



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

E.L.C NO 111 OF 2016 (O.S)

STELLAH NDURU ICHUNGE.....1ST PLAINTIFF

ESTHER KARIMI ICHUNGE.....2ND PLAINTIFF

VERSUS

EZEKIEL NKAMANI M'ICHUNGE.....1ST DEFENDANT

SILAS M'IKIRIMA M'ICHUNGE.....2ND DEFENDANT

JUDGMENT

1. The plaintiffs who are sisters filed an Originating Summon dated 25th July 2016 claiming entitlement by way of adverse possession to a portion of land, 1.5 acre out of Land Parcel L.R No. Abothuguchi/Mariene/459 registered in the names of their brothers namely Ezekiel Nkamani Ichunge, Silas M'Ikirima M'Ichunge and Japhet Muthuri M'Ichunge.

2. In support of their case, the plaintiffs have relied on the supporting affidavit of 1st plaintiff dated 25.7.2016. They have also adopted as their evidence, their respective statements recorded on 25.7.2016. They also produced as exhibits, a search certificate and a green card for the suit land, as well as photographs of a house and a cow.

3. The Plaintiffs case is that they have been in exclusive occupation of 1.5 acres of the suit land since 1989, where they have made numerous improvements to the land including but not limited to putting up a permanent structure and having electricity and water connected to the structures. They further aver that they derive their livelihood from the suit land without the permission of the respondents, and that they have been in exclusive, actual, open and uninterrupted possession of 1.5 acres of the suit land.

4. The defendants filed their statement of defence on 8th November 2016 where they indicated that they inherited the suit land from their father, Ichunge Irware as per the latter's will. They contend that the family filed a succession case where their father's wishes were executed, where by the three sons of the deceased got the land.

5. It is further pleaded that in the year 1984 the 1st plaintiff left home and went to start a tailoring business in town and later changed to a milk vendor which she does to date. Sometime in 2009 she came home and started living with their mother. The 2nd applicant finished her secretarial studies in 1987 and she was absorbed into the civil service. She has never worked outside Nairobi County and that her permanent home is in Utawala Estate in Embakasi. The two defendants did not tender any evidence but were present during the trial.

6. I have carefully perused through the pleadings, affidavits, the evidence and the. The issue for determination before this court is; **Whether the plaintiffs have acquired the title to a portion of land no. 1.5 acres of the suit land by way of adverse possession?**

7. The law is that where a person claims to have become entitled by adverse possession to land which has been registered, he is allowed by virtue of the provisions of section 38 of the Limitation of Actions Act to apply to the High Court (ELC) for an order that he be registered as the proprietor of that land. The following are key ingredients essential for the claim of adverse possession to succeed:-

- i) Exclusive use and possession of the property.
- ii) Open and notorious use of the property.
- iii) Non permissive, hostile or adverse use of the property.
- iv) Continuous/uninterrupted use of the property for a period of at least 12 years.

8. The Plaintiffs aver that they started their occupation on the suit land in 1989 when the defendants became the legal owners of the suit property. On the other hand the defendants claim that the 1st plaintiff moved away from home in 1984 and returned in the year 2009. That the 2nd Plaintiff was absorbed into the civil service in 1987 where she has worked in Nairobi county and has a permanent home in Utawala, Embakasi.

9. In the plaintiffs submission they argued that the fact that the plaintiffs left the suit property to Nairobi or Meru town from time to time to pursue education work or business does not suffice an interruption of the plaintiff's occupation of the suit property. In support thereof, they relied on **Gabriel Mbui v. Mukindia Maranya 1993 eKLR** where the court stated that

“.....Brief and ordinary absences, while the adverse possessor goes to town, is gone overnight, or is away working or on vacation for instance, would surely not break any adverse possession....”

10. During cross examination, DW1 gave an account of how he used to stay with 1st plaintiff in Nairobi in 1983 before they relocated to Meru town, where 1st plaintiff opened a shop. She apparently went to the suit land in 2010 where she stays to date. As for 2nd plaintiff she stays in Nairobi.

11. In the quoted case of **Gabriel Mbui v. Mukindia Maranya 1993 eKLR** Kuloba J at Para 3 held that;

“The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied. It has been held many times that acts done under licence or permitted by, or with love of, the owner do not amount to adverse possession and don't give the licensee or permitted entrant any title under the limitation statute.”

12. In the case of **Virginia Wanjiku Mwangi vs. David Mwangi Jotham, Nyeri ELC No. 86 of 2011**, the court had found the element of non- permissive, hostile or adverse use of the property missing in a situation where the claimant was occupying the suit premises as a wife of defendant.

13. It is therefore clear that any occupation of the land by the plaintiffs is with the tacit permission of their brothers, primarily because this was their family. The element of non-permissive, hostile or adverse occupation of the suit land is missing in this case.

14. Consequently, in light of the above I find that the plaintiffs' suit does not meet the criteria of adverse possessors. The suit is therefore dismissed with each party bearing their own costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 25TH DAY OF APRIL, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Ashaba holding brief for Mbaabu for plaintiffs

1st plaintiff

2nd defendant

HON. LUCY. N. MBUGUA

ELC JUDGE