



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 210 OF 2017(OS)

NANCY NYAMBURA GICHUHLI.....PLAINTIFF/APPLICANT

VS

GEORGE CHEGE MWANGLI.....DEFENDANT/RESPONDENT

JUDGMENT

1. The Plaintiff filed an Originating Summons which was later amended on the 12/4/17 expressed under Order 37 Rule 7 of the Civil Procedure Rules, section 38 of the Limitations of Actions Act and section 30 (f) and (g) of the Registered Land Act (repealed).
2. It is her claim that she is entitled to the land LOC8/KAHATIA THERI/630 (suit land) by way of adverse possession. She sought the following orders;
 - a. That a permanent injunction be granted to restrain the Defendant by himself his servants and/or agents or employees or any one claiming under him from entering, encroaching, obstructing, trespassing or transferring, charging, selling alienating or in any other way whatsoever from interfering with the Plaintiff's, quiet enjoyment of parcels of land No LOC 8/KAHATIA THERI/630 or any portion thereof.
 - b. That the Defendant's title to the parcels of land aforesaid be deemed to have been extinguished through Adverse Possession and or that the Plaintiff be declared and registered as the Proprietor of the said parcel of Land LOC8/KAHATIA THERI/630 and or the Defendant does hold the said parcel subject to the interest of the Plaintiff.
 - c. That the Defendant's interest acquired through the sale of parcel LOC8/KAHATIA THERI/630 on the 8/11/1985 be deemed to have been extinguished through Adverse Possession of the Plaintiff and or that the Plaintiff be declared and registered as the proprietor of the said parcel of land LOC8/KAHATIA THERI/630.
 - d. That the costs of this suit be borne by the Defendant.
3. The application is supported by the grounds annexed to the originating summons as well as the supporting affidavit of the Plaintiff.
4. The Originating Summons were later converted into a plaint pursuant to order 37 rule 19 of the Civil Procedure Rules.
5. The Defendant denied the Plaintiffs claim in a replying affidavit sworn on the 30/5/17.
6. At the hearing the Plaintiff testified and relied on the averments contained in the Supporting affidavit filed on the 14/11/2012 and witness statement dated the 19/11/2018. She led evidence that the suit land was originally owned by Mwangi Waire, now deceased. That she learnt in 1985 that the Defendant had purchased the property from the said original owner. That she has been in occupation of the suit land since 1962 cultivating and tending to 1500 tea bushes. That the land was bought by her brother in 1962 from Mwangi Waire and his brother gave her the land to occupy as his licensee. That the Defendant acquired the land fraudulently with full knowledge of her occupation. That there have been two suits between the current parties in Court since 1986 whose judgment she has annexed to her pleadings.
7. She asserted that she entered the land in 1970 and got the certificate to plant tea under license in 1972. That she was evicted in 2014 by the Defendant and she now lives elsewhere.
8. The Defendant testified and relied on his replying affidavit sworn on 30/5/17 and witness statement of even date. He informed the Court that he bought the land in 1985 and took vacant possession. That the Plaintiff was occupying/cultivating part of the land then. That the suit land has been subject of litigation to wit; HCCC No 2549/86 and HCCC No 2562 of 1998. He stated that the Plaintiff vacated the suit land in 2014 and has retaken possession and even sold it to Esther Njeri Chege.

9. The Plaintiff submitted that she has enjoyed continuous possession and exclusive control over the suit land for a period in excess of 12 years. The Defendant bought the land in 1985 while the Plaintiff had been in possession for over 20 years and pursuant to section 7 of the Limitation of Actions Act the Defendant is now estopped from claiming the suit land. That the Plaintiff's occupation and possession was without the permission of the Defendant. The Plaintiff relied on the case of **Sophie Wanjiku John Vs Jane Mwihaki Kimani ELC 490 OF 2010** where the Court stated that it is settled principle that a claim for Adverse Possession can only be maintained against the registered owner. The Plaintiff urged the Court to grant the prayers as she has proved her case on a balance of probability.

10. The Defendant in his brief submission stated that the previous two cases between the parties disrupted time from running for purposes of adverse possession. The Defendant has stated that he transferred the land to Esther Njeri in 2015 upon taking possession after removing the Plaintiff from the suit land. He urged the Court to dismiss the Plaintiffs claim.

11. Considerable ink has gone into the concept of Adverse Possession and claims related to Adverse Possession in this country. Adverse Possession is one of the modes of land acquisition.

12. The Limitation of Actions Act, Cap 22 makes provisions for Adverse Possession at **Section 13** that:

“ (1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as Adverse Possession), and, where under sections 9, 10, 11 and 12 a right of action to recover land accrues on a certain date and no person is in Adverse Possession on that date, a right of action does not accrue unless and until some person takes Adverse Possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and afresh right of action does not accrue unless and until some person again takes Adverse Possession of the land. (emphasis is mine).

