



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 156 OF 2016

TERESIA WANDERI.....PLAINTIFF

VERSUS

JOHN KINGORI KARIUKI.....DEFENDANT

JUDGMENT

By an Originating Summons dated the 20th March, 2007 and filed in court on 21st March, 2007, the Plaintiff seeks the following orders in respect of land parcel number DAGORETTI/ RIRUTA/ 3151 from the Defendant:

1. Whether the Plaintiff entered into lawful possession of the suit land and has been enjoying quiet possession thereof for a period of over twelve years.
2. Whether title obtained by the Defendant is lawful and unchangeable.
3. Whether the court should nullify title in the name of the Defendant.
4. Whether the court should order that the Plaintiff be registered as the owner of the suit land (PARCEL NUMBER DAGORETTI / RIRUTA / 3151)

The Defendant JOHN KINGORI KARIUKI filed a replying affidavit in opposition to the originating summons and averred that he is the registered proprietor of land parcel number DAGORETTIN/ RIRUTA/ 3151 hereinafter referred to as the 'suit land'. He contended that the application is misconceived, bad in law and an abuse of the process of the court. He insisted the application is only meant to delay the eviction process that was commencing against the Applicant and the other trespassers on the suit property in the Principal Magistrate's Court at Nairobi Civil Case No. 7966 of 1999 and High Court Civil Case No. 1374 of 1983. He averred that he had been denied utilization of the suit property since 1993 when he purchased suit land due to the Applicant's illegal occupation. Further, that the Applicant has no legal standi to sue on behalf of her deceased husband. He explains that the Applicant's deceased husband was the 6th Defendant in the Senior Principal Magistrate Civil Case No. 10618 of 1995 which case is still pending in court. Further, that the issues raised in the said case are directly and substantially the same as the issues raised herein. He reiterates that his title is indefeasible and cannot be defeated under the provisions of the Registered Land Act Cap 300. He reaffirms that the Applicant has all along been aware of the Defendant's right to the property and she has been issued with numerous notices to vacate the property. He deposes that he has been paying rates for the property despite the fact that he is not utilizing it.

The Plaintiff and the Defendant each called one witness.

Evidence of the Plaintiff

The Plaintiff as PW1 claimed she has resided on the suit land from 1970 to date. She avers that she got married in 1970 and found her husband Onesphorous Wanderi residing on the suit land. Further, that she has borne her children thereon. She disputes the Defendant's title and contends that the suit land is her matrimonial home. It was her testimony that her husband died in 1994. She claims in the 1980s the late vendor Kariuki Igeria's family undertook succession and the administrators of the said estate who were his two widows were supposed to distribute the plots to the purchasers including her husband. Further, that Kamau Njuguna representing one of the administrators' subdivided the land and sold to third parties. She confirms that her husband passed away before processing title to the suit land and the Defendant acquired it while there was a pending suit. She claims around 2006 some people came to claim ownership over the suit land and this prompted her to undertake a Search, which revealed that the Defendant was the proprietor of the suit land. She reiterates that the Defendant acquired the suit land unlawfully as she has been residing thereon. Further, that she is entitled to the suit land through adverse possession. PW1 produced various documents as exhibits to support her claim.

Evidence of the Defendant

The Defendant as DW1 testified that he is the owner of the suit land, which he purchased in 1993. He explained that he had issued various notices to the Plaintiff and other parties to vacate the suit land since he purchased the same but she has declined to do so. He insists the Plaintiff is a trespasser and has no legal capacity to sue on behalf of her late husband. He explains that the Plaintiff's deceased husband was the 6th Defendant in the Senior Principal Magistrate Civil Case No. 10618 of 1995 which case is still pending in court. It was the Defendant's testimony that he has continued to pay land rates but is unable to enjoy his property due to the Plaintiff's acts of trespass. DW1 produced various documents including pleadings in the related previous suits to support his claim.

Both the Plaintiff and Defendant filed their respective submissions that I have considered.

Analysis and Determination

Upon consideration of the materials presented in respect of this suit including the pleadings as well as hearing testimonies of the witnesses, the following are the issues for determination:

- Whether the Defendant acquired the title to the suit land lawfully.
- Whether the Plaintiff should be registered as owner of the suit land having acquired it through adverse possession.
- Who should bear the costs of the suit.

As to whether the Defendant acquired the title to the suit land lawfully.

