plaintiff was in effective possession of the two parcels i.e. 1833 and 1834 at the time of their alienation in 2008 even though he may have been in possession at the time of trial.

27. 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 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 Janmohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. Since the Plaintiff has partially succeeded in his claim, the court is of the view that each party should bear his own costs.

28. The upshot of the foregoing is that the court finds that the Plaintiff is entitled to the orders sought with respect to parcel Nos. 1831, 1832 and 1835 only. Consequently, the court makes the following orders;

a. A declaration be and is hereby issued that the Plaintiff has become entitled to be registered as proprietor of *Titles Nos. Mbeti/Gachuriri/1831, 1832 and 1835* by virtue of adverse possession under section 38 of the Limitation of Actions Act (Cap 22).

b. The Land Registrar, Mbeere shall cause the Plaintiff to be registered as the proprietor of *Title Nos. Mbeti/Gachuriri/1831, 1832 and 1835*.

c. Each party shall bear his own costs.

30. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED at EMBU this 13TH day of MARCH, 2019.

In the presence of Mr. Okwaro for the Plaintiff, Ms. Muthama holding brief for Ms. Wairimu for the 1st Defendant and Ms. Kiai holding brief for Mr. Guantai for the 2nd Defendant.

Court clerk: Muinde

Y.M. ANGIMA

JUDGE

13/3/2019