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3), the land in reversion is taken to be Adverse Possession of the land.”

13. **In the case of Githu vs Ndeete [1984] KLR 776** it was held that *time ceases to run under the Limitations of Actions act either when the owner takes or asserts his right or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes effective entry into land, giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act.*

14. In the case of **Kweyu vs Omutut [1990] KLR709**, the Court of Appeal, Gicheru JA, as he then was, stated as follows:

“By Adverse Possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor. (Colour of title is that which is a title in appearance, but in reality). Adverse Possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford Colour, and, second such possession under it as will be adverse to the right of a true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms (“claim or colour of title”) mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land or the period required to form the bar is not sufficient. In other words, Adverse Possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant's use done publicly and notoriously.”

15. The Limitation of Actions Act contemplates two concepts; dispossession and discontinuance of possession. The proper way of assessing proof of Adverse Possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.

16. For the registered owner of land to be dispossessed, the party claiming ownership by adverse possession must demonstrate the existence of acts done on the suit property which are inconsistent with the registered owner's enjoyment of the land for the purpose for which he intended to use it. See **Ngati Farmers Co-operative Society Limited V. Councillor John Ledidi & 15 Others, CA No. 94 of 2004**.

17. Exclusive physical control of the land must depend on the circumstances of each case, the nature of the land and the manner in which land of that nature is commonly used or enjoyed. See **Powell V. McFarlane [1977] 38 P & Cr. 452**.

18. It is not in dispute that the Defendant purchased the suit land in 1985. It is also commonly admitted that the Plaintiff was already in occupation of part of the land. It is also not in dispute that the parties have been litigating in Court from 1986 which saw the filing of two suits between them.

19. From the evidence led on record the Plaintiff settled on the land in 1962. I have seen licenses to plant tea dated 1972. Time started running either from 1962 in which event a claim for Adverse Possession crystalized in 1974. If the evidence of tea license in 1970 is to be taken as the commencement of occupation, then adversity in title crystalized in 1982. It then follows that by 1985 when the Defendant purchased the land the right of Adverse Possession had already crystalized in favour of the Plaintiff. The Defendant has admitted that the Plaintiff was in occupation of the land when he bought it.

20. I have seen the two cases between the parties filed in 1986 (**HCCC 2549 OF 1986 – Goerge Mwangi Chege Vs Nancy Nyambura Gichuhi**) and 1998 (**HCCC 2562 of 1998- George Chege Mwangi Vs Nancy Nyambura Gichuhi**) and in my view these cases did nothing to disturb the right of title that had crystallized either in 1974 or 1982. In the first case the Court ordered that the Plaintiff be compensated before vacating the land. It would appear that this judgement remained unexecuted and expired after 12 years. The Court in the case of 1989 stated that the claim was resjudicata in view of the 1986 suit as both were claims in eviction. The right to titles through Adverse Possession was present in all these periods and it laid undisturbed but ripened in favour of the Plaintiff.

21. The Plaintiff has led evidence that she vacated the suit land in 2014. According to the Defendant he evicted her. From the evidence it is agreed that the Plaintiff is no longer in possession and occupation of the land. The term dispossession implies the coming in of a person and driving out another from possession. Equally discontinuance implies the going out of a person in possession and followed in possession by another. In discontinuance, occupation or possession has been abandoned or withdrawn while dispossession involves retaking, regaining and displacing the previous possessor by another in this case the real owner of the suit land.

22. In this case the Defendant made an effective entry into the land thus disrupting the right to Adverse Possession and the Plaintiff has lost the defacto use and occupation of the suit land. The fact of abandoning the suit land could be interpreted to mean acknowledgement or admission by the adverse possessor of the Plaintiffs title.

23. Arising from the discontinuance of possession of the Plaintiff it follows that Adverse Possession cannot be found in her favour because she ceased possession of the suit land and time for purposes of adverse would begin afresh if she reentered the suit land.

24. The Plaintiff has led evidence that the land was sold to a third party namely Esther Njeri in 2015. No further details were disclosed in form of certificate of official search of the suit land. The Plaintiff did not contest this fact as well. It is taken that the position was admitted.

25. In the upshot the claim of the Plaintiff fails and is dismissed.

26. Parties have been in Court for the last 3 decades. I direct that each to bear their own costs of the suit.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 30TH DAY OF APRIL 2019.

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of;

Wanjiku HB for Mr. Gori for the Plaintiff

Bwononga HB for Gacheru for the Defendant

Kuiyaki and Njeri, Court Assistants