It was the Plaintiff's contention that the Defendant did not acquire the suit land lawfully as there was a suit pending in respect of the same. The Plaintiff in her submissions relied on the doctrine of *lis pendens* and insisted that since a suit was pending, the title by the Defendant was acquired unlawfully. The Defendant insists he acquired the suit land lawfully from the vendor Kamau Njuguna who was its owner. He has produced the Sale Agreement, Transfer of Land Form, and Certificate of Title as exhibits to prove the legality of his title deed. He further claimed that he has continued to pay all the land rates in respect of the suit land as evidenced by the receipts which he produced in court. Further, he has relied on section 28 of the replaced Registered Land Act to support his argument. The Plaintiff submitted that the Defendant's acquisition of title was unlawful since the law firm of messrs Kirundi & Company Advocates who represented the vendor were handling various suits on his behalf in relation to the land where the suit land was subdivided from and he cannot be deemed to be a purchaser for value without notice. I note that transaction relating to land is a process and from the documents produced by the Defendant, it is clear he adhered to the proper legal process before he acquired the suit land. Insofar as the Plaintiff claims the title to the suit land was acquired unlawfully, she had not demonstrated whether there was an injunction restraining the vendor from selling the suit land or whether there was a restriction over the title before the Sale took place. Since she has not brought any evidence to that effect, I opine that there was no restriction to stop the transfer of the land to a third party.

Since the suit land was registered in the Defendant's name during the regime of the Register Land Act Cap 300 (now repealed) I wish to make reference to Section 28 of the said Act which stipulated that the registration of person as proprietor shall not be liable to be defeated except as provided by the Act. From the evidence presented and since the Defendant purchased the suit land from the vendor for valuable consideration and the Plaintiff has not brought any evidence to the contrary, I have no reason to believe that he is indeed a purchaser for value and will proceed to find that he indeed acquired the land legally.

As to whether the Plaintiff should be registered as owner of the suit land having acquired it through adverse possession.

It is the Plaintiff's contention that she has lived on the suit land from 1970 and hence is entitled to it by adverse possession. It was her evidence that Kamau Njuguna unlawfully sold the land to the Defendant and she only realized in 2006 when she did a search that it is the Defendant who owned the suit land. She stated that she is the widow of Onesphory Wanderi and at the time of her marriage she found him residing on the suit land. She testified that Kamau Njuguna claimed ownership of the suit premises in 1995 but I note there was a suit filed by the said Kamau Njuguna in 1983 in respect of land parcel number DAGORETTI / RIRUTA/ 1568 where her late husband was one of the Defendant. In another related suit SPMCC No 10618 of 1995 the husband is indicated as the 6th Defendant.

Adverse possession is described as a process by which a person can acquire title to someone else's land after continuously occupying the said land, in a way that is not consistent with the owner's rights.

Adverse possession is governed by Section 38 (1) and (2) Limitation of the Actions Act that provides as follows:

(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in [section 37](#) of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

For adverse possession, to mature into title to land the following conditions must be fulfilled:

- (1) The trespasser has to demonstrate that he/she has been in *Continuous and uninterrupted* possession without the consent of the owner of the land;

- (2) The trespasser's interest has to be *inconsistent* to the interests of the true owner of the land;
- (3) The possession has to be *Open and notorious*, to enable the owner be on notice that there is a trespassing on his/her land;
- (4) The possession has to be *actual*, to enable the owner have a cause of action which if he/she fails to act on within the required legal period then he/she will be estopped by the law of Limitation to claim back the land.
- (5) The possession has to be *Exclusive*, to avoid confusion on who is entitled to obtain the title to the suit land once the limitation period lapses.

For a party to succeed in summons for adverse possession, it must be demonstrated that there was open, continuous, notorious and uninterrupted possession for a period of at least twelve years. Further, for a party to qualify as an adverse possessor, they have to prove they did not have permission to enter into the suit land. The Plaintiff is expected to furnish in court evidence to prove that the suit land where he/she is claiming adverse possession indeed belongs to the Defendant.

In the instant case, the Plaintiff claims to have been in occupation of the suit land since 1970 when she got married to the deceased Onesphorus Wanderi. I note she has produced Letters of Administration Intestate indicating she is one of the Administrators of the late Onesphorus Wanderi's estate and I have no reason to doubt she was married to him, since the Defendant has not brought any evidence to the contrary. She claims she gave birth to all her children thereon and this fact is also not disputed by the Defendant. The Defendant insists he is a purchaser for value without notice and had continued to pay the land rates from 1994 to date. The Sale Agreement produced by the Defendant is dated 15th June, 1993 and the purchase price was Kshs. 280, 000/=. He says before he purchased the suit land, he visited it and there were only temporary structures thereon. Further, that apart from Rachel MUBINU residing on the suit land, there were other occupants whom he did not know. He said after purchasing the land, he wrote letters to all occupants and asked them to vacate it, which letters were copied to the local chief. I note one of the notices was produced as an exhibit.

He testified in court that the only person who was occupying his portion of land was one MUBINU WANGETHI and there was a related suit Milimani PMCC No. 7966 of 1999 to that effect. He confirmed that in Milimani CMCC No. 2568 of 2011 he obtained eviction orders against RACHEL MUBINU who was residing on his land. He further lodged several complaints with the local District Officer for parties to vacate his land but they refused. The Plaintiff during cross examination confirmed that she had not paid any rates in respect of the suit land. Further, it was her testimony that she entered the suit land in 1970, when she got married and only learnt the Defendant had purchased it in 2006. The Defendant in his testimony explained that that the Applicant's deceased husband was the 6th Defendant in the Senior Principal Magistrate Civil Case No. 10618 of 1995, but I note from the Grant of Letters of Administration Intestate that Onesphory Wanderi died on 18th April, 1994, which means the suit was filed after his demise. Further, the Defendant has not informed Court on whether he got eviction orders against the Plaintiff's husband. In my view, the fact that there were several suits to evict the persons occupying the suit land was sufficient evidence that they were indeed on the land. I however note the Plaintiff was not a party to any of the said suits, which have been alluded to above. Further the Plaintiff was issued with a notice in 1996 to move from the suit land which was copied to their local chief but she continued to reside thereon which means her occupation on the suit land was open and notorious. The Defendant in his submission contended that the Plaintiff did not have capacity to sue on behalf of the family but I disagree with him because the Plaintiff furnished court with Grant of Letters of Administration Intestate issued on 19th December, 1995 which legally capacitated her to file a suit on behalf of the family. She claimed the husband bought the suit land and that together with her sister in law Rachel Mubinu each person was residing on a portion of the land. From the proceedings herein, it is not clear as to whether the Plaintiff was substituted in the suit where her late husband was sued, but if not, that means the suit abated in April 1995 since the husband died on 18th April, 1994. I further note at paragraph 9 of the amended Defence in SPMCCC No 10618 of 1995 where the Plaintiff's husband was purportedly sued by Kamau Njuguna in 1995, it refers to an order given by a Magistrate's Court at Sheria House dated 24th September, 1977 where the Plaintiff's husband Onesphory Wanderi was allocated 64x 83 ft. All these corroborate the fact that the Plaintiff's family has indeed been present on the suit land.

In the case of **Daniel Kimani Ruchine & Others versus Swift Lotherford & Co. Ltd and Anor (1977) eKLR** the court held that ' **The Plaintiffs have to prove that they used the land as of right, nec vi, nec clam, nec precario (no force, no secrecy, no evasion)**'.

Further in the case of **Samwel Nyakenogo v Samwel Orucho Onyaru [2010] eKLR**, the Court of Appeal held as follows: ' **For about 19 years, the respondent was in exclusive possession of the portion of the land bought from the deceased openly and as of right, and during all this time, the respondent's said possession was not interrupted by the registered proprietor, the deceased. In our view, the purported application for letters of administration in respect of the deceased land West Kitutu/Mwakibagendi/28 which was confirmed on 15th June, 1999 did not interrupt the respondent's adverse possession of the portion he bought from the deceased.**'

From the evidence before me, I find that since the Plaintiff entered the suit land in 1970, she has been in actual, open and interrupted occupation thereon for more 12 years. Further, her occupation thereon has been inconsistent with the proprietor's rights. I opine that the rights of the proprietor Kamau Njuguna were then extinguished in 1982 after 12 years and he was hence holding the said land in trust for the Plaintiff, after that. Further, that by Kamau Njuguna selling the suit land to the Defendant in 1994 after undertaking subdivisions and obtaining title DAGORETTI/ NJUGUNA/ 3151 for the portion the Plaintiff was residing on, cannot defeat the Plaintiff's claim for adverse possession because by that time, Kamau Njuguna's rights had already been extinguished over the land, in 1982.

It is against the foregoing and in relying on the above cited judicial authorities, that I find that the Plaintiff is entitled to the suit land through adverse possession.

Who should bear the costs of the suit.

I note the costs generally abide an outcome of a suit but since the Defendant was sold for land which had occupants thereon and it was his testimony that he has incurred expenses in attempting to evict the occupants, I will not make him pay the costs.

It is in those circumstances and for the reasons I have given that above that I find that the Plaintiff has proved her case on a balance of probabilities and will proceed to allow the Plaintiff's Originating Summons dated the 21st March, 2007

I further make the following orders:

1. The Plaintiff be and is hereby declared to have acquired land title number DAGORETTI/ RIRUTA/ 3151 by reason of adverse possession since 1982.
2. The Chief Land Registrar, Nairobi be and is hereby ordered to register the Plaintiff as the proprietor of land parcel number DAGORETTI/ RIRUTA/ 3151 in place of John Kingori Kariuki.
3. Each party to bear their own costs.

Dated and Delivered in Nairobi this 29th day of April, 2019

CHRISTINE OCHIENG

JUDGE

In the presence of:

Caroline Sagina-Court Assistant